

EXECUTIVE NOTE

THE TOWN AND COUNTRY PLANNING (AMOUNT OF FIXED PENALTY) (SCOTLAND) REGULATIONS 2009 SSI/2009/52

1. The above Regulations are to be made in exercise of the powers conferred on the Scottish Ministers by sections 136A (4) and 145A (4) of the Town and Country Planning (Scotland) Act 1997 (as amended by the Planning etc. (Scotland) Act 2006). The Regulations are subject to affirmative resolution procedure.

Introduction

2. The 2006 Act amended the 1997 Act to introduce a new planning enforcement power enabling planning authorities to issue a fixed penalty notice (FPN) as an alternative to prosecution where a person who has committed a breach of planning control and subsequently fails to comply with the requirements of an enforcement notice or breach of condition notice to correct the breach.

3. The purpose of the Regulations is to set the levels of fixed penalty where a fixed penalty notice (FPN) is issued by a planning authority in respect of a breach of either an enforcement notice (EN) (s136A) or a breach of condition notice (s145A).

Policy context/objectives

4. The introduction of FPNs is intended to provide planning authorities with an alternative process, in addition to the current option to seek a 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).

5. The majority of ENs and BCNs issued by planning authorities are complied with; however there are occasions where they are not. It is important that planning authorities have appropriate powers to respond to such breaches and ensure compliance.

6. 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.

Consultation

7. The provisions in the 2006 Act to introduce FPNs were introduced at stage two of the Bill process. As such they did not feature in any consultation prior to the Bill process.

8. Formal 12 week public consultation on the Regulations to set the level of Fixed Penalty to be imposed was undertaken in 2007 -2008. Those consulted included planning authorities, community councils, business, public and professional bodies.

Changes to the Regulations as a result of Consultation

9. The original intention as stated by the previous administration during the passage through Parliament of the 2006 Act was that there should be a system whereby, if a person failed to comply with the requirements of an EN or BCN, then several FPNs could be issued over a period of time, with increasing levels of penalty. The consultation was undertaken on the basis that the Regulations provided such a mechanism.

10. Analysis of the consultation responses raised fundamental concerns that;

- Any mechanism for issuing repeat FPNs would be cumbersome and lengthy as it would require the issue of a new EN or BCN before each FPN; and,
- Serious doubts were raised about the legality of imposing more than one FPN and as to the legal competency of increasing the level of Fixed Penalty in repeat FPNs.
- Concern was also expressed as to the legal validity of any fixed penalty paid in respect of failure to comply with an EN where a subsequent EN issued in respect of the same breach of planning control was quashed on appeal. Planning authorities queried whether this would mean that previous fixed penalties paid would require to be refunded. There is no direct right of appeal against a BCN.

11. Having considered the responses the Scottish Government has concluded that implementing a scheme of multiple notices with increasing penalties would be unworkable. There would be a significant amount of administrative work required from planning authorities in issuing the notices. Having also considered the legal arguments regarding the validity of increasing the level of penalty, the Scottish Government decided not to proceed with the proposed system.

12. The revised Regulations therefore simply set out the level of fixed penalty in respect of breach of an EN or BCN. A single FPN may be issued in respect of any breach.

Financial considerations

Level of penalty

13. The Scottish Government proposes that the level of the penalty imposed by a FPN should be set at £2,000 for a FPN issued in respect of failure to comply with the requirements of an enforcement notice and £300 in respect of a breach of condition notice. There will be a reduction of 25% where a fixed penalty is paid promptly. Under the provisions of the 1997 Act (as amended) 'paid promptly' means that the penalty is paid within 15 days of receipt of the notice.

14. While 15 days may seem a short period, particularly where a penalty of £2,000 is imposed, it should be borne in mind that, before a FPN is issued, the person will have been issued with an enforcement notice. Issuing an enforcement notice requires that the person be given 28 days notification before the notice take effect and there is then a 'reasonable period' for them to comply with the requirements of the notice. Feedback from enforcement officers and planning authorities indicates that this reasonable period is on average 3-4 months. Therefore a person receiving a FPN will, on average, have been aware of the possibility of the fine for some 4-5 months and also been aware of the steps they need to take to avoid the penalty. Similar time periods apply to breach of condition notices.

15. The levels of fixed penalty proposed have been determined based on;
- Established legal precedent that a fixed penalty should not exceed 30% of the maximum fine that could be imposed by a court following summary conviction for the offence. Given that the maximum fine in respect of a breach of enforcement notice is £20,000 and for a breach of condition notice £1,000, the levels proposed for FPNs are within this limit.
 - The level of fine is considered appropriate to the level of breach of planning control that the FPN is intended to address. Planning authorities have discretion to decide whether or not to offer the opportunity to pay a fixed penalty as an alternative to prosecution. Where a breach is considered to be major or to have serious consequences then the planning authority may seek a prosecution without offering the opportunity to pay a fixed penalty. Conversely where the breach is considered to be so trivial as to require no further action, then the planning authority may decide accordingly, although in such cases it may be legitimate to question why an enforcement or breach of condition notice was issued in the first place.
 - Response to the consultation indicated that the levels of fixed penalty initially proposed (£1000 for an EN and £100 for a BCN) were considered to be low, given the potential benefits to a developer of failing to comply with planning control. A range of levels were suggested by respondents and in setting the levels proposed the Scottish Government has taken these into account. The proposed levels reflect the average level suggested across the range of responses.

Costs and benefits

16. Costs and benefits are considered in detail in the attached RIA. FPNs do not in our view carry significant financial implications for planning authorities and while they may impose financial burdens to individuals issued with a fixed penalty, such individuals will have been given significant prior notification of their potential liability and of what action can be taken to avoid the penalty.

Regulatory Impact Assessment:

The Town and Country Planning (Amount of Fixed Penalty) (Scotland) Regulations 2009

Introduction and summary

1. This is a Regulatory Impact Assessment (RIA) of the proposals for Regulations to implement the provisions made in the Planning etc (Scotland) Act 2006 (the 2006 Act) in respect of the Fixed Penalty Notices (FPNs) – **The Town and Country Planning (Amount of Fixed Penalty) (Scotland) Regulations 2009**.
2. This assessment examines the impact of the proposals in the regulations on business and other interests. It considers the additional costs that may be imposed by the legislative changes and seeks to assess the wider benefits which may be brought by the changes.
3. The proposals for secondary legislation on enforcement, and a draft RIA were published for public consultation in late 2007-early 2008. Q11 of the consultation invited consultees to submit views on the draft RIA. A number of respondents did so, and these views have been incorporated into this RIA.

Objective

4. The Scottish Government is seeking to implement provisions in the Planning etc. (Scotland) Act 2006 (the 2006) Act to extend existing, and introduce new, enforcement powers designed to improve the delivery of planning enforcement. These proposed regulations are required to implement the FPN aspect of the range of options available to planning authorities to effectively address breaches of planning control.

Background

5. The Town and Country Planning (Scotland) Act 1997 sets out a range of enforcement powers available to planning authorities to enable them to address breaches of planning control. The 2006 Act introduced Fixed Penalty Notices which may be issued by planning authorities as an alternative to prosecution where a developer breaches the requirements of either an Enforcement Notice or a Breach of Condition Notice.
6. The regulations are required to set the level of an FPN, depending on whether it is issued in respect of a breach of the requirements of an enforcement notice or a breach of condition notice. The regulations propose a penalty of £2000 for failing to comply with an enforcement notice and of £300 for failing to comply with a breach of condition notice.

Consultation

Within Government

7. Scottish Government Planning Directorate has consulted with colleagues in:
- Solicitors Development, land and Local Government Division;
 - Public Health and Wellbeing Directorate, Equality Unit; and
 - Crown Office Procurator Fiscal Service.

Public consultation

8. The measures in the 2006 Act were, with the exception of Fixed Penalty Notices, set out in the White Paper: *Modernising the Planning System*. Further consultation was undertaken on the draft regulations in late 2007-early 2008. Among those consulted and offering comments were planning authorities, community councils, public, business and professional bodies as well as individual businesses and members of the public. The consultation showed strong support for the regulations with universal support for the regulations on TSNs. There was also overwhelming support for the introduction of FPNs, although legal concerns were raised which led to some rewriting of these regulations.

Options:

9. The Scottish Government has considered options for implementing the provisions of the 2006 Act. The options identified are:
- Option 1 –do nothing and remain with the status quo.
 - Option 2 - Implement the regulations as originally set out in the consultation paper with the option for planning authorities to issue repeat FPNs with increasing levels of penalty where the breach of planning control is not corrected.
 - Option 3- Implement the regulations as amended with regard to consultation responses. In this option there would be no opportunity to issue repeat FPNs and correspondingly, no increases in the level of penalties.
10. Option 1 (do nothing and remain with the status quo) is not considered viable, given the commitment in the *Modernising the Planning System* White Paper, subsequently confirmed by the Scottish Parliament in approving the 2006 Act, to implement the enforcement provisions. Therefore, the RIA focuses on the costs and benefits of implementing the proposed regulations.
11. Option 2 is also considered no longer viable. While there was strong support for the proposal that there should be increasing penalties and repeat FPNs, a number of legal bodies and planning authority lawyers expressed concern that the provisions in the 2006 Act would not permit the issue of more than 1 FPN for a particular breach. Concern was also expressed that it would be difficult to justify increasing penalties in relation to what, essentially, remained the same breach. Having considered the responses and consulted with officials in the Scottish Government Legal Directorate, this option is considered unworkable.

13. Option 3 would see changes to the regulations on fixed penalties to remove references to a system for issuing multiple notices and to increasing penalties. The Scottish Government recommend that this option be adopted.

Costs and benefits

14. It is difficult to estimate any costs accurately, particularly as use of enforcement powers is discretionary and different planning authorities may have different procedures and processes for investigating alleged breaches of planning control, which may involve different costs. We do not, however, expect that the proposed measures will have any significant financial impact on any particular group in the community.

15. Sectors and groups affected:

- Public sector – planning authorities will have a new power to address breaches of planning control.
- Public/private/individuals - where a person (either an individual or a company) has committed a breach of planning control and has failed to rectify it in accordance with the requirements of an enforcement notice, or a breach of condition notice, they may, at the planning authority's discretion, be served a FPN.

Benefits

16. Planning authorities will benefit:

- Through having a wider range of enforcement measures available to them to respond appropriately to a breach of planning control.
- By being able to offer the option to pay a fixed penalty as an alternative to the costly and lengthy process of seeking a prosecution.
- It has been suggested that planning authorities may benefit through collection of fixed penalties, on the basis that the fixed penalty would accrue to the planning authority. It should be stressed, however, that where fixed penalties are offered and paid, this would be a result of previous work carried out by the planning authority to establish that a breach of planning control had occurred. Secondly, the penalty does not allow for the amount to be varied to reflect the costs of undertaking the investigation to establish the breach of planning control. The level of fine has been set within legal constraints and at a level we consider appropriate, taking into account comments received in response to the consultation. While it is true that in some cases the level of fixed penalty will be greater than the cost of investigation, it is equally true that in many cases it will be less. The same is true of the current situation where fines are imposed by the court system following prosecution. Such fines are also not based on the amount of work undertaken in identifying the breach.

17. Developers will benefit if earlier action is taken in respect of a breach of planning control. It is accepted, from anecdotal evidence and discussion with enforcement officers, that the majority of breaches are inadvertent and relatively easily corrected through informal negotiations with the planning authority. Where this is not the case there are formal powers available to require remediation. If a breach, intentional or not, is not detected and subsequent development continues, it will generally be harder and more expensive for the developer to correct.

18. There are not expected to be any affects on communities.

Costs

Planning authorities

19. There may be some costs to planning authorities associated with the issue of FPNs. However, the proposals should offset any such increase as a FPN will provide a cost-effective alternative to prosecution. Penalties paid in response to FPN will accrue to the planning authority, which would go some way to offsetting the costs of issuing the notice. The majority of any costs incurred in investigating an alleged breach are related to the investigation of the breach and as such they are costs that the planning authority already incurs in any investigation, rather than any additional burden imposed as a consequence of the new regulations.

Developers

20. There would clearly be a cost to developers if they were required to pay a FPN. However, it should be noted that a developer would have been given considerable opportunity to avoid having to pay a FPN by complying with the terms of the enforcement notice or breach of condition notice to which the FPN related.

21. The opportunity to pay the fixed penalty is an alternative to prosecution and the possible payment of a fine on conviction. As such it is not an additional charge or burden. While the fixed penalty amount may appear high in relation to some minor breaches, paying the fixed penalty discharges liability to further prosecution and a developer paying the fixed penalty would not incur additional costs in legal fees for defending their case.

22. A fixed penalty would only be imposed on a developer or landowner who broke the law. Any developer or landowner who complied with the terms of their planning permission would not incur any penalty.

Small/Micro Firms Impact Test

23. We take the view that the impact on such firms would be minimal. Enforcement action would only be taken where there was a breach of planning control, therefore it follows that action would only be taken where there is evidence of a breach. While there are extended powers for a planning authority to take action, it remains the fact that enforcement action will only be taken if there has been a breach of planning control. In considering appropriate action the planning authority will consider the scale of the breach, rather than the size of the company.

24. That said, guidance issued by the Scottish Government on the use of planning enforcement powers (Planning Circular 4/1999: Planning Enforcement) emphasises that in considering enforcement action against small companies, planning authorities should take into account the potential effects of the action on the company's operations and commercial viability.

Legal Aid Impact Test

25. The legal Aid Test looks at individual's right to access to justice through availability of legal aid and possible expenditure from the legal aid fund.

26. The Regulations do not create any new legal procedures, as they do not create new offences (they create an alternative to existing penalties), nor do they include a right of appeal. A person who disagreed with the serving of a FPN would be able to refuse payment and it would be for the planning authority to take further action through seeking a prosecution. This option is currently available and the regulations do not create any new grounds where Legal Aid would be available.

Implementation and delivery plan

Implementation of the regulations

27. The regulations will be laid before Parliament in December 2008 with a coming into force date of 3 August 2009. Planning enforcement officers will be kept informed of progress through the Scottish Planning Enforcement Forum.

Guidance on the use of the powers

28. The regulations, when they come into force, will be accompanied by a revised Circular on the whole of the enforcement system which will provide a statement of Scottish Government policy and contain guidance on policy implementation through these legislative and procedural changes.

Post-implementation review

29. The intention is to review the policy after its first year of operation to ensure it is delivering the intended benefits, is fostering good partnership working, and no administrative or legal barriers are reducing the potential of its impact. This review will take the form of consultation with those implementing the powers.

Summary and recommendation

30. The regulations will ensure that there are robust and workable enforcement powers available to planning authorities to enable them to carry out their statutory obligations in respect of enforcement of planning control in their respective areas.

31. In view of the above, it is recommended that option 3 be implemented and that the regulations are introduced into Scottish law.

Declaration and publication

32. I have read the regulatory impact assessment and I am satisfied that the benefits justify the costs.

Signed

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Date

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