

Planning Enforcement Charter

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1. Introduction

1.1.

Under Scottish legislation primary responsibility for planning issues rests with the planning authority. In Orkney this is Orkney Islands Council.

1.2.

The planning authority's principal role is to grant or refuse permission for development. However, the planning authority is also responsible, where necessary, for taking enforcement action where planning legislation has not been followed.

1.3.

This Charter explains the meaning of planning control and enforcement, the powers and restrictions on the planning authority, and what happens at each stage of what can be a lengthy process. It outlines some of the procedures of the planning control system, and the standards of service that can be expected when enquiries are made about unauthorised development.

1.4.

Sometimes developers or householders either undertake work without planning permission or fail to accord with the permission they have been given. The planning authority has the power to take action in cases like this and enforce planning control.

1.5.

The planning authority has statutory powers to investigate breaches of planning control and breaches of conditions attached to planning permission, and to take formal action where a matter is not resolved.

1.6.

Planning enforcement is a discretionary power; if there is a breach of planning control the planning authority is not bound to act because sometimes it might not be in the public interest to do so. Any action taken must be reasonable and proportionate to the breach.

1.7.

This Charter sets out the powers that the Council as planning authority can use. These powers are set out in the Town and Country Planning (Scotland) Act 1997 as amended by the Planning etc. (Scotland) Act 2006. It is important to note that a breach of planning control is not a criminal offence, unless it involves unlawful works to a listed building. It should also be noted that a 'planning enforcement complaint' is not a complaint against the Council. Anyone with a complaint against the Council and its services should refer to the Council's Complaints Handling Procedure.

1.8.

Enforcement is one of the most complex parts of the planning system, and often has long and unpredictable timescales. The aim of this Charter is to ensure that adopted procedures are fair and reasonable, and that interested parties are kept informed and are made aware of what is required.

Copies of this Charter are available on the Council's website and at the Council Offices, School Place, Kirkwall.

2. The Planning Control Service

Planning Control is administered by Development Management, a function of Development and Infrastructure. The key officer undertaking this role is the Planning Control Officer. When formal enforcement action is taken the Council's approved scheme of delegation is followed.

3. Identification of Possible Breaches of Planning Control

3.1.

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

3.2.

Possible breaches of planning control can include:

- Work being carried out without planning permission or consent.
- An unauthorised change of use.
- Failure to comply with conditions attached to a permission or consent.
- Departures from plans approved in association with a planning permission or consent.

3.3.

Preliminary enquiries can be made by telephone or at the One Stop Shop, School Place, Kirkwall, but must be followed up in writing or by e-mail. You should send your letter to the Planning Control Officer, Orkney Islands Council, Development Management, Development and Infrastructure, Council Offices, School Place, Kirkwall, KW15 1NY.

3.4.

Enquiries by e-mail can be made to planning@orkney.gov.uk.

3.5.

For all preliminary enquiries, whether by letter or e-mail, the following information is essential:

- The address of the property concerned.
- Details of the suspected breach of planning control, with times and dates if relevant.
- A contact name and address for the informant.
- An e-mail address if available or if the complaint is submitted electronically.
- How the breach affects you.
- Whether the enquiry is to be treated confidentially.

3.6.

Wherever possible we will honour requests for confidentiality with regard to any complaint made or information supplied, however it should be noted that it may not be possible to respect such a request in all cases, and the effects of the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004, must be taken into consideration. Requests for total confidentiality limit the ability of the authority to take formal action and cannot be guaranteed if the case were to be considered at Appeal or in the Courts.

Monitoring of Conditions

3.7.

Monitoring of conditions is required to ensure that development complies with the consent granted. Details of the conditions are included within the decision notice attached to the permission. Monitoring of conditions is undertaken regularly by the Planning Control Officer supported by other officers in Development Management.

3.8.

Where members of the public believe that the conditions attached to a planning permission are not being complied with or have not been discharged in a satisfactory way, they can provide information to Development Management.

3.9.

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

3.10.

When information is received in writing by Development Management regarding a possible breach of planning control, the information will be checked to ensure that it does indeed constitute a possible breach of control, and that it includes all the detail required for a possible enforcement case to be investigated. If preliminary checking indicates that a breach of planning control may have taken place, the complaint will be registered and passed to the Planning Control Officer for investigation.

3.11.

Written complaints will be acknowledged within 20 working days of receipt. In the acknowledgement e-mail/letter the complainant(s) will be informed of whether or not a breach is suspected and, if so, the likely terms of any further action to be taken. If the information does not concern a planning matter, the complainant(s) will be advised accordingly. You should be aware that some complaints relate to matters over which Development Management has no control, for example neighbour disputes relating to the position of boundaries, land ownership, rights of access or matters associated with superior's consent. These matters cannot be investigated by the Planning Control Officer.

4. Investigating Breaches of Planning Control

Preliminary Investigations

4.1.

Following registration of a possible breach of planning control, the Planning Control Officer will visit the site. Priority for both site visits and dealing with complaints is based on the relative significance of the site, and the nature and effect of the breach of planning control.

4.2.

Following the site visit, anyone who has contacted Development Management with correct contact details will be advised what action is proposed. In some cases additional investigation is required to establish if a breach has occurred, and this may lengthen the process involved in taking action.

4.3.

It is not always possible to anticipate the length of time required for a decision or for action on a case, nor for a case to be resolved. Progress can be delayed for a number of reasons, for example if evidence must be collected and verified over a period of time, if negotiations take place, or if formal procedures have to be used. Where an application is submitted to regularise the breach, or where an appeal is

made to the Scottish Ministers against a decision of the planning authority, this will affect the timescale for resolution of the case.

4.4.

The Council recognises that delays can be a source of considerable frustration to those submitting information particularly if they consider that their amenity is affected. We will try to keep complainants informed of significant stages in the progress of a case, for example when an application is received for the site.

Resolution of a case prior to further action being sought

4.5.

In some instances, even though a breach of control has occurred, it may not be appropriate to take further action. This is because a planning authority has to consider whether, having regard to the development plan and material considerations, and to the circumstances of each case, it is expedient and proportionate to issue a notice. Most enforcement cases are resolved without formal action.

4.6.

Where the development is likely to be acceptable, it may be appropriate to seek the submission of a planning application. There are provisions in the Planning Acts for applications to be made in retrospect. In these cases any action proposed is suspended until a decision is made on the application.

Formal Action

4.7.

Only a small number of cases require to be dealt with by formal enforcement action. Formal action is instigated by the service of a notice.

4.8.

If an appeal is lodged against a notice, this appeal is submitted to and considered by Scottish Ministers. In almost all cases appeals are dealt with by Reporters from the Scottish Government's Directorate of Planning and Environmental Appeals. Anyone who has submitted information on a breach of planning control will be advised of the appeal.

4.9.

It should be noted that there is no right of appeal against a Breach of Condition Notice. If such a notice is not complied with, those responsible for the breach may be prosecuted.

4.10.

The planning authority has additional powers, including the use of Interdicts, which complement the serving of notices. For more detail, see Section 7 'Powers Available to the Planning Authority'.

4.11.

Enforcement Register

Details of Enforcement Notices, Breach of Condition Notices, Stop Notices and Section 33A Notices are entered on the Enforcement Register, which is available for inspection online, or by appointment at the Council Offices, School Place, Kirkwall.

4.12.

Powers of Entry

The Council as planning authority has powers to enter land to:

- Establish if there has been a breach of planning control.
- Check whether there has been compliance with a formal notice.
- Check whether a breach has been satisfactorily resolved.

5. Time-Limited Procedures

5.1.

In some cases the planning authority is time-barred from taking enforcement action.

5.2.

Time limited to Four Years for Enforcement Action

This applies to "unauthorised operational development" (i.e. the carrying out of building, engineering, mining or other operations in, on, over or under land) and change of use to a single dwellinghouse. After four years following the breach of planning control the development becomes lawful if no enforcement action has been commenced, and no enforcement action can then be taken.

5.3.

Time limited to Ten Years for Enforcement Action

This applies to all other development including change of use (other than to a single dwellinghouse) and breaches of condition, after which the development becomes lawful if no enforcement action has been commenced.

6. Complaints Procedure

6.1.

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

6.2.

Disagreement with the outcome of an investigation by the planning authority will not, in itself, be a ground for complaint. We will consider all complaints made about the way in which a planning control enquiry was dealt with in accordance with the Council's Complaints Handling Procedure.

7. Powers Available to the Planning Authority

7.1.

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

7.2.

Government policy on planning enforcement is set out in Planning Circular 10/2009: "Planning Enforcement". The circular is published on the Scottish Government website and can be viewed at <http://www.gov.scot/Publications/2009/09/16092848/0>.

8. Types of Notice

8.1.

Breach of Condition Notice - this is used to enforce the conditions applied to any planning permission. It comes into effect 28 days after being served. It may be used as an alternative to an enforcement notice (see below) and is served on any person carrying out the development and/or any person having control of the land. There is no right of appeal. Contravening a breach of condition notice can result in prosecution, with a fine of up to £1,000.

8.2.

Enforcement Notice - this is generally used to deal with unauthorised development, but can also apply to a breach of planning conditions. There are similar notices and powers to deal with Tree Preservation Orders and advertisements. An Enforcement Notice will specify:

- A notification period before it comes into effect (a minimum of 28 days - but see the section below on advertisements).
- The steps that must be taken to remedy the breach.
- A further period (known as the compliance period) which is set by the planning authority and gives the recipient time to carry out any work required to comply with the notice. There is no minimum or maximum period, so long as the amount of time allowed is reasonable and reflects the amount of work that may need to be undertaken.

8.3.

There are limited rights of appeal against an Enforcement Notice and, if an appeal is made, the terms of the notice are suspended until a decision is reached.

8.4.

Failure to comply with an Enforcement Notice within the time specified is an offence and may lead to a fine of up to £20,000 in the Sheriff Court. Failure to comply may also result in the planning authority taking **Direct Action** to correct the breach (see other powers below).

8.5.

Listed Building Enforcement Notice - this must be served on the current owner, occupier and anyone else with an interest in the property. The procedures are similar to those outlined above. The notice must specify the steps to be taken to remedy the breach and a final date for compliance. Failure to meet the terms of the notice by the date specified is an offence. There is a right of appeal to Scottish Ministers against the notice. Breaches of listed building control are a serious matter. It is a criminal offence to undertake unauthorised works to demolish or extend a listed building or to alter a listed building in any way that would affect its character. In certain circumstances, this can lead either to an unlimited fine or imprisonment.

8.6.

Stop Notice - this is used in urgent or serious cases where an unauthorised activity must be stopped, usually on grounds of public safety. When a Stop Notice is served, the planning authority must also issue an Enforcement Notice. There is no right of appeal against a stop notice and failure to comply is an offence. An appeal can be made against the accompanying Enforcement Notice. If a Stop Notice is served without due cause, or an appeal against the enforcement notice is successful, the Stop Notice may be quashed and the Council as planning authority may face claims for compensation. The use of Stop Notices therefore needs to be carefully assessed by the planning authority.

8.7.

Temporary Stop Notice (TSN) - this is used to require the *immediate* halt of an activity which breaches planning control. The provisions make an exception in that a TSN cannot prohibit the use of a building or a caravan as a dwelling house. TSNs are enforceable for 28 days, after which time they expire. They may, however, be

followed by further enforcement action such as an Enforcement Notice and Stop Notice. There is no provision to appeal against a TSN.

8.8.

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

8.9.

Notice Requiring Application for Planning Permission for Development

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

Other Powers

8.10.

Planning Contravention Notice - this is used to obtain information about activities on land where a breach of planning control is suspected. It is served on the owner or occupier, on a person with any other interest in the land or who is carrying out operations on the land. They are required to provide information about operations being carried out on the land and any conditions or limitations applying to any planning permission already granted. Failure to comply with the notice within 21 days of it being served is an offence and can lead to a fine in the Courts.

8.11.

Notice under Section 272 (of the Town and Country Planning (Scotland) Act 1997) - this provides limited powers to obtain information on interests in land and the use of land. Failure to provide the information required is an offence.

8.12.

Notice under Section 179 (of the Town and Country Planning (Scotland) Act 1997) - this allows planning authorities to serve a notice on the owner, lessee or occupier

of land which is adversely affecting the amenity of the area. This is also known as an '**Amenity Notice**' and sets out the action that needs to be taken to resolve the problem within a specified period.

8.13.

Interdict and Interim Interdict - an interdict is imposed by the courts and is used to stop or prevent a breach of planning control. Court proceedings can prove costly and planning authorities normally only seek interdicts in serious cases or where enforcement notices have been ignored in the past. However, a planning authority can seek an interdict in relation to any breach without having to use other powers first. Breaching an interdict can carry heavy penalties.

8.14.

Direct Action - failure to comply with the terms of an Enforcement, Listed Building or Amenity Notice within the time specified can result in the planning authority carrying out the specified work. The planning authority may recover any costs it incurs from the landowner.

8.15.

Notification of Initiation and Completion of Development (NID/NCD) and Display of Notices While Development is Carried Out – While not in themselves planning enforcement powers, these notices are intended to improve delivery of planning enforcement by requiring positive confirmation that development has commenced and been completed, and, in the case of on-site notices, to raise community awareness of developments in the local area. Planning authorities will be made aware of active development in their areas, enabling them to prioritise resources with a view to monitoring development. For any development for which permission has been granted, a NID has to be submitted to inform the planning authority of the date on which development will commence. It is to be submitted after planning permission has been granted and before development has commenced. Initiating development without submitting a NID is a breach of planning control and the planning authority may consider enforcement action. The NCD requires a developer to submit a further notice as soon as practicable after development has been completed.

8.16.

Depending on the nature or scale of a development, the developer may also be required to display on-site notices while development is taking place. These notices contain basic information about the site and the development. They also provide contact details where members of the public may find out more information or report alleged breaches of planning control. It is a breach of planning control to fail to display such a notice when required to do so.