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IHBC GUIDANCE NOTES

Use of direct action in heritage enforcement cases in England

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This is one of a series of occasional Guidance Notes published by The Institute of Historic Building Conservation (IHBC). IHBC Guidance Notes offer current and recent guidance into topics that we consider crucial to the promotion of good built and historic environment conservation policy and practice. The Notes necessarily reflect knowledge and practice at the time they were developed, while the IHBC always welcomes new case examples, feedback and comment to research@ihbc.org.uk for future revisions and updates.

Executive Summary

1. This Guidance Note is intended to explain the procedures and practical considerations in handling enforcement cases and suggest best practice.
2. Where a local authority has served a Listed Building Enforcement Notice (LBEN) and its requirements have not been carried out, it has the power to take direct action under Section 42 of the Planning (Listed Buildings and Conservation Areas) Act 1990. If as a result of that action it is unable to recover the cost from the landowner, it may put a charge on the land to recover those costs. [\[1\]](#)
3. Prompt resolution of listed building enforcement cases is in everyone's interests and, wherever possible, breaches of control should be resolved by negotiation, without the need for the local planning authority to take formal enforcement action or court proceedings, but in some intractable instances direct action is the only expedient solution.

4. Before the local authority decides to take direct action, officers should evaluate:

- whether the breach is continuing to cause significant harm to the listed building and or its curtilage;
- the anticipated overall costs of carrying out the action and the prospects of recovery;
- any health and safety risks to council employees, contractors and the owner or occupier(s) of the property; and
- whether direct action is consistent with council's corporate aims and the underpinning objectives of national planning and heritage policy.

5. There is no right of appeal against a decision by a local planning authority to take direct action except by way of judicial review. [2] The authority should nevertheless be mindful that they have acted reasonably by considering ALL the relevant circumstances. [3]

6. Although S42 provides for direct action to resolve heritage enforcement cases, the powers appear to be used only rarely, partly because of the likely up-front costs (and recovery) and partly because of a lack of guidance and suitable exemplars. This Guidance Note points towards best practice, but case studies would be welcome for a future revision and these should be forwarded to Bob Kindred at: research@ihbc.org.uk.

The policy approach

7. In contemplating direct action, the local planning authority should set this within the context and aims of an overall Planning Enforcement Policy or Protocol for planning and heritage enforcement.

8. The aims should be to ensure the fair, proportionate and consistent treatment to offenders; act as a useful defence against challenge by Judicial Review (if the authority has been demonstrable insufficiently active in the past); and, act as a reassurance to councillors especially where enforcement action decisions are delegated to officers. Such a policy is also likely to meet the recommendation in the NPPF paragraph 207 regarding enforcement plans as a means of maintaining public confidence in the planning system.

9. The aspects of direct action such a plan might address would be to:

- promote awareness of the relevant policies and procedures, including those relating to the recovery of expenses incurred by the council;
- ensure compliance with the council's statutory duties including those related to even-handed and impartial treatment;
- ensure compliance with the council's procurement rules and corporate procedures;
- maximise the recovery of the expenses the council has incurred; and,
- avoid any reputational damage because of past inactivity while meeting national priorities for heritage enforcement.

Procedural considerations

Reviewing the case to date

10. Regular case-review of enforcement cases should form a part of any good practice heritage management regime and be incorporated into, for example, a local planning authority's Annual Conservation Management Statement [\[4\]](#) and/or its Planning Enforcement Policy or Protocol.

11. In particular, such a review would consider:

- If the breach of listed building control has been remedied or is continuing;
- Whether all other reasonable opportunities have been offered to remedy the situation by complying with the local planning authority's requirements;
- That the administration and service of the LBEN has been correct and involved all the interested parties;
- That a reasonable timescale has been allowed for to ensure that all the steps required by the LBEN can be complied with;
- That no appeal matters remain outstanding;
- That the local planning authority has not been advised of any mitigating circumstances that have not been investigated and otherwise addressed;
- That the sensitivity of the case and the antipathy of the recipient might be such that the preliminaries might require confidential reporting if, for example, committee approval is required

Delegated authority or committee reporting

12. A local planning authority may not always have a scheme of officer delegation in place; or this may be limited to the service of a LBEN subject to *post-facto* committee reporting procedures.

13. The procedural and financial implications of direct action are such that in any event it would be wise for a full report to the relevant council

committee to be prepared. This will demonstrate that the only remaining course open to the council is direct action; that all other available remedies have been pursued and can be accompanied by an explanation that all other options have been considered and rejected or are not appropriate.

14. If the sensitivity of the case is such that the person responsible for the contravention should not be afforded any prior warning of the council's impending direct action - but the matter requires consideration by the relevant committee, - the proposals should be confined to the closed part of its agenda, especially if the officers propose, or the committee imposes a commencement date some distance hence.

15. Once the stage for direct action has been reached it is highly unlikely that access to the building will be offered voluntarily. Contingency arrangements should therefore be in place to obtain a magistrate's warrant under S88A of the 1990 Act if necessary.

16. Sufficient time in advance needs to be allowed for this but it is important to note that as the recipient of the warrant is obliged to be given 24 hours' notice there can be no element of 'surprise' on the council's part. Furthermore, the warrant will permit entry on only one occasion and 'at a reasonable hour' unless the matter can be demonstrated to be urgent. [\[5\]](#)

Evaluation of the case

17. In direct action cases, continuity in procedures and evidence is important. As direct action is a last resort, the breach of listed building control may well have continued for a considerable time. In the present climate of resource constraints it is possible that the local planning authority's case officer may have changed and so thorough record keeping is vital.

18. Although it is good practice to maintain a continuous file history from the outset, where this has not been done the background will need to be fully researched and summarised commencing with the date when the breach of listed building control was first reported. Any reasons for gaps in the narrative will need to be made explicit on the file.

19. It is axiomatic that the case file should include:

- Details of all correspondence by the authority that aimed to achieve a voluntary remedy of the breach;
- Details confirming that no Listed Building Consents have been granted and that the specific breach is unauthorised;

- Details of all LBENs issued together with the deadlines set for compliance and the consequential outcomes if any;
- Details of any statutory appeals against the LBENs and the associated PINS decision letter [if lengthy, summarised as necessary]. Where no appeals have been made the case file should be explicit;
- Documenting of any office and site visit discussions, telephone conversations and e-mails together with any photographs taken (all dated and the view located and described);
- Details of any requisitions for information under S89(1); [6] whether these were returned completed and any prosecution undertaken where the information requested had not been submitted;
- A summary of any other actions taken by the local planning authority against the contravention[s] to demonstrate the activities of a persistent offender (that is, not a one-off or first offence);
- Evaluation of whether the breach was deliberate or, for example, a small offence which grew and got out of hand;
- A written assessment of the existence of any possible interested parties and what their interest in the property appears to comprise;
- A legal opinion that the proposed direct action is justified.

Evaluation of the costs

20. In taking direct action the local planning authority can recover the cost from the property owner under S42 (1)(b) and where it is unable to do so it may put a charge on the land.

21. A charge is binding on successive owners of the land to which a LBEN relates and takes effect on the date on which the council completes the steps required by the Notice. The expenses recoverable will include such sums as the local planning authority considers reasonable in respect of its establishment charges and can include interest. [7] An establishment charge is defined as the reasonable charge that a local authority incurs for administering the procedure of direct action.

22. In reporting the proposed action to the relevant council committee (as recommended in paragraphs 12 to 13 above) the most likely pertinent questions that officers should anticipate are:

- What will be the community benefits of the action?
- How much will the direct action cost?
- How much of the council's costs might reasonably be recovered?
- When might the council expect to recover its costs?

- Will the costs of direct action outweigh the value of the building?

23. As a LBEN will already have been served identifying in full the breach of listed building control and explaining the harm already caused, identifying the benefits of direct action for non-compliance should be quite straightforward both in terms of national planning and heritage policy and the Council's enforcement protocols.

24. In preparing any report to the relevant committee, officers should carefully and methodically identify ALL the anticipated works as an appendix and in sufficient detail for them to be accurately costed. This may take the form of a short schedule or specification.

25. If there are doubts about the extent of the direct works necessary, access to survey the building using the provisions of S88 of the 1990 Act may be needed to provide a greater degree of certainty. [8] These powers are usually delegated and should not need committee approval.

26. Once the anticipated direct works have been identified, consideration should be given to whether any on site specialist advice will be necessary (that is, for example, on structural engineering matters); who should implement the works; how this should be done; whether any specialist equipment might be required and if this needs to be hired and for how long. [9]

27. The local authority's own staff may be capable of straightforward implementation of direct action or an outside specialist contractor may be necessary, but formal confirmation by the relevant council manager and/or the contractor concerning the competence of the operatives; together with a detailed disaggregated estimate of the costs, should then form part of the committee report. If there are likely to be structural issues, a structural engineer may need to be on standby (and an hourly fee allowed for this).

28. When using outside contractors, under most circumstances, three estimates will be needed unless the works required fall within a standard schedule of rates. The committee report should also identify who will do what works and over what anticipated timescale (especially if, for example, a temporary road closure might be necessary (see paragraph 32 below).

29. Before seeking committee approval for direct action, officers will need to seek reliable impartial valuation advice to confirm that the likely cost of the action does not outweigh the value of the building.

30. Once approval is given for direct action, all the necessary participants in the Council's action need to be contacted individually to discuss the

logistics and deployment of manpower in the most efficient and cost-effective way.

Early involvement of other parties

31. If there has been a history of a lack of cooperation or physical or verbal hostility on the part of the person[s] responsible for the contravention, consideration must be given to the possibility that a public order offence might be committed or if any physical threat made be made to anyone authorised to implement the works.

32. The police should be asked whether they would wish to be involved in the planning of- or in attendance at- the execution of the works; but as a minimum they should be formally notified in advance of the time and place that the direct action will commence; whether they consider their presence would be advisable, but if not that there is a contact telephone number for the duty officer for a rapid response in case of any difficulty.

33. If direct works are likely to affect roads or public footpaths requiring control or temporary closure, this should be discussed well in advance with the relevant officers of the local highway authority, and if necessary with the police and emergency services.

34. It is best to avoid an 'emergency (road) closure' [\[10\]](#) but the question of the sensitivity of the enforcement case and the circumstances where prior warning of direct action should be avoided (see paragraph 13 above) needs to be taken into account.

35. Other questions to consider include: Whether any incidental or ancillary unsafe/unstable structures require essential urgent work in the interests of site safety to facilitate direct action to the listed building? Whether the cost of this work has also been properly estimated? Whether such ancillary works will need to be documented or recorded during the action for the avoidance of later dispute?

36. If for any reason it is anticipated that it may become essential to temporarily remove fixtures or chattels from the building to facilitate the direct action, these items need to be recorded; moved to safe and secure storage; and the cost of their removal and storage allowed for and documented as part of the process of the recovery of costs. [\[11\]](#)

37 Other non-heritage issues to consider prior to action on site include an assessment of any anticipated environmental risks, that is the possibility of the presence of (and potential care in the handling and disposal of) any

hazardous materials; and, considerations relating to the temporary relocation of any occupiers (particularly, for example, children) to facilitate the direct action to the listed building.

Procedures following authorization of direct action.

38. Other than in exceptional circumstances when complete confidentiality is necessary, a final warning letter should be sent to owner advising that direct action has been authorised by the council to remedy the breach and that unless the works are substantially completed with, for example, 14 days [\[12\]](#) the council will carry out the works in default and place a charge on the property to recover its costs.

39. The best day and time to proceed should be discussed and agreed among all those participating in (or supporting) the action (by a round-table discussion if necessary). External factors may include, for example, ensuring (or having a reasonable expectation) that the person responsible for the contravention is present, or obviating the need for a road closure during peak hour traffic movements.

40. As far as is practicable a detailed chronology should be agreed setting out who will do what and when on the day; how many people might be required; and, if necessary, how they would best avoid getting in each other's way. A contingency allowance should also be made for unexpected problems and inevitable minor delays. [\[13\]](#)

41. In what will be a stressful situation for the person against whom the direct action is being taken, it is important to emphasise that the works must be conducted efficiently with professionalism and courtesy. This will help counter any accusations that Human Rights are being abused (although the LBEN process and an owner's rights of appeal are considered to adequately address such matters). If there are any doubts about the impact of the Human Rights Act, advice should be sought from the council's legal team.

Procedures on the day of the direct action

42. If there has been any delay between formal approval to proceed and the direct action itself, it is important to ensure that all the participants are primed and ready to progress at the appointed time; checking with them on the preceding working day. This is crucial and must not be left to the last minute.

43. A suitably worded council press release and last minute notification to

the press may sometimes be used to emphasise the last resort nature of the council's action and the harm already done to the listed building which the council intends to put right. The intentions should be to attract positive press coverage; act as a deterrent for similar contraventions; and demonstrate the council's positive stewardship of the local historic environment. [\[14\]](#)

44. A recommended order of action is as follows:

- At the appointed time, upon commencement of the direct action, the lead officer should announce and identify for the benefit of the person[s] being acted against, all those present and participating on behalf of the council and their roles in the direct action;
- Remind the person[s] being acted against, the intention to undertake the works in default notwithstanding previous opportunities to comply, and past the correspondence and statutory Notices (and any appeals) from the council;
- If necessary a copy of the committee resolution authorizing the action should be produced and where needed, a copy the magistrate's warrant; [\[15\]](#)
- Should any verbal resistance be encountered, a warning should be given that obstruction in the execution of the direct action could result in a criminal prosecution;
- If there is any possibility of physical resistance, officers and operatives should withdraw to a safe distance and the police should be requested to invoke a warning for potential breach of the peace, with the direct action only recommencing accompanied by a continuous police presence;
- The works required under the direct action to remedy the breach of listed building control should then proceed in an orderly, efficient, pre-planned manner;
- Any works necessary to incidental or ancillary unsafe/unstable structures in the interests of site safety (and only to facilitate the direct works to the listed building) should be recorded/documentated as they proceed;
- Any fixtures or chattels needing to be removed from the building to facilitate the direct action need to be carefully and thoroughly recorded (photography advised) before being safely and securely stored;
- All reasonable steps should be taken to provide the owner(s) of such fixtures or chattels with information regarding their location and the method for subsequently recovering them; [\[16\]](#)
- A photographic (and if practical and appropriate, a video) record of

the works should be made to counter any subsequent claims of damage to the building or loss of fixtures or chattels;

- If the direct works involve having to force access, a record should be made of the entry and the property should be left secure on completion of the works; and if for example, debris is removed the property should be left tidy. If the person[s] being acted against is not present on completion, arrangements should be made to deliver new door keys *etc* or make arrangements for them to be collected.

Post-facto actions

45. Following completion of the direct works, as a matter of priority, the local authority's Land Charges department should be notified of the recoverable sums that will be entered as a charge against the property in the Register of Local Land Charges. If the debt remains unpaid, the authority should then take steps to register the debt with the land at HM Land Registry. [\[17\]](#)

Conclusions

46. Direct action may be seen as the enforcement route of last resort to resolve LBENs that have not been complied with, and while such action must be proportionate it should be used more frequently on otherwise intractable cases.

47. Direct action carried out in default is time consuming and without certainty of recovering the full cost. This must be a consideration when carrying out any 'cost/benefit analysis'.

48. Direct action can help secure the authority's reputation for sound heritage stewardship - a clear community benefit; and act as a deterrent to heritage crime in line with government heritage policy.

49. In initiating action it is essential to document the case, thoroughly and consistently, particularly as the time required from start to finish means it may take a considerable time to resolve.

50. Careful preparation is a key attribute with the authorisations in place, legal powers confirmed and the facility to enter the property agreed; and all the participants knowing their exact roles so that the works can proceed with precision, efficiently and cost effectively.

51. Although there will inevitably be tensions when using a stressful

procedure of last resort, especially with the owner present, the works should be conducted with professionalism and courtesy throughout, whatever the provocations.

52. While for more simple cases most costs can be defined in advance and such works carried out by the local authority's own staff, more complex cases may require specialist advice and tendered works contracts and may also require coordination with other agencies, for example, the police and highway authority.

53. More complex cases may result in additional costs that may not always be recoverable, although in some instances this may be recouped by the sale of chattels removed from the site. A charge on the land may take longer to recover and authorities may decide that the recovery of their costs might proceed more quickly if pursued as a common debt.

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Endnotes

[1] This being 'any expenses reasonably incurred' S42(1)(b).

[2] See IHBC Guidance Note 2015/2 June 2015 and in particular paragraph 46 concerning the London Borough of Hackney v Manorgate Ltd (2015) which in a planning context (Section 187B of the Town and Country Planning Act 1990) asked why the authority had not considered direct action prior to seeking an injunction as these are discretionary remedies and local planning authorities must be prepared to set out the other enforcement options they have considered before concluding that an injunction is the best course of action.

[3] The relevant case law is contained in *R v Greenwich LBC ex parte Patel [1985] JPL 851* where the Court of Appeal held that because one of the owners of the land had not been served a copy of the (planning) Enforcement Notice [as his existence was unknown to the authority] and

having been given the opportunity to do so, could have mounted a successful appeal, the Court could question the Council's decision to take direct action - although not the validity of the Notice itself.

[4] See IHBC Guidance Note 2014/2 September 2014 and in particular paragraphs 59-60.

[5] P(LB&CA) Act 1990 (as amended) Section 88A (4)(a) and (b).

[6] The equivalent provision in the P(LB&CA) Act 1990 to Section 330 in the Planning Act 1990.

[7] Local Government Act 1974, Section 36

[8] If a magistrate's warrant is required under Section 88A of the 1990 Act the procedure for obtaining one is explained in the IHBC Advice Note on Forced Entry accessible on the IHBC website at:

http://www.ihbc.org.uk/resources_head/page47/index.html.

[9] Thorough planning and attention to detail is essential. The action should not be stymied by failing to have suitable equipment: for example, bolt croppers or a working torch or a fully charged-up camera, or appropriate personnel: for example, the absence of a locksmith and/or a carpenter to facilitate entry and secure the premises upon completion.

[10] Unless this is in relation to action associated with Section 54 of the 1990 Act or Section 77 of the Building Act 1984 with all the procedural issues that apply.

[11] It is important to draw a distinction between chattels and those fixtures that may form part of the special architectural and historic interest (and may be referred to in the list description) and which it will be necessary to ensure are returned to the building and re-affixed. [See also Endnote 16].

[12] There is no statutory timescale but 14 to 28 days would be reasonable for anything less than substantial works - where the agreed timescale might be longer but still requiring a clear demonstration that a start had been made and that the specified would be completed in full.

[13] Some practitioners draw an analogy with 'running a military campaign'.

[14] Although the advice in Planning Policy Guidance Note 15 has been withdrawn, the advice from the Secretary of State in paragraph 3.47 is still entirely sound in that 'unauthorised work may often destroy historic fabric

which cannot be restored by enforcement (but) ...well publicised, successful prosecutions can provide a valuable deterrent ...'. This advice regarding publicity as a deterrent applies equally well for cases of direct action.

[15] ...which, with the exception of urgency, should have been served at least 24 hours before.

[16] ...and to have such procedures in place in the event that if the owner(s) does not recover the chattels within a defined period, the Council may dispose of them or sell them to recover the expenses incurred in taking the direct action.

[17] Until such times as the local authority Local Land Charges system is abolished.