

Planning Enforcement – What tools to use and getting the best outcome

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Purpose of this session

- ▶ Quick recap of enforcement regime
 - ▶ Studies of enforcement cases! We will be seeking your views!
 - ▶ Best tools to use for a case post an Enforcement Notice being issued.
 - ▶ Workshop session to look at Enforcement Notices themselves and scenarios
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General Principals of Enforcement



Headington Shark Appeal decision quote!

- ▶ The Council is understandably concerned about precedent here. The first concern is simple, proliferation with sharks and heaven knows what else crashing through roofs all over the city. This fear is exaggerated, in the five years since the shark was erected, no other examples have occurred. Only very recently has there been a proposal for twin baby sharks in the Iffley Road. But any system of control must make some small place for the dynamic, the unexpected, the downright quirky. I therefore recommend the Headington Shark be allowed to remain.

Paragraph 58 of the National Planning Policy Framework which 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.*

What this means in practice

- ▶ Planning Enforcement is not a system to punish people who carry out works without planning permission. It is there to prevent inappropriate development that would not get planning permission
 - ▶ Breach of Planning Control is not a criminal offence.
 - ▶ A large percentage of breaches of planning control have no action taken against them because they cause no harm
 - ▶ The planning system is a permissive regime.
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- ▶ Not always easy to get this across to Cllrs, local Councils and the public who quite often see things in black of white ie no permission they must be punished!!

Quote from Martin Goodall a prominent Planning Solicitor which neatly sets out the position facing all Councils

- ▶ Faced with unauthorised development, a Local Planning Authority is in an initial quandary as to whether it is expedient to take enforcement action at all. As ministerial guidance makes clear, enforcement action should not be taken solely because the development was unauthorised; if the development does no harm then there is no excuse for taking enforcement action, even if the developer refuses to 'regularise' the position by applying for retrospective permission.

Roof-light installed in redundant warehouse building



This is a breach of planning control

- ▶ Would anyone take enforcement action?

Boundary fence erected, arrow points to neighbouring property.



View from neighbouring property



Would you take enforcement action on impact on neighbours amenity?

- ▶ If so what would the requirements of the Notice be?

What happened

- ▶ Council took action requiring removal.
 - ▶ Enforcement Notice upheld but requirements changed to seek reduction in height of the fence rather than total removal bearing in mind the permitted development fallback.
- 

Lord Justice Carnwath on Enforcement case in Court of Appeal 2006

- ▶ *Enforcement procedures are intended to be remedial rather than punitive” and “if there is an obvious alternative which would overcome the planning difficulties, at less cost and disruption than total removal, Councils should feel free to consider it”.*

So when taking enforcement action what is the best tools to use if an Enforcement notice is not complied with

- ▶ Prosecution?
- ▶ Injunction?
- ▶ Direct Action?

Pro's and Con's

- ▶ Prosecution advantages, probably a bit quicker than other options, can get costs back on conviction, can facilitate compliance. Disadvantages – Still need to get compliance with Notice. Can link with Proceeds of Crime Case (POCA) where appropriate.
- ▶ Injunction advantages – stronger penalties for non-compliance ie contempt of court custodial sentence (in theory!) and can get costs back, often will ensure compliance with notice. Disadvantages convincing a Court to grant one, can be lengthy in the event of non-compliance (Fidler case).
- ▶ Direct Action advantages – Results in compliance with the Enforcement Notice. Disadvantages might take some time to get costs back ie putting a charge on the land, or might never if cost of action exceeds land value.

Horses for courses in choosing which tool!

- ▶ Personally usually prosecute first and then consider direct action/Injunction in the event of continuing non-compliance.
- ▶ Probably in 80% of cases a successful prosecution will facilitate compliance with an Enforcement Notice before we have to take further action.
- ▶ Will go straight to Injunction/direct action if I think its unlikely a prosecution will result in compliance.

Outbuilding built in rear garden of property in The Forest of Dean without Planning Permission (10,000 square feet), view from neighbouring property



Aerial view



Building contained home cinema



Casino and Bar



Ten Pin Bowling Alley



Squash Court



Gym



What would you do in this case in the event that an Enforcement Notice was not complied with



What happened

- ▶ Landowner incorrectly thought he did not need planning permission.
- ▶ Council served Enforcement Notice in 2014 with 2 year compliance period.
- ▶ Landowner lost Appeal and did not comply with Notice
- ▶ Council sought Injunction and this was issued in November 2018 giving landowner a further 18 months to comply.
- ▶ A breach of an Injunction is a contempt of the Court and could lead to a custodial sentence

- ▶ The Development and now demolition will cost the landowner £720,000 (plus £30,000 costs that he has been ordered to pay) and he told the Court it will result in the collapse of his accountancy business and the laying off of all his staff.
 - ▶ It remains to be seen if he will comply with the Court Injunction to demolish by May 2020.
 - ▶ An expensive lesson to learn for the landowner!
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Points to note

- ▶ Injunction probably a good option and the developer not likely to comply with the notice (following a prosecution) bearing in mind the costs!
- ▶ Will take some time to resolve bearing in mind the 2 year compliance period on the Enforcement Notice and the 18 months the Courts gave to comply with the injunction.

New house built in Cornwall without planning permission (I have been personally involved with this case, including signing the Enforcement Notice!)



Enforcement Notice served on flood risk grounds and impact of the Countryside

- ▶ Notice not complied with what would you do?

What happened

- ▶ Enforcement Notice (EN) served September 2016 requiring house to be demolished.
- ▶ Landowner lodged appeal against Enforcement Notice to the Planning Inspectorate (PINS).
- ▶ Appeal dismissed, EN upheld May 2017.
- ▶ Appeal decision gave site owner until February 2018 to comply with the EN.
- ▶ Owner did not comply.
- ▶ Prosecution proceedings started, after preliminary hearing site owner pleaded guilty to not complying with the notice in Court in September 2018.
- ▶ Fined £5000 and ordered to pay Council costs of £1300. Fines usually significantly less than this for planning enforcement matters.
- ▶ October 2018 dwelling demolished.

Headline in The National Press about the case, albeit not quite accurate as to why we took action!

https://www.thesun.co.uk/news/7553025/woman... Woman, 63, forced to dem...

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TALL ORDER Woman, 63, forced to demolish new £150,000 home as it was ONE METRE too high

Sue Wilesmith, 63, paid £200,000 for a plot of land near Looe, Cornwall, and started building a two-storey property

By Abe Hawken
22nd October 2018, 12:07 pm | Updated: 22nd October 2018, 12:48 pm

11 COMMENTS

A WOMAN has been forced to demolish her dream £150,000 home - because she built it without planning permission.

Sue Wilesmith, 63, bought a plot of land near Looe, Cornwall, and decided to start building a two-storey timber property.

Sue Wilesmith, 63, paid £200,000 for a plot of land

↑ TOP

PS4
XBOX ONE

15:21
30/01/2019

Photo showing dwelling demolished



Points to note

- ▶ Having dealt with the developer we were confident that a prosecution would facilitate compliance with the notice.
 - ▶ We got our costs back for bringing the prosecution.
 - ▶ We still had the option of Injunction/Direct Action in the event of continuing non-compliance.
- 

Individual living in portacabin in Cornwall on land without planning permission, along with the unauthorised storage of other materials.









Non-compliance with enforcement notice

- ▶ What would you do?

What happened?

- ▶ We took direct action due to the site occupiers history

Site occupier previously jailed for attacking Council Officers

The screenshot shows a web browser window displaying a news article on the Telegraph website. The browser's address bar shows the URL: <https://www.telegraph.co.uk/news/1455739/Farmer-jailed-for-slurry-pit-a...>. The page features a navigation menu with 'File', 'Edit', 'View', 'Favorites', 'Tools', and 'Help'. A banner for 'Restore' shredding services is visible at the top. The main article is titled 'Farmer jailed for slurry pit attacks' and is dated '12:30PM GMT 01 Mar 2004'. The article text describes the conviction of Roger Baker for attacking trading standards officer Jonathan McCulloch and government vet Susan Potter. A sidebar on the right contains an advertisement for 'Inspired' real estate, featuring a house image and the text 'Find your nearest village' and 'Discover more!'. The Windows taskbar at the bottom shows various application icons and the system clock displaying '10:33 08/02/2019'.

Restore
Serious About Shredding
Compliant Shredding Solutions. Onsite, offsite, One Off or Shredder hire.

HOME » NEWS

Farmer jailed for slurry pit attacks

News



Roger Baker: deliberate and violent

12:30PM GMT 01 Mar 2004

A farmer has been jailed for two years for plunging an animal health inspector and a woman vet into a pit of slurry.

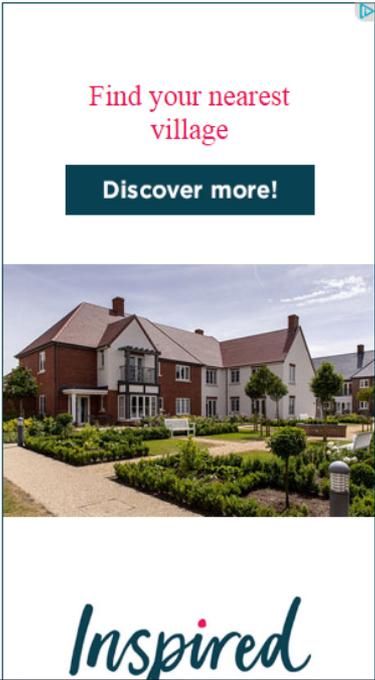
Roger Baker, 61, was found guilty in January of attacking trading standards officer Jonathan McCulloch and government vet Susan Potter on his land at Ventongimps, near Truro, Cornwall, last year.



The jury at Taunton Crown Court had last month failed to reach a majority verdict on a second charge of making a threat to kill.

The charge was instead left to lie on file at request of counsel for the

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Discover more!



Inspired

10:33
08/02/2019

- ▶ He had over 100 convictions for violence and animal cruelty.
 - ▶ Judge said he had a pathological hatred of authority.
 - ▶ No fear of prison (had been in and out of prison for most of his life) so prosecution or Injunction was never going to result in compliance with the Enforcement Notice.
- 







Points to note

- ▶ Direct action only way to secure compliance.
- ▶ Will never get our costs back as the total action cost over £14000 and the land not worth that much.
- ▶ Main cost was £8900 to the Police to provide 5 officers with tasers for the three days it took to clear the site. The Police had tasered him a few months before for swinging an axe in the direction of a Police Officer.

Proceeds of Crime Act (POCA)

- ▶ R v Del Basso [2010] EWCA Crim 1119
- ▶ Defendants operated airport parking business in breach of planning control
- ▶ S.197 TCPA prosecution successful but they continued
- ▶ On subsequent prosecution, Prosecution invoked s.6 Proceeds of Crime Act 2002 and £760,000 was confiscated

- ▶ Court of Appeal rejected Abuse of Process submission: *“They have treated the illegality of the operation as a routine business risk with financial implications in the form of potential fines or, at worst, injunctive proceedings. This may reflect a more general public impression among those confronted by enforcement notices with the decision whether to comply with the law or to flout it. The law, however, is plain. 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.”*

Beware though Councils must not use monies they might gain through POCA as a motivation to bring a Prosecution!

- ▶ *Wokingham BC v Scott* [2019] EWCA Crim (Harehatch Sheeplands Nursery Farm Shop etc in Berkshire)
- ▶ Enforcement Notice issued against various development in green belt including café, pet store, children's play area etc.
- ▶ LPA had induced the defendant to act to his prejudice by persuading him to withdraw his enforcement appeal on the basis they could approve a CLEUD.
- ▶ He had therefore been denied the opportunity to have the matter tested in the appropriate planning forum and, most importantly, the LPA had then sought to take advantage of the situation to prosecute him for alleged transgression of the enforcement notice without recourse to the appeal process
- ▶ Second, there was what the judge called the “inordinate delay between the preparation of the original Prosecution Report in May 2015 and the Expediency Report for Prosecution dated 6 March 2017”

Cont....

- ▶ judge found that at no time did the LPA notify owner or any of the other defendants that they would put themselves at risk of prosecution from 18 May 2015 onwards, he was told that such prosecution would be put in abeyance provided he supplied a timetable for compliance with the notice. But the fact remained that the defendant had been left in ignorance for the best part of two years of the fact that he was not only at risk of prosecution but that a decision had, in fact, been made on 18 May 2015 to prosecute him.
- ▶ The judge found this “a most unsatisfactory state of affairs”, particularly where there were proceedings continuing elsewhere. In her view, the effect of the failure to tell the defendant of that decision denied him the opportunity properly to consider the implications of his actions.

Cont.....

- ▶ A third and very significant area of the judge's concern was the fact that the possibility of an order being made under POCA was one of the principal factors in the decision to prosecute. (This was made abundantly clear in the 2017 "Expediency Report".) If the prosecution resulted in a conviction and a POCA order being made, the LPA would have received 37½% of the confiscation order. In the judge's view, this lent support to the defence submission that the LPA was seeking to prosecute the defendants in order to claw back public money already expended on the case.
- ▶ She observed that the POCA provisions apply only after conviction, and she made it clear that the possibility of an order *should never form any part of the prosecutorial decision-making process*, particularly where the prosecutor and the beneficiary are one and the same. To take into account the possibility of a financial benefit, in her view, ran contrary to an objective analysis of the merits of the case as required under the Code for Crown Prosecutors.

In conclusion

- ▶ The decision to prosecute is a serious step and one that must be taken with the utmost care. Where there is a potential conflict of interest, namely a financial interest in the outcome of the prosecution, set against the objectivity required of a prosecutor, the prosecutor must be scrupulous in avoiding any perception of bias. *The possibility of a POCA order being made in the prosecutor's favour should play no part in the determination of the evidential and public interest test within the Code for Crown Prosecutors.*
- ▶ The Court expressed the hope that this message will be relayed to all those making charging recommendations and decisions as soon as possible.

Workshop groups to look at Enforcement Notices and case scenarios

