Planning for a better future

Our planning manifesto for the government

POS
Planning Officers Society

Manifesto Background Paper 11

Improving Enforcement Services

The NPPF states that, “Effective enforcement is important to maintain public confidence in the planning system”. Government has recently expressed its concern about the impact that retrospective planning applications have on the public’s confidence in the planning system. In this paper POS tackles these concerns and looks at the wider enforcement system to set out changes that are designed to make it more effective and efficient. Changes are also recommended to improve the funding that enforcement services receive.

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Planning Officers Society

POS is the single credible voice for public sector planners, pursuing good quality and effective planning practice. The Society's aim is to ensure that planning makes a major contribution to achieving sustainable development in ways that are fair and equitable and achieve the social, economic and environmental aspirations of the community.

We operate in three main ways:

- As a support network for planners in the public sector
- As promoters of best practise in planning
- As a think tank and lobbying organisation for excellence in planning practice

Where we can, we will work across the sector to craft proposals that have widespread support from the people who operate the planning system at the coalface: landowners, developers, agents, legal, local authorities and politicians. We will be both radical and practical as we look for solutions to tangible problems that will make a real difference to crucial areas. Our objective is to improve the planning system to enable it to deliver its key aim of sustainable development. It is within this context that we have set out this advice to Government so we can plan together for a better future.

POS Manifesto

This started in early 2014 when we looked ahead to the national parliamentary elections in May 2015. The main parties were drafting their manifestos, so we thought about what we could do to help them. This resulted in Planning for a better future: Our planning manifesto for the next government. The time since then has seen an unprecedented amount of change to the planning system, so our initial planning manifesto for the next government has morphed into an on-going planning manifesto for government.

These are think pieces that tackle a topical area within planning practice and sets out our recommendations for improvement. They comprise a growing series of Manifesto Background Papers that look in detail at specific issues. Those that are still current are summarised in our main Planning Manifesto paper that sets out the current ask from POS to the government.

The views expressed in these documents reflect the initial view of POS. It is a consensus position. It should not be taken as a final position; rather an informed starting point to debate the issues. It is expected that the recommendations will evolve as the debate progresses.

Where we can, we will work across the sector to craft proposals that have widespread support from the people who operate the planning system at the coalface: land owners, developers, agents, legal, local authorities and politicians. We will be both radical and practical as we look for solutions to tangible problems that will make a real difference to crucial areas. Our objective is to improve the planning system to enable it to deliver its key aim of sustainable development.

Other titles in the series can be viewed from our website.

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Summary

The NPPF states that, “Effective enforcement is important to maintain public confidence in the planning system”. Government has recently expressed its concern about the impact that retrospective planning applications have on the public’s confidence in the planning system. In this paper POS tackles these concerns and looks at the wider enforcement system to set out changes that are designed to make it more effective and efficient. Changes are also recommended to improve the funding that enforcement services receive.

Our recommendations are:

- To strengthen the wording in the NPPF to make it clear that LPAs should invest in providing a good enforcement service.
- Government must increase investment in PINS so that enforcement appeals can be prioritised.
- To increase the resources going into enforcement services through amendments to fees, fines, recovered costs and confiscation orders.
- Introduce an Unauthorised Development Notice and improved Stop Notice power to give LPAs the tools they need to take swift control of enforcement situations and bring them to a resolution more quickly.
- When served, the new Unauthorised Development Notice should stop the clock on enforcement time limits to avoid contraveners being able to delay the process and take it beyond those limits.
- Targeted amendments to Enforcement Notices to make them a more effective and efficient tool and to limit the ability of contraveners to string out the process.
- Introduce a new Retrospective Development Application to combine retrospective applications for CLUoD and planning permission to streamline the process and stop the ability of some contraveners to game the system.
- Minor reforms to Completion Notices to enable them to be a more effective enforcement tool.
- Both parties should be expected to bear their own costs when Planning Enforcement Orders are made and costs should only be awarded if the actions of one party amounts to unreasonable behaviour.
- Reforms to the Land Registry to ensure that overseas companies must register sufficient information to enable LPAs to serve Notices.

1 Introduction

1.1 Government is looking to improve planning enforcement. This paper sets out recommendations from POS that we hope will assist government with this task. We concentrate mainly on improving the way retrospective planning applications work but also include suggestions for improvements in other areas. Before setting out our recommendations we draw attention to wording in the National Planning Policy Framework (NPPF) around enforcement that needs amending and urge that the resourcing of the Planning Inspectorate (PINS) in the context of enforcement appeals must be looked at by government.

NPPF

1.2 The phrase, “Enforcement action is discretionary” (NPPF paragraph 59) is often misunderstood to imply that offering an enforcement service is optional. The NPPF should be reworded to make it clearer that enforcement is not an optional service – it is only when deciding a specific enforcement case that the expediency test can result in a conclusion that action isn’t justified on planning grounds for that breach.

Enforcement appeals

1.3 Enforcement is often where the planning system earns credibility (or otherwise) from the public. Planning appeals have been the slowest to be dealt with by PINS for many years. This undermines the NPPF message in paragraph 59 that “Effective enforcement is important to maintain public confidence in the planning system”.

1.4 We have seen cuts to enforcement services over the last decade or more as Councils try to tackle the savings that they have been required to make due to austerity measures. Some Councils have taken the view that if government (via PINS) isn’t investing in their enforcement appeal service why should they, as cash-strapped Local Planning Authorities (LPA), bother to invest in their enforcement service.

Funding

1.5 At the end of this paper, we list our suggestions for leveraging more funding into enforcement services so that they have the resources to be effective.

2 Improving retrospective applications

2.1 Last year Gareth Bacon, Conservative MP for Orpington, introduced a Private Members Bill entitled Unauthorised Development (Offences) Bill. It sought “to ensure that everyone who engages with the planning system is on a level playing field and follows the same procedures”. The MP was particularly concerned with the way some people play the system by knowingly carrying out development without planning permission and then using the power in §73A to make retrospective applications and then exercising their §78 and §174 rights to appeal decisions and notices to stretch out the time it takes for the LPA to take effective enforcement action.

2.2 Shortly after, Dr Ben Spencer, Conservative MP for Runnymede and Weybridge, also sought to introduce a Private Members Bill entitled Planning (Enforcement) Bill addressing similar concerns.

2.3 Neither Bills have advanced (as is normal for the majority of Private Members Bills) but the Housing Minister Christopher Pincher indicated to Parliament during a debate on planning permissions and unauthorised developments in the House of Commons on 26 January 2022 that Government was willing to investigate the concerns behind the Bills and to legislate to improve planning enforcement services.

2.4 This paper sets out comprehensive proposals for a mixture of new powers, targeted amendments to existing powers, better fines and clearer procedures to be followed when development occurs without planning permission. They are designed to eliminate the gaming and disregard for due process highlighted by the two MPs and should restore the level playing field that they were seeking in their Bills.

Principles

2.5 The principles behind the recommendations are:

- Planning is complex and people can make genuine mistakes especially around what is permitted development. The proposals in this paper seek to not cause people who are in this position any additional hardship, provided they cooperate with the LPA.
- The LPA can be under pressure to act when a 4 or 10-year rule deadline is looming. Currently only the service of an Enforcement Notice or a Breach of Condition Notice stops the clock. LPAs may not have the evidence they need to serve such Notices when they are first investigating a suspected breach. POS is recommending that the service of our recommended new Unauthorised Development Notice should stop the clock. This new power would combine the existing Planning Contravention Notice powers with a revised Stop Notice power, plus some key new powers that are explained in the next bullet point.
- Currently contraveners can play the system by submitting retrospective applications and appealing against both CLUoD or planning permission refusals and Enforcement Notices. The proposals in this paper seek to streamline the enforcement process so that a retrospective application for a CLUoD or planning permission can no longer be made or determined when an Unauthorised Development Notice is served. After considering the evidence supplied in response to the Unauthorised Development Notice, if the LPA considers that either the development is potentially lawful or that planning permission is required and it may be granted, they would invite a Retrospective Development Application. This recommended new power combines an application for a CLUoD with an application for planning permission so that a single decision can be made at the end of the assessment process: a CLUoD is issued, planning permission is granted or an Enforcement Notice is served. This would ensure that a contravener only has a single right of appeal and all issues will be dealt with at that one appeal.
- Much of the activity around enforcement action is free to the contravener. Our proposals introduce fees for all stages of the process which are designed to act as a disincentive to playing the system and not cooperating with the LPA: the more a contravener strings out the process, the more it will cost them.
- Paying costs or compensation are a feature of some of the current system (eg Stop Notices and Planning Enforcement Orders) and this should change. The

LPA should only be liable to pay costs or compensation when they have clearly acted unreasonably. For example, if it is not clear whether a development is permitted development or not, the LPA should not be automatically liable for compensation. If they serve a Stop Notice and on appeal it is decided that it was permitted by the General Permitted Development Order (GPDO) or otherwise lawful, the inspector should only award costs if that position was clear and unarguable. In this context the national Planning Practice Guidance should be amended to encourage people to make applications for CLUoD, especially where the interpretation of the GPDO in the context of a proposed development is open to interpretation.

Recommendations

2.6 POS has looked carefully at the process that takes place when an unauthorised development is brought to an LPA's attention and is investigated. The key stages are:

1. Is the development clearly lawful or de-minimus?
2. LPA gathers the evidence it needs with an Unauthorised Development Notice and stops construction works where they are in progress.
3. LPA requests a Retrospective Development Application where justified and serves an Enforcement Notice where it is not.
4. LPA assesses a valid application where one is received in time and serves an Enforcement Notice where one is not.
5. Final decision on Retrospective Development Application.

2.7 These are set out in a diagram in the appendix.

2.8 **Stage 1** is concerned with establishing whether the development constitutes a breach of planning control because it may be lawful, such as a legitimate exercise of permitted development rights, and therefore no enforcement action is needed.

2.9 **Stage 2** combines the existing Planning Contravention Notice power (to obtain evidence) with an amended Stop Notice power (to bring all construction activity to a halt) alongside new powers to prevent the making of an application for a CLUoD or planning permission. POS considers that the LPA should run the enforcement investigation process and they need to dictate whether an application for a CLUoD or planning permission is made. There should be clear legislative backing for this and POS is recommending a new power to serve an Unauthorised Development Notice which contains all these elements.

2.10 To ensure that contraveners are not able to string out this new process and drag it beyond the 4/10-year time limits on taking enforcement action, POS is recommending that the clock should stop when an Unauthorised Development Notice is served.

2.11 In the interests of natural justice, if the contravener considers that the development is lawful, they should have the opportunity to put their case to the LPA provided this is done within a set deadline (28 days). This would not however interfere with the requirement to stop all building works. How these new powers should work are set out in the appendix.

2.12 It is important that Stop Notices can be used more frequently to ensure that unauthorised works stop quickly. Currently there are two types:

- Full Stop Notice – carries a risk of compensation if the associated Enforcement Notice is quashed on any ground except (a) (planning permission is granted) – this risk is very high, so they are not used often – they must also be served alongside or after an Enforcement Notice, which usually delays their use.
- Temporary Stop Notice – only carries a risk of compensation if the development was already lawful, but only lasts 28 days.

2.13 Stop Notices tend to only be used where a very serious nuisance is being caused because of the high risk of compensation. POS considers that the existing powers should be combined into a single new power and amended so that a Stop Notice can be served on nearly all occasions where a development that needs planning permission is taking place without consent. People should not be carrying out development unlawfully and it is in the public interest that they know this and are told to stop all works, irrespective of the level of nuisance caused. Furthermore, it is a waste of embedded carbon to be carrying out building works that subsequently must be demolished.

2.14 The new compensation regime should be based on the current Temporary Stop Notice provisions (ie that the development was already lawful) and should not be automatic but based on an unreasonable behaviour judgement by the Inspector dealing with any subsequent appeal. The LPA should only be liable for compensation where it should have been very clear that the development was lawful. Where the evidence was either not available or unclear or the legislative provision was open to interpretation, the LPA would not be found to have acted unreasonably and would therefore not be liable for compensation. This would enable the new Stop Notice to be used far more routinely to bring planning breaches under control more swiftly.

2.15 The fine regime should also be improved to support these aims and this should include (potentially daily) fixed penalty fines. They are used in other areas of public law (such as environmental health and parking/traffic offences) and would be a very powerful new tool to ensure that Stop Notices and Enforcement Notices are not ignored. POS is recommending that the fixed penalty fine would be £500 on each occasion.

2.16 **Stage 3** is the point where the LPA has the information it needs to assess whether planning permission is needed or not and, if it is, the LPA can consider whether the development has the potential to be acceptable.

2.17 If the LPA considers that either the development is potentially lawful, or that planning permission is required and it may be granted, they should invite a Retrospective Development Application. There should be a strict 28-day deadline for a valid application to be made. How this new power will work is set out in the appendix

2.18 If the LPA considers that planning permission is required but it is unlikely to be granted, they should serve an Enforcement Notice.

2.19 **Stage 4** is needed to avoid some of the gaming that currently takes place where procedures can be dragged out. We are recommending that an Enforcement Notice should be served where the LPA invites an application for a Retrospective Development Application but no application or an invalid application is made. An appeal against such a Notice would have limited grounds of appeal. These are explained in the appendix.

2.20 **Stage 5** is where a valid application for a Retrospective Development Application has been made and the LPA can decide whether the development is lawful or not and if unlawful, whether it is acceptable or not. POS is recommending that the determination of a Retrospective Development Application should result in one of three potential outcomes: the issuing of a CLUoD where the development is lawful, the granting of planning permission where the development is unlawful but acceptable or the service of an Enforcement Notice where the development is unlawful and unacceptable. POS considers this to be an improvement on the current system where the applications (CLUoD and/or planning permission) and an Enforcement Notice are potentially three separate decisions each with a separate right of appeal. Having separate rights of appeal that effectively deal with the same issues is unnecessary and these proposals seek to deal with that. How this new type of application would work is set out in the appendix.

Updating Enforcement Notice grounds of appeal

2.21 POS is also recommending that the grounds of appeal against an enforcement notice (§174(2)) should be updated. Grounds b, c and d all relate to whether a breach of planning control is lawful or not. The drafting of these provisions predates the introduction of CLUoDs (Planning and Compensation Act 1991) and needs to be updated to reflect the most recent legislative provision. The current wording of these grounds is:

(b) that those matters have not occurred
(c) that those matters (if they occurred) do not constitute a breach of planning control
(d) that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters

2.22 They should be replaced by a single ground which states:

(b) that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, a certificate of lawful use or development ought to be issued

2.23 Just as ground (a) currently attracts a fee (the equivalent of that needed for an application for planning permission), so too should this new ground attract a fee the equivalent of that needed for a retrospective application for a CLUoD. As part of its package of disincentives against ignoring planning controls, POS proposes that these fees should be doubled.

2.24 POS are recommending further changes to the way Enforcement Notices operate and these are set out in the appendix.

Criminalising planning breaches

2.25 POS does not support making the carrying out of development without planning permission a criminal offence. Planning is very complicated and has got increasingly so in recent years. It is easy for members of the public to genuinely make a mistake and they should not be criminalised for that. We consider that the comprehensive set of improvements to the enforcement regime we have set out in this paper strike the right balance between protecting people's legitimate rights and preventing some people from playing the system.

3 Other areas for improvement

3.1 In this section we draw attention to other areas of the enforcement regime that could be tweaked to make them more effective.

Completion Notices

3.2 Completion Notices (§94-96 of the 1990 Act) need to be reviewed. This power is seldom used and the main reason is that the consequences of a Completion Notice can be worse than the status quo.

3.3 When a Completion Notice is served the result, when the development is not completed within the deadline specified in the Notice, is that the planning permission is extinguished so the development can no longer be completed. The problem is that what has been built is effectively made lawful by §95(5) which states:

> *Subsection (4) [the extinguishing of the planning permission] shall not affect any permission so far as development carried out under it before the end of the period mentioned in that subsection is concerned*

3.4 The intention of this section was to protect self-contained buildings that had already been built (eg a completed house within a larger estate). It did not clearly deal with the situation where a Completion Notice results in a partly completed structure becoming lawful after the Notice takes effect, invariably resulting in an eyesore.

3.5 The only way to remove such a structure in those circumstances would be through the service of a Discontinuance Notice (§102 of the 1990 Act) which attracts the prospect of compensation. This is perverse and §95(5) needs to be amended so that its provisions deal with incomplete structures. POS suggests that the new wording should be along the lines of:

> *Subsection (4) shall not affect any permission so far as development carried out under it before the end of the period mentioned in that subsection is concerned, provided such development resulted in a fully completed structure, which is in accordance with the original planning permission and constitutes an independent planning unit.*

3.6 With this provision uncompleted structure(s) would become unlawful when the Completion Notice takes effect on the basis that what has been built (ie a partially completed structure) does not have a planning permission as the permission, when it was in existence, was for the finished building and not the incomplete one.

3.7 An LPA should have the power to take normal enforcement action against an incomplete building or structure on the basis that it doesn't have a planning permission. The LPA should be able to serve an Enforcement Notice at the same time as a Completion Notice and incorporating the Enforcement Notice into the Completion Notice is probably worth considering. It would be preferable if the Secretary of State confirmed the Enforcement Notice at the same time as the Completion Notice rather than they being two separate procedures.

3.8 POS believes that a discretionary power to serve an Enforcement Notice is preferable to an automatic requirement to remove the works (as is the case with a Discontinuance Notice) as in some cases the works that were carried out might be de-minimus (such as a drainage or foundation trench) and enforcement action against such elements may not be expedient.

3.9 It would need to be clear that there would be few circumstances where an appeal against the Enforcement Notice would be reasonable. Ground (a), that planning permission ought to be granted, would clearly not be a ground of appeal against such an Enforcement Notice. Grounds (b), (c) and (d), that the development is lawful, would only be arguable in the context of the new §95(5) provisions: that the "development [has] resulted in a fully completed structure, which is in accordance with the original planning permission and constitutes an independent planning unit". An appeal under a lawfulness ground might also be possible if new GPDO rights, that postdate the original planning permission, renders a development that needed planning permission to now be permitted development. The usual procedural grounds (e, f and g) may be relevant.

3.10 These changes are likely to increase the use of Completion Notices and government may wish to consider whether confirmation by the Secretary of State remains the right approach or whether a right of appeal, dealt with by PINS, would be a better regime. "Call-in" powers would still be available to the Secretary of State, as with other such appeals.

Planning Contravention Notices

3.11 Were an LPA discovers a breach of planning control that may have taken place some time ago, they are under pressure in case one of the enforcement action time limitations (the 4-year or 10-year rules) is about to bite. An LPA may not have sufficient evidence of when the breach took place and what exactly the breach is. The tool for this is a Planning Contravention Notice, but by the time the Notice is completed and returned and the LPA concludes their investigation, they can find that they are out of time. POS therefore recommends that the service of a Planning Contravention Notice should be expressly considered as "purporting to take enforcement action" (§171B(4)(b)) and enables the enforcement action to continue. That section should also be amended to apply to both the 4-year and 10-year time limits, rather than just the 4-year one as it does now.

3.12 The proposals in this paper for an Unauthorised Development Notice would achieve this as it incorporates the current Planning Contravention Notice powers. However, if government does not take forward that recommendation, POS urges it to still consider this recommendation for Planning Contravention Notices.

Planning Enforcement Orders

3.13 Planning Enforcement Orders are a relatively new provision that enables deliberately concealed breaches to not benefit from the enforcement action time limitations. When applying for a Planning Enforcement Order in the Magistrates Court, if the council loose they must pay the other side's costs, which can run into thousands of pounds. This puts councils off using the procedure. POS recommends that each side ought to bear their own costs in a Planning Enforcement Order hearing, unless the actions of one party amounts to unreasonable behaviour in the same way that costs are awarded in §78 planning appeals.

Serving Notices

3.14 LPAs can have problems in identifying the owner of a property due to the way the land registry identifies overseas companies registered in the Virgin Islands or Panama. This makes it very difficult to find who is in control of the property and progress enforcement action. The law should be amended so that you cannot register a foreign based company on the land registry unless there is a clear entry setting out the person responsible so that the LPA can progress enforcement matters with respect to that property.

4 Improving funding for enforcement services

4.1 The credibility of a planning service is undermined by a poor enforcement service (NPPF paragraph 59). Unfortunately, this area has had to bear a disproportionate level of resource reduction over the last decade or so in response to wider Local Government cuts due to austerity measures. POS recommends the following changes to maximise the level of resources going into planning enforcement services with the aim of getting them to be self-funding or even profit making:

- The fees charged for retrospective planning and CLUoD applications should be twice that of a prospective application for planning permission.
- Appealing against an Enforcement Notice should carry a fee not just for ground (a) but for all the other grounds, as set out in this paper.
- Magistrates need to take enforcement breaches more seriously and impose greater fines. Further training is needed and in particular their attention needs to be drawn to §171G(7) (Temporary Stop Notices), §179(9) (Enforcement Notices) and §187(2A) (Stop Notices) which all say, "In determining the amount of any fine to be imposed on a person convicted of an offence under this section, the court shall in particular have regard to any financial benefit which has accrued or appears likely to accrue to him in consequence of the offence".
- A greater proportion of fines need to go to the LPA to help fund enforcement services.
- Magistrates also need to award fuller costs to LPAs. Too often they say that the cost of Council officers would happen anyway, yet the size of an enforcement team and other support services, such as legal officers, are directly related to the scale of breaches in an area.
- The use of fixed penalty fines needs to be explored, as set out earlier in this paper.

- The use of confiscation orders under the Proceeds of Crime Act within planning enforcement should be more extensive and their use as a source of income to fund the service should be explicitly allowed.

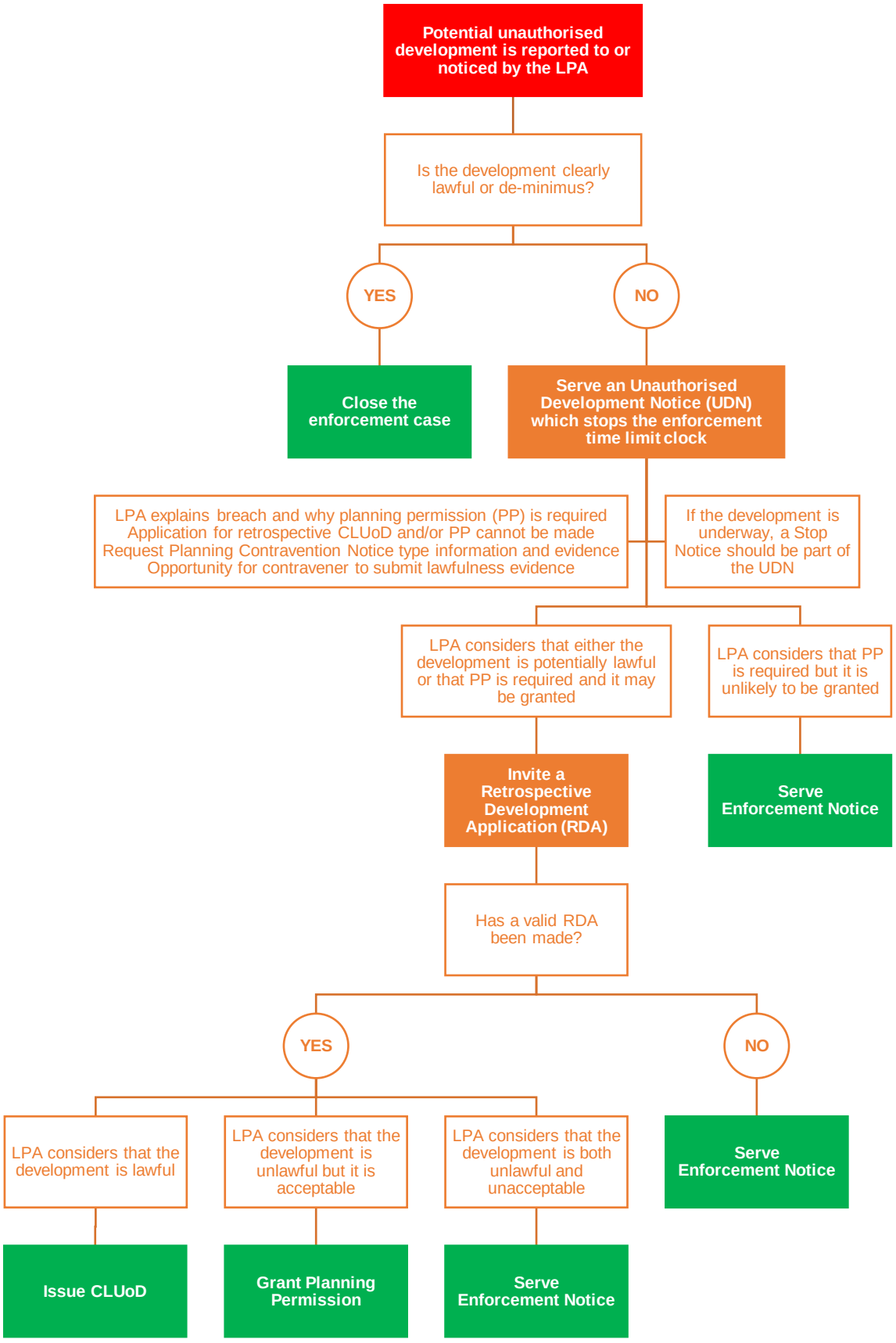
4.2 These and other initiatives should be explored to ensure that each LPA has the resources it needs to fund a good quality enforcement service.

5 Conclusions

5.1 POS believes that if the changes set out in this paper were implemented the planning enforcement regime would represent a much more efficient and effective tool for LPAs and the gaming that currently takes place will be all but eliminated. This paper sets out a wide-ranging package of recommendations and POS is ready to work with DLUHC and front-line enforcement officers to refine them.

Appendix: A new planning enforcement process

The diagram below sets out the proposed process for dealing with potential breaches of planning control.



Procedures

Below are the steps that should be followed when a potential breach of planning control is considered by an LPA. The term “development” is used to include a physical building, mining, engineering or other operation and the carrying out of a material change of use of a building or an area of land. The latter is necessary to enable these provisions to apply to changes of use where caravans or mobile homes are brought onto land without planning permission.

Is the development clearly lawful or de-minimus?

When a potential breach of planning control is brought to its notice, the first task for the LPA is to check whether the development is lawful, because if it is there is generally no further enforcement action that can be taken. The reasons why a development could be lawful are:

- The development does not involve §55 operations or a material change of use.
- The development is permitted by the GPDO, an LDO or an NDO.
- The development already has planning permission.
- The development is now lawful due to the 4-year or 10-year rule and deliberate concealment powers (a Planning Enforcement Order) are not appropriate.

The concept of de-minimus means that the development is a breach, but it is so small scale that enforcement action is not justified.

If an LPA decides that the works fall into one of the above categories there would be no material breach of planning control and no further enforcement action is required. The LPA should advise the contravener as appropriate, but this should not amount to a free CLUoD or planning permission. They should advise the contravener to make a retrospective application for a CLUoD or planning permission, as appropriate, to enable a definitive position to be established and to avoid any problems selling the property in the future.

Any third parties will also need to be informed that the case is closed and the reason(s) why.

Gathering evidence and stopping construction

Where it appears to the LPA that a breach of planning control is probably taking place, POS recommends that the LPA needs to do three things:

- Prevent the contravener from making a retrospective application for a CLUoD or planning permission, unless invited to do so by the LPA, to stop delaying tactics being used.
- If the LPA requires further information to establish whether there is a breach of planning control, they need to obtain that evidence. The main tool that is currently used is a Planning Contravention Notice.
- Where works are still in progress, a Stop Notice should be served to stop all construction activity. This should be an amended power to make Stop Notices a more effective enforcement tool.

POS is recommending a new power, which is the service of an Unauthorised Development Notice, that incorporates all these powers. It will inform the contravener of what they have done wrong and what will happen next. It is designed to put the LPA in control and avoids contraveners being able to game the system. The way this new Notice would work is set out below under Powers.

The service of this new Notice should stop the enforcement time limitations (the 4/10-year rules).

The contravener will be given the opportunity to explain if they think that planning permission isn't required. They have 28 days to do this. If the LPA agrees that this is the case, they can close the enforcement investigation (as set out under the "Is the development clearly lawful or de-minimus?" section above) and lift the Unauthorised Development Notice. There would be no compensation liability.

In order to encourage cooperation, if the contravener fails to make a case of lawfulness at this stage, they forfeit the right to do so at a later stage.

Is the development potentially acceptable? (Expediency stage 1)

Having considered any case put by the contravener following the service of an Unauthorised Development Notice, the LPA would have the evidence it needs to judge what are the appropriate next steps. There are two options under the new powers POS are recommending:

- Where the LPA consider that either the development is potentially lawful or that planning permission is required and it may be granted, they would invite a Retrospective Development Application.
- Where the LPA considers that planning permission is required but it is unlikely to be granted, they would serve an Enforcement Notice.

A Retrospective Development Application combines an application for a CLUoD with an application for planning permission. The fee for the application would be twice the fee for the equivalent application for planning permission. How this would work is explained below under Powers.

LPAs would be free to negotiate on amendments or other changes that may make an unauthorised development acceptable, but this would be against the background where that is at the LPA's discretion and the unauthorised building works must have stopped as required by the Stop Notice. The LPA can charge their usual pre-application advice fees for this engagement.

Dealing with non-cooperation

The new process would routinely set a 28-day time limit for the submission of a valid Retrospective Development Application. A longer period could be set, but not less. The period should generally only be extended where the LPA agrees to enter pre-application negotiations with the contravener.

In cases where an invalid or no application has been made within the deadline, LPAs are currently at a disadvantage if the development is potentially acceptable. In many cases the LPA will need to impose conditions (such as controlling external materials or restricting hours of use) and it is very clumsy or impossible to do this effectively through an Enforcement Notice.

One solution would be a new power that enables the LPA to issue a planning permission itself. The problem with this is that the LPA is unlikely to have a set of plans to approve. On balance POS considers that where a development has the potential to be acceptable, but the contravener has failed to submit a valid or any application following a request to do so, the LPA should issue an Enforcement Notice. The reason for serving such a Notice would be that the contravener did not submit a valid application within the deadline to enable the LPA to judge the lawfulness and/or acceptability of the development. If the Notice was appealed on this ground the Inspector would first judge whether the submitted application was in fact valid when it was made and, if it was found to be so, to go on to assess the merits of the Retrospective Development Application. If the application was found to have been invalid, or no application was made, the inspector would dismiss the appeal on the merits and/or lawfulness grounds. This ensures that contraveners cannot play the system. How this amended Enforcement Notice power would work is set out below under Powers.

Is the development acceptable? (Expediency stage 2)

Where a valid Retrospective Development Application is made, it should be determined in the same way that an application for a CLUoD and planning permission are currently determined. There would one of three potential outcomes:

- Where the LPA considers that the development is lawful, issue a CLUoD.
- Where the LPA considers that the development is unlawful but acceptable, grant planning permission.
- Where the LPA considers that the development is unlawful and unacceptable, serve an Enforcement Notice.

This ensures that there is only one right of appeal against the LPA's decision.

Powers

Below are the new or amended powers that should be available to LPAs when dealing with breaches of planning control. POS is recommending these changes so that planning enforcement services can deal better with breaches of planning control.

Unauthorised Development Notice (new power)

The legislative expectation would be that where an unauthorised development is taking place or is complete, an Unauthorised Development Notice would be served by the LPA. This new power formalises the process whereby the LPA engages with a contravener in these circumstances.

An Unauthorised Development Notice would inform the contravener:

- that the LPA considers that the development is unlawful and sets out the reasons why it needs planning permission.
- that they cannot apply for a CLUoD or planning permission for the unlawful development and that the LPA cannot determine any such application that has already been made. Such an application will be treated as withdrawn by the LPA. The fee would not be returned.
- that if the contravener thinks the development is lawful, they must make their case in full to the LPA within 28 days of the date of the Notice and that this is likely to be the only opportunity that they will have to make that case.
- that after 28 days the LPA will either:

- invite them to make a Retrospective Development Application if the development may be lawful or potentially acceptable; or
- serve an Enforcement Notice if the development is unlawful and not acceptable.

Where the LPA requires evidence to assist them with their investigations into establishing whether the development is a breach of planning control (currently done by the service of a Planning Contravention Notice) this would form part of the new Unauthorised Development Notice.

Where an unauthorised development is in progress, the expectation would be that a Stop Notice will generally be served by the LPA. This should be incorporated into the new Unauthorised Development Notice. This amended power combines the two existing Stop Notice powers into a single new regime and adds additional provisions to manage the enforcement process better. The requirements would be:

- All building, engineering mining or other operations must stop within 24 hours.
- All building materials, scaffolding, tools and other building equipment and machinery to be removed from the site within 7 days.
- If the breach is a change of use, the new use must cease within 7 days.
- All vehicles, machinery and other items brought into buildings or onto land in connection with a change of use to be removed within 7 days.

It would be an offence to ignore a Stop Notice with the following penalties applicable:

- Fixed penalty fines of £500 which can be levied daily
- Magistrates Court for up to £20K fine
- High Court for an injunction

Compensation would only be payable on the unreasonableness principle: that it should have been clear to the LPA that the development was lawful and that judgement raised no unique or obscure legal principles. If the contravener frustrated or prevented the LPA from collecting the evidence that they needed to make such a judgement, no compensation should be payable. Compensation matters (if they arise) would be dealt with as part of any appeal against a subsequent Enforcement Notice.

The service of an Unauthorised Development Notice would stop the clock with respect to the 4/10-year rule enforcement time limitations.

There should be no right of appeal against an Unauthorised Works Notice, however consideration should be given to the implications of this. It is the experience of some enforcement services that Breach of Condition Notices, which similarly have no right of appeal, do consequently result in a disproportionately high level of Judicial Reviews. If a right of appeal is contemplated, then it must be a very fast-track procedure if the aim of a swifter enforcement process is to be maintained. The provisions of the Notice must continue to apply during any appeal period and, in particular, not interfere with the requirement to stop all construction work.

Retrospective Development Application (new power)

A Retrospective Development Application can only be made where the LPA invites a person, that the LPA considers has carried out development that has not been properly authorised, to make one.

This is a relatively straightforward new power that is designed to simplify the situation where the decision as to whether a development is lawful or not can be finally balanced and the outcome uncertain. Currently in such cases both an application for a CLUoD (to establish lawfulness) as well as an application for planning permission (to establish acceptability in cases where the development is found to be unlawful) may need to be made. The new power enables both or either application to be made in a single submission and for the LPA to issue whatever outcome is considers appropriate: a CLUoD, a planning permission or an Enforcement Notice. The advantage of a single outcome is a single right of appeal, whereas currently there can often be two or even three appeals.

POS does not consider that the introduction of a Retrospective Development Application should result in the repealing of retrospective CLUoD applications or retrospective applications for planning permission as there will be circumstances where these are still needed, such as where an LPA has not instigated an enforcement investigation, but the property owner needs to establish lawfulness or acceptability (eg for a property sale).

Enforcement Notice (amended power)

The powers around the service of an Enforcement Notice are recommended to be amended in some key areas to strike the right balance between protecting people's legitimate rights, whilst preventing some people from playing the system.

The structure of an Enforcement Notice should be amended to make it clear why planning permission is needed. This means splitting the existing section "Reasons for issuing this notice" into two separate sections as follows, with the proposed new sections in red:

- Powers under which the notice is issued
- The land to which the notice relates
- The matters which appear to constitute a breach of planning control
- Why planning permission is required for the breach
- Why planning permission should not be given for the breach
- What you are required to do
- Time for compliance
- When this notice takes effect

In the diagram at the beginning of this appendix there are three points in the process at which an enforcement Notice can be served.

Point 1: Where the LPA considers the development is unacceptable without the need for a Retrospective Development Application (expediency stage 1).

Point 2: Where the contravener is invited to make a Retrospective Development Application and fails to do so or makes an invalid one.

Point 3: Where the LPA considers the development is unacceptable after determining a valid Retrospective Development Application (expediency stage 2).

The right of appeal should be amended to remove some of the grounds of appeal depending at which point the Notice was served. The proposed amended grounds of appeal would be:

Merits ground
a. that planning permission ought to be granted for the development.

Lawfulness ground (as proposed to be amended – see paragraph 2.21 above)
b. that a CLUoD ought to be issued for the development.

Procedural grounds
c. copies of the Notice were not properly served on the relevant parties.
d. that the steps for compliance required by the Notice are excessive.
e. that the period for compliance set out in the Notice is too short.

Grounds of appeal available to the appellant for Enforcement Notices served at different points in the process should be:

<table>
<tr><th></th><th>Ground a</th><th>Ground b</th><th>Grounds c, d & e</th></tr>
<tr><td>Point 1</td><td>Ground is available, but appellant must submit a valid set of plans unless the development is complete.</td><td>Ground is only available if a lawfulness case was made within the 28-day deadline after the service of an Unauthorised Development Notice.</td><td rowspan="4">Grounds are available, but a ground (d) appeal (that the steps for compliance required by the Notice are excessive) cannot be made on the ground that the development should remain (effectively a ground (a) or (b) appeal).</td></tr>
<tr><td rowspan="2">Point 2</td><td colspan="2">These grounds are only available if a valid Retrospective Development Application was made in time (28 days) following a request by the LPA to make one.</td></tr>
<tr><td>If an invalid Retrospective Development Application was made, the appeal under this ground would be that the application submitted to the LPA was made within the specified deadline and was legally valid when made and that planning permission ought to be granted for the development.</td><td>If an invalid Retrospective Development Application was made, the appeal under this ground would be that the application submitted to the LPA was made within the specified deadline and was legally valid when made and that a CLUoD ought to be issued for the development.</td></tr>
<tr><td>Point 3</td><td colspan="2">Grounds are available</td></tr>
</table>

Where there is a ground (a) appeal against a Point 1 Enforcement Notice, the appellant must submit plans, reports and other materials necessary to describe their proposals, unless the development is complete, otherwise that appeal ground would not be considered. The Inspector's first task would therefore be to effectively validate the appeal in the same way that an LPA validates a planning application. If the Inspector considers that the material submitted by the appellant is not sufficient to properly describe the development, they will not consider ground (a) further and dismiss that part of the appeal. The fee would not be refunded. The appellant would be barred from submitting any additional plans, reports or other materials to supplement the material they submitted with their appeal.

A ground (b) appeal against a Point 1 Enforcement Notice can only be made if a lawfulness case was made within the 28-day deadline after the service of an Unauthorised Development Notice. The appellant would not be allowed to supplement the case that they had made except where there is directly applicable new case law or there have been relevant changes made to the pertinent part of the GPDO that post-dates their original submissions. Where the appellant failed to make that case within the deadline, they forfeit this right of appeal.

Where there is a ground (a) and/or (b) appeal against a Point 2 Enforcement Notice, the Inspector's first task would be to decide whether the invalid Retrospective Development Application submitted to the LPA was in fact valid at the time. If the Inspector agrees with the LPA that it was invalid, they will not consider any ground (a) or (b) appeal further and dismiss that part of the appeal. If they found it to have been valid, they would go on to consider whether a CLUoD should be issued, or a planning permission should be granted. The appellant would not be allowed to submit any additional plans, reports or other materials to supplement the application that they had made except where there is directly applicable new case law or, in the case of ground (b) (the CLUoD part), there have been relevant changes made to the pertinent part of the GPDO that post-dates their original submissions.

Where there is a ground (a) appeal against a Point 3 Enforcement Notice, the appellant would not be allowed to submit any additional plans, reports or other materials to supplement the application that they had made.

Some appellants appeal under ground (d) and argue that the steps in the Notice are excessive in that the development should be allowed to remain. This is effectively a ground (a) or (b) appeal and such a ground should be considered no further. The fee would not be refunded.

Each ground of appeal would attract a fee to discourage time-wasting on grounds where there is no case to be made. The proposed fees are set out below.

<table>
<tr><th></th><th>Ground a</th><th>Ground b</th><th>Grounds c, d & e</th></tr>
<tr><td>Point 1</td><td>2x the fee for the equivalent planning application</td><td>2x the fee for the equivalent retrospective CLUoD application</td><td rowspan="4">£250 for each ground</td></tr>
<tr><td rowspan="2">Point 2</td><td>4x the fee for the equivalent planning application</td><td>4x the fee for the equivalent retrospective CLUoD application</td></tr>
<tr><td colspan="2">50% refund if the submitted application is found by the Inspector to have been valid when made</td></tr>
<tr><td>Point 3</td><td>2x the fee for the equivalent planning application</td><td>2x the fee for the equivalent retrospective CLUoD application</td></tr>
</table>

Generally, the appellant would need to pay twice the normal planning application fee to argue that planning permission should be granted (ground a) and twice the normal retrospective CLUoD application fee to argue that the development was lawful (ground b). The "procedural grounds" (grounds c to e) each attract a fee of £250.

Fees would not be refunded if grounds of appeal are withdrawn by the appellant. Nor would they be refunded if a ground is found by the Inspector to be invalidly made and is considered no further.

The recommendation is that with a Point 2 Enforcement Notice (where the appellant has failed to make a Retrospective Development Application that was valid) the fee for a ground (a) or ground (b) appeal would be four times the equivalent planning application or retrospective CLUoD fee for the equivalent development to discourage people from failing to engage with the process and to cover the additional work in the appeal to deal with the validation issues. If the Inspector found that the submitted application was both timely and valid, the LPA would have to refund 50% of the fee. The Inspector would go on to consider the ground (a) and/or (b) appeal as appropriate.

POS recommends that the penalties for ignoring an Enforcement Notice should be:

- Fixed penalty fines of £500 which can be levied daily
- Magistrates Court for up to £20K fine
- High Court for an injunction
- Direct Action

The ban on the contravener applying for a CLUoD or planning permission for the development that is in breach (as set out in the Unauthorised Development Notice) should continue at least until the Enforcement Notice is complied with in all respects. This power would need to be incorporated into the existing power in §70C to decline to determine retrospective applications where an enforcement notice for the development is in operation. A contravener is not barred under this power from applying for a materially different development, but the LPA would have to judge whether this was so and could decline to determine such an application if it was not, as provided for in §70C.