

The consultation paper for the review of enforcement procedures has now been published. Julia Berry discusses how the proposals will affect LPAs

Enforcement issues under a cloud

Key points

- Problems in the system arise mainly from LPAs' lack of resources and experience
- The planning delivery grant, announced in July, should encourage LPAs to take a more active role in enforcement action

The Planning Green Paper warned that enforcement arrangements were to be reviewed as part of the proposed fundamental changes to the planning system, in an attempt to make it "faster, fairer and more predictable". Almost one year on, the consultation paper for this review has been published, setting out a range of proposals. But how far will these go towards achieving the paper's aims?

The government is worried that public confidence in the enforcement system is being undermined by abuse. It also feels that the system is cumbersome and expensive for local planning authorities (LPAs) to operate. It is true that few LPAs take more than a handful of enforcement actions a year, and are rarely moved to act formally in any but the most compelling situations. So will these proposals make their role easier?

The last major review of the system was undertaken by Robert Carnwath QC (now Carnwath LJ) more than a decade ago. Some of the present proposals were examined at that time, but were put to one side.

Discretion

Enforcement is the only part of the planning process where LPAs have retained discretion, and several methods are available to them. These are: contravention; enforcement; stop and breach of condition notices; and injunctions. Although LPAs

have a duty to consider enforcement action in cases where they believe that a breach has taken place, whether they take action is a matter for their discretion. The decision will be based upon principles of expediency and public interest.

However, this can lead to inconsistency and uncertainty. Many factors can be taken into account when exercising the discretion, including whether the planning authority have sufficient resources to take action that is not wholly relevant to the breach itself.

In order to encourage LPAs to take a more active role, the government is now considering whether to boost enforcement resources by using the new planning delivery grant, which was announced in July.

Criminalisation

Criminalisation was firmly rejected following the Carnwath Report, and the consultation paper makes it clear that this remains the government's stance. It would certainly provide a firmer deterrent, but breaches of planning control should surely not be treated as criminal offences. Criminal sanctions obviously apply for listed buildings and advertisements, which have historically been dealt with in this way. So, why not more generally?

First, there are too many grey areas. These are difficult enough even for the experts to determine, let alone the magistrates who deal with these prosecutions, but who rarely see a planning case.

Second, the burden of proof would shift from the balance of probabilities (at the moment, the appellant has to prove that no breach has taken place) to the normal criminal system of "beyond reasonable doubt", whereby the LPAs would have to

prove that there had been a breach. This would be much more difficult. An alternative would be to limit this sanction to certain categories, perhaps for persistent offending. However, it would be difficult to identify serious breaches deserving of such a penalty, and this could lead to further uncertainty. The government is therefore right to reject the idea of criminalisation.

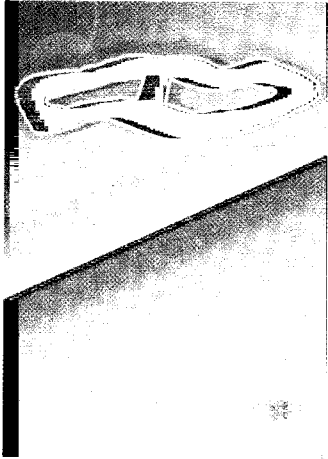
Retrospective planning permission

The paper goes on to consider imposing a presumption against granting permission for a development that has been started without consent.

There is no good argument to support this. The issues should be considered in the normal way, and research shows that, in practice, they usually are. A punitive fee, payable to an LPA upon demand, may, however, be appropriate to discourage this approach. The paper considers and rejects this idea as being counterproductive, but the benefits would surely outweigh any disincentive element, and would help to boost resources.

Enforcement powers

There is a definite downward trend in the use of the available powers. The paper queries whether LPAs are wary of enforcement action because of the risk of failure. I would suggest that this problem is more one of resources (and lack of experience within many LPAs), with LPAs being unable properly to mount a case against a breach where the person defending the case has more to lose. Fewer than 30% of enforcement appeals are successful, with many notices being quashed on technical grounds because LPAs have not adequately prepared their cases.



The paper queries whether the risk of compensation liability acts as a deterrent to the use of stop notices by LPAs. Of course it does, and so it should. If the action is ultimately unsuccessful, the LPA should pay for any loss suffered if the development is abandoned while the question is being decided. Would it perhaps be more equitable to enforce an automatic costs liability if an appeal fails?

The paper queries whether a stop notice could be served in advance of an enforcement notice, without any right to compensation. This would be too draconian a power, and would encourage LPAs to act without properly researching the incident in question. If a breach is deemed to be so serious that it has to be dealt with quickly, an injunction should be sought, but the paper ignores this remedy.

Breach of condition notice

These have proved a popular tool with LPAs; with no statutory appeal, there is no downside for the LPA. But the paper sees no reason to change this. It uses the old arguments set out in the Carnwath Report, namely that, initially, a condition can be appealed and an application may be made at any time to remove or vary a condition if compliance becomes a problem.

The same argument applies, however, for most breaches, and yet, thankfully, the proposal is to retain the right of appeal against an enforcement notice, and with it an important safeguard that should be extended to these notices. Human rights issues are in question here, and this whole area should be re-examined in light of the Human Rights Act 1998.

Monitoring implementation and compliance site notice

One idea is to display, on site, details of the permission, together with its conditions, for a specific period. This would allow third parties to monitor any breaches. Although sensible, might this not encourage more vexatious judicial review attempts if information were so readily available? However, this still improves upon the paper's other proposal, namely to impose a duty to self-certify that no breaches have taken place, with criminal sanctions for false certificates.

While this might work for a small development, several certificates would be required for a larger, phased development, and what about continuing conditions? Would certificates have to be submitted on a regular basis in order to confirm continuing compliance? The LPAs would be swamped with paper, and it would be an impossible task to identify omissions.

It might be as well to impose a duty to report a breach; but perhaps I should not put that sort of idea into the heads of those involved in this consultation process!

Planning contravention notices

The proposal is to expand planning contravention notices to provide a half-way house between informal and more formal enforcement. In practice, they would require an application to be submitted to prove that development has not occurred, or that it is lawful, or that any breach has been remedied. This appears to be a reasonable proposal.

Time limits

The paper suggests that the 10-year time limit should be scrapped, and the four-year limit retained. This might be acceptable for an unauthorised change of use, where it is often difficult to establish the commencement of the breach, but conditions relating to operational development should still be subject to time limits. Moreover, if the breach has not caused a problem within that period, it should be allowed.

Magistrates' courts

According to the paper, planning is a technical and complex subject, which has significant consequences. Why then do we send crucial issues to a magistrates' court, when few magistrates have any real experience in this field? The paper suggests

grouping cases together, but that would lead to further delays and would not address the decision maker's lack of skills and expertise. The paper suggests guidance notes for magistrates, but what is needed is a decision maker who properly understands both the system and the arguments. A rethink is required as to whether the magistrates' court, or, indeed, the criminal system, is still appropriate. Ideally, each area would have its own, full-time magistrate, who would be charged with planning cases alone. An expert arbitrator would also be able to gauge appropriate penalties more effectively, and would be better placed to ensure a reasonable consistency of approach.

The subject of mediation is raised, but only as an area undergoing further research. This research has to be done, and I suggest it should have been part of the fundamental review of enforcement, since mediation alone could solve a number of the problems inherent in the current regime.

Omissions

Thankfully, there was no suggestion to allow third parties to promote enforcement action. The principle that enforcement proceedings should be brought where it is in the public interest to do so is fundamental. This would be eroded if private individuals or companies were able to bring proceedings.

Conclusion

The Dobry Report, commissioned in 1975, reviewed the entire planning system, and found enforcement to be the weakest link. The changes arising out of the Carnwath Report addressed the failing areas, and vastly improved them by introducing tools such as planning contravention notices and certificates of lawful use or development.

The principal remaining problems arise mainly through the lack of resources, and the corollary to that, namely lack of expertise. The government is considering whether to boost enforcement resources through the new planning delivery grant announced in July. This would encourage LPAs to take a more active role in relation to enforcement, and to give it a higher priority. In one stroke, this would do more to improve the system than all the changes mooted in this paper.

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The closing date for the consultation period is 31 December 2002. Copies of the paper can be downloaded from www.planning.odpm.gov.uk/consult/enforce/index.htm