

Annex 4: enforcement of planning conditions: the breach of condition notice

Introduction

4.1 Section 187 A of the Town and Country Planning Act 1990 ("the 1990 Act") provides for enforcement of a planning condition by the breach of condition notice. This Annex explains how the notice is intended to operate as an alternative method of dealing with this type of breach of control; or, if appropriate, as well as an enforcement notice. It does not apply to breaches of listed building or conservation area control, hazardous substances control or control for protected trees.

The statutory provisions

4.2 The relevant statutory provisions for the breach of condition notice are

- section 187A of the 1990 Act (inserted by section 2 of the Planning and Compensation Act 1991 ("the 1991 Act");
- sections 171A and 171B of the 1990 Act (inserted by section 4 of the 1991 Act);
- section 4(2) of the 1991 Act;
- section 180 of the 1990 Act (substituted by paragraph 26 of Schedule 7 to the 1991 Act); and
- section 188 of the 1990 Act (as amended by paragraph 30 of Schedule 7 to the 1991 Act).

4.3 There is no right of appeal to the Secretary of State against a breach of condition notice.

Where a breach of condition notice may be used

4.4 The breach of condition notice procedure is applicable where planning permission has been granted (including a grant of permission, on appeal, by the Secretary of State or a Planning Inspector) for carrying out any development of land subject to conditions.

4.5 By virtue of section 187 A(13)(a) and (b) of the 1990 Act

- the reference to conditions includes reference to "limitations" which are statutorily imposed by certain of the provisions for "permitted development" rights in Article 3 of, and Schedule 2 to, the Town and Country Planning (General Permitted Development) Order 1995 (SI 1995/418); and
- the expression "carrying out any development" includes causing or permitting another person to carry out development.

4.6 The breach of condition notice is mainly intended as an alternative to an enforcement notice for remedying a breach of control arising from failure to comply with any planning condition or limitation. But it may also be served in addition to the issue of an enforcement notice, perhaps as an alternative to a stop notice, where the LPA consider it expedient to

stop the breach quickly and before any appeal against the enforcement notice is determined, because, for example, it is causing serious environmental harm, or detriment to amenity or public safety. It is particularly apt for use where a valid planning condition has clearly been breached and the salutary experience of summary prosecution (or the threat of prosecution) seems likely to compel the person responsible to comply with the condition. If there is any legal doubt about the validity of a condition, use of the breach of condition notice procedure is inadvisable.

"Immunity" from breach of condition notice

4.7 Section 171B(3) provides that no enforcement action can be taken against (among other cases) a breach of a planning condition after the end of the period of ten years from the date on which the breach first occurred. In effect, there is a ten-year "immunity" rule applicable to the service of a breach of condition notice (except a condition relating to use as a single dwellinghouse where the period of "immunity" is four years). Thus, assuming the breach has been continuous, any breach of condition which first occurred more than ten calendar years before the date on which the LPA formally recognise its occurrence (eg by notifying their opinion that there has been a breach to the owner or occupier of the land) has perpetual immunity. (This assumes that no enforcement action had previously been taken against it.) An explanation of this and other exceptions to the ten-year rule, as it applies to breach of condition notices, is given in paragraphs 2.4 to 2.5 of Annex 2 to this Circular.

4.8 Additionally, section 180 of the 1990 Act provides that, where planning permission is subsequently granted so as to authorise any activity which is specified in a breach of condition notice as a contravention of a planning condition, or where a condition specified in the notice is discharged, the notice ceases to have effect in so far as it requires anyone to secure compliance with that condition. But section 180(3) also specifically provides that, when a breach of condition notice ceases to have effect, wholly or partly, in these circumstances, any person's liability for an offence of previously failing to comply, or not securing compliance, with the notice is not affected. In other words a person can be prosecuted for a contravention of a breach of condition notice occurring during any period prior to the date when the supervening planning permission is granted or the relevant condition is discharged.

Drafting a breach of condition notice

4.9 The purpose of the breach of condition notice is to require its recipient to secure compliance with the terms of a planning condition, or conditions, specified by the LPA in the notice. Thus one notice may be directed at the contravention of two or more planning conditions. But the offence provisions (section 187 A(8) and (9)) relate to any failure to comply with the requirements of the notice after the end of the compliance period specified by the LPA. Accordingly, where one notice is to be directed at the contravention of two or more planning conditions and this would involve specifying more than one compliance period in the same notice, it may be more satisfactory to serve a breach of condition notice for each contravention, so that there is no doubt about which compliance period is applicable in each case.

4.10 Section 187 A(5) provides that a breach of condition notice must specify the steps which the LPA consider ought to be taken, or the activities which they consider ought to cease, so as to secure compliance with the conditions specified in the notice. Thus a notice may be -

- mandatory (eg to require a landscaping scheme to be carried out and completed in accordance with the terms of a landscaping condition imposed on a grant of permission); or
- prohibitory (eg requiring a restaurant, or take-away food shop, to stop opening to customers after the closing time specified in a planning condition).

4.11 A model breach of condition notice is provided in the Appendix to this Annex.

Serving a breach of condition notice

4.12 Section 187 A(2) provides that the person on whom a breach of condition notice may be served is

- (a) any person who is carrying out or has carried out the development; or
- (b) any person having control of the land.

But section 187 A(4) effectively limits the service of a breach of condition notice on any person having control of the land to the case where the contravened condition (or conditions) regulates the use of the land. Thus, for example, where a developer has carried out residential development subject to a condition (among others) that screen walling or garden fencing be erected, and that condition has been contravened but the individual dwellinghouses have been occupied by owners who now control the land comprising the curtilage of each residence, the breach of condition notice cannot be used against them. Because a condition requiring the erection of walls or fences does not regulate the use of land, the breach of condition notice can only be used against the original developer. (This does not mean that enforcement action may only be taken against the person who carried out the development when this type of breach of condition occurs: provided the breach has not gained immunity from an enforcement action, an enforcement notice may still be issued in order to remedy the alleged breach.)

4.13 By virtue of section 187 A(3), any person on whom the LPA serve a breach of condition notice is defined as "the person responsible". The main effect of this provision is that any recipient of a notice will be in breach of the notice if, after the compliance period, any condition specified in it has not been complied with and the steps specified have not been taken or the activities specified have not ceased (section 187A(8)); and that person will be guilty of an offence (section 187 A(9)). These provisions make it essential for the LPA, at the outset, to consider and decide in each case who is properly to be regarded as the "person responsible" for an alleged breach of a planning condition. Normally, a breach of condition notice should have only one recipient.

The compliance period

4.14 The breach of condition notice must specify a compliance period within which the person responsible must comply, or secure compliance, with the condition to which the notice relates. The period allowed for compliance with the notice is

- a period of not less than 28 days beginning with the date of service of the notice; or the initial period of 28 days or more, extended by whatever further period the LPA may
- allow by serving another notice on the person responsible.

LPAs will wish to ensure that the compliance period is commensurate with the requirements of the notice.

Withdrawal of the notice

4.15 Section 187 A(6) provides that the LPA may withdraw a notice by serving notice of withdrawal on the "person responsible". But, by virtue of the "second bite" provisions in section 171B(4) (see Annex 2 paragraph 2.5), the LPA's withdrawal of a notice does not affect their power to serve on the person responsible a further breach of condition notice directed at the conditions specified in the earlier notice, or at any other conditions (provided the breach has not gained "immunity" from enforcement action in the meantime). Withdrawal of a notice may take place at any time, including after expiry of the compliance period.

Contravention of the notice

4.16 Sections 187 A(8) and (9) provide that if, following the end of the period allowed for compliance with the notice, the "person responsible"

- has not ensured compliance with all of the conditions specified in the notice; and
- has not ensured that any specified steps have been taken, or any specified activities have ceased, he or she is in breach of the notice and guilty of an offence (section 187 A(9)).

Prosecution of offences

4.17 Summary prosecution can be brought in the Magistrates' Court for the offence of contravening a breach of condition notice. The maximum penalty on conviction is a fine not exceeding "level 3" on the standard scale (currently £1,000). As this offence is triable summarily, the provisions of section 127(1) of the Magistrates' Courts Act 1980 apply. There is a six-month limitation period, running from the time when the offence was committed, within which an information must be laid in the Court. This period runs, not from the date on which the offence was *first* committed, but on a continuing basis, so that only so much of the offence as falls within the six-month period can be charged. If, for example, the breach of the notice occurred over a period of three months, and an information is laid five months after the last day on which that breach occurred, only the third (and last) month of the period of the breach will fall within the limitation period and thus be chargeable. An

information should therefore always be laid as soon as possible. Each offence is, in effect, a single offence to be charged by reference to any day or longer period. A subsequent offence may be charged by reference to a later period.

4.18 Section 187 A(10) provides that an offence may be charged by reference to any day or longer period of time; and a person may be convicted of a second, or subsequent, offence. These provisions enable further prosecutions to be brought where the person responsible has been prosecuted and fined but still fails to comply with the notice. The prosecution's case must always be proved on the criminal standard of proof, "beyond reasonable doubt".

4.19 It is a defence against prosecution for a person charged with an offence under section 187 A(9) to prove

- that he took all reasonable measures to secure compliance with the conditions specified in the notice; or
- where the notice was served on him as a person having control of the land, that he no longer had control of it when the notice was served on him, by virtue of section 187 A(2)(b).

Challenging the validity of a notice

4.20 Although there is no right of appeal to the Secretary of State against a breach of condition notice, the validity of the notice, or the validity of the LPA's decision to serve it, may be challenged by application to the High Court for judicial review; but probably not by way of defence to a prosecution brought by an LPA if the notice is valid on its face, by analogy with the judgement of the Court of Appeal (Criminal Division) in *R v Wicks* [1995] 93 LGR 377. This emphasises the advisability of only using the breach of condition notice where the contravened planning condition is legally valid; satisfies the criteria for the imposition of conditions stated in DOE Circular 11195 (WO 35/95); and has clearly, on the available evidence, been breached. Failure to make certain that the condition in question is both valid and enforceable, before serving a breach of condition notice, may result in protracted litigation, thus negating this procedure's primary purpose of swiftly achieving compliance with planning conditions and limitations. Where the LPA foresee scope for argument about the interpretation, validity or enforceability of a condition, but nevertheless consider it expedient to take enforcement action, the issue of an enforcement notice may be the more appropriate procedure.

Entry in the enforcement notice and stop notice register

4.21 The provisions of section 188(1)(c) of the 1990 Act (as amended by paragraph 30 of Schedule 7 to the 1991 Act) require the LPA to enter details of each breach of condition notice they serve in a register (together with information about enforcement and stop notices). Article 26 of the Town and Country Planning (General Development Procedure) Order 1995 (SI 1995/419) specifies the details which are to be entered in the register in respect of a breach of condition notice. A county planning authority who issue a breach of condition notice are required to supply relevant information about the notice to the district planning authority in whose area the land to which the planning permission relates is

situated; and to inform that authority of any withdrawal of a notice or any judgement as to its invalidity.

4.22 A breach of condition notice is not a legal charge on the land and need not, therefore, be entered in the local Land Charges Register. In practice, the existence of the condition is already recorded in registering the grant of planning permission on which it was imposed. Because the notice is directed at an individual (the "person responsible"), it applies to that person rather than to the land, and cannot be enforced against any other person.

Appendix to Annex 4

Model Breach Of Condition Notice

Important - This Communication Affects Your Property

Town And Country Planning Act 1990
(as amended by the Planning and Compensation Act 1991)

Breach Of Condition Notice

Served By: [name of Council]

To: [name[s] of person[s] responsible for the alleged breach of condition]

1. This Notice is served by the Council, under section 187A of the above Act, because they consider that [a condition] [conditions] imposed on a grant of planning permission, relating to the land described in paragraph 2 below, [has] [have] not been complied with. The Council consider that you should be required to [comply] [secure compliance] with the condition[s] specified in this notice. The Annex at the end of this notice contains important additional information.

2. The Land To Which The Notice Relates

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

3. The Relevant Planning Permission

The relevant planning permission to which this notice relates is the permission granted by the Council on [date of issue of permission] for [description of development] Ref [Council's reference number].

4. The Breach Of Condition

The following condition[s] [has][have] not been complied with:

- (1)
- (2) [State the terms of each condition which has not been complied with.]
- (3)

5. What You Are Required To Do

As the person responsible for the breach[es] of condition[s] specified in paragraph 4 of this notice, you are required to [comply][secure compliance] with the stated condition[s] by taking the following steps:

- (1) [State clearly the steps to be taken in order to
- (2) to secure compliance with the condition[s] in

(3) *paragraph 4 above.*]

[and] [ceasing the following activities:-]

- (1) *[State clearly the activities which must cease*
- (2) *in order to secure compliance with the*
- (3) *condition[s] in paragraph 4 above.]*

Period for compliance: 30 days beginning with the day on which this notice is served on you. *[Different periods may be specified for each requirement].*

Dated: *[Date of notice]*

Signed: *[Council's authorised officer]*

On behalf of: *[Council's name and address]*

Annex

Warning

This Notice Takes Effect Immediately It Is Served On You In Person Or On The Day You Received It By Post.

There Is No Right Of Appeal To The Secretary Of State For The Environment Against This Notice.

It is an offence to contravene the requirements stated in paragraph 5 of this notice after the end of the compliance period. You will then be at risk of immediate prosecution in the Magistrates' Court, for which the maximum penalty is £1,000 for a first offence and for any subsequent offence. If you are in any doubt about what this notice requires you to do, you should get in touch immediately with *[Council's nominated officer to deal with enquiries, address and telephone number]*.

If you do need independent advice about this notice, you are advised to contact urgently a lawyer, planning consultant or other professional adviser specialising in planning matters. If you wish to contest the validity of the notice, you may only do so by an application to the High Court for judicial review.