

Property managers in Scotland – a market study

Annexe J - Local authority use of planning conditions

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1 LOCAL AUTHORITY USE OF PLANNING CONDITIONS

Imposition of planning conditions

- 1.1 Planning conditions are the Scottish Government's preferred method of ensuring land is maintained to a certain standard where this is to be achieved through planning legislation. However Scottish Government guidance states that a condition requiring land to be maintained should be imposed only when the requirement is sufficiently precise in its terms to be readily enforceable. It may be difficult to specify the standard to which land is to be maintained so precisely that it would be clear when such a planning condition was in breach.
- 1.2 The principal powers are in sections 37 and 41 of the Town and Country Planning (Scotland) Act 1997:
- Section 37(1) of the Act enables the planning authority to grant planning permission 'either unconditionally or subject to such conditions as they think fit'.
 - Section 41(1) amplifies the general power in section 37(1). It makes clear that the planning authority may impose conditions regulating the development or use of land under the control of the applicant even if it is outside the site which is the subject of the application.¹
- 1.3 Scottish Government guidance on the use of conditions in planning permissions states that a condition may be imposed, where appropriate, to require some feature of a development to be retained – an area of open space on a housing scheme, for example. However it states that a condition requiring something to be maintained, in the sense of being kept in good repair or in a prescribed manner, should be imposed only when the planning authority is fully satisfied that the requirement is both relevant to the development which is being permitted, reasonable in its

¹ Scottish Government Circular 4/1998 Annexe A The Use of Conditions in Planning Permissions paragraphs 1-3.

effects and sufficiently precise in its terms to be readily enforceable.^{2 3} Indeed it states that 'precision in the wording of conditions is crucial when it comes to enforcement'.⁴

- 1.4 However it may generally be difficult to specify the standard to which open space is to be maintained so precisely that it would be clear what must be done to comply with it and when it was in breach. Thus Scottish Government guidance on the use of planning conditions explicitly states that vague expressions like 'keep the buildings (and similarly presumably the open spaces) in a tidy state' which are not sufficiently precise to ascertain what must be done to comply must not be imposed.⁵ The difficulty of specifying the standard of maintenance so precisely may affect the extent to which local authorities (LAs) impose conditions requiring land maintenance or the standard of maintenance which is prescribed and thereby whether they are an effective mechanism for ensuring that open spaces are maintained satisfactorily.
- 1.5 Applicants for planning permission have the right to appeal to the Secretary of State against any conditions at the time they are imposed. They may also apply at a later stage to have the conditions varied, although they should adhere to the original conditions until such time as their application is approved.⁶ Grounds for this may be that they are

² Scottish Government Circular 4/1998 Annexe A The Use of Conditions in Planning Permissions paragraph 81.

³ Scottish Government guidance on the use of conditions also covers the planting and establishment of new trees. Where appropriate, a condition may require not just initial planting but also that trees shall be maintained over a specified period of years and that any which die or are removed within that time shall be replaced. It says that the authority may wish to ensure that it obtains details of those responsible for the management and maintenance of certain planted areas in that period. (Scottish Government Circular 4/1998 Annexe A The Use of Conditions in Planning Permissions paragraph 78).

⁴ Scottish Government Circular 4/1998 Annexe A The Use of Conditions in Planning Permissions paragraph 25.

⁵ Scottish Government Circular 4/1998 Annexe A The Use of Conditions in Planning Permissions paragraph 30.

⁶ Circular 4/1999 Annexe G first page.

'seen as being inappropriate or too onerous'.⁷ The possibility of appeal with its attendant demand on LA resources may deter imposition of planning conditions or lower the standard of maintenance they prescribe. This may especially be the case given the difficulty of specifying the state of land precisely. A small number of LAs confirmed that the possibility of appeal against planning conditions could act as a deterrent to their use. Scottish Government guidance on planning agreements acknowledges that 'many authorities' feel that these are a 'more effective means of enforcement without the risk of having a condition overturned or modified at appeal'.^{8 9}

- 1.6 In some cases planning conditions may not stipulate the standard of maintenance directly, but just that the developer should have a maintenance scheme. Scottish Government guidance on the use of planning conditions sets out model conditions. These include 'efore development begins a scheme for the maintenance of open space, including play areas, within the development shall be submitted to and approved in writing by the planning authority'.¹⁰

Enforcement of planning conditions

- 1.7 Whether planning conditions are an effective mechanism for ensuring land maintenance is carried out depends not only on whether they are imposed but also on whether LAs enforce them. For enforcement to be effective the breach of planning conditions must be clear notwithstanding any difficulty of specifying maintenance standards precisely.
- 1.8 Scottish Government guidance is that as a planning condition should only have been imposed out of necessity, where the application for permission would otherwise be unacceptable, it is likely that a failure to

⁷ Circular 4/1998 paragraph 11.

⁸ Circular 12/1996 paragraph 3.

⁹ This may change with the implementation of the provisions of the Planning etc (Scotland) Act 2006 which will allow appeals against the terms of planning agreements.

¹⁰ Addendum to Circular 4/1998 E Landscape 1. Landscaping 1.

comply with it will be damaging and enforcement action will be justified. Enforcement action should always be commensurate with the breach of planning control to which it relates and the decisive issue for the planning authority should be whether public amenity or the use of land and buildings meriting protection in the public interest is unacceptably affected.¹¹

1.9 All enforcement action is discretionary although any decision not to take action may be challenged through judicial review.

1.10 The principal means by which planning conditions may be enforced are Enforcement Notices and Breach of Condition Notices. These are considered in turn.

1.11 An Enforcement Notice¹² must specify the steps which the authority requires to be taken, or the activities which it requires to cease, in order to:

- remedy the breach by discontinuing any use of the land or by restoring the land to its condition before the breach took place, and/or
- remedy any injury to amenity which has been caused by the breach.

Copies of the notice must be served on the owner and occupier of the land to which it relates and any other person with an interest in the land.

1.12 There is a right of appeal to the Secretary of State against the notice.¹³ Issuing an Enforcement Notice is discretionary and the possibility of appeal may deter enforcement. This may especially be the case given any difficulties in specifying precisely the standard to which land is to be maintained. The condition must be clearly breached for enforcement action to be worthwhile. One LA that responded to our questionnaire

¹¹ Circular 4/1999 Annexe G pages 1-2.

¹² Covered in sections 127-129 of the Town and Country Planning (Scotland) Act 1997.

¹³ Circular 4/1999 Annexe E pages 1-3.

confirmed that the possibility of appeal against Enforcement Notices could act as a deterrent to their use and they were only issued if the breach was clear and the terms of the notice were reasonable. However once the Planning Etc (Scotland) Act 2006 is implemented appeals against Enforcement Notices on the basis that a condition should be dropped/varied will no longer be allowed.

1.13 It is an offence under section 136 of the Act for owners of land to be in breach of an Enforcement Notice (for instance, to fail to take the required steps, or to fail to cease an activity required to cease, within the specified time). A person guilty of an offence under this section is liable:

- on summary conviction, to a fine not exceeding £20,000, or
- on conviction on indictment to an unlimited fine.

In determining the amount of any fine, the Court is to have regard to any financial benefit which has accrued or appears likely to accrue in consequence of the offence.¹⁴ Any remedial work is required to be undertaken in addition to the fine (see below). It is also possible for a person to be convicted and fined for repeated breaches, i.e. where the person continues to fail to resolve the breach, in association with the same enforcement notice.

1.14 A Breach of Condition Notice¹⁵ requires the person on whom it is served to secure compliance with the specified conditions. It may be served on the developer or 'any person having control of the land'.¹⁶ A notice must specify the steps required to be taken (for example requiring a landscaping scheme to be carried out and completed in accordance with

¹⁴ Circular 4/1999 Annex E page 7.

¹⁵ Section 145 of the 1997 Act.

¹⁶ Note that if the title of the land had transferred to a land maintenance company (LMC) then the Breach of Condition Notice would, by default, be served on the new landowner. It would be for the landowner to prove that responsibility for the breach rested elsewhere as responsibility runs with the land, not the individual. This is also true for Enforcement Notices.

the terms of a landscaping condition imposed on grant of permission) within a specified period.

- 1.15 There is no right of appeal to Scottish Ministers against a Breach of Condition Notice. However, recipients may make representations to the planning authority. The validity of a notice may be challenged through judicial review or by defence submissions in the Sheriff Court in the event of prosecution. It is a summary remedy to enable a condition to be enforced without having its merits re-examined through an Enforcement Notice appeal (although as noted earlier once the Planning Etc (Scotland) Act 2006 is implemented appeals against Enforcement Notices will no longer be allowed). It may be issued as an alternative to (or in conjunction with) an Enforcement Notice. Scottish Government guidance emphasises that a Breach of Condition Notice should only be served where the condition in question has clearly been breached.
- 1.16 The maximum penalty for contravening a Breach of Condition Notice is a fine not exceeding level 3 on the standard scale (which is £1,000).¹⁷
- 1.17 The Scottish Government's Circular 4/1999: Planning Enforcement, which provides guidance on enforcement of planning conditions is shortly to be rewritten, reflecting the changes to legislation introduced by the 2006 Act.
- 1.18 In addition, section 179 of the 1997 Act provides planning authorities with the power to serve a notice on the owner of land in their area where they consider the condition of this to be adversely affecting the amenity of the area.¹⁸

Direct action by local authorities

- 1.19 Section 135 of the 1997 Act provides planning authorities with the 'default' powers to enter Enforcement Notice land and carry out the

¹⁷ Circular 4/1999 Annexe G pages 2-4.

¹⁸ Circular 4/1999 Annexe I.

unfulfilled requirements of a notice themselves. The costs of such direct action are recoverable from the responsible person.

- 1.20 It is also technically possible that the LA could find itself responsible for undertaking maintenance itself in the event that an enforcement notice could not be enforced against the owner, for example if an absentee owner could not be located or contacted, given that notices enforcing planning conditions are liable to be served on the owner of the land.