
Planning Enforcement Avoiding the Pitfalls

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Planning Enforcement – Avoiding the Pitfalls: Agenda for the morning

We have a full programme, covering:

9.50–11.15 - Session 1

Review of the legislation
Detailed case law update
Legislative changes & Planning policy/guidance

11.15 Comfort break

11.30–12.30 - Session 2

Drafting tips
Practical examples

12.30 Q&A

13.00 Lunch

Enforcement action: NPPF

Paragraph 207 of the NPPF states

“Effective enforcement is important as a means of maintaining public confidence in the planning system. Enforcement action is discretionary, and local planning authorities should act proportionately in responding to suspected breaches of planning control. Local planning authorities should consider publishing a local enforcement plan to manage enforcement proactively, in a way that is appropriate to their area. This should set out how they will monitor the implementation of planning permissions, investigate alleged cases of unauthorised development and take action where it is appropriate to do so.”

Relevant Legislation

- Town and Country Planning Act 1990 Part VII
- Planning and Compensation Act 1991 – amended Part VII Town and Country Planning Act 1990
- S 330 Town and Country Planning Act 1990
- S 16 Local Government (Miscellaneous Provisions) Act 1976

Also don't forget:

Proceeds of Crime Act 2002 ('PoCA')

Forms of Enforcement Action

- **Enforcement Notice** - S171 and S172 TCPA 1990 can be issued where breach of planning control and LPA consider it expedient
- **PCN** (and s330 and s16 Local Government (Miscellaneous Provisions Act 1976– gathering information about the breach – offence in the event of non-compliance
- **BCN** – breach of a condition of the planning permission; alternative to EN
- **Temporary Stop Notice** – can be served at any time/Stop Notice – only served once EN served; no appeal; compensation payable in both cases.
- **Injunctions** – s187B: where LPA consider necessary/expedient to restrain by injunction actual or apprehended breach of planning control they may make application for injunction in the High Court.

Forms of Enforcement Action

- **Powers of entry** – Council have right to enter land without warrant to establish breach of planning control; must have reasonable grounds for entering the land or buildings (s196A, TCPA 1990).
- **POCA** - LPA may recover any proceeds of crime (Proceeds of Crime Act 2002 (PoCA 2002)) following conviction of a criminal offence through use of a confiscation order (see R v Del Basso and another v R [2010] EWCA Crim 1119, confiscation order of £760,000 was upheld).
- **Section 215 Notice** (untidy land) affecting amenity
- **Relevant demolition** s196D TCPA

Enforcement action

- Taking action is discretionary
- Time limits:
 - 4 years operational development and change of use of any building to use as single dwelling house (s171B (1) and (2) TCPA)
 - 10 years for any other breaches (s171B (3) TCPA)
 - **Remember there is now no time limit for taking enforcement action for breach of planning control in respect of “relevant demolition” (as defined in s196D (3) TCPA: demolition of unlisted building in a conservation area)**
 - Deliberate concealment – planning enforcement order extends limit by 1 year and 22 days

Starting Point : Section 172 TCPA 1990

- The local planning authority may issue a notice (in this Act referred to as an “enforcement notice”) where it appears to them—
 - (a) that there has been a **breach of planning control**; and
 - (b) that it is **expedient** to issue the notice, having regard to the provisions of the development plan and to any other material considerations.

Breach of Planning Control

s171 TCPA 1990

Section 171A:

(1) For the purposes of this Act—

- (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 or pursuant to permitted development rights under GDPO 2015

constitutes a **breach of planning control**.

Definition of 'Development'

- Section 55 (1) TCPA 1990
- “development,” means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.
- It is not a criminal offence to carry out development of land without first obtaining the necessary planning permission.

Operational Development

- Section 55 (1) TCPA 1990
 - **Building Operations**
 - a Demolition
 - b Rebuilding
 - c Structural alterations / additions
 - d other operations carried out by a builder

Operational Development

Definition of 'building': Leading cases

- Cheshire CC v Woodward (1962) 2 QB 126 (coal hopper not considered to be a building (including structure or erection))
- Barvis Ltd v SSE (1971) 22 P&CR 710 (mobile crane = structure)
- Skerritts of Nottingham Ltd v SSETR (2000) JPL 1025 (marquee=structure/erection)
- R (Save Woolley Valley Action Group Ltd) v Bath and North East Somerset Council [2012] (Chicken sheds)

Operational Development cont.

Engineering Operations

- s336(1) 'the formation or laying out of means of access to highways'
- *Case Coleshill & District Investment Co Ltd v Minister of Housing and Local Government (1969) 1WLR 746* (removal of embankment was an engineering operation)
- *Ewen Developments v SSE [2010]* creation of bund was an engineering operation

Operational Development cont.

Mining Operations s55(4) TCPA

- For the purposes of this Act mining operations include -
 - (a) the removal of material of any description -
 - (i) from a mineral-working deposit;
 - (ii) from a deposit of pulverised fuel ash or other furnace ash or clinker; or
 - (iii) from a deposit of iron, steel or other metallic slags;
 - (b) the extraction of minerals from a disused railway embankment.

Material Change of Use

Material Change of Use

- the making of any material change in the use of any buildings or other land
 - has to be 'material' change of use
 - case law: *East Barnet UDC v British Transport Commission* (1962) 2 QB 484 (Div Court)
- whether or not C of U is material is a matter of fact and degree. Courts cannot interfere with decision of LPA/SofS unless the decision is such that they could not reasonably have made.

Material Change of Use: Cases 1

Some Changes of Use are permitted by TCPA (Use Classes) Order, are considered Permitted Development or are sui generis and therefore pp not required.

- **Somak Travel Ltd v Secretary of State for the Environment** [1988] 55 P. & C.R. 250 (removal of internal staircase could be required if part and parcel of Change of Use)
- **Murfitt v Secretary of State for the Environment and East Cambridgeshire DC** [1980] 40 P. & C.R. 254 (hardcore used for parking of vehicles). EN upheld and action of Inspector to vary notice to require LPA approval of scheme for removal of hardcore endorsed.
- **Westminster City Council v SSCLG and another** [2015] can be mixed use where different uses not associated with certain part of the premises and need to consider off-site impacts when considering materiality of alleged change of use

Material Change of Use Cases 2

- **Hertfordshire CC v SSCLG [2012]** It was necessary to consider both what was happening on the land and its impact off the land when deciding whether the character of the use had changed
- **Sheila Tara Moore v SSCLG and Suffolk Coastal DC [2012]** Use of dwelling as holiday home a material change of use
- **Winchester City Council v Secretary of State for Communities and Local Government and others [2015]** whether the alleged change of use is a material change for planning purposes
- **R. (Peel Land and Property Investments Plc) v Hyndburn BC [2013]** Grants of PP for operational building works did not involve MCU that would remove previously agreed restrictions on use

Permitted Development

- **Arnold v SSCLG [2015]** construction of a new dwelling with integration of few remaining walls does not allow reliance on PD rights
- **Evans v SSCLG and another [2014]** PD rights don't apply if building operation involved in construction of a building were unlawful

Breach of Planning Control

Remember!!!:

- Works that do not constitute development
 - Affecting only interior/does not materially affect external appearance of building/works to make good war damage (s55 (2)(a))
 - incidental to enjoyment of dwelling house (s55 (2)(d))
 - agricultural/forestry use (s55 (2)(e)) or
 - change of use within same use class as permitted by Use Classes Order) (s55 (2)(f))
- That demolition of certain buildings within CA now requires pp (s196D TCPA-see later provisions) EIA

Section 172 TCPA 1990 cont.

Expediency

No statutory definition; scoped out in case law

Local authorities when determining whether it is expedient to take action should consider whether:

- i) the proposed action is in the public interest
- ii) the breach is sufficiently harmful to justify taking action
- iii) the proposed action is reasonable and commensurate with the breach in planning control to which it relates
- iv) the action undertaken would be cost effective
- v) or not the development is in accordance with planning policies

Expediency

Human rights is a consideration

- *“In deciding whether enforcement action is taken, local planning authorities should, where relevant, have regard to the potential impact on the health, housing needs and welfare of those affected by the proposed action, and those who are affected by a breach of planning control.”*

Planning Policy Guidance, paragraph 3 section 17b

Expediency cases

- Also need to consider the personal circumstances (health and welfare) of persons suspected of the breach of planning control and must not forget the human rights implications.
 - *R (on the application of Usk Valley Conservation Group and others) v. Brecon Beacons National Park Authority* [2010] EWHC 71 (Admin)
 - *Gazelle Properties Ltd and Sustainable Environmental Services Ltd v. Bath & North East Somerset Council* [2010] EWHC 3127 (Admin)
 - *Britannia Assets (UK) Limited v. Secretary of State for Communities & Local Government, Medway Council* [2011] EWHC 1908 (Admin)

Ground for appeal relating to relevant demolition

- “relevant demolition” as defined in S196D Town and Country Planning Act 1990
- Ground for appeal applies if:
 - Relevant demolition urgently necessary for safety or health reasons
 - Not practicable to secure safety or health by repair works or works for temporary support or shelter
 - Relevant demolition was minimum measure necessary

Planning Contravention Notices

- S 171C Town and Country Planning Act 1990
- Local planning authority may serve notice if there appears to have been a breach of planning control
- May serve notice on:
 - Owner, occupier or person with an interest in the land
 - Person carrying out operations on or using the land

Planning Contravention Notices

- Notice may require information on:
 - Operations and activities carried out on the land
 - Matters relating to conditions or limitations applying to planning permission granted for the land
- Failure to comply and knowingly or recklessly making false or misleading statements are offences

Power to require information as to interests in land

- S 330 Town and Country Planning Act 1990
- Local authority may serve notice requiring occupier or person receiving rent to provide information on interests in and use of land
- Failure to comply and knowingly or recklessly making false or misleading statements are offences

Power to obtain particulars of persons interested in land

- S 16 Local Government (Miscellaneous Provisions) Act 1976
- Local authority may serve notice on occupier, freeholder, mortgagee, lessee, person receiving rent, person authorised to manage or arrange for letting of land
- May require details of nature of interest in land and of occupier and others with interests
- Failure to comply and knowingly or recklessly making false or misleading statements are offences

Injunctions

- S 187B Town and Country Planning Act 1990
- Local planning authority may apply to High Court or county court for injunction to restrain actual or apprehended breach of planning control
- May be granted against persons of unknown identity
- Injunction is a discretionary relief – Granting it should be proportionate to the breach

Injunction – Failure to consider use of S178 TCPA 1990

- *Hackney London Borough Council v Manorgate Ltd* [2015] EWHC 2025
 - Application for mandatory injunction refused
 - Local authority had not considered use of S178 Town and Country Planning Act 1990 to take action itself and recover costs from land owner

Stop Notices

- S 183 Town and Country Planning Act 1990
- Stop Notice served by local planning authority
- May serve if it considers it expedient for activity to cease before deadline for compliance with enforcement notice
- May not prohibit use of building as dwellinghouse
- May not prohibit activity carried out for more than four years

Stop Notice

- Must refer to related enforcement notice and must have copy annexed
- Must specify date it takes effect
 - No earlier than three days after notice is served
 - No later than 28 days after notice is first served
- Local authority may display a notice at site in respect of which stop notice has been served

Stop Notices

- S 185 Town and Country Planning Act 1990
- Stop Notice served by Secretary of State
- May serve if Secretary of State considers it expedient
- Secretary of State must consult local planning authority

Compensation for loss due to stop notice

- Compensation may be payable for loss caused by a stop notice served by a local authority if:
 - Enforcement notice is quashed*
 - Enforcement notice is varied*
 - Enforcement notice is withdrawn otherwise than as a result of grant of planning permission
 - Stop notice is withdrawn
 - *On grounds other than planning permission ought to be granted or condition or limitation discharged

Stop Notices - Offences

- Contravention of stop notice after site notice has been displayed or stop notice served is an offence

Temporary Stop Notice

- Section 171E Town and Country Planning Act 1990
- Local planning authority may issue temporary stop notice if it considers it expedient to stop activity in breach of planning control immediately
- Maximum duration: 28 days starting on day when copy notice is displayed on land to which it relates
- May not prohibit use of building as dwellinghouse
- May not prohibit activity carried out for more than four years

Temporary Stop Notice: Offences

- Contravention of temporary stop notice after copy notice displayed or notice served is an offence

Temporary Stop Notice: Compensation

- Compensation may be payable for loss caused by temporary stop notice served by a local authority if:
- Activity is authorised by planning permission, development order, local development order, Mayoral development order, neighbourhood development order
- Certificate of lawfulness is issued
- Authority withdraws notice

Breach of condition notices

- S187A Town and Country Planning Act 1990
- Local planning authority may serve notice for breach of condition relating to planning permission
- Notice must specify steps required or activity required to cease
- Deadline for compliance is 28 days beginning with date of service of the notice unless authority extends this

Breach of condition notices: Offences

- Failure to comply with breach of condition notice is an offence
- However, it shall be a defence for a person charged with an offence to prove that he took all reasonable steps to secure compliance with the conditions specified in the notice or when the notice was served he no longer had control of the land.

Untidy Land section 215

- The council can serve an ‘amenity’ notice on the owner of any land or building which is in an unreasonably untidy condition and we consider has an adverse affect on the amenity of the area. This is done under section 215 of the Town and Country Planning Act 1990 (as amended).
- This notice is used to maintain and improve the quality of the environment, to assist in tackling dereliction and retaining land in a productive use as well as contribute to the regeneration of an area and respond positively to public concerns.
- right of appeal in the event that the activity complained of benefits from planning permission.

Enforcement Notices

Must specify the following:

- matters alleged to constitute a breach of planning control
- breach = unauthorised development or breach of a condition
- steps required to 1) remedy the breach and 2) to either restore land to former condition or secure compliance with any planning conditions or limitations
- compliance period within which the steps must be taken
- The date the planning enforcement notice takes effect
- The reasons why the LPA considers it expedient to issue the planning enforcement notice
- The precise boundaries of the land to which the planning enforcement notice relates

In all cases enforcement notices must be clearly and properly drafted leaving the recipient in no doubt as to what is required see *Egan v Basildon Borough Council* [2011] EWHC 2416 (QB)

Enforcement Notices cont.

- Can require a number of steps are taken within a specified period to:
 - Ensure that land is restored to the condition it was in before the unauthorised development occurred.
 - Secure compliance with the conditions of a planning permission.
- Need to be
 - served on the owner, occupier, anyone with an interest in the land
 - not more than 28 days after it is issued and not less than 28 days before it is to come into effect
 - Entered into the LA planning register
- An offence is not committed unless the EN is not complied with within the compliance period.

Appeals against Enforcement Notices

- S174 Town and Country Planning Act 1990
- Occupier and person with interest in land may appeal to Secretary of State against Enforcement Notice
- Notice of Appeal must be give (sent) to Secretary of State before date that the Enforcement Notice takes effect
- 7 grounds for appeal

Prosecution

- S 179 Town and Country Planning Act 1990
- Offence where enforcement notice not complied with
- Defence for owner to show he did everything he could to secure compliance
- Defence for person to show he was not aware of notice if it has not been served on him and is not in register kept under S188 TCPA 1990

Confiscation Orders

- Part 2 Proceeds of Crime Act 2002
- Confiscation order against person convicted of offence through failure to comply with enforcement notice
- Allows recovery of financial benefit obtained through crime

Confiscation Orders

- Total amount received as proceeds of crime can be recovered
- *R v Del Basso* [2010] EWCA Crim 1119

“Those who choose to run operations in disregard of planning enforcement requirements are at risk of having the gross receipts of their illegal businesses confiscated. This may greatly exceed their personal profits. In this respect they are in the same position as thieves, fraudsters and drug dealers.”

Confiscation orders

- Proceeds must be from conduct which is criminal not just in breach of planning requirements
- *R v Ali* [2014] EWCA Crim 1658
- Conduct was criminal once time for compliance with enforcement notice had elapsed

No action

- Planning Practice Guidance Paragraph: 010
- Addressing breaches of planning control without formal enforcement action can often be the quickest and most cost effective way of achieving a satisfactory and lasting remedy. For example, a breach of control may be the result of a genuine mistake where, once the breach is identified, the owner or occupier takes immediate action to remedy it. Furthermore in some instances formal enforcement action may not be appropriate.
- It is advisable for the local planning authority to keep a record of any informal action taken, including a decision not to take further action

No action cont.

- there is a trivial or technical breach of control which causes no material harm or adverse impact on the amenity of the site or the surrounding area;
- development is acceptable on its planning merits and formal enforcement action would solely be to regularise the development;
- in their assessment, the local planning authority consider that an application is the appropriate way forward to regularise the situation (think of conditions)

Review of Cases

- Oldies but goodies!
 - Fidler v Secretary of State for Communities and Local Government & Reigate and Banstead Borough Council [2010] EWHC 143 (Admin)– every man’s house is his castle – or is it?? (subsequent appeals to retain as agricultural dwelling has failed)
 - Welwyn Hatfield Council v Secretary of State for Communities and Local Government and another [2010] EWCA Civ 26: pp for barn – house built!

AND

- Jackson v SSCLG [2015] new regime of planning enforcement orders under ss 171BA-BC not exhaustive replacement of the Welwyn principle
 - a. positive deception in matters integral to the planning process
 - b. deception intended to undermine the planning
 - c. deception DID undermine planning process
 - d. the wrong doer would profit directly from the deception if the normal limitation period were to enable him to resist enforcement

Case law update

Harbige v Secretary of State for Communities and Local Government [2012] EWHC 1128 (Admin) (21 March 2012) – question whether changes of use within the same use class over 10 years conferred immunity (s55 (2)(f) considered). Immunity conferred.

Allsop, R (on the application of) v Derbyshire Dales District Council [2012] EWHC 3562 (Admin) “lurid face” case - s215 notice could not be used in the manner sought and it failed to appropriately specify the mischief.

Royal Borough of Windsor & Maidenhead v Smith [2012] EWCA Civ 997 – case involving the definition of caravan in the context of an injunction

Stern, R (on the application of) v Horsham District Council, Court of Appeal - Administrative Court, May 01, 2013, [2013] EWHC 1460 (Admin) – EN served out of time was quashed as action deprived claimant opportunity of appealing notice.

Ahmed v SSCLG [2014] inspector failed to consider “Obvious alternative” of lesser scheme after wrongly concluding he had no power to grant lesser scheme (he has power if lesser scheme is part of scheme enforced against

Ioannou v SSCLG [2014] distinguished Ahmed inspector has no power under ground (f) to bring about deemed permission for a scheme not in existence at the time of the EN

Hackney LBC v Manorgate Ltd [2015] LPA failed to consider use of s178 TCPA to take action and recover costs from land owner



New cases

- **NSV Management Ltd v. Sec. of State[2014] EWHC 1355 (Admin)**
- **Silver v. Sec. of State and another [2014] EWHC 2729 (Admin)**
- **R (Barker) v. Brighton and Hove CC [2014] EWHC 233 (Admin)**
- **Gambone v Sec. of State and another [2014] EWHC 952 (Admin)**
- **Reed v. Sec. of State [2014] EWCA Civ 241**
- **Ball v. Sec of State[2014] EWCA Civ 352**
- **R (Matthews) v. Sec. of State [2014] EWHC 1299 (Admin)**
- **Williams v. Sec. of State and another [2013] EWCA Civ 958**
- **Makanjuola v. Sec. of State and another [2013] EWHC 3538 (Admin)**
- **R (On The Application Of Tesco Stores Ltd) (Claimant) V Forest Of Dean District Council (Defendant) & (1) JD Norman (Lydney) Ltd (2) Asda Stores Ltd (3) Windmill Ltd (4) MMC Land & Regeneration Ltd (Interested Parties) (2014)**
- **R v Ali[2014] EWCA Crim 1658**

Legislative changes and Planning

Policy/guidance:

Impact following NPPF and Localism Act?

Localism Act 2011, Part 6 Chapter 5 ss123 to 127

- New Planning enforcement provisions
- Deals with the following:
 - s123: Retrospective Planning Permission
 - s124: Time limits for enforcing concealed breaches of planning control (new ss171BA; 171BB and 171BC TCPA)
 - s125: Assurances against prosecution for those served with EN
 - s126: Planning offences: time limits and penalties
 - s127: Powers re unauthorised developments and defaced premises

Planning Enforcement Order

- Section 124 – new Planning Enforcement Order Regime to cover cases of concealment
 - Follows on from the cases of *Fidler* and *Welwyn*
 - Where there is an apparent breach of planning control LPA may apply to Mags Court for Planning Enforcement Order.
 - If granted LPA may take enforcement action in respect of—
 - (a) the apparent breach, or
 - (b) any of the matters constituting the apparent breach,
- at any time in the enforcement year.
 - ‘Enforcement Year’ begins at end of 22 days from the day court’s decision to make order is made. If referred to High Court the year begins on date proceedings finally determined/withdrawn.

Planning Enforcement Order cont.

- Procedure set out in s171BB – application may be made within 6 months of evidence of apparent breach of planning control coming to authority’s knowledge
- s171BC – Court may make Planning Enforcement Order only if
 - (a) it is satisfied, on the balance of probabilities, that the apparent breach, or any of the matters constituting the apparent breach, has (to any extent) been deliberately concealed by any person or persons, and
 - (b) it considers it just to make the order having regard to all the circumstances.

Other recent legislative changes

The Town and Country Planning (General Permitted Development) (England) Order 2015 (SI 2015 No. 596) .

The Town and Country Planning (Use Classes)(Amendment)(England) Order 2015 (SI 2015 No.597),

The Town and Country Planning (Section 62A Applications)(Procedure and Consequential Amendments)(Amendment) (England) Order 2015 (SI 2015 No.797),

The Town and Country Planning General (Amendment)(England) Regulations 2015 (SI 2015 No.807).

The Enterprise and Regulatory Reform Act 2013 (Abolition of Conservation Area Consent) (Consequential and Saving Provisions) (England) Order 2013 (SI 2013/2146) – (some provisions yet to come into force) changes to various SIs; abolishes system of CAC which will now be dealt with under planning system.

The Town and Country Planning General (Amendment) (England) Regulations 2013 (SI 2013/2145) – sets procedure to be followed by S of S when determining applications by interested LPAs for demolition

Planning Policy/Guidance

- National Planning Policy Framework – para 207
(see slide above)
- Planning Practice Guidance, Ensuring effective enforcement: section 17b
- Planning Inspectorate Guidance – Enforcement Appeals England July 2015

New material planning consideration: Intentional unauthorised development

- New policy effective from 1 September 2015
- Implemented following letter from DCLG Chief Planner, Steve Quartermain
 - to deal with the “expensive and time-consuming enforcement action” resulting from unauthorised developments and
 - protection of the green belt
 - Applies to all new planning applications and appeals received from 31.08.15

New material planning consideration: Intentional unauthorised development

Questions:

- How will it work in practice?
- How do you ascertain the intentions of a developer?
- Most concealment cases are revealed after the fact – may not be at application stage
- Will developments which would otherwise comply with plan policies be refused as a result?
- Needs closer working together of DC and enforcement teams – already stretched
- Will it result in costs savings?

May aid in preventing authorised development due to later refusal of retrospective application

We were great please buy us a drink



Bad Notice Day

What are we going to cover?

- The purpose of enforcement
- Duty of Inspector
- Powers of correction
- Nullities – what are they?
- Nullities – how to avoid them
- Invalidity (*What can and can't be corrected*)
- Common errors
- Questions

Objectives of enforcement

- To remedy the undesirable effects of unauthorised development.
 - Harm to sensitive areas, harm to neighbours, traffic hazard.
- To bring unauthorised activity under control to ensure that the credibility of the planning system is not undermined.
 - Conflict with DP, becoming lawful through time, ignoring conditions – ‘getting away with it’

And who are the offenders ?



Confused of Leicester



**Wayne from Walsall or
any other cowboy you
care to think of !**

And on what basis do they appeal ?

- 7 grounds - (a) to (g).
- Grounds (b), (c), (d) and (e) commonly known as the legal grounds of appeal.
- Ground (a) similar to a s78 appeal.
- (f) is made on basis of 'too onerous'
- (g) on basis more time required to comply

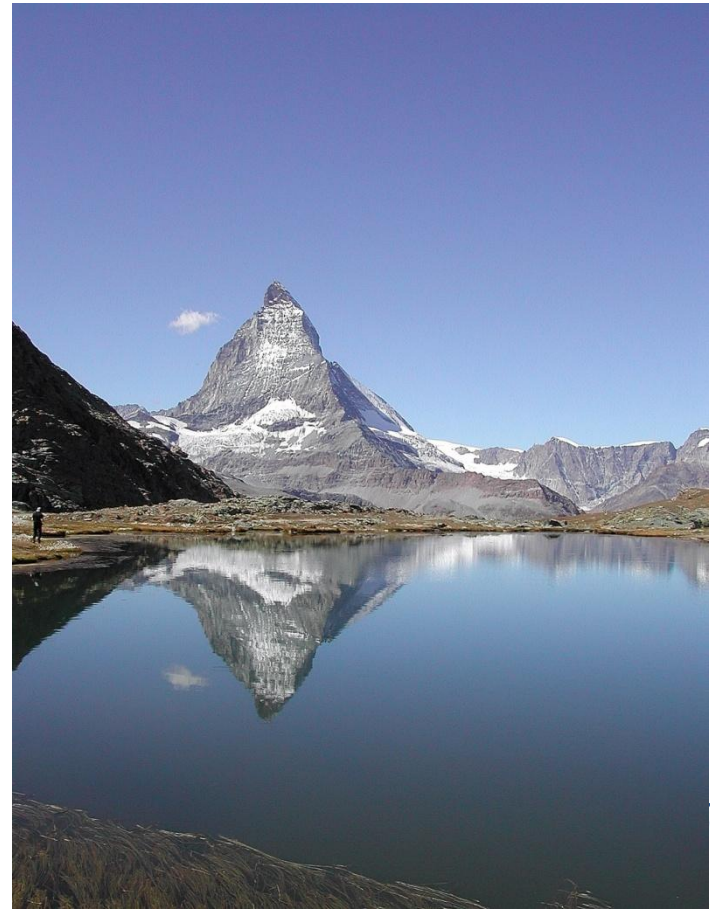
- **BUT SOME NOTICES ARE NULLITIES !**

The appellant's view of the grounds !

- (e) You ain't done it right
- (b) I ain't done nufink
- (c) Even if I did it's legal
- (d) OK, it ain't legal but you're too late (mate)
- (a) OK I should have got permission before I built it !... but it ought to be allowed
- (f) You're being too 'ard on a poor bloke like me
- (g) I give in but let's 'ave a bit longer

Inspector's duty

- ***“the Secretary of State has a duty to try and get the notice in order”***
- ***HAMMERSMITH LBC v SSE AND W F SANDRAL***
1975
- Sometimes this is a steep hill to climb



Inspector's duty

- Although this duty exists you shouldn't rely on the Inspector rescuing a faulty notice
- Always better to get it right first time
- Make sure you allow time to read through the notice
- Consider how every element relates to each other
- What are you seeking? Can this be clearly understood from the terms of the notice?

Basic principles

- Precision is important and in a criminal Court any ambiguity is likely to be construed against the authority.
- Remains the case that the recipient is entitled to a notice that tells him “fairly what he has done wrong and what he must do to remedy it” Miller-Mead.

Background

- 1963 Miller-Mead
- 1960 – 1981 the Act said:
“the Minister may correct any informality, defect or error ... if he is satisfied that the informality defect or error is not **a material one**”
- 1981 – 1990 s88A(2) said:
“the SoS may correct any informality, defect or error ... or vary its terms, if he is satisfied that the correction or variation can be made **without injustice** to the appellant or the LPA”

Step back to 1989



R v Tower Hamlets LBC,
ex parte P F Ahern
(London) Ltd (J.686)

EN: alleged MCU but
breach was BoC.

Inspector: defect too
fundamental to be
corrected.

EM
LawShare

emlawshare.co.uk

Ahern: Court held:

- The law has progressed to the point where the pettifogging has stopped ... the Act can be read so that it means what it says, namely that the SoS may correct any defect or error if he is satisfied that there would be no injustice to either party.
- Each case will depend upon its own facts as to whether an appellant has been so misled as to suffer injustice.

Pettifogging

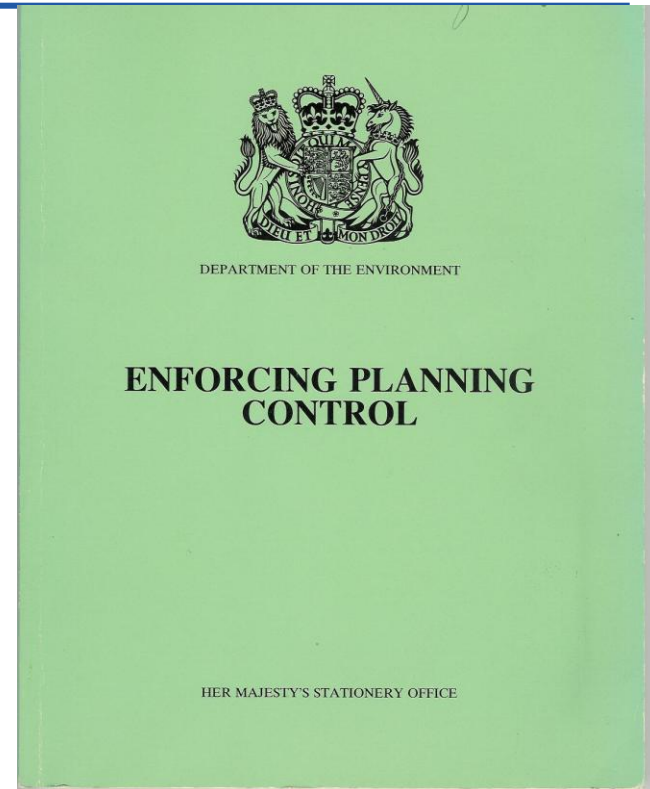
- Pettifogging is an adjective which is defined as petty, mean or quibbling.
- Pettifog is to be a Pettifogger
- Definition of a Pettifogger is
- “A lawyer of inferior status who conducts unimportant cases, especially one who is unscrupulous or resorts to trickery”
- Or “any person who quibbles or fusses over details”

The Carnwath Report 1989

Limited Powers of correction “one of the least satisfactory features of the current law of enforcement”.

“The perceived need to get the drafting precisely right can lead to LPAs delaying issue for months and leads Inspectors to look for technical problems rather than concentrate on the substance of the matter.”

Recommended that Inspectors should be given the widest possible powers ‘to get the notice right’ on appeal. Thus a notice requiring major alteration should not be simply set aside as invalid or a nullity.



1991 P&C Act – amends s176(1)

- On an appeal ... the Secretary of State may -
 - (a) correct any defect, error or misdescription in the enforcement notice; or
 - (b) vary the terms of the enforcement notice,
 - If he is satisfied that the correction or variation will not cause **injustice** to the appellant or the LPA.
- Not as wide as Carnwath may have intended – paraphrased the original words in the 1990 Act. But it is intended to give wide powers to get the notice right.

Post Carnwath & the 1991 Act

- Carnwath sought to broaden the power to correct very widely – including remedying nullities
- However the courts ruling in Miller Mead still remains good law i.e. that a notice can be so “hopelessly ambiguous and uncertain” that it is beyond an Inspector’s powers to correct.
- **WHY is this?**
- Primarily because where an error is so serious as to render the notice a nullity – it effectively becomes waste paper and there is legally no notice that the Inspector can correct.

What makes the notice a nullity

- A notice is a nullity if it is missing some vital element and so is "defective on its face" (*R v Wicks* [1996] JPL 743)
- i.e. it could be missing a requirement or it could fail to specify why service was expedient or identify the harm arising from the development
- Failure to include a period of time for compliance can also render the notice a nullity.
- Words like “immediately” or “forthwith” do not give a period of time and will therefore render the notice a nullity (*R (oao Lynes and Lynes) v W Berkshire DC* [2003] JPL 1137

The 'Payne' of getting the notice right

- **Payne v NAW & Caerphilly CBC [2007]** : EN: a site used for tipping and recycling.



Payne

- Requirement for a scheme of levelling and planting to be submitted to the LPA for approval.
- Inspector concluded that it was insufficiently specific to comply with the requirements of **s173(3)** but varied the requirement to something sufficiently specific..

More Payne.....

- Challenged & Held: not within his power to do that. On the **Miller-Mead** dictum the appellant could not tell from the notice **with reasonable certainty** what he had to do to put the matter right.
- So EN bad on its face, a nullity and not correctable. Not challenged by NAW.
- BUT Inspectors had been varying notices in that situation for years

Where does Payne leave us?

- Tests for nullity:
 1. Something specified as necessary in s173 & the ENAR is omitted and cannot be deduced. More than a clerical error (e.g. Lynes).
 2. If the EN is hopelessly ambiguous and uncertain such that recipient cannot know what he has done wrong or has to do to put the matter right.

Payne

- Applying the nullity tests:
 - Clear omission of something required by s173 that cannot be deduced. But in Payne the requirements were not omitted.
 - Was the EN “hopelessly ambiguous and uncertain”? The recipient didn’t know in detail what was required but he knew the substance (levelling and planting).
 - A great deal of imprecision and lack of clarity is needed before an EN is “hopelessly ambiguous and uncertain”.

Two examples post Payne

To dismantle and remove from the forecourt the single storey front extension together with the access canopy;

to reinstate the front of the ground floor restaurant with an approved stall riser and glazed window on the building line;

and to remove all associated debris from the site.

(vii) Seek the local planning authority's prior written approval of the inert materials to be used in order to comply with step 5(viii) below. Time for compliance: 2 months after this Notice takes effect.

(viii) Infill using materials previously approved in writing by the local planning authority (in accordance with step 5(viii) above), to a level of ... Time for compliance: 1 month after the date of the local planning authority's written approval.

Approval not caught by Payne

Where the recipient is offered a choice of options; one specified in detail or as an alternative a scheme to be submitted to and approved by the LPA. This does tell the recipient with reasonable certainty a way in which to comply with the notice and the notice is not a nullity.

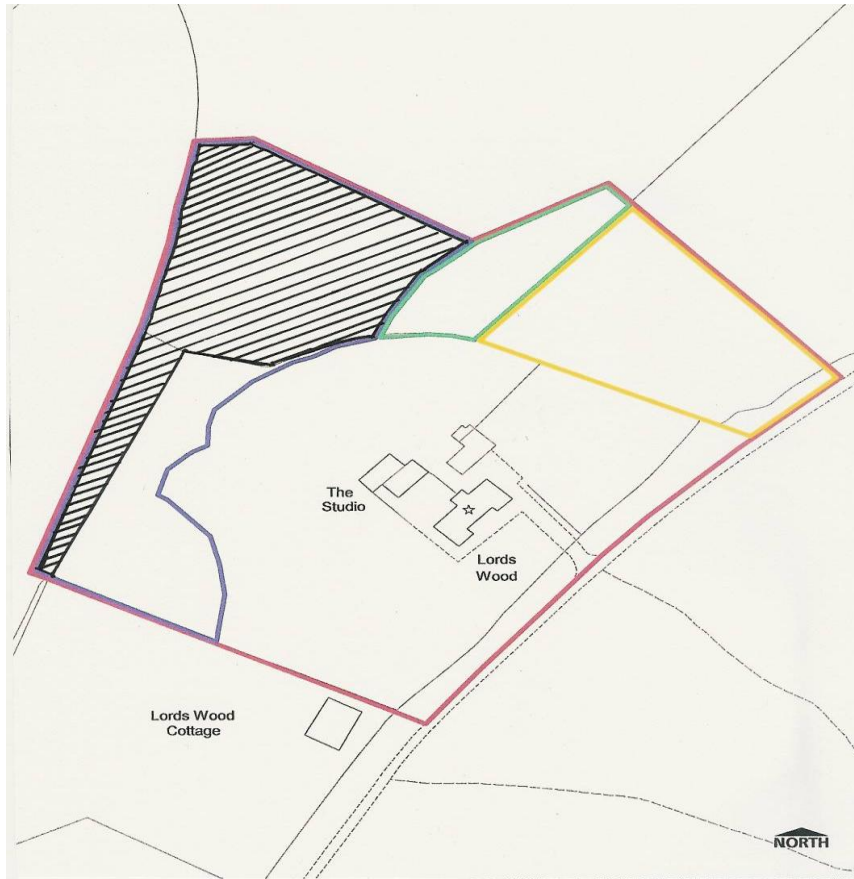
Where the breach is failure to comply with a planning condition that requires submission to and approval of a scheme by the LPA, you can require compliance with the condition.

Nullities

- It seemed that the concept of nullity was being expanded further so that any requirement that is unclear and ambiguous could render the notice a nullity
- So need for absolute clarity with requirements to avoid the possibility notice will be found a nullity

Case study 1

- Extension of garden of a large house into surrounding fields + erection of associated structures
- Appellant had planted a number of trees, including native species on part of the land, which he claimed was woodland not garden and therefore not development
- Notice required amongst other things:-
“Return the use of the areas of the Land edged in blue, green and yellow to an agricultural use with no trees or shrubs of a residential nature to be retained thereon”



Case study 1

- Appellant argued reference to trees of “ a residential nature” was hopelessly ambiguous and therefore nullity
- Inspector accepted that it was insufficiently precise but considered the intention was clear. Varied notice to require:-
“Return the areas of Land hatched black and edged green and yellow to the condition they were in before the unauthorised changes of use occurred.”
- Decision challenged on grounds that even if the notice was correctable the correction had rendered it a nullity

Case study 1

- Issue not determined by Courts as LPA reached agreement with appellant and challenge withdrawn
- However, TSol sought Counsel's advice and his view was that the notice was so ambiguous that it was a nullity
- View was that it did not make clear what the recipient was required to do.

Case study 2

- Erection of play equipment and creation of an adventure play ground on two islands in a lake
- Time for compliance to cease use of land as adventure playground was specified as “immediately”. Thus a nullity?
- In addition, required a scheme to be agreed. Based on *Payne* this also rendered it a nullity

Payne 5 years on

- Would the courts still strictly apply the reasoning in Payne or avoid pettifogging?
- Payne was not taken to the Court of Appeal and Ahern and the approach that flows from that was not argued before the court.
- If no injustice would be caused in such a situations could such an error be treated as an invalidity and capable of correction?

Invalidity – correctable errors

- Any error which does not render the notice a nullity effectively goes to the validity of the notice
- All such errors are potentially correctable providing no injustice is caused
- So changing description of breach e.g. from MCU to BOC acceptable if no injustice
- Even area covered by notice could be expanded subject to the same caveat but exercise caution [Howells v SSCLG]

Non-correctable errors

- What would amount to an injustice?
 - a) If the appellant had been aware of change would s/he have appealed on different grounds (e.g. ground d)
 - b) Would the correction make the requirements of the notice more onerous so that the appellant is worse off having appealed?
 - c) Notice covers land in other ownership where owner not served
 - d) Wrong Council mentioned on notice

Common errors

- Not including all the uses where there is a mixed use
- Incorrectly identifying the planning unit – vital in MCU cases
- Failure to identify the relevant area where the breach is occurring
- Inaccurate description of the breach
- Not being clear about whether under-enforcing
- Requirements don't match allegation
- Failure to mark up plan in manner specified in notice

Checking that the notice right !

Many notices null and void – More over recent years -----WHY?

- One or other of constituent parts either missing or defective.
- Allegations – what is the breach ?
- Reasons for issuing the notice ?
- What recipient is required to do ?
- Time for Compliance ?
- Effective Date -and signed !

Enforcement Notice to contain

- An EN shall state/specify:
 - s173(1)(a) - the matters which appear to the LPA to constitute the breach of planning control – **the allegation**
 - s173(1)(b) - the paragraph of s171A(1) within which, in the opinion of the LPA, the **breach** falls – **development without pp or failure to comply with a condition.**
 - s173(3) - the steps to be taken or activities to cease – **the requirements**
 - s173(8) - the **date** on which it is to **take effect**
 - s173(9) - **the compliance period(s)**

Continued.....

- s173(10) – An enforcement notice shall specify such additional matters as may be prescribed, and regulations may require every copy of an enforcement notice served under section 172 to be accompanied by an explanatory note giving prescribed information as to the right of appeal under s174: **reasons why expedient to issue EN**, relevant DP policies, precise boundaries of the land & explanatory note [**Regs 4 & 5, ENAR 2003**]

Continued.....

- Regulations 25 & 26 of the EIAR extend the requirements for environmental assessment to the deemed application in enforcement cases where relevant. In such circumstances an environmental statement is to be attached to an appeal against the enforcement notice.
- The LPA must serve with the notice a statement that the unauthorised development is likely to have a significant effect on the environment, and requiring that any appeal be accompanied by an ES.

In the beginning: the allegation

EXAMPLE ENFORCEMENT NOTICE - MATERIAL CHANGE OF USE

IMPORTANT - THIS COMMUNICATION AFFECTS YOUR PROPERTY

TOWN AND COUNTRY PLANNING ACT 1990
(as amended by the Planning and Compensation Act 1991)

ENFORCEMENT NOTICE

ISSUED BY: [name of Council]

1. **THIS NOTICE** is issued by the Council because it appears to them that there has been a breach of planning control, within paragraph (a) of section 171A(1) of the above Act, at the land described below. They consider that it is expedient to issue this notice, having regard to the provisions of the development plan and to other material planning considerations. The Annex at the end of the notice and the enclosures to which it refers contain important additional information.

2. THE LAND TO WHICH THE NOTICE RELATES

Land at [address of land], shown edged red on the attached plan.

3. THE MATTERS WHICH APPEAR TO CONSTITUTE THE BREACH OF PLANNING CONTROL

Without planning permission, change of use of the land from use for agriculture to a mixed use for agriculture and as a road haulage depot.

4. REASONS FOR ISSUING THIS NOTICE

It appears to the Council that the above breach of planning control has occurred within the last ten years. The unauthorised use as a road haulage depot is not an appropriate use of the land, which is within a rural area and forms part of the approved Green Belt in the development plan. The site is approached by narrow country lanes which are unsuitable for use by the type and quantity of traffic which the use attracts. The Council do not consider that planning permission should be given, because planning conditions could not overcome these objections.

5. WHAT YOU ARE REQUIRED TO DO

Stop using any part of the land as a road haulage depot and remove from the land all

- Is it clear if alleging a mixed use ?
- mixed use as a dwelling and ...
- Does it clarify other uses/activities cited ?
 - Ancillary uses or primary uses within mixed use
- If MCU alleged, shouldn't include Ops
 - Unless a composite notice intended
 - *Murfitt and Somak Travel*
 - Works that have taken place to facilitate or been part and parcel of MCU can be attacked under the requirements.

The allegation

- if it refers to previous lawful use we need to know what it is.
- siting/stationing caravans **not a use** of land
 - Why are they there? ie Use as what ?
- end of temp PP and no action = BoC not MCU
- Need to know if it is development without PP or BoC
 - In some cases it can be either !

Some Bad Allegations

- The carrying out of development without planning permission ---- eh ??? Another clue ?
- Confused allegations – does the LPA actually understand what it is enforcing against – Do you understand ?
- If we don't understand what hope has the recipient of the notice ?

Faulty allegation

THE MATTERS WHICH APPEAR TO CONSTITUTE THE BREACH OF PLANNING CONTROL

The unauthorised material change of use of the land from Green Belt to use as follows:-

- i. a builder's storage yard

- ii. for the operation of a business known as "See Sense Ltd"

- iii. for residential purposes.

The Requirements

- These should tie in to allegation(s) –
- Should indicate clearly what has been done without pp.
- What is being asked re putting that right ?
- no ‘schemes to be agreed’ or ‘submit Planning Application’
 - *Payne v NAW & Caerphilly BC* [2007] JPL 117
- S173(9) EN to specify ‘the period ...’ a period is not ‘immediately’ or ‘forthwith’

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5. WHAT YOU ARE REQUIRED TO DO

Stop using any part of the land as a road haulage depot and remove from the land all
8 weeks after this notice takes effect.

7. WHEN THIS NOTICE TAKES EFFECT

This notice takes effect on [specific date, not less than 28 clear days after date of issue], unless an appeal is made against it beforehand.

Dated: [date of issue]

Signed: [Council's authorised officer]

on behalf of
[Council's name and address]

The Requirements

- cannot require **resumption** of previous use
- no improvements over **original condition** of site
- **no imprecision** – what does ‘clean and tidy condition’ mean?
- May need to save lawful uses but no need to save the obvious (Cord v SSE)

Faulty requirements

THE MATTERS WHICH APPEAR TO CONSTITUTE THE BREACH OF PLANNING CONTROL

Without planning permission:-

- The raising of the ridgeline of the house and
- Erection of rear dormer

WHAT YOU ARE REQUIRED TO DO

- 1) Reduce the ridgeline back to its original height
- 2) Remove the dormer and replace the roof at the rear of the property to its original state
- 3) Cease the use for multiple occupation and revert the property to a single dwelling house
- 4) Remove all locks from internal doors
- 5) Remove materials from site. Restore the property to its original single family use as it looked in October 2007.

Other matters

- Regulation 4 (ENAR 2003)
 - all policies and proposals which are relevant to the decision to issue an enforcement notice
 - yes, but key ones are the relevant ones
 - reasons why it is expedient to issue EN

STATUTORY INSTRUMENTS

2002 No. 2682

TOWN AND COUNTRY PLANNING, ENGLAND

The Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002

Made - - - - - 23rd October 2002

Laid before Parliament 1st November 2002

Coming into force - - 23rd December 2002

The First Secretary of State, in exercise of the powers conferred on him by sections 173(10), 174(4) and 175(1) of the Town and Country Planning Act 1990(a) and sections 39(4), 40(1), 42(5) and 91(1)(a) of the Planning (Listed Buildings and Conservation Areas) Act 1990(b) and of all other powers enabling him in that behalf, hereby makes the following Regulations:

PART 1

CITATION, COMMENCEMENT, INTERPRETATION AND EXTENT

Citation, commencement and extent

1. These Regulations may be cited as the Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002, and shall come into force on 23rd December 2002.
2. These Regulations shall extend to England only.

Interpretation

3. In these Regulations—
 - “enforcement notice” means a notice issued under section 172(1)(c) of the Planning Act or section 38(1) of the Listed Buildings Act;
 - “the Hearings Rules” means the Town and Country Planning (Enforcement) (Hearings Procedure) (England) Rules 2002(d);
 - “the Inquiries Rules” means the Town and Country Planning (Enforcement) (Inquiries Procedure) (England) Rules 2002(e);

(a) 1990 c. 8; the functions of the Secretary of State under sections 173(10), 174(4) and 175(1) were, so far as exercisable in relation to Wales, transferred to the National Assembly for Wales by article 2 of and Schedule 1 to the National Assembly for Wales (Transfer of Functions) Order 1999, S.I. 1999/672; see entry in Schedule 1 to the Town and Country Planning Act 1990 (c. 8). Section 173(10) is substituted by section 5(1) of the Planning and Compensation Act 1991 (c.34); see section 336(1) of the 1990 Act for the definition of “prescribed”.

(b) 1990 c. 9; the functions of the Secretary of State under sections 39(4), 40(1) and 42(5) were, so far as exercisable in relation to Wales transferred to the National Assembly for Wales by article 2 of and Schedule 1 to the National Assembly for Wales (Transfer of Functions) Order 1999, S.I. 1999/672; see entry in Schedule 1 to the Planning (Listed Buildings and Conservation Areas) Act 1990 (c. 9).

(c) Section 172(1) is substituted by section 5(1) of the Planning and Compensation Act 1991 (c. 34).

(d) S.I. 2002/2684.

(e) S.I. 2002/2686.

[ODPM 2384]

Lack of reasons

The construction of an extension which is not wholly in accordance with the approved plan

REASONS FOR ISSUING THIS NOTICE

It appears to the Council that the above breach of planning control has occurred. An application for an extension to the side and rear of the property was granted on 20th August 2007. The roof design of the said extension fails to comply with the stamped approved plan dated 31 July 2007

Lack of reasons

4. Reasons For Issuing This Notice

InSufficient reasons for issuing "

It appears to the Council that the above breach of planning control has occurred within the last ten years.

The Council do not consider that planning permission should be given because planning conditions could not overcome these objections to the development.

Lack of reasons

REASONS FOR ISSUING THIS NOTICE

It appears to the Council that the above breach of planning control has occurred within the last 10 years.

It appears that a breach of planning control (material change of use) has occurred.

- a. The erection of fencing/gate in excess of two metres in height, adjacent to Occupation Lane/Green Lane
- b. The provision of a caravan on site, which is being or appears to be occupied as a residence.
- c. The installation of a decking and the storage of other domestic equipment not in association with the existing house known as 13 Endyke Lane, Cottingham.
- d. The change of the land to form a second planning unit.

Location and extent of site

- Site Plan - normal but not a requirement Reg 4(c)
ENAR – “reference to a plan or otherwise”
 - area too large, land not owned/no interest
 - Search land registry/electoral roll/council records
 - Correct planning unitAddress of site
 - no street number
 - incorrect address

So, what do you need to do ?

- Check that all constituent parts are there !
- Check reason for issuing Notice:
- Is it clear ? It must
- Be absolutely clear
- Leave nothing to interpretation
- Leave no gap for the lawyers

Next : check Allegation.

- Is it clear ? Will the recipient be clear about what is alleged
- Has LPA made it clear ?
- Does it allege: carrying out of development without planning permission **AND Does it also set out in detail what has been done without planning permission ?**

Next – check requirements

- Are requirements clear ?
- Are reqs unambiguous ?
- Are reqs detailed enough to ensure that a lawyer cannot get the recipient off the hook ?
- Have you read reqs as though you were on receiving end ?

Purpose of requirements

- Section 173(4) enables LPA to specify different categories of requirement.
- (a) Remedy the breach OR
- (b) Remedy any injury to amenity caused by the breach.
- Disclose exactly what LPA seek to achieve whether (a), (b) or both.
- Particular relevance for ground (f)

CHECK DATE AND SIGN !

- Immediately – not acceptable !
- Make sure the time specified is reasonable
- Make sure that time specified is in notice !
- Make sure that notice is signed

Headlines

Club for men in nappies wins battle to stay open

by David Harrison

NAPPY days are here again. And nappy nights, too. A club for adult men who like to dress up as babies has won a fight to stay open — and permission to offer members a new 'bed and breakfast' service.

The ruling by a government planning inspector means club members can now be tucked in bed, with clean nappy and cuddly toy, and read a bedtime story by 'Mummy Hazel Highheels' at a terraced house in Gillingham, Kent. Dummies are optional.

Hazel Highheels — aka Dr Hazel Jones, a former academic — had appealed against an attempt by Gillingham borough council to close the Nappy-Night Babyclub, which she runs from her home in Windmill Road.

Neighbours and some councillors dubbed Dr Jones the 'Witch of Windmill Road'.

They accused her of 'pandering to perverts' and prompting awkward questions from their children.

romper suits. Two neighbours moved house in disgust.

The inspector granted Dr Jones permission to run the 'adult baby nappy therapy club', with B&B for years — but banned members going into the garden in baby clothes.

Mr surprised but very pleased win, she said. 'I think I am something useful. Some people so intolerant.'

But Shirley Griffiths, council South ward, which includes Road, was 'deeply unhappy' decision. 'It sets a bad precedent as explain man in our grandchildren'.

A neighbour, who named, said: 'I don't like it if it keeps indoors. The club has 150 members all over Britain. Thousands of books.'



she says. 'It seems to help their life.' Most are in high-powered jobs and many are overweight. 'It's all milk they drink', says Dr Jones, adding that some are 'very well known though she will not name names.'

The 'infantiles' usually come to luncheon on their own, bringing their own baby food. Dr Jones dresses the food items, 'when necessary', admit 'parents discipline'.

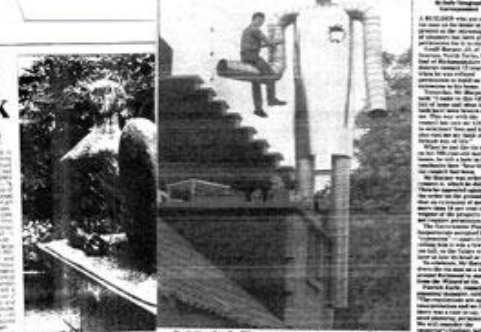
Dr Jones said she would find the house must 30 members who help her to run the club.

Couple fool planners to build luxury home in the hayloft

Secret of the barn



Planners no match for the tin man



Planners no match for the tin man

BNP ordered to close HQ

McAlpine pool broke planning law, judge rules

My paradise lost

Gardener must turn the land he tamed back into a wilderness

Demolition turns the Dallas of Derwent to dust



Art taken from listed building must go back

Commissioned works integral part of architect's reports Delta Alberg

Planners no match for the tin man

Planners no match for the tin man

Demolition turns the Dallas of Derwent to dust

THEY SAID THEY WANTED TO BUILD A COTTAGE BUT THIS WAS THE RESULT ...

QUESTIONS?