

CAIRNGORMS NATIONAL PARK AUTHORITY

Title: PLANNING ENFORCEMENT

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Purpose

This report has been prepared to summarise the Committee's powers for dealing with breaches of planning control.

Recommendations

That the Committee:

- (1) Notes the report
- (2) Will review the operation of the Development Control Protocol's provisions for enforcement in September 2004 and, at that time, decide whether there is a need for the appointment of specialist enforcement staff.
- (3) Agrees to the inclusion of a Development Control Enforcement Policy in the Cairngorms National Park Local Plan.

Executive Summary

Planning enforcement is an integral part of the statutory planning process together with development planning and development control. A lack of appropriate and expeditious attention to breaches of planning control can weaken public confidence in the planning system but the reaction must proportionate to the offence. The main options for dealing with breaches are reviewed and an explanation is given of the division of responsibility between the CNPA and the constituent local authorities.

Legislative Background

Great importance is given in legislation and official guidance to effective enforcement as a means of sustaining public confidence in the planning system. The key objectives are:

- To remedy undesirable effects of unauthorised development;
- To bring unauthorised activity under control

The CNPA has the same enforcement powers as the four constituent local authorities and can therefore take action against development which has taken place without the required planning permission or which fails to comply with any condition or limitation subject to which a planning permission has been granted. Development which can be described in that way is a “breach of planning control” but any such breach is not, in itself, a punishable offence. In summary, planning authorities’ powers to deal with an offence can be summarised as follows:

- **Powers of entry onto the land** for the planning authority’s officer to obtain information required for enforcement purposes.
- **The power to serve a Planning Contravention Notice** where it appears to the planning authority that there may have been a breach of planning control, and the planning authority require information about activities on the land or the nature of the recipients interest in the land. The notice is a means of obtaining information on which subsequent enforcement action may be based but, very often, the service of a notice leads to discussion and the avoidance of further enforcement action. However, if subsequent enforcement is required the PCN facilitates the gathering of accurate information on which enforcement notices can be based. A common outcome of serving a PCN is the submission by the offender of a retrospective planning application for the unauthorised development.
- **Powers to serve an enforcement notice.** Planning authorities may issue an enforcement notice where it appears to them that there has been a breach of planning control and they consider it expedient for planning policy reasons to take action against the breach. It is served on the owner and the occupier of the land to which it relates, and any other person with an interest in the land if the authority considers that interest to be materially affected by the notice. Like all other enforcement powers the serving of an enforcement notice is discretionary and there are legal risks to the planning authority in taking action if it is subsequently judged to be “unreasonable” through being based on irrational factors or taken without proper consideration of the relevant facts and planning issues - or based on non-planning grounds. An Enforcement Notice may require a wide range of steps to be taken to make a development comply with the terms of a planning permission, or for the moving or alleviating an injury to an amenity caused by the development. This may include:
 - (a) the restoration of the land to its condition prior to the unlawful development,
 - (b) the demolition of any buildings or works,
 - (c) the discontinuance of the use of any land, or the carrying out of any building or other operations, or,
 - (d) compliance with a planning condition.

All the steps required must be clearly stated since once the notice has been complied with any step or action not stated will be deemed to have planning consent. Every enforcement notice must specify the reasons why the planning authority consider it “expedient” to issue the notice. The reasoning process is important as a means of explaining to the recipient of any enforcement notice why action is justified. A persuasive statement of

reasons may convince the recipient that nothing is likely to be gained from submitting an appeal against the notice but in the event of an appeal the Inquiry Reporter will critically examine the statement of reasons in order to assess the merits of enforcement action on planning grounds.

- **Powers to serve a Stop Notice** to prohibit the carrying out of any activity described in an Enforcement Notice. An appeal against an enforcement notice effectively suspends the operation of that notice until the appeal is finally determined, or the notice is withdrawn. The Stop Notice provisions therefore enable the planning authority to deal effectively with the interim position. The provisions enable the planning authority to serve a stop notice which, either,
 - (a) prohibits the carrying out on the enforcement notice land, of any activity which is within the scope of the breach of control alleged in enforcement notice, or,
 - (b) requires any such activity to cease until the date when the compliance period specified in the related enforcement notice expires. A stop notice is prohibitory and can only compel an activity to cease, thus, where an enforcement notice alleges a material change of use of land, a stop notice may prohibit an activity which is ancillary or incidental to the change of use.
- **The power to serve a Breach of Condition Notice** where the planning authority considers there is a failure to comply with any condition or limitation imposed on a grant of planning permission. As the process of specifying a period for compliance with an enforcement notice - and a possible appeal - can be protracted the issuing of a Breach of Condition Notice can be a more immediate remedy in cases where conditions on a planning consent need to be enforced. This is possible because there is no right of appeal to a BCN as the developer has previously had a right (at the time of the planning consent) to appeal against the conditions and did not do so. A BCN can be used as an alternative to, or in conjunction with, an enforcement notice.
- **The ability of the planning authority to seek an interdict** to restrain any actual or apprehended breach of planning control applications may be made to either the Sheriff Court or the Court of Session for an interdict to restrain or prevent any breach of planning control - either actual or apprehended. It is seen as a potentially effective measure to address blatant and persistent breaches of planning control. An interdict amounts to contempt of Court and is policed by the Court itself whereas the contravention of a Stop Notice is a criminal offence for which the maximum summary penalty is £20,000. There is also a provision for the Court, when sentencing a convicted person for an enforcement notice or stop notice offence, to have regard to any financial benefit which has accrued, or appears likely to accrue, in consequence of the offence.

Discussion

Most breaches of planning control are not inadvertent: they are attempts to avoid the trouble of seeking planning permission or the disappointment of not getting it. Understandably, planning committees are often indignant when significant breaches come to their attention and are tempted to deal with them in a “punitive” way but this is not possible, because, as I have explained, the breach is not in itself an offence. Official guidance in Planning Advice Note 54 (Planning Enforcement) and the related Circular states the “while it is clearly unsatisfactory that anyone should carry out development without submitting an application and paying a fee, serving an enforcement notice to regularise development is not necessarily the correct route. Where such development is

acceptable, service of a Planning Contravention notice is intended to encourage submission of a planning application, whereas service of an enforcement notice would not only be considered unreasonable but might also lead to an award of expenses against the authority in the event of an appeal.” There is an expectation therefore that the type of enforcement action taken will be in proportion to the seriousness of the breach. As these powers are discretionary there is no obligation to take enforcement action but many investigations of alleged or suspected breaches of planning control result from neighbour’s complaints to the planning authority. The authority must observe decision-making procedures enabling them to satisfy any complainants that whatever decision is eventually taken is well founded and, if it is not, the complainant would have a good case to refer the matter to the Local Government Ombudsman on the grounds of maladministration. In other words, where there is evidence of a breach of planning control there may be maladministration unless the planning authority either solicit an application for planning permission to legitimise the situation, or consider taking enforcement action. A decision not to take enforcement action can also be challenged by judicial review and it is therefore important to ensure that such decisions are well-founded.

Conclusion

Planning enforcement is a very complex part of the development control regime. Very few planning authorities have allocated the resources, and developed the procedures, to deal with breaches of planning control as efficiently as they would wish. Very often, breaches are brought to attention by members of the public - particularly neighbours - and there is an expectation that a planning authority will deal with a breach appropriately and expeditiously.

In the CNPA we have no dedicated enforcement staff (and at present only one development control officer) and it was agreed in drawing up the Development Control Protocol that the following three principles would apply to enforcement issues:

- The relevant local authority would lead on all breaches arising from a planning consent which it had issued,
- The CNPA would lead on all breaches arising from a planning consent which it had issued,
- The relevant local authority would lead on all general breaches - ie. not related to specific planning applications.

Observance of these principles will be particularly important in the early life of the CNPA because we have made no provision for the appointment of enforcement staff, or legal professionals with experience in this type of work. I would suggest that the staffing and resource issue for enforcement be reviewed at the end of our first year of operation to see whether the level of casework justifies having our own in-house capacity. As more decisions are taken on planning applications, the greater will be the need for follow-up checking of compliance with conditions/time limits and the stronger the case for having specialist staff to deal with these issues. An alternative approach might, of course, be to have a service agreement with the constituent local authorities if it is within their capacity to take on extra work.

Whatever decision is taken on staffing, enforcement provisions need to be considered in development plan policies both as a means of providing an approved context for future action and public declaration of the CNPA's disapproval of development which is carried out without permission or at variance with the terms of approval. This would fit very appropriately within the local plan which we are preparing and, as a general illustration of the form this might take, I attach as annex 1 an extract of the policies used by the Western Isles Council which were commended as good practice in Scottish Executive guidance on Planning Enforcement.