

Enforcement

Practice Note 3

PRACTICE NOTE

03

Investigative Approaches

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An Roinn

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Preamble

This Enforcement Practice Note looks at the investigative approaches available to councils in order to establish if a breach of planning control or an offence has occurred. It forms part of a series of new practice notes stemming from the **Planning Act (Northern Ireland) 2011 [the 2011 Act]** and any related subordinate legislation. The emphasis is very much on advice but where explicit legislative requirements must be followed these will be made clear.

Where appropriate this practice note will therefore highlight:

- relevant legislation;
- procedural guidance;
- definitions; and
- best practice examples / relevant case law.

This practice note is not intended to replace the need for judgement by planning officers and those involved in planning enforcement. Nor is it intended to be a source of definitive legal advice. Reference should be made to the actual legislation referred to in this document and if any discrepancy or conflict exists between this Enforcement Practice Note and legislation, the provisions of the legislation will prevail.

It is important to note that councils have the primary responsibility for exercising the function of planning enforcement in their given administrative area.

Please ensure you are considering the most up to date version of this Enforcement Practice Note.

1.0 Legislative context

- 1.1 Enforcement powers within the **Planning (Northern Ireland) Order 1991** are re-enacted in **the 2011 Act** and transferred to councils who are responsible for the enforcement of breaches of planning control. The following paragraphs relate to a council's information gathering powers in relation to its enforcement function.
- 1.2 **Section 133** of the 2011 Act provides for the issue of a planning contravention notice, giving a council the power to obtain information prior to taking enforcement action.
- 1.3 **Section 134** of the 2011 Act makes it an offence to fail to comply with a planning contravention notice and sets out the penalties.
- 1.4 **Section 176** allows a person authorised in writing by a council to enter land without a warrant to carry out enforcement functions under the 2011 Act.
- 1.5 **Section 177** provides that if entry to land has been refused or the case is urgent, then a council can obtain a warrant to enter the land.
- 1.6 **Section 240** allows a council to require occupiers of premises to provide information to them, such as who is the owner, to enable them to serve a notice or other document on the owner.

2.0 Typical stages in the investigative process

- 2.1 The key stages in the investigative process are as follows:-
- Receipt of a complaint;
 - Office based investigation;
 - Site inspection;

- Interviews; and
- Report and Assessment

3.0 Types of complaints

3.1 Table 1 (below) details the different types of complaint received in relation to development activities and the associated purpose of investigation alongside relevant legislation.

Table 1: Types of complaints

Type of Complaint	Purpose of Investigation
Unauthorised development (a) Operational development. (b) Material change of use;	To establish if a breach of planning control as defined in section 131(1) (a) of the 2011 Act has occurred.
Non compliance with conditions or limitations attached to a planning permission or Development Order	To establish if a breach of planning control as defined in section 131(1) (b) of the 2011 Act has occurred.
Unauthorised works to a listed building (a) Demolition; (b) Alterations; (c) Extension.	To establish if an offence under section 85(1) of the 2011 Act has occurred.
Non compliance with conditions attached to a listed building consent.	To establish if an offence under section 85(5) of the 2011 Act has occurred.
Unauthorised demolition in a Conservation Area	To establish if an offence under section 105(2) of the 2011 Act has occurred.

Non compliance with conditions attached to Conservation Area consent.	To establish if an offence under section 85(5) (by virtue of reference in section 105(6)) of the 2011 Act has occurred.
Unauthorised display of advertisement	To establish if an offence under section 175(2) of the 2011 Act has occurred.
Unauthorised works to trees covered by a Tree Preservation Order (TPO) and/or within a Conservation Area.	To establish if an offence under section 126 or 127 of the 2011 Act has occurred.
Contravention of hazardous substances control	To establish if an offence under section 117(2) of the 2011 Act has occurred

3.2 Under the **Freedom of Information Act 2000** or the **Environmental Information Regulations 2004**, a council may receive a request to release details of complainants. Council FOI guidance should be fully considered before any details are released. Normally personal information will not be released without the permission of the complainant.

4.0 Office based investigation

4.1 Initial research should include a check of the following:

- **Planning register and planning history.** It is important to establish if the alleged breach/offence benefits from any express planning permission or consent and to establish if the land has been the subject of any previous enforcement investigation.
- **Legislation.** Initial research must include a check of legislative requirements. It is important to establish if a complaint is a breach of planning control and/or an offence under planning legislation. Enforcement Practice Note 1 defines what constitutes a breach of

planning control and Enforcement Practice Note 2 lists offences under planning law.

- **Development Plan.** The plan policies and planning constraints and/or hazards affecting the land should be checked and noted. This should include checks for listed buildings, conservation area status, tree preservation orders and plan policies and zonings, including designated sites.

4.2 There are other sources of information that may assist in an investigation. A council may, therefore, find it helpful to consult with other bodies such as the Department for Finance Land and Property Service or Councils' Building Control Teams.

- **Land and Property Services** comprises the former Rate Collection Agency, the Valuation and Lands Agency, Land Registers of Northern Ireland and Ordnance Survey of Northern Ireland.
- **Council Building Control Records** provide construction details as well as start and completion dates. It is important to be aware that plans submitted for Building Control approval may often vary from those submitted with a planning application.

5.0 Site inspections

5.1 Site inspections should be undertaken to establish whether a breach of planning control and/or an offence has occurred.

5.2 Before any site inspection it is advisable for the investigating officer to gather as much relevant information from office based research as possible (see section 4.0) where appropriate to do so. **Sections 176, 177 and 178** of the 2011 Act give a council the authority to enter any land for enforcement purposes.

5.3 Under **section 176** (rights to enter without warrant) any person, authorised in writing by a council may, at any reasonable time, enter any land –

- (a) to ascertain whether there is or has been any breach of planning control on the land or on any other land;
- (b) to ascertain whether an offence has or is being committed with respect to any building on the land or any other land, under **section 85, section 85 as applied by section 105(6), section 103 or 147 or section 147 as applied by section 157(6)**;
- (c) to ascertain whether an offence has been committed under **section 117** (with regards to hazardous substances), **section 126** (with regard to TPOs) or **section 127** (with regards trees in a conservation area);
- (d) for the purpose of exercising any of the functions of **section 161** (with regards urgent works to preserve a building);
- (e) to determine whether any enforcement powers conferred on a council should be exercised in relation to the land or any other land;
- (f) to determine how such powers should be exercised in relation to the land or any other land; and
- (g) to ascertain whether there has been compliance with any requirements arising from earlier enforcement action in relation to the land, or any other land,

if there are reasonable grounds for entering for the purpose(s) in question.

5.4 Where the building to be entered is a dwelling house, 24 hours notice must be given of the intended entry to the occupier of the building (**section 176(4)**)

5.5 Under **section 177(1)** (right to enter under warrant) where it can be shown to the satisfaction of a lay magistrate, on a complaint on oath that:

1. there are reasonable grounds for entering the land for any of the purposes set out above; and
2. admission to the land has been refused, or a refusal is reasonably anticipated; or
3. the case is one of urgency;

a lay magistrate may issue a warrant authorising any person authorised by a council to enter the land.

- 5.6 The application for the warrant sets out the council position and the reason a warrant is required.

Effecting the Warrant

- 5.7 Under **section 177(3)** a warrant authorises entry on one occasion only and that entry must be within one month from the date of the issue of the warrant and must be at a reasonable time, unless the case is one of urgency.

6.0 Rights of entry – supplementary provisions

- 6.1 These supplementary provisions set out conditions for any authorised person (by a council) entering land. If required, an authorised person entering land must produce evidence of their authorisation and state the purpose of entry before they enter the land (**section 178(1) (a)**). He / she may also take with him / her other persons as may be necessary (**section 178(1) (b)**). When leaving the land the authorised person is responsible for securing it as effectively as it was found (**section 178(1) (c)**).

- 6.2 Under **section 178(2)** it is an offence to wilfully obstruct an authorised person in the exercise of a right of entry and are liable on conviction to a fine not exceeding level 3 on the standard scale (£1000).

7.0 Site Safety

7.1 It is imperative that officers follow site safety precautions at all times in accordance with established health and safety procedures.

8.0 Interviews

8.1 Interviews can range from an informal telephone conversation to a formal interview held in the office or on site.

8.2 In a case where the interviewee is suspected of committing an offence (see Table 1) the interview must be carried out under caution¹ to allow the information obtained to be used as evidence in court.

9.0 Report and Assessment

9.1 The enforcement officer should compile a comprehensive report which covers all the salient facts and issues. All information collected must be recorded appropriately. This includes conversations at site visits and on the telephone. It would be good planning practice for the report to include information on the following:

- (1) nature of breach;
- (2) site address;
- (3) site description;
- (4) planning history;
- (5) policy background;
- (6) other material considerations;
- (7) assessment of the case; and,
- (8) recommendation and reasoning.

¹ Police and Criminal Evidence (Northern Ireland) Order (1989) (PACE).

9.2 It is the responsibility of each council to establish its own internal procedures for considering enforcement cases, ensuring an adequate audit trail and ensuring that appropriate determination and notification processes are put in place.

10.0 Additional investigative powers

10.1 Under the 2011 Act there are two further investigative powers which may be used to request additional information:-

- where a council requires details on the ownership of the land in question an information notice may be served; and,
- where a council suspects a breach of planning control has occurred a planning contravention notice can be used to gain information about activities on land where the breach of planning control is suspected.

10.2 Both of these provisions are discretionary procedures and do not constitute enforcement action. However, they do represent the start of formal action, which may act as a clear warning that further action is being considered. Both provisions are considered in more detail below.

11.0 Information Notice

11.1 Under **section 240** of the 2011 Act a council has the power to serve a notice requiring the occupier or any person who receives rent from the premises to provide information about the ownership, occupation and use of the premises to enable a council to make, issue or serve any document it has power to make under the 2011 Act. This information must be given in writing within 21 calendar days after the date on which the notice is served, or a longer time as may be specified in the notice or as the council may allow.

Content of the Information Notice

11.2 Under **section 240(2)** of the 2011 Act a council can seek information on the following matters:

- the nature of the estate in the premises of the person on whom the notice is served;
- the name and postal address of any other person known to that person as having an estate in the premises;
- the purpose for which the premises are being used;
- the time when that use began;
- the name and postal address of any person known to the person on whom the notice is served as having used the premises for that purpose; and,
- the time when any activities being carried out on the premises began.

Offences and Penalties

11.3 Under **section 240(3)** of the 2011 Act failure to give the information required, without reasonable excuse, is an offence, punishable on summary conviction by a fine not exceeding level 3 on the standard scale (£1000).

11.4 The giving of false information knowingly is an offence punishable on summary conviction by a fine not exceeding the statutory maximum and on conviction on indictment to imprisonment for a term not exceeding 2 years, or a fine, or both (**section 240(4) (a) and (b)** of the 2011 Act).

12.0 Planning Contravention Notice

12.1 A council has the power under **section 133** of the 2011 Act to request additional information about activities on land where it suspects a breach of

planning control has occurred. A planning contravention notice (PCN) may be served on the owner or occupier of the land in question, or a person with any other estate in the land, or on a person who is using the land or carrying out operations on the land or using it for any other purpose (**Article 133(1) (a) and (b)** of the 2011 Act).

12.2 A notice may be served whenever a council suspects that a breach of planning control has occurred.

12.3 In most cases it will be the first step in resolving a breach of planning control. As the primary method of gaining information about an alleged breach of planning control, it gives a clear warning that further action is being considered. However, serving a PCN does not constitute taking enforcement action. It is an entirely discretionary procedure. There is no requirement to serve a notice before taking enforcement action, nor does the serving of a notice affect any other power exercisable in respect of any breach of planning control.

Content of the Notice

12.4 Under **section 133(2) (a) and (b)** of the 2011 Act, the recipients of the notice are required to provide information regarding:-

- any operations being carried out on the land, any use of the land and any other activities being carried out on the land; and
- any matter relating to the conditions or limitations, subject to which planning permission in respect of the land has been granted,

as may be specified in the notice.

12.5 Under **section 133(3)** of the 2011 Act a PCN can also require a person on whom it is served, so far as he/she is able to provide:-

- a statement as to whether or not the land is being used for any purpose specified in the notice or whether any operations or activities specified therein are being or have been carried out;
- details of when any operation, activity or use began;
- the names and postal addresses of any other persons who use or have used the land, or who carry out or have carried out any operations or activities on the land;
- information regarding any planning permission for any use or operation, or any reason why such permission is not required; and
- a statement from the recipient of the notice as to the nature of their estate (if any) in the land and, if known the names and addresses of any other persons with an interest in the land.

12.6 The PCN may allow the recipient an opportunity to make a response to the matters raised although this provision is at the discretion of a council. Where a council offers this opportunity, the notice must state a time and place to make representations. It is up to the council to decide if discussions with the recipient would assist in remedying a breach of planning control or would serve no useful purpose. Where it is decided that discussions would not be beneficial, the PCN may be used only for the purposes of obtaining information.

12.7 The notice must set out the likely consequences if the recipient fails to respond to it (namely, the possibility of formal enforcement action being taken) and the effect of **section 185(5) (b)** of the 2011 Act - that is, that no compensation is payable in respect of any loss or damage suffered, which could have been avoided had the information requested (under **section 133** of the 2011 Act) been submitted to the relevant local council.

Offences and penalties

12.8 Under **section 134(1)** of the 2011 Act the recipient must respond in writing to a council within 21 days beginning with the day on which the notice is served.

Failure to do so is an offence and those found guilty of such an offence will be liable on summary conviction to a fine not exceeding level 5 on the standard scale (£5000). Those who fail to comply with a notice following conviction may be prosecuted for a second or subsequent offence by reference to any period of time following the preceding conviction.

- 12.9 Under **section 134(5)** of the 2011 Act to make a false or misleading statement (either intentionally or recklessly) in response to a notice is also an offence punishable by a fine not exceeding level 5 on the standard scale (£5000).

13.0 Time Limits

- 13.1 When considering enforcement action, councils should bear in mind the statutory time limits for taking enforcement action as set out in **section 132** of the 2011 Act.
- 13.2 **Section 132(1)** states where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of five years beginning with the date on which the operations were substantially completed.
- 13.3 **Section 132(2)** states where there has been a breach of planning control consisting in the change of use of any building to use as a single dwelling-house, no enforcement action may be taken after the period of five years beginning with the date of the breach.
- 13.4 **Section 132(3)** states in the case of any other breach of planning control, no enforcement action may be taken after the end of the period of five years beginning with the date of the breach.

13.5 The time limits do not prevent the service of a breach of condition notice in respect of any breach of planning control if an enforcement notice in respect of the breach is in effect² or taking further enforcement action in respect of any breach of planning control if the council has taken enforcement action within the previous five years. It is important to note that minerals development and waste deposition are 'continuing operations' and the above time limits should be considered in light of relevant case law (Thomas David Porthcawl v Pennybont RDC 1972).

² See Enforcement Practice Note 4 – Enforcement Procedures.



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