



A GUIDE TO PLANNING AND BUILDING STANDARDS ENFORCEMENT CHARTER

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PLANNING AND BUILDING STANDARDS ENFORCEMENT CHARTER FOREWORD



The purpose of this guide is to explain the role of Enforcement within Planning, Housing and Related Services, to show what happens at each stage in the process.

The service provided by the enforcement team covers two specific disciplines namely Planning and Building Standards.

The planning process is made up of three constituent elements:

- development planning – setting out future development proposals
- development management – assessing and determining planning applications
- planning enforcement – ensuring that developments are built in accordance with approved plans and pursuing unauthorised development.

The building standards process is made up of two constituent elements:

- building standards – assessing and determining building warrant applications, ensuring that developments are built in accordance with building warrant approvals and responding to reports of dangerous buildings.
- building standards enforcement – pursuing unauthorised development.

On the whole both the planning system and the building standards system operates well, but there are times when things go wrong – developments are not completed in accordance with the approved plans, conditions are not complied with, or ignored; work is undertaken without first seeking the required statutory consents from either the Council and/ or Building Standards. In these circumstances it is important that alleged breaches are properly investigated and, where appropriate, significant breaches are pursued. Members of the public and community groups have a valuable role in alerting the Council to potential breaches of planning control or works that have been undertaken without warrant. As a result of the Covid-19 pandemic the Council has had to adopt new process to allow investigation to continue. These new process, including remote visits and seeking copies of photographs from members of the public that they may have, has proven to be successful and we will incorporate these into our operating practices going forward.

I hope you will find this guide informative and of assistance.

Councillor Simon Mountford

Executive Member for Planning and Environment.

PLANNING AND BUILDING STANDARDS ENFORCEMENT CHARTER INTRODUCTION

Planning permission and a building warrant is required for most development that takes place in Scotland, with the exception of some minor works. Sometimes, however, developers or householders undertake work without the required permissions or fail to keep to the permissions they have been given.

The Council has discretionary powers to enforce planning and building standards requirements in such cases, if they consider it is in the public interest to do so. The Council will endeavour to monitor ongoing development, where resources permit, to ensure planning and building standards approvals are being followed but there is a role for the public in alerting the council to any problems they become aware of.

Whilst enforcement is an integral part of the Planning and Building Standards system it is also one of the most complex parts. The aim of this guide is to ensure that adopted procedures are fair and reasonable, and that interested parties are kept informed and made aware of what is required. The guide will set out the current powers available to the Council. These powers are set out in the Town and Country Planning (Scotland) Act 1997 as amended by the Planning etc. (Scotland) Act 2006 and the Building (Scotland) Act 2003 as amended.

KEY POINTS ON PLANNING ENFORCEMENT

A breach of planning control is not a criminal offence. The purpose of planning enforcement is to resolve the problem rather than to punish the mistake. In addition, any action taken has to be in the public interest and appropriate to the scale of the breach.

The Council has statutory powers to investigate unauthorised works, non-compliance with approvals and breaches of conditions attached to a planning consent, and to take formal action where a satisfactory outcome cannot be achieved by negotiation.

It should be noted that planning enforcement is a discretionary power. This means that, even where there is a breach of planning control, the Council has to consider if it is in the public interest to take enforcement action. The Council is not required to take any particular action in relation to a specific breach of planning control and, indeed, can decide that no action is necessary.

Planning enforcement also covers the physical display of advertisements such as billboards and advertisement hoardings, although slightly different procedures apply. These are set out later in this document. The actual content of an advertisement is not covered by planning control. Any complaint about the content of an advertisement should be made to the Advertising Standards Authority.

KEY POINTS ON BUILDING STANDARDS ENFORCEMENT

Where a building warrant is required for building works' the carrying out of these works without a building warrant is a criminal offence. The purpose of building standards enforcement is to resolve the problem rather than to punish the mistake. In addition, any action taken should be appropriate to the scale of the offence.

The Council has statutory powers to investigate unauthorised works or works not in accordance with the building warrant, and to take formal action where a satisfactory outcome cannot be achieved through negotiation.

It should be noted that Building Standards enforcement is a discretionary power. This means that, even where an offence has taken place, the Council has to consider if it is appropriate to take enforcement action. The Council is not required to take any particular action in relation to a specific offence and, indeed, can decide that no action is necessary.

With regard to Dangerous Buildings the Council has a duty to act to ensure the Health, Safety and Welfare, and Convenience of persons in or about buildings and others who may be affected by buildings or matters connected with buildings. **These powers are not discretionary.**

In circumstances where a building is felt to be a danger, the Building Standards Team should be contacted directly on 0300 100 1800.

THE ENFORCEMENT SERVICE

The Planning Acts give the Council discretionary powers in relation to Planning Enforcement. In Scottish Borders the majority of powers conferred to the Council have been delegated to the Chief Planning and Housing Officer, who in turn has authorised his officers to act on his behalf. The integrity of the Development Management process depends on the Council's readiness to take effective enforcement action when it is considered necessary and expedient to do so. It will not always be necessary or appropriate to pursue formal enforcement action, however, it is important that potential breaches are investigated and that explanations are available as to why action is, or is not taken. Public confidence in the Development Management process is quickly undermined if unauthorised development, which is unacceptable on planning merits, is allowed to proceed without any apparent attempt from the Council to intervene.

The Building (Scotland) Act 2003 gives the Council discretionary powers in relation to Building Standards Enforcement. In Scottish Borders the majority of powers conferred to the Council have been delegated to the Chief Planning Officer, who in turn has authorised his officers to act on his behalf. The integrity of the building standards process depends on the Council's readiness to take effective enforcement action when it is considered necessary to do so. However, it is important that those potential offences are investigated and that explanations are available as to why action is, or is not taken. Public confidence in the Building Standards process is quickly undermined if unauthorised development, which is unacceptable in terms of the building regulations, is allowed to proceed without any apparent attempt from the Council to intervene.

It is the policy of this Council to exercise enforcement powers responsibly to ensure that development takes place in accordance with the appropriate legislation and any planning conditions imposed by the Council. In recognition of this policy Scottish Borders Council has produced an Enforcement Charter to ensure that we have something to measure our progress against, and provide some clarity and consistency to the Enforcement process.

By implementing an Enforcement Policy and publishing this Charter we aim to make our work more understandable and accessible. The public are our main source of information when it comes to enforcement, so it is very important that they see how we operate and understand when we can or cannot take action. Enforcement can be a complex process with varying timescales. The aim of the Charter is to ensure that adopted procedures are fair and reasonable to all parties and that the outcome of any investigation is commensurate with the breach of control or the offence.

HOW TO CONTACT THE ENFORCEMENT SERVICE

Whilst the Council endeavours to monitor development to the best of its abilities with the resources it has available, it relies to a large extent on members of the public bringing potential breaches of planning control and building regulations to our attention. A breach of planning control or an offence under the Building (Scotland) Act can take several different forms:

- works being undertaken without planning consent or a building warrant
- an unauthorised change of use of a building or land
- a condition attached to a planning consent which is not being adhered to
- departing from the approved planning or building warrant plans
- unauthorised works to a Listed Building
- works to protected trees without first obtaining consent.

If you consider that a possible breach of planning control or an offence under the Building (Scotland) Act 2003 has taken place within Scottish Borders, you are encouraged to contact the Enforcement Service of Scottish Borders Council. The most efficient way to do this is by means of the online complaints form which can be found on the Planning Enforcement and Building Standards Enforcement by the following the link below: https://www.scotborders.gov.uk/site/xfp/scripts/xforms_form.php?formID=120&language=en

Please note when completing the on-line form the following information will greatly assist us in having a case registered:

- Full address include a Postcode of the property to be investigated.
- A clear and detailed description of the alleged works and there location within the property.
- The length of time the alleged works have been in existence for.

The purpose of the online form is twofold; firstly all complaints will be recorded in a consistent manner and secondly the information required by the Enforcement Service, to allow an investigation to commence, will have been provided.

The Enforcement Service will investigate all complaints about contraventions and unauthorised works it receives from completed online forms or in writing, and will allocate a priority level to the case. On receipt of a written complaint, the complaint will be assessed to establish if a potential breach or offence exists and if one exists it will be registered. Once registered the person making the complaint will receive a letter confirming the case will be investigated. This letter will contain the name of the case officer and the case reference number. Some complaints, such as neighbour disputes over boundaries or complaints over antisocial behaviour relate to matters over which the enforcement service has no control and cannot be investigated by the enforcement team. Wherever possible, those complaints will be passed to the most appropriate team within the Council or other agency.

Whilst we will do our utmost to honour any requests for confidentiality, you should be aware that it may not be possible to respect such a request in all cases. Some information may require to be released under the Freedom of Information (Scotland) Act 2002, subject to meeting our obligations under the Data Protection Act. At present, requests for total confidentiality with regard to the information supplied limits the ability of the authority to take formal action on the matter, and cannot be guaranteed if the case were to be considered at Appeal or in the Courts.

Anonymous complaints about contraventions and unauthorised works will **NOT** be investigated.

IDENTIFICATION OF POSSIBLE BREACHES OF PLANNING CONTROL

Planning enforcement involves two issues – whether a breach of planning control has taken place, and whether it is expedient or appropriate to take enforcement action. *That decision is within the planning authority's sole discretion.*

MONITORING OF CONDITIONS

Monitoring of conditions is required to ensure that development complies with the terms of the consent granted. Details of the conditions are included within the decision notice attached to the permission. It is first and foremost the responsibility of the developer to ensure that the development is undertaken in accordance with the approved plans and any conditions. Monitoring of conditions is undertaken by the Council's Planning Department and in the first instance, would be investigated by the appointed officer for the area before being passed to the enforcement team as required.

Where it is believed that the conditions attached to the consent are not being complied with or have not been discharged in a satisfactory way, members of the public can provide information to the Council. The large number of permissions granted each year makes the involvement of members of the public invaluable to the monitoring process. It should however be recognised that there are a large number of permissions granted each year and it is not practical, nor is it expected, that the Council monitor all conditions at all times.

When breaches of conditions are identified, they are investigated in the same way as other breaches of planning control.

PRIORITY / RISK ASSESSMENT

The Council faces an ever-increasing demand on its services and is obliged to demonstrate that it is offering best value in the use of these resources. All enforcement cases will be prioritised and risk assessed against known hazards.

Highest priority cases are dealt with first, to ensure that the Enforcement Officer's time is spent effectively on cases that either significantly affects the amenity and / or the public. The Enforcement Officers will aim to complete the investigation phase (including site visit) within 12 weeks.

Priority will be given to:

1. A breach of planning control which could lead to irreversible harm being caused to land and / or buildings (unauthorised quarry activity).
2. A breach in planning control which results in unauthorised works to a Listed Building.
3. Unauthorised works to trees covered by a tree preservation order, or in a conservation area.
4. Special Projects (assisting with regeneration or removal of blighted properties or restoring listed buildings).
5. Breaches which may cause danger to the general public, neighbours or highway users. (e.g. traffic hazard, storage of hazardous substances, development creating pollution problems).
6. A breach of planning control which is likely to result in serious ongoing environmental harm or nuisance.
7. Breaches within a Conservation Area, which may have irreversible effect on its appearance.
8. Reported breaches of conditions which would fall into categories (1-6 above).
9. The pursuance of cases where a retrospective planning application has been refused.

Other breaches of Planning Control such as minor development and advertisements will be investigated subject to resource availability and will not be considered a priority unless there is a wider public interest.

IDENTIFICATION OF POSSIBLE OFFENCES UNDER THE BUILDING (SCOTLAND) ACT 2003

Building Standards enforcement have to consider two issues – whether an offence has taken place, and whether it is expedient or appropriate to take enforcement action. *That decision is within the Councils sole discretion.*

PRIORITY / RISK ASSESSMENT – UNAUTHORISED AND NON COMPLAINT WORKS

The Council faces an ever-increasing demand on its services and is obliged to demonstrate that it is offering best value in the use of these resources. All enforcement cases will be prioritised and risk assessed against known hazards.

Highest priority cases are dealt with first, to ensure that the Enforcement Officer's time is spent effectively on cases that either significantly affects the amenity and / or the public. The Enforcement Officers will aim to complete the investigation phase (including site visit) within 12 weeks.

Priority will be given to:

- 1) An offence which could have a direct impact on life safety.
- 2) Offences which may cause danger to the general public, neighbours or highway users.

GENERAL

Finally, it is recognised that some offences under the Building (Scotland) Act which are of a temporary or irregular nature may require immediate action. These may not necessarily be determined by the above priorities.

INVESTIGATIONS

PRELIMINARY INVESTIGATIONS

On receipt of a completed enforcement enquiry form, the complaint will be registered and allocated to an Enforcement officer. An initial desktop investigation into the history of the property will be undertaken. Depending on the outcome of this initial assessment a site visit may be required. The priority allocated to each case will be established by considering the effect of the breach or offence and the significance of the breach on the amenity of the area.

As part of the registration process, the individual who has contacted the Enforcement Service will be sent an acknowledgement within 15 days of receipt of the completed form or letter, unless they have specifically requested not to be contacted.

Once a determination has been reached about the complaint we will contact you (within 40 days from when the case was registered), although this may take longer dependent on the complexity of the case being investigated again to advise you what action is to be taken. If your information does not concern a Planning matter or a Building Standards matter, you will be advised accordingly and we will endeavour to direct your concerns to the most appropriate section within the Council.

It is not always possible to anticipate the length of time required for a determination or for action on a case, nor for a case to be resolved. Progress can be delayed for a number of reasons, for example where evidence must be collected and verified over a period of time, where negotiations take place, or where formal procedures have to be used. Where an application is submitted to regularise the matter, or where an appeal is made to the Scottish Ministers or the Sheriff Court against a formal Notice, this will affect the timescale for resolution of the case.

The Council recognises that delays can be a source of considerable frustration to those submitting information particularly if they consider that their amenity is affected. Whilst the Enforcement Service will not enter into correspondence with a complainant about an investigation to avoid prejudicing any potential court action we will keep members of the public, who have reported a contravention, advised of significant developments in the case e.g. the service of a notice or the closure of the case. However, if a complainant makes contact with the service we will provide a general overview of the case without discussing the specifics of the case.

CONFIRMED BREACHES OF PLANNING CONTROL AND OFFENCES UNDER THE BUILDING (SCOTLAND) ACT

Where a breach of planning control or an offence under the Building (Scotland) Act has been established, the Council will invite the developer / land owner / occupier into negotiations to resolve the issue. However, these must be balanced against harm to the amenity, Scottish Borders Council's Planning Policies and to life safety. The Council will not let protracted negotiation prevent effective enforcement.

Advice from an Enforcement Officer will be put clearly and simply and will be confirmed in writing to the relevant parties, explaining where the breach or offence has occurred and what action is required to remedy the matter and over what time scale.

RESOLUTION OF A CASE PRIOR TO FURTHER ACTION BEING SOUGHT

In some instances, even though a breach or offence has occurred, it may not be appropriate to take further action. This is because the Council has to consider whether, having regard to the development plan and material considerations, the nature of the offence and to the circumstances of each case, it is appropriate to issue a Notice. It should be recognised that most enforcement cases are resolved without formal action.

Where the unauthorised development is likely to be acceptable, it may be appropriate to seek the submission of a planning application or a late building warrant. There are provisions in the Planning Acts and the Building (Scotland) Act for applications to be made in retrospect. If following discussions with the relevant parties an application is made, the enforcement case would be suspended until a decision is made on the application.

FORMAL ACTION

Only a small number of cases require to be dealt with by formal enforcement action. Formal action is instigated by the service of a Notice. All Notice's include the following information:

- a description of the breach or offence which has taken place
- the steps which should be taken to remedy the breach or offence
- the consequences of failure to comply with the Notice
- rights of appeal where appropriate.

If an appeal is lodged against a Notice, this appeal is submitted to and considered by Scottish Ministers (Planning) or the Sheriff (Building Standards). In almost all cases appeals against a Planning Enforcement Notice are dealt with by Reporters from the Scottish Government's Directorate for Planning and Environmental Appeals (DPEA). There is no right of appeal against a breach of condition notice. Anyone who has submitted information on a breach of planning control is advised of the appeal. The Council has additional powers, including the use of Interdicts, which complement the serving of Notices. For more detail, please see the section on Enforcement Tools further on in the Charter.

PLANNING REGISTER

Details of enforcement notices, breach of condition notices and stop notices are entered into an Enforcement Register, which forms part of the Planning Register.

These documents are available for inspection at Legal Services, Scottish Borders Council, Council Headquarters, Newtown St Boswells or an abridged version can be accessed via the Council's online Portal.

<http://eplanning.scotborders.gov.uk/online-applications/search.do?action=simple&searchType=Application>

BUILDING STANDARDS REGISTER

Details of Section 27 Notices (Building Warrant Enforcement Notice), Section 28 Notices (Defective Buildings), and Section 29/30 Notices (Dangerous Buildings) are entered into an Enforcement Register, which forms part of the Building Standards Register. These documents are available for inspection at Scottish Borders Council, Council Headquarters, Newtown St Boswells or an abridged version can be accessed via the Council's online Portal.

<http://eplanning.scotborders.gov.uk/online-applications/search.do?action=simple&searchType=Application>

AVAILABLE POWERS PLANNING

DECIDING WHETHER TO TAKE FORMAL ENFORCEMENT ACTION

The power to issue an Enforcement Notice (S127. Town and Country Planning (Scotland) Act 1997) is discretionary and is dependent on a number of factors to confirm that it is 'expedient' to issue a notice. A notice requires remedial steps to be taken within a specified time scale.

In serving a notice, the Enforcement Service will have regard to:

- its own Planning Policy contained within the Scottish Borders Council Development Plans
- Central Government advice in the form of Scottish Planning Policy Guidance (SPPG's), Planning Advice Notes (PANS), Circulars and the Enforcement Circular 10 of 2009
- the decision must not be 'unreasonable' (that is, must not be based on irrational factors; or taken without proper consideration of the relevant facts and planning issues; or based on non-planning grounds)
- whether the breach of control would unacceptably affect public amenity or the existing use of land or buildings meriting protection in the public interest
- to relevant judicial authority
- any other material considerations.

The Enforcement Service will keep a properly documented record of the investigation of each case and of the reasons why we decided to take, or not to take, enforcement action.

The decision to instigate enforcement action or not, will normally be made by the Team Leader - Enforcement in consultation, where necessary, with the Lead Officer (Development Management).

TIME LIMITS FOR ENFORCEMENT

The Town and Country Planning (Scotland) Act 1997 set out clear time limits for taking enforcement action against a breach of planning control. These time limits are set out below and where a breach has existed for longer than the specified time period no action can be taken.

- erection of buildings and other works - 4 years
- changes of use of buildings or land - 10 years
- non-compliance with planning conditions - 10 years

There are exceptions to these periods and questions of interpretation should be discussed directly with the appropriate Enforcement Officer or the Development Management officer for the area.

SECURING COMPLIANCE WITH A NOTICE

The Planning Acts provides that a criminal offence occurs when the requirements of an extant Enforcement Notice are contravened after the date by which the compliance period stated in the notice expires.

The Council *may* take action to ensure compliance with an Enforcement Notice. Such action may include:

- prosecution through the Sheriff Court
- carrying out works in 'default' of an Enforcement Notice. In other words the Enforcement Service may arrange for works required by an Enforcement Notice to be carried out and then recover the cost of this work from the recipient of the notice.

The Council will consider the most effective way of ensuring that someone who is contravening an Enforcement Notice complies with its requirements. It may, for example, be expedient to initiate prosecution proceedings and take 'direct' action, especially if the offence is blatant and causes serious environmental harm.

If an owner / occupier is found guilty, a maximum fine of £50,000 may be imposed by the Courts. If the Notice is still not complied with, a second prosecution may be sought with a recommendation that the courts impose a 'continuance fine', which will apply every day the Notice is in breach.

When a Notice has been complied with, the fact will be confirmed with the owner / occupier of the land / building and to anyone who has complained about the development or activity.

AVAILABLE POWERS BUILDING STANDARDS

DECIDING WHETHER TO TAKE FORMAL ENFORCEMENT ACTION

Building Works, which have not been specifically granted exemption, required a Building Warrant before the works can start and failure to obtain the necessary consent is a criminal offence. The Council may refer the owner of the building, the contractor carrying out the work, or any person with an interest in the works where an offence has taken place to the Procurator Fiscal for consideration of a prosecution under summary proceedings in the Sheriff Court.

The power to issue a Building Warrant Enforcement Notice (S27 Building (Scotland) Act 2003) are discretionary. The specifics of the case will determine if it is 'expedient' to issue a notice. A notice will require remedial steps to be taken within a specified time scale.

In serving a Notice, the Enforcement Service will have regard to:

- the implications of the offence
- if it is considered to be in the public interest to serve a Notice
- the decision must not be 'unreasonable' (that is, must not be based on irrational factors; or taken without proper consideration of the relevant facts)
- to relevant judicial authority.

The Enforcement Service will keep a properly documented record of the investigation of each case and of the reasons why we decided to take, or not to take, enforcement action.

The decision to instigate enforcement action or not, will normally be made by the Team Leader - Enforcement in consultation, where necessary, with the Lead Officer (Development Management) and / or Lead Officer (Building) Standards.

DANGEROUS BUILDINGS

If Building Standards become aware that a building constitutes a danger to members of the public, then we have a duty to act. An Officer from the Building Standards team will visit the dangerous building and make an assessment of the risk to the public. Section 29 and 30 are the relevant sections within the Act that determine how a dangerous building will be dealt with.

There are two types of danger, the first requiring immediate action and the second requiring urgent action. A detailed explanation of the powers available in relation to dangerous buildings can be found under Enforcement Tools – Building Standards.

Building Standards should be contacted directly on 0300 100 1800.

SECURING COMPLIANCE WITH A NOTICE

The Building (Scotland) Act 2003 provides that a criminal offence occurs when the requirements of an extant Enforcement Notice are contravened after the date by which the compliance period stated in the notice expires.

The Council *may* take action to ensure compliance with an Enforcement Notice. Such action may include:

- Referring the matter to the Procurator Fiscal for consideration
- carrying out works in 'default' of an Enforcement Notice. In other words the Enforcement Service may arrange for works required by an Enforcement Notice to be carried out and then recover the cost of this work from the recipient of the notice.

The Council will consider the most effective way of ensuring that someone who is contravening an Enforcement Notice complies with its requirements. It may, for example, be expedient to initiate prosecution proceedings and or take 'direct' action, especially if the offence is blatant and causes serious harm.

If an owner / occupier is found guilty of non compliance with the terms of a Notice, a fine on summary conviction not exceeding Level 5 may be imposed. If the Notice is still not complied with, a second prosecution may be sought with a recommendation that the courts impose a 'continuance fine', which will apply every day the Notice is in breach.

When a Notice has been complied with, the fact will be confirmed with the owner / occupier of the land / building and to anyone who has complained about the development or activity.

TREES, LISTED BUILDINGS AND ADVERTISEMENTS

Some breaches of Planning Control are subject to separate legislative codes, these include Tree Preservation Orders, works to trees in a Conservation Area, Listed Buildings and Advertisement Control.

Works to a protected tree or Listed Building require prior consent from the Council and failure to obtain the necessary consents is a criminal offence. The Council may refer the owner of a Listed Building or protected tree, the contractor carrying out the work, or any person with an interest in the land where an offence takes place to the Procurators Fiscal for consideration of a prosecution under summary proceedings in the Sheriff Court.

The display of advertisements is covered by the Town and Country Planning (Control of Advertisements) (Scotland) Regulations 1984. Many advertisements are displayed with what is called 'deemed consent' which means they do not require advertisement consent if they meet the criteria and conditions set out in the regulations. One of these conditions is that the landowner has given permission for the advertisement to be displayed on their land.

Displaying an advertisement in contravention of the regulations is an offence and, if convicted in court, an offender can be fined. The court can impose further fines for each day the breach of the regulations continues.

The Council has the power to serve an enforcement notice. This specifies a time period (normally 28 days) for compliance with the notice. However, this period can be reduced to seven days if the Council believes there is an urgent need for the advertisement to be removed or altered in the interests of public safety, or if the advertisement can be removed without any other work being required.

An enforcement notice can also require that a particular piece of land should not be used to display advertisements. This remains in force even if the original advertisement is removed. Any subsequent advertising on this site would amount to a breach of the notice.

The Council also has powers to remove or destroy placards and posters that do not have planning permission or deemed consent. If the person who put up the poster can be identified, they have to be given at least two days' notice that the Council intends to take the poster down. If they cannot be readily identified, then the advert can be removed immediately.

Council officials can enter unoccupied land, if necessary, to remove an advertisement. However they have no powers to remove advertisements displayed within a building to which there is no public access.

The Council regularly removes unauthorised advertisements on or adjacent to a public road. The Planning Enforcement Service will pursue action against advertisements, which are harmful to the visual amenity of the region.

ENFORCEMENT TOOLS PLANNING

The planning enforcement powers available to the Council are set out in the Town and Country Planning (Scotland) Act 1997 as amended by the Planning etc. (Scotland) Act 2006. Listed Building enforcement notices are covered by the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997. The Planning Acts are available from HMSO, 71 Lothian Road, Edinburgh and can be viewed online at the Office of Public Sector Information (OPSI) website: <http://www.opsi.gov.uk/>

Government policy on planning enforcement is set out in Planning Circular 10/2009: Planning Enforcement. The circular is published on the Scottish Government website and can be viewed at www.scotland.gov.uk/Topics/Built-Environment/Planning/publications/circulars.

POWERS OF ENTRY

The Council has powers to enter land to:

- establish if there has been a breach of planning control
- to check whether there has been compliance with a formal notice
- to check whether a breach or an offence has been satisfactorily resolved.

CERTIFICATES OF LAWFULNESS

Section 150 of the Town and Country Planning (Scotland) Act 1997 allows for the issuing of a Certificate of Lawful Use or Development. This means that where unauthorised development has taken place, but is outside time scales within which enforcement actions can be taken, the owner of the land is given the possibility of obtaining a statutory document confirming that the use, operation or activity named in it is lawful for planning control purposes. Once granted, the certificate will remain valid for the use or development described in it, on the land identified in the application.

RETROSPECTIVE PLANNING APPLICATIONS

Some forms of unauthorised development may not significantly breach planning policy or can be made acceptable by imposing planning conditions. In such cases the local Council may invite the owner to submit a retrospective planning application. The planning process for retrospective applications is exactly the same as normal planning applications and is consulted upon in the same way. The fact that the development has already commenced will not influence the outcome of the application process. Where proposals are less clear cut, or it appears that a retrospective application is unlikely to be successful, care will be taken to ensure that, even though it remains their right, a developer is not being encouraged to submit an application that has no prospect of success.

PLANNING CONTRAVENTION NOTICE (SECTION 125)

This is appropriate where the Council wish to know more before making a final decision on action or where they think an agreement might be reached. The Notice is served if it appears to the Council that there may have been a breach of planning control. It may be served on the owner, occupier, or any other person with an interest in the land, or anybody using it or carrying out operations on the land in question.

These persons may be required to give information on:

- (i) operations or activities being carried out, or the use of the land
- (ii) any matter relating to any conditions or limitations of a relevant permission.

The Notice may also give formal notice of a time and place when the Council will hear and consider:

- a) any offer by a person served with the Notice to apply for permission, refrain from operations or activities or undertake remedial works
- b) any representations the person may wish to make.

There is no appeal against this Notice and if it is not complied with, an offence is committed. The penalty for the first and subsequent summary convictions is a fine to the maximum of level 3 on the standard scale (Town and Country Planning (Scotland) Act 1997). However, making a false or misleading response carries a level 5 fine (Town and Country Planning (Scotland) Act 1997).

STOP NOTICE (SECTION 140)

These are issued only in extreme cases. This is an interim measure only available after the service of an Enforcement Notice and before all appeals against such a notice are resolved. It can forbid the continuation of operations and, but not all, uses. There is no appeal and penalties are as for the breach of an Enforcement Notice (see below). Mistaken use of a Stop Notice by the Council can render the Council liable for certain costs.

TEMPORARY STOP NOTICE (SECTION 144A)

These would be used to require the immediate halt of an activity which breaches planning control. The provisions make an exception in that a Temporary Stop Notice cannot prohibit the use of a building or a caravan as a dwellinghouse. Temporary Stop Notices are enforceable for 28 days, after which time they expire. They may, however, be followed by further enforcement action such as an Enforcement Notice and Stop Notice. There is no provision to appeal against a Temporary Stop Notice.

FIXED PENALTY NOTICE (SECTION 145A)

This provides planning authorities with an alternative process, in addition to the option to seek prosecution, to address situations where a person has failed to comply with the requirements of an enforcement notice (EN) or a breach of condition notice (BCN). By paying the penalty imposed by the FPN, the person will discharge any liability for prosecution for the offence. They will not, however, discharge the obligation to comply with the terms of the EN or BCN and the Council will retain the power to take direct action to remedy the breach and recover the costs of such work from that person. The Council is not required to offer the option of paying a fixed penalty. Any decision to do so would be dependant on considerations such as the scale of the breach and its impact on local amenity.

NOTICE REQUIRING APPLICATION FOR PLANNING PERMISSION FOR DEVELOPMENT ALREADY CARRIED OUT (SECTION 33A)

Where the Council considers that a development which does not have planning permission may be acceptable (i.e. they consider that it might be granted planning permission) they may issue a notice requiring the landowner or developer to submit a retrospective planning application. This application will be considered on its planning merits and handled in the same way as any other planning application. Issuing such a notice does not guarantee that permission will be granted; the Council may, on consideration of the application, decide instead to refuse permission, or to grant permission subject to conditions or alterations to make the development acceptable.

ENFORCEMENT NOTICE (SECTION 127)

This may be issued when it appears to the Council:

- (a) that there has been a breach in planning control
- (b) that it is expedient to issue the Notice having regard to the development plan and other material considerations.

A copy of the Notice is served on:

- (i) the owner and the occupier of the land to which it relates
- (ii) any other person with an interest in the land, being an interest, which in the opinion of the Council, is materially affected by the Notice.

The Notice must specify the steps necessary to secure compliance and the period for compliance must be at least 28 days.

It should be noted that once an Enforcement Notice has been served it will remain on the land or property indefinitely.

BREACH OF CONDITION NOTICE

This may be served if any of the conditions or limitations of the relevant permission are not complied with. It comes into effect 28 days after being served. Again, the Notice must specify the steps necessary to secure compliance, and the period for compliance must be at least 28 days.

There is no appeal against the Notice except by way of judicial review. Contravention of a breach of condition notice can result in the Council deciding to prosecute, with a fine up to £1,000 (level 3 fine).

INTERDICTS (SECTION 146)

An interdict is imposed by the courts and is used to stop or prevent a breach before it has occurred, for example undertaking mineral extraction in a disused quarry. It can also be used as an alternative to Enforcement Notices or Breach of Condition Notice. However, it is generally used as a final resort if all the other methods fail to deter. Penalties are flexible and at the court's discretion. The granting of an interdict is at the Court's discretion and a failure to obtain an interdict is likely to carry a heavy cost for the Council.

APPEALS

There is a limited right of appeal to the Scottish Government's Directorate for Planning and Environmental Appeals (DPEA), with the possibility of subsequently taking points of law to the Court of Session.

There are six grounds for an enforcement appeal, as follows:

- a) that those matters have not occurred, (ground [a])
- b) that those matters (if they occurred) do not constitute a breach in planning control, (ground [b])
- c) that, at the date when the Notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters, (ground [c])
- d) that copies of the Enforcement Notice were not served as required under Section 172, of The Town and Country Planning (Scotland) Act 1997, (ground [d])
- e) that the steps required by the Notice to be taken, or the activities required by the Notice, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach, (ground [e])
- f) that any period specified on the Notice in accordance with section 173(9) falls short of what should reasonably be allowed, (ground [f]).

All complainants, neighbours and local elected Members will be made aware that an appeal has been lodged against an Enforcement Notice, together with any arrangements made for a Public Inquiry or Hearing. The Council will advise all parties of the outcome of an appeal. If an appeal is successful and the Enforcement Notice quashed, the investigation is closed.

ENFORCEMENT TOOLS

BUILDING STANDARDS

The Building Standards enforcement powers available to the Council are set out in the Building (Scotland) Act 2003 as amended. The Building (Scotland) Act is available from The Stationary office (TSO) at www.tsoshop.co.uk and can be viewed online at the Legislation.gov.uk website: <http://www.legislation.gov.uk/>

BUILDING WARRANT ENFORCEMENT NOTICE (SECTION 27)

In circumstances where work for which a building warrant is required has started without a warrant, an offence has been committed. However, to deal with these cases where work has started without a warrant, perhaps through ignorance of the law, a mechanism exists to allow the owner to secure statutory approval for the works. The Act, therefore, allows a late application for warrant to be submitted at any time before the works on site are complete or where the works have been completed, a late completion certificate. The Late Application for Building Warrant or completion certificate process requires full drawings, as for a normal application. If the construction is well advanced the verifier may request parts to be exposed so that adequate checks can be made and a higher fee is charged to cover such difficulties (200% in cases where works have started but not completed and no Building Warrant has been issued and 300% in cases where the works have been completed and no Building Warrant was obtained, of the normal fee). These disadvantages to starting work before obtaining a warrant are not designed as a penalty, which would arise from any action taken in relation to the offence, but are necessary to allow proper consideration of the work.

Section 27 also provides for the provision to require works to be halted until a Building Warrant has been approved.

DANGEROUS BUILDINGS NOTICE (SECTION 29 / 30)

SECTION 29: DANGEROUS BUILDINGS (IMMEDIATE ACTION)

Under Section 29 where a building constitutes an immediate danger to persons in or about it or to the public generally or to adjacent buildings or places, we must carry out such work (including, if necessary, demolition) as it considers necessary:

- (a) to prevent access to the dangerous building and to any adjacent parts of any road or public place which appear to us to be dangerous by reason of the state of the building,
- (b) for the protection of the public and of persons or property in places adjacent to the dangerous building.

In respect of immediate action the Council must remove the danger and will, when possible, notify the owner.

In certain instances, the nature of the danger / emergency work required may prevent the occupiers from remaining in the building; in that situation, occupants will have to move out immediately, and we can apply to the Sheriff for a warrant for removal if necessary.

If the Council has to undertake works to make a building safe the Council will seek to recover these costs (including an administration, tendering and contract charge currently set at 20%) from the owners of the property.

SECTION 30: DANGEROUS BUILDINGS (URGENT ACTION)

In respect of urgent action, we must notify the owner by serving a notice under Section 30 to give the owner(s) the opportunity to carry out the necessary work. If this fails, we may take action and will reclaim the costs and expenses from the owner(s).

The powers given to us by the Building (Scotland) Act 2003 does not reduce the owner responsibility; however, they do provide a safety net that the Council can use to protect the public when it appears to the Council that, for whatever reason, building owners have failed to fulfill their legal responsibilities.

If the Council has to undertake works to make a building safe the Council will seek to recover these costs (including an administration, tendering and contract charge currently set at 20%) from the owners of the property.

POWERS OF ENTRY (SECTION 39)

This provision of this section of the Act allows the Council to enter a property to verify if works have or have not been carried out without a Building Warrant. In addition it also confers powers to the Council to allow them to undertake works to comply with the terms of a Notice served under Section 27, 28 and 30 of the Act.

EVACUATION OF BUILDINGS (SECTION 42)

In situations where a building is dangerous and it is considered that the risk to persons in the building or adjacent buildings to be such that they would be at risk the Council has the power to require those persons to be evacuated from the relevant buildings.

APPEALS (SECTION 47)

A person on whom a Notice has been served may appeal the Notice to the Sheriff Court.

INTERDICT (SECTION 21)

An interdict can be imposed by the courts prevent a building from being occupied prior to a completion certificate being issued in order to prevent an offence occurring.

SUMMARY

PLANNING ENFORCEMENT

Planning permission is required for most development, with the exception of certain types of work specified by Act of Parliament which takes place in Scotland. Sometimes, however, developers or householders undertake work without planning permission or fail to keep to the permission they have been given. The Council have powers to act in such cases and will investigate breaches of planning control.

These can include:

- work being carried out without planning permission
- an unauthorised change of use
- not following conditions imposed by a planning permission
- not following plans approved by a planning permission.

The public can play a vital role in reporting such incidents to the Council. Any report of an alleged breach will need to include:

- the address of the property concerned
- details of the suspected breach of planning control (with times and dates if relevant)
- contact details for the person providing the information
- whether that person wishes the matter to be treated confidentially.

The Council will do its best to honour such requests but anonymity cannot be guaranteed where statutory enforcement action is undertaken, particularly where court action is required and that person may be called as a witness. The purpose of planning enforcement is to resolve the problem rather than to punish the mistake. Action can involve negotiating a solution, asking for a retrospective planning application to be made, or more formal action such as the issue of an enforcement notice or a breach of condition notice. Formal action may require the agreement of the Council's Planning and Building Standards Committee. This can include serving an enforcement notice on the relevant people, spelling out the action they are required to take. They can challenge this notice through an appeal to Scottish Ministers. If an appeal is made, enforcement action is suspended until a decision is issued. Failure to comply with an enforcement notice can result in prosecution.

In some cases, the Council is time-barred from taking action. Generally, work carried out more than four years ago or a change of use that took place more than 10 years ago is considered lawful and immune from action. It is not always possible to anticipate how a particular case will develop, nor how long it will take. The Council will try to keep people informed of progress.

SUMMARY

BUILDING STANDARDS ENFORCEMENT

BUILDING WORKS

A building warrant is required for most development, with the exception of certain types of work specified by Act of Parliament which takes place in Scotland. Sometimes, however, developers or householders undertake work without first obtaining a Building Warrant or fail to keep to the permission they have been given. The Council have powers to act in such cases and will investigate alleged unauthorised building works.

These can include:

- work being carried out without a Building Warrant
- an unauthorised change of use
- not following plans approved by a Building Warrant.

DANGEROUS BUILDINGS

The Council has a duty to act in situations where a building poses a risk to the public or persons using the building. **In circumstances where a building is felt to be a danger, the Building Standards Team should be contacted directly on 0300 100 1800.**

The public can play a vital role in reporting such incidents to the Council. Any report of an alleged unauthorised works will need to include:

- the address of the property concerned
- details of the suspected works, (with times and dates if relevant)
- contact details for the person providing the information
- whether that person wishes the matter to be treated confidentially.

The Council will do their best to honour such requests but anonymity cannot be guaranteed where statutory enforcement action is undertaken; particularly where court action is required and that person may be called as a witness. The purpose of Building Standards Enforcement is to resolve the problem rather than to punish the mistake. Action can involve negotiating a solution, asking for a late Building Warrant application to be made, or more formal action such as the issue of an enforcement notice. Formal action may require the agreement of the Council's Planning and Building Standards Committee. This can include serving an enforcement notice on the relevant people, spelling out the action they are required to take. They can challenge this notice through an appeal to the Sheriff Court. If so, enforcement action is suspended until a decision is issued. Failure to comply with an enforcement notice can result in prosecution.

It is not always possible to anticipate how a particular case will develop, nor how long it will take. The Council will try to keep people informed of progress.

OUR SERVICE STANDARDS

By publishing our standards and targets, we aim to improve our enforcement service and make it responsive to the needs of our customers. We will monitor the contents of this Charter to ensure that standards and targets are being met.

Further copies of this Charter can be down loaded from the Council's website, and viewed online in local libraries and at Council Offices (*please see Useful contacts*).

Following receipt of a written complaint about contraventions, you will receive a formal acknowledgement to your letter or e-mail within 15 working days. The acknowledgement noted above will include a reference number and contact details for the investigating officer. If the matter does not involve a possible breach of planning control, you will be advised accordingly.

Members of the public who report a contravention will receive a formal response within 40 working days following registration of a the complaint. They will be advised of the proposed action to be taken. This may include the need for additional investigation prior to deciding on a course of action. They will be advised if the matter does not involve a breach of planning control of an offence under the Building (Scotland) Act 2003.

The Council recognises that delays can be a source of considerable frustration to those making a complaint, particularly if they consider their amenity is affected. We will keep members of the public, who have reported a contravention, advised of significant developments in the case e.g. the service of a notice or the closure of the case.

Where a planning breach cannot be resolved and action is justified, a formal notice will be served. This will be either an enforcement notice or, if a condition of planning consent has been breached the Council may issue a breach of condition notice instead. If it is decided to serve a formal notice, we will write to the recipient to explain what is required, the timescales involved and the available options to resolve the issue.

Where an issue under the Building (Scotland) Act 2003 cannot be resolved and action is justified, a formal notice will be served. If it is decided to serve a formal notice, we will write to the recipient to explain what is required, the timescales involved and the available options to resolve the issue.

Where the terms of any enforcement notice are not complied with, every effort will be made to resolve the case to the satisfaction of the Council.

Options include:

- direct action by the Council and / or
- the matter being referred to the Procurator Fiscal for possible prosecution.

Priority will be given to significant breaches of planning control and Building Regulations which may include:

- works being undertaken in contravention of the requirements of an enforcement notice
- irreversible damage to Listed Buildings
- unauthorised works to protected trees
- breaches of condition for major development
- unauthorised development that may lead to substantial and / or permanent damage to sites of National Importance, for example, Scheduled Ancient Monuments
- Unauthorised works which result in life safety implications.

When an appeal is submitted on an enforcement notice served by the Council, we will inform the original complainant within 10 working days of the receipt of the appeal.

CUSTOMER CARE

The Council will disseminate information about planning enforcement by publishing and making an Enforcement Charter available to all its customers by means of the internet. Specialist 'in-house' leaflets may be produced to assist complainants, owner / occupiers and businesses that are subject to the enforcement procedure.

The Council aims to provide a service that is courteous and efficient. Staff will identify themselves by name and provide a contact point and telephone number for future dealings with the organisation.

We will seek to ensure that all communications are in Plain English with interpretation / translation services available when requested.

We will seek to act in a co-ordinated manner with other departments of the Council and with outside agencies, to minimise overlapping actions and time delays.

MAKING A SUGGESTION OR COMPLAINT ABOUT THE SERVICE

The Council hopes the public will be satisfied with the enforcement service. However, if you have any suggestions, concerns or difficulties, we want to hear from you. We are committed to improving our service and dealing promptly with any failures.

The Council recognises that there may be occasions when things go wrong and the customer's complaint is the first step in helping to put matters right.

We will consider all complaints made about the way an enforcement enquiry was dealt with. Some people may disagree with the outcome of an investigation but, of itself, that is not grounds for complaint.

In the first instance, please discuss the matter with the member of staff involved. If you are still dissatisfied, talk to the Team Leader - Enforcement (see list of contacts).

If that officer is unable to help, you will be given the name of a more senior manager who will investigate the matter.

If you are still unhappy about how the complaint has been handled, a formal complaint can be made.

The Council has a corporate complaint procedure, which is followed when a complaint is received. Complaints about the service can be made:

- by letter to the Chief Planning Officer (see list of contacts)
- in person or by telephone – our staff will be able to take the generic details of the complaint and make sure it is dealt with.
- logging on to **www.scotborders.gov.uk/complaints**.

All complaints regarding the service will be recorded. If the problem cannot be resolved immediately it will be passed on for further investigation and action. We will acknowledge the complaint within three working days and every effort will be made to fully resolve the complaint within 20 working days.

Ultimately the complainant has the right to contact the Scottish Public Service Ombudsman and leaflets / forms are available either in hard copy format from all our Area Offices or at our reception facility at Headquarters, in addition the forms are also available on the Councils website to facilitate this process.

USEFUL CONTACTS

FOR ALL ENQUIRES ABOUT THE ENFORCEMENT SERVICE AND ENFORCEMENT INVESTIGATIONS

TEAM LEADER - ENFORCEMENT

Alan Gueldner | Scottish Borders Council | Council Headquarters
Newtown St. Boswells | MELROSE | TD6 0SA
tel: 01835 825090

FOR COMPLAINTS ABOUT THE SERVICE

CHIEF PLANNING AND HOUSING OFFICER

Ian Aikman | Scottish Borders Council | Council Headquarters
Newtown St. Boswells | MELROSE | TD6 0SA
tel: 01835 826510

PLANNING AND BUILDING STANDARDS INTERNET SITE:

www.scotborders.gov.uk/info/20012/planning_and_building

PLANNING ENFORCEMENT INTERNET SITE:

http://www.scotborders.gov.uk/info/20050/planning_applications/534/planning_enforcement

BUILDING STANDARDS ENFORCEMENT INTERNET SITE:

http://www.scotborders.gov.uk/info/162/building_standards/440/dangerous_structures_and_enforcement

You can get this document audio CD, in large print, and various other formats by contacting us at the address below. In addition, contact the address below for information on language translations, additional copies, or to arrange for an officer to meet with you to explain any areas of the publication that you would like clarified.

BUSINESS SUPPORT

Jacqueline Whitelaw | Scottish Borders Council | Council Headquarters
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