

PLANNING ENFORCEMENT

Report of Scrutiny Sub-Committee C

May 2010



Chair's foreword and context of the review

Planning has always been a complex and contentious issue across the United Kingdom. Southwark is no exception to this.

Planning enforcement is an important element of the overall planning regime. The delivery of an effective, consistent and efficient enforcement service can have a great positive impact on the lives and livelihoods of the people of Southwark.

The visibility of planning issues evoke strong feeling and this makes them a favourite topic of discussion and debate in every community, especially where there is a perception that things have not been dealt with effectively.

This scrutiny review has been deliberately narrowly focused and objective. We have not sought to form opinions or recommendations on the planning policies of the council, nor to assess the outcomes of individual enforcement cases.

Instead we focused our attention on the way the enforcement process works in Southwark, in particular:

- How the enforcement service works in collaboration with other regulatory and service delivery functions within the council
- The understanding and approach to pre-emptive tools such as temporary stop notices and injunctions
- Decision making and the scheme of delegation in operation
- Communication between the council and the community on enforcement issues

The time available to undertake the review has been limited due to the election period, so our review has been largely reliant upon evidence from members and officers of the council. The sub-committee is grateful for the expert, positive and timely input it has received, in particular from the Head of Development Management, Planning Enforcement Manager and Health Safety and Licensing Manager

We have also benefitted from input and evidence from a local resident with a long experience of planning enforcement issues. We hope that those taking forward the recommendations from this review will make use of the resources available in the community as the enforcement service moves forward.

The recommendations made in this report offer an opportunity to clarify and enhance an important service for the community and businesses in the borough.

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Chair, Scrutiny Sub-Committee C
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1. What is planning enforcement?

- 1.1 The Planning Acts give the council a wide range of powers to deal with a breach of planning control. The implementation of these powers is known as planning enforcement.
- 1.2 A breach of planning control occurs when an organisation or individual:
 - carries out development that needs planning permission without first obtaining it, or
 - breaches the conditions attached to planning permission.
- 1.3 Effective planning enforcement has a significant role to play in protecting the quality of the local environment and quality of life for communities.

2. Introduction and scope of the review

- 2.1 The scrutiny review of planning enforcement was originally suggested by Councillor Gordon Nardell. Its scope has been informed by two papers which Councillor Nardell produced in January 2009 and January 2010, based on experience of enforcement issues arising in and around Peckham.
- 2.2 The scoping discussion was also informed by a comprehensive report from the planning enforcement team in the council, outlining current working practice including a large number of recent service improvements such as considerably improved resource stability, and arrangements for consistent delivery of the service.
- 2.3 The report also contained recent performance statistics for the service to enable the sub-committee to see the current volume and complexity of issues that are being managed by the team.
- 2.4 The sub-committee also invited views at the scoping stage from Eileen Conn, an active local resident who had expressed a particular interest in the review.
- 2.5 The scoping discussion highlighted a potential need for greater clarity, communication and consistency between cases in the implementation and decision making associated with planning enforcement.
- 2.6 In this context it was agreed that the review should focus upon the council's own processes, procedures and decision-making around planning enforcement.

2.7 With this in mind detailed evidence was requested on the following issues:

- How the enforcement service works in collaboration with other regulatory and service delivery functions within the borough
- The understanding of and approach to use of pre-emptive tools such as temporary stop notices and injunctions
- Decision making and the scheme of delegation in operation

3. Planning enforcement and other council functions

Joined-up working between council departments

3.1 It came to the attention of the sub-committee during the scoping exercise that, historically, the effectiveness of the relationship between the planning enforcement functions within the council and other departments had been poor. In some cases, so poor that other departments have been in breach of planning control in the work they have done.

3.2 Evidence on specific cases from a number of departments was received by the sub-committee that confirmed this to be the case. The sub-committee noted the importance of improved joined-up working and systems between council departments to ensuring successful planning enforcement, and was pleased to learn that there are a number of working protocols now in place.

3.3 The sub-committee noted from the evidence it considered that where town centre managers are, or have been, in post, this clearly has a beneficial impact upon facilitating joined up working on a very localised basis.

3.3 During discussions it became evident that many of the issues derive from lack of staff awareness of enforcement issues and the seriousness of infringement, which could ultimately lead to legal action.

3.4 It was discovered that any general lack of awareness is further exacerbated by the complexity of planning issues. In particular, incremental changes of use of a building over time, or changes to the fabric of the building, can accumulate into a planning breach. Each individual change may be very small but the cumulative alteration is substantial. This type of evolution of premises is an area of concern which needs a particular training focus. It would not be captured in generic "planning awareness" training.

3.5 The sub-committee's recommendations on joined up working, focus on actions which will help to avoid the need for enforcement action within the council are set out below:

Recommendations:

1. The implementation of increased and systematic internal communication (including access to computerised record systems) and training between planning enforcement and other regulatory functions of the council, and with housing and highways functions.
2. Particular focused training should be introduced in the “evolution of premises” issue.
3. A common system should be developed for all enforcement teams across the council to pass information in a timely way to planning enforcement officers when they become aware of a possible breach of planning control.

Joined up working with partners and partnerships

- 3.6 The activities of many partners and partnership bodies impinge upon planning and planning enforcement activities in the borough. There is a clear need for planning enforcement staff to have an understanding of how the service relates to other organisations, and supports the priorities for the borough, by working closely with others.
- 3.7 It may be possible for example, to work more closely with the police on designing out crime and disorder, and reducing the risk of amenity issues by working closely with the safer neighbourhood teams.

Multiple regulatory processes and priorities

- 3.8 It became clear during the review how easily regulatory systems which operate in isolation from one another can find themselves giving judgements and rules which may appear contradictory to land and building users in the borough. For example, the permission granted for hours during which premises can operate for commercial purposes may be different from the licensing hours.
- 3.9 The council is responsible for a number of regulatory functions, each of which has its own legal framework and governance arrangements. No one regime has supremacy over the other and the decisions of one are not binding on another.
- 3.10 The sub-committee deliberated the impact on the “consumers” of the system of the various regulatory processes.
- 3.11 The council’s own policy sets out a framework for cross-consultation so that there is consistency for the customer from both processes, with an expectation that where rules differ between the two approvals, for example on opening hours, the more stringent rules would apply.

- 3.12 This evidence demonstrates clearly how easily confusion can arise, particularly from the perspective of customers of the systems, or members of the public observing the outcomes of these complex decision-making processes (many of whom have an active interest in supporting the council in the effective implementation of its planning enforcement responsibilities). There are issues around public expectations from the various systems, and how users of the system understand and negotiate their use.
- 3.13 The sub-committee noted the example of the Guide for Faith Communities produced on the planning requirements around faith premises, and agreed that this kind of guidance is good practice which could be replicated for other groups which are users or, which do not know they need to use the planning process.
- 3.14 The review recommends the following practical steps that could be taken to minimise confusion leading to non-compliance in the future:

Recommendations:

4. The development of clear guidance for businesses and individuals on planning enforcement issues, especially around licensing. This advice should be developed with full engagement of those members of the public who are already actively involved in planning enforcement issues.
5. In future, when differential and potentially contradictory compliance requirements are made by planning enforcement and other regulatory regimes, a clear “joint” explanation be offered to minimise misunderstanding.

4. Pre-Commencement vigilance

- 4.1 The sub-committee received a variety of evidence demonstrating that even for developments with appropriate planning and regulatory arrangements in place there is still a need for planning enforcement. There is a need to ensure that the development proceeds in line with the plans approved.
- 4.2 Effective vigilance requires close working between building control and planning enforcement teams, even after the relevant planning approvals are in place.

Recommendation

6. Development of systematic closer working arrangements between the planning enforcement and building control functions of the council.

5. The council's use of enforcement tools and pre-emptive powers

- 5.1 The council has a number of tools at its disposal to deal with planning enforcement issues, ranging from low key negotiation to taking court injunction action to stop activity.
- 5.2 The sub-committee confirmed through the evidence it received that whilst there are legal frameworks and guidance around the use of each power, there is a substantial level of subjective judgement necessary on a case by case basis to decide which, if any, of these tools should be used. In planning enforcement terminology this is often referred to as the "expedient" use of planning action, from the language of s. 172 of the Town and Country Planning Act 1990, which relates to enforcement notices. The main two categories of enforcement tools are those which follow a period of investigation and which, once deployed, come into effect after a waiting period (enforcement notices and breach of condition notices); and those that are pre-emptive and can stop a breach of planning control in its tracks – stop notices (which can be served in conjunction with an enforcement notice), temporary stop notices and injunctions (which can be used as soon as a breach is detected).
- 5.3 In many cases, taking formal enforcement action is costly and time-consuming for all concerned, and the use of good judgement by planning and legal professionals can minimise the need to resort to confrontational legal measures. Where appropriate, and particularly where a breach of planning control is causing harm, officers recognise the need to use the powers at their disposal.
- 5.4 The sub-committee was keen to take a view on the balance of judgements for and against using various enforcement tools.
- 5.5 In particular we explored the use of temporary stop notices, which were introduced by the Planning and Compulsory Purchase Act 2004. Temporary stop notices can be used when a local planning authority considers that there has been a breach of planning control so that activity can be stopped immediately, for up to 28 days, whilst the authority decides whether to take formal enforcement action by enforcement notice or breach of condition notice. Temporary stop notices are most effective when they are utilised very quickly once a breach of planning has been identified, not least because that prevents a change of use from becoming established and minimises the scope for arguments about compensation liability (see below).

- 5.6 In order to form an opinion on our council's use of enforcement methods, a benchmarking exercise was undertaken comparing the pattern of activity in Southwark with that in neighbouring boroughs and comparable urban areas elsewhere in the UK. We confirmed that our team's activities are broadly consistent with practice elsewhere.
- 5.7 The objective benchmarking exercise did not reveal on what basis any one planning tool is deemed to be appropriate.
- 5.8 In addition to the benchmarking it was necessary to address the issue of "expediency". Planning enforcement officers explained the current process leading to a judgement on the action to be taken, as follows:
- A possible breach is identified
 - A planning enforcement officer makes a site visit to collect relevant information
 - Enforcement manager assesses the evidence against the policy planning framework, the nature and impact of the infringement and any precedents in the area
 - A recommendation for action is passed to legal services
 - Legal services advise on expedient action
 - If no action is thought expedient a retrospective planning application is invited
- 5.9 There were concerns amongst members of the sub-committee that a lack of clarity of legal opinion on the liability the council may face if it issues temporary stop notices may be affecting their use as a pre-emptive enforcement tool. Independent legal counsel was sought on this issue, and it was confirmed that the use of temporary stop notices does not put the council at risk of compensation liability as long as there is a breach of planning control evident. It is important to note that liability does not arise in circumstances where planning permission for the development the subject of the notice, is granted after the notice has been served.
- 5.10 It was also revealed in the evidence sessions that the resources and systems to capture the necessary information to make a temporary stop notice a viable option are not always available.
- 5.11 Limited resources necessitate prioritisation within the planning enforcement function. The sub-committee endorses the current classification which gives priority one (highest) status to investigating complaints relating to works causing serious harm, defined as follows:
- Works that are irreversible or irreplaceable, or constitute a serious breach of planning control;
 - Unauthorised works to a listed building;
 - Breaches of article 4 directions
 - Significant development within or on metropolitan open land

- Unauthorised development causing serious harm to the character and appearance of a conservation area
 - Unauthorised development (building operations and change of use) that seriously affect the vitality and viability of shopping parades
- 5.12 To make best use of available resources, and make dispute resolution as efficient as possible, the sub-committee feel that where breaches of planning control fall into the top priority for the council, the use of temporary stop notices is the least costly measure, both in terms of impact on the business/individual activity concerned, and in terms of enforcement resources.

Recommendations:

7. Where a priority one breach of planning control is identified, there will be a presumption in favour of the use of a temporary stop notice by the legal and planning enforcement officers.
8. Systems should be put in place to facilitate decision making for priority one breaches which are fast enough to make the use of temporary stop notices by the council a viable option.

6. Schemes of delegation

- 6.1 The sub-committee considered the scheme of delegation on planning enforcement currently in operation, and whether this is appropriate for the efficient operation of the enforcement service.
- 6.2 The current arrangement is a simple approach with the delegation of all planning enforcement matters to the head of development management.
- 6.3 Benchmarking evidence was considered on the delegation schemes in some other local authorities.
- 6.4 The benchmarking exercise demonstrated that overall there is a trend towards maximising delegation, but with some variation of approach, and referral to elected members where there is uncertainty over:
 - Whether something falls within existing agreed policies and plans (departure from the development plan)
 - If there is a judgement to be made about expediency
 - If a decision is likely to be controversial
 - If an elected member “calls in” an enforcement action/lack of action
- 6.5 The sub-committee discussed the merits of the various approaches vis a vis the simple 100% delegation approach.

- 6.6 Overall, because of the technical and legal nature of decisions to be taken, and the need for rapid action, the current scheme of delegation was considered to be appropriate for operational issues in the majority of cases. However, while the 100% delegation approach has the advantage of simplicity, there are sound democratic arguments for there to be at least some scope for decision-making by members.
- 6.7 It was agreed that on enforcement matters which are not straightforward it would be useful for the head of development management to be able to refer matters upwards as appropriate. We did not feel it appropriate to be prescriptive about the categories of case that might be referred for member decision. We felt the simplest approach would be to amend the Constitution to give the Head of Development Management a broad discretion to relinquish a decision to members. However, we anticipated that in practice, the sort of cases likely to be considered appropriate for member decision would be in particular:
- where officers propose not to take enforcement action on a controversial issue
 - on matters of strategic importance
 - on matters which, though minor individually, have a considerable cumulative effect
 - where a decision could set a precedent establishing or varying priorities for enforcement action
- 6.8 We recognised that these would invariably be “after the event” cases in which the issue is whether or not to issue an enforcement notice or possibly a breach of condition notice; or to take self-help steps to give effect to an enforcement notice (eg. demolishing a building where the developer has failed to comply with a requirement to do so). Members would not have a role in taking decisions about pre-emptive measures such as temporary stop notices, because there the speed of decision making is crucial. There was consideration of the role of different bodies in the council’s decision making structure, including community councils which currently have a role to play in the context of planning applications. In the case of enforcement, the sub-committee feel that the most appropriate place of referral for planning enforcement decisions would be the Planning Committee. This would avoid inconsistency of approach, and would reflect the fact that decisions relinquished to members are likely to include cases that are either of strategic importance or locally controversial. However, we emphasise that community councils should nevertheless receive regular reports about enforcement in their area: see below.
- 6.9 The sub-committee’s provisional view is that this change could be achieved by a simple amendment to Part 3F of the Constitution by adding a new matter to the ten already reserved for decision by the Planning Committee along the following lines:

“In cases referred to them by the appropriate chief officer, head of service or head of business unit, to consider and determine the taking of enforcement steps.”

Recommendations:

9. The Planning Committee should receive an annual report on planning enforcement containing both quantitative and qualitative information, to allow it to set policy priorities effectively.
10. The scheme of delegation in the Council’s Constitution should be amended to facilitate the referral (at the discretion of the Head of Development Management) of planning enforcement decisions to the Planning Committee.

7. Issues not covered in the review

- 7.1 During our scoping discussion the sub-committee agreed the parameters for the review.
- 7.2 We agreed that it would be inappropriate to focus on issues which impinge upon planning policy, as discussions of this type would require the collection of a much more extensive evidence base, and could only be done as it should be with the engagement of a broad range of organisations, individuals and expertise. The time available for this review was insufficient to undertake this scale of work.
- 7.3 Similarly, it was agreed that it was not possible to undertake a wide review inviting general evidence from local residents and customers of the planning service. The level of interest and potential for involvement of interested members of the community was acknowledged by the sub-committee.
- 7.4 It was agreed that, although this review could not involve more people, enhanced and broader communication on planning enforcement issues, by extending the availability of quarterly monitoring reports to all eight community councils in the borough, would be recommended for immediate implementation. It was noted that at least two community councils have already adopted this practice, and members of the council and the public have found this very helpful.
- 7.5 The need for better communication with individuals who report possible breaches of planning was also discussed. Improved transparency around processes is desirable, and it was agreed that in future, the acknowledgement of receipt of a complaint relating to a possible breach should include a copy of the enforcement protocol so that complainants could better understand the enforcement process.

Recommendations:

11. Each community council should receive regular (at least quarterly reports) on planning enforcement issues, building upon the pilots already underway. These should normally be presented by an officer who could answer questions.
12. Individuals or organisations that report a possible breach of planning should receive a copy of the enforcement protocol to improve communication and transparency around processes.

8. Conclusion and summary of recommendations

- 8.1 The recommendations made in this review advocate small scale changes to the planning enforcement processes and procedures of the council.
- 8.2 If made, though small in scale, they would have a substantial impact on the effective delivery of the service, by:
 - setting a clear framework for joined-up working with other regulatory regimes;
 - improving clarity of roles;
 - establishing clear priorities for use of resources; and
 - providing better information and guidance for users of the planning service

Summary of recommendations:

1. The implementation of increased and systematic internal communication and training between planning enforcement and other regulatory functions of the council, including access to computerised record systems.
2. Particular focused training should be introduced in the “evolution of premises” issue.
3. A common system should be developed for all enforcement teams across the council to pass information in a timely way to planning enforcement officers when they become aware of a possible breach of planning control.

4. The development of clear guidance for businesses and individuals on planning enforcement issues, especially around licensing. This advice should be developed with full engagement of those members of the public who are already actively involved in planning enforcement issues.
5. In future, when differential and potentially contradictory compliance requirements are made by planning enforcement and other regulatory regimes, a clear “joint” explanation be offered to minimise misunderstanding.
6. Development of systematic closer working arrangements between the planning enforcement and building control functions of the council.
7. Where a priority one breach of planning control is identified, there will be a presumption in favour of the use of a temporary stop notice by the legal and planning enforcement officers.
8. Systems should be put in place to facilitate decision making for priority one breaches which are fast enough to make the use of temporary stop notices by the council a viable option.
9. The Planning Committee should receive an annual report on planning enforcement containing both quantitative and qualitative information, to allow it to set policy priorities effectively.
10. The scheme of delegation in the Council’s Constitution should be amended to facilitate the referral (at the discretion of the Head of Development Management) of planning enforcement decisions to the Planning Committee.
11. Each community council should receive regular (at least quarterly reports) on planning enforcement issues, building upon the pilots already underway. These should normally be presented by an officer who could answer questions.
12. Individuals or organisations that report a possible breach of planning should receive a copy of the enforcement protocol to improve communication and transparency around processes.

Scrutiny Sub-Committee C membership

Councillor Toby Eckersley (Chair)

Councillor Anood Al-Samerai (Vice-Chair)

Councillor Richard Livingstone

Councillor Jane Salmon

Councillor Robert Smeath

(Councillor Gordon Nardell also participated in this review as a reserve member for Councillor Livingstone at the second meeting on this project and instigator of the review)

Only Councillors Toby Eckersley, Richard Livingstone and Gordon Nardell participated in this scrutiny review.