REPORT TO DEVELOPMENT CONTROL COMMITTEE

21 December 2017

REPORT OF THE CORPORATE DIRECTOR COMMUNITIES

Suggested Changes to the Planning Enforcement System in Wales

1. Purpose of Report

1.1 At the meeting of the Development Control Committee on 9 November 2017 Members resolved that a report be submitted to the next meeting of the Committee on a proposal that a letter be sent by the Committee to the Welsh Assembly Cabinet Secretary for Energy, Planning and Rural Affairs and Bridgend Assembly Members requesting that a surcharge be applied to retrospective planning applications.

1.2 The following report attached as Appendix 1 outlines this proposal in addition to other suggested changes to the planning enforcement system.

2. Connection to Corporate Improvement Plan/Other Corporate Priorities

2.1 The delivery of the County Borough's statutory planning function has links to the Council's corporate priorities in particular number 1 – supporting a successful economy.

3. Background

3.1 Following a number concerns raised by MPs, AMs and Members regarding the effectiveness of the planning enforcement system in controlling major polluting activities that raise significant amenity issues, Bridgend County Borough Council (BCBC) was asked to compile a list of potential improvements to the planning enforcement system that would provide greater strength to the Local Planning Authority to effectively and swiftly control development. BCBC has raised this issue with other authorities and regional planning groups and it was discussed and debated at the Wales Planning Enforcement Conference.

3.2 The content of the report goes beyond the remit of the original proposal put forward by Members, however, it is considered that as the report also covers the main area of concern raised it is an opportune moment to bring this matter forward particularly as it was requested by a local AM.

3.3 The report provides an outline of the current enforcement system and suggests a number of changes and improvements to the current system of planning enforcement and these are grouped under the following headings:-

- Principle of enforcement action – criminal and proportionate?

- Fiscal measures
- Role of Welsh Government
- Enforcement Appeals
- Relationship between Planning and other Environmental Agencies
- Advertisement Controls
- Other areas for improvement

3.4 Most of the suggested changes requires new or alterations to primary or secondary legislation or national policy although there are other improvements that can be made under current powers.

4. Next Steps

4.1 If Members are agreeable to the content of the report then Officers will draft a covering letter to be signed by the Chair on behalf of the Development Control Committee forward the report to the Welsh Assembly Cabinet Secretary for Energy, Planning and Rural Affairs as a discussion document. The Bridgend AMs will be copied in.

5. Recommendation

That the Development Control Committee approves the content of the report and writes to the Cabinet Secretary for Energy, Planning and Rural Affairs and local AMs requesting that the content of the report be taken forward as a discussion document.

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Background Papers
None

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APPENDIX 1

1. Background

1.1 Following a number of concerns raised by MPs, AMs and Members regarding the effectiveness of the planning enforcement system with regard to significant polluting activities, Bridgend County Borough Council (BCBC) was asked to compile a list of potential improvements to the planning enforcement system that would provide greater strength to the Local Planning Authority to effectively and swiftly control development. BCBC has raised this issue with other authorities and regional planning groups and it was discussed and debated at the Wales Planning Enforcement Conference.

1.2 The following comments and suggestions are drawn from these discussions and from observations received from Local Authority Planning Enforcement practitioners from across Wales.

1.3 The main issues raised would suggest that, whilst the everyday business of enforcing planning regulations under the current system is generally effective, there is concern that some improvement is needed in order to maintain effective control and protect amenity as well as adapting to a changing planning, environmental and social climate. There is also concern that the existing enforcement tools are cumbersome and can involve lengthy legal action in order to be effective resulting in reluctance within LPAs to pursue some avenues of control. The consequence is that planning enforcement action is increasingly seen to be failing to live up to public expectation in terms of speed and appropriate and effective action. The debate revealed that there is considerable scope to improve the system. Unsurprisingly perhaps the main focus for suggested improvements relate to reducing the level of bureaucracy and/or introducing stronger financial penalties.

1.4 It is worth pointing out that the vast majority of enforcement work does not result in formal action and more often than not enforcement complaints are resolved very quickly, in an amicable or agreeable manner without recourse to legislation. However, higher profile cases can draw attention to inadequacies in the current system and whilst a Planning Authority may have a very efficient planning service, a relatively small number of difficult cases can easily have a major impact on public confidence.

1.4.1 A strong planning enforcement system also sends out an important message to developers considering carrying out unauthorised activity that all cases will be investigated and where necessary positive action taken. Also it demonstrates that planning conditions will be enforced and failure to comply with approved plans addressed. Notwithstanding the relative importance of effective enforcement in providing ‘teeth’ to the planning system it is not regarded as a statutory function in the same way as, for example, determining applications or producing a Development Plan. As such it is often seen as the ‘Cinderella’ service and an easy target for cuts. In many cases the enforcement function of a planning service has been subsumed into mainstream Development Management functions.

1.5 Reviews of the effectiveness of the of the planning enforcement system in both England and Wales have been undertaken. Most recently Welsh Government (WG) published a document entitled "Research into the Review of the Planning Enforcement System in Wales" in May 2013. The research was undertaken to inform the then forthcoming Wales Planning Bill in relation to newly acquired devolved powers to introduce new planning legislation in Wales. The report made 18 recommendations that could be taken forward into the new Planning Act some of which coincide with the suggestions highlighted below. Unfortunately, only a few of the recommendations subsequently found their way into the Planning (Wales) Act 2015. While the reasons for this are unclear the report remains a detailed and well-reasoned research document that provides an element of legitimacy to the suggestions outlined below as well as a strong evidence base. A fresh debate on this issue in light of recent issues may provide an opportunity for WG to look into this important matter again.

The research document may be found here:

http://gov.wales/topics/planning/planningresearch/publishedresearch/review-of-the-planning-enforcement-system-in-wales/?lang=en

1.6 The Law Commission is also undertaking a review into the consolidation of planning law legislation in Wales. The review is currently out to consultation and includes specific topics on unauthorised development. Although this is primarily a review and consolidation exercise there may be opportunity to make some technical changes to the substance of the law.

2. The current planning enforcement system

2.1 The current planning enforcement regime remains largely unchanged since the inception of the modern planning system in 1948. As with other aspects of planning law, much of the current working practice stems from decades of case law and common practice, which have been highly influential in how local Authorities pursue enforcement action.

2.2 Occasionally, case law has a fundamental impact on how action is pursued, for example during the early 2000s there was a raft of cases involving the lawfulness of development carried out without compliance with conditions or not in accordance with the approved plan. More recently, the issue of deception has been featured in a number of high profile cases concerning the deliberate concealment of dwellings in the countryside which in England has now wound its way into practice and regulation.

2.3 Notwithstanding some positive tweaks to the system over the years via minor updates to planning legislation, the fundamental principle of planning enforcement remains the same. One of the main tenets of this system is that non-compliance with planning law is not a criminal activity in itself and the purpose of the planning enforcement system, as confirmed in national planning policy, is to regulate the development of land rather than to punish offenders. This is sometimes difficult to explain to members of the public complaining about unauthorised development or non-compliance with conditions, who often wish to see some form of punitive measure rather than a further planning application to regulate matters. In most cases the regulation of the development is entirely appropriate particularly where

there is no demonstrable harm to amenity, yet there is clearly a gap between public perceptions and expectations and the reality of the function and purpose of planning enforcement.

2.4 Also, the fundamental planning enforcement principles apply to all types of unauthorised development whether it be the regulation of a relatively minor householder extension or the complete restoration of a major opencast coal site. The effectiveness of the current system in practical terms in relation to such large-scale, complicated development with the potential for wide reaching environmental and amenity impacts is questionable as the appropriate action may not secure the desired outcome at best resulting in compromise or at worst in failure.

2.5 The legal test for planning is based on the principle of 'balance of probability'. It is not until much later in the process where enforcement matters are brought to Court that the higher criminal test of 'beyond reasonable doubt' is applied. The question arises as to whether this is set too low for some types of polluting or environmentally damaging development. This certainly becomes an issue in those cases where a LPA is trying to establish a breach has occurred whilst the developer argues immunity and produces witness statements that are afforded considerable weight in the absence of other documentary evidence to back up their assertions. Should this evidence be accepted so readily as offenders often have a great deal to gain in some circumstances particularly in respect of financial uplift and should the evidence base be proportional to the impact of unauthorised development? This principle would of course apply equally to LPAs pursuing action and may require more detailed evidence although the burden of proof required for more complicated cases by its nature may already be to this standard.

2.6 The matter is further complicated by the significant changes to the social and economic climate over the last half century. Developers may now be more prepared to challenge local Authorities and risk a fine which, given the economic value of some activities, could be considered as minimal and deemed to be ‘worth the risk’ in business terms. Some of these cases can involve highly technical legal or planning arguments and are often outside the experience of most Magistrates. It is not uncommon for developers to engage Counsel’s advice in court cases, which can put the local Authority at a disadvantage as their legal and planning services are often underfunded and under resourced. The local Authority may find itself in the position of having to compensate a developer if legal action is thrown out. Rightly or wrongly, the threat of ‘costs’ being awarded against the Local Planning Authority can be a major consideration in taking action if a risk assessment approach is adopted.

2.7 Another issue is the length of time required to bring forward enforcement action and secure a positive outcome. Formal action often follows a long period of monitoring, dialogue, consideration and evidence gathering before serving Notices and taking legal action. National guidance in Planning Policy Wales Edition 9, 2016 (PPW) and The Development Management Manual suggests that formal action is usually pursued as a last resort after all other approaches have failed. Enforcement Notices are challengeable on appeal further adding to the timescale, which is often at odds with the public expectation for swift action particularly where the activity is considered to be causing considerable harm to amenity.

2.8 The operational pressure on local Authority planning services is increasing as a result of significant funding cuts and loss of specialist and experienced staff. Welsh Government has suggested that this may on average be as much as 40%. This will have a direct effect on the level of action an LPA can pursue and it may be the case that it finds itself unable to fully utilise all the powers available. An example of this is the ability for an LPA to take 'direct action'. As enforcement action normally runs with the land it is sometimes difficult to secure compliance with Notices if an offender no longer has an interest in the site or in the case of a company it has gone into receivership. In these circumstances LPAs currently have the ability to carry out direct action works in default of enforcement action, although budgeting constraints often render this option difficult if not impossible. The cost of the work carried out could be levied as a charge on the property although, in reality, these costs can often outweigh the value of the land/property. The result is that some sites may remain unrestored or incomplete to the considerable detriment of visual and environmental amenity for long periods of time.

2.9 Whist the environmental consequences of larger polluting development can be highly significant it is unlikely that direct action would be useful for large scale restoration given the potential for significant technical or costly engineering works involved. However, it is often the neglect of an individual building or group of buildings within a street that can have a long term detrimental impact on the public realm with the consequential effect on communities. This could also act as a barrier to regeneration and only serves to further frustrate the process for officers and undermine public confidence in the planning system.

2.10 In addition to normal enforcement powers a LPA also has the power to issue an 'amenity notice' under Section 215 of the Town & Country Planning Act 1990. This power could be used for example to clear untidy land or carry out works to buildings where there is a clear impact on public amenity. Failure to comply with a S215 Notice may be pursued through the Magistrates Court, although even a successful action does not necessarily mean that any improvement takes place if there is an absentee landlord or the owner has no available funds. Having access to a sustainable direct action fund could provide LPAs with some positive means of delivering public uplift. Even if a full restoration is not achievable some minor repair or visual improvements could be advantageous and have wider public benefits. As it stands, the lack of a realistic fall-back position in the event of non-compliance leads to uncertainty in delivering the desired outcomes and could dissuade LPAs from using this power.

3. Suggested changes to current planning enforcement system in Wales

3.1 <u>Principle of enforcement action – criminal and proportionate?</u>

3.1.1 As described above, one of the principles of planning enforcement is that it should not be punitive but rather regulate the use and development of land in the public interest. As such breaches of planning law are not criminal acts until it has been proven that an Enforcement or other Notice has not been complied with, whereby it is referred to the Magistrates Court (the issue of specialist planning training for Magistrates is discussed further below). National advice in Planning Policy Wales (Edition 9 Nov 2-16) indicates at para 3.6.1 that the decisive issue for the Authority in considering enforcement action is whether the breach of planning control would

unacceptably affect public amenity or the existing use of land and buildings meriting protection in the public interest. Is there scope to broaden this principle to take into account repeat offences or the scale and potential damage caused and to allow an element of punishment in order to deter future events?

3.1.2 Some aspects of planning law already involve a criminal offence if they are breached i.e. unauthorised work to a tree covered by a Tree Preservation Order, unauthorised advertisements and any unauthorised works to a Listed Building. These are covered under specific regulations and in the case of Listed Buildings under a separate Act.

3.1.3 Under this system it is possible to prosecute an individual for displaying an unauthorised advert relatively quickly whereas for example, an unauthorised waste site with potentially far reaching environmental and amenity impacts will require a lengthy investigation process including multiple site visits, Land Registry checks, legal advice, possibly the consideration of a planning application and Enforcement Notices which are themselves subject to appeal and challenge before the matter comes to court. Whilst it is not clear whether criminalising certain aspects of planning law would sufficiently deter potential defaulters but it is worthy of discussion and comparisons drawn with other regulatory regimes such as health and safety legislation.

3.2 The question also arises as to whether the system is proportionate in relation to the unauthorised activity. Is there scope therefore for 'criminalising' other elements of the planning system? Any such approach should of course be proportionate to the level of unauthorised development taking into account the potential impacts. This will obviously dictate the levels of fines imposed and could possibly include the introduction of fixed penalty notices for certain unauthorised activity. The issue of fiscal measures is discussed in more detail below.

3.3 Allied to this is the issue of whether the planning enforcement system should allow for more stringent control over certain types of development. This would in effect create a two tier system whereby larger unauthorised development with wider reaching impacts would be subject to a higher level of control allowing for more direct action and punitive measures if necessary. The thresholds for such development would be a matter for discussion but could include extractive industries, waste processing and other potentially polluting or bad neighbour activities. Any such action will still require detailed consideration and any additional enforcement powers would only be invoked where there is a continued disregard for planning control or significant environmental effects which demand swift action. In these cases it is important to differentiate land use planning from other environmental controls although there are clearly cross service implications.

3.4 Another aspect of planning enforcement that may impact on a successful outcome is that it relies principally upon the transgressor to remedy the breach of planning control. This could either be voluntary or enforced through the courts. As with any aspect of civil law, difficulties arise when one or more of the parties default on their responsibilities either through bankruptcy or other means, which results in a situation where there is a deficit of funds to put things right. This is more relevant to situations that require immediate or long term remediation or restoration following development and may occur if a long and protracted enforcement case involving considerable expense is undertaken or even be prompted by the threat

of such action. The planning system can only enforce against the landowner or interested party and to a limited extent with the party who carried out the activity. It is possible to place a charge on the land or property but restoration costs could easily outweigh any retained value. The result is that some sites may not be restored satisfactorily for many years, if at all, to the continued detriment of the surrounding area resulting in pressure on local Authorities to step and rectify the situation. Whilst it is possible for Councils to take direct action this will be a public expense and there are very limited funds available.

3.5 Further clarity is required on the test for concealed development or situations where there is evidence of a deliberate intent to deceive. There have been a number of high profile cases concerning concealment recently but it is rare for the principle to be engaged. The tolerance for the application of this principle could be lowered to cover more cases where people have concealed unauthorised development. For example failure to pay Council Tax could be regarded as an attempt to conceal a new dwelling.

4. Fiscal measures

4.1 It is suggested that it should be a fundamental principle that the offender should pay and not the tax payer for the cost of investigation where there is a breach of planning control. Ignorance of the law is no excuse in other unlawful activity and, in the case of planning, advice on whether planning permission is required is often freely available online or at a modest cost.

4.1.1 This could potentially be retrieved via a system of fines with a sliding scale of modest fines for unauthorised development/breach of condition or Notice. This could also be set in line as a percentage of the appropriate planning application fee e.g. 30%, which would be proportionate for the development concerned i.e. small for householders around £60 but more significant for larger corporations or companies, which could run in to the hundreds or thousands. Breach of any planning condition could also attract an immediate fine e.g. £20 per condition for householder related development and £50 for everything else. These fines would not replace normal enforcement action and could be appealable to the Planning Inspectorate through a written representation procedure, i.e. if it is found to be breach then costs could be awarded if there were no grounds for pursuing action. This would deter inappropriate use of the system and should deter spurious claims. Any fine should of course be proportional to the breach.

4.1.2 A system of quick fines would be a helpful deterrent and would greatly assist in funding the planning enforcement service. However, it does raise the question as to whether it would be fair to have a fine system where the local Authority does not offer a free service for queries as to need for planning consent and it could be argued that an individual was ignorant of the law. This may be more relevant for householders but less so for larger developers where they usually engage some form of professional advice. Nevertheless the increasing availability of online advice as to the need for planning permission i.e. through the Planning Portal and the relatively modest fee for seeking clarification from a local Authority is well within the means of the vast majority of individuals.

4.2 Currently a person is entitled to appeal against an Enforcement Notice, which may be on a number of grounds. This includes that planning permission should be granted known as ground (a), whether there has been a breach of planning control

as a matter of fact, whether the steps required by the notice are excessive, that the alleged works undertaken do not amount to development, that the works are lawful, and whether there has been improper service of the notice. At present only the ground (a) appeal attracts a fee as it is effectively a retrospective application. Perhaps consideration should be given to extending this to all Enforcement appeals, which would be refundable to the appellant if the appeal is upheld on a particular ground. This fee would help recompense the LPA for any wasted costs, officer time, room hire etc. and, more importantly, could help discourage spurious appeals where the main aim is to delay proceedings and inevitable compliance with the Notice.

4.3 As part of the recent Welsh Government changes to planning regulations Enforcement Warning Notices (EWN) have been introduced, which are intended to be used on occasions where unauthorised development has been carried out but could be made acceptable by conditions attached to a retrospective application. Notwithstanding the introduction of EWNs there is still no legal compulsion for an offender to submit an application and enforcement action may still be necessary in order to render the development acceptable. If a fine could be issued for non-compliance, possibly on a sliding scale percentage of normal planning application fee, formal enforcement action would still be possible but it would help cover costs. The fine could be refunded if a subsequent appeal is allowed but would act as a financial deterrent and contribute towards funding the service.

4.3.1 Related to this is the suggestion that the fee for a retrospective application should be higher than a normal application. This would be in line with enforcement appeals whereby fees are double that of a normal application. Again this would act as a deterrent and assist in the funding of the service.

4.4 The fines could be levied in the form of a fixed penalty notices (FPN) – Councils already issue fixed fines for littering, dog fouling and car parking allowable under different legislation – could this principle be extended to breaches of planning regulations? FPNs are already in operation in Scotland.

4.5 There may also be scope for reviewing the standard fines imposed at the Magistrates Court. Currently the maximum fine for not complying with an Enforcement Notice is £20,000 with the maximum fine for a Breach of Condition or Amenity Notice of around £1,500. Given that some fines can be considered negligible in comparison to the amount of income derived from an unauthorised activity or in terms of the environmental damage taking place, if the maximum fine was to be substantially increased it could provide the Courts with the option of fitting the fine with the breach that has taken place, in other words ‘a fine to fit the crime’.

4.6 The Proceeds of Crime Act 2002 sets out the legislative scheme for the recovery of criminal assets with criminal confiscation being the most commonly used power. It also applies to planning enforcement and there have been a number of cases where offenders by obtaining an income from unauthorised development have had to repay a proportion back to the LPA. It is not a commonly used Act and many LPAs may be put off by the legal work involved. Nevertheless there may be scope for more centralised advice and best practice guidelines.

4.7 As referred to above, any fines received should be retained by the planning service which could then be invested into resources. Alternatively, the money could be directed into a 'direct action' fund, which would enable LPAs to carry out some works in default or carry out improvements following action taken under Section 215 (Amenity Notices).

5. Role of Welsh Government

5.1 The planning system in Wales is devolved to Welsh Government (WG). As such any proposal to amend the current enforcement system or introduce new regulations must go through the appropriate legislative process. As part of this WG would need to carry out its own consideration of any suggested changes, which may involve an element of public consultation. Any fundamental alterations to the current system in terms of altering principles and the introduction of a more punitive fine regime will require changes to secondary legislation and National policy.

5.2 Whilst the role of professional planning organisations, such as Planning Officers Society for Wales (POSW) and its various sub-groups, will be invaluable in promoting improvements it is ultimately a matter for WG to bring forward the necessary legislative changes if agreed. This is a significant body of work and any new laws or regulations will be competing with other legislative priorities. It is appreciated that new powers, if considered acceptable, will not arrive swiftly. Nevertheless the support of WG in any subsequent debate is crucial and there are other potential improvements that may be considered that would require less intensive or prolonged work. For example, WG could take on a greater role in coordinating and delivering training, directing resources and seeking out best practice. There may be a need to provide training and advice for Magistrates which could enable more appropriate fines taking into account the scale and impact of the breach. Perhaps clarification could be provided to Magistrates that the prosecution process should not be an opportunity for an offender to revisit the planning merits – that is a matter for a Planning Inspector. There could also be encouragement for greater sanctions for repeat offenders as well as better appreciation by Magistrates of the substantial costs involved to the public purse in pursuing enforcement cases through the Courts particularly where a full award of costs is not forthcoming.

5.3 WG could provide further assistance and training to LPAs in respect of the Proceeds of Crime Act (POCA), this could be achieved by way of a central unit to advise and direct assistance through specialist legal advisors and investigators.

5.4 It is also suggested that WG consider setting aside a national 'fighting fund' for taking direct action or carrying out works in default, on the basis that it will be ultimately recoverable in the long term. Individual LPAs would be able to apply for assistance to pursue remediation schemes. On a regional basis WG would be in a better position to coordinate direct action assistance to areas that may be blighted by unrestored development, failed S215 action or generally poor quality public realm that may be a bar to larger regeneration schemes. It could also extend its empty homes initiative by invoking planning powers to initiate action to bring empty buildings back into use as affordable housing. It would be easier for WG to act regionally in terms of securing resources than for individual Councils to pursue such initiatives locally.

5.5 As part of the Wales Planning Act, WG introduced a new category of development – Developments of National Significance (DNS), where certain classes of applications are submitted to and determined directly by WG. The LPA has limited input into the processing of the application and will not benefit from a full fee yet it will be responsible for the agreement and discharge of conditions as well as any subsequent enforcement. This may impact on the resourcing of Councils particularly if a scheme requires regular monitoring over a prolonged period of time. There is scope for WG to consider how assistance could be given to LPAs to carry out this work such as allowing for monitoring/administration fees to be included on S106 Agreements to cover some of the cost of monitoring large and abnormal developments. Monitoring costs are normally included as part of a planning consent for mineral development however, recent case law would suggest that monitoring and administration charges should not from part of any legal agreement. This is an issue that would warrant further discussion.

6. Enforcement appeals

6.1 Enforcement Notices are subject to an appeal process administered by the Planning Inspectorate (PINs). An appeal must be submitted before an Enforcement Notice takes effect (usually 28 days) and once submitted, suspends the enforcement process. Enforcement appeals often rely on evidence submitted on oath and, as such, they are usually heard by way of a Public Inquiry, which can be a lengthy process often involving legal representation, witness statements and evidence under oath. Public Inquiries are quasi-judicial in their format, unlike a Hearing which is a more informal method and does not normally involve legal representation although there is still a requirement for expert witness evidence. There is also the written method which is handled by way of an exchange of written statements. All appeals are heard and considered by a Planning Inspector, independent of either party. However, as enforcement tends to be regarded as a specialist area of planning, there is a limited pool of suitably experienced Inspectors available at any one time, which leads to delays particularly where there is a Public Inquiry. The choice of method used to be up to the Appellant who would often choose a Public Inquiry tactically to play for time even for simple cases where there are very limited issues. However, PINs now has the power in all circumstances to decide on the method of appeal but, where evidence under oath is necessary, a public inquiry can still be specified which adds considerable burdens to all parties. The taking of evidence under oath should be more widely allowed via the hearing process. Further to this, LPAs are required to meet the full costs of hosting a Public Inquiry again adding to financial and operational pressures.

6.1.1 The appeals process should be greatly shortened for simpler cases, it is normal for it to take several months for even simple issues like fences and domestic development. A ‘fast track’ system could help restore confidence in what is perceived to be a bureaucratic and cumbersome system.

6.2 In any appeal the respective parties are expected to meet their own costs, although costs may be awarded against either party if they have been proven to have acted ‘unreasonably’ during the course of the appeal. Unreasonable behaviour, specific to enforcement, could include an unnecessary appeal or being unable to provide evidence to support the case. LPAs could find themselves at risk of an award of costs if an appeal is allowed and an Enforcement Notice

quashed. Any Notice must be rigorously assessed for soundness before service as an appeal is always a possibility and the validity of a Notice may be challenged. The prospect of costs may be influential in any decision to proceed with formal action and whilst an LPA's intentions are just and within the public interest, an appeal may be thrown out on a relatively minor technicality placing them at risk of costs and having to start the process again.

6.2.1 Occasionally, a developer may submit an appeal against an Enforcement Notice as a delaying tactic, which may prevent further action for some considerable time. In these cases Planning Inspectors should be able to automatically initiate a costs claim where the appeal was clearly unnecessary and or bound to fail and is unreasonable. Any cost recovered (there is a separate civil process which may or may not be successful) could be used to resource the service.

7. Relationship between Planning and other Environmental Agencies

7.1 There is a bigger issue generally about the relationship between NRW and the LPA when it comes to enforcing polluting activities. When there is an overlap of enforcement regimes, problems may arise as to who is going to take the lead on such matters. There needs to be better joint working and a clearer understanding of who should do what, and when. Similar problems occur with regard to work that affects protected species.

7.2 The difference in enforcement regimes is also evident in the level of powers to take action and also in the fines imposed by the Courts. Again this difference causes confusion with the public.

7.3 In some cases NRW are unable to take action against some matters which are considered as planning issues and vice versa. There may be scope for granting 'catch-all' enforcement powers to the lead Authority to cover all breaches on a site.

8. Advertisement Controls

8.1 As outlined above control of advertisements is regulated by separate planning legislation and an unauthorised display of an advertisement constitutes a criminal act. Advertisement clutter poses an amenity and safety risk and much time is expended by LPAs in chasing and dealing with illegal adverts and flyposting.

8.2 If a company benefits from an advertisement but are not responsible for its display, the LPA should be able to serve a Notice on the company to require removal within a reasonable timeframe. If not addressed they should be prosecuted, unlike at present where it is considered be a 'defence' and virtually impossible to prove otherwise.

8.3 The power to enter and remove from any land any unauthorised advertisements including those mounted upon trailers and similar and, subject to a suitable notice period, recharge the offender for any cost incurred, including disposal, should be provided to LPAs.

8.4 The Advertisement Regulations are quite complex. Is there scope to consolidate or incorporate the Advertisement Regulations in to the General Permitted Development Order?

8.5 Outdoor advertising is a matter currently under consideration as part of the Law Commission review of Planning Law in Wales.

9. Other areas for improvement

9.1 Planning enforcement can only be initiated within certain timescales i.e. 4 years for operational development i.e. building work and 10 years for changes of uses or breach of conditions. However, unauthorised work to a Listed Building has no immunity period and is a criminal offence. Once this period has lapsed the developer may claim immunity and seek to regularise the development as lawful. A change in the immunity provisions could bring operational development and change of use to 10 years for all breaches which is consistent and provides more time for stretched Authorities to detect breaches and take action. There are difficult evidential issues for a LPA in considering some of the time limit cases either in enforcement or where a Certificate of Lawfulness is applied for. Some consideration should be given to clarifying what has to be shown where 4 year or 10 year rule breaches are claimed by a developer, for example does a use have to be actually carried on at the time of the application rather than be “dormant”? A LPA should be able to rely on any statements which a developer or a previous landowner has made in the past which are inconsistent with the claimed 4 year or 10 year use period, whatever a developer now claims, even if evidence is given by statutory declaration.

9.2 Planning Contravention Notices (PCN) are useful information gathering tools, and place a legal requirement on a developer to provide information as to the nature of the alleged breach and land ownership. There is no PCN equivalent for unauthorised works to Listed Buildings and adverts. There is scope to extend this provision to apply to other types of development.

9.3 Completion Notices (CN) allow LPAs to effectively remove a planning consent if permitted works have not been completed within a reasonable timescale. This allows some control over uncompleted sites that are causing a local amenity issue. However, there is nothing preventing a developer to simply re-apply for planning permission or the site will be left with partially completed works with no valid consent in place. This procedure will not necessarily result in the removal of the amenity problem. Further powers could allow LPAs to enforce a sale of the land if a developer is not progressing and/or prevent reapplication by that party within certain timeframe;

10. Conclusions

10.1 The suggested improvements to the current enforcement regime have been made following direct discussion with practising local Authority Enforcement Officers. Whilst the system is usually sufficient to deal with most minor breaches of planning control, it is often under resourced and inadequate to act swiftly and any action is open to appeal and challenge. The two main areas of concern are process and financial penalties. This situation is having a negative impact on the image of the

service and the public's confidence in its ability to resolve what are often considered to be very complex problems

10.2 The changes described will improve the planning enforcement system from a enforcers perspective but will require changes to primary and secondary legislation as well as national guidance. WG input is crucial to bringing this forward as the devolved law maker. However, WG could also have a wider training, coordinating and enabling role.

10.3 There is an existing relevant evidence base to support some of the suggested changes and a national debate on this issue would be welcomed.

Suggested Improvements to the Planning Enforcement System in Wales - Summary		
	Action	*Requirement*
1	Principal Of Planning Enforcement • Bring into realm of criminal law for certain types of activity • Introduce an element of punishment for unauthorised polluting activities or where there is a significant risk/impact to public amenity • More stringent system for unauthorised development with wide reaching environmental and amenity issues • Clear guidelines on concealment cases or deliberate breaches of planning law • Enforcement action proportionate to the breach of planning control	Changes to primary and secondary legislation and national planning guidance.
2	Fiscal Measures • Introduce the principle that the offender should pay and not the tax payer for the cost of investigation where there is a breach of planning control. • System of immediate fines with a sliding scale for unauthorised development/breach of condition or non-compliance with any Notice set as a percentage of the	Changes to primary and secondary legislation

	appropriate planning application fee proportionate for the development concerned • Extending fees to all enforcement appeals • Raising fees for a retrospective applications • The fine to be levied in the form of a fixed penalty notice (FPN) • Review the standard fines imposed at the Magistrates Court - 'a fine to fit the crime'. • Any fines received to be retained by the planning service, to be invested into resources or into a 'direct action' fund to enable LPAs to carry out some works in default or carry out improvements following action taken under Section 215 (Amenity Notices).	
	Role of Welsh Government • WG to take on a greater role in coordinating and delivering training, directing resources and seeking out best practice e.g. training and advice for Magistrates. Clarification provided that the prosecution process should not be an opportunity for an offender to revisit the planning merits, encouragement for greater sanctions for repeat offenders, as well as a better appreciation of the substantial costs involved to the public purse in pursuing enforcement cases through the Courts particularly where a full award of costs is not forthcoming. • Provision of further assistance and training to LPAs in respect of the Proceeds of Crime Act (POCA). This could be achieved by way of a central unit to advise and direct assistance through specialist legal advisors and investigators. • WG to set aside a national 'fighting fund' for taking direct action or carrying out works in default, • WG to coordinate direct action assistance on a regional basis to areas that may be	Changes to primary and secondary legislation, national planning guidance and necessary financial arrangements

	blighted by unrestored development, failed S215 action or generally poor quality public realm that may be a bar to larger regeneration schemes. • Extend its empty homes initiative by invoking planning powers to initiate action to bring empty buildings into use as affordable housing. More effective for WG to act regionally in terms of resource than for individual Councils to pursue such initiatives locally. • WG to provide assistance to LPAs to carry out monitoring for DNS consents. • Monitoring/administration fees to be included on S106 Agreements to cover some of the cost of monitoring large and abnormal developments	
	Enforcement Appeals • Evidence under oath to be taken at Hearings	Changes to national guidance
	Relationship between Planning and other Environmental Agencies • Improved joint working with other agencies including NRW and a clearer understanding of who should do what and when. • Catch-all enforcement powers for lead agency	Changes to secondary legislation and national guidance. Further facilitation from WG
	Advertisement Controls • If a company benefits from an advertisement but is not responsible for its display, the LPA should be able to serve a Notice on the company to require removal within a reasonable timeframe and if not addressed they can be prosecuted • The power to enter and remove from any land any unauthorised advertisements including those mounted upon trailers and similar and recharge offender for any cost incurred, including disposal. • Consolidate or incorporate the	Changes to or new secondary legislation

	Advertisement Regulations in to the General Permitted Development Order	
	Other areas for improvement • A change in the immunity provisions to bring operational development (currently 4 years) and change of use to 10 years for all breaches • Extend Planning Contravention Notices (PCNs) to apply to other types of development including Listed Building development and Advertisements. • Changes to Completion Notice powers to allow LPAs to enforce a sale of the land if a developer is not progressing with a scheme and/or prevent reapplication by that party within certain timeframes.	Changes to or introduction of new secondary legislation