

Report to District Development Control Committee



**Epping Forest
District Council**

**Report reference: ENF/0337/07
Date of meeting: 4 August 2009**

Subject: Direct Enforcement Action - Car wash at 1 – 3 Coopers Hill, Ongar

**Officer contact for further information: David Thompson (01992 564108)
Stephan Solon (01992 564103)**

Committee Secretary: Simon Hill (01992 564249)

Recommendation:

- (1) That the Director of Planning and Economic Development be authorised to take direct action under Section 178 of the Town & Country Planning Act 1990 on one or more occasions to secure compliance with the requirements of the Enforcement Notice on the Car Wash at 1-3 Coopers Hill, Ongar issued 11 December 2007, subject to Cabinet approval to incur associated expenditure; and**
- (2) That a report be made to the Cabinet accordingly.**

Background:

1. On 9 November 2007 a planning application proposing the continuance of use of the land for car valeting and as a hand car wash together with the retention of a canopy was refused, Ref EPF/1860/07. The decision to refuse planning permission was on the basis that the proposal would intensify the use of a sub-standard existing access onto a classified highway that would be harmful to highway safety.
2. An Enforcement Notice was issued on the 11 December 2007 requiring the cessation of the use of the land as a hand car washing centre and the removal of the canopy and all equipment and movable structures brought onto the land in connection with the use ('the Notice'). The period given for compliance with the requirements of the Notice was 2 months from the date the Notice became effective. The authority to issue the Notice included authority for the Head of Legal Administration and Estates Services (now the Director of Corporate Support Services) to commence criminal and/or civil proceedings to remedy a breach of the Notice.
3. Subsequent appeals against the Notice and the decision to refuse planning permission were dismissed on 13 May 2008 when the Notice became effective. The compliance date was therefore 13 July 2008.
4. Prior to the appeal decision, on the 23 January 2008 a further planning application proposing the erection of car washing and valeting equipment, new island for directing traffic and full width lowered kerb to site frontage was refused, Ref EPF/1831/08. The decision to refuse planning permission was on the same basis as the decision on application EPF/1860/08. No appeal was made against that decision.
5. The requirements of the Notice were not complied with by the compliance date so the Council prosecuted the owner and occupier of the land for failing to comply. On 26 January 2009 at Harlow Magistrates Court the tenant of the car wash Mr Artur Hasani pleaded not

guilty to the offence of failing to comply with the Notice. The Magistrates found him guilty and fined him £300 and ordered him to pay £200 towards the prosecution costs. The freehold owner of the property Mr James Mason also pleaded not guilty but the Magistrates found him not guilty on the basis that they were satisfied he had done everything he could be reasonably expected to do to secure compliance with the Notice.

6. The owner and occupier were reminded of the need to comply with the requirements of the Notice but they have failed to comply with it. Consequently Officers are considering prosecuting the owner and operator of the car wash again but are mindful the previous prosecution has not achieved compliance with the Notice. As the occupier remains the same a second prosecution may result in a higher fine than previously. In respect of the owner he may not be able to convince the Magistrates a second time that he has done everything possible.

Report:

7. The Council has the power, under Section 178 of the Town and Country Planning Act 1990, to enter the land and take steps to secure compliance with the requirements of the Notice. Any expenditure could be recovered as a simple debt and additionally be secured as a charge against the land which would be recovered on the completion of any future transfer or sale of the land.. In this case, since the requirements of the Notice have not been complied with despite prosecution and the issue of further written requests to comply, Officers have taken steps to explore the option of taking direct action to secure compliance with the Notice.

8. There are practical and legal issues associated with what specific steps a Council can take in exercising its power under Section 178 to secure a cessation of a use. It is very unlikely any steps could be taken to physically stop people washing cars by hand on the land or preventing customers bringing cars on the land to be washed. However, measures such as removing taps are likely to be possible. These would be explored more fully as part of preparing a report setting out estimated costs of the action for presentation to Cabinet if this Committee agrees to give conditional authority to take direct action as detailed in the recommendation of this report. That exercise would involve consulting with Legal Services on the specific steps proposed.

9. There are no such issues in respect of the steps the Council could take to secure compliance with the requirements to remove a canopy erected on the land and remove all equipment and movable structures brought onto the land in connection with the use. In respect of those requirements it is clear that the Council would have to carry out demolition works to remove the canopy and it would have to take away equipment such as vacuum cleaners, buckets, hose pipes, water pipes above ground, water storage containers and equipment stores.

10. Materials removed from the site while taking steps required by the enforcement notice must be held for at least 3 days and if the owner claims them within that period they must be returned (Reg 14 of the Town and Country Planning Regulations 1992) However, if they are not claimed, then the Council can sell the materials and retain any proceeds up to the amount of expenditure incurred by the Council in taking the steps to comply with the Notice. If a debt remains to the Council after the materials have been disposed of, the Council can place a charge upon the land so that monies from any future sale may be offset against the costs incurred and recover as a simple debt.

11. Alternatives courses of action open to the Council are a further prosecution (which in fact is being considered as an additional action) and seeking an Injunction from the High Court against the owner of the land and operator of the use. Clearly prosecution in the Magistrates' Court has not worked to cease the use to date,. A successful prosecution against the Owner may secure compliance with the requirements of the notice, but that is uncertain.

12. The process of seeking and enforcing an injunction can be costly and time consuming, although costs are likely to be recoverable in this case. The High Court may grant the Council an injunction requiring named persons to comply with the requirements of the Notice. However, if the persons an Injunction is directed against fail to comply with its terms then the Council could seek to have them committed for contempt of court.

Human Rights Considerations

13. Taking Direct Action could be considered an infringement of The First Article of the First Protocol of the European Convention of Human Rights. The First Article of the First Protocol states persons are entitled to the peaceful enjoyment of their possessions. That right is a qualified right and interference with it by a public authority is permitted in accordance with the law as necessary for the protection of the rights and freedoms of others and the general interest. Accordingly, there is a fair balance to be struck between individual's rights, the public interests protected by the planning system and those of other persons.

14. In this case it is considered that since the use of the land causes clear harm to the interests of highway safety the balance falls against the rights of the owner and occupier of the land. The Council has attempted on a number of occasions to gain the cooperation of the owner and occupier to remedy the harm caused and has successfully prosecuted for failure to comply with the Enforcement Notice but the use is continuing. It is therefore necessary to take alternative action including direct action to secure compliance with the requirements of the Notice. In the circumstances taking direct action to remedy the harm caused by the continuation of the unlawful use is considered to be proportionate.

15. The owner and occupiers Article 6 right to a fair trial has in this case already been provided by the appeal process.

Conclusion:

16. Following the refusal of planning permission and dismissal of appeals it has been established that the continuance of the use of the land as a hand car wash and the retention of a canopy required for the use is not acceptable in planning terms. Since the Council's actions to date have not been successful in bringing the unauthorised use to an end, if the Council does not seek to uphold the terms of the Notice by taking further alternative action to secure compliance this would result in the continuation of harm to highway safety. Moreover, if the Council does not take such action to uphold the Notice it could lead to the owners of other land and operators of similar unlawful uses disregarding the Councils planning control function in the future. Although the Council could prosecute the owner and operator in the Magistrates' Court again it is at best a course of action that is used in conjunction with other action.

17. The options for alternative action are to either take direct action under Section 178 of the Town & Country Planning Act 1990 or to seek an Injunction from the High Court against the owner of the land and operator of the use. In this case taking direct action is likely to achieve compliance with the requirements of the enforcement notice faster than could be achieved if the Council sought and then had to take steps to enforce an Injunction. However, given the nature of the use it could resume with little cost to the land owner and operator therefore any direct action would most probably have to be repeated a number of times in quick succession to secure permanent compliance with the Notice. Nevertheless, the costs of taking direct action in this case are likely to be relatively modest when compared to those of seeking and enforcing an Injunction, although the Council should be able to recover its costs whichever of the alternative courses of action were taken (subject to the status of the proposed defendants).

18. If direct action is unsuccessful it would still be open to the Council to seek an Injunction at a later date. Authority already exists to pursue that option as part of the original authority.

19. It is therefore recommended that authority be given to the Director of Planning and Economic Development to take direct action under Section 178 of the Town & Country Planning Act 1990 on one or more occasions to secure compliance with the requirements of the Notice, subject to Cabinet approval to incur associated expenditure.