

# Scrutiny Sub-Committee C

Wednesday March 3 2010  
7.00 pm

## Supplemental Agenda

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Update note to assist scoping of planning enforcement scrutiny projectCouncillor Gordon Nardell –February 2010

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1. This note should be read with the scoping note I gave the Sub-Committee in January 2009 (attached) – see the “Peckham as a case study” section. It outlines highlights/lowlights of the Lane ward councillors’ enforcement mailbag since 2006, plus other Peckham enforcement cases that have come to my attention, and treats them as a representative profile.
2. There is a fair spread of differing degrees of seriousness and complexity. Some of the cases are good examples of a swift and effective response to breaches of control. Others reflect problems of the kind sketched out in my January 2009 note. I have also referred to one or two other examples/sources of information about enforcement performance over the past year or so. I hope that identifying these cases will help officers, and members of the public with an interest in the issues, to focus their evidence to the Sub-Committee.
3. **Case (i): 5a Bushey Hill Road SE5** An example of good practice in relation to a particular breach of planning control, but also of confusion about roles in relation to other alleged breaches.
  - 3.1. Planning permission was granted for residential redevelopment of a backland site between residential streets (Bushey Hill Road and Talfourd Road) running south from Peckham Road. In its location and scale this is typical of many sites that come forward for residential development around Peckham. There were two narrow access ways – one from Peckham Road, the other from Bushey Hill Rd. A condition prohibited use of the Peckham Road access for site traffic. The access way passed between two residential buildings with front doors directly onto the access.
  - 3.2. In breach of condition, heavy vehicles used the Peckham Road access, endangering residents of the two buildings, who complained to officers. Officers served a BCN, along with a TSN to prevent the breach during the 28-day waiting period before the BCN came into force. That largely resolved the problem. There were, however, one or two further breaches, and there was a suggestion by residents that a junior officer had purported to relax the restriction by allowing certain vehicle movements. Whether or not that was so, senior officers quite properly insisted on strict compliance with the BCN. There was at one point a threat of prosecution, though (as far as I can recall) no prosecution was actually brought.
  - 3.3. Residents also complained to members about deviations from the approved plans. I do not have any particular concerns about

the outcome. But there was an animated exchange, which involved legal officers, about the appropriateness of CC planning meetings as a forum for reports or depositions about enforcement items. That precipitated a practice of enforcement officers giving regular written/oral reports to CC public meetings about planning enforcement, taking questions from members of the public.

4. **Case (ii): Holly Grove Ironworks, 1-4 Holly Grove, SE15** Unfortunately an example of a sluggish response to a flagrant and harmful breach of planning control, raising issues about (among other things) the Council's approach to potential compensation liability for enforcement action.
  - 4.1. Holly Grove runs west from Rye Lane just south of and parallel to the rail tracks and station. This a 2-storey building just to the west of the access way to the station and immediately abutting the terrace of houses on Holly Grove that fall within the Holly Grove Conservation Area. A number of the houses are also listed buildings. The former ironworks had been used for some years for light industrial/employment activities. The UDP confines retail activity here to the Rye Lane frontage.
  - 4.2. The owners of a large fish and meat retailer on Rye Lane acquired the premises and, without planning permission, opened them as a retail outlet, with prominent incongruous signage describing it as a "massive meat and fish market". Unauthorised alterations were also made to create a shopfront.
  - 4.3. Residents immediately complained to officers and members. Members pressed officers to take urgent enforcement action. The local view was that the harm caused by the unauthorised operations and change of use was not just the impact on visual and other amenity – significant though that was – but also as contributing to a growing sense of lawlessness in Peckham. That is, traders and operators at the lower end of the market habitually flout planning and other regulatory controls, leading to a haphazard rather than planned approach to development and activity in and around the town centre.
  - 4.4. Enforcement action was eventually taken, but not until some months after officers had been made aware of the breach of control. Enforcement and stop notices were served. The operator appealed against the enforcement notice and lost. Attempts are being made to find an acceptable use – possibly cultural (an artists studio or similar) – for the premises.
  - 4.5. Officers' reasons for refusing to take urgent steps from the outset referred to the possibility of having to pay compensation to the

operator if a TSN were served. That raises three issues of general importance.

- 4.6. First, it is far from clear that officers' position was based on any adequate risk assessment incorporating accurate legal advice.
- 4.7. The legislation prevents compensation from being claimed where the activity an SN or TSN prohibits was *at any time* unauthorised. So the subsequent retrospective grant of planning permission creates no risk of compensation. In my experience local authorities often take a knee-jerk approach to compensation risk instead of carefully assessing that risk and balancing it against the harm resulting from inaction.
- 4.8. Such an approach has regrettably been evident in some local planning decisions: in 2008 officers advised Planning Committee, on compensation risk grounds, against making an Article 4 direction to prevent demolition of a building (155 Chadwick Road SE15) of acknowledged high architectural value. Members nevertheless made the direction. The Secretary of State subsequently confirmed it. I understand the owner attempted but failed to establish entitlement to compensation. In the Holly Grove case, no claim for compensation has been made in respect of the SN eventually served. Ward members' view is that there was never any real likelihood of having to pay compensation in respect of a TSN.
- 4.9. The Committee may wish to hear evidence about the Council's approach to compensation risk and its impact on enforcement decisions.
- 4.10. Second, even if there was a risk of compensation liability in principle, it was exacerbated by the hesitation in taking action. That allowed the business to become established. The whole point of a TSN is precisely that it stops a breach of planning control in its tracks.
- 4.11. Third, no consideration appears to have been given in this case to applying for an injunction. That would have given rise to no compensation liability. Though the Council would incur its own legal costs, if the application were successful it is almost certain the developer/operator would be ordered to pay them. My recollection from the annual statistics considered by Planning Committee in 2009 is that the Council made no use at all of planning injunctions during the relevant period. The Committee may want to explore with officers the Council's attitude to injunctions generally.
- 4.12. Residents dissatisfied with the Council's enforcement performance in this case pressed N&PR Community Council to

examine ways of bringing together the Council's – and other agencies' -- enforcement functions to take a more joined-up approach. Swift action can only be taken against breaches of planning control if they come promptly to the attention of enforcement officers.

- 4.13. I attended a meeting in autumn 2008 (30.9.08) with representatives of a variety of departments and agencies. The initiative was led by David Strevens (community safety). Others involved included community wardens, planning enforcement, Met Police SNT, environmental enforcement, and Peckham Town Centre Management Group. There was agreement in principle that a joined-up approach would be welcome, and that it this was sensible in the light of the complexity and inter-related nature of the regulatory problems in and around Peckham Town Centre. There had already been some multi-agency operations, and it was agreed ways should be found of including planning enforcement in the mix. It might be useful for the Committee to investigate what systems have been since been put in place to enable this to happen.

5. **Case (iii): Unauthorised shopfront alterations – Rye Lane, Peckham High Street and Queen's Road** This has been a long-running problem affecting The Lane and Peckham wards.

- 5.1. In short, there is a history of traders making a variety of shopfront alterations, without planning permission, that have a deleterious effect on the streetscene. These include replacing shop windows with booths or stalls for retail sub-operations (eg. a stall selling mobile phone cards etc. within the shopfront of a food retailer), and installing opaque exterior roller shutters. Roller shutters, once closed after the day's trading, create a bleak outlook and entrench a sense of fear of crime.
- 5.2. Officers have periodically reported to Community Council on a variety of individual cases. But there is a sense of lack of progress or overall strategy. The subject was discussed at the autumn 2008 multi-agency meeting. It was agreed that a carrot and stick approach would be desirable: advice and assistance should be made available to traders on alternative methods for securing their premises, while enforcement action should be taken prioritising those cases where alterations were about to become immune from enforcement (the four-year time limit). In the wake of that there was a brief e-mail exchange about ongoing enforcement action against 139, 143, 145 an 147 Peckham High Street (all in Peckham ward). I do not know the outcome of that action.

- 5.3. It would be useful for the Committee to receive an up to date report on progress and strategy, in particular on the role of planning enforcement powers in tackling this sort of problem. One particular issue it may be worth focusing on is prioritisation of resources so as to avoid unauthorised works from acquiring immunity through passage of time.
6. **Case (iv):** This case raises the important question of how steps can be taken to ensure breaches of planning control in the course of carrying out development can be brought to officers' attention so as to enable timely enforcement action.
- 6.1. Nunhead and Peckham Rye CC considered an application for planning permission for a multiple unit residential block at this site. This was effectively an application to retain and complete a building authorised by a previous grant of permission. The maximum height of the consented scheme was x, but approved floor-to-floor heights failed to allow for the necessary concrete floor slab at first floor level and sufficient space for installation of insulation and services. The building skeleton was substantially completed, higher than approved, by x when officers required work to cease.
- 6.2. NPRCC resolved to refuse planning permission and expressed disquiet that work had been allowed to progress to this point before enforcement action was taken. We were not prepared to "regularise" the breach: we thought the external design and appearance were of poor quality, and that these harmful effects in this prominent town centre location were amplified by the greater bulk and massing than originally approved.
- 6.3. The Committee may wish to invite officers to comment on what lessons have been learned from this and any similar cases, in particular what mechanisms can be put in place to detect deviations from approved plans early in the construction process.
7. **Case (v):** This site forms a compound consisting of – a former industrial building; one or two other light industrial units still in use, including a studio; and a large, rough, unsurfaced yard area. This was the very first piece of casework I received when elected in 2006. It is still unresolved.
- 7.1. Planning permission was granted some years ago for this residential conversion. The conversion was completed and units sold/leased off and occupied. But in breach of condition the developer failed to submit details, and subsequently complete, (a) car parking for x vehicles, and b) secure cycle parking.

Provision of the car parking area would have resulting in the surfacing and laying out of the yard area., which remains extremely unsightly.

- 7.2. It turned out that the plans approved by the Council were inaccurate, and the parking area could not accommodate all the x vehicles. The developer submitted fresh applications for provision of parking but only as part of an additional residential building on the site, which was unacceptable. Stalemate resulted.
- 7.3. I gave officers a detailed paper setting out a suggested strategy of "under-enforcement" – issue of an enforcement notice requiring provision of x spaces rather than the original x. The then enforcement officer made impressive progress, sending a letter warning of enforcement action, resulting in a site meeting and agreement by the developer to take the necessary steps. When those were not taken, the officer arranged for service of BCNs. Those were not complied with. Instructions were given for a prosecution, but the Council received advice that the BCNs were defective.
- 7.4. By then the officer had left the Council. Nothing happened for some time. Officers appear to have threatened further BCNs, resulting in submission of further car park plans by the developer. But the details have been unsatisfactory, especially as regards access arrangements to the industrial units. My latest understanding is that fresh BCNs are now under preparation. I have slight concerns about the use of BCNs rather than enforcement notices, because BCNs cannot "under-enforce".
- 7.5. Meanwhile residents of the development have raised concerns with members about the lack of progress and the failure to provide the original x spaces; and users of the industrial units remained concerned about the implications for access to their units.
- 7.6. This case seems to have been in somebody's "too difficult" pile for far too long. Admittedly it is complex, compounded by the original failure to spot that the plans were inaccurate. But enforcement cases are often legally and practically complex. There should have been an early clear strategy and timetable for action, overseen by a senior officer. The case has been dogged by staff turnover -- the enforcement officer whom I dealt with, and even his manager, were on contract arrangements and were not employees of the Council.
- 7.7. The case cries out for the Council to use its power under TCPA 1990 s. 178 to carry out the necessary work itself and charge the

cost to the developer. The state of the yard is not just an inconvenience to occupiers of the site – it is harmful to the visual amenity – the look and feel -- of the whole area. No consideration appears to have been given to that approach. The Committee may wish to invite officers to provide information about the Council's approach to that power, including statistics about its use.

8. I draw attention to a two other cases in less detail:
  - 8.1. **(vi)** : A case I inherited on election in 2006. It involved long-running neighbour complaints about an unauthorised chimney structure backing onto residential premises, and continuation of a change of use without obtaining approval for kitchen extraction arrangements.
  - 8.2 Two points: first of all the repeated themes of delay, and a case being passed between successive enforcement officers whom residents had to brief afresh every time. Second, consideration should be given to whether lessons might be learned from the permission wording used here. The permission approved the change of use but required it to cease after 6 months if extraction details had not by then been submitted and approved. In retrospect, the problem might have been avoided if the permission had prevented the new use from commencing until details had been approved.
  - 8.3 **(vii): 12a Station Way SE15 – “RnB” club**: This was a rather complicated case involving interaction between planning and licensing. Following complaints of noise nuisance, an enforcement notice was served following unauthorised change of use from restaurant to nightclub. The operator appealed. The key issue was whether the change of use had become immune as a result of taking place 10 years previously (not 4 years – this was a change of use, not operational development). At the appeal inquiry, crucial evidence was received from a local resident who was able to explain the history. The Council won, and I praise the work done by officers that led to this result.
  - 8.4 Officers made appeals for witnesses *via* Community Council and local residents groups. The witness came forward at a late stage. Arranging her attendance, and explaining to her what her role required, involved a good deal of last-minute member effort. That proved entirely worthwhile. But thought might be given to how this sort of evidence gathering exercise might be undertaken early on in a case, in good time for the witness to be interviewed and a proof of evidence prepared by the Council's lawyers.



**Note to assist scoping of scrutiny project on planning enforcement**

**Councillor Gordon Nardell**

**17 January 2009**

**Background**

1. A breach of planning control occurs when someone:
  - carries out development that needs planning permission without first obtaining it, or
  - breaches the conditions attached to planning permission.
2. The Planning Acts give the Council a wide range of powers to deal with a breach of control.
3. Main instrument is an enforcement notice (EN) requiring a person to take steps to remedy the breach. Failure to comply is an offence. But an EN is usually issued only after a period of investigation. It can also be appealed to the Secretary of State, and an appeal delays the EN coming into effect. So there are also a number of pre-emptive powers, in particular:
  - Stop Notices (SN), which can be used to require activity covered by an EN to cease straight away. A SN can be served any time between the EN being issued and coming into effect – so can avoid the stalling effect of an appeal. But liability to pay compensation in some limited circumstances. Council must consider cost/benefit before serving SN.
  - Temporary Stop Notices (TSN), which can be used to stop any activity for a brief period (generally up to 28 days) even if no EN issued. Council must do “quick” cost/benefit check. Compensation in same circumstances as for SN.
  - Application to high court for an injunction. Usually done where case extremely urgent or where other measures have failed (eg. breach continues despite conviction for failing to comply with EN). Court has a discretion. Potentially an expensive process – but then so is defending an appeal against an EN.
4. Breaches of condition can also be dealt with by breach of condition notice (BCN). Failure to comply is an offence. Comes into force 28 days after service, but TSN can be used to bridge the gap.
5. There are additional special powers dealing with unauthorised work in relation to listed buildings.
6. Effective enforcement of planning control can have a huge role to play in protecting the quality of life and the local environment. But it is highly technical and depends on a team of skilled officers. It seems appears to be generally acknowledged that there is a historic shortage of suitably experienced officers in Southwark, which has left a gap in effective enforcement, the consequences of

which have been particularly visible in a number of areas including Peckham. As a result of inaction a number of harmful physical operations and changes of use have now become immune from enforcement (which happens after a period of 4 or 10 years depending on the type of breach of control).

7. Things have been improving recently. I gather some recruitment has taken place, and the workforce seems to be getting more effectively organised. A number of cases that had gathered dust have begun moving, in some cases as a result of member pressure. At the request of N&PRCC, Dennis Sangweme, Enforcement Manager, has been giving regular written and oral reports on enforcement – mainly in The Lane ward which includes much of Peckham Town Centre – to public Community Council meetings. These have been valuable to members and welcomed by the public. There are also embryonic steps in progress in the N&PRCC area to take a more joined-up approach to planning enforcement, involving other agencies (such as Community wardens) and the eyes and ears of planning enforcement staff. My guess is there may have been signs of improvement elsewhere in the Borough. So this is an opportune time for a scrutiny project, enabling the Sub-Committee to understand the lessons of the past, identify current problem areas, help senior officers shape improvements to the service, and make recommendations for the respective future roles of officers and members including Community Councils.

#### General issues

8. Quality and effectiveness of service:
  - a. prompt response once apparent breach discovered by officers/notified by members/public?
  - b. Criteria for identifying priorities and who decides? Officers/Exec member or other? Role of ward members/Community Councils in identifying local prevalence of particular kinds of enforcement problem (like fixing of SNT priorities ward panels, and interplay between Community Councils and Community Wardens management in fixing wardens' priorities)
  - c. Is appropriate use of pre-emptive powers: is an overcautious approach taken towards SNs and TSN's? Is an accurate risk assessment made of the prospects of compensation liability in these cases? Is sufficient attention paid to the possibility of injunctions (this authority makes relatively little use of planning injunctions).
  - d. Information –gathering from the public in relation to appeals where contest on facts, eg. how long an allegedly immune use has gone on?
  - e. Suitably flexible approach where breach unintentional and minimal policy/amenity harm?
  - f. Joined-up inter-agency approach to detecting breaches of planning control?
  
9. Delegations and member involvement:
  - a. Scheme of delegation – are decisions taken at appropriate officer level?

- b. member role and education/training of members
- c. report-back practices – written/oral reports to CC? Regularity? Public or planning meetings?

10. Resourcing and organisation of the service:

- a. resourcing generally: senior officers' views on whether appropriate numbers of specialist officers at necessary levels of experience/seniority?
- b. Permanent/temporary staff. Are there/have there been HR issues specific to planning enforcement?

Peckham as a case study

- particular problem of impact of unauthorised operations/changes of use because:
  - o harmful to amenity – eg shopfront alterations and fitting of roller shutters (affects Peckham High St/Queen's Road and Rye Lane – Peckham and The Lane wards)
  - o overall problem of “lawlessness” – residents troubled by “wild west” attitude to frequency and seeming impunity with which unauthorised changes made
- a number of difficult cases still gathering dust or not moving towards resolution. Review process to ensure doesn't happen? General attitude towards protracted negotiations?
- Lack of prompt pre-emptive action in some significant cases, eg. Holly Grove “Massive Fish and Meat Market”, citing potential compensation liability as basis for decision not to serve TSN.
- Cases where prompt action has been taken illustrate what can be done when Council uses powers at its disposal. Eg. unauthorised lorry route to 5A Bushey Hill Road site – BCN plus TSN over the waiting period. Applauded by residents (though some later hiccoughs over whether BCN subsequently breached).
- embryonic steps towards “joined up” enforcement in N&PR area

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