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INTRODUCTION

Sections 1 to 11 of the Planning and Compensation Act 1991 ("1991 Act'), together with related secondary legislation, Department of the Environment Circular 21/91 and 17/92 and Planning Policy Guidance Note No 18 (PPG18), published in December 1991, represented the culmination of the Government's response to, and implementation of, most of the recommendations made by Robert Carnwath QC, in his 1989 report "Enforcing Planning Control" (ISBN 0 117521949).

2. The report's final recommendation was that consideration should he given to the preparation of a practice manual for LPAs on all aspects of (planning) enforcement work.

3. This guide is the Government's response to that final recommendation.

THE PURPOSE OF THE GUIDE

4. It was recommended that the guide should cover best practice with regard to investigation, negotiation, drafting and procedure, appeals, prosecution, stop notices, injunctions, default action and other aspects of the system, and include examples from actual cases. The twelve parts to this manual attempt to address these fundamental requirements and are prefaced by a brief summary of "dos" and "don'ts".

5. There is inevitably some overlap with the procedural advice now contained in the consolidated and up-dated planning enforcement Circular 10/97, and even to some extent with the policy advice contained in PPG18. The primary intention of this guide, however, is that it should simply complement those publications. It is not intended to give further policy guidance or to duplicate the procedural guidance in the Circular. It is recognised that the Department of the Environment, Transport and the Regions is not itself involved in most of the day to day development control processes that concern LPAs. Its primary role is confined to providing, through Parliament, the legislative enabling framework and powers for LPAs to use in the course of this work, to providing policy and procedural guidance, and to its statutory duties, through the Secretary of State or Planning Inspectors acting on his behalf, in determining appeals against enforcement notices. It is also recognised that the appeal process, in which the Department and its Planning Inspectorate agency are most directly involved, will often form only a small part of the total work involved in enforcing planning control in any particular case. Many LPAs will already have developed their own effective and perfectly acceptable methods of undertaking all the practical work involved in enforcing planning control. If those methods are already proven to be effective, it may be reasonable to continue to use them.

6. The manual is not only intended to assist professional Planning staff in LPAs. It is addressed equally to LPA lawyers, administrators and investigating staff, such as Enforcement Officers, as well as to those members of a LPA involved in delegating various enforcement powers to officers and committees, or who are involved in taking development control decisions themselves. It will also be of help to those concerned with the development control of listed buildings and conservation areas, minerals, hazardous substances and protected trees.

EXAMPLES FROM CASES

7. Throughout the text, efforts have been made to include references to the most up to date, relevant judicial authorities known about at the time of publication. Where possible, case citations used are taken from full case reports contained in the Journal of Planning & Environment Law (JPL), as this is the publication thought most likely to be readily available to LPA officers. Where a full case report is not known to be available, judgment summaries have been cited, taken from JPL bulletins (the green pages preceded by the letter "B") or Estates Gazette case summaries (the loose, green "EGCS" inserts). Other reports cited are mainly taken from Property, Planning and Compensation Reports (P&CR) and Justice of the Peace & Local Government Law (JP).

Table 1 **A preface of "Dos" and "Don'ts"**

DO	DON'T
Have an enforcement policy	Enforce **solely** to regularise acceptable development
Have regard to judicial authority	Enforce solely to obtain a fee
Have regard to the provisions of the development plan and other material	Give weight, either way, to the fact that the development has already taken place
Have regard to national policy guidance	Have regard to other immaterial (non-planning) considerations
Have regard to procedural advice in DOE/WO Circulars and use the example/model notices as guides	Let protracted negotiation delay essential enforcement action
Investigate complaints thoroughly and act promptly	Be overtaken by time limits for enforcement
Keep accurate records, including photographs where possible	Forget to consult other departments and sources of information
Respect complainants' confidentiality	
Prevent delay by ensuring that a properly delegated person is always available to take urgent action/decisions when needed	
Be prepared to give reasons for taking enforcement action or ignoring a breach or inviting an application for permission	Act without proper authority according to Standing Orders
Use the appropriate investigative powers	Seek to restore land to a better condition than it was in before the breach took place
Be prepared to justify using those powers	Be too legalistic
Use HM Land Registry and own records	Be **unduly** cautious about serving stop notices
Maintain close liaison between Council Departments	Hesitate to issue enforcement notices in the alternative, if unsure of the nature of the breach
Have regard to the provisions of the Police and Criminal Evidence Act 1984 when interviewing persons suspected of criminal offences	Ignore other uses on land in mixed use when formulating allegations, or the provisions of section 173(11)
Be aware of the Local Government Ombudsman	Require "immediate" compliance with an enforcement notice (that does not give a period)
Keep up to date with reported case law and keep staff informed by circulating it	Forget that a neighbouring LPA may have relevant experience or be a source of advice

CHAPTER 1

Stating the authority's enforcement policy

INTRODUCTION

1.1 The planning authority's decision whether to take enforcement action *must* always be well-founded. Whether it is "expedient" for the authority to initiate formal enforcement action, to remedy or stop an alleged breach of planning control, requires thorough assessment of the relevant factors in every *case*. That assessment is made more difficult if the authority have not produced a clear statement of enforcement policy to provide a decision-making framework. Paragraph 9.1 of the booklet entitled "A Charter Guide: Development Control" (published jointly by the National Planning Forum, Department of the Environment and the Welsh Office) states—

"The Council's policy on enforcement will be publicised. It will explain the Council's enforcement procedures and practice."

1.2 What the authority's enforcement policy statement should say depends partly on the judgement of the Planning Committee, advised by their officers, on what resources should be allocated to the task of enforcing planning control efficiently and cost-effectively in their administrative area. The business of investigating and remedying alleged breaches of control is usually labour-intensive. The resources allocated for this purpose should therefore be regularly reviewed as local circumstances change. It is recommended that this should take place at least once a year, possibly to coincide with the annual budget process. Reviews should be based on up-to-date information about enforcement activity and trends, using IT equipment to maintain accurate records and retrieve data.

THE POLICY STATEMENT

1.3 A statement of enforcement policy will address some or all of the following issues—

(1) the main planning policies applicable in the Council's administrative area, as stated in their development plan;

(2) the type and incidence of enforcement problems;

(3) the resources (financial and staff) to be devoted to enforcing planning control, as part of the authority's planning function or in association with their other enforcement responsibilities;

(4) the procedure for dealing with complaints about allegedly unauthorised development;

(5) any special planning enforcement issues the authority may anticipate (eg unlawful

DO	DON'T
Allocate the necessary resources to see action through to the end	Forget to enter action in the register of enforcement and stop notices and breach of condition notices
Delegate sensibly (the next committee meeting may be too late)	Forget to withdraw a redundant notice in good time
Make sure action is properly authorised	Forget that BCNs are available for some breaches
Be clear and precise in specifying breaches and requirements	Ignore the possible advantages of "default' action over prosecution
Use plain language	Hesitate to challenge an appeal decision that is clearly defective
Be prepared to use all the enforcement powers available, commensurate with the seriousness of the breach	
Use the provisions of sections 171 B(4)(b) and 289(4A)	Forget some Magistrates' Courts see few enforcement cases
Make sure the reasons for issuing the enforcement notice match its requirements	Try to prosecute an owner under section 179(4)
Stick to procedural time-limits or ask for justifiable extensions	
Be prepared to counter requests for adjournment	
Set priorities for enforcement action	Ignore the benefits of computerised record-keeping
Involve the police if trouble is expected	Ignore the safety of staff
Have regard to the Council's obligations under other legislation which may be invoked as a result of enforcement action	Be strong with the weak and weak with the strong
Be flexible and consider Qenuine alternative solutions	Be influenced by threats or other irregular pressures

winning and working of minerals; unauthorised waste-tipping; or the frequent stationing of residential caravans on privately owned land without planning permission); and

(6) how the authority intends to monitor new building activity on sites where the building control function is not being carried out by the authority.

FORMULATING THE POLICY STATEMENT

1.4 The statement of enforcement policy should be formulated by reference to—

(1) national policy in Planning Policy Guidance Note (PPG) 18, "Enforcing Planning Control";

(2) relevant statements in the authority's development plan;

(3) the need to maintain the integrity of specially protected areas, including National Parks, Areas of Outstanding Natural Beauty, Sites of Special Scientific Interest and Conservation Areas; and

(4) the need to achieve a reasonable balance between protecting amenity and other interests of acknowledged importance throughout the authority's area and enabling acceptable development to take place, even though it may initially have been unauthorised,

1.5 The authority should have regard, where appropriate, to the provisions in section 73A of the Town and Country Planning Act 1990, as amended. These provisions enable planning permission to be granted for buildings or works constructed or carried out, or a use of land instituted, without planning permission. The authority's approach to enforcing planning control over unauthorised development should not therefore be stricter, for planning purposes, than it would be when considering the merits of a prior application for planning permission before development starts. The authority should not use their enforcement powers solely to compel someone who has carried out unauthorised development which is acceptable on its planning merits, without the imposition of any planning conditions, to pay the planning application fee the authority would have received if an application had been submitted to them.

THE AVAILABILITY OF APPEAL COSTS IN ENFORCEMENT PROCEEDINGS

1.6 Appeal costs may be awarded against the authority where someone who appeals to the Secretary of State against an enforcement notice can show that the authority behaved "unreasonably" during the enforcement proceedings, if the appellant incurs unnecessary expense in pursuing the appeal. A detailed explanation of "unreasonable" conduct is in paragraphs 21 to 28 of Annex *3* to DOE Circular 8/93. In brief, when considering whether to use their discretionary enforcement powers, the authority will be expected to ensure that their decision to issue an enforcement notice takes full account of relevant judicial authority, policy guidance in PPG 18 and any well-publicised appeal decisions.

1.7 Nevertheless, the authority should not be inhibited from taking enforcement action which they consider essential in the public interest by any suggestion that individual members of the Planning Committee could be "surcharged" if there is a subsequent award of appeal

(6) that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach (ground (f));

(7) that any period specified in the notice in accordance with section 173(9) falls short of what should reasonably be allowed (ground (g)).

6.3 The appeal on ground (a) is an appeal solely on planning merits. This ground of appeal is directly linked to the "deemed" application for planning permission inherent in an enforcement appeal, for which section 177(5) of the 1990 Act provides. In most cases, an administrative fee is payable (in accordance with a tariff prescribed in the Planning Application Fees Regulations) to the Secretary of State and the LPA as a contribution towards their expenses in dealing with the deemed planning application. When this fee is not paid within the time-limit specified for it in each case by the Secretary of State, section 177(5A) of the 1990 Act provides that the appeal on ground (a) and the deemed planning application will lapse. The appeal can then only proceed on whichever of grounds (b) to (g) the appellant has selected.

6.4 Grounds (b), (c), (d) and (e) are usually known as the "legal grounds" of appeal because they are each concerned with mixed issues of fact and Planning Law. An appellant who relies on any of these grounds will have to provide relevant facts to support them. This process will usually involve a detailed examination of the planning history of the enforcement appeal site.

6.5 Grounds (f) and (g) deal, respectively, with whether the LPA's required remedial steps in the enforcement notice are excessive for their purpose; and whether the specified compliance period is shorter than should reasonably be allowed. These two grounds are not concerned with the planning merits of the alleged breach or with any legal issue which may be involved in the appeal.

THE ENFORCEMENT APPEAL PROCESS

6.6 Because the submission of a valid enforcement appeal suspends the effect of the enforcement notice, it is vital for the LPA's officers to respond promptly to the Planning Inspectorate Agency's requests for information. Quick responses will enable the appeal to be processed efficiently and even-handedly towards both principal parties. Unless the LPA's response is prompt and helpful, a stalemate can result which brings the entire planning enforcement process into disrepute and is likely to provoke criticism from any neighbours of the site whose amenity is adversely affected by the breach of control. If the LPA consider there is a realistic prospect that negotiation with the appellant could result in withdrawal of the appeal, or of the enforcement notice, they should pursue negotiations vigorously during the appeal and inform the Planning Inspectorate's case officer about what progress is being made.

6.7 Most enforcement appeals are decided by "an appointed person", who is a Planning Inspector to whom the Secretary of State's jurisdiction to determine the appeal is formally transferred. There are three procedures for processing and deciding the appeal—

(1) *by a public inquiry* (including a site-inspection): an inquiry will usually be held when

costs against the authority for "unreasonable" conduct. The provisions of section 20(1)(b) of the Local Government Finance Act 1982 enable the auditor to certify that an amount is due for recovery where "a loss has been incurred or deficiency caused by the wilful misconduct of any person". It seems most unlikely that a Planning Committee's collective decision, even if it is contrary to officers' advice, would ever amount to "wilful misconduct", unless it was made for an improper purpose.

CHAPTER 2
Investigating allegations of unauthorised development

INTRODUCTION

2.1 At the outset, thorough investigation of the facts of any allegedly unauthorised development is vital to effective enforcement of planning control. The planning history of the relevant parcel of land must be established as accurately as practicable, using all the available sources (including the knowledge of the Parish Council and local residents).

2.2 A complete documentary record of all investigation is essential. Wherever possible, it should include photographic records which are signed and dated by the person taking the photographs. All photographic records should he supplemented by a location plan showing the position from which each photograph was taken.

CITIZEN'S CHARTER STANDARDS

2.3 The jointly published DOE, Welsh Office and National Planning Forum booklet entitled "Planning—Charter Standards" (April 1994) recommends to planning authorities what constitutes a good standard of planning enforcement service, as follows—

(1) acknowledging someone's complaint within three working days of receiving it;

(2) treating the complaint as confidential, as far as possible, within the authority;

(3) visiting the site of the allegedly unauthorised development and ascertaining what activities are taking place there;

(4) writing to the complainant again, within fifteen working days of the complaint, explaining what action the authority propose to take, or why they think no formal enforcement action is needed; and

(5) telling the complainant about the authority's decision to take formal enforcement action within ten working days of the authority's making that decision.

THE AUTHORITY'S INVESTIGATIVE POWERS

2.4 The planning authority have three main investigative powers for planning enforcement purposes. They are—

(1) *section 330 of the Town and Country Planning Act 1990:* this power may be used in order to obtain relevant information at an early stage of the enforcement process. Receipt of a notice requesting information which is clearly being sought for a possible enforcement purpose may suffice to prompt the recipient to remedy the apparently unauthorised development straightaway, without any formal enforcement action. (The recipient of the notice must be either the occupier of the premises or the person receiving rent for them.)

(2) *section 16 of the Local* Government (Miscellaneous Provisions) Act *1976* : these provisions are primarily intended to enable the authority to establish the facts about ownership of land. The requisition may be directed to the occupier, any freeholder, mortgagee or lessee, any person receiving rent from the land, and any person who is legally authorised to manage or arrange the letting of the land.

Two offences may arise from these provisions, namely—

(a) failure to respond to the notice within the stated time-limit; and

(b) furnishing information which the defendant knows to be false, or contains a recklessly made false statement.

On conviction of either offence, the maximum summary penalty is £5,000.

(3) section 171C of the Town and Country Planning *Act* 1990: these provisions enable the authority to serve a "planning contravention notice", as described in paragraphs 2.5 to 2.7 below.-

THE PLANNING CONTRAVENTION NOTICE

2.5 The planning contravention notice (PCN) is intended to be the main method by which the planning authority obtain information about allegedly unauthorised development. Guidance on how to use this type of notice is given in Annex 1 to DETR Circular 10/97. A model PCN is provided in the Appendix to Annex 1.

2.6 The PCN may also be used to invite its recipient to respond constructively to the planning authority by discussing how any suspected breach of control may be satisfactorily remedied. This might include, for example, a discussion with officers or elected members about whether conditional planning permission might be granted for whatever development is mutually agreed to have taken place. This is an optional procedure, for use in appropriate circumstances. No face-to-face discussion need be offered in cases where the planning authority consider it unnecessary or unhelpful, or where it would delay urgently required enforcement action.

2.7 Judgment given in the High Court on 19 December 1994, in the case of R *v Teignbridge District Council ex parte Teignmouth Quay Co Ltd* [1995] JPL 828, held that, while the PCN procedure was not as draconian as an enforcement notice, it was nevertheless "an intrusive procedure" which should not be deployed unless it appeared to the planning authority that a breach of planning control might have taken place. It follows from this judgment that the authority should never use a PCN to carry out an investigative "trawl", just to satisfy themselves about what activities are taking place on a parcel of land. Before a

PCN is served, the authority must have some prima facie evidence to justify their suspicion that a breach of planning control is taking place, or has occurred, on the land to which the notice relates.

COMPENSATION FOR LOSS OR DAMAGE RESULTING FROM SUBSEQUENT STOP NOTICE

2.8 Section 186(5)(b) of the 1990 Act provides that, in the event of a claim for compensation for loss or damage resulting from a stop notice prohibiting some activity on the land by someone who was statutorily required to provide information to the authority, no compensation is payable in respect of loss or damage which could have been avoided had he or she provided the required information, or had otherwise co-operated with the planning authority when responding to their notice. These provisions should help to provide a financial incentive for the recipient of any of these three types of notice to reply fully and truthfully to a request for information. The model PCN in the Appendix to Annex 1 to DETR Circular 10/97 mentions the effect of these provisions in Schedule 2 (paragraph 4). The recipient of such a notice should be specifically warned about them where the authority anticipate a subsequent decision to serve a stop notice because the apparent breach of control is particularly serious.

ACCESS TO HM LAND REGISTRY

2.9 Where the authority cannot obtain essential information about land ownership, or they suspect that false or incomplete information has been submitted to them in response to a requisition, it may be worthwhile to seek information from HM Land Registry about the identity of people who have a legal interest in a parcel of land. The Land Registry now maintains an "open" register of interests in- land. The register is being progressively extended and will eventually include all land in England and Wales. For land which has been entered on the register, the authority should be able to obtain information from the relevant District Land Registry's Chief Registrar.

OTHER SOURCES OF INFORMATION IN THE COUNCIL'S RECORDS

2.10 Staff responsible for investigating any suspected breach of planning control should bear in mind that other Departments of the Council may already possess relevant factual information about the current ownership or use of a particular parcel of land, or its history having regard to the provisions of the Data Protection Act 1984. For example, information may have been obtained for Council Tax assessment purposes which would help to establish the legal status or ownership of land.

2.11 It is particularly important that the planning authority do not overlook any relevant information available to the Council for Building Regulations purposes. Sometimes, a person who has not obtained the requisite planning permission for development will have sought and received a Building Regulations approval. This often means that a person responsible for building control has inspected, or will inspect, the building work taking place on the land. The authority should ensure that effective liaison arrangements for transmitting information always operate between staff in their Planning Department and those responsible for building control. This was emphasised by the High Court's judgment, on 31 July 1986, in the case of R *v Basildon District Council ex parte Martin Grant* Homes

Ltd [1987] JPL 863: the Court held that, where the Council's Planning Committee had granted planning permission for nine dwellings and associated development, they must be deemed to have known of a Building Regulations consent granted by the Council a few weeks earlier for the same development. In a report published on 15 July 1992 (Manchester City Council, Complaints Nos. 90/C/2240 and 91/C/1726), the Local Government Ombudsman stated, as a principle, that there is maladministration where a local authority's building control staff do not notify the planning staff when they become aware of a possible breach of planning control.

THE RIGHT OF ENTRY TO LAND FOR ENFORCEMENT PURPOSES

2.12 Sections 196A, 196B and 196C of the Town and Country Planning Act 1990 provide the planning authority's authorised officers with the right to enter land for enforcement purposes. The powers are limited to what is considered essential to enable the authority to enforce planning control effectively in most situations their officers are likely to meet. Annex 5 to DETR Circular 10/97 explains in detail-how these powers are best used.

THE DUTY TO ADMINISTER A CAUTION DURING INVESTIGATION

2.13 Provisions in sections 66 and 67 of the Police and Criminal Evidence Act 1984 require a caution to be administered in certain circumstances when a contravention is being investigated, or, during an investigation, when it is first suspected that an offence has been committed. (It should be noted that the power to enter land and carry out an investigation for planning enforcement purposes does not depend on a prior suspicion that some contravention of Planning Law has occurred.) A code of practice, known as "Code C" (Code of Practice for the detention, treatment and questioning of persons by police officers), has been issued by the Home Secretary. It explains when, and in what terms, a caution must be given during an investigation. The planning authority's Solicitor or Legal Adviser will be aware of the requirements in the Police and Criminal Evidence Act 1984 and will be able to advise the authority's officers about when and how it should be applied in practice.

CHAPTER 3
Deciding whether to take formal enforcement action

INTRODUCTION

3.1 The decision whether it is "expedient" (as in section 172(1)(b) of the Town and Country Planning Act 1990) to take formal enforcement action in any case is within the local planning authority's sole discretion. The authority must have regard to relevant planning policies in their development plan and the particular circumstances of any alleged, or suspected, breach of planning control. But the authority's discretion is not "unfettered".

THE REQUIREMENT OF "REASONABLENESS"

3.2 The decision must not be "unreasonable" in the judicial sense of "Wednesbury unreasonable". This means that it must not be based on irrational factors; or taken without proper consideration of the relevant facts and planning issues; or based on non-planning grounds. For example, it would not be reasonable for the authority to seek to remedy a noise-nuisance by issuing an enforcement notice unless there were also relevant **planning** reasons for requiring the use of land which is causing unacceptable levels of noise to neighbours to cease or be substantially modified, Generally speaking, if a decision to take enforcement action is unreasonable, the remedy lies in an appeal to the Secretary of State against the enforcement notice. The appeal will consider whether there is a proper planning case for the notice. Although it rarely happens, an authority's decision to take, or not to take, enforcement action may be challenged, in the High Court, by way of an application for leave to bring judicial review proceedings. The Court is likely to accept jurisdiction to consider judicial review only where the right of appeal is not appropriate, such as where it is alleged that the enforcement notice was issued in bad faith or was not properly authorised. Similarly, a decision not to take enforcement action will not be reviewable unless it is based on an error of law, or is arbitrary or capricious.

THE LOCAL GOVERNMENT OMBUDSMAN'S JURISDICTION

3.3 **Many** investigations of alleged or suspected breaches of planning control result from neighbours' complaints to the authority about nuisance. It follows that, in deciding whether to take formal enforcement action, the authority must observe decision-making procedures enabling them to satisfy any complainants that whatever decision is eventually taken is well-founded in all respects. Decisions whether to take formal enforcement action are regularly featured in reports by the Local Government Ombudsman into alleged "maladministration". The Ombudsman held in one such case (Bassetlaw District Council,

Complaint No. 90/7/1723, report issued on 7 May 1992) that, where there is evidence of a breach of planning control, there will be maladministration unless the planning authority either solicit an application for planning permission to legitimise the situation, or consider taking enforcement action. In this context, it is vital for the authority to maintain a properly documented record of their investigation of each case and of the reasons why they decided to take, or not to take, enforcement action. Provided such a record is maintained, it should usually be sufficient to convince the Local Government Ombudsman that no maladministration has occurred.

THE IMPORTANCE OF JUDICIAL AUTHORITY

3.4 The planning authority must always have regard to relevant judicial authority in deciding whether formal enforcement action is appropriate. There are many relevant cases, of which the most important are mentioned in the Encyclopedia of Planning Law and Practice published by Sweet & Maxwell Ltd. Where there is any doubt expert legal advice should be obtained before a decision is taken. In exceptional cases, it may be prudent to seek Counsel's opinion on matters where there is apparently conflicting legal opinion or judicial authority. Although the fee for Counsel's opinion may seem comparatively expensive in this context, it may later prove to be well worthwhile, especially if it means that the authority decide the correct course of action, and successfully defend any appeal or court challenge. It will be even more worthwhile if it enables appeals to be avoided.

GOVERNMENT'S PLANNING GUIDANCE

3.5 The Government's planning policy guidance on the general approach to enforcement and the criteria for taking enforcement action in some of the most frequently encountered cases of unauthorised development are stated in paragraphs 5 to 18 of PPG 18 ("Enforcing Planning Control"). The decisive issue for the planning authority to consider in each case is whether the alleged breach of control would unacceptably affect public amenity or the existing use of land or buildings meriting protection in the public interest. It is also important to ensure that any enforcement action which the authority decide to take should be commensurate with the seriousness of the breach of control it is intended to remedy.

SUBSTANTIATING A DECISION NOT TO TAKE ENFORCEMENT ACTION

3.6 Although the planning authority have discretion to take formal enforcement action when it appears to them "expedient" to do so, it is equally important to ensure that a decision not to initiate enforcement action is well-founded. This is because of possible judicial review. The High Court's judgment, on 29 July 1994, in the case of R *v Sevenoaks District Council ex parte Palley* [1995] JPL 915, illustrates the way in which the Court may intervene (following a judicial review application) to quash a decision not to take enforcement action where the applicant in the judicial review proceedings was a neighbouring landowner. In brief, the point at issue in this case was whether a parcel of land was being used for "agriculture" or was in mixed use for agricultural activities and a trade or business. The Judge held that the Council's officer should have made further enquiries to determine whether the use of the land was for the purpose of a trade or business. Such enquiries were not made and the question was not addressed in the Council's officer's report to the

Planning sub-committee. A later decision, based on these enquiries, not to take enforcement action was thus flawed and was consequently quashed by the Court.

THE ALTERNATIVE COURSE OF INVITING A PLANNING APPLICATION

3.7 Whenever it is appropriate, the usual alternative to taking formal enforcement action is to invite a retrospective planning application. In approaching this possibility, the LPA should consider the merits of granting planning permission for unauthorised development in the same way as they would approach a planning application for proposed development. The fact that the development has already taken place should make no difference to the LPA's consideration of its merits.

3.8 The LPA would need to take into account the views of neighbours and other interested parties.

(1) other Departments of the authority (eg the Environmental Health Department if the development involves noise-nuisance);

(2) the local highway authority;

(3) statutory consultees (eg the Environment Agency if the development involves actual or potential pollution of a water-course).

TIMING OF THE AUTHORISATION TO ISSUE AN ENFORCEMENT NOTICE

3.9 Because the provisions of section 172(1) of the 1990 Act enable the LPA to issue an enforcement notice "where it appears to them that there has been a breach of planning control ...." it is vital that, when authorising the issue of a notice, there is some evidence available to them to show that the alleged breach has occurred. It follows from these provisions that the LPA cannot lawfully authorise the issue of an enforcement notice in anticipation of a breach of control. (These provisions do not apply to a planning enforcement injunction, where the provisions of Section 187B(1) of the 1990 Act enable an "actual or apprehended breach of planning control to be restrained by injunction,...").

3.10 The requirement that some evidence of a breach of control should exist can produce practical difficulties when it is unclear whether a new use of land is merely temporary or is intended to be permanent. These difficulties can be particularly troublesome where a landowner or occupier claims that a new use benefits from"permitted development" rights granted by virtue of provisions in the General Permitted Development Order. This is illustrated by the circumstances of the High Court's judgment in the case of R *v Rochester upon Medway City Council ex parte Wendy Hobday* [1990] JPL 17. In that case, the LPA's decision on 17 November 1987 purported to authorise the issue and service of an enforcement notice on or after the fifteenth day of market trading at a time when only 7 days' trading had elapsed. It was claimed that the activity then benefited from "permitted development" rights in the General Development Order, current at that time, which allowed the holding of a temporary market on not more than 14 days in any calendar year. If they considered, as in this case, the new use was a temporary one, the LPA could only

authorise the issue of an enforcement notice after the period of "permitted development" had expired. Subsequently, the LPA decided that the new use had become permanent and sought, at meetings in March and April 1988, to ratify the resolution of 17 November 1987. The Court's judgment held that, because the original resolution was invalid, it could not subsequently be ratified.

CONSIDERING WHETHER IT IS "EXPEDIENT" TO ISSUE AN ENFORCEMENT NOTICE

3.11 The provisions of section 172(1)(b) enable the LPA to issue an enforcement notice where it appears to them "expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations." It follows from these provisions that the question of "expediency" is a discretionary matter on which the LPA must themselves decide in the particular circumstances of each case. Provided the LPA have properly directed themselves in relation to considering any relevant provisions of the development plan and any other considerations which are clearly material for a planning purpose, their decision whether to issue an enforcement notice should be capable of withstanding any criticism that it was not well-founded.

3.12 Occasionally, somebody with a private interest in the land, or in some neighbouring parcel of land, may represent to the LPA that enforcement action should be taken to protect, or to further, that private interest. This happened in the case of *Perry v Stanborough (Developments) Ltd and Wimborne DC and Dorset CC* [1978]JPL 36, where a neighbouring landowner sought to compel the LPA to enforce a planning condition requiring an estate road to be fully made up to the adjoining boundary of the developer's land. In refusing the application, the Court held that Parliament had expressly left it to the LPA to decide whether enforcement action was desirable or not. The fact that the LPA had imposed a planning condition in relation to the development of one piece of land could not mean that the LPA necessarily had an obligation to enforce it for the benefit of the owner of another piece of land.

"ISSUE ESTOPPEL"

3.13 Judicial authority has established that the legal concept in private law known as "issue estoppel" applies in strictly limited circumstances to the LPA's decision whether to initiate enforcement action. The two leading cases (which are judgments given in the House of Lords on 14 December 1989) are cited as *Thrasyvoulou v Secretary of State for the Environment and Hackney LBC;* and *Oliver and Others v Secretary of State for the Environment and Havering LBC* [1990]59 P&CR 326. Briefly summarised, the judgements mean that the legal concept of "res judicata" (literally, the matter having been judged) applies to decision-making on appeals on grounds (b) to (e) in section 174(2) of the 1990 Act (known as the "legal grounds of appeal"). Thus, once a mixed issue of law and fact (for example, whether a particular change of use of land amounts in law to a "material change of use") has been decided in an enforcement appeal, the LPA are "estopped" (that is precluded) from subsequently making the same allegation in a later enforcement notice, *in the absence of any material difference in the facts of the use.* This concept extends to any attemp,t the LPA might make to describe a particular use of land in different terms on a subsequent occasion if the reality is that the actual use of the land was the same on both occasions. The practical consequence is that, once an issue of fact and law has been decided in an enforcement appeal, and there has been no further successful appeal against

it (under section 289 of the 1990 Act) to the High Court, the LPA cannot re-open that particular issue by taking further enforcement action on it.

3.14 Issue estoppel does not apply to any decision on planning merits (ground (a) and the deemed planning application in an enforcement appeal) because a decision whether to grant planning permission does not depend on questions of law and fact: it is an exercise of the decision-maker's planning judgement.

3.15 Issue estoppel does not apply where the Secretary of State has allowed an appeal and quashed an enforcement notice on procedural grounds, in accordance with the power in section 176(3)(b) of the 1990 Act. In the case of R v Wychavon DC and Secretary of State for the Environment ex parte Saunders [1991] EGCS 122, the High Court held that a decision to allow an appeal and quash a notice on procedural grounds did not confer any legal rights on the development alleged in the notice.

CHAPTER 4

Issuing an enforcement notice

INTRODUCTION

4.1 The provisions of section 172(1) of the Town and Country Planning Act 1990 enable the LPA to issue an enforcement notice where they consider there has been a breach of planning control and it is expedient to issue the notice. What is meant by "issuing" an enforcement notice is not defined in the 1990 Act. The Department of the Environment, Transport and the Regions interprets this term as meaning that the LPA should produce a properly authorised notice which is then retained in their documentary record of enforcement notices. Copies of each enforcement notice have to be served on specified persons who have an interest jn the relevant land.

PROPER AUTHORISATION TO ISSUE A NOTICE

4.2 Because an enforcement notice issued without proper authorisation is likely to be vulnerable to legal challenge on the ground that it is "a nullity" (and, thus, of no effect), it is vital to ensure that every enforcement notice is properly authorised. The relevant provisions for discharge of a local authority's functions, including issuing enforcement notices, are in section 101 of the Local Government Act 1972. Among other things, they enable an authority to arrange for the discharge of any functions by a committee, a sub-committee or an officer of the authority. It should always be clear from an authority's standing orders how their planning enforcement functions are to be exercised, especially when there is a scheme for delegation of functions to officers.

DELEGATION OF FUNCTIONS TO A COMMITTEE

4.3 The provisions of section 101 of the Local Government Act 1972 do not enable a LPA to delegate the function of issuing an enforcement notice to one elected member of an authority, even if that member is the chairman of the authority's Planning Committee. This is because there cannot legally be a "committee of one". But the function can be delegated to a particular officer. This distinction is explained in the High Court's judgment given on 14 November 1985 in the case of R *v Secretary of State for the Environment ex parte* Hillingdon *LBC* [1986] *JPL 363.* There could be good reason why decision making was entrusted to an officer of the Council, who would have no party political allegiance, whereas the same could not be said of an individual elected member. In dealing with the need to establish a procedure for emergency authorisation of enforcement action when a Planning Committee meeting was not scheduled, Woolf J gave his opinion that it would be difficult to fault a procedure whereby decisions were taken by a duly authorised officer, pursuant to section 101 of the 1972 Act, in consultation with the elected Committee chairman.

DELEGATION OF FUNCTIONS TO AN AUTHORISED OFFICER

4.4 A scheme for delegation of planning enforcement functions to an authorised officer, or officers, should be clearly stated in an authority's standing orders. If a specified Chief Officer (eg the Borough Secretary or County Solicitor) is authorised to issue enforcement notices, the person holding that post is not required to authorise each notice personally: someone properly acting on the Chief Officer's behalf may do so. The High Court's judgment in the case of *Cheshire* CC *v Secretary of State for the Environment* [1988] JPL 30, held that the County Council's senior assistant solicitor could properly authorise the issue of an enforcement notice although the Council's delegation was expressly to the County Solicitor.

CHAPTER 5

Formulating the terms of an enforcement notice

INTRODUCTION

5.1 Once the LPA have decided to issue an enforcement notice, it is vital to consider with the utmost care how to formulate the terms of the notice. This requires clarity and precision in the use of language. Enforcement notices are not improved by the inclusion of legalistic terms or obscure expressions which can only be understood by experienced practitioners. Time spent on formulating the terms of an enforcement notice, so that they are immediately comprehensible to a lay person reading it,,will usually be repaid later on, especially if eventually the notice has to provide the foundation for a criminal prosecution, in accordance with the provisions of section 179 of the Town and Country Planning Act 1990.

THE LEGISLATIVE REQUIREMENTS

5.2 The legislative requirements of a valid enforcement notice are stated in section 173 of the 1990 Act. It is essential for the notice to—

(1) state the matters which appear to the LPA to constitute the breach of planning control (subsection (1)(a));

(2) state the LPA's opinion on which of the two paragraphs in section 17 1A(1) of the 1990 Act [defining what constitutes a breach of planning control] is the one relating to the alleged breach (subsection (1)(b));

(3) specify the remedial steps which the LPA require to be taken, or the activities which the LPA require to cease, in order to achieve, wholly or partly, any of the alternative purposes defined in subsection (4) of section 173 (sub-section (3));

(4) specify the calendar date on which the notice is to take effect (subsection (8));

(5) specify the compliance period within which any required remedial steps are to be taken (subsection (9));

(6) specify the LPA's reasons for issuing the notice (subsection (10) and regulation 3(a) of the Enforcement Notices and Appeals Regulations 1991);

(7) specify the precise boundaries of the land to which the notice relates (subsection (10) and regulation 3(b) of the Enforcement Notices and Appeals Regulations 1991);

(8) be accompanied by an explanatory note giving information to the recipient of every copy of the notice about the right of appeal to the Secretary of State and the appeal procedure (subsection (10) and regulation 4 of the Enforcement Notices and Appeals Regulations 1991).

These requirements are discussed in the following paragraphs 5.3 to 5.31.

STATING THE MATTERS CONSTITUTING THE ALLEGED BREACH OF CONTROL

5.3 The requirement to state the matters constituting, in the LPA's opinion, the alleged breach of planning control is fundamental to the entire enforcement process. This is because the statement of the alleged breach may subsequently have to provide the foundation for—

(1) the service of a stop notice, to reinforce the effect of the enforcement notice; or

(2) the Secretary of State, or a Planning Inspector, to consider any matters arising from a valid appeal under section 174 of the 1990 Act; or

(3) in the event of subsequent non-compliance with an effective enforcement notice, a criminal prosecution by the LPA (under section 179 of the 1990 Act) for that offence, in which an alleged contravention of the notice's requirements will have to be proved "beyond reasonable doubt" (the criminal standard of proof).

Thus, unless an enforcement notice's allegation is firmly founded, from the outset, on factual information about the suspected breach of control, the LPA may well experience difficulty at a later stage of enforcement proceedings.

5.4 The leading statement of the legally correct approach to the content of an enforcement notice is found in Lord Justice Upjohn's judgment in the Court of Appeal, on 12 December 1962, in the case of *Miller-Mcad v Minister of Housing and Local Government* [1963] 1 Al 1 ER 459, where he said that the recipient of an enforcement notice "is entitled to say that he must find out from within the four corners of the document what he is required to do or abstain from doing". Lord Justice Upjohn also identified a test to be applied in deciding whether an enforcement notice satisfied the statutory requirement. He said the test must be : does the notice tell him fairly what he has done wrong and what he must do to remedy it?"

NULLITY AND INVALIDITY

5.5 LPAs are naturally concerned to ensure that any enforcement notice they may issue is not subsequently found to be a "nullity" or "invalid". In the case of *Miller-Mead v Minister of Housing and Local Government,* Lord Justice Upjohn distinguished between these two legal concepts. A notice is "bad on its face and a nullity" if someone cannot tell in what respect he had allegedly failed to comply with a condition, or could not tell with reasonable certainty what steps must be taken to remedy the alleged breach. Such a notice would be "so much waste paper"; and, for that reason, there would be no need (and thus there is no statutory power) to quash it. In contrast, where there is a fundamental error in the notice, which is demonstrable by reference to evidential fact (such as alleging development without planning permission when in law no permission is required), the notice will be

invalid. When those facts are adduced - for example, in adjudication on an enforcement appeal - the notice may be quashed for invalidity.

5.6 The distinction between nullity and invalidity was further examined in the Court of Appeal Criminal Division's judgment on 11 April 1995, in the case of R *v Wicks* [1996] 160 JPL 743. In that case the Court distinguished between "defects on the face of a notice rendering it a nullity" and "those matters which may render a notice invalid". The Court held that no evidence would be required if a defendant alleged that an enforcement notice was a nullity: this is because it would be necessary to show that the notice was "patently defective on its face", as a matter of law. "Invalidity" involved different considerations. The issue would be whether there had been procedural irregularity or deficiency, or the LPA had been "Wednesbury unreasonable" in taking the decision to issue the notice. In those circumstances, it would be necessary to consider the evidence about the LPA's process in considering enforcement action and the decision to issue a notice. Only the High Court had the power to quash an enforcement notice on invalidity grounds: no criminal court had that power.

ALLEGING SEPARATE BREACHES OF PLANNING CONTROL IN ONE NOTICE

5.7 Where enforcement action is authorised against separate breaches of planning control involving activities on the same parcel of land, it is prudent to consider whether to state each allegation in a separate enforcement notice. The decision on how many notices to issue will usually depend on the complexity of activities on the site and the planning history of the land. If the LPA are faced with a particularly complicated situation, it may be preferable to use a separate enforcement notice to allege each breach of control. But the High Court's judgment on 8 May 1992, in the case of *Valentina of London Ltd and Roundalet Ltd v Secretary of State for the Environment and Islington LBC* [1992]JPL 1151, is authority for the view that allegations about a material change of use and about operational development can be included in the same enforcement notice; and this would be normal where the allegations relate to connected matters, eg what would be submitted in one planning application for proposed development.

CATEGORISING THE ALLEGED BREACH

5.8 Subsection (l)(b) of section 173 of the 1990 Act requires the LPA to state their opinion on which of the two paragraphs in section 17 1A(1) of the 1990 Act is the one relating to the alleged breach. The two paragraphs are —

(a) carrying out development without the required planning permission; or

(b) failing to comply with any condition or limitation subject to which planning permission has been granted.

In most cases it should not be difficult to make this distinction satisfactorily, depending on the facts and planning history.

5.9 It is sometimes not clear from the planning history and the current circumstances of the land how the alleged breach is most accurately stated. In that event, there is no objection to issuing two notices "in the alternative" relating to the same breach. For example, where

it appears that an additional, unauthorised use has been started in a recent extension to a building, it may well be prudent to issue a "material change of use" and an "operational development" notice. If, during the course of an enforcement appeal against each of two notices issued in the alternative, it is clear that one notice is preferable to the other, the LPA should be ready to withdraw the alternative notice so that the expense involved in dealing with two appeals is reduced. Where the LPA have clearly stated that two notices have been issued "in the alternative" and one notice is subsequently withdrawn because it is acknowledged to be superfluous, the LPA will not normally be at risk of an award of appeal costs against them on the ground that they behaved "unreasonably" (as interpreted in DOE Circular *8/93)* by issuing two notices.

SPECIFYING THE STEPS REQUIRED BY THE ENFORCEMENT NOTICE

5.10 It is essential for the steps required by an enforcement notice to be formulated with the utmost precision. This is because, in the event of subsequent prosecution (under section 179 of the 1990 Act) for an offence of contravening the notice, any uncertainty about the required steps will tend to defeat the prosecution's (the LPA's) case. This was clearly stated by Judge Woolley in Mold Crown Court, on 26 January 1988, in the case of *Warrington BC* v Garvey [1988] JPL 752, when he said—

"He [the Judge] did not see it as any part of his role in a criminal case to construe anything benevolently in favour of the local planning authority, or in the context of a criminal case in favour of the prosecution. If there was uncertainty, if there was doubt, if one or more of the essential ingredients of an offence were considered to be dubious, it was not his duty and indeed it would be contrary to his duty, presiding as he did in a criminal trial to construe them in favour of the Prosecution and against the Defendant

In that case, the Judge went on to find irregularities in each of the enforcement notices on which the prosecution's indictment relied. Consequently, he directed the jury to return a "not guilty" verdict on each count in the indictment.

5.11 There is no certain method of successfully specifying the required steps in every enforcement notice. Sometimes the steps may be quite straightforward (eg. "cease the use of the building as a dwelling house"); or several different steps may be required (eg. "cease the use of the land as a haulage contractor's depot"; "remove all the wooden pallets stacked on the land"; and "remove the diesel fuel storage tank from the land".); or a series of steps may be required in accordance with different compliance periods in order to achieve satisfactory conditions on the site. The two vital considerations in formulating the required steps are—

(1) to express them precisely in plain language, so that anyone subsequently required to implement the steps will not be left in doubt about what is required; and

(2) to ensure that the steps do not go beyond what needs to be required in order to remedy any breach of control or any injury to amenity on the enforcement notice site: this is to safeguard the LPA's interest against any subsequent appeal on ground. (f) in section 174(2) of the 1990 Act.

5.12 The following are examples of required steps which are unlikely to be enforceable in practice—

(1) "return the land to the physical condition in which it was before the breach of control occurred";

(2) "take all possible steps to minimise noise and fumes from activities on the land";

(3) "carry out a comprehensive landscaping scheme on the boundary of the site, to the local planning authority's satisfaction".

MAKING THE DEVELOPMENT COMPLY WITH THE TERMS OF A PLANNING PERMISSION

5.13 The provisions of section 173(4) (a) of the 1990 Act enable an enforcement notice to require steps to be taken for the purpose of "remedying the breach by making any development comply with the terms (including any conditions and limitations) of any planning permission which has been granted in respect of the land,..." Any such permission may have been granted by the LPA themselves (in response to a planning application), or by the General Permitted Development Order ("the GPDO"). Where the permission was granted by the LPA, it is important to ensure that the required steps are reasonable in the particular circumstances of the development as carried out (either wholly or partly) and are not a disproportionate remedy. For example, if a dwellinghouse has been built 3.0 metres nearer to the neighbouring site boundary than indicated on the approved plans, it may well not be justified to require the demolition of the building and its re-construction in the exact location shown on the plans, unless this is the only way to remedy what would otherwise amount to unacceptable overlooking of the neighbouring dwelling. Instead of demolition, the LPA might consider a requirement for remedial works to make the development acceptable, such as no opening windows or the use of opaque glazing.

DISCONTINUANCE OF USE OF LAND OR RESTORATION TO ITS PREVIOUS CONDITION

5.14 The provisions of section 173(4)(a) of the 1990 Act also enable an enforcement notice to require steps to be taken for the purpose of "remedying the breach .... by discontinuing any use of the land or by restoring the land to its condition before the breach took place." These steps should enable the LPA to respond flexibly to most breaches of control. In considering what was the condition of the land before the breach occurred, it is important not to impose excessive requirements for the sake of tidying up a derelict site. If there is photographic evidence (including reliably dated aerial photographs) of the previous condition of the site, they may be useful in supporting the case for this type of requirement.

5.15 There is judicial authority to support the view that, where the breach of control involves a material change of use of land, a restoration requirement may extend to remedying "operational development" which has been carried out as partand parcel of the change of use. For example, in the case of *Murfitt v Secretary of State for the Environment and East Cambridgeshire DC* [1980] JPL 598, the High Court held that some hardstanding which had become "immune" from enforcement action, because it had been laid down more than four years before the date of the enforcement notice, could nevertheless be required to be removed because it was an integral part of the material change of use of the land for parking heavy goods vehicles.

REMEDYING ANY INJURY TO AMENITY CAUSED BY THE BREACH

5.16 The provisions of section 173(4)(b) of the 1990 Act enable an enforcement notice to require, alternatively, steps to be taken for the purpose of "remedying any injury to amenity which has been caused by the breach". While this provides the possibility of tailoring the

required steps, so that they match the remediation process on the land as closely as possible, it is essential for this type of step not to be oppressive. This is emphasised by the use of the words "wholly or partly" in the preceding sub-section 173(3).

"UNDER-ENFORCEMENT"

5.17 "Under-enforcement" (namely, requiring steps to be taken which do not fully remedy the breach of control alleged in the enforcement notice) has long been a familiar process for LPAs, although there was previously some legal doubt about whether it was properly authorised by the enforcement provisions. The combined effect of subsections *(3),* (4) and (11) in section 173 of the 1990 Act is to remove any legal doubt that under-enforcement is permissible. The effect of the provisions in section 173(11) of the 1990 Act is that where –

(1) the LPA have "under-enforced" (by requiring less onerous remedial steps to be taken than might have been required); and

(2) the recipient of the notice has complied with all the required steps,

planning permission is granted (by deeming provisions) for retention of any operational development or continuation of any activities which were within the scope of the alleged breach of control but not subject to any of the required steps. Thus, when considering possible under-enforcement, the LPA need to assess what the practical consequences will be, in each case, if "deemed" permission subsequently applies to any development or activities remaining on the land after compliance with the enforcement notice's requirements.

5.18 There is no legislative requirement for the LPA to notify the recipient of an "under-enforcing" notice that, on compliance with its requirements, planning permission will be "treated as having been granted" for the retention of operational development or continuance of some activities not included within the scope of the required steps. Nevertheless, for avoidance of possible doubt (especially if the ownership of the land subsequently changes), it will usually be prudent for the LPA to give written notice of what they regard as the permission deemed to have been granted by virtue of section 173(11). This notification could also be recorded in the register of enforcement notices maintained by virtue of the requirements of section 188 of the 1990 Act.

SPECIFYING THE EFFECTIVE DATE OF AN ENFORCEMENT NOTICE

5.19 The provisions of section 173(8) of the 1990 Act require that an enforcement notice "shall specify the date on which it is to take effect and, subject to sections 175(4) and 289(4A), shall take effect on that date". This date is known as the effective date of the notice. It must be a calendar date. It is insufficiently precise for the effective date to be stated, for example, as "30 days after service of the notice on all recipients".

5.20 The effective date of a notice is directly related to—

(1) the required procedure for serving a copy of the notice on the people with an interest in the land (by virtue of section 172(3)(b) of the 1990 Act); and

(2) the requirements for submitting an appeal to the Secretary of State against the notice (by virtue of section 174 of the 1990 Act).

5.21 The provisions of section 172(3)(b) of the 1990 Act require that service of an enforcement notice shall take place "not less than 28 days before the date specified in it as the date on which it is to take effect". Thus there is effectively a minimum period of 28 days between the date on which everyone with an interest in the land must have been served with a copy of the notice and the date on which the notice comes into force. This required 28-day period needs to be carefully considered where there are numerous recipients of an enforcement notice who are to be served by postal delivery. It may be prudent to allow a margin of several days above the minimum period of 28 days so that every recipient of a copy of the notice will receive it not less than 28 days before the effective date.

5.22 The provisions of section l74(3)(a) of the 1990 Act state that an enforcement appeal to the Secretary of State shall be made "before the date specified in the enforcement notice as the date on which it is to take effect ....". The effective date in the notice also provides the time-limit within which any enforcement appeal to the Secretary of State must be received. Any appeal which is not received by the Planning Inspectorate Agency (which receives appeals on the Secretary of State's behalf) before the effective date in the notice will usually be regarded as not validly made. Moreover, by virtue of the provisions of section 175(4) of the 1990 Act, the submission of a valid appeal to the Secretary of State suspends the effect of the enforcement notice until the appeal is finally decided or withdrawn, except in one case. The exception is where there has been a further appeal to the High Court, on a point of law, against the Secretary of State's or a Planning Inspector's enforcement appeal decision at first instance. In that event, the provisions of section 289(4A) of the 1990 Act enable the High Court, or the Court of Appeal, to order that the enforcement notice shall have effect wholly or partly until those litigation proceedings are finally decided and any re-determination of the appeal by the Secretary of State has been issued. If the Court makes such an order, it can also impose such terms as it thinks fit, including a requirement that the LPA give an undertaking as to damages which may result from bringing the enforcement notice into effect, or such other undertaking as the Court may require from the LPA. In the case of *Roger Bown and RB Transport Ltd v Secretary of State for the Environment and Harborough DC* [19961 JPL B130, the High Court directed, on 29 February 1996, that the enforcement notice should take effect pending final determination of an appeal to the Court against the Secretary of State's appeal decision, because considerable harm, in terms of safety, and damage to the environment was likely to be caused by the continuation of the appellants' activities.

SPECIFYING THE COMPLIANCE PERIOD IN AN ENFORCEMENT NOTICE

5.23 Section 173(9) of the 1990 Act provides that an enforcement notice "shall specify the period at the end of which any steps are required to have been taken or any activities are required to have ceased and may specify different periods for different steps or activities; . This is usually known as the compliance period. Additionally, section 173A(1)(b) of the 1990 Act provides that the LPA "may waive or relax any requirement of such a notice and, in particular, may extend any period specified in accordance with section 173(9)."

5.24 The provisions of section 173 and 173A do not indicate what factors the LPA should consider in deciding how long the compliance periodfor taking any remedial action required by the enforcement notice should be. The limiting factor derives from the provisions of section 174(2) (g) of the 1990 Act which enable an enforcement appeal to be

based on the ground that the compliance period specified in the notice "falls short of what should reasonably be allowed". These provisions effectively oblige the LPA to consider carefully what the recipient of the enforcement notice will have to do, in practice, to carry out the required remedial steps and, consequently, how much time it is reasonable to permit for that purpose. This will clearly depend on the particular circumstances of each case. If the requirements are unusually onerous (eg remedying the effects of a large-scale waste-tipping operation by removing large quantities of waste by lorry), or the work involved can only be carried out during suitable weather conditions, it may be advisable to discuss the matter with the owner or operator of the enforcement notice site, with a view to agreeing on a mutually acceptable compliance period. If any such negotiations take place, the LPA should not overlook the interest of any local residents or other neighbours of the site whose amenity is seriously harmed by the breach of control. If the LPA also serve a stop notice, to reinforce the effect of the related enforcement notice, the prohibition in the stop notice will normally remain effective for the duration of the enforcement notice compliance period.

5.25 In deciding on the compliance period's duration, the LPA should bear in mind that staff resources will usually have to be devoted to monitoring remedial work while it takes place on the enforcement notice site. This suggests that the period should be as short as can reasonably be allowed. A helpful rule of thumb is that the compliance period should not normally exceed one year, unless some exceptional circumstance justifies it. If a compliance period is to exceed one year, the LPA should consider whether the better course is to grant a time-limited planning permission for whatever activity is to take place on the site.

SPECIFYING THE LPA'S REASONS FOR ISSUING THE NOTICE

5.26 The provisions of regulation 3 of the Town and Country Planning (Enforcement Notices and Appeals) regulations 1991 (SI 1991/2804) ("the 1991 Regulations") require every enforcement notice the LPA issue to specify the reasons why they consider it "expedient" to issue the notice. The example enforcement notices in Annex 2 to DETR Circular 10/97 indicate how reasons can helpfully be stated in the text of the notice.

5.27 The reasoning process is important as a means of explaining to the recipient of any enforcement notice why, in the LPA's view, enforcement action is justified. Even if the recipient of the notice has previously refused to discuss the alleged breach of control with the LPA's officers, a persuasive statement of reasons may help to convince him that nothing is likely to be gained from submitting an appeal against the notice. And, in the event of an appeal, the Secretary of State or a Planning Inspector who is to decide the appeal will critically examine the statement of reasons in order to assess the merits of enforcement action on planning grounds. The statement of reasons should always correspond closely to any reasoning in a Committee report which recommended issuing the enforcement notice. If the Planning Committee authorised the issue of an enforcement notice for different, or additional, planning reasons, these should be included in the LPA's statement of reasons for issuing the notice.

SPECIFYING THE ENFORCEMENT NOTICE LAND

5.28 The provisions of section 172(2) of the 1990 Act state the requirement to serve a copy of an enforcement notice on the owner and occupier "of the land to which it relates".

Regulation 3(b) of the 1991 Regulations requires an enforcement notice to specify "the precise boundaries of the land to which the notice relates, whether by reference to a plan or otherwise". It is because an effective enforcement notice also becomes a "local land charge" (which is material for any conveyancing purposes) that these provisions strongly emphasise the importance of precisely defining the boundary of the enforcement notice site.

5.29 The best way of defining the boundary of a site is by reference to an Ordnance Survey base map, to a scale of not less than 1/2500. If the precise location of a building, or an area where a material change of use has allegedly occurred, on enforcement notice land, is in doubt, the LPA should arrange for it to be accurately surveyed before the enforcement notice plan is finalised. This will help to minimise the possibility that the notice may be quashed, on appeal to the Secretary of State, because the location plan (and, consequently, the enforcement notice) is fundamentally defective.

5.30 Although the inclusion of a location plan is usually the most effective way of specifying the enforcement notice land, this procedure is not essential in every case. The High Court's judgment on 9 July 1991, in the case of *Wiesenfeld v Secretary of State for the Environment and Barnet* LBC [1992] JPL 556, held that the words "or otherwise" in regulation 3(b) of the 1991 Regulations indicated that some flexibility is intended. There is no need for the site-boundary to be identified by its length or the points of the compass. Where appropriate, a verbal description of the site would suffice, including merely the address of the premises, bearing in mind that, in conveyancing practice in urban areas, it was sufficient to rely on the address of the site as the means of ascertaining its boundary.

EXPLANATION OF THE ENFORCEMENT APPEAL PROVISIONS AND PROCEDURE

5.31 The provisions of Regulation 4 of the 1991 Regulations require that every copy of an enforcement notice served by a LPA be accompanied by an explanation which includes the following matters—

(1) a copy of sections 171A, 171B and 172 to 177 of the 1990 Act, so that the recipient is aware of the enforcement appeal provisions and procedures, including the grounds on which an enforcement appeal may be submitted; and

(2) notification of the time-limit within which an enforcement appellant must specify the grounds on which the appeal is made and the facts on which each ground of appeal will be supported.

There is no need for the LPA to set up their own arrangements to fulfil these requirements. The Department of the Environment supply, through the Planning Inspectorate Agency, an official explanatory booklet about the entire enforcement appeal process and a stock of enforcement appeal forms, which can be used whenever an enforcement notice is issued.

CHAPTER 6

The response to an enforcement notice appeal

THE STATUTORY RIGHT OF APPEAL

6.1 Section 174 of the Town and Country Planning Act 1990 ("the 1990 Act") provides a right of appeal to the Secretary of State against an enforcement notice. The people entitled to appeal are defined as—

(1) "a person having an interest in the land": this means anyone who possesses a legal interest in the parcel of land to which the notice relates, but does not include a trespasser; and

(2) "a relevant occupier": section 174(6) of the 1990 Act defines such an occupier as "a person who (a) on the date on which the enforcement notice is issued occupies the land to which the notice relates by virtue of a licence; and (b) continues so to occupy the land when the appeal is brought".

Anyone who is within the legal scope of these two categories of appellant may appeal against a relevant enforcement notice, regardless of whether a copy of the notice was served on them individually (as required by section 172(2) of the 1990 Act).

THEGROUNDSOFAPPEAL

6.2 Section 174(2) of the 1990 Act provides seven grounds for an enforcement appeal, as follows—

(1) that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged (ground (a));

(2) that those matters have not occurred (ground (b));

(3) that those matters (if they occurred) do not constitute a breach of planning control (ground (c));

(4) 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 (ground (d));

(5) that copies of the enforcement notice were not served as required by section 172 (ground (e));

there is a conflict of evidence about one of the "legal grounds" of appeal in section 174(2) of the 1990 Act and the evidence of witnesses needs to be tested in cross-examination;

(2) *by a hearing* (including a site-inspection): this procedure may be apt where one of the principal parties has asked to be "heard" but the formality of a public inquiry is not considered necessary;

(3) *by* written *representations, with or without a site-inspection:* this procedure will be used whenever both principal parties accept it and the Planning Inspectorate considers that an inquiry or hearing is unnecessary. A site inspection may not be necessary if the ''planning merits" of the appeal do not fall to be considered (because, for example, the fee for the deemed application has not been paid) and the appeal revolves solely around the legal interpretation of agreed facts. As soon as they are aware that an enforcement appeal has been validly made, the LPA's officers should decide what procedure they will ask the Planning Inspectorate to adopt. This decision should take account of the matters at issue in the appeal and the resource costs the LPA will incur in responding at all subsequent stages of their preferred procedure. It should be noted that when one party has exercised the right to be heard, the Planning Inspectorate, acting on behalf of the Secretary of State, will decide whether a hearing or inquiry will be held, taking into account the circumstances of each appeal, including any preferences already expressed by the principal parties.

REQUIREMENTS TO BE FULFILLED BY THE LPA

6.8 Part III of the Town and Country Planning (Enforcement Notices and Appeals) Regulations 1991 (SI 1991/2804) imposes certain procedural requirements on the appellant and the LPA in an enforcement appeal. The requirements on the LPA are—

(1) within 14 days from being given notice of the enforcement appeal, to send the Secretary of State a copy of the enforcement notice and a list of the names and addresses of the people on whom a copy of the notice was served, as required by section 172(2) of the 1990 Act (regulation 6);

(2) where a local inquiry is to be held and the date fixed for holding the inquiry is less than 18 weeks after the date of the Secretary of State's written notice of his intention to cause an inquiry to be held (the "relevant date"), to submit a statement of the LPA's proposed submissions on the appeal at least 6 weeks before the inquiry date (regulation 7);

(3) in any other case where a local inquiry is to be held, to submit that statement not later than 12 weeks after the "relevant date" (regulation 7); and

(4) where no inquiry is to be held, to submit their statement of case no later than 28 days after the date of the Secretary of State's request for it (regulation 7)

The LPA's statements in sub-paragraphs (2), *(3)* and (4) above must include—

(a) a summary of the LPA's response to each ground of appeal; and

(b) a statement whether the LPA would be prepared to grant planning permission for the alleged breach of control and, if so, particulars of any conditions they would wish to have imposed on any such permission (regulation 7).

The LPA's statements should be entirely consistent with the LPA's reasons for taking enforcement action. But they should not be over-elaborate or legalistic. A clearly and succinctly expressed statement, which is readily comprehensible to the appellant and any "interested persons", will best fulfil this requirement.

INQUIRY APPEALS

6.9 Where a Planning Inspector is to hold a public local inquiry into an enforcement appeal, the provisions of the Town and Country Planning (Enforcement)(Inquiries Procedure) Rules 1992 (SI 1992/1903) prescribe the appeal procedure. The LPA's officers who are to participate in an enforcement appeal inquiry should be familiar with all the requirements of these Rules. In particular, the LPA's officers should carefully consider who is to lead the authority's case at the inquiry and the witnesses they intend to call in support of their case. Where a witness representing another authority (eg the County Council as highway authority) or another agency (eg the Environment Agency commenting on a water quality issue) is to be called, it is vital to ensure that the witness's evidence is directly relevant, professionally presented and entirely consistent with the LPA's case.

PUBLIC NOTIFICATION OF THE INQUIRY AND APPEAL

6.10 Rule 11 of the Enforcement Inquiries Procedure Rules prescribes the procedure to be followed in publicly notifying the arrangements for an inquiry into an enforcement appeal. In appeals where a local inquiry is not being held, regulation 8 of the Enforcement Notices and Appeals Regulations prescribes the notification of the appeal which the LPA must give to occupiers of property in the locality of the enforcement notice site and any other people who, in the LPA's opinion, are affected by the alleged breach of planning control.

POWER TO QUASH THE ENFORCEMENT NOTICE ON PROCEDURAL GROUNDS

6.11 Provisions in section 176(3) (b) of the 1990 Act enable the Secretary of State to allow an appeal and quash the enforcement notice if the LPA fail to comply with any procedural requirement in Part II of the Enforcement Notices and Appeals Regulations, other than the requirement to give public notification of the appeal. The Department's experience is that this discretionary power is only rarely used. When its use is being considered, the LPA will be given adequate warning and should then take immediate steps to submit the required information or statement (preferably transmitting it by fax),

POSSIBLE WITHDRAWAL OF AN ENFORCEMENT NOTICE DURING THE APPEAL

6.12 As an enforcement appeal proceeds to the point at which a public inquiry or site-inspection is to take place, the LPA's officers should monitor all statements and representations the appellant and any "interested persons" make. The LPA's officers should also consider any advice issued by the Planning Inspectorate during the appeal's procedural

stage. If officers conclude from their consideration of another party's statements that an enforcement notice is fundamentally defective, so that it cannot be corrected in the appeal decision (using the Secretary of State's power in section 176(1) of the 1990 Act), they should take steps to withdraw the notice as soon as practicable. If the appellant, or an agent on the appellant's behalf, warns the LPA that the notice is fundamentally defective and the warning is ignored, or rejected without adequate reasons, the LPA will be at risk of having the appellant's appeal costs awarded against them if the notice is quashed by the Secretary of State or a Planning Inspector.

6.13 If two enforcement notices have been issued "in the alternative" and it becomes clear that one of them is superfluous, the LPA should take steps to withdraw the superfluous notice as soon as practicable. To safeguard the authority against a possible award of the appellant's costs, the LPA should explain that the notice is being withdrawn because it is no longer considered necessary to maintain it, as the service of two notices was precautionary.

6.14 Whenever an enforcement notice is withdrawn during the appeal process, the LPA should ensure, in accordance with the provisions of section 173A(3) of the 1990 Act, that notification of the withdrawal is given to everyone who has previously been served with a copy of it, or who would be served if the notice were re-issued. The relevant entry in the LPA's enforcement notice register should also be deleted.

INQUIRY APPEALS: PREPARING FOR THE INQUIRY

6.15 In preparing for an inquiry into an enforcement appeal, the LPA's officers will need to consider how best to present a thoroughly co-ordinated and well substantiated case on the authority's behalf, especially if the appeal involves a lengthy planning history, or complicated legal issues, or both. It is essential to decide, well before the inquiry, how each witness's evidence can best be presented. In giving evidence as to the facts, it is always preferable to rely on a witness who can speak from personal experience: for example, an Enforcement Officer who has observed the appeal site over a long period, or a neighbour of the site who has kept detailed records of activities taking place on the site on recorded dates, may be better equipped to give evidence than a Planning Officer who may only have visited the site intermittently. If technical evidence is needed to support the LPA's case, the authority's officers should ensure that responsibility for it is allocated to someone (possibly a consultant) who is professionally competent to deal with the relevant issues and to withstand any detailed cross-examination.

6.16 Particular care must be taken in producing the relevant documentary evidence. This may include sworn affidavits, copies of any planning permission relating to the appeal site, previous "established use" certificates, correspondence with officers about activities on the site, and replies to requests for the appellant to provide information (including, for example, the response to a planning contravention notice). Photographic evidence, including aerial photographs, can be particularly useful in an enforcement appeal in establishing what activities were taking place on the site in the past. If photographs are to be submitted in evidence, they must be of sufficiently good quality to enable the activities on the site to be established satisfactorily and reliably dated.

6.17 The LPA's officers should bear in mind that further development, including new activities, may take place on the appeal site at any time after an enforcement notice has been issued. It is therefore prudent to keep the appeal site under regular observation and to record any significant development which may occur between serving copies of the enforcement notice and the date ofa public inquiry or site inspection. If possible, a photographic record of new development or activities should be made. Sometimes, the owner or occupier of the appeal site may take steps to "tidy up" the site in advance of the Planning Inspector's site-inspection. It is therefore important to have a witness available to give first-hand evidence about the condition of the appeal site, and the activities taking place on it, on the date of issue of the enforcement notice.

THE ONUS OF PROOF

6.18 The appellant's and the LPA's respective role in an enforcement appeal inquiry is sometimes misunderstood because the enforcement notice is mistakenly regarded as if it were an indictment in criminal proceedings. An enforcement notice is a statement that, in the LPA's opinion, a breach of planning control appears to have taken place on the land. The enforcement appeal enables the recipient of the notice to rebut the LPA's opinion that a breach appears to have occurred or, if a breach of control is admitted, to maintain that planning permission should be granted for it. It follows that the onus of proof in an enforcement appeal is on the appellant to show, by virtue of the material facts adduced in support of any of the grounds (b) to (e) in section 174(2) of the 1990 Act, that the appeal should be allowed. The onus in the appeal is not on the LPA to show that the appeal should be dismissed, although in practice that may well constitute the LPA's main line of argument at the inquiry in response to any legal ground of appeal.

THE TEST APPLICABLE TO EVIDENCE

6.19 Proceedings at an enforcement appeal inquiry take place before an administrative tribunal (constituted by the Planning Inspector in person). They are not Court proceedings. It follows that the correct test applicable to the submitted evidence is what is called the "civil standard of proof' which involves the tribunal's assessment "on the balance of probabilities". This is a less demanding standard of proof than the test used in criminal proceedings, which is "beyond reasonable doubt". If there is a conflict of evidence on a material fact or facts, it is the Planning Inspector's responsibility to decide, on the balance of probabilities, which evidence is to be preferred.

POSSIBLE GRANT OF PLANNING PERMISSION ON APPEAL

6.20 If the appeal is proceeding on ground (a), including the "deemed" planning application, the LPA's officers who are to attend the inquiry should agree on a contingent list of planning conditions for submission at the inquiry if the Planning Inspector is minded to grant planning permission for the development involved in the alleged breach of control, or part of it. The submission of a list of conditions does not imply that the LPA concede that planning permission should be granted: it simply registers the LPA's concern that any permission which may be granted should be effectively controlled by the suggested conditions. If authority to take enforcement action has not been delegated to the LPA's officers, or where such authority has been delegated but authority to grant permission, or to determine conditions, has not been,

it may be advisable to obtain the relevant Planning Committee's approval for any proposed list of conditions to be submitted at an inquiry.

AWARD OF COSTS IN ENFORCEMENT APPEAL PROCEEDINGS

6.21 Each party to an enforcement appeal may apply for an award of its appeal costs against another party, regardless of the procedure used to process and decide the appeal. There is some evidence that LPAs are generally reluctant to pursue the possibility of a costs application, especially in written representations enforcement appeals. Enforcement action is often labour-intensive and the inquiry appeal process usually involves the production of documentary evidence and the attendance of witnesses at an inquiry, causing the LPA substantial expense. It is therefore prudent always to consider whether a costs application against the appellant is justified. As with any other appeal costs application, the LPA will have to show that the appellant's behaviour in the appeal proceedings was "unreasonable" (as that term is in interpreted in DOE Circular 8/93) **and** that, consequently, the LPA have incurred unnecessary expenditure in the appeal process. The guidance in the Circular includes illustrative examples of what may amount to "unreasonable" conduct in an enforcement appeal. By the same token, the LPA's officers should ensure that their own conduct in the appeal proceedings is reasonable at all times, so that they do not put the authority at risk of an award of appeal costs in the appellant's favour.

SCRUTINISING THE APPEAL DECISION

6.22 The Planning Inspector's or Secretary of State's decision letter should be scrutinised to establish what further action may be necessary, depending on the outcome of the appeal.

6.23 If the enforcement notice is upheld, officers will need to consider what further steps may be needed to ensure compliance with its requirements. If these involve a substantial amount of remedial work (eg the removal of large quantities of waste material or scrap from the site), it is prudent to discuss with the landowner or occupier of the site how the work is to be carried out and, if possible, agree a timetable for it to be done within the compliance period. The provisions of section 173A(1)(b) of the 1990 Act enable the LPA to extend the compliance period at any time if it is clearly reasonable to allow more time for any particularly onerous requirement.

6.24 If the appeal succeeds, officers will occasionally need to consider whether there are grounds for seeking leave in the High Court to appeal against the decision, on a point of law, in accordance with the provisions of section 289 of the 1990 Act. The time-limit for this type of appeal is 28 days from the date of receipt of the decision letter, although the Court has discretion to admit a late leave application in exceptional circumstances. This type of appeal will normally need to be assessed by an experienced Planning lawyer, or it may well be prudent to obtain Counsel's opinion before any decision is taken to incur the additional expense of an appeal in the High Court.

6.25 An application under section 288 of the 1990 Act can only be used to challenge a decision to grant planning permission under paragraph (a) of section 17 7(1) or to discharge a condition or limitation under paragraph (b) of that section. Unlike an application under section 289, a section 288 application does not require the leave of the Court, but it must be made within 6 weeks of the date of the decision letter and the Court has no discretion to

extend this time-limit. However, while a successful application under section 288 can secure the quashing of a decision to grant planning permission or to discharge a condition or limitation, it cannot secure the reinstatement of an enforcement notice which may have been quashed at the same time by the appeal decision. Only an application under section 289 can do that. Moreover, in the case of *Gill v Secretary of State for the Environment and North Warwickshire* BC [1985] JPL 710, it was held that a decision to grant planning permission under a former comparable provision to section 177(1) of the 1990 Act, could be challenged under either of the former procedures which are now provided by sections 288 and 289 of the 1990 Act.

6.26 In deciding whether to appeal in the High Court, the LPA's officers should bear in mind that, unless the appeal decision is successfully challenged by an appeal to the Court, the terms of the decision will apply in all respects. Thus, if (for example) the text of the decision letter canvasses a number of possible planning conditions which the Inspector intends to impose on a conditional grant of planning permission, but one such condition is clearly omitted from the actual grant of permission, that deficiency can only be remedied by way of a further appeal to the High Court. In deciding whether to appeal against the appeal decision, the LPA's officers should be aware that a well-founded appeal may not necessarily involve a full hearing by a Deputy Judge in the Court. This is because there is a legal process, known as "submission to judgment" which enables the Secretary of State formally to concede that the decision was legally defective in one or more respects and, consequently, to agree with the LPA that it should be "remitted" to the Secretary of State for his re-determination. When the Department (acting through the Treasury Solicitor's Department as agent) agrees to this process, the LPA's litigation costs in bringing the appeal in the High Court will normally be met by the Department.

CHAPTER 7
Serving a stop notice

PURPOSE OF A STOP NOTICE

7.1 Because an appeal to the Secretary of State (under section 174 of the Town and Country Planning Act 1990) effectively suspends an enforcement notice until the appeal is finally determined, or the notice is withdrawn, the stop notice provisions (in sections 183 to 187 of the 1990 Act) enable the LPA to deal effectively with the interim situation. These provisions enable the LPA to serve a stop notice, prohibiting the carrying out, on the enforcement notice land, of any activity which is within the scope of the breach of control alleged in the enforcement notice. The stop notice may require any such activity to cease until the date when the compliance period specified in the related enforcement notice expires.

THE SCOPE OF A STOP NOTICE

7.2 The stop notice provisions of the 1990 Act are legally constructed so that what is prohibited by the notice must derive entirely from the related enforcement notice. Consequently, if the LPA anticipate having to serve a stop notice, they should consider its scope when the enforcement notice is being formulated.

7.3 The provisions of section 183(1) of the 1990 Act enable the LPA to prohibit the carrying out of an activity "on land to which the enforcement notice relates, or any part of that land specified in the stop notice." It follows from these provisions that the activity to be prohibited must be taking place somewhere on the parcel of land comprising the enforcement notice site. Thus the activity need not be taking place on the entire enforcement notice site: it might be confined to a specific area of the site, eg a particular building from which noise, fumes and dust are being emitted; or a portion of the site where open storage of scrap materials is unacceptable because of the height at which the scrap is piled. In deciding whether to limit the stop notice to part only of the enforcement notice site, the LPA will need to consider whether the activity to be prohibited is capable of readily being moved around to any other part of the site, eg open storage of pallets: if so, it will usually be prudent to make the stop notice apply to the entire enforcement notice site.

7.4 An "activity" which a stop notice may prohibit is defined in section 183(2) of the 1990 Act as—

> any activity specified in the enforcement notice as an activity which the local planning authority require to cease and any activity carried out as part of that activity or associated with that activity."

Because a stop notice is prohibitory, it is not apt for use in any circumstance which requires some positive action to be taken in response to it. A stop notice can only compel an

activity to cease, or reduce or minimise the level of an activity. Provided the activity to be prohibited is within the scope of the breach of control alleged in the enforcement notice, a stop notice may apply to it. 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 (even though an enforcement notice itself could not be directed against an ancillary or incidental use).

7.5 By virtue of section 183(4) and (5) of the 1990 Act, a stop notice cannot prohibit—

(1) the use of any building as a dwellinghouse;

(2) the carrying out of any activity if the activity has been carried out (whether continuously or not) for a period of more than four years ending with the date of service of the notice. For this purpose, any period during which the activity was authorised by planning permission is not counted.

AUTHORITY FOR SERVICE OF A STOP NOTICE

7.6 It is important to obtain proper authorisation for service of a stop notice, either from the relevant committee or the Council's officer to whom authority to proceed with serving a stop notice has been delegated. Although there is no right of appeal to the Secretary of State against a stbp notice, it can be challenged on the ground that it was not properly authorised, or that the decision to issue it was "Wednesbury unreasonable". A challenge on this basis may be brought by seeking leave, in the High Court, to bring judicial review proceedings, or by way of the defence to a prosecution under section 187 of the 1990 Act for contravening the prohibition in the stop notice.

THE RECIPIENT OF A STOP NOTICE

7.7 The requirement for service of a stop notice on interested people is less rigorous than for an enforcement notice. Section 183(6) of the 1990 Act provides that a stop notice "may be served by the local planning authority on any person who appears to them to have an interest in the land or to be engaged in any activity prohibited by the notice". Nonetheless, it is prudent for the LPA to make thorough enquiry into the identity of the owner, and any other occupier or operator, of the stop notice land so that any subsequent allegation of defective service procedures can be effectively rebutted.

7.8 Section 184(6) of the 1990 Act contains useful supplementary provisions enabling the LPA to display what is called a "site notice" on the stop notice land. The three-fold purpose of a site notice is—

(1) to state that a stop notice has been served and that any person contravening it may be prosecuted for an offence under section 187 of the 1990 Act;

(2) to give the date when the stop notice takes effect; and

(3) to indicate the stop notice's requirements.

Wherever there is difficulty in establishing the identify of everyone who may have an interest in land to which a stop notice will apply, it would be prudent to ensure that at least one site notice is prominently displayed on any stop notice site.

7.9 The provisions of section 184(1) of the 1990 Act require that a stop notice must refer to the enforcement notice to which it relates and have a copy of that notice annexed to it.

TIME-LIMIT FOR COMPLIANCE WITH A STOP NOTICE

7.10 The provisions of section 184(2) of the 1990 Act require that a stop notice must specify the date on which it will take effect. This must be a calendar date. It is referred to as the effective date. In section 184(3) of the 1990 Act, there are specified limits on the effective date. In normal circumstances, the limits are—

(1) not earlier than 3 days after the date on which the stop notice is served; and

(2) not later than 28 days after the date on which the notice is first served on any person.

The three-day time-limit for bringing a stop notice into force can be waived if the LPA consider there are "special reasons for specifying an earlier date and a statement of those reasons is served with the stop notice." These provisions (in section l84(3)(a) of the 1990 Act) enable a stop notice to be brought into force immediately where the LPA consider that the activity to be prohibited is so environmentally harmful, or likely in practice to be irremediable, that it is imperative to prohibit it at once.

WHEN THE EFFECT OF A STOP NOTICE CEASES

7.11 The provisions of section 184(4) of the 1990 Act state that a stop notice will cease tote effective when—

(1) the LPA withdraw the related enforcement notice or that notice is quashed in proceedings on an enforcement appeal to the Secretary of State, or in any judicial review by the High Court;

(2) the compliance period in the enforcement notice expires (so that it then becomes a criminal offence not to carry out the required remedial steps);

(3) the LPA withdraw the stop notice.

FORMULATING THE TERMS OF A STOP NOTICE

7.12 As with the terms of an enforcement notice, it is vital that the terms of a stop notice are formulated with the utmost clarity and precision. Since there is no right of appeal to the Secretary of State against a stop notice, there is no opportunity for any drafting deficiency in it to be corrected after it has been served. The alleged breach of planning control will have been stated in the enforcement notice to which the stop notice is related. But, unlike the enforcement notice, the stop notice does not specify any required steps to be taken for a remedial purpose. The stop notice simply prohibits all the activities comprised in the alleged breach of control, or certain of the specified activities at which the LPA have decided to direct the notice. In the event of a subsequent contravention of a stop notice, the LPA may need to initiate prosecution proceedings under section 187 of the 1990 Act,

which would require the LPA to prove "beyond reasonable doubt" (the criminal standard of proof) that the prohibition had been contravened by the defendant. The terms of the notice must provide the basis for any such prosecution.

7.13 It is helpful in formulating the terms of a stop notice to recall that the High Court's judgment on 16 July 1986, in the case of R *v Runnyinede* BC *ex parte Sarvan* Singh *Seehra* [1987] LGR 250, held that questions of fact and degree are frequently encountered in Planning Law and there is no objection to incorporating such matters into enforcement and stop notices, even though the result creates uncertainty as to the standard of conduct required in order to comply with the notices. The point at issue in that case was the alleged imprecision of the prohibition in Runnymede BC's stop notice, as follows—

"Use of the land for the purposes of religious meetings and services and for the purposes of religious devotion otherwise than as incidental to the enjoyment of the dwelling house as such."

It was argued on Mr Seehra's behalf that the words after "religious devotion" made the prohibition in the stop notice too uncertain for him to be confident of holding religious and devotional meetings at his home in Chertsey in such a way as to avoid contravening it. He sought judicial review in order to have the stop notice quashed by the Court or to obtain a declaration that it was invalid or void. Mr Justice Schiemann refused the application on the ground that, although Mr Seehra had well-founded worries about the terms of the stop notice, they did not result in the stop notice being regarded as void. The notice gave the recipient an indication of what he must do and what he must not do; and there was no need (in the Judge's view) for a precise specification of the number of people, or the amount of noise, or whatever it may be that is complained of, before a stop notice has any validity.

ASSESSING A STOP NOTICE'S LIKELY CONSEQUENCES

7.14 Because a stop notice can have immediately serious consequences on a business, Government guidance in Annex 3 to DETR Circular 10/97 advises that a "cost/benefit assessment" should be carried out. The purpose of this exercise, which need not be over-elaborate, is to examine the foreseeable costs to the company, operator or landowner against whose activities the stop notice is directed, and the benefit to amenity in the vicinity of the site which is likely to result. The High Court's judgment on 12 October 1994, in the case of R *v Elmbridge* BC *ex parte Wendy Fair* Markets *Ltd* [1995] JPL B36, held that the same guidance in the previous Circular (DOE Circular 21/91) was advisory and not binding on the LPA if they could show adequate reasons not to follow it. The LPA in this case (involving land in the Metropolitan Green Belt) were aware of the effect the stop notice would have on market operators, traders and customers; and there was evidence that they had weighed evidence of that effect against the seriousness of the Green Belt objection. They were not required to go into a "more detailed economic exercise". The Court should not substitute its own view for that of the LPA on the expediency of serving a stop notice.

PROSECUTING A STOP NOTICE CONTRAVENTION

7.15 Unlike an enforcement notice contravention, which can be remedied by the LPA's own "default action" (by virtue of the provisions in section 178 of the 1990 Act), a stop notice contravention can only be dealt with by initiating prosecution proceedings under section 187 of the 1990 Act. To emphasise the seriousness of contravening a stop notice, the LPA

should always consider a possible prosecution as soon as they have evidence of an offence. If there is likely to be delay in hearing the case in the Magistrates' Court or Crown Court, the LPA should emphasise the seriousness and urgency of the case to the Court's administrators and ask for an "expedited" hearing.

INJUNCTION IN SUPPORT OF A STOP NOTICE

7.16 Even though they have served a stop notice, the LPA may find that it is deliberately contravened and the hearing of a prosecution under section 187 of the 1990 Act cannot be arranged quickly. In that event, the LPA may wish to seek an interlocutory (that is, interim) injunction to restrain the prohibited activity. In a case involving Tower Hamlets LBC and a company known as Peachbar Limited, Mr Justice Brooke granted such an injunction on 18 December 1989 in circumstances where criminal proceedings on the stop notice offence could not be heard by the Thames Magistrates' Court until 22 February 1990. When Peachbar Limited challenged the High Court's grant of an interlocutory injunction, the Court of Appeal (Civil Division) held, in a judgment given on 20 December 1989, that the Judge in the High Court was entitled to take into account the flagrant and deliberate breach of Planning Law in weighing "the balance of convenience" in the Council's application for an injunction; and it was not for the Court of Appeal to interfere in a question which was for the High Court Judge's discretion, unless it could be said that his decision was so clearly wrong that it was genuinely perverse. In this case, the Judge's directions to himself were "impeccable" and the Court of Appeal dismissed Peachbar Limited's appeal against the grant of the interlocutory injunction.

THE LPA'S POSSIBLE LIABILITY TO COMPENSATION WHERE A STOP NOTICE IS SERVED

7.17 Some LPAs are reluctant to serve a stop notice, even where they consider it is justified, because they believe, or are advised by officers, that there is a substantial risk of having to pay compensation for financial loss which the recipient of the stop notice may incur. In practice, this risk is often exaggerated. There is no evidence of frequent or substantial payments of compensation having to be made by LPAs who serve stop notices which are legally well-founded.

7.18 Section 186(1) of the 1990 Act provides that, on serving a stop notice, the LPA will only have to pay compensation if the following circumstances arise—

(1) the related enforcement notice is quashed, on appeal to the Secretary of State on one of the grounds (b) to (g) in section 174(2) of the 1990 Act: this means that compensation is **not** payable when the related enforcement notice is quashed on a "ground (a)" appeal because planning permission is granted;

(2) the related enforcement notice is varied (otherwise than on a "ground (a)" appeal) so that any prohibited activity in the stop notice ceases to be a relevant activity within the enforcement notice;

(3) the LPA decide to withdraw the related enforcement notice for some reason other than their decision to grant planning permission for the development to which the enforcement notice relates;

(4) the LPA decide to withdraw the stop notice.

And, even if the LPA incur a liability to pay compensation for one of these four reasons, that liability may be reduced or eliminated in any case where the claimant was required, by a planning contravention notice or other formal requisition for information, to provide information to the LPA and did not provide it or did not otherwise co-operate with the LPA when responding to the notice. The purpose of these provisions is to ensure that someone who fails to provide the LPA with required information, or pursues a course of non-cooperation with the LPA, should not be able to obtain any compensation for loss or damage which could have been avoided if he or she had provided the required information or co-operated with the LPA.

7.19 There is a 12-month time-limit (running from the date of the decision on the related enforcement notice appeal, or the date of withdrawing the enforcement notice or stop notice) on claiming compensation for loss or damage due to a stop notice. The usual approach, if liability is admitted, is for the LPA and the claimant to agree on the amount of any compensation which may be payable. If agreement on the amount payable cannot be reached, the dispute is normally referred to the Lands Tribunal for decision.

CHAPTER 8

Serving a breach of condition notice

INTRODUCTION

8.1 The provisions of section 187A of the Town and Country Planning Act 1990 enable the LPA to serve a "breach of condition notice". This type of notice has been available since July 1992. It provides a summary procedure for the LPA to secure compliance with conditions imposed on a grant of planning permission for carrying out any development of land. (By virtue of section 187A(13)(a) of the 1990 Act, "conditions" includes "limitations" on a grant of permission, such as, for example, the limitations on certain "permitted development" rights which are granted by virtue of the General Permitted Development Order.)

CHOOSING BETWEEN A BREACH OF CONDITION NOTICE AND AN ENFORCEMENT NOTICE

8.2 When considering how best to secure compliance with a planning condition, the LPA will often have to choose between serving a breach of condition notice and issuing an enforcement notice. This choice may not be a simple matter: some of the relevant factors are explained in the following paragraphs 8.3 and 8.4.

8.3 Some advantages of serving a breach of condition notice are—

(1) because there is no right of appeal to the Secretary of State against the notice, its effect cannot be suspended by means of an appeal;

(2) if the "person responsible" for securing compliance with any conditions is in breach of the notice, a criminal offence occurs and may be prosecuted immediately in the Magistrates' Court, where the maximum penalty on conviction is £1,000;

(3) the threat of being prosecuted for contrayening a breach of condition notice may suffice to persuade the recipient of it to comply with the condition without further action by the LPA.

8.4 Some possible disadvantages of serving a breach of condition notice are—

(1) because there is no right of appeal to the Secretary of State, the notice cannot be corrected if it contains some significant defect;

(2) if someone who is in breach of the notice is prosecuted, the onus of proof is on the LPA to show "beyond reasonable doubt" (the criminal standard of proof) that an offence has occurred;

(3) if the notice can be shown to be fundamentally defective, or the LPA exceed their power in serving it, the notice may be quashed, by the High Court, on judicial review, thus delaying the enforcement process and causing expense for the LPA;

(4) if someone who has been prosecuted and convicted of an offence of contravening a breach of condition notice still persists in contravening it, there is no "default" power for the LPA to enter the land and carry out any works which may be required by the notice.

THE RECIPIENT OF A BREACH OF CONDITION NOTICE

8.5 The person on whom a breach of condition notice may be served is referred to in section187A(3) of the 1990 Act as—

(1) "any person who is carrying out or has carried out the development" (paragraph (a)); or

(2) "any person having control of the land" (paragraph (b)).

The definition of the first category is self-explanatory, but it is elaborated by section187A(13)(b) of the 1990 Act which provides that carrying out any development is to include "causing or permitting another to do so." Thus, for example, where the owner of a building which is being converted to a dwellinghouse instructs a construction company to carry out conversion work which contravenes a planning condition, a breach of condition notice can be served on the building's owner or the construction company or both. The definition of the second category ("any person having control of the land") is specifically limited by subsection (4) of section 187A so that the breach of condition notice served on such a person can only relate to "conditions regulating the use of the land". For example, where a housebuilder has carried out residential development of 20 houses in contravention of a condition requiring a specified type of roof-tile to be used on all the houses, and the houses have all been sold to individual owner-occupiers, the breach of condition notice could not be served, even though the owner-occupiers have control of the land, because this type of planning condition is not a condition which regulates the use of the land.

FORMULATING THE TERMS OF A BREACH OF CONDITION NOTICE

8.6 The provisions of section 187A(5) and (7) of the 1990 Act require that a breach of condition notice must—

(1) specify the condition with which, in the LPA's view, the recipient of the notice has failed to comply;

(2) specify the steps which the LPA consider ought to be taken, or the activities which ought to cease, to secure compliance with the specified condition;

(3) state the period allowed for compliance with the notice.

8.7 It is vital to state all the terms of a notice with the utmost clarity and precision, bearing in mind that any prosecution of a contravention of the notice will result in the Magistrates' Court's examination of its terms in the minutest detail. This is particularly relevant to the required steps, where the recipient of the notice must not be left in any doubt about exactlt what has to be done, or what must cease, in order to comply with whatever condition is specified in the notice.

THE COMPLIANCE PERIOD

8.8 The provisions of Section 187A(7) of the 1990 Act prescribe that the compliance period in a breach of condition notice is to be—

(1) a period not less than 28 days, starting with the date of service of the notice (paragraph (a)); or

(2) the initial compliance period, extended by a period to be specified by a further notice served on the person responsible (paragraph (b)).

Section 187A does not prescribe any criteria for the LPA to use in deciding what compliance period to specify in the notice. But, since section 187A(11)(a) provides a defence for a person who is prosecuted for contravening a notice that "he took all reasonable measures to secure compliance with the conditions specified in the notice", the LPA should ensure that the compliance period provides a reasonable time to accomplish whatever the notice requires. When a substantial amount of work is needed to comply fully with a condition, it may be advisable for the LPA to try to agree on the duration of the compliance period with the person on whom the notice is to be served, even though what is to be required is at the LPA's discretion.

THE DEFENCE AGAINST PROSECUTION

8.9 Section 187A(11) of the 1990 Act provides two statutory defences against prosecution for a person charged with the offence of contravening a breach of condition notice. As mentioned in the preceding paragraph 8, the main available defence is that the person charged "took all reasonable measures to secure compliance with the conditions specified in the notice". It is for the Court to decide what it was reasonable for the person prosecuted to do *in the particular circumstances* of *the case* to achieve compliance with the conditions in the notice.

8.10 The defence in section 187A(11)(b) of the 1990 Act is confined to "any person having control of the land": consequently, this defence is available for an offence involving a breach of a condition regulating the use of the land. Such a person may claim that "he no longer had control of the land" at the time the offence was alleged to have been committed.

8.11 Anyone who seeks to rely on either of these defences must prove the defence on the balance of probabilities. It is not for the LPA to prove either that the defendant did not take all reasonable steps to secure compliance with the conditions; or that a person (in the case of section 187A(2)(b) and (4)) still had control of the land on the date when the notice was served.

8.12 A breach of condition notice will continue to have effect in a recurring situation, eg if a BCN requiring a breach to stop is complied with but the breach later recurs, the original notice can be enforced afresh and a new notice is not normally required. Once served, it will continue in force until withdrawn. Section 187A(8) provides that the person responsible is in breach of the notice if at *any time after the end of the compliance period* the notice has not been complied with, Even a successful prosecution does not prevent a further prosecution in respect of the same notice (section 187A(10)). However, the "person responsible" must be the same or a new notice will need to be served on the new person responsible.

CHAPTER 9
Obtaining an enforcement injunction

THE STATUTORY PROVISIONS

9.1 Section 187B(1) of the Town and Country Planning Act 1990 provides a wide-ranging power for the LPA to obtain a planning enforcement injunction when a court order is needed to restrain a breach of planning control. The provisions are as follows—

"Where a local planning authority consider it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction, they may apply to the court for an injunction, whether or not they have exercised or are proposing to exercise any of their other powers under this Part."

Section 187B(4) of the 1990 Act explains that "the court" means the High Court or the County Court.

9.2 The Court's power to grant an injunction is wide-ranging. Section 187B(2) of the 1990 Act provides—

"On an application under subsection (1) the court may grant such an injunction as the court thinks appropriate for the purpose of restraining the breach."

9.3 These provisions have been in force since January 1992. They are available in addition to the powers conferred by section 222 of the Local Government Act 1972, which enable a local authority to institute any legal proceedings in their own name where they consider it expedient for the promotion or protection of the interests of the inhabitants of their area. The preferable course, in dealing with any actual or alleged breach of control for which injunctive relief is to be sought, is for the LPA to use the provisions in section 187B of the 1990 Act.

THE SCOPE OF AN ENFORCEMENT INJUNCTION

9.4 The scope of an injunction which may be sought under section 187B of the 1990 Act is apparently very wide. It may apply to "any actual or apprehended breach of planning control". In this context "apprehended" is taken as meaning an anticipated breach of control, eg. where it is clear that preparations are being made to establish a permanent residential caravan site; or a major waste-tipping operation is about to start; or mineral extraction is about to re-start at a long since disused limestone quarry—all without the planning permission required in each case.

9.5 An injunction may be sought at any stage of the planning enforcement process, either as the LPA's preferred remedy or in addition to some other formal enforcement action. For example, if an enforcement notice requiring the use of land for scrap-metal recovery to cease is suspended by an appeal to the Secretary of State, but the recovery operations are extended to a two-shift system and weekend working, it may be justified to seek an injunction to restrain the extended working; or if, despite being prosecuted by the LPA for contravening an effective enforcement notice, the operator of a haulage business continues to defy the notice, seeking an injunction may be the LPA's only effective course of action. When initiating injunctive proceedings by virtue of section 187B of the 1990 Act, the LPA do not have to show that the grant of an injunction is the only available remedy: it is sufficient for the LPA to "consider it necessary or expedient" for the breach to be restrained by an injunction.

9.6 Judicial authority has established that the High Court or County Court should apply the injunctive provisions in section 187B of the 1990 Act flexibly, with proper regard to the underlying planning control enforcement situation. This can be seen from the Court of Appeal's judgment on 7 February 1994 in the case of Runnymede BC *v Harwood* [1994] EGCS 23. In that case, the defendant (Mr P C Harwood) had sought permission for the change of use of former farm-land, near Egham in Surrey, to use for the maintenance and repair of commercial vehicles for a period of five years; and, separately, to convert a former agricultural building on the land to residential use. The plaintiff (Runnymede BC) refused both applications on 20 August 1993, but both developments went ahead without permission. In initial injunctive proceedings in the High Court, the Judge granted four interlocutory (that is, interim) injunctions. Among them, one injunction restrained Mr Harwood from continuing to use the land for the storage of motor vehicles; and another restrained him from moving or causing or permitting any person to move into occupation of a particular building on the land. Just under three weeks later, these injunctions were discharged by another High Court Judge when Mr Harwood undertook to prosecute planning appeals against Runnymede BC's refusal of permission with all due diligence. The reason for the Judge's decision was that he considered a grant of interlocutory relief, in advance of the later trial of the action, would prejudice the defendant's chance of resisting the Council's case at the trial because Mr Harwood would then no longer be on the land, or living in the building, if an interim injunction were granted. In reaching this conclusion, the Judge applied legal principles laid down in the earlier injunctive case of *East Hampshire DC v Davies* [1991] 2 PLR 8 which preceded the new powers in section 187B of the 1990 Act. The Court of Appeal held unanimously that the High Court Judge had misdirected himself in concentrating on the interlocutory nature of the application and in applying the principles stated in the case of *East Hampshire DC v Davies* to an application under section 187B of the 1990 Act. The Court of Appeal stated that Parliament had clearly enacted a power for the Court to grant an injunction to enforce planning control over actual and apprehended breaches of control; and it could not have been Parliament's intention, where there had been an actual breach, that the power should only be exercisable at the trial of the action, with interlocutory applications confined to preserving the "status quo" until the trial. Accordingly, the Court restored the injunctions, as sought by the Council, but suspended the effect of the injunction relating to the particular building on the land until the planning appeal had been determined.

9.7 In another judgment given on 7 February 1994, in the case of Croydon LBC v Giadden and Another [1994] EGCS 24, the Court of Appeal held that section 187B of the 1990 Act was drawn on the statutory assumption that an actual, as well as an intended, breach of planning control could be restrained by injunction. Therefore, the word "restrained" had to be given a wider, and in the context more natural, meaning. Once that was done, it was

obvious that a mandatory injunction (as opposed to a merely negative injunction) was not excluded. It appears to follow from this judgment that the High Court or County Court may grant an injunction, under section 187B of the 1990 Act, requiring some action to be taken to deal with the breach of control.

9.8 In a judgment given on 29 March 1995, in the case of *Hambleton DC v Bird and Another* [1995] EGCS 67, the Court of Appeal overturned the County Court's refusal of a planning enforcement injunction against an extended gypsy family on the ground that the family might have an arguable case for the grant of planning permission if they re-applied to Hambleton DC for it, and the overall public interest did not (in the County Court's view) justify granting an injunction which would cause gross disruption to the family group. The Court of Appeal held that the possibility of planning permission being granted in future was not a legitimate reason for refusing an injunction to restrain a breach of the law. It was for the planning authority, and not the Courts, to consider any planning application in the light of policy considerations. It was not for the Courts to usurp the decision-making function of the Council. Where the balance of public interest in such matters lay was for the planning authority, not the Judge. The Court of Appeal held that the respondents (the gypsies) had demonstrated a constant intention to remain in residence at the farm and break the law, which could not be tolerated. Accordingly, the Court granted the injunction sought by Hambleton DC, but suspended it for three months to enable the extended gypsy family to make alternative arrangements. In giving judgement on 7 July 1995, in the case of *South Hams DC v Halsey* [1996] JPL 761, the Court of Appeal dismissed an appeal against the High Court's mandatory injunction requiring demolition of part of a building as required by an enforcement notice. The Appeal Court held that while it was open to a defendant to assert that the enforcement notice was a nullity, the present notice was not a nullity (in the sense of *Miller-Mead);* that although the defendant had been acquitted in the Crown Court on a prosecution under section 179, the Council's application for an injunction under section 187B was not an abuse of process; and that section 187B conferred wider scope and application than was the case under the previous common law, and was wide enough to allow the grant of mandatory injunctions (see also *Croydon* LBC *v* Gladden). In R v Basildon DC ex parte Clarke [1996] JPL 866, on 21 December 1995, where the County Court had refused to adjourn proceedings on the injunction to allow the application for judicial review to be disposed of, the High Court noted the various cases in which the complex relationships between injunctions and judicial review had arisen, and sought to establish a more streamlined approach. The procedural points highlighted by the cases were considered likely to be of no more than theoretical relevance in the majority of cases. It was held that if something had gone seriously wrong with the procedure, whether in the initiation of the injunction proceedings or in any other way, there was no reason why the County Court could not properly take it into account when deciding whether to grant or refuse the injunction.

THE PERSONAL NATURE OF INJUNCTIVE PROCEEDINGS

9.9 Unlike an enforcement notice or a stop notice, a planning enforcement injunction is not primarily directed at the parcel of land on which the breach of control is taking place. Injunctive proceedings are "personal" in the sense that the LPA seeks to obtain an order from the Court to restrain a person, or a number of people, who must each be cited by name in the LPA's application, from carrying on the breach. It follows that, in assessing what is called "the balance of convenience" in the decision whether to grant injunctive relief on the LPA's application, the Court will have to weigh the public interest (which the LPA

represents) against the private interest of the person or people whom the LPA seek to restrain..This differs from, for example, the process of an enforcement appeal where the decision-maker is concerned with whether the appeal should succeed on its legal or planning merits. And, even if the Court concludes that an interlocutory injunction should be granted, its effect may be suspended for a specified period so that the defendant has time in which to make suitable alternative arrangements for whatever activity is to be restrained. The Court may require the plaintiff (the LPA) and the defendant to appear in person at the end of an initial period of suspension of an injunction, so that the balance of convenience can be reassessed.

PROCEDURE WHERE A PERSON'S IDENTITY IS UNKNOWN

9.10 Although it will usually be necessary for the LPA's application to the Court to cite the name of any person or persons against whom an injunction is sought, section 187B(3) of the 1990 Act enables Rules of Court to provide for such an injunction to be issued against a person whose identity is unknown. This rule-making power has been used to make Order 110 in the Rules of the Supreme Court (inserted by SI No. 1992/638 from April 1992) and to insert Order 49, rule 6, in the County Court Rules 1981. These procedural rules specify the documentary evidence the LPA will be expected to provide if they seek a planning enforcement injunction against a person whose identity is unknown.

A POSSIBLE UNDERTAKING IN DAMAGES

9.11 Another example of the personal nature of injunctive proceedings is that, where the Court grants an interlocutory injunction, pending the eventual trial of the action or the outcome of a concurrent enforcement appeal, the Judge has discretion to require the person seeking the injunction to give what is called "an undertaking in damages" to the person or people whom the injunction will restrain during the interim period. The purpose of such an undertaking is to provide financial compensation for the injuncted person if a substantive injunction is not granted at the eventual full trial of the action, or if it is subsequently shown that no breach of planning control has occurred. The Judge in the interlocutory proceedings will exercise the Court's discretion in the particular circumstances of each case. Moreover, it should not necessarily be assumed that an undertaking in damages will be required. In the case of *Kirklees* MBC *v Wickes Building Supplies Ltd* [199213 All ER 717, the House of Lords held (in a Sunday trading case where the local authority had sought an injunction under section 222 of the Local Government Act 1972) that the Court need not necessarily require the authority to give an undertaking in damages where the requirement would effectively result in the failure of the law enforcement process.

FAILURE TO OBSERVE THE REQUIREMENTS OF AN INJUNCTION

9.12 Any failure to comply with the terms of an injunction is always an extremely serious matter. (A person who does not comply is in contempt of the Court and is technically known as a "contemner".) The provisions of Order 45, rule 5, of the Rules of the Supreme Court give the Court discretion to commit to a term of imprisonment someone who refuses or neglects to do something required by a Court order within the time specified in the order. But, as with the grant of an injunction, the Court has discretion to decide whether a term of imprisonment is appropriate in the particular circumstances of any contempt it has to consider. How that discretion may be exercised in the case of a planning enforcement

injunction is illustrated by the Court of Appeal's judgment, on 4 October 1993, in the case of *Quildford BC v Valler and Others* (Times Law Report, 15 October 1993), where Guildford BC sought to enforce the terms of an injunction under section 187B of the 1990 Act against a group of gypsies who continued to occupy a residential caravan site on their privately owned land in the Council's area. In earlier proceedings in the High Court, on 20 April *1993* [1993] EGCS 78, Mr Justice Sedley had concluded that committal to prison for contempt should not be ordered unless the defendant's conduct involved a degree of fault or misconduct. In this case, the Judge considered that the gypsies had done all they could possibly do to find a collective site and the Council could suggest no alternative site in their area. Accordingly, as there was no evidence of wilful or deliberate disobedience of the Court's order, nor any wilful refusal or neglect to comply with it, the defendant's contempt could not attract a prison sentence. The Court of Appeal held that the High Court Judge had taken too narrow a view of the Court's power to sentence a contemner to a prison term. The judgment held, instead, that the High Court had jurisdiction to commit a contemner to prison for negligently failing to comply with an injunction. This was necessary to enable the Court to act as a guarantor of the rule of law. However, the power was discretionary and enforcement was not automatically available at the demand of the plaintiff whose rights were being infringed. In conclusion, the Court of Appeal also held that the High Court had been right not to impose a prison term in this case where an order of committal would have faced the particular group of gypsies with a stark choice between imprisonment and abandoning their communal existence. There appears to be no conclusive authority on the effect of a contemner's release from prison on the injunction. However, in the case of In *re Barrell Enterprises* [1973] 1WLR 19, the Court of Appeal held that a person should be released after six months imprisonment even though there was no likelihood of her complying with the injunction in respect of which she was in contempt. This suggests that the Court assumed that she would not be imprisoned again for the same, continuing contempt.

CONSIDERING WHETHER TO INITIATE INJUNCTIVE PROCEEDINGS

9.13 The decision whether to initiate injunctive proceedings must always depend on the particular circumstances of an actual or apprehended breach of control. It should normally be a corporate decision, involving the Council's Planning and Legal Departments. The legal considerations may be so complex that it is prudent to obtain a Counsel's opinion on the merits of the case as part of the decision-making process. If Counsel advises that there is an arguable case but that it is almost certain to fail, there would need to be extremely exceptional circumstances to justify bringing the proceedings. In any event, if proceedings are to be brought in the High Court, Counsel will have to be instructed, and it is always difficult to instruct Counsel to advocate a case which he or she has advised against. What matters is whether the grant of an injunction is the only effective means of taking enforcement action in the particular circumstances faced by the Council.

CHAPTER 10

"Default" action to secure compliance with enforcement notice

THE "DEFAULT" POWER

10.1 Section 178 of the Town and Country Planning Act 1990 enables the LPA to take action where, on expiry of the enforcement notice compliance period, the required steps have not been taken, by carrying out "default" action themselves and recovering their reasonable expenses from the then owner of the enforcement notice land. The provisions of section 178(1) of the 1990 Act are—

"Where any steps required by an enforcement notice to be taken are not taken within the period for compliance with the notice, the local planning authority may—

(a) enter the land and take the steps; and

(b) recover from the person who is then the owner of the land any expenses reasonably incurred by them in doing so."

Since the scope of this power was extended by provisions in the Planning and Compensation Act 1991, some LPAs have found it the most effective and economical way of securing compliance with an enforcement notice where the owner or occupier of the land is reluctant to carry out the requirements. In some cases, a formal notification of the LPA's intention to carry out required works on a future date has persuaded the owner or occupier to do what is required.

THE SCOPE OF DEFAULT ACTION

10.2 While it is now clear that the scope of the LPA's "default" action extends to the whole range of steps which may be required by virtue of the provisions in section 173(3) to (7) of the 1990 Act, particular care is essential when action is taken to compel a use of land to cease. For example, where the required steps are to cease the use of privately owned land as a residential caravan site and to remove all the caravans stationed on the land, if the LPA are also the housing authority, they will need to consider what statutory duty they may have towards people who could be homeless on eviction from the site. If the LPA are not the housing authority, they will need to consider the housing authority's position.

THE POSSIBILITY OF JUDICIAL REVIEW

10.3 The LPA's decision to take "default" action may be challenged by a leave application to seek a judicial review of the decision in the High Court, on the ground that it is "Wednesbury unreasonable". In that event, the LPA will need to show that they have acted reasonably (in the "Wednesbury" sense) by considering all the relevant circumstances before deciding to take action. In the case of R v Greenwich LBC ex parte Patel [1985] JPL 851, the Court of Appeal discussed the circumstance where default action was to be taken against an owner of land who had not been served with a copy of an enforcement notice (because his existence was entirely unknown to the LPA), and consequently had not appealed against it, but was able to adduce facts which might have resulted in a successful enforcement appeal. The Court concluded that, in a case of this kind, the LPA ought to investigate the relevant facts before deciding to take "default" action. If the LPA failed to investigate the facts, it would amount to unreasonable conduct; and, while the Court could not itself question the validity of the extant enforcement notice, the Court would be entitled to review the decision to initiate "default" action.

PRACTICAL ARRANGEMENTS FOR TAKING DEFAULT ACTION

10.4 Default action must be planned, organised and implemented with the utmost care. While such action may well stimulate publicity, which the LPA may welcome (or even encourage), on the ground that they will be seen to be determined not to tolerate persistent contravention of an enforcement notice, the owner or occupier of the site may strongly resent, and possibly try to prevent implementation of, the authority's decision. There may even be threats of violence or an anticipated breach of the peace. If that is expected, the co-operation of the local constabulary should always be sought.

10.5 Among the practical matters which the LPA need to consider when planning default action are—

(1) exactly what must be done (including any necessary operational development on the land) in order to carry out the required steps in the enforcement notice;

(2) what is the best time of day to carry out the operation and how long it is likely to take;

(3) who is best equipped to carry out the operation—the Council's staff or a private contractor;

(4) whether any special powers of entry are needed;

(5) what other local authority services need to be involved, eg the Social Services Department;

(6) if chattels (eg caravans, cars, working equipment) are to be removed from the land, where they can be stored securely until their owner can retrieve them.

If a breach of the peace or any more serious disturbance is anticipated, it may be advisable for the LPA to seek an injunction under section 187B of the 1990 Act as a precaution and to encourage any necessary police presence.

10.6 Section 178(6) of the 1990 Act creates an offence of wilful obstruction of any person who is exercisingthe LPA's power to take "default" enforcement action. The offence is triable summarily in the Magistrates' Court, where the maximum penalty on conviction is £1,000. In any proceedings for this type of offence, the LPA will be required by the Court to prove their case "beyond reasonable doubt" (the criminal standard of proof). If the LPA anticipate, in any case where default action is to be taken, there is likely to be wilful obstruction by the owner or occupiers of the enforcement notice site, it is a sensible precaution to warn those concerned that they will risk criminal prosecution if obstruction occurs.

THE LPA'S POWER TO RECOVER THEIR EXPENSES OF "DEFAULT" ACTION

10.7 The provisions of section 178(1)(b) of the 1990 Act enable the LPA "to recover from the person who is then the owner of the land any expenses reasonably incurred by them" in taking default enforcement action. Regulation 14 of the Town and Country Planning General Regulations 1992 (SI 1992/1492) applies the provisions of sections 276, 289 and 294 of the Public Health Act 1936 for this purpose. By virtue of regulation 14(2) of the General Regulations 1992, the LPA's expenses in taking default action become a legal charge on the land to which the enforcement notice relates until the expenses are fully recovered. This charge is binding on successive owners of the enforcement notice land.

SUBSEQUENT REINSTATEMENT OF WORKS WHICH HAD BEEN REMOVED

10.8 The provisions of section 181 of the 1990 Act deal with the circumstance where, in contravention of an effective enforcement notice, any development is carried out on land by way of reinstating or restoring buildings or works which have been removed or altered in compliance with the notice. If the LPA propose to take "default" action (in accordance with section 178 of the 1990 Act) for the purpose of removing or altering the buildings or works resulting from this further reinstatement or restoration, the provisions of section 18 1(4) require them to give the owner and occupier of the enforcement notice land not less than 28 days' notice of their intention to take such action. There is no specific requirement about the way this notice should be given to the owner and occupier: the provisions of section 329 of the 1990 Act thus apply in the normal way. If notice is to be given by letter, it would be advisable to send it by recorded delivery service. It is noteworthy that the only *requirement* to give notice of an intention to take "default" action, is in respect of such action taken in these particular circumstances.

10.9 Section 181(5) of the 1990 Act makes it an offence for someone to carry out, without planning permission, any development on land by way of reinstating or restoring buildings or works which have been removed or altered in compliance with an enforcement notice. On summary conviction for this offence in the Magistrates' Court, the maximum penalty is £5,000. Although there is no statutory defence against prosecution for this offence, section 181(5)(b) provides that no person shall be liable for a separate offence under section 179(2) of the 1990 Act of failure to take any steps required by an enforcement notice by way of removal or alteration of what has been reinstated or restored.

CHAPTER 11

Prosecuting enforcement notice offences

INTRODUCTION

11.1 Section 179 of the Town and Country Planning Act 1990 provides that a criminal offence occurs where the requirements of an effective enforcement notice are contravened after the date on which the compliance period stated in the notice expires. Once a compliance period in an enforcement notice has expired and there is evidence to show, "beyond reasonable doubt" (the criminal standard of proof), that any requirement in the notice has been, or is being, contravened, it is open to the LPA to initiate a prosecution of the offence. Whether prosecution in the Court is the most appropriate way to achieve compliance with an effective enforcement notice is for the LPA to decide. In some cases, it may suffice for the LPA to warn of their intention to prosecute if, during the compliance period, someone is seen to make no serious effort to take the steps an enforcement notice requires.

11.2 The LPA should consider carefully what is likely to be the most efficient and cost-effective way of compelling someone who is contravening an enforcement notice to comply with its requirements. If it is known that prosecution proceedings will result in substantial delay in remedying the effects of a breach of control, the LPA may prefer the alternative course of taking "default" action under section 178 of the 1990 Act. Or it may be expedient simultaneously to initiate prosecution proceedings and take "default" action, especially if the offence is blatant and causes serious environmental harm.

11.3 Section 179 of the 1990 Act provides for two separate categories of enforcement notice offence, depending on whether the defendant is the owner of the land or not. These two categories are described, respectively, in the following paragraphs 11.4 to 11.6 and 11.7 to 11.8.

OFFENCE COMMITTED BY THE OWNER OF LAND

11.4 Section 179(1) and (2) of the 1990 Act provide for an offence to be committed by the owner of the enforcement notice land, as follows—

"(1) Where, at any time after the end of the period for compliance with an enforcement notice, any step required by the notice to be taken has not been taken or any activity required by the notice to cease is being carried on, the person who is then the owner of the land is in breach of the notice.

(2) Where the owner of the land is in breach of an enforcement notice he shall be guilty of an offence."

It is clear from these provisions that, to be guilty of an enforcement notice offence, an owner of the land must be the legal owner throughout the period during which the offence is alleged to have occurred. If ownership of the land transfers to another person and the offence continues, or it is resumed by another person after a successful prosecution of the previous owner, the subsequent owner becomes liable to prosecution.

11.5 Section 179(3) provides a defence against prosecution for an owner of enforcement notice land who shows "that he did everything he could be expected to do to secure compliance with the notice". This defence provision is available to enable a defendant to submit to the Court that, in the particular circumstances of any prosecution proceedings, he or she is legally or practically prevented from achieving compliance with an enforcement notice. For example, the owner may have granted a lease in specific terms which prevent him or her from stopping the lessee's activities in contravention of the enforcement notice. The nature of this defence was considered by the High Court in the case of Kent CC *v John* A *Brockman.* In judgment given on 10 October 1993, [1994] JPL B27, the Court held that it would be contrary to the tenets of criminal law to find somebody guilty of not doing something which they were genuinely incapable of doing. If a defendant was genuinely incapacitated, even if he had done nothing, he could still make out a defence because he could not be expected to do anything. The Magistrates' Court or Crown Court should be fairly rigorous in the proof they demanded of a defendant, and "not allow itself to be hoodwinked by protestations of impecuniosity on behalf of an individual". In giving his judgment Lord Justice Simon Brown said—

"It is clearly imperative that land should not be left in an unsatisfactory state, perhaps as a public eyesore, unless a landowner has taken every practical step to overcome his financial problems in complying with the requirements of the enforcement notice, to the extent if need be of selling his land, if that is possible, to ensure that it will be put into a proper state."

11.6 The owner of the land (and any other defendant) has a further defence, in section 179(7) of the 1990 Act, namely that he or she has not been served with a copy of the enforcement notice and the notice is not contained in the enforcement notice register (which the LPA are required to keep, by virtue of section 188 of the 1990 Act), if such a person can show that he or she was not aware of the existence of the notice.

OFFENCE COMMITTED BY SOMEONE WHO CONTROLS OR HAS AN INTEREST IN THE LAND

11.7 Section 179(4) and (5) of the 1990 Act provide for an offence to be committed by someone who controls or has an interest in the enforcement notice land, as follows—

"(4) A person who has control of or an interest in the land to which an enforcement notice relates (other than the owner) must not carry on any activity which is required by the notice to cease or cause or permit such an activity to be carried on.

(5) A person who, at any time after the end of the period for compliance with the notice, contravenes subsection (4) shall be guilty of an offence."

This second category of offence relates specifically to someone who exercises legal control over the enforcement notice land (eg. a sub-tenant operating his or her own business) or someone who has a separate legal interest in the land from the owner's interest. These

provisions were considered by the Queen's Bench Divisional Court, on 11 May 1994, in the case of Holmes and Another v Bradford MCC (Times Law Report, 19 May 1994). The Court held that an owner of enforcement notice land could not be properly charged under section 179(4) of the 1990 Act.

11.8 The question whether a person who is to be prosecuted for this second category of offence has the power to permit a contravening activity to be carried on (as in section 179(4) of the 1990 Act) may be especially difficult for the LPA to address in prosecution proceedings. Judicial authority suggests that a person is unlikely to be held by the Court to have permitted someone else to carry on an activity unless he or she has the legal power to forbid the activity **and** has not taken reasonable steps which are open to him or her to prevent it.

THE NATURE OF AN ENFORCEMENT NOTICE OFFENCE

11.9 In a judgment relating to the previous enforcement notice offence provisions (in section 89(5) of the Town and Country Planning Act 1971) in the case of R *v Collett and Others* [1994] 2 All ER 372, the Court of Appeal held, on 21 October 1993, that this offence is an offence of "absolute liability". Whilst, in the Court's view, the presumption remained that a "guilty mind" ("mens rea") was required for a criminal offence to have occurred, that presumption could be set aside if the proper construction of the statutory provisions made it plain that Parliament did not intend that it should be necessary to establish a "guilty mind", particularly if that approach would appear to promote the object of the statute. It follows from this judgment that, in bringing enforcement notice prosecution proceedings under what is now section 179 of the 1990 Act, the LPA are not required to prove that the defendant knew of the existence of the enforcement notice before he or she can be convicted of a criminal offence. The Court of Appeal, in the case of R *v Collett*, also specifically gave its view that "the policy of the Act was to impose absolute liability so as to encourage vigilance on the part of the landowners and users."

CHALLENGING THE VALIDITY OF AN ENFORCEMENT NOTICE IN PROSECUTION PROCEEDINGS

11.10 The effect of provisions in section 285 of the 1990 Act is to limit very greatly the scope for challenging the validity of an enforcement notice by way of a defence against prosecution under section 179 of the 1990 Act. The provisions of section 285(1) and (2) are—

"(1) The validity of an enforcement notice shall not, except by way of an appeal under Part VII be questioned in any proceedings whatsoever on any of the grounds on which such an appeal may be brought.

(2) Subsection (1) shall not apply to proceedings brought under section 179 against a person who—

(a) has held an interest in the land since before the enforcement notice was issued under that Part;

(b) did not have a copy of the enforcement notice served on him under that Part; and

(c) satisfies the Court—

(i) that he did not know and could not reasonably have been expected to know that the enforcement notice had been issued; and

(ii) that his interests have been substantially prejudiced by the failure to serve him with a copy of it."

Thus, apart from this very limited defence available to someone who can prove to the Court that he or she is within the scope of section 285(2), the only way to challenge the validity of an enforcement notice is by an appeal against it (to the Secretary of State) under section 174 of the 1990 Act.

11.11 How the validity of an enforcement notice might be challenged was considered by the Court of Appeal's judgement in the case of R *v Wicks* on 11 April 1995, [1996] JPL 743. The Court held that, so long as an enforcement notice was not a nullity, it was an enforcement notice and would remain so until quashed; and, for an offence under section 179(2) of the 1990 Act to be proved, there was no requirement for the prosecution to call evidence that the LPA's decision to issue the notice had been "intra vires". Only the High Court had the power to quash an enforcement notice (in judicial review proceedings); no criminal court had such a power. If an allegation about the validity of a notice was raised in criminal proceedings, the criminal court might then have to consider matters of planning policy, which were not appropriate, whereas such matters were the everyday concern of "Crown Office list" Judges, who dealt with judicial review applications. And the judicial review procedure should not be bypassed by someone served with an enforcement notice. Accordingly, it was not proper to challenge the LPA's decision to issue an enforcement notice, on the ground of "Wednesbury unreasonableness", by way of a defence to an indictment alleging an offence under section 179(1) of the 1990 Act.

11.12 The practical effect of the provisions of section 285(1) of the 1990 Act is further illustrated in the High Court's judgement, on 22 February 1996, in the case of *Vale of White Horse DC v Treble-Parker and Another* [1996] EGCS 40. The Magistrates' Court had dismissed two informations laid by the Council under section 179 of the 1990 Act. The question for the High Court to decide, on the Council's appeal, was whether the provisions of section 285(1) of the 1990 Act precluded the Magistrates from allowing evidence showing storage of vehicles taking place more than 10 years before service of the enforcement notice; or whether the Magistrates were required to allow such evidence to enable the respondents to establish their defence. The High Court allowed the Council's appeal, set aside the acquittal, and remitted the case to the Magistrates' Court. The High Court held that it was not open to the defendants to argue in the Magistrates' Court that their use of land was "immune" from enforcement action. The proper remedy had been for the defendants to appeal to the Secretary of State against the enforcement notice; but they had previously withdrawn their appeal and the provisions of section 285(1) of the 1990 Act now precluded them from raising these arguments in their defence against prosecution.

PRESENTING THE PROSECUTION'S CASE EFFECTIVELY IN COURT

11.13 Some LPAs are concerned that certain Magistrates' Courts do not appear fully to appreciate the serious nature of the offence for which section 179 of the 1990 Act provides. In discussion between officials of the Magistrates' Association and the Department of the Environment, the Association has pointed out that each Magistrates' Court has little

practical experience of enforcement notice prosecutions and it is therefore helpful for the LPA's prosecutor to explain fully to the Court the context in which the alleged offence has occurred.

11.14 Depending on the circumstances of the case, the following approach should usually help the Court fully to appreciate the strength of the prosecution's case—

(1) explain that the provisions of section 179 of the 1990 Act make it a criminal offence to contravene the requirements of an enforcement notice after the reasonably allowed compliance period has expired;

(2) describe the procedure adopted by the Council to enforce against the particular breach of planning control, including the time it has taken since the date of issue of the enforcement notice and the result of any appeal to the Secretary of State;

In the case of R *v Sandhu* [1996], TLR 2 January 1997, the Court of Appeal held, on 10 December 1996, that to adduce evidence which went beyond proof of elements necessary to be established for an offence of strict liability was not an optional extra for the prosecution; and to adduce inadmissible evidence which was prejudicial to the defendant had to be objectionable. (Although this case concerned a listed prosecution, it appears to be apt also to planning enforcement prosecution proceedings.) In the light of this case, evidence concerning such matters as whether the offence is blatant, carelessness or negligence, the degree of harm to amenity in the neighbourhood of the site that has resulted from the offence; the maximum penalty available and an attempt to relate the penalty to the estimated amount of profit accruing from the offence, and the prosecution's costs in bringing the case to Court, is irrelevant to the issue of proving the offence, and inadmissible. However, it might be relevant to the Court's assessment of the appropriate penalty.

APPLICATION BY THE DEFENDANT FOR AN ADJOURNMENT

11.15 Sometimes an application is made to the Court on the defendant's behalf for an adjournment (which may be an adjournment of the hearing or of the Court's sentence when the defendant has been found guilty), on the ground that a retrospective planning application has been submitted to the LPA and remains undecided or the outcome of a planning appeal to the Secretary of State is awaited. Any such application should normally be resisted, citing in support of the prosecution's case the judgement of the Queen's Bench Divisional Court, on 12 February 1993, in the case of R *v Beaconsfield Magistrates ex parte South Bucks* DC [1993] JPL B53. The Court held in that case that "as a general rule, the Magistrates must deal with the matter forthwith, unless there is a prospect that the planning application's fate will be known shortly." Section 180(3) of the 1990 Act may also usefully be cited. This makes clear that a subsequent grant of planning permission does not affect the liability of any person for an offence in respect of failing, meanwhile, to comply or secure compliance with the requirements of an enforcement (or breach of condition) notice.

FURTHER APPEAL TO COURT OF APPEAL (CRIMINAL DIVISION)

11.16 Occasionally, a convicted person appeals against conviction for an enforcement notice offence to the Court of Appeal (Criminal Division). In that event, the case must take its turn with other appeals before the Court for serious crime where the appellant may be

serving a term of imprisonment. However, the Court of Appeal (Criminal Division) is aware that an appellant convicted of an enforcement notice offence may have a particular incentive to defer, for as long as possible, the successful resolution of the case because it will effectively frustrate the prosecuting LPA's interest in completing the planning enforcement process. It is thus open to the LPA to request an "expedited hearing" by the Court. This can be done by arranging for the LPA's Solicitor to write personally to the Court's Registrar, explaining the nature of the breach of control and its impact on amenity in the neighbourhood. It is also helpful to inform the Registrar about any other proceedings against the appellant which depend on the outcome of the appeal to the Court of Appeal (Criminal Division)..

THE PENALTIES ON CONVICTION OF AN ENFORCEMENT NOTICE OFFENCE

11.17 Section 179(8) of the 1990 Act specifies the penalties which the Court may impose on conviction of an enforcement notice offence. They are —

(1) on summary conviction in the Magistrates' Court, a fine not exceeding £20,000; and

(2) on conviction on indictment in the Crown Court, a fine of an unlimited amount.

There is no power to sentence a convicted defendant to a term of imprisonment under section 179 of the 1990 Act. But someone who defaults on payment of a fine imposed under section 179(8) may be imprisoned as a fine defaulter, at the Court's discretion.

11.18 Section 179(9) of the 1990 Act provides that, in deciding the amount of any fine for an enforcement notice offence, the Court shall in particular have regard to any financial benefit which has accrued or appears likely to accrue to the convicted person in consequence of the offence. These provisions are specifically intended to enable the Court to take into account the profitability of an enforcement notice offence to the convicted person. It is therefore advisable for the LPA's prosecutor to draw the Court's attention to the availability of this power and, wherever possible, to offer the Court some estimate of the financial gain resulting from commission of the offence.

11.19 Subsection (9) does not lessen the concurrent obligation of the Court, when imposing a fine, to have regard not only to the seriousness of the offence, but also the financial circumstances of the offender. (Sections 18(2) and (3) of the Criminal Justice Act 1991.) The Court of Appeal, on 1 December 1995, in the case of R *v Browning* [1996] 1PLR 61, in substituting a fine of £1,000 for the fine of £25,000 imposed in the Crown Court, emphasised that the amount of fine should not be fixed solely by reference to the accrued benefit, and that regard should also be had to the question of the ability to pay.

CHAPTER 12

Efficient and Effective Organisation of Planning Enforcement

INTRODUCTION

12.1 Planning enforcement is the most technically complex component of the development control régime. To be effective, it requires whole-hearted co-operation between people with experience in a range of professional and investigative disciplines at each successive stage of the enforcement process. Occasionally, that process may be prolonged and make unforeseen demands on the LPA's staff and financial resources. Unless the LPA's enforcement function is efficiently organised, resources will be wasted and the authority's performance will not reach acceptable standards. It may be desirable to seek specialist Counsel's opinion when dealing with difficult cases involving problems/areas of law with which the authority is not familiar.

ACTION OR REACTION

12.2 The traditional approach to planning enforcement is to confine the activity mainly to a response to neighbours' complaints of alleged breaches of control. Whether the LPA can take a more positive approach will depend on the resources members are willing to commit to this function. To confine the enforcement function to a reactive response may sometimes store up more difficulty for the future. In allocating the Council's resources, it must be recognised that planning enforcement activity is almost always labour-intensive. Thorough investigation of the relevant planning history and painstaking evaluation of the facts are the foundation for effective enforcement. Neither can be obtained cheaply.

SETTING PRIORITIES

12.3 Enforcement cases must be progressed quickly at every stage. Because not every case can be given top priority, it is essential to establish a set of priorities which will enable enforcement staff to maximise their output. Setting priorities is a matter for each LPA to address in their own development control context. An example of a possible order of priorities might be on the following lines—

(1) any unauthorised development which causes immediate and irremediable harm in the locality;

(2) unauthorised demolition or partial demolition of a building which it is essential to retain;

(3) breach of a condition which results in serious harm to amenity in the neighbourhood;

(4) unauthorised development in a National Park, AONB or Conservation Area;

(5) any unauthorised development where the time-limit for enforcement action will expire within the next six months.

In some areas, the LPA may be faced with numerous cases of one type of particularly harmful or prevalent unauthorised development, such as home-working with noisy equipment, mini-cab offices, or take-away food premises, making it essential to establish and maintain firm control over every incident of that category of development as soon as it appears. In this situation, enforcement action must be determined and well-publicised.

TARGET TIME-LIMITS FOR PROGRESSING ENFORCEMENT ACTION

12.4 When formal enforcement action follows from a neighbour's complaint, the LPA should have target time-limits within which they anticipate taking each step of the enforcement process. The time-limits will depend on the resources allocated to planning enforcement functions. Successive steps might be—

(1) acknowledge the complaint and obtain any supplementary information required to investigate it;

(2) investigate the current facts and the planning history;

(3) produce a situation report, including any legal advice on issues arising from the investigation;

(4) submit a considered recommendation to the appropriate decision-maker (usually the Planning Committee or an officer with delegated authority);

(5) obtain and record the decision on enforcement action;

(6) implement the decision;

(7) report the decision and initial outcome to the complainant;

(8) monitor the practical effect of implementing the decision;

(9) review the need for possible further enforcement action.

When the decision at sub-paragraph (5) above is to issue an enforcement notice and it results in an appeal to the Secretary of State, each stage of the appeal process must be supervised to ensure that the LPA's response to the appeal is on time and, if appropriate, approved by the Planning Committee or officer with delegated power. Whether to serve a stop notice, if one has not already been served, should be considered as soon as an appeal is notified to the LPA. If the appeal process proves lengthy, the need to serve a stop notice should be reviewed at pre-arranged intervals.

DOCUMENTING THE CASE

12.5 Throughout the enforcement process it is essential to maintain a complete, accurate and up-to-date record of all investigation carried out and assessment of the results. This is particularly important in cases where the initial decision isnot to initiate formal enforcement action: if it is necessary to return to that case in future, officers who will then have to deal with it will be able to establish the relevant facts quickly.

12.6 The case-record should contain the following information—

(1) the alleged breach of control (as notified to the LPA);

(2) the date of first notification;

(3) the identity of the complainant;

(4) the address of the site;

(5) the identity of the site's owner and any separate occupier;

(6) brief description of the site (including any relevant photographs, which should always be dated);

(7) the alleged breach of control (as established by the LPA's officers, following initial investigation);

(8) summary of the factual evidence;

(9) summary of the planning history;

(10) planning policies applicable to the site;

(11) summary of recommendation on enforcement action;

(12) implementation of LPA's decision;

(13) if an enforcement notice is issued—

(a) date of issue;

(b) intended effective date;

(c) date compliance period expires;

(d) summary of required steps;

(e) date on which any appeal is notified;

(f) actual effective date

[A similar record should be maintained for any other formal enforcement action taken.]

(14) result of formal enforcement action;

(15) summary of any subsequent monitoring of the site.

12.7 Documenting and processing a case can be carried out more efficiently if computerised and word-processing systems are used. Computerised systems are particularly valuable for keeping enforcement records up-to-date; enabling records to be quickly accessed; and providing information which can be used to assess whether the running cost of the enforcement process is being kept within budget.

THE ORGANISATION OF THE ENFORCEMENT TEAM

12.8 There is no "right" and "wrong" way to organise and deploy the people who are responsible for the LPA's enforcement work. It is generally true that the more enforcement work the authority's officers are engaged in the more efficient and effective they become. Because enforcing planning control is becoming steadily more specialised and public expectations are more demanding, it is usually preferable to maintain a specialised "enforcement team" where the volume of case-work is sufficient to justify this approach. LPAs should ensure that legal advice is available at short notice where required.

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