

Report to: **Scrutiny Committee**



Date of Meeting 3rd June 2021

Document classification: Part A Public Document

Exemption applied: None

Review date for release N/A

Planning Enforcement Process

Report summary:

This report responds to a request from Scrutiny Committee to look at the planning enforcement process and the resourcing of planning enforcement. It seeks to outline the principles of planning enforcement, the process followed and how the work is resourced. It is hoped that this will enable Members to further consider these issues or at least further scope the issues.

Is the proposed decision in accordance with:

Budget Yes No

Policy Framework Yes No

Recommendation:

That the Scrutiny Committee:

1. Consider the planning enforcement process and the resourcing of this area of work as outlined in the report.
2. Make any recommendations for changes to the planning enforcement process to Council having regard to the Local Enforcement Plan and the legal framework for planning enforcement.
3. Make any recommendations for changes to the resourcing of the planning enforcement service to Council.

Reason for recommendation:

To ensure that Members fully understand the planning enforcement process and how this is resourced and are able to appropriately scrutinise this area of work and make recommendations to the appropriate committees of the council.

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Portfolio(s) (check which apply):

- Climate Action and Emergencies
- Coast, Country and Environment
- Council and Corporate Co-ordination
- Culture, Tourism, Leisure and Sport
- Democracy and Transparency
- Economy and Assets
- Finance

- Strategic Planning
- Sustainable Homes and Communities

Equalities impact Low Impact

If choosing High or Medium level outline the equality considerations here, which should include any particular adverse impact on people with protected characteristics and actions to mitigate these. Link to an equalities impact assessment form using the [equalities form template](#).

Climate change Low Impact

Risk: Low Risk; Click here to enter text on risk considerations relating to your report.

Links to background information Local Enforcement Plan - [local-enforcement-plan-final-march-2020.pdf \(eastdevon.gov.uk\)](#); Government Guidance - [Enforcement and post-permission matters - GOV.UK \(www.gov.uk\)](#)

Link to [Council Plan](#):

Priorities (check which apply)

- Outstanding Place and Environment
- Outstanding Homes and Communities
- Outstanding Economic Growth, Productivity, and Prosperity
- Outstanding Council and Council Services

Background

At the meeting of Scrutiny Committee on the 4th February 2021 a proposal form was considered by Members that asked committee to consider the role of planning enforcement. The form raised issues around consistency across the district, transparency, a clearer process with timescales and apparent disparities between actions taken against developers and those taken against private individuals. Issues around the checking and enforcement of planning conditions, the checking of building heights and the enforcement of works to trees were also raised.

In response the Scrutiny Committee resolved:

- “1. That a report on the planning enforcement process should come to Scrutiny Committee so that Members can ask questions and fully understand the forces at play be agreed.
2. That Scrutiny Members consider whether the Planning Enforcement Team are fully resourced be agreed.”

Planning Enforcement Principles

Government guidance defines a breach of planning control as:

- “the carrying out of development without the required planning permission; or
- failing to comply with any condition or limitation subject to which planning permission has been granted.

Any contravention of the limitations on, or conditions belonging to, permitted development rights, under the [Town and Country Planning \(General Permitted Development\) \(England\) Order 2015](#), constitutes a breach of planning control against which enforcement action may be taken.”

It goes on to stress the importance of effective enforcement to:

- “tackle breaches of planning control which would otherwise have unacceptable impact on the amenity of the area;
- maintain the integrity of the decision-making process;
- help ensure that public acceptance of the decision-making process is maintained.”

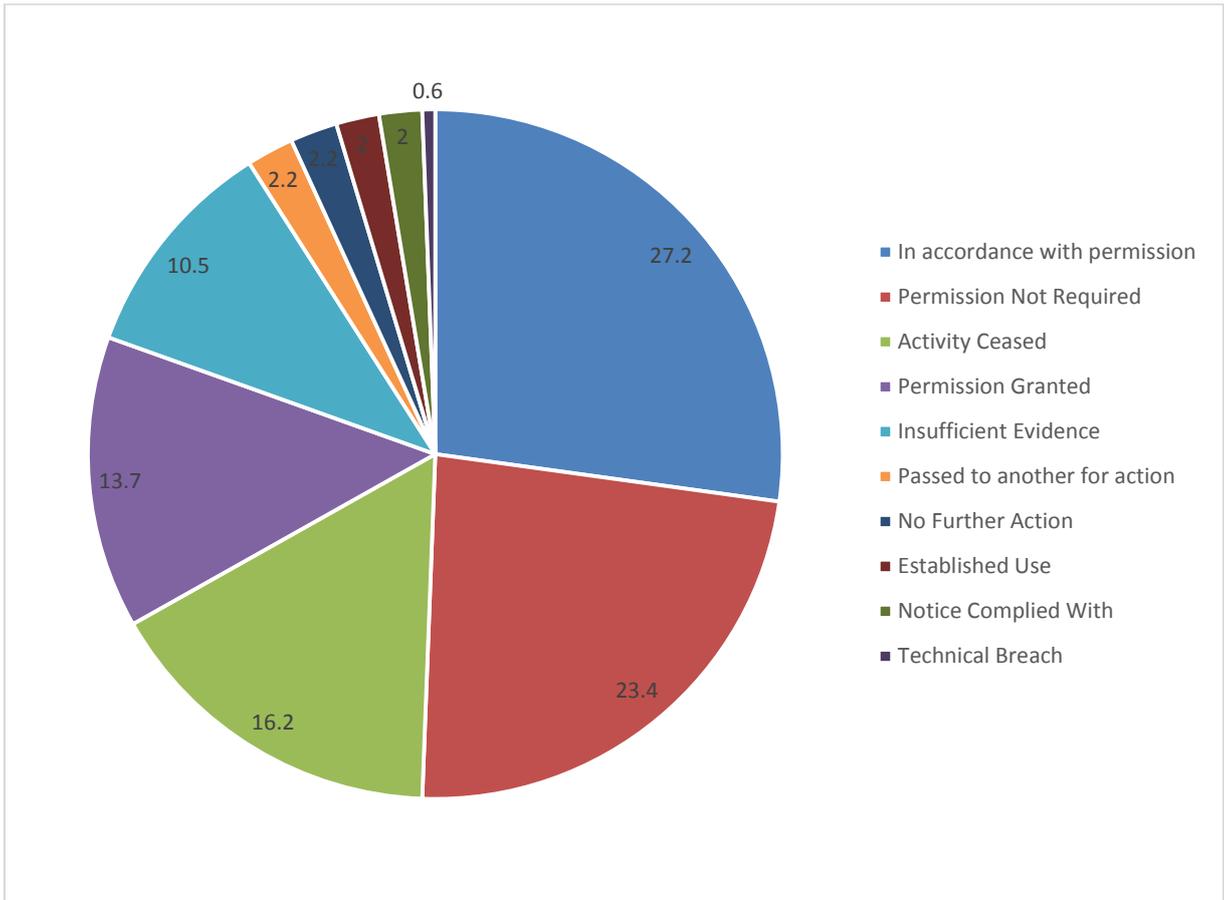
Before considering the planning enforcement process it is important to first understand some of the basic principles that are set by government legislation and guidance in relation to planning enforcement. There are many preconceptions that people have with regard to planning enforcement action which often mean that they think that we have more powers than we actually do. Basic principles include:

- Planning enforcement is discretionary but we have a duty to investigate.
- We can only take enforcement action where the unauthorised works are unacceptable in planning terms. We cannot take action simply because someone has failed to get planning permission if the works would be granted planning permission had an application been made.
- Developers undertaking unauthorised works have the right to make a retrospective planning application to retain the works and for this to be considered in the same way as if the application were made in advance. There is no penalty for applying retrospectively.
- Formal enforcement action is an evidence led process with the burden of proof on the Council to prove that a breach of the legislation or a planning condition has occurred and that this is harmful in planning terms.
- Any enforcement action must be reasonable, proportionate, expedient and in the public interest.
- It is not illegal to breach the planning legislation. It only becomes an offence where a formal notice is served and it is not complied with.

The limitations on our powers mean that in the majority of cases issues are resolved through discussion and negotiation with the developer or individual undertaking remedial works to secure compliance. The service of formal legal notices is a time consuming and resource intensive process that does not yield quick results. Legal action is used as a last resort when all other options have failed and the unauthorised works are causing significant and evidenced harm.

On average we receive about 500 cases per year and in the period April 20 to March 21 the average length of time for a case from start to finish was 173 days. This is however heavily skewed by a small number of cases where due to the service of a notice and or an appeal the case takes up to a few years to resolve thereby increasing the overall average. Most cases are resolved within a few weeks. The pie chart on the following page shows the outcomes of the 401 cases closed during the April '20 to March '21 period. It can be seen the most common closure reasons are that once checked the development was in accordance with the approved plans (27%) and the works did not require permission (23%). Between them these categories make up half of all cases. In almost 30% of cases officers have managed to get the unauthorised activity to cease or successfully secured a planning application that has then been granted. The remaining categories relate to cases such as where there was insufficient evidence of a breach or the matter was a technical breach such as where a fence is only slightly over the permitted height for example.

Chart 1: Proportion of enforcement cases closed between 1 Apr 20 and 31st March 21 by closure reason.



The majority of cases are resolved in good time, however where formal action is needed this takes significantly longer. This is because of the need to draft a notice, serve it, deal with any appeal against the notice, wait for it to take effect and the compliance period to expire. Then if it is not complied with gather the required evidence and prosecute the offender sometimes multiple times in order to secure compliance. As a result where formal action is taken the time taken from complaint to resolution can run into several years. This is largely a result of the process that the legislation requires us to follow. Fortunately it has only been necessary to serve a notice in a small proportion of cases with only 2% of cases in the 20 – 21 period being closed because a notice has been complied with.

The full enforcement process is documented in the Councils Local Enforcement Plan which can be found on the Council’s website at: local-enforcement-plan-final-march-2020.pdf (eastdevon.gov.uk). The plan explains the process of an investigation and all of the possible outcomes. It also explains the various notices that can be served to seek to remedy breaches of the legislation. The plan also covers enforcement against unauthorised works to trees and breaches of Section 106 agreements and the CIL regulations

Consistency and Transparency

The planning process whether through the determination of planning applications or planning enforcement is often accused of being inconsistent. In reality every enforcement case is different both in terms of the location and the circumstances of the site and in terms of the works themselves. The local enforcement plan seeks to establish a clear process for officers to follow and for the public to understand how we will act in particular circumstances. It seeks to ensure a

suitable level of consistency and transparency. In addition officers will speak to one another and discuss cases to seek advice and understand how each other would act to also aid consistency.

The proposal form submitted to Scrutiny Committee raising issues with Planning Enforcement indicates that the actions taken against homeowners seem more harsh than those taken against big corporate developers. It is important to remember that the legislation requires us to treat everyone equally. Developers are likely to have a much greater understanding of the system and the consequences of not complying with the legislation. That does not mean that they get away with things that others wouldn't simply that they will often have more resources and expertise at their disposal to argue their case and resolve matters. In contrast a homeowner may not understand the potential consequences of breaching the legislation and feel hard done by when they are treated the same as a developer. Their home will likely be their biggest investment and vital to them and so they will fear the worst when an issue with it is raised causing stress and anxiety. This can mean that they feel hard done by compared to what they perceive happens to commercial developers, however the response from officers is the same in either case. It is often the fact that our approach is the same that raises concerns about the fairness of the approach with people arguing that we should be much harder on developers because of their greater knowledge, understanding and resources, however to do so would in itself be unfair. All we can do is help private individuals to understand the process and their options and signpost them to sources of help but the requirements of the legislation are the same regardless of who the person responsible for the works is and so our approach must also be the same.

The perception that commercial developers are "getting away with it" is often fuelled by a lack of understanding of both the system and the individual cases. In the past the planning online system has enabled people to see when we are investigating a development at a particular site. They could also see basic information about how the case was progressing. The intention was that residents and members could check whether we were aware of an issue before reporting it themselves and that this and the basic progress shown would reduce incoming telephone and e-mail demand and enable customers to self-serve. However we received complaints that particular sites or developments were indicated on the website as an active enforcement case often before the owner of that site or the developer was aware of an investigation. Affected owners and developers also argued that by showing this information it indicated that something untoward was taking place in a "name and shame" approach when in many cases an investigation would show that there was no breach of the legislation and everything was OK. There was some sympathy with this concern and as a result this information is no longer displayed on our web-site and only cases where a formal notice has been served are shown. These are cases where a breach of the legislation has been proven and formal action taken and so the concerns raised could not be applied to these cases.

Proactive vs reactive approach

Currently the planning enforcement service works by responding to complaints received from the public, members of the Council and town and parish councils. We do not usually investigate anonymous complaints. The reason for this is that as a customer focused service it is important that we have a customer to respond to but also because action can ultimately only be taken where the unauthorised development causes harm and so it is important that a customer has contacted us and identified the harm that they are concerned about to focus our investigation.

Proactive enforcement work can be initiated by an officer who observes or becomes aware of unauthorised works but the enforcement officers do not routinely check works taking place on construction sites in the district to ensure that they are complying with the approved plans and any

associated conditions. Matters are sometimes highlighted by our own building control surveyors should they observe something in their duties that is of concern but it is important to note that unlike planning the building control process is led by the works on site rather than what is shown on plan.

We do not have the resources to carry out routine monitoring of construction sites. We are therefore reliant on matters being reported to us. This is clearly not ideal and can lead to reputational harm where a complainant thinks the matter they are complaining about should have been picked up by ourselves. It also runs the risk that developers feel that they can get away with things in the belief that we will not notice or find out. It is however considered that to start doing monitoring work even in a relatively light touch way would generate significant amounts of additional work that we are not resourced to handle. There is also a danger that investment in this area while good reputationally and sending out the message that we are watching to developers may yield little in the way of actual breaches of the legislation that cause material harm and are therefore of concern. Given the high number of complaints that are received each year which is often 500 to 600 a year it is considered that most issues that have an impact in planning terms are identified through these complaints. It is impossible to know how many other deviations from approved plans and breaches of condition take place that are not picked up but in all likelihood they have not caused material harm in planning terms otherwise they would have been reported to us. Although natural justice would suggest that such matters should still be addressed it is important to remember that unless they cause material harm in planning terms then formal action could not be taken. Identifying them would therefore simply generate additional applications and non-material amendments each of which cost the council to process and would generate additional work for the already stretched planning teams and nothing would actually change in terms of the built form. The additional cost of going through this process may not therefore be worth the outcomes that it would achieve.

Resources

The Council's Development Management Service is divided into a number of teams of which there are 3 area based teams. Each of these has an Enforcement Officer who is dedicated to investigating planning enforcement complaints in their area.

From time to time some informal benchmarking has taken place with similar authorities in the area to check the levels of resource committed to this area of our work. This was last done in 2018 and the results can be seen below:

Local Authority	Number of enforcement cases	Number of enforcement officers	Cases per officer
East Devon	598	3	199
North Devon	438	2.6	168
Taunton and West Somerset	333	2	166
Teignbridge	441	2.8	157
Torbay	287	1	287
Torrige	218	2	109

It should be noted that the above is a snap shot of a single year with the number of cases fluctuating from year to year. In 2019 the number of cases for EDDC dropped slightly to 575 but dropped markedly in 2020 to 461.

Overall the level of resource is considered to be appropriate for the level of demand and is able to cope with the cases received based on the current scope of the service. However if Members were minded to take a more proactive approach to planning enforcement either by taking a more forceful approach by serving more enforcement and related notices then further significant resource would be needed both within Planning Enforcement but also within the legal team who are required to draft the notices. If Members were minded to take a more proactive approach to checking works on authorised construction sites to ensure compliance with the plans and conditions then additional resource would also be required. In that instance it is considered that the resource would potentially need to be a qualified surveyor to ensure all dimensions and levels could be thoroughly checked.

Legislation

From various interactions with those raising enforcement issues with us over the years and officers own frustrations it is considered that many of the issues with planning enforcement are a result of deficiencies in the legislation. As stated at the start of the report our ability to take action is limited to those cases where the unauthorised development causes material harm in planning terms and even then the notices that can be served can only secure remedial works to rectify the harm. This has never felt like much of a deterrent.

Often even minor breaches of other legislation can lead to a fine being issued and yet what can be significant and harmful breaches of the planning legislation only reach the point of fines upon failure to comply with an enforcement notice and then prosecution proceedings are required. Even then the fines issued are often minimal. A system whereby the Council could issue fines for unauthorised works that continue until such time as consent is granted or the works removed would provide a suitable disincentive to those minded to breach the legislation and an income source by which to fund the additional resources needed to fully monitor developments taking place in the district and ensure compliance. Clearly this would require changes to the legislation that only government could achieve however the Council could seek to lobby the government for a review and suggest changes to the system.

Financial implications:

The employee specific budget for enforcement within the planning service, excluding equipment and the allocation of overheads is £110k for the current financial year. Any additional resource requirements will require additional budget and therefore resolution by council.

Legal implications:

Provided the statutory and government guidance is followed in any proposed changes to the planning enforcement process there are no legal implications from this fact finding report.