Annex 2: enforcement notices and appeals

Introduction

2.1 This Annex provides guidance on enforcement notice and appeal procedures. Policy advice on planning enforcement is given in Planning Policy Guidance (PPG) Note 18: Enforcing Planning Control. The DOE booklet "Enforcement Notice Appeals - A Guide to Procedure" gives guidance on appealing to the Secretary of State against an enforcement notice. Booklets are available from the local planning authorities' (LPAs') offices. As explained in paragraph 2 of the main text of this Circular, the main text of this Annex relates to planning enforcement notices and appeals only. Paragraphs 2.56 to 2.77 of this Annex refer specifically to the comparable provisions for the enforcement of listed building and conservation area control, minerals planning control, control for protected trees and hazardous substances control.

Deciding whether to issue an enforcement notice

2.2 The power (in the amended section 172 of the Town and Country Planning Act 1990 ("the 1990 Act")) to issue an enforcement notice is discretionary. A notice requires remedial steps to be taken within a specified time-limit. It should only be used where the LPA are satisfied that there has been a breach of planning control and it is expedient to issue a notice, having regard to the provisions of the development plan and to any other material considerations.

2.3 The provisions of amended section 173(3) are intended to remove any doubt that an enforcement notice can be directed at only part of a breach of control and require it to be remedied. In deciding on the precise requirements of a notice and the appropriate compliance period, the LPA should always examine the intended result and the likely practical outcome. In cases of "under-enforcement", involving the partial demolition of a structure, the LPA should consider whether any "permitted development" rights under the Town and Country Planning (General Permitted Development) Order 1995 ("the GPDO") would enable the structure to be subsequently replaced, possibly in a less acceptable way.

Time-limits for issuing an enforcement notice

2.4 Enforcement action in respect of all breaches of planning control is subject to time-limits. Section 171 B of the 1990 Act specifies these time-limits as follows:

- for operational development - four years from the date on which the operations were "substantially completed". *This applies to all breaches of planning control consisting in the carrying out without planning permission of all forms of "operational development", namely, the carrying out of building, engineering, mining or other operations in, on, over or under land;*
- for breaches of planning control consisting in the change of use of any building (which, for the purposes of the 1990 Act, includes part of a building) to "use as a single dwellinghouse" - four years from the date of the breach. *This time-limit applies either where the change to use as a single dwellinghouse involves development*

without planning permission, or where it involves a failure to comply with a condition or limitation subject to which planning permission has been granted;

- in the case of any other breach of planning control (ie other than those already referred to in sub-paragraphs (1) and (2) above) - ten years from the date of the breach. *In practice, this ten-year time-limit therefore applies to breaches of planning control involving any material change in the use of land (other than a change to use as a single dwellinghouse) and to any breach of condition or limitation (including one where the breach is of an occupancy condition imposed on permission for the erection of a dwelling house, but not including one where the breach consists in using a building as a single dwellinghouse).*

How the time-limits apply in practice

2.5 The time-limits stated in paragraph 2.4 above do not prevent enforcement action after the relevant dates in two circumstances:

- section 17IB(4)(a) provides for the service of a breach of condition notice, if there is already an enforcement notice in effect in respect of the breach, thus enabling the LPA to strengthen the effect of the enforcement notice;
- section 17IB(4)(b) provides for the taking of "further" enforcement action in respect of any breach of planning control within four years of previous enforcement action (or purported action) in respect of the same breach. This mainly deals with the situation where earlier enforcement action has been taken, within the relevant time-limit, but has later proved to be defective, so that a further notice may be issued or served, as the case may be, even though the normal time-limit for such action has since expired.

Drafting an enforcement notice

2.6 The provisions of amended sections 172 and 173 were intended to reduce the likelihood that a technical defect in drafting the notice would result in its being quashed on appeal, or found to be a nullity. Every notice should nevertheless be drafted with the utmost care. The Secretary of State's power, in section 176(1)(a), to correct, on appeal, any misdescription in the enforcement notice, may be used only where there would be no Injustice to either the appellant or LPA: it does not extend to the correction of notices which are so fundamentally defective that correction would result in a substantially different notice. To help LPAs to minimise technical drafting defects in notices, example notices are appended to this Annex. The examples are intended to cater for most enforcement situations; but the terms of each notice must correspond exactly to the specific breach of control it is intended to remedy.

2.7 Section 171A of the 1990 Act defines a breach of planning control as

1. the carrying out of development without the required planning permission; or

2. failing to comply with any condition or limitation subject to which planning permission has been granted.

Any contravention of the limitations on or conditions pertaining to "permitted development" rights, under the GPDO, constitutes a breach of planning control against which enforcement action may be taken.

2.8 Paragraphs 2.52 to 2.54 of this Annex draw attention to a particular difficulty, highlighted by recent judicial authority, which may occur when seeking to take enforcement action in respect of any failure to comply with a condition subject to which planning permission has been granted for the carrying out of building, engineering, mining or other operations on land.

Stating the breach of control clearly

2.9 An enforcement notice must enable every person who receives a copy to know-

- exactly what, in the LPA's view, constitutes the breach of control; and
- what steps the LPA require to be taken, or what activities are required to cease, to remedy the breach.

It must also specify whether the breach is regarded as carrying out development without planning permission, or a failure to comply with any condition or limitation. Enforcement notices are not improved by over-elaborate wording or legalistic terms: plain English is always preferable. An eventual prosecution under section 179 of the 1990 Act may fail if the Court finds the terms of the notice incomprehensible to the lay person.

"Under-enforcement" and deemed planning permission

2.10 Section 173(11), as amended, corresponds substantially to the previous section 173(8) of the 1990 Act, except that, after full compliance with the requirements of an enforcement notice, the provisions apply to any remaining uses or activities on the land and to any remaining buildings or works. It deals with the situation where "under-enforcement" has occurred, by providing that planning permission shall be treated as having been granted for the development or the activity, as it is in the state resulting from the owner or occupier having complied with the enforcement notice's requirements. As the section applies to all the remaining uses or activities on land once the enforcement notice has been complied with, LPAs should ensure that they identify all the relevant breaches of planning control involving the use of land before they issue an enforcement notice. Where the land is in mixed use, it is important that the notice should allege a change of use to that mixed use, specifying all the component elements in the notice's allegation. The deemed application for planning permission under section 177(5), arising from any appeal against the notice, which the Secretary of State or a Planning Inspector will need to consider, should properly relate to the mixed use in its entirety, not just to those elements of the use which the LPA may have identified as being in breach of planning control and which are covered by the notice's requirements. This is because the planning merits of a particular use of land will not necessarily be the same, where that use is only one of a number of uses taking place, as the planning merits of that use where it is the land's sole use. For example, if the other uses were to cease and the single remaining use were to occupy the entire "planning unit", to the exclusion of the others, that change could well constitute, as a matter of fact and degree, a "material" change of use of the planning unit, to which different

planning considerations might apply (*Wipperman v Barking LBC* [1965] 17 P&CR 225). Accordingly, if the LPA do not specify all the uses taking place on a planning unit in a mixed use case, the Secretary of State's or an Inspector's appeal decision will correct that notice, to reflect the actual situation on the land as it was when the notice was issued, before dealing with any "deemed planning application" on that basis. In these circumstances, if the LPA have failed to identify any uses of the land which may not already be lawful, and to which planning objections would apply if they were to become lawful, the effect of section 173(11) could be to grant deemed planning permission for those uses if they are specified in the allegation but are not required to cease.

2.11 If it emerges, during an enforcement appeal, that the LPA have inadvertently omitted any component of a mixed use from the allegation in their notice, they and the appellant will be given the opportunity to make representations on the planning merits of the whole mixed use before the Secretary of State or an Inspector corrects the notice as in paragraph 2.10 above. It is normally not possible to expand the requirements of an enforcement notice without causing injustice to the appellant or other "relevant occupiers" as defined in section 174(6). In those circumstances the LPA might wish to withdraw the notice and issue another, rather than have a corrected notice upheld and the provisions of section 173(11) apply to formerly unlawful elements of a mixed use, of which they may have been unaware. (The "second bite" provisions of section 171B(4)(b) of the 1990 Act should ensure that the LPA are still "in time" to issue a further enforcement notice in these circumstances.)

2.12 In cases where the allegation as drafted by the LPA correctly specifies all the elements of a mixed use, LPAs will need to ensure that the requirements of the notice also fully reflect their intentions for the land, once the notice is complied with and section 17 3(11) comes into operation.

2.13 Section 173(11) does not specify any procedure for this "deemed grant of planning permission". The Department suggests that the LPA need only notify the recipient of a copy of an enforcement notice that permission is deemed to have been granted at the time when, in the LPA's view, the requirements of the enforcement notice have been fully complied with. The deemed grant of planning permission should also be entered in the enforcement and stop notice register.

Effect of compliance with a notice

2.14 Compliance with an enforcement notice does not discharge the notice. It remains in effect in relation to the land, unless it is withdrawn. In these circumstances, if the land subsequently changed hands, prospective purchasers might seek some further assurance of full compliance, in addition to their own observations and interpretations of the requirements of the enforcement notice. This clarification might be needed to satisfy potential lenders for loan security purposes, or to satisfy purchasers that they would not be liable to prosecution.

2.15 If an assurance is sought, by an existing or prospective owner or occupier of the land, and can be given, it is considered reasonable for the LPA to confirm in writing that the enforcement notice in question had been, or was continuing to be, complied with, at a

particular date. If a more formal assurance is required, it will be open to the applicant to apply for a "lawful development certificate" and pay the appropriate application fee.

2.16 A similar assurance might also be given in the circumstances of section 173(12), where a "replacement building" has been constructed in full compliance with the requirements of an enforcement notice.

Statement of reasons for issuing the notice

2.17 It is vital that anyone served with a copy of an enforcement notice should understand, from the outset, the reasons why the LPA issued the notice. Consequently, regulation 3 of the Town and Country Planning (Enforcement Notices and Appeals) Regulations 1991 (SI 1991/2804), ("the 1991 Regulations") requires every enforcement notice to specify why the LPA consider it "expedient" to issue the notice. The statement of reasons should therefore be included in the text of the enforcement notice, and, in the light of the advice contained in paragraphs 2.30 to 2.33 below, should make clear whether or not those reasons are only for the purpose of remedying an injury to amenity.

Identification of the site

2.18 Regulation 3 of the 1991 Regulations also requires that the enforcement notice shall specify the precise boundaries of the land to which it relates. This is always best done by means of a plan (preferably on an Ordnance Survey base with a scale of not less than 1/2500) attached to the enforcement notice, on which the *exact* boundary of the land is clearly indicated by a suitably co loured outline. If this is insufficient to identify the boundary exactly, the plan should be supplemented by a brief written description, or an accurately surveyed drawing to a larger scale.

Personal circumstances

2.19 The personal circumstances, including such matters as health, housing needs and welfare, of persons suspected of acting in breach of planning control must be taken into account when deciding whether to take enforcement action. (See *R v Kerrier DC, ex parte Uzell* [1996] 71 P&CR 566).

Issuing of enforcement notice and service of copies

2.20 The concept of "issuing" an enforcement notice, rather than serving it, derives from the Local Government and Planning (Amendment) Act 1981. The requirement to "issue a notice is interpreted as meaning that the LPA should prepare a properly authorised document and retain it in their records. Copies of that notice are then served on interested persons, as described in paragraph 2.22 of this Annex.

2.21 It is important that, as soon as possible, details of every enforcement notice issued are entered, in accordance with Article 26 of The Town and Country Planning (General Development Procedure) Order 1995 (SI 1995/419) (the "GDPO"), in the enforcement and stop notice register which LPAs are required to keep (under section 188 of the 1990 Act). Section 1 79(7)(b) of the 1990 Act provides a defence for persons charged with offences

under that section if they can show that the notice was not contained in the register, a copy was not served on them and they were not aware of its existence.

2.22 Section 172 of the 1990 Act requires that a copy of an enforcement notice shall be served

- on the owner and on the occupier of the land to which the notice relates; and
- on any other person having an interest in the land, being an interest which, in the LPA's opinion, is materially affected by the notice.

Service of the notice must take place not more than twenty-eight days after its date of issue and not less than twenty-eight days before the effective date specified in it. (The effective date is the date from which the compliance period starts to run.) When serving enforcement notices, the LPA should ensure that any known mortgagees are served with a copy. In cases where the owner of the land is a defaulting mortgagor it may not be possible to locate him or her, and the mortgagee-in-possession will need to be made aware of the situation. In accordance with section 173A(3) of the 1990 Act, a mortgagee should also be notified of any withdrawal of a notice, or the waiving or relaxation of any requirement.

2.23 Regulation 4 of the 1991 Regulations, as amended by SI 1992/1904, requires every copy of an enforcement notice served by a LPA, under section 172, to be accompanied by an explanatory note which includes a copy of, or a summary of, sections 171A, 171B and 172 to 177 of the 1990 Act explaining

- that there is a right of appeal to the Secretary of State against the notice;
- that any appeal must be made in writing before the date specified in the notice as the date on which it takes effect; and
- the grounds on which an appeal may be made.

Regulation 4 also requires the LPA to explain that an appeal must be supported simultaneously (or within the time-limit of fourteen days which can be imposed by the Secretary of State, under this regulation) by a statement of the grounds of appeal and facts on which it is based. LPAs should decide how to fulfil the requirement of this regulation. Regulation 13 of the Town and Country Planning General Regulations 1992 (SI 1992/1492) requires that notices and envelopes be marked with the words: "Important - This communication affects your property".

2.24 It is usually best to enclose three copies of each enforcement notice and a copy of the DOE explanatory booklet ("Enforcement Notice Appeals - A Guide to Procedure") and three copies of the official appeal form. This will ensure that every intending appellant has the same information and knows the procedure for submitting an appeal. (The explanatory booklet and appeal form are not appropriate for listed building and conservation area enforcement notices, to which regulation 4 does not apply.)

Secretary of State's power to require information and quash a notice

2.25 LPAs are asked to send three copies of every enforcement notice they issue, so that an intending appellant can submit one with any appeal to the Secretary of State. If this

procedure does not work satisfactorily, the Department must be able to obtain a copy of the notice quickly. Regulation 6 of the 1991 Regulations requires the LPA to send the Secretary of State a copy of the notice, not later than 14 days from the date on which he notifies them that an appeal has been made, together with a list of the names and addresses of the people served with a copy of it. If the LPA fail to observe this requirement, the Secretary of State has power to quash the notice, by virtue of section 176(3). It should be most exceptional to quash a notice in these circumstances. If quashing does seem appropriate, the Department will give the LPA seven days' final notice of the intention to quash and will examine any representations from the LPA, during that period, that there are extenuating circumstances making it inappropriate to quash the notice. Any decision to quash a notice is open to challenge in the High Court, and does not prevent the LPA from issuing another notice, within any relevant timelimit.

Withdrawal of an enforcement notice

2.26 Section 173A enables the LPA to withdraw an enforcement notice issued by them, or to waive or relax any of its requirements, and to extend any period specified for compliance with it. This power may be used whether or not the enforcement notice has taken effect. When it is used, the LPA are required to notify immediately anyone who has been served with a copy of the enforcement notice or would have been served with a copy. Withdrawing an enforcement notice does not prevent the LPA from issuing a further notice relating to the same site or to the same breach, if it is otherwise open to them to do so.

Right of appeal to the Secretary of State against an enforcement notice

2.27 Section 174(1) provides a right of appeal for anyone who has an interest in the land to which the enforcement notice relates, or who is a "relevant occupier", whether or not they have been served with a copy of the notice. "Interest" means a legal or equitable interest, such as ownership, or the grant of a tenancy or lease, or the securing on the land of a mortgage or other loan. "Relevant occupier" is defined in section 174(6). Anyone occupying the land with the owner's oral or written consent is a relevant occupier.

2.28 The grounds of appeal in section 174(2) of the 1990 Act are as follows

a. "that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged;

b. that those matters have not occurred;

c. that those matters (if they occurred) do not constitute a breach of planning control;

d. 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;

e. that copies of the enforcement notice were not served as required by section 172;

f. that the steps required by the notice to be taken, or the activities required by the notice to cease, 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;

g. that any period specified in the notice in accordance with section 173(9) falls short of what should reasonably be allowed."

Liability to pay the deemed planning application fee

2.29 Section 177(SA) provides that, on an appeal under ground (a), if any deemed planning application fee is payable under Regulations made by virtue of section 303, and the Secretary of State gives written notice of the period in which the fee must be paid, then if the appellant does not pay the fee within that period, the appeal on ground (a) and the deemed application will lapse. The fee is payable to the Secretary of State and the LPA in equal shares, within whatever time-limit may be specified in writing. A reasonable time-limit for the payments will be given. If a reasonable request for more time to pay is made within the initial time-limit, the Department may extend the period for payment, in writing. In that event, the LPA will be notified accordingly.

Stating the LPA's requirements in an enforcement notice

2.30 Some appellants who have not paid the deemed application fee have instead attempted to introduce arguments on the planning merits of their appeal in the context of an appeal on ground (f) in section 174(2). In the Department's view, the provisions of section 174(2) must be construed in accordance with the larger scheme of this Part of the 1990 Act. In particular, it is necessary to construe the grounds of appeal in relation to the provisions of subsections (1) to (4) of section 173 of the Act. By the words "wholly or partly", subsection (3) makes it clear that the LPA may "under-enforce", in specifying the steps they require to be taken, or the activities they require to cease, in order to achieve the purposes specified in subsection (4). Subsection (4) enables the LPA to specify either of two different categories of remedial requirement in an enforcement notice, namely

a. making any development comply with the terms of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place; or

b. remedying any injury to amenity which has been caused by the breach.

So the LPA must first choose which route to take in specifying their requirements. If the LPA follow the pattern of the example enforcement notices in Appendices 1 to 3 of this Annex, it should be clear, by considering what is said in paragraphs 3, 4 and 5 of the notice, read as a whole, whether the remedial requirements ought to follow from paragraph (a) or paragraph (b) of section 173(4). Nevertheless, it is still possible that a notice which "under-enforces" does so for purposes other than solely to remedy an injury to amenity. Equally, a notice whose requirements follow from paragraph (a) and which requires development to comply totally with the terms of a planning permission, or total removal of a building, or total cessation of a use, may have been issued solely to remedy an injury to

amenity caused by the breach and for no other reason. So it is also pertinent that regulation 3(a) of the 1991 Regulations requires that an enforcement notice should specify the reasons why the LPA considered it expedient to issue the notice.

2.31 The LPA must formulate their remedial requirements so as to correspond clearly to either purpose (a) or purpose (b) in section 173(4). It follows from the construction of these provisions that the only type of enforcement notice open to appeal on the second element of ground (f) ("or, as the case may be, to remedy any injury to amenity which has been caused by any such breach;") is a notice where the LPA's reasons for issuing it (paragraph 4 of the example notice) state that its only purpose is to remedy some injury to amenity caused by the breach.

2.32 The wording of ground (f) is also important in this respect. The basic ground differs little from ground (g) of section 174(2) of the 1990 Act, as originally enacted. But ground (f) is now worded so as to split the two arguments that can be employed under this more significantly by the words "or, as the case may be,". Examination of the enforcement notice should clearly disclose exactly what the LPA sought to achieve by their notice. If it appears that the breach may be contrary to the development plan, or gives rise to a traffic hazard, or there are any objections to it other than on the sole ground of detriment to amenity, and the LPA required its total cessation, that is not considered to be a situation where "the case may be" that all that is necessary is simply a remedy of any injury to amenity that might have been caused. In such a case it is considered that the Act cannot sensibly be interpreted as allowing any appeal submission under the second head of ground (f) where the deemed application has not been considered and objections other than on grounds of detriment to amenity have not been satisfactorily resolved. The only available appeal submission in that case should be that, as a matter of fact, the requirements exceed what is necessary to remedy the breach.

2.33 Alternatively, if it is clear that the only reason for issuing a notice, or the only objection to the breach, is an amenity one, and no other objections have been raised to it on policy or traffic or infrastructure grounds, then, and only then, will any appeal submission under the second head of ground (f) be taken into account where the deemed application has not been considered. Consideration of ground (f) in these circumstances would be limited to amenity issues only, without the need to address planning policy or any other issue of planning merit.

Additional points about requirements

2.34 In the case of *Kaur v SSE and Greenwich LBC* [1990] JPL 814, it was held that a requirement of an enforcement notice which provided for the subsequent submission and approval of a restoration scheme introduced an unacceptable degree of uncertainty. While such a requirement can be validated by a provision for such a scheme to be determined non-statutorily, in default of agreement (see *Murfitt v SSE and East Cambridgeshire DC* [1980] JPL 598), the Secretary of State should not be invoked as the arbitrator of such a scheme in a LPA's enforcement notice, in which, in the absence of any appeal against that notice, he may have had no previous involvement. LPAs are therefore encouraged to avoid such requirements in enforcement notices, but instead, wherever possible, to set out specific steps which they require to be taken in order to remedy a breach of planning control. If this is impractical, perhaps because the precise condition of the land before the

breach took place is peculiarly within the knowledge of the developer, an alternative is simply to require restoration of the land to its condition before the breach of planning control took place, leaving it to the developer to comply in accordance with his or her knowledge of that condition.

2.35 On the other hand, LPAs should be wary of imposing over-detailed requirements in enforcement notices, such as specifying the exact mixture of grass seed to be used for re-seeding land in order to return it to its former state, as such requirements may be excessive.

Time-limits for appealing

2.36 Section 174(3) provides that an appeal shall be made

a. by giving written notice of the appeal to the Secretary of State before the date specified in the enforcement notice as the date on which it is to take effect; or

b. by sending such notice to him in a properly addressed and pre-paid letter posted to him at such time that, in the ordinary course of post, it would be delivered to him before that date.

Since an appeal is usually the only way in which a recipient of an enforcement notice can challenge the LPA's action in issuing the notice, it is vital that all intending appellants are made aware of this absolute time-limit, which the Secretary of State has no discretion to vary, for making a valid appeal. The explanatory booklet emphasises the strict time-limits which will be applied to enforcement appeals and the advisability of not waiting until the end of the appeal period before submitting an appeal.

Conduct of enforcement appeals: procedures

2.37 Where an appeal is made against an enforcement notice, both the appellant and the LPA have the right to appear before, and be heard by, a person appointed by the Secretary of State. Where this right is exercised, a public local inquiry will usually be held. Where the grounds of appeal suggest a dispute about the relevant facts, between the LPA and the appellant, eg under grounds (c) and (d) of section 174(2), an inquiry is generally essential. In that event, the Town and Country Planning (Enforcement) (Inquiries Procedure) Rules 1992 (SI 1992/1903) will apply. Where the dispute is solely about the planning merits of the development, or the requirements of the notice or the period for compliance, and there has been a request to be heard, it may be appropriate to proceed by way of an informal hearing rather than a public inquiry. The less formal procedure of a hearing makes it inappropriate in any case where there is a dispute on evidential facts, or on most legal grounds in section 174(2).

2.38 In suitable cases, the Department will suggest that the appeal be dealt with by the written representations procedure. If an appeal proceeds on this basis, it will often be necessary for a Planning Inspector to inspect the site. Where this requires entry to land, arrangements will usually be made for the Inspector to be accompanied by a representative of the appellant and the LPA.

Conduct of enforcement appeals: requirements applicable to appellants

2.39 Regulation 5 of the] 991 Regulations requires that any person who gives notice to the Secretary of State appealing against an enforcement notice, listed building enforcement notice or conservation area enforcement notice, and who does not send with it a statement in writing specifying the grounds on which he or she is appealing, and stating briefly the facts in support of each of those grounds, should do so within 14 days of the Secretary of State giving him or her notice to that effect. Section 174(5) enables the Secretary of State to determine the appeal without considering any ground of appeal for which the appellant fails to provide the required information within the specified time.

2.40 Intending appellants (and their agents) should consider most carefully the LPA's statement of reasons for issuing the enforcement notice when they are contemplating an appeal. In any subsequent appeal, they should address their arguments to the alleged breach of planning control and the LPA's statement. If the LPA state that they are prepared to grant conditional planning permission for the allegedly unlawful development, an intending appellant should consider whether to make the appropriate planning application, instead of appealing. This should be discussed urgently with the LPA to establish whether they would be prepared to withdraw the notice if such permission were granted. If the proposed conditional permission would be unacceptable, the appeal should state any modified conditions which would make it acceptable.

2.41 If an enforcement appeal is delayed because the appellant fails to provide sufficient information, and the Department's requests for it are ignored, the Department will invoke the Secretary of State's powers in regulation 5 to require time-limits to be observed. If there is a continued failure to provide the information, the Secretary of State may proceed to dismiss the appeal (or determine it only on those grounds of appeal for which he has sufficient information) unless the appellant can show genuine extenuating circumstances preventing him or her from providing the required information. When an appeal is dismissed under section 176(3), the deemed planning application will not have been considered and any fee already paid by the appellant will be refunded by the Department and the LPA.

2.42 An appellant's statement is sometimes insufficiently informative or detailed for the purposes of a public inquiry. If so, the Department will use the Secretary of State's power, in rule 8(6) of the 1992 Enforcement Inquiries Procedure Rules, to require the appellant to serve a written statement of the submissions he or she intends to make at the inquiry. A copy of the appellant's statement will have to be served on the LPA and the Secretary of State at a specified time before the inquiry date.

Conduct of appeals: requirements applicable to LPAs

2.43 The Department sometimes experiences great difficulty in obtaining the LPA's written statement for the appeal, eyen when it is relatively straightforward and the parties are proceeding by way of written representations and a site-inspection by a Planning Inspector. LPAs' statements are sometimes inadequate as a means of preparing for a public inquiry, with the result that the appeal parties, and the Planning Inspector who conducts the inquiry, spend more time than should be necessary at the inquiry. If the LPA fail to adhere to the

time-table set by the Department, the Secretary of State may exercise the powers in regulation 7 of the 1991 Regulations (as amended).

2.44 Regulation 7(2) requires the LPA's statement of submissions on the appeal to be served

1. in those inquiry cases where the date arranged for the inquiry is less than 18 weeks after written notice of intent to hold one has been given by the Secretary of State to the appeal parties - at least six weeks before the inquiry date;

2. in other inquiry cases - not later than 12 weeks after written notice of intent to hold an inquiry; and

3. where no local inquiry is held - not later than 28 days from the Secretary of State's notice to the LPA requesting a statement.

If the LPA do not comply with these requirements, the Secretary of State has a discretionary power to quash the enforcement notice, in accordance with section 176(3)(b). Such cases should be rare because the time-limits provide ample opportunity for a LPA's statement to be served. If an enforcement notice is quashed under section 176(3)(b), the notice will cease to have effect; and any deemed planning application fee already paid by an appellant will be refunded by the Department and the LPA. The quashing of a notice in these circumstances does not affect the LPA's powers to issue another, provided the relevant time-limit for taking enforcement action is not exceeded.

Conduct of appeals: public notification of an appeal

2.45 Regulation 8 of the 1991 regulations requires the LPA, when the appeal is to be dealt with other than by an inquiry, to give notice of the appeal to occupiers of land in the neighbourhood of the appeal site who, in the LPA's opinion, are affected by the alleged breach of planning control. When giving this notification, the LPA must include in it a description of the alleged breach of control, their reasons for serving the notice, the grounds on which the appeal has been made, and the time-limit for interested persons to submit written representations to the LPA. This notification should be given as soon as practicable during the progress of an enforcement appeal.

Transferred appeals

2.46 Most enforcement appeals are transferred to Planning Inspectors for determination. The classes of transferred appeal are specified in the Town and Country Planning (Determination of Appeals by Appointed Persons) (Prescribed Classes) Regulations 1981 (SI 1981/804, as amended by SIs 1986/443, 1986/623, 1989/1087, 1995/2259 and 1997/420). The question whether an appeal is to be "recovered" for determination by the Secretary of State is decided by reference to the category of breach of planning control alleged in the enforcement notice and the circumstances of the appeal.

Costs

2.47 The parties to an enforcement notice appeal are normally expected to meet their own expenses. Unlike litigation, costs do not normally "follow the event" of the appeal and are only awarded, on an application, against a party if it is shown that they behaved "unreasonably" in the appeal process. DOE Circular 8/93 gives comprehensive guidance on the policy and procedures for awarding costs to parties in an appeal. By virtue of section 175(7) of the 1990 Act (inserted by paragraph 3 of Schedule 4 to the Planning (Consequential Provisions) Act 1990), an award of costs may be made in an enforcement notice appeal whether the appeal has proceeded by written representations or by local inquiry.

Finality of the appeal decision

2.48 Once the Secretary of State, or an Inspector exercising transferred powers, has decided an appeal, he has no further jurisdiction and cannot reconsider or correct it. An application for leave to submit a further appeal in the High Court can be made on a point of law, under section 289 of the 1990 Act. The Supreme Court Rules require it to be made within 28 days of the date when the decision is given, or within an extended period at the Court's discretion. Where planning permission is granted, under section 177(1)(a) and (b) of the 1990 Act, an appeal can be made, under section 288, within six weeks of the date of the decision, on the ground that the action is not within the powers of the 1990 Act or that any "relevant requirement" as defined in the section has not been complied with.

2.49 Section 175(4) includes a reference to section 289(4A) under which the High Court, or the Court of Appeal, may order (on terms which may include requiring the LPA to give an undertaking as to damages or any other matters) that the enforcement notice shall have effect, or have effect to the extent specified in the order, pending the final determination of those proceedings and any rehearing and determination by the Secretary of State. Proceedings under section 289 of the 1990 Act may not be brought without the leave of the High Court or Court of Appeal. A Court of Appeal judgment (*Huggett, Wendy Fair Markets Ltd and Bello v SSE and Others* [1995] JPL 649) has held that there is no right of appeal to that Court against the High Court's refusal of leave under section 289 of the 1990 Act.

2.50 When it is justified by the particular circumstances, the LPA should not be dissuaded from applying to the Courts for an Order under section 289(4A), by the possibility that they might be required to give an undertaking as to damages, in the event, for example, of their enforcement notice eventually being quashed. In the light of the House of Lords' approach to public authority action in the case of *Kirklees MBC v Wickes Building Supplies Ltd* [1993] AC 227, it appears that the Court may well not require a LPA to give any such undertaking. Alternatively, the LPA could offer an undertaking that, despite the immediate coming into effect of the enforcement notice, they would not seek to prosecute in respect of any failure to comply with it, or to exercise their powers in section 178 of the 1990 Act, until the litigation had been decided in their favour, or the appeal finally redetermined and the enforcement notice upheld as the case may be, and the expiration of the period allowed for compliance, commencing from either of those dates as appropriate.

2.51 Where the final determination of an appeal against an enforcement notice has been considerably delayed by litigation, or for any other reason, LPAs should ensure that the passage of time does not remove their future ability to control the alleged breach of planning control to which their notice relates, if and when the appeal against that notice is finally determined. Within four years of the date on which the LPA first took enforcement action, it is open to them to take further enforcement action under what has become known as the "second-bite provision" in section 171B(4)(b) (see paragraph 2.5 of this Annex). Accordingly, within four years of first taking enforcement action in respect of it, no use, operation or other matter can usually become "lawful" within the meaning of section 191(2) or (3) of the 1990 Act, because, by virtue of the "second-bite provision", the time for taking (further) enforcement action in respect of that use, operation or other matter, may not then have expired (see section 191(2)(a) and (3)(a)). The exception to this will be in those cases where an appeal against a previous enforcement notice has succeeded on any of the grounds in section 174(2)(a), (c) or (d), or planning permission has since been granted for the matter in question. In those circumstances it clearly would not be open to the LPA to take further enforcement action. However, where an enforcement notice has yet to take effect, because an appeal against it is still outstanding, it is possible that it would not be regarded as being "in force" for the purposes of section 191(2)(b) and (3)(b); and where a period of more than four years has expired since that notice was issued, without a further notice having been issued under the "second-bite provision", it is possible that the passage of time may, by then, have made the use, operation or other matter to which the outstanding enforcement notice relates, lawful for the purposes of section 191(2) or (3), as the case may be, by virtue of the normal time limits for the taking of enforcement action. In these circumstances, a subsequent application for a LDC, made before the outstanding enforcement notice has come into effect, may be difficult to resist. There is currently no judicial authority on the question whether a LDC granted in these circumstances would be a defence against an enforcement notice issued before, but coming into effect after, the date specified in that LDC. LPAs need to be aware of this possible difficulty where an appeal against an enforcement notice is outstanding for nearly four years, usually as a result of protracted litigation, and to use the provisions of sections 17IB(4)(b) and/or 289(4A) expeditiously in order to safeguard their continued ability to remedy the alleged breach of planning control.

Enforcing conditions imposed on permission for operational development

2.52 Paragraph 29 of the Annex to DOE Circular 11/95, on the use of conditions in planning permissions, together with its explanatory footnote, draws attention to the implications of the Court of Appeal's judgement in the case of *Handoll and Others v Warner Goodman and Streat (A firm) and Others* [1995] JPL 930.

2.53 Where the LPA are themselves responsible for ensuring that the works comply with Building Regulations, it is suggested that the responsible inspecting officer should liase closely with colleagues in the Planning Department, to avoid the need for both Departments to inspect the development. In other cases the authority's Planning Department will need to make their own detailed check that the development complies with the approved plans. The Court of Appeal's judgement may therefore have implications for the administrative organisation of work in those authorities which do not already carry out these checks as a matter of routine, but instead rely on others to report or complain about

any failure to comply with approved plans. Such failures will not necessarily prompt complaints, but they may render unenforceable any conditions imposed on the permission.

2.54 Whether a deviation from an approved plan is sufficiently significant as to render the whole development in breach of planning control is a matter of fact and degree in every case. In both the *Handoll* case, and the *Kerrier DC* case which it overturned, the deviations from the approved plans were clearly apparent from cursory inspection of the development.

2.55 As more fully explained in Annex 4, any condition imposed on a planning permission may be enforced, within the appropriate time-limits, by the use of either or both an enforcement notice (alleging a breach of condition) and a breach of condition notice.

Enforcement of listed building control

2.56 Schedule 3 (paragraphs 2 to 6) to the Planning and Compensation Act 1991 ("the 1991 Act") amended the listed building enforcement provisions in sections 38 to 43 of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the Listed Buildings Act"). Paragraph 8 of Schedule 3 introduced a new section 65(3A) and amended section 65(5) of the Listed Buildings Act to reflect changes made to the "planning enforcement regime in section 289(4A) and (6) of the 1990 Act (see paragraphs 2.48 to 2.50 above). In particular it should be noted that PPG15, which is obtainable from The Stationery Office Bookshops (ISBN 0 11 752944 3, price £8.40) gives specific policy and other guidance on listed building and conservation area control, including its enforcement. The main differences between the enforcement of planning control and the enforcement of listed building and conservation area control are: that neither listed building and conservation area consent applications, nor appeals under section 39 of the Listed Buildings Act attract any application fee; that there are no time-limits for issuing listed building or conservation area enforcement notices; that carrying out work without the necessary listed building or conservation area consent, or failing to comply with a condition attached to that consent, is an offence under section 9 of that Act, whether or not an enforcement notice has first been issued; and that listed building and conservation area consents are never made retrospective.

Enforcement of minerals planning control

2.57 In his report, "Enforcing Planning Control", Robert Carnwath QC, as he then was, recognised that minerals planning control is well-established as part of the planning system and recommended no special amendments to the enforcement provisions for minerals. But unauthorised mineral working involves particular problems. Damage to amenity, which is sometimes irremediable, can be caused very quickly. Mineral planning authorities (MPAs) therefore need to be able to stop unauthorised activity immediately it is detected. MPAs' attention is drawn to section 184(3) which enables a stop notice to be made immediately effective where special reasons justify it (see paragraph 3.29 of Annex 3). While formal enforcement action may well prove necessary where unauthorised mineral working is taking place, or where authorised working is being carried out, but planning conditions are not being observed, it is preferable for liaison and routine discussion between MPAs and operators to be sufficiently good to avoid the occurrence of breaches of planning control. Any problems are best handled by discussion and co-operation in the first instance.

Tree preservation orders: enforcement The duty to replace trees

2.58 Under section 206 of the 1990 Act, landowners are placed under a duty to replace trees which are protected by tree preservation orders (TPOs) in certain circumstances. The duty arises where a tree is removed in contravention of a TPO or because it is dead, dying or has become dangerous. The duty requires the landowner to plant another tree of an appropriate size and species at the same place as soon as he or she reasonably can. The duty transfers to the new owner where the land in question changes hands. Trees which are planted in accordance with the duty are automatically protected by the original TPO, even if they are of a different species.

2.59 In relation to trees in woodlands, the duty only arises where the trees are removed in contravention of the TPO. It can be complied with by planting the same number of replacement trees on or near the land on which the original trees stood, or on other land agreed between the LPA and the landowner, and in such places as the LPA designate.

2.60 The duty does not apply where the LPA, on an application by the landowner, dispense with it. In dealing with applications to dispense with the duty, the LPA should give their decision in writing, setting out their reasons.

Enforcing the duty

2.61 If it appears to the LPA that the duty has not been complied with they may, within 4 years from the date of the alleged failure to comply, require replacement trees to be planted by serving on the landowner a notice under section 207 of the 1990 Act ("a tree replacement notice"). In general terms, a tree replacement notice should tell the landowner what the LPA consider has given rise to the duty and what must be done to comply with it. It should specify the size and species of the replacement trees and a period within which the planting is to be carried out. It must also specify a period at the end of which the notice is to take effect; this period must be not less than 28 days beginning with the date of service of the notice.

2.62 The power to serve a tree replacement notice is discretionary. In deciding whether to exercise it (and in deciding how to deal with applications to dispense with the duty), the LPA will wish to consider the amenity issues, including the impact which the removal of trees has had on the local environment and its enjoyment by the public. They will also need to consider whether it would be reasonable in the circumstances to require their replacement by the landowner. They should also consider, in the case of woodlands, whether replacement would be in accordance with good forestry practice.

2.63 Failure to comply with a tree replacement notice is not a criminal offence. If a replacement tree is not planted within the specified period (which may be extended by the LPA) the LPA may enter the land, plant the tree and recover from the landowner any reasonable expenses incurred. Anyone who wilfully obstructs a person exercising this power is guilty of an offence and liable on summary conviction to a fine of up to level 3 on the standard scale (currently £1,000).

Conditions of consent requiring the replacement of trees

2.64 Under the terms of the model form of TPO the LPA may, in granting consent to fell a tree, include a condition requiring its replacement by one or more trees on the site or in the immediate vicinity. If it appears to the LPA that such a condition has not been complied with, they may enforce it also by serving a tree replacement notice under section 207.

2.65 The 1990 Act does not provide for trees planted pursuant to a replacement condition to be automatically protected by the TPO under which consent was given. Where the felled trees comprise all or part of a woodland, and the replacements are planted within the woodland area defined by the TPO, the Secretary of State considers that they are protected by the TPO. In other cases, a fresh TPO may be required to protect the replacements.

Enforcing the replacement of trees in conservation areas

2.66 A duty similar to that described above applies where trees in conservation areas are removed in contravention of the controls relating to those areas (see section 211 and 212 of the Act) or because they are dead, dying or have become dangerous. That duty may also be enforced by the service of a tree replacement notice under section 207.

Appeals

2.67 A person may appeal to the Secretary of State against a tree replacement notice. Section 208 of the 1990 Act, as amended, provides five grounds of appeal:

- that the provisions of the duty under section 206 or, as the case may be, the condition of consent are not applicable or have been complied with;
- that in all the circumstances of the case the duty should be dispensed with;
- that the requirements of the notice are unreasonable in respect of the period or the size or species of trees specified in it;
- that planting in accordance with the notice is not required in the interests of amenity or would be contrary to good forestry practice;
- that the place at which the tree or trees are required to be planted is unsuitable for that purpose.

2.68 An appeal must be made in writing *before the tree replacement notice takes effect. This is an absolute time-limit; the Secretary of State has no discretion to accept late appeals*. LPAs are advised, when they serve a tree replacement notice, to make it plain to the landowner that any appeal which is sent to the Secretary of State (which should be addressed to the appropriate Government Office for the Region and not the Planning Inspectorate) must be posted in time to be received, in the ordinary course of post, before the date on which the notice is stated to take effect.

2.69 Both the appellant and the LPA have a right to appear before, and be heard by, a person appointed by the Secretary of State. In most cases, however, the Department will suggest that the appeal be dealt with by exchange of written representations, followed by a site visit.

2.70 As with planning enforcement notices, the Secretary of State has power, in amended section 208(7), to correct defects, errors or misdescriptions in a tree replacement notice or to vary its requirements, if he is satisfied that he can do so without causing injustice to either party. His power does not extend to the correction of a notice which is so fundamentally defective that correction would result in a substantially different notice. It follows that the notice should be drafted with care. A model form of tree replacement notice is at Appendix 4.

2.71 Once the Secretary of State has given a decision on the appeal, either party may seek leave to appeal to the High Court against the decision on a point of law. Rules of Court provide that the appeal must be made within 28 days of the date of the decision, although the Court may at their discretion allow a longer period.

Costs

2.72 Although the parties to an appeal are normally expected to meet their own expenses, an application for costs may be made by either party, whether the appeal has been dealt with by written representations or a hearing/local inquiry. However, costs are only awarded against a party if it is shown that they have behaved unreasonably in the appeal process, causing the other unnecessary expense.

Tree preservation orders: penalties

2.73 Anyone who, in contravention of a TPO:

- cuts down, uproots or wilfully destroys a tree, or
- wilfully damages, tops or lops a tree in a way that is likely to destroy it, is guilty of an offence under section 210(1) of the 1990 Act and liable, on summary conviction, to a fine of up to £20,000. The offence is also triable on indictment so that in serious cases a person may be committed for trial to the Crown Court and be liable on conviction to an unlimited fine. This is an absolute offence which can be committed without knowledge of the TPe's existence. A tree does not have to be obliterated in order to be "destroyed". The High Court's judgment in Barnet London Borough Council v Eastern Electricity Board [1973] 1 WLR 430 held that a tree could be said to have been "destroyed" if, as a result of that which is done to it, it ceases to have any use as an amenity, as something worth preserving.

2.74 In determining the amount of any fine, the Court is expressly required to have regard to any financial benefit which has accrued in consequence of the offence, or is likely to accrue, to the person convicted.

2.75 It is a lesser offence under section 210(4) of the 1990 Act to contravene the provisions of a TPO otherwise than as mentioned in paragraph 2.73 above. For example, anyone who lops a tree in contravention of a TPO but in a way that is unlikely to result in the tree's destruction is guilty of this offence and liable, on summary conviction, to a fine not exceeding level 4 on the standard scale (currently £2,500).

2.76 Paragraphs 60 and 63 of DOE Circular 36/78 are cancelled.

Enforcement of hazardous substances control

2.77 The Planning (Hazardous Substances) Act 1990 requires hazardous substances consent to be obtained for the presence on land of a hazardous substance in a controlled quantity. The provisions for enforcing against breaches of control generally follow the planning enforcement provisions, so far as appropriate. A contravention of hazardous substances control is itself an offence. Fuller advice on the hazardous substances enforcement provisions is contained in DOE Circular 11/92.

Environmental assessment

2.78 The Town and Country Planning (Environmental Assessment and Unauthorised Development) Regulations 1995 (SI 1995/22 58) require that an environmental statement (ES) shall be provided for allegedly unauthorised development which is within Schedule 1 to the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (SI 1988/1199) or within Schedule 2 and likely to have a significant effect on the environment by virtue of its nature, size or location. These requirements already apply to planning applications and appeals. When issuing an enforcement notice, the LPA should consider whether the unauthorised development requires environmental assessment. If it appears that environmental assessment is necessary, a "regulation 4" notice will be served specifying the description of the development. This also requires a person who gives notice of an appeal under section 174 of the 1990 Act to submit 4 copies of an ES. The LPA will send a copy of the "regulation 4" notice to the Secretary of State and other statutory bodies listed in regulation 4 of the Regulations. The recipient of a "regulation 4" notice may seek a further direction on the need for environmental assessment under regulation 5. If the Secretary of State confirms that an ES is required and the appellant fails to provide one within the prescribed timescale, the deemed application and ground (a) appeal, if any, will lapse.

2.79 Detailed guidance on the implementation of the Regulations is given in DOE Circular 13/95: The Town and Country Planning (Environmental Assessment and Unauthorised Development) Regulations 1995. Guidance on preparing environmental statements is given in "Preparation of Environmental Statements for Planning Projects that Require Environmental Assessment: A Good Practice Guide" published by The Stationery Office, ISBN 0 11 753207 X.

Interpretation of "substantially completed" in section 1718(1) of the 1990 Act

2.80 The term "substantially completed" in section 171B(l) of the 1990 Act put into statutory terms, for the avoidance of doubt, the Courts' interpretation of the provisions in section 172(4)(a), as originally enacted, as to the date from which the four-year period, within which enforcement action may be taken in respect of unauthorised operational development, starts. Judicial authority in the case of *Ewen Developments Ltd v SSE* [1980] JPL 404 established that in the case of a single operation, such as the building of a house, the four-year period does not begin until the whole operation is substantially complete. What is substantially complete must always be decided as a matter of fact and degree. It is

not therefore possible to define precisely what is meant by the term "substantially completed". Arguably, in the case of a house, it is not substantially complete until all the external walls, roof-tiling, woodwork, guttering and glazing are finished; but it might be regarded as substantially complete if only some internal plastering or decorating, or external decorating work, remains to be done, particularly if use of the building for its intended purpose has started. All the relevant circumstances must be considered in every case.

Interpretation of "use as a single dwelling house"

2.81 It is important to distinguish the term "use as a single dwellinghouse", in section 171 B(2), from what might normally be regarded as being a single dwellinghouse. Experience has suggested that, on occasion, people may adapt, or use, unlikely or unusual buildings or structures as their home or dwellinghouse. However, the Courts have held that, although there is no definition of what is a dwellinghouse, it is possible for the reasonable person to identify one when he sees it. If no reasonable person would look at a particular structure used as a dwellinghouse and identify it as such, it is justifiable to conclude, as a matter of fact, that it is not a dwellinghouse. In those circumstances, while its use as a dwellinghouse might be immune from enforcement action, it is not a dwellinghouse as such and, accordingly, would never enjoy the benefits of "permitted development" rights under Article -3 of, and Part 1 of Schedule 2 to, the GPDO. The Department considers that a flat may be used as a single dwellinghouse in certain circumstances, but not acquire GPDO "permitted development" rights as such, because Article 1(1) of the GPDO specifically excludes them from the definition of a "dwellinghouse" for GPDO purposes. For the purposes of the 1990 Act, where section 336(1) defines "building" as including any part of a building, the view is taken that a flat can be used as a single dwellinghouse, whether or not it would otherwise be regarded as being a single dwellinghouse as such, (see *Doncaster MBC v. SSE and Dunhill* [1993] JPL 565). It is considered that the criteria for determining use as a single dwellinghouse include both the physical condition of the premises and the manner of the use. Where a single, self-contained set of premises comprises a unit of occupation, which can be regarded as a separate "planning unit" from any other part of a building containing them; are designed or adapted for residential purposes, containing the normal facilities for cooking, eating and sleeping associated with use as a dwellinghouse; and are used as a dwelling, whether permanently or temporarily, by a single person or more than one person living together as, or like, a single family, those premises can properly be regarded as being in use as a single dwellinghouse for the purposes of the Act. This interpretation would exclude such uses as bed-sitting room accommodation, where the occupants share some communal facilities within a building, such as a bathroom or lavatory, and the "planning unit" is likely to be the whole building, in use for the purposes of multiple residential occupation, rather than each individual unit of accommodation.

Penalties for enforcement notice offences

2.82 Section 179 of the 1990 Act provides that if, at any time after the period for complying with an enforcement notice, any step required by the notice has not been taken, an offence is committed. An offence may be charged by reference to any day or longer period, and a person may be convicted of a second or subsequent offence by reference to any period of time. A person guilty of an offence under this section is liable, on summary conviction, to a

fine not exceeding £20,000, or on conviction on indictment to an unlimited fine. In determining the amount of any fine, the Court is to have regard to any financial benefit which has accrued or appears likely to accrue in consequence of the offence. Accordingly, prosecuting authorities should always be ready to give any available details about the proceeds resulting, or likely to result, from the offence, so that the Court may take account of them.

Cautioning alleged offenders

2.83 When making an investigation of the facts prior to initiating any proceedings LPAs should have regard to the provisions of sections 66 and 67(9) of the Police and Criminal Evidence Act 1984 in relation to cautioning alleged offenders.

The LPA's "default" powers

2.84 Amendments, made by section 7 of the 1991 Act, to section 178 of the 1990 Act considerably extended the LPA's "default" powers to enter enforcement notice land and carry out the requirements of a notice themselves; and provided for a new offence of wilfully obstructing anyone who is exercising those powers on the LPA's behalf. As did amendments made by Schedule 3 to the 1991 Act in respect of the equivalent powers in section 42 of the Listed Buildings Act, the amended power enables the LPA to carry out any steps required by an enforcement notice, including such steps to discontinue a use of land (which by virtue of regulation 2(1) of the Town and Country Planning (Minerals) Regulations 1995 (SI 1995/2863) includes the discontinuance of mining operations) and such steps for the purpose of making development comply with the terms of any planning permission which has been granted in respect of the land, or for the purpose of removing or alleviating any injury to amenity which has been caused by the development.

2.85 The previous reference, in section 178(1), to steps other than the discontinuance of a use of land, could inhibit LPAs' efforts to stop illegal uses of land. The amended provision does not mean that the LPA will themselves be able to stop the illegal use (because only the person who is actually carrying out the use is capable of stopping it entirely). But where, for example, a storage use is required to be discontinued, and whether or not the notice specifically requires the removal of stored items, it is now open to the LPA to remove those items as a step towards discontinuing the use and continue to remove such items which may appear on the land. Where, as an alternative to requiring an entire unauthorised building to be removed, a notice requires the building to be altered, in order to remove or alleviate an injury to amenity, or to make the building comply with the terms of a planning permission granted for the erection of a similar building on the land, the LPA may now carry out those works themselves. (Previously the LPA's default powers were limited to taking steps required by a notice in order to remedy the breach of planning control.)

2.86 These amendments were intended to remove any doubt about the scope of LPAs' default powers, and encourage and facilitate their use, when other methods, including prosecution for an offence, have failed to persuade the owner or occupier of land to carry out, to the LPA's satisfaction, any of the steps required by an enforcement notice. The LPA may recover from the person who is then the owner of the land any expenses reasonably incurred by them in doing so. Regulation 14(2) of the Town and Country Planning General

Regulations 1992 (SI 1992/1492) provides that any such expenses, until recovered, become a charge on the land binding on successive owners. It is considered that such a charge is registrable as a local land charge under section 1(1)(a) of the Local Land Charges Act 1975; and, by virtue of section 7 of that Act, such a charge then confers upon the LPA powers of a mortgagee-in-possession, to order the sale of the land themselves, or to appoint a receiver in order to recover their costs from the proceeds, should that prove necessary. Recent research commissioned by the Department has suggested that most authorities have successfully recovered such expenses in full, as a simple common law debt, without the need to invoke these powers. Regulation 14(1) of the 1992 General Regulations provides the other powers, limitations and rights referred to in section 178(3) and (4).

2.87 Many LPAs have found that exercising their powers in section 178, in the event of a failure to comply with the requirements of an enforcement notice, provides a swifter and more cost-effective means of remedying a breach of planning control than initiating successive prosecutions under section 179 alone, which can prove timeconsuming. LPAs with experience of operating these provisions have pointed to the occasional need to arrange for a police presence, to deter or deal with any breach of the peace on the part of aggrieved landowners or occupiers, and to ensure that their officers and contractors are not obstructed or assaulted whilst going about their lawful duties. Depending on the particular circumstances of each case, it may also be advisable to provide some appropriate form of protective clothing for officers and not to publicise in advance any proposal to exercise section 178 default powers. Suitable publicity after the event may well be a salutary warning of the LPA's determination to others who might be contemplating a breach of planning control.

2.88 Some LPAs have reported examples of intimidation directed at individual officers and members responsible for enforcing, or deciding to enforce, planning control. Such cases are rare. Where threats are made, or there is actual violence to individual officers, members, their families or their property, LPAs may consider exercising their powers under sections 111 or 13 7 of the Local Government Act 1972, as amended by section 36 of the Local Government and Housing Act 1989, to incur the expenditure necessary to compensate those officers or members who need to pursue private prosecutions or seek an injunction against the perpetrators, if it is not appropriate for the LPA to initiate such proceedings in their own name, in exercise of their powers in section 222 of the 1972 Act. It is the LPA's responsibility, in consultation with their legal advisers, to decide whether section 111, 137 or any other legislation would be appropriate in the circumstances of any particular case. Where an officer or member is sued, section 265 of the Public Health Act 1875, as amended and extended, is intended to protect them from personal liability when acting in a bona fide capacity for the authority.

Fee payable for deemed planning application arising from an enforcement appeal

2.89 The provisions relating to enforcement appeal deemed application fees are dealt with in detail in Appendices 1 and 2 respectively of DOE Circular 31/92. It should be noted that the specific sums referred to in paragraph 1 of that Appendix have been increased and are set out in the Town and Country Planning (Fees for Applications and Deemed Applications)

(Amendment) Regulations 1997 (SI 1997/37) currently in force, and will be subject to further periodic reviews of the Fees Regulations.

Appendix 1 to Annex 2

Important - This Communication Affects Your Property

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

Enforcement Notice

Issued By: [name of Council]

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

2. The Land To Which The Notice Relates

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

3. The Matters Which Appear To Constitute The Breach Of Planning Control

Without planning permission, the erection of a brick-built, single-storey building, and the construction of a driveway leading to it, in the approximate position marked with a cross on the attached plan.

4. Reasons For Issuing This Notice

It appears to the Council that the above breach of planning control has occurred within the last four years. The building in question was substantially completed less than four years ago. The building looks like, and appears to have been designed as, a dwellinghouse. The site is within the approved Green Belt where, with certain exceptions which do not apply in this case, there is a strong presumption against any development. The building appears as an intrusion in this otherwise mainly open, rural landscape. It is contrary to development plan policies and harmful to the visual amenities of the area. The Council do not consider that planning permission should be given, because planning conditions could not overcome these objections to the development.

5. What You Are Required To Do

(i) Remove the building and the driveway.
(ii) Remove from the land all building materials and rubble arising from compliance with requirement (i) above, and restore the land to its condition before the breach took place by levelling the ground and re-seeding it with grass.

6. Time For Compliance

(i) 12 weeks after this notice takes effect.
(ii) 24 weeks after this notice takes effect.

7. When This Notice Takes Effect

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

Dated: *[date of issue]*

Signed: *[Council's authorised officer]*

on behalf of
[Council's name and address]

Annex

Your Right Of Appeal

You can appeal against this notice, but any appeal must be received, or posted in time to be received, by the Secretary of State before the date specified in paragraph 7 of the notice. The enclosed booklet "Enforcement Notice Appeals - A Guide to Procedure" sets out your rights. You may use the enclosed appeal forms.

(a) One is for you to send to the Secretary of State if you decide to appeal, together with a copy of this enforcement notice.

(b) The second copy of the appeal form and the notice should be sent to the Council.

(c) The third copy is for your own records.

What Happens If You Do Not Appeal

If you do not appeal against this enforcement notice, it will take effect on the date specified in paragraph 7 of the notice and you must then ensure that the required steps for complying with it, for which you may be held responsible, are taken within the period[s] specified in paragraph 6 of the notice. Failure to comply with an enforcement notice which has taken effect can result in prosecution and/or remedial action by the Council.

Appendix 2 to Annex 2

Example Enforcement Notice - Material Change Of Use

Important - This Communication Affects Your Property

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

Enforcement Notice

Issued By: [name of Council]

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

2. The Land To Which The Notice Relates

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

3. The Matters Which Appear To Constitute The Breach Of Planning Control

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

4. Reasons For Issuing This Notice

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

5. What You Are Required To Do

Stop using any part of the land as a road haulage depot and remove from the land all vehicles and equipment brought on to the land for the purpose of that use. (You may keep on the land any equipment which you use solely for the maintenance of farm vehicles and machinery used for the purposes of agriculture on that land).

6. Time For Compliance

8 weeks after this notice takes effect.

7. When This Notice Takes Effect

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

Dated: *[date of issue]*

Signed: *[Council's authorised officer]*

on behalf of
[Council's name and address]

Annex

Your Right Of Appeal

You can appeal against this notice, but any appeal must be **received**, or posted in time to be received, by the Secretary of State **before** the date specified in paragraph 7 of the notice. The enclosed booklet "Enforcement Notice Appeals - A Guide to Procedure" sets out your rights. You may use the enclosed appeal forms.

(a) One is for you to send to the Secretary of State if you decide to appeal, together with a copy of this enforcement notice.

(b) The second copy of the appeal form and the notice should be sent to the Council.

(c) The third copy is for your own records.

What Happens If You Do Not Appeal

If you do not appeal against this enforcement notice, it will take effect on the date specified in paragraph 7 of the notice and you must then ensure that the required steps for complying with it, for which you may be held responsible, are taken within the period[s] specified in paragraph 6 of the notice. Failure to comply with an enforcement notice which has taken effect can result in prosecution and/or remedial action by the Council.

Appendix 3 to Annex 2

Example Enforcement Notice - Failure To Comply With A Condition

Important - This Communication Affects Your Property

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

Enforcement Notice

Issued By: [name of Council]

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

2. The Land To Which The Notice Relates

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

3. The Breach Of Planning Control Alleged

On [date of planning permission] planning permission was granted for the erection of a building for use as a retail shop, subject to conditions. One of those conditions was that the premises should not be open for the sale of goods on Sundays or after 1900 hours on any other day. It appears to the Council that the condition has not been complied with, because the premises have been open for the sale of goods on Sundays and after 1900 hours on some other days.

4. Reasons For Issuing This Notice

It appears to the Council that the above breach of planning control has occurred within the last ten years. The building adjoins a residential area. Its immediate surroundings also contain a number of residential flats above shops and other business premises. The sale of goods from the premises on Sundays and late in the evenings attracts large numbers of people to the area both on foot and in vehicles and is causing significant disturbance to nearby residents, at times when they might reasonably expect the area to be relatively peaceful. The Council do not consider that there should be any relaxation of the condition in question, which already permits reasonably long opening hours for the shop.

5. What You Are Required To Do

Stop opening the shop for the sale of goods on Sundays and on other days after 1900 hours.

6. Time For Compliance

7 days after this notice takes effect.

7. When This Notice Takes Effect

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

Dated: *[date of issue]*

Signed: *[Council's authorised officer]*

on behalf of
[Council's name and address]

Annex

Your Right Of Appeal

You can appeal against this notice, but any appeal must be **received**, or posted in time to be received, by the Secretary of State **before** the date specified in paragraph 7 of the notice. The enclosed booklet "Enforcement Notice Appeals - A Guide to Procedure" sets out your rights. You may use the enclosed appeal forms.

(a) One is for you to send to the Secretary of State if you decide to appeal, together with a copy of this enforcement notice.

(b) The second copy of the appeal form and the notice should be sent to the Council.

(c) The third copy is for your own records.

What Happens If You Do Not Appeal

If you do not appeal against this enforcement notice, it will take effect on the date specified in paragraph 7 of the notice and you must then ensure that the required steps for complying with it, for which you may be held responsible, are taken within the period[s] specified in paragraph 6 of the notice. Failure to comply with an enforcement notice which has taken effect can result in prosecution and/or remedial action by the Council.

Appendix 4 to Annex 2

Model Tree Replacement Notice

Important - This Communication Affects Your Property

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

Tree Replacement Notice

Tree preservation order: [title]
[name of Council]

1. This Notice is served by the Council under section 207 of the Town and Country Planning Act 1990 ("the Act") because it appears to them that

> [you have not complied with a duty to plant [a tree/trees] under section 206 of the Act].
>
> [you have not complied with a condition of consent granted under the above tree preservation order to plant [a replacement tree/replacement trees]].
>
> [you have not complied with a duty to plant [a tree/trees] in a conservation area under section 213 of the Act].

2. The Land Affected

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

3. Reasons For Serving Notice

[On or around [date], a beech tree protected by the above tree preservation order was cut down on the grounds that it had become dangerous. Under section 206 of the Act the owner of the land is under a duty to plant another tree. It appears to the Council that this duty has not been complied with.]

[On [date], the Council granted consent to fell an oak tree protected by the above tree preservation order subject to a condition to plant [a replacement tree or trees] [*give details of condition*]. It appears to the Council that this condition has not been complied with.]

[On or around [date], an ash tree situated in the [title of conservation area] was removed in contravention of section 211 of the Act. Under section 213 of the Act the owner of the land is under a duty to plant another tree. It appears to the Council that this duty has not been complied with.]
[*Then set out any relevant background leading up to the Council's decision to serve the notice (eg references to correspondence with the landowner)*.]

4. What You Are Required To Do

You are required to plant [*number, species and size of tree or trees to be planted*] at the place(s) shown on the attached plan.

Time for compliance: [X months from the date stated in paragraph 5 below.]

5. When This Notice Takes Effect

This notice takes effect on [specific date (which must be not less than 28 clear days after date of service)], unless an appeal is made against it beforehand.

Dated: *[date of notice]*

Signed: *[Council's authorised officer]*

on behalf of
[Council's name and address]

Annex

Your Right Of Appeal

You can appeal to the Secretary of State for the Environment against this notice by writing to [*name and telephone number of relevant Government Office for the Region*]. **Your appeal must be received, or posted in time for it to be received, before [date specified in the notice (at 5 above)]**. You can appeal on anyone or more of the following grounds

- that the provisions of the duty to replace trees or, as the case may be, the conditions of consent requiring the replacement of trees, are not applicable or have been complied with;
- that in all the circumstances of the case the duty to replace trees should be dispensed with in relation to any tree;
- that the requirements of the notice are unreasonable in respect of the period or the size or species of trees specified in it;
- that the planting of a tree or trees in accordance with the notice is not required in the interests of amenity or would be contrary to the practice of good forestry;
- that the place on which the tree is or trees are required to be planted is unsuitable for that purpose.

You must also state the facts on which your appeal is based.

Failure To Comply

If you do not comply with this notice, the Council may enter the land, plant the tree(s) and recover from you any reasonable expenses incurred.

Advice

If you have any questions about this notice or would like some advice on how to comply with it, please contact [*name, address and telephone number of appropriate Council officer*].