



Local Enforcement Plan

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Lincolnshire County Council

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1. Introduction

1.1 Lincolnshire County Council is the **Mineral and Waste Planning Authority** for the county of Lincolnshire (which excludes the areas covered by the unitary authorities of North Lincolnshire and North East Lincolnshire).

1.2 Under the Town and Country Planning Act 1990 as amended by subsequent legislation ("the 1990 Act"), the county council has discretionary powers to enforce against breaches of planning control primarily relating to mineral and waste activities. Paragraph 58 of the National Planning Policy Framework (February 2019) (NPPF) states that:

"Effective enforcement is important to maintain public confidence in the planning system. Enforcement action is discretionary, and local planning authorities should act proportionately in responding to suspected breaches of planning control. They should consider publishing a local enforcement plan to manage enforcement proactively, in a way that is appropriate to their area. This should set out how they will monitor the implementation of planning permissions, investigate alleged cases of unauthorised development and take action where appropriate."

1.3 The National Planning Practice Guidance (PPG) goes on to state that the preparation and adoption of a local enforcement plan is important because it:

- allows engagement in the process of defining objectives and priorities which are tailored to local circumstances;
- sets out priorities for enforcement action, which will inform decisions about when to take enforcement action;
- provides greater transparency and accountability about how the local planning authority will decide if it is expedient to exercise its discretionary powers; and
- provides greater certainty for all parties engaged in the development process.

1.4 This Local Enforcement Plan (LEP) has therefore been prepared in accordance with the NPPF and PPG, and replaces the former LEP dated August 2014.

1.5 Within Lincolnshire most other aspects of planning (i.e. not relating to minerals or waste), such as housing, industry, commerce, and recreation are dealt with by the seven constituent district councils, namely:

- Boston Borough Council
- City of Lincoln Council
- East Lindsey District Council
- North Kesteven District Council
- South Holland District Council
- South Kesteven District Council and
- West Lindsey District Council

Each district council is responsible for producing its own local enforcement plan to cover how they will deal with breaches of planning control.

1.6 Although the district councils are responsible for most forms of development excluding minerals and waste, the county council is required to determine most of its own applications by virtue of regulation 3 of the Town and Country Planning General Regulations 1992 ("county council development"). Such applications relate to most road schemes, libraries, fire stations and schools under the control of the county council.

1.7 Should a breach of planning control occur in relation to county council development, the county council is unable to take enforcement action against itself. Whilst technically the local district council could initiate such action against the county council, this would be highly undesirable - not least due of the potential drain on the public purse. This LEP therefore sets out how the county council will seek to resolve any reported breaches of planning control relating to such development internally.

2. Overview of planning enforcement provisions

Breaches of planning control

- 2.1 In brief, a breach of planning control is defined in Section 171A of the 1990 Act as:
- carrying out of development (which includes operational development and material changes of use) without the required planning permission (referred to in this LEP as "**unauthorised development**"); or
 - failing to comply with any condition or limitation subject to which planning permission has been granted (referred to in this LEP as a "**breach of condition**").
- 2.2 Being in breach of planning control is not an offence under the 1990 Act. However, the county council has powers under this Act to take enforcement action against certain breaches of planning control. Where such action is taken and comes into effect, a failure of an operator/owner to comply is an offence and may result in prosecution. These enforcement powers relate to "**county matter**" activities, which are defined in Schedule 1 of the 1990 Act and in the Town and Country Planning (Prescription of County Matters) (England) Regulations) (2003). In summary these include:
- the winning and working of minerals, and associated development;
 - development mainly for the purpose of recovering, treating, storing, processing, sorting, transferring or depositing of waste [Appendix 1]; and
 - other forms of development that would conflict with or prejudice compliance with a restoration or an aftercare condition imposed on a planning permission for the winning and working of minerals.

The enforcement powers are discretionary and are only used when the county council considers it to be expedient to take such action having regard to the **development plan** (see below) and to any other material considerations.

- 2.3 In relation to mineral and waste activities, the principal policies of the development plan are contained in the two parts of the **Lincolnshire Minerals and Waste Local Plan**:
- the **Core Strategy and Development Management Policies (2016)** document and

- the **Site Locations (2017)** document
- 2.4 In addition, the district councils' local plans and any neighbourhood plans form part of the development plan for the county, and any relevant policies in those documents will also need to be taken into account.
- 2.5 The other material considerations referred to above include this LEP and, if the development plan is not fully compliant with the NPPF, any policies in the NPPF that have not been fully incorporated into the development plan.

Time limits for taking enforcement action

- 2.6 Under Section 171B of the 1990 Act, breaches of planning control relating to county matters become lawful (and therefore immune from enforcement) if no enforcement action is taken within prescribed periods. These periods are:
- four years for operational development
 - ten years for changes of use and for breaches of planning conditions.

With respect to the above, the winning and working of minerals falls into the first category (operational development) and is therefore subject to the four year limit. It should, however, be noted that the courts have held that for mineral extraction each shovelful is a separate act of development [David (Thomas) (Porthcawl) Ltd v Penybont Rural District Council (1972)]. Therefore, even if extraction commenced more than four years ago, any extraction carried out within the last four years will not be immune from enforcement action.

- 2.7 In contrast to mineral extraction, waste management is normally classed as a use of land, although it often involves operational development to facilitate that use. It therefore usually falls into the second category of paragraph 2.6, so when an unauthorised material change of use takes place, the time limit for enforcement action is ten years. Furthermore, in some cases, where such action is taken it may lawfully require the removal of integral operational development even if it would have been immune under the first category [Murfitt v Secretary of State for the Environment (1980) and Hydro v Secretary of State for Communities and Local Government (2016)].
- 2.8 In planning law the use of land or buildings for waste management is classed as a "sui generis" use, which means "of its own kind", that is it does not fall into any of the use categories identified by the Town and Country Planning (Use Classes) Order 1987 (as amended). As a result, setting up a new waste management facility is likely to result in a material change of use of the land/building, unless the site has previously been used lawfully for the same activity - and that use has not subsequently been abandoned. As a sui generis use, any changes to the nature of the waste management activities, such as changes to the type of waste involved, may result in a

further material change of use requiring planning permission. Therefore, even when a waste management facility has been established for more than 10 years, if any subsequent material changes of use have taken place within the last 10 years without planning permission, those uses will not be immune from enforcement action.

2.9 The time-limits set out above do not prevent enforcement action after the relevant dates in certain circumstances. These are:

- where further enforcement action is taken in respect of any breach of planning control within four years of previous enforcement action (or purported action) in respect of the same breach (Section 171A of the 1990 Act);
- where there has been a deliberate concealment of a breach of planning control, the county council may apply to the magistrates court under Section 171BA of the 1990 Act for a **Planning Enforcement Order (PEO)** to allow it to take action after the time limit in section 171B; and
- where a person has deliberately concealed a breach of planning control, the courts have found that the time limits in section 171B do not engage until the breach has been discovered (Secretary of State for Communities and Local Government and another v Welwyn Hatfield Borough Council; and Monsall/Jackson v Secretary of State for Communities and Local Government).

2.10 Therefore, in cases of deliberate concealment, the county council may decide to serve an enforcement notice "out of time" or to apply for a PEO, whichever is considered the most appropriate.

Options available to tackle alleged breaches of planning control

2.11 Enforcement action is intended to be remedial rather than punitive and should always be commensurate with the breach of planning control to which it relates. The main options for dealing with breaches of planning control are listed below, but include **informal action** and **formal enforcement action**. It should be noted that the information provided here is largely culled from the PPG and adapted for the county council's needs, and is not an exhaustive account of the provisions of the 1990 Act.

2.12 **Informal action** – breaches of planning control can often be resolved without formal enforcement action where:

- the breach of planning control is the result of a genuine mistake and, once pointed out, the owner or occupier takes immediate action to remedy it;

- the breach is trivial or technical, but causes no material harm or adverse impact on the amenity of the site or the surrounding area; or
- the development is acceptable on its planning merits and formal action would serve no purpose other than to solely regularise the development.

Not taking formal action can often be the quickest and most cost effective way of achieving a satisfactory and lasting remedy.

- 2.13 **Retrospective planning application** (section 73A of the 1990 Act) - the county council may seek to avoid formal enforcement action by inviting the owner or occupier to submit a retrospective application for the unauthorised development or to amend the breached condition. This would occur where, following an initial assessment, the county council's planning officers consider that:
- the unauthorised development is likely to be acceptable subject to the imposition of planning conditions to control its impacts; or
 - in the case of a breach of condition, the condition could be amended without this resulting in unacceptable impacts.
- 2.14 It should be noted that such an application would need to go through the statutory planning process, which could result in issues coming to light that were not apparent during the initial assessment. Also the application may need to go before the council's Planning and Regulation Committee for determination. That committee may take a different view from officers. It cannot therefore be assumed that the application would be granted. Furthermore, enforcement action may still be needed in relation to other elements of the development.
- 2.15 The County Council can decline to accept a retrospective application if an enforcement notice has previously been issued (Section 70C of the 1990 Act).
- 2.16 **Planning Contravention Notice (PCN)** (Section 171C of the 1990 Act) - a PCN may be issued by the county council when it appears that a breach of planning control has occurred and it wants to find out more information before deciding what, if any, enforcement action to take. The notice may be served on the owner or occupier of the land, or on any person who has an interest in the land. It may also be served on any person carrying out operations on or using the land for any purpose (regardless of their interest in the land). This is a discretionary procedure and the county council does not have to serve a PCN before considering whether it is expedient to take formal enforcement action.
- 2.17 A PCN may require the recipient to provide any information the county council wants for enforcement purposes about any operations, any use, or any activities being carried out on the land. It can also invite the recipient to

respond constructively about how the suspected breach of planning control may be satisfactorily remedied. Whilst the service of a PCN is not classed as formal enforcement action, a failure to complete or return it within 21 days is an offence, as is providing false or misleading information on the notice.

- 2.18 **Rights of entry** (Sections 196A, 196B, and 196C of the 1990 Act) – the county council can authorise named officers in writing that where there are reasonable grounds they may enter land for the following purposes:
- to ascertain whether there is or has been any breach of planning control;
 - to determine whether any of the county council's enforcement powers should be exercised in relation to the land, or any other land;
 - to determine how any such power should be exercised; and
 - to ascertain whether there has been compliance with any requirement arising from earlier enforcement action in relation to the land, or any other land.
- 2.19 The phrase "or any other land" referred to above means that if necessary neighbouring land can be entered, whether or not it is in the same ownership, or is being occupied by the person whose land is being investigated.
- 2.20 It is an offence to wilfully obstruct an authorised person acting in exercise of a right of entry. Notwithstanding this, where there are reasonable grounds for entering land for enforcement purposes, and entry is refused or is likely to be refused, or there is a need for urgency, then it is possible for a Justice of the Peace to issue a warrant to allow entry.
- 2.21 **Enforcement notice** (Section 172 of the 1990 Act) – the county council can issue an enforcement notice if it is satisfied that it appears that there has been a breach of planning control and that it is expedient to issue such a notice. A copy of the notice is served on the owner and occupier of the land to which it relates, and on any other person having an interest in the land, being an interest which, in the opinion of the county council, is materially affected by the notice.
- 2.22 The notice enables every person who receives a copy to know:
- the matters which, in the county council's view, constitute the breach of planning control; and
 - what steps are required to be taken, or what activities are required to cease to remedy the breach.

- 2.23 The county council may decide not to require action to be taken to remedy the whole of the breach of planning control. This is known as "**under enforcement**". Where this occurs, and all of the requirements of the enforcement notice have been met, planning permission is deemed to be granted for those remaining operations/activities.
- 2.24 The notice must be served at least 28 days before it takes effect, and during this period there is a right of appeal against the notice to the Secretary of State. If an appeal is made, the notice is suspended pending the final determination or withdrawal of the appeal.
- 2.25 Once an enforcement notice takes effect, it is an offence not to comply with the steps set out in the notice within the specified time periods. A person guilty of an offence is liable on conviction to an unlimited fine. In determining the amount of any fine, the court should have regard to any financial benefit which has been accrued or appears likely to accrue in consequence of the offence. Where the county council achieves a successful prosecution for failure to comply with an enforcement notice it can apply for a Confiscation Order under the Proceeds of Crime Act 2002.
- 2.26 It should be noted that an enforcement notice will be interpreted so as not to interfere with permitted development rights. Thus in the context of a prosecution, a defendant may put in issue whether the activity relied on as a breach of the enforcement notice is, in fact, caught by the notice.
- 2.27 **Direct action** (Section 178 of the 1990 Act) - where steps required by an enforcement notice to be taken are not taken within the period for compliance, the county council may decide to:
- a) enter the land and take the steps; and
 - b) recover from the person who is then the owner of the land any expenses reasonably incurred by them in doing so.
- 2.28 These default powers would only be used when other methods have failed to persuade the owner or occupier of the land to carry out, to the county council's satisfaction, any steps required by an enforcement notice. It is an offence to wilfully obstruct anyone who is exercising these powers on the county council's behalf.
- 2.29 The county council can prosecute for a failure to comply with an enforcement notice as well as using these default powers.
- 2.30 **Stop notice** (Section 183 of the 1990 Act) – The power to serve a stop notice is discretionary, but it cannot be served independently of an enforcement notice. Its purpose is to prohibit any or all of the activities which comprise the alleged breach(es) of planning control specified in the

related enforcement notice ahead of the deadline for compliance in that notice. Therefore, before serving such a notice, the county council must be satisfied that it is expedient to take such action by undertaking an assessment of the likely consequences of serving the notice. This should examine, amongst other things, the foreseeable cost and benefits likely to result from the stop notice.

- 2.31 A stop notices requirements should only prohibit what is essential to safeguard amenity or public safety in the neighbourhood or to prevent serious or irreversible harm to the environment in the surrounding area. It must specify when it is to take effect, which normally must not be less than three days after the date the notice is served. However, when there are special reasons for specifying an earlier date, a statement of reasons must be served with the notice.
- 2.32 There is no right of appeal to the Secretary of State against the prohibitions in a stop notice. The validity of the notice, and the propriety of the county council's decision to issue one may only be challenged by an application to the High Court for judicial review. However, where the associated enforcement notice is quashed, varied or withdrawn, or the stop notice is withdrawn, compensation may be payable by the county council in certain circumstances and subject to various limitations as set out in the 1990 Act.
- 2.33 A person who contravenes a stop notice after a site notice has been displayed, or the stop notice has been served on them, is guilty of an offence and is liable on conviction to an unlimited fine. In determining the amount of fine imposed, the court should have regard to any financial benefit which has been accrued, or appears likely to accrue, in consequence of the offence.
- 2.34 **Temporary Stop Notice** (Section 171E of the 1990 Act) – unlike a stop notice, a temporary stop notice does not have to wait for an enforcement notice to be issued. Furthermore, while there are restrictions on the activities it can prohibit, those restrictions do not apply to mining operations, or the deposit of refuse or other waste materials. This provision therefore allows the county council to act very quickly, where it is expedient to do so.
- 2.35 A temporary stop notice can be served on any of the following:
- the person who the county council think is carrying out the activity;
 - a person who the county council think is an occupier of the land;
 - a person who the county council think has an interest in the land.
- 2.36 The county council must display on the land a copy of the notice (together with other statutory information). The notice takes effect from the time it is displayed on site.

- 2.37 A temporary stop notice must state the activity that has to cease, and that any person contravening it may be prosecuted for an offence. The PPG advises that a temporary stop notice should only prohibit what is essential to safeguard amenity or public safety in the neighbourhood, or prevent serious or irreversible harm to the environment in the surrounding area.
- 2.38 Before a temporary stop notice is served, the county council must be satisfied that there has been a breach of planning control and that it is expedient that the activity which amounts to the breach is stopped immediately. As this can have serious consequences on the recipient, the county council is also required to undertake a quick but adequate assessment of the likely consequences of issuing the notice. This does not need to be a detailed cost/benefit assessment, but the assessment should examine the foreseeable costs to the company, operator or landowner, against whose activities the notice is directed, and weigh these against the benefits to amenity in the vicinity of the site which is likely to result from the temporary stop notice.
- 2.39 A temporary stop notice expires 28 days after the display of the notice on site (or any shorter period specified). There is therefore a risk that the specified activity will recommence unless an enforcement notice and stop notice is served in the interim.
- 2.40 Any person affected by a temporary stop notice will be able to make representations to the county council to challenge the notice, but there is no right of appeal to the Secretary of State. The validity of the temporary stop notice and the propriety of the county council to issue a notice may, however, be challenged by an application to the High Court for judicial review.
- 2.41 It is an offence to contravene a temporary stop notice. A person guilty of an offence is liable on conviction to an unlimited fine.
- 2.42 In very limited circumstances, compensation for any loss or damage directly attributable to the prohibition effected by the temporary stop notice may be payable by the county council to the parties affected. The scope of the compensation is set out in section 171H of the 1990 Act.
- 2.43 **Breach of Condition Notice (BCN) (section 187A of the 1990 Act)** - A BCN requires its recipient to secure compliance with the terms of a planning condition or conditions specified in the notice within a period of not less than 28 days. Unlike an enforcement notice, there is no "expediency test" for the service of a BCN, and the recipient has no right of appeal to the Secretary of State. The validity of such a notice, and the propriety of the county council's decision to serve it, may however be challenged by application to the High Court for judicial review.

- 2.44 A BCN may be served on:
- any person who is carrying out or has carried out the development; or
 - any person having control of the land.
- 2.45 Any recipient of a BCN will be in breach of the notice if, after the compliance period, any condition specified in it has not been complied with, and the steps specified have not been taken or the activities have not ceased. Summary prosecution can be brought in the magistrates' court for the offence of breaching the notice.
- 2.46 A breach of condition notice is mainly intended as an alternative to an enforcement notice for remedying a breach of condition, particularly where the potentially lower penalties involved would still act as a sufficient deterrent against non-compliance. It may, however, be served in addition to an enforcement notice so that, in the event of non-compliance, the county council can still prosecute under the breach of condition notice should the enforcement notice not come into effect through the lodging of an appeal.
- 2.47 **Injunction (Section 187B of the Act)** – Where the county council consider it expedient for any actual or apprehended breach of planning control to be restrained, it can apply to the High Court or county court for an injunction. Such an application can be made whether or not the county council has exercised, or proposes to exercise, any of its other powers to enforce planning control, and can be sought against a person unknown.
- 2.48 Proceedings for an injunction are the most serious enforcement action that the county council can take. This is because if a person fails to comply with an injunction they can be committed to prison for contempt of court. Additionally, once an injunction has been granted, it cannot be discharged except where there has been a significant change of circumstances since the order was made. Therefore an injunction would generally only be sought as a last resort and only if there have been persistent breaches of planning control over a long period and/or other enforcement options have been, or would be, ineffective.
- 2.49 In deciding whether it is necessary or expedient to seek an injunction, the county council will need to consider whether:
- it has taken account of what appear to be relevant considerations, including the personal circumstances of those concerned;
 - there is clear evidence that a breach of planning control has already occurred , or is likely to occur;
 - injunctive relief is a proportionate remedy in the circumstances of the particular case; and

- in the case of an injunction sought against a person whose identity is unknown, it is practicable to serve the court's order on the person or persons to whom it will apply.

Register of enforcement and stop notices

2.50 Under Section 188 of the 1990 Act, each district council is responsible for maintaining a register containing information relating to planning enforcement orders, enforcement notices, stop notices and breach of condition notices which relate to land in their area. These registers are available for inspection by the public at all reasonable times.

3. Site monitoring

- 3.1 The principal enforcement activities of the county council are directed towards prevention of infringements through the proactive monitoring of mineral and waste sites or, more specifically, the implementation of the planning permissions which it has granted at those sites.
- 3.2 Site monitoring falls into two categories as set out below. Both types of monitoring seek to ensure that the development is being carried out in accordance with the planning requirements, and provide an opportunity for officers to provide advice to developers before emerging issues develop into breaches of planning control.

Monitoring of mineral and landfill sites

- 3.3 The county council is able to undertake an annual programme of chargeable visits to every site in the county which has a valid planning permission (or permissions) for mineral working and/or landfill under the Town and Country Planning (Fees for Applications, Deemed Applications, Requests and Site Visits) (England) Regulations 2012. These regulations allow up to 8 chargeable visits to be made to each active site in any one period of 12 months (referred to as the charging year). For inactive sites, a reduced fee is payable and only one chargeable visit can be made in the charging year. If necessary it is possible for the county council to undertake more visits to both active and inactive sites, but no charge can be made.
- 3.4 Government advice on the implementation of these regulations is provided in "Fees for monitoring of mining and landfill sites in England: A guide to implementation and good practice (April 2006)". The county council has ultimate responsibility for setting the number of site visits (announced and unannounced), but in accordance with Government advice seeks to agree these with operators at the start of the charging year. Where an operator considers that they are being subjected to an excessive number of visits, they can follow the county council's complaints procedures. If this does not resolve the matter to their satisfaction, they can then consider asking the local government ombudsman to investigate.
- 3.5 The general approach of the county council is that:
- for active sites which have been operating largely in compliance with the planning requirements and which are not particularly complex or sensitive, a maximum of four site visits is set;

- for active sites where there has been significant breaches of planning control, or which are either complex or sensitive, a higher number of visits is set (up to eight); and
 - for inactive sites, where there is a reasonable prospect that mining operations could recommence, a single chargeable site visit is set.
- 3.6 Chargeable site visits are undertaken by a dedicated planning monitoring officer whose principal aim is to secure compliance with planning conditions and agreements through constructive dialogue with site operators. Where breaches of planning control are detected, these are reported to the operator in the site monitoring report which is sent to them following the inspection - together with details of what needs to be done to resolve the breach(es). If these requirements are not met within the specified timescale a reminder is sent to the operator warning them that, unless the breach is resolved promptly, the matter will be referred to the county council's enforcement team for resolution.

Inspection of sites involved with the disposal or recovery of waste

- 3.7 Under Section 19 of The Waste (England and Wales) Regulations 2011, the county council must ensure that appropriate periodic inspections of establishments or undertakings carrying on disposal or recovery of waste are made. No definition of "periodic" is given in the regulations, but the county council considers that this should be a minimum of one inspection per year. In practice, where the county council grants a new planning permission, an inspection is carried out within three months from the date of that grant. Thereafter an inspection will take place at least once a year.
- 3.8 The periodic inspections are undertaken by officers of the county council's planning enforcement team, which consists of:
- the Planning Enforcement Team Leader;
 - the Senior Planning Enforcement Officer; and
 - the Planning Enforcement Officer.

These inspections are normally unannounced.

- 3.9 Following an inspection a report is prepared and sent to the operator/owner within two weeks from the date of the inspection. The report details any breach(es) of planning control detected, the steps required to remedy the breach(es) and the timescale to implement those steps.

4. Investigating alleged breaches of planning control

4.1 This section deals with the investigation of alleged breaches of planning control, which may be discovered through the monitoring detailed in the previous section (proactive investigations), or may arise from complaints from other sources, such as the general public or public bodies (reactive investigations). These breaches may relate to either unauthorised development or to breaches of planning conditions.

Determining the appropriate planning authority

4.2 As stated in the introduction, the county of Lincolnshire operates under two tiers of local government: the county council being the upper tier with seven lower tier district councils. Section 1(5) (c) and Schedule 1, paragraph 11 of the 1990 Act sets out how the enforcement functions are divided between the two tiers of local government, but these divisions are not always straight forward.

4.3 In summary the district councils have wide ranging powers to take enforcement action, but subject to the following:

- the county council may take formal enforcement action where it considers the breach of planning control should properly be considered a county matter;
- the county council is exclusively the appropriate authority to take such action in respect of certain forms of specified minerals development; and
- where it appears to a district council that the breach of planning control relates to a county matter, they must consult the county council before taking enforcement action.

4.4 For a breach of planning condition, it should be straight forward which council has responsibility for enforcement. Where the planning permission relates to a county matter, the county council is the appropriate authority. For other types of development, the responsibility rests with the appropriate district council. The situation can, however, become more complicated in relation to unauthorised development, particularly material changes of use where a number of breaches are detected but not all appear to be county matters. In such cases, the county council will need to establish at an early stage the extent of the "**planning unit**". This is a concept that has evolved through case law as a means of determining the most appropriate physical area against which to assess whether there has been a material change of use [Burdle v Secretary of State for the Environment (1972)].

When assessing the materiality of a change of use, two things should be considered:

- any change in the character of the use itself, including the land where it is located; and
- the effects of the change upon neighbouring uses and the locality.

For the change to be material, the new use must be substantially different from the proceeding use.

- 4.5 Where the uses in a planning unit relate solely to county matters, the county council will be the appropriate authority for taking enforcement action - when expedient to do so. On the other hand, if the planning unit has a mixed use and the breaches relate to both county matters and non-county matters, the relevant district council would be the responsible authority for taking enforcement action [The Queen oao East Sussex CC v Secretary of State for Communities and Local Government, Michael and Gary Robins (2009) EWHC 3841 (Admin)].
- 4.6 Notwithstanding the above, Section 286 of the 1990 Act precludes challenges to the validity of notices issued in relation to formal enforcement action on the grounds that they were issued by the wrong authority (i.e. district council rather than county council, or vice versa). It is nevertheless important that the breach is accurately described in the notice, i.e. all the unauthorised uses have been identified.
- 4.7 In addition to breaches of planning control relating to county matters, the county council's enforcement team will also investigate alleged breaches of planning control relating to the county council's own development. Whilst formal enforcement action would fall into the jurisdiction of the relevant district council, initially the county council would seek to resolve these matters internally in accordance with this LEP.

Identifying the lead authority

- 4.8 Activities involving the disposal and/or recycling of waste in the county may fall under the regulatory control of a number of public bodies, namely:
- the county council, as waste planning authority
 - the relevant district council's environmental health department
 - the Environment Agency (EA) and
 - the Health and Safety Executive (HSE)

As a result, even when the county council is the appropriate planning authority, there is still a need to establish which organisation is best placed to take the lead in any investigations.

- 4.9 Unauthorised development and some breaches of planning conditions involving wastes which results in, or has the potential to result in, pollution may be a criminal offence under legislation enforced by the EA. The EA may therefore be in a stronger position to ultimately remedy harm to amenity by way of prosecution and enforcing cessation of the harmful activities. In these circumstances the EA would normally be the lead authority.
- 4.10 The county council and the EA have issued a Joint Enforcement Protocol, which provides a framework for joint enforcement activities where there is an overlap between the functions of the two regulators.
- 4.11 Where the activities involve a statutory nuisance the appropriate district council's environmental health department may be better placed to take action.
- 4.12 In cases where unauthorised development causes or has the potential to cause serious harm to human health, the county council will have regard to the fact that it may be more appropriate for the Health and Safety Executive (HSE) to be the lead authority, and will liaise with the HSE accordingly.
- 4.13 In all cases that potentially involve the above bodies, consultations and discussions will take place to see which authority is in the best position to lead the investigation and, if necessary, take action.

Investigation priorities

- 4.14 The Planning Enforcement Handbook for England (2020) published by the National Association of Planning Enforcement (NAPE), a division of the Royal Town Planning Institute, advises that all enforcement cases should be investigated properly with the following key questions answered:
- Is there development?
 - Is there a breach?
 - Can the breach be resolved through negotiation?
 - Is the breach causing harm?
 - Is enforcement expedient?
- 4.15 A file will be opened for each reported incident or complaint and allocated an enforcement reference number. These will be acted upon as quickly and as efficiently as possible. However, in practice breaches of planning control vary in terms of severity. Therefore in order to make the most effective use of the resources of the enforcement team, each case will be allocated into one of three categories based on the criteria below:

Category A – the aim will be to undertake investigations within three working days where:

- the breach appears to be causing serious harm to local amenity; or

- there are reasonable grounds to suspect that the breach is having, or is likely to have, serious detrimental impacts on the environment, which would be difficult or impossible to reverse.

Category B – the aim will be to undertake investigations within eight working days where:

- there are reasons to believe that the breach is causing harm to local amenity, but not serious harm (which would fall in Category A); or
- the breach could affect a nationally protected feature such as the Lincolnshire Wolds AONB, a site of special scientific interest, a scheduled monument, a listed building or a conservation area (except where a serious impact is suspected, which would fall into Category A)
- the breach was undetected until the complaint was received and it appears that the time-limit for enforcement action will expire within six months.

Category C – the aim will be to undertake investigations within 14 working days for all other complaints relating to alleged breaches not falling in any of the above categories.

- 4.16 There will be occasions when these timescales cannot be met, particularly where there are a large number of cases under investigation at the same time, or when some of the cases under investigation place particularly high demands on the time of the enforcement staff. In these circumstances, any delays should be capable of being justified.

Site visits and surveillance

- 4.17 Site visits will normally be unannounced to ensure public confidence in the enforcement system and to protect the reputation of the county council. Any surveillance undertaken will, however, be overt.
- 4.18 Although local authorities may seek judicial approval of directed covert surveillance, this is not generally an option for planning enforcement officers because approval can only be sought to prevent or detect criminal offences punishable by imprisonment.

Dealing with complaints

- 4.19 Where the alleged breach of planning control has been reported through a complaint, the county council will:
- acknowledge the complaint within three working days of receiving it
 - treat the complaint as confidential, as far as possible, within the

authority

- visit the site of the allegedly unauthorised development and ascertain what activities are taking place there, unless the county council is satisfied that it already has sufficient information that makes a site visit unnecessary
- contact the complainant again within fifteen working days of the complaint to provide an update and, if a final decision has been made by that stage, explain what actions the county council proposes to take, or why they think no formal enforcement action is needed; and
- where a decision is made after the fifteen working day period referred to above, inform the complainant about the final decision within ten working days of the county council making that decision.

5. Resolving apparent breaches of planning control relating to county matters

- 5.1 The county council is committed to fostering business enterprise, provided that the necessary development can take place without unacceptable harm to local amenity and the environment. While the county council does not condone wilful breaches of planning law, it has a general discretion to take enforcement action only when it regards it as expedient to do so. The purpose of this LEP is therefore to ensure that breaches of planning control are resolved in a consistent, transparent, proportionate and fair manner.
- 5.2 Following an initial investigation of an alleged breach of planning control, the enforcement officer that undertook the investigation will prepare a report setting out his/her findings and seeking authorisation from an officer authorised under the Directorate's Scheme of Authorisation to either close the case (if no further action is needed) or to undertake a specified course of action, which could include formal enforcement action.
- 5.3 In accordance with the Directorate's Scheme of Authorisation, where a case raises particularly controversial issues which are likely to be of concern to the county council's Planning and Regulation Committee, at the discretion of the Head of Planning Services the matter may be referred to that committee for a decision. This approach will, however, only be appropriate when prompt action is not considered necessary.
- 5.4 To avoid misunderstandings and ensure transparency, the county council will ensure that everyone subject to enforcement action is informed of what is expected of them and the procedures that will need to be followed.
- 5.5 When considering the issue of expediency, the county council will have regard to the development plan and to any other material considerations, including this LEP.
- 5.6 In considering where the balance of public interest lies, the following considerations will be taken into account:

Impact on local amenity and/or the environment

- (1) **Proportionality** - All enforcement action should be based upon an assessment of the risk to the environment, public health, public safety, harm to amenity, and/or economic well-being and should be proportionate to the severity of the breach of planning control to which it relates.

- (2) **Breaches of planning control with negligible impacts** - The county council would consider it inappropriate to take formal enforcement action against a trivial or technical breach of planning control which causes no harm to amenity in the locality of the site or to the environment. In the case of unauthorised development which is more substantive, if it accords with the development plan and does not require mitigation (normally secured through planning conditions), the county council would not consider it to be expedient to take enforcement action or seek a retrospective application simply to regularise the development.
- (3) **Breaches of planning control causing serious harm to public amenity or irreversible harm to the environment** - In circumstances where the breach is causing serious harm to public amenity in the neighbourhood of the site, or irreversible harm to the environment, the county council will normally take urgent and vigorous enforcement action (including, if appropriate, the service of a temporary stop notice or stop notice) to remedy the breach and prevent further serious harm. The following subparagraphs should therefore be read in this context.

Unauthorised development

- (4) **Unauthorised development which could potentially accord with the development plan (subject to the imposition of planning conditions)** - Where the county council considers that development has been carried out without the requisite planning permission, but the development would appear to accord with the development plan subject to the imposition of planning conditions to control the impacts, the owner or occupier will be invited to submit a retrospective application and pay the appropriate application fee. If they agree to do this within an acceptable timescale, the county council will not normally take formal enforcement action provided agreement can be reached on the implementation of appropriate mitigation measures to reduce the impact of the development pending the determination of the application. Such measures could include limiting the hours of operation, restricting the use of plant and equipment, and the routing of vehicles.

Notwithstanding the above, there is no guarantee that a retrospective application invited by the county council will be granted. In particular, an application might be refused because an issue comes to light during the processing of the application that was not known by officers at the time of the request. Alternatively, if the application needs to be determined by the county council's Planning and Regulation Committee, that committee may take a different view to officers. In these circumstances, further

negotiations would normally take place to establish if the matter can be resolved by the operator/owner voluntarily agreeing to cease/remove the unauthorised development.

Alternatively, if the applicant chooses to appeal the decision promptly, the county council may agree to suspend enforcement action for a sufficient period of time to allow the determination of the appeal, provided that in the interim any impacts are mitigated to the county council's satisfaction.

The county council will normally take formal enforcement action where:

- despite a request by the county council, a developer refuses or fails to submit a valid retrospective planning application within an agreed timescale;
- an application is made but is refused by the county council and agreement cannot be reached on the cessation/removal of the unauthorised development; or
- if an appeal is made promptly, the appeal is dismissed/withdrawn and agreement cannot be reached on the cessation/removal of the unauthorised development.

The county council will not normally invite an owner or operator to submit a planning application if it appears that any actual or potential harm cannot be made acceptable by the imposition of planning conditions.

(5) Unauthorised development which is contrary to the development plan, but could be relocated - It is not the county council's responsibility to seek out and suggest an alternative site to which the activity might be satisfactorily relocated. However, if the developer is proposing to relocate to another site which is likely to accord with the development plan, the county council will normally agree to suspend enforcement action provided:

- the move can be completed within a reasonable timescale acceptable to the county council; and
- the unauthorised development is not causing unacceptable harm to the local amenity or the environment, and will be subject to any mitigation measures agreed with the county council pending relocation.

In terms of timescale, what is considered reasonable will depend on the particular circumstances, including:

- the nature and extent of the unauthorised development;

- the time needed to negotiate and secure an interest in the alternative site;
- the time needed to secure planning permission for the alternative site (if required); and
- the need to avoid unacceptable disruption during the relocation process.

If the owner or operator fails to provide satisfactory justification for a suggested timescale, the county council will set a timescale it considers reasonable. If a timetable for relocation is ignored, or it is evident that appropriate steps are not being taken to progress the relocation, the county council will normally take formal enforcement action. In that event, the compliance period in the notice will specify what the county council regard as a reasonable period to complete the relocation.

If the unauthorised development is causing unacceptable harm to the environment or amenity, the authority will consider issuing an enforcement notice and/or stop notice even if an alternative site has been identified and steps have been made towards relocation. The county council considers that any difficulty or delay with relocation will not normally be a sufficient reason for delaying formal enforcement action to remedy unacceptable harm.

- (6) Unauthorised development which is contrary to the development plan and without reasonable prospect of relocation** – Where the unauthorised development provides valued employment, the owner or occupier will be advised how long the county council is prepared to allow it to continue before the operation or activity must stop.

If the owner/occupier accepts the county council's decision and agrees to comply, formal enforcement action may be avoided. If no agreement can be reached, the issue of an enforcement notice will usually be justified, allowing a realistic compliance period for the cessation/removal of the unauthorised development.

The council will not normally invite an owner or operator to submit a retrospective planning application where the unauthorised development is contrary to the development plan. However, there may be odd occasions when the council's planning officers consider that the council's Planning and Regulation Committee may be prepared to make an exception and grant planning permission for the unauthorised development (either in its current form or at a reduced level of activity) when it appears there may be overriding material considerations involved. In such cases, the owner/operator may be invited to make a retrospective application

and to provide evidence of the overriding material considerations. When inviting such an application, the council's officers will make it clear that as the development is contrary to the development plan, there would be a higher risk of refusal.

If planning permission is subsequently refused, it may still be possible to avoid enforcement action provided:

- a programme for the cessation/removal of the unauthorised development is agreed with the council and followed; or
- a prompt appeal is made to the Secretary of State and the appellant respects the outcome of that appeal.

Breach of condition

(7) Breaches of condition occurring within the first six months from the grant of planning permission - Most planning permissions granted by the county council are subject to conditions to protect the amenity of a locality and the environment. For a period of six months following the grant of planning permission, an applicant can appeal to the Secretary of State against the conditions if they consider that they do not meet the tests set out in the NPPG. Irrespective of whether such an appeal is made, if the applicant elects to commence the development within this six month period, the county council will normally require them to comply with those conditions.

If an appeal is made, the county council may agree to suspend enforcement action for a sufficient period of time to allow the determination of the appeal, provided that in the interim any impacts are mitigated to the county council's satisfaction.

Where the county council considers that formal enforcement action would be the most appropriate response, a decision to issue a breach of condition notice is not subject to the expediency test.

(8) Breaches of condition where alternative mitigation may be acceptable - If in the county council's view the breach could be resolved through the submission of a retrospective application to vary the condition (by for example putting forward an alternative mitigation strategy), the county council will provisionally agree to suspend enforcement action for a sufficient period of time to allow the preparation, submission and determination of such an application, provided that in the interim any impacts are mitigated to the county council's satisfaction. It should be noted, however, that this will not bind the authority; if it becomes clear that it has become expedient to take formal enforcement action prior to the expiry of the compliance period, then such action will be taken.

As with retrospective applications for unauthorised development described above, there is no guarantee that such an application invited by the county council will be granted. Where such an application is refused, and the operator/owner is unwilling to voluntarily comply with the condition, the county council will normally take formal enforcement action.

- (9) Breaches of condition with unacceptable (or potentially unacceptable) impacts** - Breaches of conditions may have an immediate harmful impact on local amenity and/or the wider environment. For example, operating plant and equipment outside the permitted hours may cause disturbance through noise. Other breaches may not have an immediate effect, but if allowed to continue may have a subsequent deleterious effect on amenity, such as failing to adhere to a restoration programme. Another example would be an operator's failure to maintain a jet spray wheelwash during dry conditions. Whilst that might not be a problem at the time, if weather conditions change and the wheel wash cannot be brought back into operation immediately, this may result in mud and debris being carried onto the highway.

In considering formal enforcement action, the county council will have regard to the fact that enforcement notices and breach of condition notices do not take effect for at least 28 days. Therefore, except in cases where the breach is causing significant harm to the local amenity or the wider environment, or it is clear that the breach could be and should be resolved within a shorter timescale, the operator or landowner will normally be given a minimum of 28 days to resolve the breach. However, where the breach of condition is not resolved within the agreed compliance period, the county council will normally take formal enforcement action.

History and behaviour of the owner/operator

- (10) History of non-compliance** - In all negotiations seeking to resolve breaches of planning control, the county council will have regard to the developer's history of compliance or non-compliance with planning legislation and any previous failure to comply with informal agreements without reasonable excuse. As a general rule very little weight will be given to assurances made by a developer who has previously given assurances, but has subsequently failed to comply.
- (11) Protracted negotiations** - Where it appears that informal negotiations to remedy a breach of planning control have become protracted with little apparent progress being taken to remedy the breach, the county council will normally take formal enforcement action if it considers it is expedient to do so.

(12) Flagrant breaches of planning control - Where, in the county council's view:

- the breach of control took place in full knowledge that planning permission was needed (whether or not advice to this effect was given by the county council to the person responsible);
- the person responsible for the breach has failed to submit a planning application for it (where advised to do so); and
- the breach is causing harm, or has the potential to cause harm, to local amenity or the wider environment,

the county council will normally take enforcement action to remedy the breach or prevent further harm to amenity or the environment.

(13) Previous advice – the county council will have regard to previous correspondence and negotiations with the owner/operator. However, it should be noted that the courts have advised that it is unhelpful to introduce private law concepts of "estoppel" into planning law as public authorities should not be estopped from exercising their statutory discretion and carrying out their public duties [R v East Sussex County Council, ex parte Reprotech (Pebsham) Ltd (2002)].

Risks to the county council (costs and reputation)

(14) Exemptions from the LEP - any departure from the enforcement plan must be fully justified to reduce the risks associated with the challenges set out below.

(15) Enforceability - A breach of planning control may not be straight forward, particularly when a site has a complicated planning history or a planning condition has been poorly drafted. The enforceability of the breach therefore needs careful consideration in relation to the likely effectiveness of the enforcement options and the potential for challenges (see below).

(16) Maladministration - Whilst the private citizen cannot initiate planning enforcement action, they can complain to the Local Government Ombudsman if the county council does not take formal enforcement action. The ombudsman can investigate such cases and will make a finding of "maladministration" against the county council if they consider that effective enforcement action was plainly necessary. Such a finding could result in a recommendation to make a compensatory payment to the complainant for the

consequent injustice, and could damage the county council's reputation.

- (17) Appeals to the Secretary of State** – A person having an interest in the land to which an enforcement notice relates or a relevant occupier may appeal against the notice on any of grounds set out in Section 174 of the 1990 Act. A decision to issue an enforcement notice therefore needs to have regard to the prospects of a successful appeal against the notice. In addition, if the county council is considered to have behaved unreasonably which has resulted in the appellant incurring wasted costs, those costs can be awarded to the appellant.
- (18) Legal challenge** – Apart from enforcement notices, there is no right of appeal against the other types of notices referred to in this LEP. However, the validity of the notices and the propriety of the county council's decision to issue those notices may be challenged by application to the High Court for judicial review. A successful challenge is likely to lead to the award of significant costs against the county council, and in some cases the county council may become liable to pay compensation.

A decision not to take enforcement action or simply a failure to consider doing so can also be challenged by judicial review [R v Stroud DC Ex p. Goodenough (1982); R v Sevenoaks DC Ex p. Palley (1995)].

- (19) Costs** – The above paragraphs highlight the potential costs that the county council can face if it loses an appeal or legal challenge against a decision to take formal enforcement action, or a failure to take such action when necessary. It should be noted, however, that even where the county council wins an appeal or legal challenge, it is unlikely to recover its full costs, which could be substantial. The unauthorised Dale Farm traveller site in Essex (Basildon Council) is an example of how planning enforcement costs can rapidly spiral into millions of pounds, even though technically successful. The council therefore needs to consider the potential costs when deciding how to resolve breaches of planning control.

To avoid incurring such costs, the council places a high emphasis on negotiation to resolve breaches of planning control. This includes the provision of advice to help secure voluntary compliance. However, the authority recognises that at times negotiation will fail to result in compliance. In such circumstances the authority will consider the most cost-effective method of enforcement (see Section 2.0) to achieve compliance.

Human Rights

(20) European Convention on Human Rights - The provisions of Article 1, Article 8 and Article 14 of the first Protocol are relevant when considering enforcement action. There is a clear public interest in enforcing planning law and planning regulation in a proportionate way. In deciding whether enforcement action is taken, the county council will, where relevant, have regard to the potential impact on the health and welfare of those affected by the proposed action, and those who are affected by a breach of planning control.

6. Resolving apparent breaches of planning control relating to county council development

- 6.1 This Section provides a protocol on how the county council will deal with any breaches of planning control relating to its own development granted under Regulation 3 of the Town and Country Planning General Regulations 1992. It aims to make the process transparent and reduce the risk of intervention by the ombudsman or relevant district council.
- 6.2 Where a breach is detected the following steps will be taken:
- The enforcement case officer will contact the promoting department and seek to agree a settlement in writing, including a timetable to carry out remedial work and, if appropriate, submit a retrospective planning application. Where the promoting department is willing to comply, this will usually result in no further action being required.
 - If the works do not progress, or a commitment is not received to carry out the necessary remedial works, the matter would be referred to the Head of Planning Services to raise with the Head of the relevant promoting department/service. If agreement is reached, and the matter satisfactorily resolved, no further action will be taken.
 - In the event that the two Heads of Service are unable to resolve the breach of planning control, the matter will be referred up to the county council's corporate leadership team for final resolution.
- 6.3 Any complainant, the local Member and the Executive Member (Commercial and Environmental Management) will be kept informed throughout.

7. Prosecutions and formal cautions

- 7.1 The county council accepts the principle that failure to comply with formal notices should not automatically be the subject of prosecution. Formal cautions will be considered where criteria for a prosecution are satisfied, but the offence is of a less serious nature, having regard to Home Office Circular 18/1994 and other relevant guidance.
- 7.2 Formal cautions will be issued by an appropriately authorised officer.
- 7.3 Persons who fail to comply with a formal notice will normally be prosecuted if the non-compliance meets both of the following criteria:
- (i) Evidential test, i.e. where the evidence is sufficient for a realistic prospect of successful prosecution; and
 - (ii) Public Interest test, i.e. where the prosecution is in the public interest.
- 7.4 The county council will have regard to government guidance 'The Proceeds of Crime Act 2002 (POCA) guidance under section 2a January 2018'. Asset recovery in every case in which a defendant has benefited from criminal conduct will be considered. The authority will instigate confiscation proceedings in appropriate cases where it appears that a person convicted of offence(s) meets the definition of 'criminal lifestyle' or 'course of criminal activity'.

Appendix 1: waste development

The National Planning Practice Guidance states that, though interpretation is ultimately a matter for the courts, the following is a general, non-exhaustive list of matters which can be considered as waste operations:

- metal recycling sites
- energy from waste incineration and other waste incineration
- landfill and land raising sites (such as soils to re-profile golf courses)
- landfill gas generation plant
- pyrolysis/gasification
- material recovery/recycling facilities
- combined mechanical, biological and/or thermal treatment
- in-vessel composting
- open windrow composting
- anaerobic digestion
- household civic amenity sites
- transfer stations
- waste water management
- dredging tips
- storage of waste
- recycling facilities for construction, demolition and excavation waste