

**REPORT TO: DEVELOPMENT QUALITY COMMITTEE - 18 FEBRUARY 2008**

**REPORT ON: PLANNING ENFORCEMENT REGULATIONS 2007 - CONSULTATION PAPER**

**REPORT BY: DIRECTOR OF PLANNING & TRANSPORTATION**

**REPORT NO: 28-2008**

## **1 PURPOSE OF REPORT**

- 1.1 The report seeks to confirm the views of the Council in response to the consultation paper "Planning Enforcement Regulations 2007" and to authorise the Director of Planning & Transportation to issue the response to the Scottish Government by 20 February 2007.

## **2 RECOMMENDATION**

- 2.1 It is recommended that the Committee
- a endorses the recommendations contained in Annex B to this report as the Council's formal response to the consultation paper;
  - b authorises the Director of Planning & Transportation to issue the formal response to the Scottish Government by 20 February 2008.

## **3 FINANCIAL IMPLICATIONS**

- 3.1 As noted in the Council's response to Question 3 in Annex B there appears to be doubt, legally, as to whether the proposed fines will merely act as a deterrent or will actually be collected. If collection is undertaken the amount of gross income likely to be generated as a result of the implementation of the Regulations will depend on a number of factors including the number and frequency of Fixed Penalty Notices issued and the degree to which the Council considers that Direct Action and reporting to the Procurator Fiscal to be the most appropriate ways of resolving persistent breaches as alternatives.

## **4 BACKGROUND**

- 4.1 Enforcement of planning control is primarily the responsibility of the relevant planning authority. To enable them to do this effectively, the Town and Country Planning (Scotland) Act 1997 sets out a range of powers available to enforce planning control (Part VI, sections 123-158).
- 4.2 The Planning Etc (Scotland) Act 2006 (the 2006 Act) introduced a number of new powers, and changes to the operation of the existing powers into planning legislation, namely:
- Notice requiring application for retrospective planning permission for development already carried out;
  - Temporary stop notices;
  - Notification of Initiation of Development and Completion of Development;

- On-site Notices;
  - Enforcement Charters; and
  - Removal of certain grounds for appeal against Enforcement Notices.
- 4.3 Some of the required changes now being consulted on were first raised in the White Paper "Modernising the Planning System" published in June 2005. Others were introduced during the passage of the Bill through the Scottish Parliament. Reports 504-2005 and 7-2006 to the Planning & Transportation Committees of September 2005 and February 2006 respectively refer.
- 4.4 In wording the new enactment Ministers agreed that while the basic principles of enforcement in the 1997 Act did not need to be changed, there was scope for improving the delivery of planning enforcement with the introduction of the above new or extended powers.
- 4.5 The purpose of this consultation paper is to seek views on proposed Regulations which deal with some of the matters outlined above. The consultation contains a number of specific questions on which respondents views are sought. These are outlined in Annex B to this report together with a suggested response/commentary.
- 4.6 To assist Members to better understand the proposals the report below summarises them under the following headings:-
- a Fixed Penalty Notices;
  - b Notification of Initiation of Development/Notice of Completion of Development/On Site Notices; and
  - c Temporary Stop Notice.
- 4.7 The consultation paper also contains copies of the draft Regulations; an Equalities Impact Assessment; and a draft regulating assessment which summarises the likely impact of the proposals on business and other interests and considers potential additional costs balanced against benefits.
- 4.8 The paper specifically asks respondents to bear in mind that the Planning Etc (Scotland) Act 2006 has already been granted Royal Assent. The Scottish Government is therefore unable in this consultation to consider comments seeking amendment of the provisions contained in the 2006 Act.
- 4.9 Copies of the full consultation paper have been deposited in Members Lounges or may be viewed on-line at [www.scotland.gov.uk/Topics/Planning/Modernising](http://www.scotland.gov.uk/Topics/Planning/Modernising).

## **5 FIXED PENALTY NOTICES**

- 5.1 Planning authorities are being offered the power to issue Fixed Penalty Notices (FPN) giving those not complying with an Enforcement Notice or a Breach of Condition Notice the opportunity to pay a monetary penalty as an alternative to prosecution. In the past authorities have expressed concern that prosecution is a potentially lengthy and expensive process with no guarantee that the desired outcome will be achieved. The consequences often are that offences go unpunished

creating the perception that the planning enforcement system lacks credibility. Under the 1997 Act authorities can seek a prosecution and fine on conviction up to £20,000 for breach of an Enforcement Notice and £1,000 in respect of a Breach of Condition Notice. These levels of fine were not increased in the 2006 Act.

- 5.2 The Regulations to which this consultation relate propose the following scales of fixed penalties:

Enforcement Notice (EN): £1,000 for a breach of the first notice with £500 increases for each subsequent breach of a subsequent EN up to a maximum amount of £5,000.

Breach of Condition Notices (BCN): £100 in respect of the first breach with £50 increases for each subsequent breach of BCNs in respect of the same condition, up to a maximum of £300.

- 5.3 The consultation paper indicates that the maximums payable are consistent with fixed penalty regimes under other legislation where the maximum fine does not exceed 30% of the maximum which can be imposed on summary conviction.
- 5.4 The paper reminds Councils that other existing options (prosecution or direct action) remain open and may be preferable to FPNs where more serious breaches merit a higher penalty.

## 6 NOTIFICATION OF INITIATION OF DEVELOPMENT/NOTICE OF COMPLETION OF DEVELOPMENT AND ON SITE NOTICES

- 6.1 The new Act requires anyone intending to carry out development for which they have been given permission to inform the planning authority before starting development of the date on which they intend to start. This notice is to be called a Notice of Initiation of Development (NID).
- 6.2 The applicant will be directed to this requirement by the application of an appropriately worded standard condition on the consent notice.
- 6.3 Once development is completed a Completion Notice must be supplied to the authority (NCD).
- 6.4 For certain categories of development, viz
- a major development
  - b national developments
  - c bad neighbour developments

a notice must also be displayed on site from the start date to the completion date giving the following details:

- i Location of development
- ii Applicant details
- iii Local Planning Authority
- iv Details of development and any conditions applicable
- v Details of where further information on the permission granted may be obtained

- 6.5 The draft Regulations also provide that the NID should also include information on the developer's enforcement history over the previous three years.
- 6.6 The provisions are intended as an aid to effective development monitoring. The proposed site notices are intended to raise public awareness of development taking place in their area. It will be noted from the above that site notices will not be relevant for small scale developments as the paper considers that neighbour notification procedures are sufficient in this regard.
- 6.7 The Regulations provide that site notices must be displayed in a permanent place, be visible to the public and printed on durable material.

## **7 TEMPORARY STOP NOTICES**

- 7.1 There is currently a power in the 1997 Act to serve, in association with an Enforcement Notice, a Stop Notice to stop unauthorised activity or development especially where there is a threat to amenity through irreparable damage to buildings or the environment.
- 7.2 However, this is a relatively slow and unwieldy process. The alternative is for authorities to seek an Interdict through the Courts. This also can be time consuming and relatively inflexible.
- 7.3 The new Act now provides authorities with the power to issue Temporary Stop Notices (TSN). These notices are valid for up to 28 days and could be effective from the day they are served without the need for an enforcement notice.
- 7.4 The notice would be valid for 28 days before a formal Enforcement Notice and Stop Notice would be required.
- 7.5 TSNs have the following advantages:
- a there is no appeal against a TSN.
  - b a TSN is not served on individuals as it takes affect from the time it is displayed on site which is indicated as a valid alternative to service on persons.
- 7.6 A TSN may not prohibit the use of a building as a dwelling house nor on a caravan occupied by a person as their main residence except where the siting of the caravan creates a danger to the occupants or the public or would be unacceptable for some other "compelling reason".

## **8 THE ENFORCEMENT SERVICE AT DUNDEE CITY COUNCIL**

- 8.1 Enforcement has a fundamental role in the operation of an effective planning system in Dundee. Unauthorised development and breaches of planning control are discouraged, and where appropriate, dealt with quickly, efficiently and rigorously to demonstrate to the public that the planning system operates fairly and in the public interest.
- 8.2 A breach of planning control is defined as carrying out development without the required planning permission, or failing to comply with any condition or limitation contained in a planning permission. Many, if not the significant majority, of breaches

of planning control are inadvertent and are usually easily resolved without the need for formal action to be taken.

- 8.3 For many individuals, their first contact with the planning system, unless they are themselves making a planning application, is through the enforcement system. In many cases the system may seem to be lengthy and 'unfair' in that there appears to be no penalty for unauthorised development.
- 8.4 The Council's enforcement service is undertaken from within the Planning & Transportation Department by two full time enforcement officers and one part time enforcement officer.
- 8.5 The most recent report to the Council on the output and effectiveness of the service was made to the DQ Committee in June 2007 (Report 219-2007 refers). At the same meeting the Council approved an amended Planning Enforcement Charter as required by Section 27 of the new Act (Report 331-2007 refers). This document is available on the Council's website and outlines the Council's approach to planning enforcement.
- 8.6 The main impacts on the Council's enforcement service from the proposed Regulations are:
- a The Fixed Penalty Notice procedure offers an additional option in law to enforce breaches of control. The principal impacts will be deciding when it is appropriate to involve the FPN procedure and if so for how long before the alternatives of prosecution or direct action are thought to be more appropriate remedies.
  - b The FPN scheme is likely to impose additional administrative and cost burdens, ie repeated service of Notices.
  - c Additional administrative burdens of ensuring that statutory requirements in respect of the submission of NIDs and NCDs are enforced. This is to an extent counterbalanced by the benefits from more structured monitoring.

## **9 EQUALITIES IMPACT ASSESSMENT AND DRAFT REGULATORY ASSESSMENT**

- 9.1 The consultation paper contains information which justifies the proposals against the Scottish Government's equal opportunities objectives and assesses its overall financial input on stakeholders.
- 9.2 The paper concludes that the Scottish Government is unable to estimate any costs accurately. However, it is concluded that the measures will not have any significant financial impact on any particular group in the community.
- 9.3 The paper evaluates the benefits and costs of the proposals. These are summarised in Annex A.

**10 POLICY IMPLICATIONS**

- 10.1 This Report has been screened for any policy implications in respect of Sustainability, Strategic Environmental Assessment, Anti-Poverty, Equality Impact Assessment and Risk Management. There are no major issues identified.

**11 CONSULTATIONS**

- 11.1 The Chief Executive, Depute Chief Executive (Support Services) and Depute Chief Executive (Finance) have been consulted and are in agreement with the contents of this report.

**12 BACKGROUND PAPERS**

- 12.1 Planning Enforcement Regulations 2007 - Consultation Paper (November 2007).
- 12.2 The Planning Etc (Scotland ) Act 2006.
- 12.3 The Town and Country Planning (Scotland) Act 1997.

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7 February 2008

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**ANNEX A: COSTS AND BENEFITS OF PROPOSED REGULATIONS (Ref Consultation Paper Annex F)**

<b>Benefits</b>	<b>Costs</b>
<p><u>Public Authorities</u></p> <ul style="list-style-type: none"> <li>• Wider range of enforcement measures available.</li> <li>• Option of Fixed Penalty Notices as an alternative to costly and lengthy prosecution processes.</li> <li>• NIDs will provide useful information to assist enforcement monitoring.</li> </ul> <p><u>Developers</u></p> <ul style="list-style-type: none"> <li>• Earlier identification of breaches saving time and money in correcting breaches earlier.</li> </ul> <p><u>Communities</u></p> <ul style="list-style-type: none"> <li>• Use of TCNs can be used to immediately stop unauthorised development which damages local environment and amenities.</li> <li>• Additional information available through site notices about large scale developments.</li> <li>• Protection for caravan dwellers and occupiers of dwelling houses from the Regulations regarding TSNs.</li> </ul>	<p><u>Public Authorities</u></p> <ul style="list-style-type: none"> <li>• There may be increased costs associated with the investigation of additional allegations of breaches drawn to Councils' attention through increased public awareness.</li> <li>• More efficient allocation of resources as a result of NID/NCD process.</li> <li>• New FPN powers will provide a cost effective alternative to prosecution.</li> <li>• Penalties paid through FPNs will accrue to the planning authority, rather than the Courts.</li> </ul> <p><u>Developers</u></p> <ul style="list-style-type: none"> <li>• Slight increase in cost to developers and individuals through the requirement to complete NIDs and in compiling and maintaining a list of previous enforcement actions.</li> <li>• Negligible cost of displaying a site notice.</li> </ul>

## ANNEX B: CONSULTATION QUESTIONS AND COUNCIL RESPONSES

Category	Question	Suggested Response/Commentary
Fixed Penalty Notices.	Q1. Do you support the proposal that penalties should be increased for continuing breaches and if not, why not?	<u>In principle</u> , yes. The proposals do send out the clear message that repeat breaches of planning control will be penalised. However, the issuing of repeat Notices will be time consuming and costly as Notices require to be served on all interested parties. Presumably this process needs to be repeated for each repeat Notice served. This is unclear from the paper. These costs are likely to outweigh the proposed scale of fines.
	Q2. Do you have any views on the proposed amounts for the fixed penalty, in particular the proposed initial amounts?	The initial penalty amounts are <u>far too low</u> . Penalties at such a low level overall are likely to be a deterrent to householders. Larger developments will be able to more easily absorb the penalties. It is not clear why the 30% rule (Para 5.3) cannot be varied by Regulation to a much higher level as an even greater deterrent. It is of great regret that the new Act did not take the opportunity to greatly increase the fine on prosecution. In the absence of this a greater deterrent might be to increase substantially the levels of the first stage fine and then scaled to fit the nature of the breach.
	Q3. Do you have any views on the proposed increase in the amount of each subsequent fixed penalty, in particular with regard to the number of FPNs that would be required to reach the maximum and whether the fixed penalty should increase by a larger amount for each subsequent offence?	It is considered that the Act proposes that the fines, on an increasing scale, are designed to be <u>alternative to prosecution</u> and therefore act as a deterrent to the continuing breach of planning control rather than sums of money which will <u>actually be collected</u> . The Consultation Paper and the Draft Regulations are unclear as to whether or not this is the intention of the proposals. In addition, Section 136(A)(3) of the new Act indicates that it is "not competent to serve more than one fixed penalty notice in relation to a particular step or activity". This would seem to point towards multiple FPNs/ENs not being possible. This is a fundamental point which needs to be clarified by Scottish Government.



Category	Question	Suggested Response/Commentary
		<p>No guidance is offered on how the notices are to be served or worded. In addition, there is no guidance offered on how money is to be collected, if that proves to be the objective of the Regulations.</p> <p>The Consultation Paper is silent on the issue of whether appeals may be made in relation to the second and subsequent Enforcement Notices which are issued with the first and subsequent FPNs. If a second appeal opportunity is to be made available and is successful, will the original fine imposed be reimbursed? The Council feels that there should be one and final right of appeal.</p>
<p>Notification of Initiation of Development/Notice of Completion of Development/On Site Notices.</p>	<p>Q4. Do you have any views on the proposed level of information requested in the NID or any suggestions for other information, for example declaring that any suspensive conditions had been met, might be useful?</p>	<p>It should be noted that the developer intimating the development may be different to the original applicant. Also the developer completing the development may be different from the developer who submitted the NID. Therefore the Regulations should specify responsibilities for submitting NID and NCDs and authorities should be formally notified of all changes of developer. In submitting an NID it should be the applicant/first developer's responsibility to notify the Council, in writing, with evidence that all the relevant negatively worded conditions have been discharged. Will it be an offence to provide wrong information?</p> <p>The Draft Regulations provide no definitions of "initiation", "commencement" and "completion". Section 27(B)(2) of the Act refers to a Notice of Completion having to be submitted "as soon as practicable". It is essential that this terminology is clarified in the Regulations to ensure consistency of approach by authorities and certainty for developers.</p>

Category	Question	Suggested Response/Commentary
		<p>It is assumed failure to submit either of the Notices will be a breach of planning condition. For this reason it is essential that the meaning of all important terms are understood.</p> <p>It would be helpful if the Regulations included standardised Notice templates.</p> <p>The Draft Regulations are also silent on how soon prior to the intimation of development the Notices should be submitted to authorities.</p>
	<p>Q5. Are you content with the proposed time limits for recording relevant enforcement action?</p>	<p>The Regulations do not make clear as to whether the declarations should be in respect of other developments in the Council's area or elsewhere in the country. Whilst it is useful to be aware of a developer's "track record" it is unclear how this is intended to influence the planning process in relation to the development to which the Notice relates. This could lead to objections to applications by the same applicant/developer elsewhere based solely on their previous enforcement track record. Such objections could not have a bearing on the determination of such an application.</p> <p>It is unclear why a historic period of three years has been selected.</p>
	<p>Q6. Bearing in mind that the purpose of the notice is to make people aware of the development and direct them to the appropriate contacts for further information, are you content with the level of information to be included?</p>	<p>Generally satisfactory.</p>

Category	Question	Suggested Response/Commentary
	Q7. Are you content with the proposed categories of development for which notices would be required to be displayed, and if not, why not?	Given the classes of development to which they will relate they will relate to large and significant developments only. The Council may feel that public involvement in enforcement activity might be better served by making notices apply to a broader range of developments. Schedule 1 to Regulation 4 is unclear as to whether the site notice should contain a detailed list of conditions and how these have been discharged (see above). The Council thinks it should. Regulation 4 should clearly define "bad neighbour developments" as the definition provided may shortly be amended as a result of other consultations under way.
	Q8. Do you consider this sufficient, or would you like to suggest other criteria for the siting, display, size, etc, of these notices?	The Regulations should make clear where the responsibility for the removal of notices lies and when the removal should be undertaken and the penalty for non-compliance. In addition, there is no provision relating to the replacement of Notices removed prior to the completion of development.
Temporary Stop Notices	Q9. In relation to the proposed Town and Country Planning (Temporary Stop Notices) (Scotland) Regulations 2007, are you content with the proposed draft Regulations and if not, why not?	<p>Temporary Stop Notices are a valuable new tool in dealing with serious or potentially serious breaches of control which have immediate environmental or amenity effects. The lack of opportunity to appeal is a distinct advantage to the process. However, given that the TSN must be followed by an Enforcement Notice and Stop Notice (together) the appeal process is brought back into play in the Enforcement Notice element. Effectiveness may therefore be short lived.</p> <p>Although a TSN does not need to be served on individuals but by a site notice alone, this practice could lead to challenge. It is perhaps safer if the Notice were served formally on individuals.</p>

Category	Question	Suggested Response/Commentary
	Q10. Are there any other situations where you believe use of a Temporary Stop Notice should not be permitted?	It is not anticipated that TSNs would be widely used and it should be for individual authorities in their Enforcement Charters to set out guidelines applicable locally. Section 144B(1) of the 1997 Act (introduced by the 2006 Act) indicates that a TSN may not prohibit the use of a building as a dwellinghouse. It is not clear whether this provision prohibits their use where there is unauthorised use of a dwelling or flat, eg HMO.
General	Q11. Do you wish to comment generally on the draft Regulations, RIA, EqIA, or other issues in respect of this consultation?	<p>In order for Planning enforcement to be as effective as possible it is right that there should be a range of remedies available, the choice of remedy being appropriate to the nature and scale of the breach. Members may be of the view that the Scottish Government should be seen to be encouraging Procurators Fiscal to give greater priority to the prosecution remedy as solid backup. To be an effective deterrent prosecution should be capable of being applied with confidence even when all other potential remedies have not been followed or are applicable.</p> <p>The new Act amends the 1997 Act by deleting the first ground of appeal against an enforcement notice. This means that the recipient of an enforcement notice will no longer be able to argue that planning permission for the alleged breach of control ought to be granted. This provision has yet to be formally enacted. The implications for Councils of this change and the implications for the proposed Fixed Penalty Notice are not developed in the consultation paper.</p>