

DRAFT 2.3.16

# A Review of Procedures for Planning Applications and Enforcement

By a Working Group of the Environment, Culture and Communities Overview and Scrutiny Panel



March 2016

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## Acknowledgements

The Working Group would like to express its thanks and appreciation to the following people we met for their co-operation and time. All those who have participated in the review have been thanked for their contribution and sent a copy of this report **[To be done after report finalised]**.

### Elmbridge Borough Council

Councillor Andrew Kelly	Planning Cabinet Member
Councillor James Browne	Housing Cabinet Member
Councillor Barry Cheyne	Chairman of Planning Committee and Chairman of West Area Planning Sub Committee
Karen Fossett	Head of Planning Services
Mark Behrendt	LDF Planning Policy Manager
Katie Baldwin	Senior Enforcement Officer
Edward Chetwynd-Stapylton	Principal Planning Officer - Appeals
Julie Cook	Head of Housing
Colin Waters	Housing Strategy & Enabling Manager

### Bracknell Forest Council

Councillor Dudley	Chairman, Planning Committee.
Councillor Turrell	Executive Member for Planning and Transport
Max Baker	Head of Planning
Richard Beaumont	Head of Overview and Scrutiny
Andrew Hunter	Chief Officer: Planning and Transport
Rachel McKoy	Assistant Borough Solicitor (Planning)
Nigel Moore	Team Leader Implementation, Spatial Policy
Ben Temple	Principal Planning Officer (Enforcement)

## **1. Foreword by the Lead Member**

- 1.1 The Environment, Culture and Communities Overview and Scrutiny Panel had not previously carried out a review of the Council's procedures for Planning Applications and the Enforcement Team. Members agreed that the high visibility and interest frequently commented upon by residents made it a worthwhile subject to scrutinise.
- 1.2 The Panel established a Working Group to carry out this review. Our work has been thorough and therefore taken a little longer to complete. It was difficult at times to contain the process to the agreed scoping document. It became very evident that so many areas interact with other aspects of both the Planning Department and other departments throughout the Council.
- 1.3 I wish to express thanks to my fellow councillors who worked on the review and to all the officers who supported us throughout the process. Thanks also to Elmbridge Borough Council's members and officers for their help on our visit.
- 1.4 The findings and recommendations to the Executive have not been arrived at lightly. Many hours of listening, learning and discussing have taken place, both within and with others externally. The Working Group trust the Executive will find them helpful and acceptable.

**Councillor Robert Angell**  
**Lead Working Group Member**

## 2. Executive Summary

2.1 This report summarises the review by an Overview and Scrutiny (O&S) Working Group (the Group) of procedures for planning applications and enforcement in Bracknell Forest, which took place between August 2015 and February 2016.

2.2 The remainder of this report is organised in the following parts:

Part 3 Gives information in respect of planning applications and enforcement, and summarises how we set about our review.

Part 4 Contains the conclusions we have reached following our review, on which we have based a number of recommendations to the Council's Executive.

At the end of our report is a glossary of terms used and two appendices containing detailed supporting information and summaries of the meetings we held.

2.3 Our overall conclusions are that:

- a) The information gained from this review should be of interest to all councillors
- b) In most respects, the answers we received to our concerns were reassuring
- c) The Council's performance on Enforcement had slipped. That has recently improved, and the new Local Enforcement Plan is a much sounder way to proceed. We were glad to have contributed to the production of that plan.
- d) We have identified various improvements which we think would be of benefit to the processes concerning planning applications and enforcement, at no additional net cost to the Council.

2.4 Our recommendations to the Executive, for consultation with the Planning Committee, are in part 4 of this report. They cover a variety of improvements which we believe are reasonable and necessary.

2.5 Members of the Working Group hope that this report will be well received and we look forward to receiving responses to its recommendations.

2.6 The Working Group comprised:

Councillor Angell (Lead Member)  
Councillor Mrs Angell  
Councillor Brossard  
Councillor Finnie  
Councillor Leake  
Councillor Porter

### 3. Information Gathered

We set out in Appendix 2 of this report: the role of a Local Planning Authority in England, the responsibilities of Councillors and planning Officers, and summaries of the meetings we held. Key information gathered during our meetings is included in this part of the report.

#### The Bracknell Forest Context

3.1 We received an informative presentation from officers at our first meeting on 24 August. The key points from the presentation were as follows.

3.2 The Planning Service plays a key role in preparing and delivering the Council’s strategy and objectives (e.g. A Town Centre fit for the 21<sup>st</sup> Century). It does this through proactive engagement with other Council Departments and partners, statutory bodies, the local community and developers. In addition to Development Management, the Planning Team is also responsible for

- Policy Planning (Plan Making): producing ‘The Local Plan’, the framework for assessing planning applications, and Neighbourhood Planning
- Planning to meet the Borough’s infrastructure needs, and operating the Community Infrastructure Levy (CIL) and Section 106<sup>1</sup>
- Delivery of complex strategic sites
- Heritage / Urban Design
- Special Protection Area mitigation (Suitable Alternative Natural Greenspace).

3.3 The **Planning Service Statistics for August 2014 – July 2015** were

Planning Applications received - number	1663
Major applications determined in time (including extensions)	77%
Minor applications determined in time (including extensions)	87%
Appeals - number. [The England average was 33]	33
Appeals - percentage dismissed [The England average was 68%]	70%
Pre-application enquiries	466
Enforcement cases opened	431
S.106 income received	£2,013,186
Complaints received (at stage 2 and above)	9
Compliments received	45

3.4 Other key information we elicited about the service was:

- 1379 Planning applications had been received in 2013/14, and 1518 in 2014/15.
- In 2013/14, the Planning Committee determined 51 cases (7% of all 827 decisions), and in 2014/15 59 cases (6% of all 1006 decisions).
- In 2013/14, the Committee’s decisions overturned officers’ recommendations in 11 cases (22%), and in 2014/15 5 cases (9%).
- The cost of dealing with an appeal can vary considerably depending on appeal type, complexity and length e.g. Public Inquiry. A benchmarking report

<sup>1</sup> Section 106 of the Town and Country Planning Act allows the Council and persons interested in land to agree contributions, arrangements and restrictions as *Planning Agreements* or *Planning Obligations*, in order to offset the costs of the external effects of development.

dated 21.3.2012 by CIPFA indicated that BFC staff costs for dealing with an appeal were £2,314.

- A benchmarking report dated 21.3.2012 by CIPFA indicated that BFC costs for processing a delegated application was **£101** (compared to average of £115 within the Benchmark Group) and **£1,089** for a Committee application (average was £957). The Group accepted officers' representations that repeating this costing exercise would be unduly time consuming.
- The percentage of Planning Applications subject of pre-application requests was 27% in 2013/14, and 17% in 2014/15.
- On planning enforcement, in the period 1 April 2013 to 31 July 2016, five appeals had started, two had been dismissed, and there had been a partial dismissal in three cases. In the period 1 April 2014 to 30 June 2015, 681 enforcement cases had been opened, and 713 cases closed.
- In the two years 2013/15, applicants appealed against 11 of the Committee's decisions to refuse planning approval, and 6 of these (55%) were dismissed by the Planning Inspectorate. In the two years 2013/15, applicants appealed against 40 of the officers' decisions to refuse planning approval, and of these 27 (68 %) were withdrawn or dismissed.

3.5 Applications can take many forms, from Full Applications, to Listed Buildings consents, works to protected trees, and Conservation Area consents, for example. These all undergo a structured set of processes – many determined by statute – to ensure that they are reviewed and determined properly and on time.

3.6 The Planning service is headed by the Chief Officer: Planning and Transport, and comprises three teams:

- Planning Policy and Implementation (14 officers)
- Development Management (20 officers)
- Planning Support (6 officers)

#### Why Did We carry out This Review?

3.7 The Environment, Culture and Communities Overview and Scrutiny (O&S) Panel decided to review key aspects of the procedures for Planning applications and Enforcement because:

- We had not carried out a focussed review of the Council's performance in this very important function previously.
- We wanted to raise awareness and build members understanding of the topic.
- We had some concerns about the procedures, on which we wanted to get information and explanations.
- We wanted to make an input to the new Local Enforcement Plan, which was under preparation by officers, before it was considered and approved by the Council's Executive.
- We wanted to see whether improvements could be made, and to make recommendations accordingly.

#### Approach of the Working Group

3.8 The approach we took to our work was to meet a range of people inside and outside the Council with relevant knowledge and experience of the issue, and we supplemented this with research and analysis of our own, supported by Council officers. This was all set out in detail in the standard scoping document for O&S reviews, at Appendix 1.

## 4. Conclusions and Recommendations

From its investigations, the Working Group (the Group) has drawn the following conclusions, on which we have based a number of recommendations to the Executive, for them to consider in consultation with the Planning Committee.

### General

- 4.1 This has been an interesting review. In addition to carrying out a focussed scrutiny review of the Council's processes and performance in a very important function for the first time, we think we have achieved our aims of:
- Raising awareness and building members' understanding of the topic. Once our report has been adopted by the Panel, we will send the report to all Members.
  - Getting information and explanations for our concerns about planning procedures
  - Making an input to the new Local Enforcement Plan, before it was approved by the Council's Executive
  - Identifying possible improvements to planning procedures.
- 4.2 Our overall conclusions are that:
- The information gained from this review should be of interest to all councillors
  - In most respects, the answers we received to our concerns were reassuring
  - The Council's performance on Enforcement had slipped. That has recently improved, and the new Local Enforcement Plan is a much sounder way to proceed. We were glad to have contributed to the production of that plan.
  - We recommend below various improvements which we think would be of benefit to the processes concerning planning applications and enforcement, at no additional cost to the Council.

### Planning applications involving council officers

- 4.3 The Chief Officer: Planning and Transport's delegated authority requires that any planning applications from members of staff in that division, also any staff involved in the decision making process, shall be determined by the Planning Committee (PC). To achieve and maintain high standards of governance, **we recommend that the Council should require Committee approval for planning applications by any Council employee.**

### Recognition of the different roles that officers and members have in the planning process

- 4.4 In all councils, there is an inevitable tension in the statutory process for making decisions on planning applications. Members without a professional planning background exercise their democratic role, representing residents' interests, when determining applications. Those decisions are informed by reports from professional planning officers, who are required to produce dispassionate, balanced and informative reports. Determining applications requires a general overall judgement, and in many aspects this is unavoidably rather subjective, which can give rise to differing viewpoints. That occasional tension, which can be constructive, needs to be understood and accepted by councillors (who possess the statutory planning powers)

and officers (who exercise those powers under authority delegated by councillors) alike. To help minimise this aspect **We recommend that induction training for PC Members and Planning Officers should openly recognise the separate roles of Members and officers, and encourage mutual understanding and respect between the two groups.**

- 4.5 Ward Members have an important role and a strong interest in Planning Applications as they are the Council's local point of contact for representations by residents. It is good that Members are already informed of proposals in the pipeline through the 'Weekly List' of new pre-applications and applications.

#### The split of responsibilities between the Planning Committee and planning officers

- 4.6 The scheme of delegation, which establishes the division of responsibilities for determining planning applications between the Planning Committee on the one hand, and planning officers on the other hand, requires balance. For example:
- There are too many applications for the Committee to consider, so of necessity many must be delegated to officers to determine
  - The cost, in terms of Member and officer time, is much higher for committee decisions than officer decisions
  - The more significant, contentious applications, and those from officers personally should properly be determined by elected representatives.

On the whole, we think the balance is about right, but we consider that some changes are needed, as follows.

- 4.7 The research we carried out of other councils' arrangements for determining whether a Planning Application should be decided by the Planning Committee (PC) leads us to recommend some changes to the delegation arrangements. The Planning Committee's agenda should not be over-loaded, otherwise meetings can take a great deal of time, or insufficient time is given to consider all the Applications before the Committee. We think that, currently too many minor applications are being determined by the PC, whose meetings consequently often run for too long into the evening, affecting the quality of debate. This also slows down the service for applicants, who are awaiting the Council's decisions, since the PC meets just once monthly. To remedy this, **we recommend:**

- **So as to minimise the number of minor and non-controversial Planning Applications referred to the Planning Committee, there should be an increase in the threshold for the numbers of objections resulting in referral to the Planning Committee, from 'more than 3' to 'more than 5', and the criteria for referral could usefully distinguish between major and minor developments.** The current trigger point of three can be met very easily, and setting the bar higher should result in only those applications attracting substantial opposition (i.e. beyond the immediate neighbours of the applicant) being put before the PC.
- **We also recommend that the increase to 'more than 5' objections should be accompanied by a change to the 1-3 objections procedure and move to a 3-5 objections procedure, by which the ward councillors and the chair are provided with details of a scheme and the objections to see if they wish to bring the scheme to the PC for determination.**

- 4.8 The Committee's time should not be wasted on matters which are irrelevant to their determination of applications. Accordingly, **we recommend that any objections that**

**do not refer to any Planning issues should be excluded from the calculation of the number of objections (though the existence of all objections should be recognised in the Case officer's report).** When introducing this change, it would be important to set out those criteria that would not be considered planning matters so that all parties were clear on these.

#### Operation of the Planning Committee

- 4.9 From our observations and participation, we think our Planning Committee works quite well. Nevertheless, **the Executive and the PC should consider making possible improvements to its proceedings:**
- Members of the PC are sent full reports on all applications to come before the PC, a week in advance. Whilst some scene-setting at the Committee meeting is necessary, in order to make the best use of the Committee's time, **presentations by officers should be shorter, focussing on the key issues, plans and photographs.**
  - The ordering of the PC's agenda should not be determined by the committee clerk and simply be in application number order, as at the time of our review. Instead, **the Chairman of the Committee should have an agenda-setting meeting with a senior planning officer to determine the order of the agenda.** To ensure they get the time and attention they deserve, we recommend that the most significant applications should be near the front, always accepting that applications attracting large numbers of people to the meeting need to go first on the agenda.
  - We acknowledge that the length of the Committee's agenda and the extent of public interest in agenda items cannot be predicted accurately in advance. Nevertheless, PC meetings tend to run too late, making it hard for people to maintain concentration. The Council could consider starting meetings earlier than 7.30pm, but we would not recommend this as it might exclude Members with day-time commitments. A better way might be **to have more precise time allocations to agenda items by the Chairman and a warning point at 10.30pm, with a cut-off point at 10.45pm. However, this should not mean that decisions are deferred as the national standard deadlines for determining applications need to be adhered to. These new arrangements should be reviewed after six months in the light of practical experience.**
- 4.10 In order that the PC should not be over-burdened with minor matters, we recommend that **Members should be reminded that their right to request that an Application should go before the Committee should be exercised judiciously, and their request should only be accommodated if they provide good cause and valid planning reasons for doing so. The Chairman of the PC should be informed by officers of these requests and – in consultation with the Vice Chairman – they should have the right to decline Members' requests if they believe it would not be a good use of the PC's time.**
- 4.11 Any material amendments to a previously approved planning application and the associated conditions imposed by the Council requires the applicant to submit a fresh application for approval. Additionally, officers regularly exercise their judgement in deciding not to fully enforce some planning conditions, and they may also approve 'non-material' amendments to previously approved planning applications, even when the application was approved by the Planning Committee. We do not believe it is appropriate that officers are allowed to decide not to enforce planning conditions previously set by members of the Planning Committee, and other significant issues.

**We recommend that the scheme of delegation is amended to require that, for applications previously approved by the PC, any subsequent non-material amendments or significant changes to planning conditions should be notified to the Chairman and one Planning Committee member from the affected ward to decide whether the change should be considered by the PC.**

#### Appeals against the Council's decisions to refuse planning approval, and complaints

- 4.12 Applicants who have their planning applications turned down can appeal to the Planning Inspectorate to get the decisions overturned, and many people do so. We note that the Planning Inspectorate allowed 41% of all householder appeals in England in 2014-15 (in the preceding four years it ranged from 35-37%). On Enforcement appeals to the Planning Inspectorate, we note that they upheld 46% of Enforcement Notices, and varied 29%. The remaining ENs were quashed or planning permission was granted.
- 4.13 We were interested to learn that, although better than the England averages above, a seemingly high proportion of the Council's decisions to refuse planning approval were challenged successfully by dissatisfied applicants. In the two years 2013/15, applicants appealed against 11 of the Committee's decisions to refuse planning approval, and 6 of these appeals (55 %) were dismissed by the Planning Inspectorate. In the two years 2013/15, applicants appealed against 40 of the officers' decisions to refuse planning approval, and of these 27 (68 %) were withdrawn or dismissed. We do not think any new action is needed on this area.
- 4.14 The information on the number of successful appeals against PC decisions showed that there had only been one case in the two years 2013-15 where costs had been awarded against the Council. We think this is at odds with the strong messages given to members of the Planning Committee about the risk of cost consequences to the Council in the event of them refusing an application, contrary to an officer recommendation. The Planning Committee can take some reassurance from this, and not shy away from acting against officer recommendations where they feel this is justified on sound planning grounds.
- 4.15 On complaints, it is inevitable that the approval of some applications and the rejection of others will give rise to some localised disagreement and controversy. In that regard, the number of complaints about the planning function was reassuringly low.

#### Planning Enforcement – Performance

- 4.16 We acknowledge that there are limitations in being able to follow-up anonymous allegations that there have been breaches of planning control, and it is right that officers encourage people to identify themselves, offering to keep their details confidential. However, we think that public confidence in the enforcement function is eroded by the blanket policy not to act on any anonymous reports. Neither are we persuaded by officers' view that they should not be followed up as they do not know who to give feedback to, or that the reports might be malicious. **There are relatively few anonymous reports of breaches in planning, and we recommend that the Enforcement Team should follow them up as far as they are able to**, in the same way as the Police have an anonymous 'Crime stoppers' facility. Otherwise, important infringements of planning control may be missed.
- 4.17 Our visit to Elmbridge BC, we were impressed by their strong performance on planning enforcement. They have no backlog. This had been achieved with just three

staff. 528 enforcement investigations commenced in that Borough in the year ended 31 October 2015.

- 4.18 We are concerned that a sizeable Planning enforcement backlog built up in our Council, and this had not been brought to Members' attention in the Quarterly Service Reports or elsewhere. We were told that 431 enforcement cases were opened in 2014/15; and there were as many as 103 live enforcement cases which originated more than one year ago, of which 60 were over two years old, and 45 were over three years old. We appreciate that some of these cases were long-running as they involved revised applications or legal action, for example, but that was not the explanation in most cases. Confidence in the enforcement function requires transparency over the backlog, and continuing reductions in that backlog. **We recommend that the Planning Committee's role should not be confined to determining individual planning applications; there should be an open, quarterly report to the Planning Committee on the performance on enforcement, as well as other key performance information, such as the numbers of planning applications and appeals.**
- 4.19 We are reassured that since 2014 management of the enforcement function seems to have improved, and the backlog of enforcement cases has reduced. We acknowledge that the backlog was probably mainly due to staff shortages, which we were told have now been resolved. Failing to deal promptly with suspected planning breaches undermines the public confidence in the Council's protection of the community's interests. **We recommend that if in future there are insufficient staff resources to progress enforcement cases, then a request should be made for temporary additional staff.**
- 4.20 To minimise the incidence and cost to the Council of new enforcement cases, **we recommend that guidance to planning applicants, also formal notices giving planning permission, should clearly state that any failure to comply with planning conditions will be viewed seriously and will lead to an automatic fine, similar to that recently introduced by the Council for failures to notify change in circumstance affecting Council Tax.**

#### Local Enforcement Plan

- 4.21 We suggested a number of improvements to the draft Local Enforcement Plan and we were pleased to see that most of these<sup>1</sup> were included in the final version of the plan approved by the Executive.

#### Section 106 developer contributions

- 4.22 As an outcome of one of our meetings, the Head of Planning offered that in future, S106 Heads of Terms would be included in officer reports. We welcome this development, which will lead to better informed decision making.

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<sup>1</sup> The Executive report in October 2015 on the Local Enforcement Plan stated: 'The draft LEP includes suggested changes made by the Overview and Scrutiny Working Group as part of their review of the Planning Service. All their recommendations have been included apart from their suggestion that the target for carrying out an initial site visit for priority B cases should be 5 days where practicable rather than 7. Officers consider that a solid measurable target would be more appropriate and that 7 working days is a suitable target commensurate with the available resources. It also compares well with other local planning authorities, some of whom have a 10 day target.'

## Affordable Housing

- 4.23 Like much of South East England, there is a shortage of Affordable Housing (AH) in Bracknell Forest, and this is likely to worsen as the population is growing and house prices and market rate rents continue to rise. As well as being frustrating for people on the housing register awaiting affordable housing, this has a cost consequence for the Council, for example in our paying for temporary accommodation for homeless people. The main provision of new AH comes from developers of new private housing paying for AH units to be built, either directly or through a commuted sum (cash contribution). We accept that requiring an AH provision must not be allowed to undermine the commercial viability of the development, but we are not convinced that the maximum level of suitable AH is being achieved. **We recommend that this is further reviewed by the Executive, particularly the robustness of the Council's challenge to developers' representations about commercial viability.**
- 4.24 The type and location of the AH dwellings is important, and this is unlikely to be best served by this being determined solely by the commercial developer, as at present. **We recommend that in the event that the offered AH units are unsuitable, the Council should make more frequent and innovative use of requiring an alternative financial contribution, for use perhaps in grant-aiding the provision of suitable AH units by a Housing Association.** On our visit to Elmbridge, this arrangement seemed to be working well. We note that this approach is being taken to the AH aspect of a major development near Crowthorne, and we welcome that innovation.
- 4.25 There is a case for considering whether the requirement for a contribution to new AH should not be confined to developments over 14 dwellings, as at present. However, we note that the Council has already decided to charge a higher Community Infrastructure Levy for housing developments of less than 15 units (currently the threshold for the requirement of affordable housing). Consequently, if there were to be an Affordable Housing contribution required for developments under this threshold, then the CIL rates would have to be reviewed and probably lowered. The balance between CIL and AH is a policy decision for the Executive.

## Member training

- 4.26 It is essential that Members of the Planning Committee are properly equipped for their statutory role. We consider that the PC members receive good, on-going training. We were similarly impressed by what we learned about Elmbridge's programme of Member training on Planning issues.

## Cost recovery

- 4.27 The Council, like other local authorities, is experiencing great pressure on its finances, such that we need to look for every opportunity to obtain income wherever reasonable and permissible. The cost of defending appeals against the Council's Planning decisions can be substantial. We were told that it was possible for the Council to apply for costs when defending an appeal, but this would only be justified rarely. We do not consider this to be a fair burden on Council Tax payers, and **we recommend that wherever an applicant has acted unreasonably, the Council routinely seeks recovery of costs of defending appeals.**

- 4.28 The costs of determining planning applications are intended to be met from fees, set by the Government. If someone has not complied with planning conditions or otherwise breached planning rules, no fees are applied to recover the Council's costs of enforcement. We consider it is unfair for council tax payers unconnected with Planning issues to bear the cost of the related enforcement action, and we were disappointed to learn from officers that the Council is not legally permitted to seek recovery of costs, save in limited circumstances under the Proceeds of Crime legislation. We understand that the Local Government Association has recently urged the Government to allow councils to set their own planning fees, as they often do not cover the cost of processing applications. **We recommend that the Executive supports the LGA initiative and makes representations to the Government to allow the Council to set fees to recover more of its planning-related costs than is currently allowed.**
- 4.29 It seems that there is an opportunity to increase charges for the legal costs of producing S106 agreements. The Council's charge of £160 per hour is well below some other councils' of £250, for example. Given the pressure on the Council's finances, this should be pursued quickly, and **we recommend that the Executive should increase the S106 legal fees charge and review all Legal's other fees and charges to determine whether income is being maximised.**

## 5. Glossary

AH	Affordable Housing
BC	Borough Council
BFC / 'The Council'	Bracknell Forest Council
CC	County Council
CIL	Community Infrastructure Levy. A levy that local authorities can choose to charge on new developments in their area to fund infrastructure.
DCLG	Department of Communities and Local Government
EBC	Elmbridge Borough Council
EN	Enforcement Notice
HB	Housing Benefit
HMO	House in Multiple Occupation
LEP	Local Enforcement Plan
LPA	Local Planning Authority
NPPF	National Planning Policy Framework
NPPG	National Planning Practice Guidance
O&S	Overview and Scrutiny
PA	Planning Applications
PC	Planning Committee
PPG	Planning Policy Guidance
RSL	Registered Social Landlord (usually a Housing Association)
RTPI	Royal Town Planning Institute
S 106	Section 106 of the Town and Country Planning Act allows the Council and persons interested in land to agree contributions, arrangements and restrictions as <i>Planning Agreements</i> or <i>Planning Obligations</i> , in order to offset the costs of the external effects of development.
SPA	Special Protection Area
T&P	Town & Parish (Councils)
'The Group'	The Working Group of the Environment, Culture and Communities Overview and Scrutiny Panel
TPO	Tree Preservation Order

**BRACKNELL FOREST COUNCIL**

**ENVIRONMENT, CULTURE AND COMMUNITIES OVERVIEW AND SCRUTINY PANEL  
AUGUST 2015**

**WORK PROGRAMME 2015 – 2016**

Terms of Reference for

**PLANNING OVERVIEW AND SCRUTINY WORKING GROUP**

**Purpose of this Working Group / anticipated value of its work:**

- |   |
|---|
| <ol style="list-style-type: none"> <li>1. To explore various issues of interest to Members, to build knowledge and understanding</li> <li>2. To explore and resolve various issues of concern to Members</li> <li>3. To make an input to the production of the new Local Enforcement Plan</li> <li>4. To explore the opportunities for recommending improvements to Planning policies and procedures</li> </ol> |
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**Key Objectives:**

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|--|
| <ol style="list-style-type: none"> <li>1. To gather and assess the information requested by Members</li> <li>2. To consider the draft Local Enforcement Plan before its submission to the Executive</li> <li>3. Through research, analysis and comparison with other local authorities, consider whether improvements can be made to Planning policies and procedures</li> <li>4. To determine whether or not further clarification is required regarding the different roles that officers and members have in the planning process. (The Director has explained 'What I thought this might stimulate is trying to understand what can cause tension between Members and Officers and whether a better understanding of roles might lead to less tension on those relatively few occasions when Officers and Members simply have to agree to disagree.')</li> </ol> |
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**Scope of the work:**

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| <ol style="list-style-type: none"> <li>1. The Council's Planning function</li> </ol> |
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**Not included in the scope:**

- |  |
|--|
| <ol style="list-style-type: none"> <li>1. Anything within the remit of the Planning Committee, i.e. matters related to individual applications under the Planning Acts</li> <li>2. Anything related to the content of the Local Plan (for which there is a separate Member reference group)</li> </ol> |
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**Terms of Reference prepared by:** Richard Beaumont

**Terms of Reference agreed by:** The Working Group

**Working Group structure:** Councillors Angell, Mrs Angell, Brossard, Finnie, Leake and Porter

**Working Group Lead Member:** Councillor Angell

**Portfolio Holder:** Councillor Turrell

**BACKGROUND:**

The Environment, Culture and Communities Overview and Scrutiny Panel decided to carry out a review of the council's Planning function, because:

- It is a major activity, which has not previously been subject to a focussed O&S review
- Members have a number of information requests and points of concern around the Planning function

The issues to be reviewed by the Working Group are around:

- Section 106 developer contributions
- Appeals and complaints
- Enforcement and the Local Enforcement Plan
- Affordable housing
- The Pre-application process
- Tree Preservation Orders and the Green Belt
- The reasons for the split of decision-making between the Planning Committee and Planning Officers

**SPECIFIC QUESTIONS FOR THE PANEL TO ADDRESS:**

Questions will be asked as necessary to address the key objectives above.

**INFORMATION GATHERING:**

**Witnesses to be invited**

<b>Name</b>	<b>Organisation/Position</b>	<b>Reason for Inviting</b>
Councillor Turrell	BFC, Executive Member for Planning and Transport	To discuss the Working Group's provisional conclusions and recommendations
Councillor Dudley	BFC, Chairman of Planning Committee	To obtain the Committee Chairman's views on any prospective changes to Planning policies and procedures
Vincent Paliczka	BFC, Director of Environment, Culture and Communities	To discuss the Working Group's provisional conclusions and recommendations
Andrew Hunter	BFC, Chief Officer: Planning and Transport	For advice on the review's approach and provisional conclusions, and for information on the Planning Function.
Rachel McKoy	Assistant Borough Solicitor Planning	To gain information on the Legal team's input to the Planning Function.
Max Baker	BFC, Head of Planning	Link Officer for the Review. Advice on the review's approach and provisional conclusions, and for information on the Planning Function.

Ben Temple	BFC, Principal Planning Officer (Enforcement)	Detailed information on Planning Enforcement issues.
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### Site Visits

Location	Purpose of visit
Elmbridge BC or Southend-On-Sea BC	To see what can be learnt from Elmbridge BC (Commended in the 2015 RTPI Awards for Planning Excellence) alternatively the award-winning Southend-On-Sea Council's Development Management Team

### Key Documents / Background Data / Research

1.	All Councillors to be asked to let the Working Group know if they have any issues about the Planning function which they would like the Working Group to pursue.
2.	To research other councils' thresholds for Planning Committee approval

### TIMESCALE

Starting: August 2015

Ending: January 2016 (possibly later)

### OUTPUTS TO BE PRODUCED

1. A report containing recommendations to the Executive
2. Wider sharing of information on various issues of interest and concern to Members, concerning the Planning function, to build knowledge and understanding.

### REPORTING ARRANGEMENTS

Body	Date
Environment, Culture and Communities Overview and Scrutiny Panel	12 January 2016 (possibly later)

### MONITORING / FEEDBACK ARRANGEMENTS

Body	Details	Date
Environment, Culture and Communities Overview and Scrutiny Panel	Progress reports on Working Group's review	At each meeting of the Panel, next on 22 September 2015

## APPENDIX 2

### Background and Summaries of Meetings

This section of the report is based mainly on the meetings which we held. **Max Baker** (Head of Planning) was our Link Officer throughout the review and he and **Andrew Hunter** (Chief Officer: Planning and Transport) attended most of our meetings. **Richard Beaumont** (Head of Overview and Scrutiny) provided officer support to us and attended all our meetings.

### The Role of a Local Planning Authority in England

- 1 In England, district and unitary councils are designated as a Local Planning Authority (LPA), empowered by law to exercise statutory town planning functions for a particular area of the United Kingdom. As a unitary council, this is an important responsibility for Bracknell Forest Council ('the Council'), which must comply with Planning Legislation and other rules set by the Government, whilst also acting in the best interests of the people who live in Bracknell Forest, and our business community. Effective Planning helps to ensure that the right development happens in the right place at the right time, benefitting communities and the economy. It plays a critical role in identifying what development is needed and where, what areas need to be protected or enhanced and in assessing whether a proposed development is suitable.
- 2 A major part of the planning function is 'Development Management', which is the process of deciding whether to authorise a wide range of applications, including proposed developments of land and buildings, and enforcing planning law and the Council's planning decisions. The purposes of this process are to save what is best of our heritage and improve the infrastructure upon which we depend for a civilised existence. The Council, as the LPA, is responsible for deciding whether a development - anything from an extension on a house to a new shopping centre - should go ahead. However, the Council does not have sole responsibility nor sole powers over developments. For example, certain minor developments are 'permitted' by law. Additionally, the Secretary of State for Communities and Local Government has a direct role in a small number of decisions through the appeals system (involving the Planning Inspectorate), the call-in process<sup>1</sup> and decisions on nationally significant infrastructure projects.
- 3 As part of Development Management, the Council is also required to provide planning enforcement services, which are vital. By identifying and tackling cases of unauthorised development, the enforcement process helps to ensure fairness, stops unacceptable development and gives communities confidence in the system. Although effective planning enforcement is fundamental to the integrity of the system, the Government requires that responses to breaches of planning control should always be proportionate. Where work has been undertaken without the necessary permission, there is scope to apply retrospectively for planning permission. These powers do not condone development being undertaken without the correct permissions, but they do enable local authorities to use their planning enforcement powers proportionately.

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The Secretary of State has the power to take over particular planning applications rather than letting the local planning authority decide, which is known as 'call-in'. An application can be called-in whether or not there has been a request to do so.

- 4 Whilst the determination of a planning application is not a 'quasi-judicial' process (unlike, for example, certain licensing functions carried out by a local authority), it is a formal administrative process involving the application of national and local policies, reference to legislation and case law as well as rules of procedure, rights of appeal and an expectation that people will act reasonably and fairly. In addition to the right of appeal to the Planning Inspectorate which applicants have, an aggrieved party may seek a Judicial Review and/or complain to the Local Government Ombudsman on grounds of maladministration or a breach of the authority's code.

### **The Responsibilities of Councillors and Planning Officers**

- 5 Responsibility for exercising an LPA's statutory Planning functions is shared between councillors (who are democratically elected representatives of their local communities) and officers. Councillors and officers have different but complementary roles. Both serve the public but councillors are responsible to the electorate, whilst officers are responsible to the council as a whole. Officers advise councillors and the Council and carry out the Council's work. They are employed by the council, not by individual councillors. A successful relationship between councillors and officers will be based upon mutual trust, understanding and respect of each other's positions. Both councillors and officers are guided by codes of conduct. There is a legal duty for each local authority to promote and maintain high standards of conduct by councillors and to adopt a local code of conduct, and this together with a code of conduct for officers, is in place in the Council. Furthermore, officers who are chartered town planners are subject to the Royal Town Planning Institute (RTPI) Code of Professional Conduct, breaches of which may be subject to disciplinary action by the Institute.
- 6 Parliament has decided that local people should take the lead in shaping their neighbourhoods and that councillors should have a key leadership role in this process. The role of councillors varies depending on whether they sit on the Planning Committee (PC, which makes decisions on certain planning applications) or not. However, all councillors have a role to play in representing the views and aspirations of residents in plan-making and when planning applications affecting their ward are being considered.
- 7 The Council appoints planning officers to assist with the operation of the planning system. Most minor and uncontroversial planning applications – around 90% received by most local planning authorities – are delegated by councillors to officers for them to determine. Larger and more controversial developments are often decided by the PC, informed by officers' recommendations. Planning Officers in Development Management (the main focus of this Overview and Scrutiny review) carry out a wide variety of professional tasks, including for example: Pre-application discussions; ensuring all material considerations are balanced; advising the Planning Committee; determining applications under delegated authority; dealing with appeals; and dealing with breaches of planning regulations.

### **Introductory Review Work**

- 8 The Working Group ('the Group') met for the first time on **24 August 2015** to elect a Lead Member (Councillor Angell); to receive an introductory briefing in respect of the Council's Planning functions from officers; and to discuss the approach to be taken by the Working Group. Officers present were **Andrew Hunter** (Chief Officer: Planning and Transport), **Max Baker**, Head of Planning, and **Richard Beaumont** (Head of Overview and Scrutiny).
- 9 The Group received written material in advance and a presentation, the content of which is summarised in the section 4 of this report. The presentation, covered the role, responsibilities and structure of the Planning Service (divided between Development

Management, Enforcement, Support, and Plan Making); key statistics; the main processes around planning applications; other policy work, implementation and infrastructure. We were told that the Council has a strong track record of plan making compared to other local authorities.

- 10 The Group's initial ideas for the focus of the review were processes and procedures, Section 106 developer contributions, and planning enforcement. The Group decided that the review should be shaped by each Member setting out their information requests and issues of concern to them about the planning function which they would like the Working Group to review. The information we gained from our enquiries is included in part 4 of this report. Other matters raised by Members, together with the responses we received at this and later meetings, were:
- a) What was the basis for the Council deciding that three or more objections against an application resulted in it having to go before the Committee? Was there a case to lift that threshold to around six objections?  
*We were subsequently shown the detailed internal procedure note which set out this procedure.*
  - b) Are the current arrangements for notifying neighbours about planning applications adequate?  
*These were described to us, and we consider them to be sufficient.*
  - c) Who checks the officers' decisions on S.106 cases? The Group asked officers for a case study/ worked example of a S.106 calculation  
*We subsequently received and considered this at a later meeting (see paragraph 22 below)*
  - d) The Group asked officers to bring forward a case study/ worked example of a planning enforcement case, to illustrate how enforcement worked in relation to the new Local Enforcement Plan (LEP).  
*We subsequently received and considered this at a later meeting (see paragraphs 26-27 below)*
  - e) The usage of temporary planning permissions.
  - f) Affordable Housing (AH): was it viable to require developers to meet the target of 25% affordable housing on qualifying sites? Officers advised that the target was not achieved in every case, as developers can sometimes demonstrate that it would jeopardise the viability of the overall development.
  - g) Who negotiates S.106 agreements<sup>1</sup>, and is there a standard basis for the agreements/notifications?  
*We subsequently received and considered this at a later meeting (see paragraphs 24-25 below)*
  - h) Community Infrastructure Levy (CIL). Officers explained that officers calculate the CIL amount, the applicant can ask for that to be reviewed, and they have recourse to the District Valuer. There is no other avenue for appeals.
  - i) The amount of New Homes Bonus received is shown in the budget papers.

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<sup>1</sup> Section 106 of the Town and Country Planning Act 1990 Act allows the Council and persons interested in land to agree contributions, arrangements and restrictions as *Planning Agreements or Planning Obligations*. Applicants can offer such agreements unilaterally or negotiate and agree them as support for their application to make it accord with local planning requirements, but without some of the rigorous controls of Planning Conditions under s 70(1). It relates to money paid by developers to Local Planning Authorities in order to offset the costs of the external effects of development. For example, if a developer were to build 100 new houses, there would be effects on local schools, roads etc., which the Local Authority would have to deal with. In that situation, there might be a Section 106 agreement as part of the granting of planning permission. The agreement might also entail provisions about production of social/affordable housing. The developer might agree to make a contribution towards the provision of new schools or traffic calming on local roads.

- j) The WG asked officers to bring forward a case study of a pre-application. We subsequently received and considered this at a later meeting (see paragraph 54 below)
- k) Officers advised that land owners are approached through the Local Plan 'call for sites' process, concerning making land available for development.
- l) We were told that planning policies were revised through the Local Plan process, over a 5-6 year cycle. A fundamental review would be taking place soon.
- m) What are the consequences of not achieving the housing completions target in the Core Strategy? We learnt that any shortfall is added to the target in the next Local Plan. In the event that this resulted in an unachievable target, for example due to Green Belt restrictions, then the Council would need to seek the assistance of other Local Authorities in meeting the target.
- n) Would it be feasible for Ward Councillors, rather than the entire Committee, to decide on applications of a purely local nature?  
We subsequently discussed this with officers, and accepted that it would not be practicable.
- o) Officers confirmed that approved applications are usually valid for three years. The cases making up the five year land supply for housing included a range of 'hard' (e.g. approved applications) to 'soft' planned developments.
- p) Whether the Council could adopt a more robust policy to minimise the number of appeals? We return to this point in our recommendations in Part 4.
- q) What was the nature of the complaints at stage 2 and upwards?  
*This information was subsequently provided to, and considered by the Group on 13 October, but as it contained individual and personal details, we are not publishing it.*
- r) How is the Green Belt defined and designated, i.e. what determines whether an area of land is included in the Green Belt? Officers commented that the National Planning Policy Framework (NPPF) largely covered this; and that Bracknell Forest's Green Belt, which had been unchanged for many years, would need to be reviewed as part of the Local Plan process. One Member observed that there was widespread confusion over the Green Belt and its connection with 'countryside'.
- s) Trees and Tree Preservation Orders (TPO), and the Planning team's role. We were told that the TPO function was in law part of the Planning function, though the tree team were part of the Parks and Countryside section.
- t) The definition of affordable housing, and information on how it is applied in practice.  
*The definitions of Affordable housing, Affordable rent, and Intermediate housing are normally taken from Annex 2 of the NPPF and used in the S106. The S106 normally also refers to affordable numbers, dwelling type, tenure and location. The rent charged by social landlords must be no more than 80% of market rates.*

*The planning policy relating to affordable housing relies on the Executive decision dated March 2011 whereby a qualifying site is triggered if there are 15 (net) or more dwellings, then the quantum is 25% of total dwellings should be affordable housing, subject to viability. For information on how it is applied in practice, is best to look at a resulting planning permission. [A list of planning permissions granted since March 2011 for "S106 sites" where S106s have been used to secure an element of affordable housing was provided to the Group].*

- 11 The Group discussed the scope of its review of the Planning function. It was agreed that the areas of focus for our review could be grouped under several headings, and needed further refinement. We subsequently formalised the approach to our review in the standard scoping document for Overview and Scrutiny reviews, attached at Appendix 1. We invited views on the scoping from the Executive Member and the Director responsible for the Planning function, and made one addition as a consequence.

### **Draft Local Enforcement Plan**

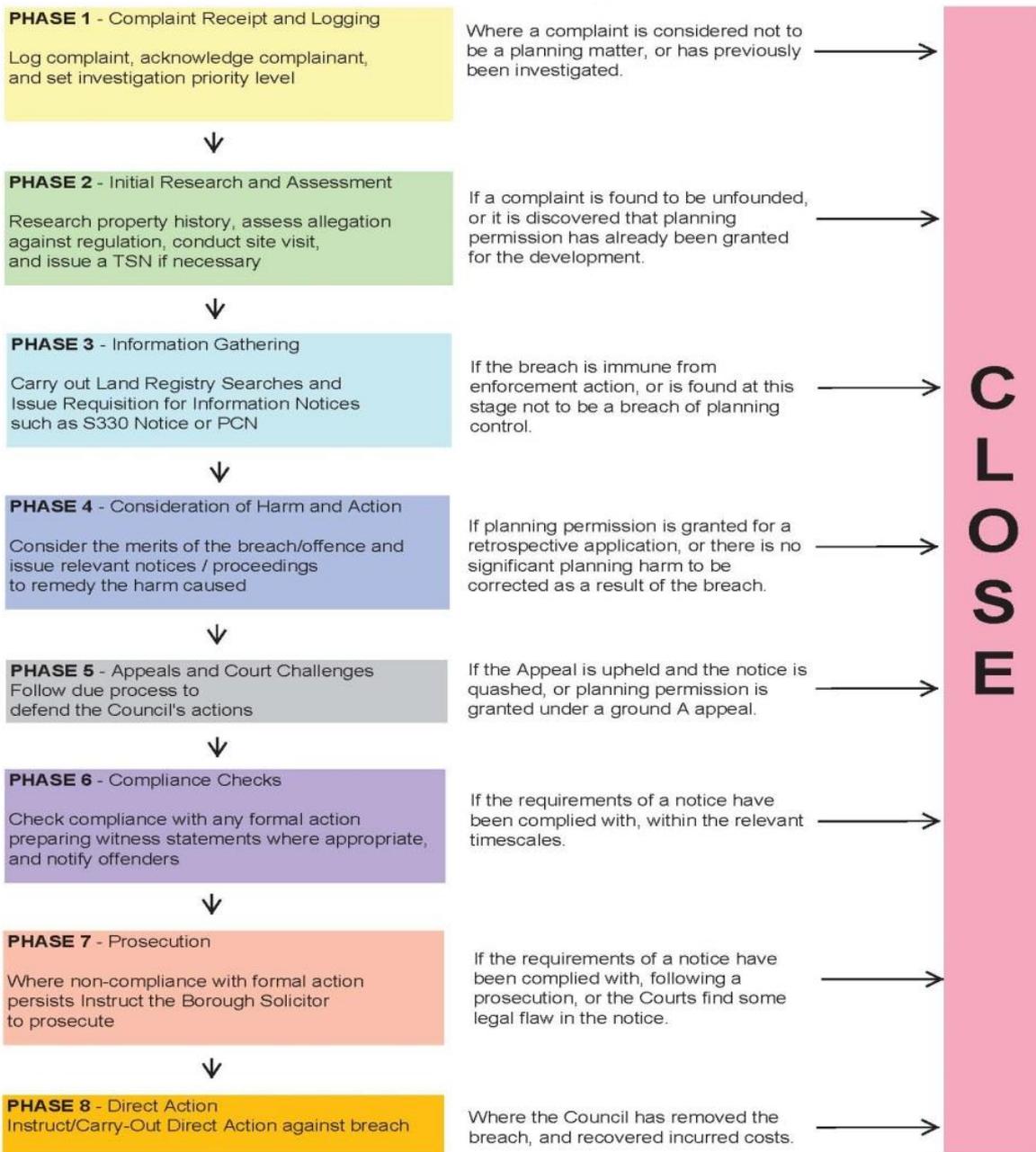
- 12 On **7 September 2015** the Group met **Ben Temple (BT), Principal Planning Officer (Enforcement)**, mainly to review the draft Local Enforcement Plan (LEP), before its submission to the Executive for approval.
- 13 Officers told the Group that the draft LEP was intended to be a published, public policy document on how the Council deals with reported breaches of planning control. The decision to produce the Plan was partly in response to the previous prescriptive guidance from central government<sup>1</sup> having been withdrawn, giving local authorities more freedom to determine their own approach to planning enforcement, also because there were financial incentives from central government for Local Planning Authorities (LPA's) to adopt an LEP.
- 14 The Government's National Planning Policy Framework (NPPF) states '*Effective enforcement is important as a means of maintaining 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. Local planning authorities 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 it is appropriate to do so.*'
- 15 The underlying objective of the Council's LEP was to make best use of the officer and other resources available. This entailed taking a linear approach (shown diagrammatically below), meaning that cases are progressed logically and promptly to a conclusion, without 'looping back' to earlier stages in the process. The LEP set out clearly the activities to be carried out with the resources available, it provided more consistency and performance information, and it allowed greater accountability for the function than was previously the case. The LEP set out a workflow, designed to close investigations that would not reasonably result in formal action (when assessed against the development plan). This was done by phasing investigations, as shown in the diagram above. This process deliberately avoided investigations cycling back through earlier stages, so as to avoid the risk of tactical delays being instigated by developers looking to profit from continuing breaches of planning control, and to minimise duplication of work for Officers.

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<sup>1</sup> PPG18 (the formal national policy on Planning Enforcement) was quite prescriptive, and had an underlying principle, that Enforcement action is only taken as a measure of last resort. This was often interpreted by LPA's that they should not enforce while negotiations were still possible. PPG18 is now a withdrawn policy and has been replaced by the National Planning Policy Framework (NPPF) and National Planning Practice Guidance (NPPG).

# PLANNING ENFORCEMENT

## 8 PHASE INVESTIGATIONS | FLOW CHART



- 16 The Government had set aside £1 million to fund half the legal costs of an LPA seeking an Injunction for an ‘apprehended breach’; however this funding was only available to those LPAs with an LEP. The Council had not had an LEP previously, relying instead on the Government’s Planning Policy Guidance (PPG). Consequently, the LEP had been written ‘from scratch’, referring to such government guidance that was available. The LEP was a deliberate, ‘step change’ from the previous enforcement arrangements which followed the traditional LPA approach to enforcement, and which had been less efficient in the use of resources.
- 17 In producing the LEP, three objectives had been applied:
- To reduce the amount of time spent on investigations that will not result in formal action.
  - Within the bounds of reasonableness, to expeditiously take formal action against breaches causing a planning harm.
  - Where breaches persist in breach of formal action, to seek to recover any proceeds to emphasise that crime doesn’t pay – and to supplement the operational costs of the department, so that the service can be improved.
- 18 In the long term, the underlying goal of the LEP was to make the enforcement service resource efficient, while increasing the output capacity of the service. Furthermore, it allowed officers the time and resources to issue more Enforcement Notices (EN), carry out more prosecutions, and where applicable, seek to confiscate (on behalf of the Council) any proceeds from criminal activity conducted within the planning system.
- 19 Matters arising in discussion, and in response to Members’ questions included:
- a. There are some circumstances where the Council is allowed to charge for enforcement work, though not for the cost of serving an EN. Recovery of costs might be possible if ‘direct action’ e.g. demolition, was taken by the LPA at the end of the enforcement process; or by applying to the courts for recovery of ‘proceeds of crime’ (there had been no cases to date under this new legal provision).
  - b. Members saw a deterrent value in prosecuting cases, but agreed there had to be a balanced approach on whether to prosecute.
  - c. Members asked for information on the annual cost of planning enforcement, together with the number of enforcement cases progressed<sup>1</sup>. Costs were mainly on officer time, plus on-costs. Enforcement appeals can be costly to defend, so traditionally many councils saw Enforcement Notices (EN) as being a last resort. The draft LEP provided for cases to be promptly progressed to prosecution, where appropriate.
  - d. Officers cited an example of an enforcement case, of a traveller site in Ascot, which led to ENs, court action and an appeal. The Council’s costs had exceeded £100,000.
  - e. Councils have to make a ‘balance of probability’ test when considering ‘Certificates of lawfulness’. Unless deception is at issue, once operational development or the use of a building as a dwelling house is recognised to be more than four years old (or 10 years for any other breach of planning control), it is immune from formal planning enforcement action.
  - f. Responsibility for deciding whether to prosecute an enforcement case was a sequential matter; it started with a decision on whether to issue an EN; if a notice was issued, the next stage would be whether a prospective appeal was successful. The Borough Solicitor acted on instructions from the Chief Officer:

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<sup>1</sup> This was subsequently provided at a later meeting, see paragraph 62

Planning and Transport, and the former Borough Solicitor had been careful in deciding whether to take proceedings. In contentious cases, Counsel's opinion was usually obtained.

- g. The reference in the LEP to action being 'proportionate to the harm caused' was taken from the Government's NPPF.
- h. We made a number of suggested changes to the draft LEP, including:
  - Section 2 of the LEP would benefit from a summary of where the planning enforcement function sits within the Council, the posts and contact details.
  - Expanding it to refer to Tree Preservation Order (TPO) consents.
  - Adding the words 'where practicable' to the target times for site visits, and making a commitment to monitor internally the timeliness of visits.
  - The removal of an unnecessary appendix.
  - Recognising the role of the Communications team.
  - Indicating the consequences of Community Infrastructure Levy (CIL) not being paid.
  - Committing that the policy should be reviewed after its first year, and that performance against the measures should be routinely monitored.

We were pleased to see that most of these changes were subsequently incorporated in the revised draft LEP which officers submitted to the Executive for approval.

- i. There are no aspects of planning enforcement which are non-discretionary, though if the Council failed to take necessary enforcement action this could be challenged by e.g. Historic England.
- j. Fines for enforcement offences varied. The County Court can impose fines up to £20,000, and the High Court can impose unlimited fines. Judges can decide to discount fines, e.g. for a first offence. If there is a profit incentive, there is also the option to seek a penalty under the Proceeds of Crime legislation. LPA's had an opportunity to maximise fines through breaking down an enforcement case into a number of separate enforcement cases.
- k. Some enforcement cases had lapsed because they were outside the statutory time limits, but these cases were not recorded separately. The Council was also at risk of time-lapsed cases where another part of the Council became aware of a property change (e.g. the Council tax team commencing charging for an occupied property) but this was not communicated to the planning enforcement team. There are some working relationships within the Council that allowed such information exchange, and there are some statutory restrictions over the exchange of information.
- l. We were informed that anonymous calls were received alleging breaches in planning control, but it was Council policy not to pursue such allegations. In around 95% of such cases, there was insufficient information to proceed with: unless contact details were given the missing information could not be obtained; and a number of anonymous allegations were known to be malicious. Officers explained that customer services staff routinely told callers that they were protected informants, such that the Council is required to keep their identity confidential. The Council's normal practice is to arrange for officers to review the scene directly, in order that officers (rather than the informants) can then appear as witnesses in court cases of breach of planning control; thus helping to keep the complainant's identity secret.
- m. Enforcement activity is no longer published on the Council's website, as this had generated unnecessary queries from e.g. solicitors carrying out property searches.

- n. Most enforcement activity is reactive rather than proactive, mainly arising from reports by Town & Parish councils (which are not 'protected people') or individuals.
- o. Concerning the under-sized garages at a major housing development, officers commented that Building Control is an open market activity, and the Planning service is not required to check compliance with approved plans. The garages issue was followed up by ENs, which led to an alternative solution. Officers confirmed that the planning application fees broadly covered the cost of determining applications, with no contribution towards monitoring costs.
- p. The planning enforcement team does not have the facility to record telephone calls. It is understood that incoming calls are recorded by Customer Services, at least up to the point of re-routing the calls.
- q. The enforcement team is staffed over Bank holiday weekends, but not during other weekends.
- r. The target times for site visits are the maximum times that officers aimed to visit within, performance being affected by staff absences and other factors.
- s. We were concerned at the public perception of the statement that enforcement action would not be taken automatically. Officers explained that this helped to manage expectations by complainants.
- t. We were told that some flexibility was needed on the delegated authorities for enforcement action, due to the variety of decisions and staff availability. Consistency of decision-making is important.
- u. The actual usage of the various enforcement options might be obtainable through an IT search. Relatively few ENs had been issued in the previous year, and given there was something of a backlog, it was likely that there would be an increase in enforcement action over the next six months or so.
- v. There had been extensive consultation within the Council on the draft LEP.
- w. The LEP would not be subject to copyright. It is customary for LPA's to openly share best practice.
- x. The Planning department had been relatively under-resourced for the last two years, and staff departures had caused a loss of knowledge. Planning enforcement posts were no longer filled by generalists but by qualified planning officers, and it had been fortunate that the vacant enforcement posts had been filled.

The Group thanked officers for their input and commended the quality of the draft Local Enforcement Plan. Subsequently, we were pleased to see that most of our suggested improvements to the draft LEP were included in the final version of the plan approved by the Executive

- 20 At this meeting, the Group also finalised the scoping document for our review (Appendix 1). This included the Lead Member writing to all councillors, asking if they had issues of concern about the planning function which they would like the Group to pursue.
- 21 On **29 September** the Group met **Rachel McKoy (Assistant Borough Solicitor (Planning))**, and **Nigel Moore (Team Leader Implementation, Spatial Policy)**.

### **Section 106 Developer Contributions**

- 22 The Group considered a S106 case study from officers, regarding a major residential property development in Bracknell. Members expressed surprise that the developer seemed unaware of the Council's aim for 25% Affordable Housing (AH) to be included. Officers advised that the Council's policy on AH is 'up to 25%, subject to viability', and the Council could not legally require non-viable schemes to be put forward. Members expressed dissatisfaction with developers seeking to avoid providing AH to the 25%

level, and in some cases no AH. Officers advised that the Council cannot stop an application being submitted, and if the Council refused applications unreasonably, they could proceed to appeal, with the Council possibly losing and incurring costs. In cases where Planning officers considered applications to not comply with the Council's AH policy, independent assessments of viability were commissioned. In the case study, the Council's starting position of £1M plus 25% AH met with the response that it would make the development unviable.

23 Other matters arising in discussion, and in response to Members' questions were:

- a. In terms of checks and balances on officers' decisions on S106 details, Case Officers will consult Housing and Highways officers; and there is a 'shopping list' of infrastructure/remediation measures behind the S106 scheme.
- b. There is a formula to calculate the Special Protection Area (SPA) element for S106, and other S106 items are site-specific. Everything else is covered by CIL. The S106 tariff was no longer used.
- c. Viability assessments are not a precise science.
- d. Some councils employed a formulaic approach to AH, with fixed sums for commutation in cases where AH was not provided.
- e. Officers advised that the need for AH was growing, and the position was due to be reviewed as part of the process for updating the Local Plan.
- f. Some councils adopt a definition of AH by reference to local income levels, as part of their Housing strategy.
- g. One Member expressed the view that the Council's current approach meant that the Borough's AH needs would never be met. Officers advised that some developments achieved 25% AH, also that the delivery of AH was monitored. We decided to seek information on the AH levels agreed for all approved planning applications for developments of 15 or more units, over the preceding three years (see paragraph 53 below).

### **Legal Input to the Planning Function**

24 The Assistant Borough Solicitor (RM) described to us the legal input to the Planning Function, with particular reference to Legal's input on planning enforcement and S106. This included: advice to the Planning Committee on reports; advice to officers on planning and highways issues; advice on Plan Making and Neighbourhood plans; commissioning Counsels' opinions; assisting on appeals cases, enforcement cases and prosecutions; and S106 negotiations and agreements. S106 agreements comprised standard cases and separately negotiated cases for the larger sites (e.g. Warfield) where RM participated in meetings with developers' legal advisors, advised BFC officers, and drafted S106 agreements.

25 Matters arising in discussion, and in response to Members' questions were:

- a. The legal team does not approve S106 agreements and other issues. Legal operate in an advisory role, with the Planning Team as their client. MB clarified that the Planning Officers' role was to work out the S106 details, with Legal advising and putting the agreement into a legally binding form.
- b. As part of their advisory role, Legal can – and do – challenge the legality and sense of proposals, and elevate issues to the Borough Solicitor as necessary. Legal advice is formally recorded.
- c. On major projects, Legal are involved at the pre-application and Heads of Terms stages, participating in meetings between the Council and developers. In other cases, Legal become involved when requested by Planning Officers (RM is

- based in Time Square one day each week, to offer on-call advice), and when reports are produced for the Planning Committee (PC).
- d. RM had not been involved in many enforcement cases since arriving in post in mid-2015. Legal's role is to check the draft Enforcement Notices put forward by Planning and issue them (the Planning team are not authorised to issue ENs) once they are satisfied that the required steps, such as a site visit, had been completed. RM understood that a number of Enforcement cases were about to be referred to Legal. MB commented that ENs were sometimes issued in order to obtain information.
  - e. RM said there were good working relationships between Planning and Legal officers. As RM is still new in post, the opportunity was being taken to query whether improvements are possible to some of the current arrangements, such as the clarity of instructions to Legal. There might be a case to increase the early involvement of Legal on major development schemes. One particular improvement being progressed was the opportunity to charge more for S106 legal costs, for example the Council currently charges £160 per hour, whereas a London Borough Council was known to charge £250 per hour.
  - f. RM said that Legal sometimes become involved in S106 cases or are otherwise aware of them in advance of the report to the PC. Officers advised that standard S106 agreements covered the SPA aspect; also that smaller schemes rarely had a S106 agreement, instead the developer contribution was secured through CIL. Occasionally, S106 terms were agreed before the report to the Committee, indeed some are even paid at that point. All Planning Approvals are subject to S106, as necessary.
  - g. One Member commented that some developers had complained about delays in progressing the S106 details, once the planning approval was obtained. Officers told us that the Case Officer advises Legal once the details have been agreed with the developer. Sometimes, developers would not commence negotiation over details until later in the process, and in some cases only after they had received the in-principle decision on their application.
  - h. The Group observed that there was a lack of understanding amongst some Members about S106 and CIL.

### **Information on Planning Enforcement From Planning Officers**

- 26 The Group reviewed a Planning Enforcement case study, concerning a residential property in Warfield that had been reported as being used for commercial purposes; a further issue concerned a Tree Preservation Order. Officers acknowledged that there had been some significant delays in progressing this enforcement case which could not all have occurred under the new Local Enforcement Plan (LEP).
- 27 One Member commented that the Council's handling of the case had had a negative impact, causing distress for the family concerned over a protracted period. There was some doubt over the facts of the case, and an unresolved dispute over who owned the land in question. The resident had offered a possible solution and this had not been progressed. The Group expressed concern over the length of time which had elapsed without a solution having been reached yet, the amount and cost of officer time which had been expended on it, and the seemingly inadequate procedures which allowed the case to run as it had. Officers explained that the Council was of the view that the legal notice was valid and should be enforced, and that the ownership of the land was not uncertain, but this would need to be put to a Lands Tribunal. Enforcement can be a drawn-out process if people do not co-operate with the Council. Officers added that under the new LEP, and having brought staffing up to the required level, a new case of this nature would be progressed faster and more conclusively, though there would still

be the scope for appeals and the consequent slowing- down of the enforcement process.

28 In response to our questions, we were told that:

- There were not many cases in the backlog of live enforcement cases<sup>1</sup>, though some cases had originated some years earlier, particularly the more complex cases.
- Staff absences can be filled by temporary and agency staff if necessary.
- The backlog of enforcement cases was periodically reviewed by the Principal Planning Officer (Enforcement) and their line manager. They pay particular attention to the cases approaching four years old, which in many cases is the time limit for enforcement action by the Council.

29 The Group considered that the performance on planning enforcement damaged the Council's reputation. The Group asked for summary details of a random selection of ten enforcement cases (5 which had originated two years earlier, and 5 which had originated more than three years earlier), which they wished to review with the Principal Planning Officer (Enforcement) at a future meeting (see paragraph 51 below).

### **Members' Views on the Planning Function**

30 We received four responses to our invitation to all Members to let us know of any concerns about Planning which they held.

- One Member had queried the prospective combination of S106 amounts, also combination with CIL. We were advised that CIL was not ring-fenced, unlike S106. CIL is allocated using the Council's budgeting process, and there were individual meetings with Town & Parish (T&P) councils on the spending of their share of CIL. There are legal limitations on what can be levied and combined in terms of CIL and S106, and the position had been explained to T&P councils. The Planning Obligations Supplementary Planning Document (SPD) sets out the Council's rationale for using S106/CIL for education, libraries, etc.
- Another query concerned the respective roles of T&P councils and the Council.
- One query related to timeliness. It was noted that the Council cannot require developers to consult publicly, or to submit a pre-application. The Council can take the initiative to publicise a prospective development, but that can be resource intensive.
- Another Member had queried the level of detail for prospective S106 agreements. Officers advised that officer reports summarised the key points for inclusion in S106 agreements, but it would delay the planning consent process if every S106 detail was to be completed before decisions were taken on applications. One Member commented that conditions were sometimes written into S106 agreements which had not been apparent to the Planning Committee, and in some cases it had taken a long time to conclude S106 agreements. Officers offered that in future, S106 Heads of Terms would be included in officer reports.

31 On **13 October** the Group met Councillor Dudley, Chairman of the Council's Planning Committee.

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<sup>1</sup> The Head of Planning subsequently advised that there were currently 103 live enforcement cases which originated more than one year ago, of which 60 were over two years old, and 45 were over three years old.

## **Information from Planning Officers**

- 32 The Group reviewed the various information they had requested from officers. The points arising in discussion were as follows.
- a. Whilst it was understandable that the number of planning applications received exceeded the number of decisions made, e.g. because some were withdrawn by applicants, the difference of c. 500 each year seemed disproportionately large. The number of Planning Committee (PC) decisions also seemed unduly low, at 50-60 each year. This in turn could affect the information provided on the number of overturned decisions. Officers subsequently advised that the reason for the difference between the numbers of applications received and the decisions made arose largely due to the numbers received including certain classes of application that are not recorded as planning decisions - or as Committee decisions. These include prior approval applications (including telecommunications masts), conditions applications, non-material amendments and lawful development certificates. Neither set of figures included Tree Preservation Order (TPO) applications. This explained the wide divergence between applications received and decisions made and the relatively low number of Committee decisions in the table provided to us.
  - b. A major housing development in an adjoining borough had attracted a significant monetary settlement in lieu of AH. The sum would be related to construction costs and hence lower than the open market value of the housing.
  - c. Officers clarified that Registered Social Landlords (RSLs) were required to charge rents at no more than 80% of open market rents.
  - d. The information on the number of successful appeals against PC decisions showed that there had been few applications for costs by appellants, and there had only been one case in the two years 2013-15 where costs had been awarded against the Council. The Group regarded this to be at odds with the strong messages given to members of the PC about the risk of cost consequences to the Council in the event of them refusing an application, contrary to an officer recommendation; and this would have influenced Members' thinking. Cllr Dudley (CD) commented that these costs had fallen over time, which reflected well on the quality of the PC's decision making. This was assisted by the quality of the 'Blue Sheets' provided by officers at Members' request, which summarise the planning grounds which could be used to refuse an application. CD suggested that the Group might like to look into the Blue Sheet process. It was noted that some Members were dissatisfied when officers did not meet their request for a Blue Sheet, but this was because officers were unable to offer a valid planning reason for refusing an Application.
  - e. The staff costs of £2,314 for each appeal case was an average figure, using benchmarking information. Written representations and informal hearings were the least costly, and Public Enquiries were the most costly. The Planning Case officer usually handled the appeal, but a different officer was deployed if the PC had overturned the Case officer's recommendation. Legal officers supported the appeals process as necessary. There was no separate budgetary provision for the cost of staff time in dealing with appeals. In the event of a very time consuming appeal, that could give rise to a budget pressure.
  - f. Officers advised that it was possible for the Council to apply for costs when defending an appeal, but this would only be justified rarely, and it would be difficult to form a policy for this.
  - g. It was noted that Members needed to have reasonable Planning grounds when asking for a Planning Application to be put on the PC agenda. Planning Officers assisted Members in that regard. The Group thought it was important for

Members to retain the right to ask for such referrals, but it was hoped that this would not be over-used.

- h. So as to better manage the PC's workload, there might be a case to change the current policy, to the effect that objections which do not refer to any Planning issues should be excluded from the calculation of the number of objections triggering inclusion in the PC's agenda.
- i. The Group noted that PC decisions were around ten times more expensive to process than officer decisions. In terms of the time spent on cases before the PC, it was thought that whilst some scene-setting was necessary, and it was important to develop the presentation skills of junior staff, presentations by officers could be shorter, focussing on the key issues.
- j. The Group noted that there are occasional omissions in notifying neighbours about Planning Applications. Officers necessarily exercised their judgement in deciding which residents to notify about an Application.
- k. It was noted that it was entirely up to developers to decide whether to have a pre-application, indeed the Council could not force developers to come forward at all.
- l. The Group noted that there are relatively few complaints which escalate to stage 3 (the final stage in the Council's corporate complaints process) or the Local Government Ombudsman, and that compensation payments are rare.

### **Visit to Elmbridge Borough Council**

- 33 On **9 November**, the Group visited **Elmbridge Borough Council (EBC)**, at their offices in Esher. We met **Cllr. Andrew Kelly** (Planning Cabinet Member), **Cllr. James Browne** (Housing Cabinet Member), **Cllr Barry Cheyne** (Chairman of Planning Committee and Chairman of West Area Planning Sub Committee), **Karen Fossett** (Head of Planning Services), **Mark Behrendt** (LDF Planning Policy Manager), **Katie Baldwin** (Senior Enforcement Officer), **Edward Chetwynd-Stapylton** (Principal Planning Officer – Appeals), **Julie Cook** (Head of Housing), and **Colin Waters (Housing Strategy & Enabling Manager)**. We were very appreciative of the time everyone gave us on our visit.
- 34 The meeting had been arranged at our request, to see what could be learnt from EBC, whose Planning team had been runner-up in the Royal Town Planning Institute's (RTPI) Excellence in Planning awards, 2015. Information circulated in advance of our visit included: EBC's entry for the RTPI Planning awards; a Planning Enforcement report to the EBC Performance and Finance Standing Panel, and EBC's responses to our questions sent in advance, covering:
  - The number of planning applications and appeals
  - The application of the Community Infrastructure Levy
  - Affordable Housing
  - Parking standards
  - Enforcement cases
  - Travellers' accommodation
  - Requirements for applications to be determined by the Planning Committee (PC)
  - The operation of Area PC's.
- 35 Karen Fossett (KF) described the reasons for EBC entering the RTPI award, and their pleasure with the outcome. Mark Behrendt (MB) summarised EBC's current position on its Local Plan, where –like Bracknell Forest – the Inspector had concluded that a five year housing land supply had not been demonstrated, requiring the Local Plan to be

reviewed. This entailed a review of the green belt and reassessing the level of housing need. Elmbridge borough is either urban or green belt, and all major sites have been developed, which makes the planning function challenging.

- 36 EBC had invested a lot of time on the 'duty to cooperate', particularly with LB Kingston, at Member and officer level. This was not always easy, but EBC saw it as being important. Some disagreements were to be expected, the key thing being to have a shared goal. EBC had worked with adjoining borough councils on their housing needs assessments, and in considering how to meet that need. The London factor caused tension, as Surrey (being a Home County) was seen by some as being able to take up the over-spill of housing need from London. Sustainability was a key issue for EBC, and protecting the green belt was a sensitive issue.
- 37 All EBC Members had been involved in the plan making process from an early stage, for example in considering the current position in the light of the Inspector's conclusion, and on evolving government policies. EBC had also held an innovative public meeting, explaining at an early stage what needed to be done, and the reasons for it (rather than just presenting the outcome at a later stage). Residents welcomed this open engagement approach, even if they were disappointed with the outcome of the process.
- 38 EBC have a team of three Planning Enforcement officers, who work hard and have achieved a zero backlog of cases. They aim to refer on to the appropriate organisation the c.50% of new cases which are not planning-related (such as Party Walls and boundary issues); and highways enforcement issues are referred on to Surrey County Council (CC). The Enforcement team's approach is to achieve resolution to minimise planning harm. The negotiation route can take time, and they were considering introducing a six week review stage, at which they would take one of three routes: Continue negotiation (if it is proceeding well); take enforcement action; or close the case. EBC had striven not to be seen as weak on Enforcement, and they believe that their reputation for firm but fair action has spread to good effect. Negotiation is EBC's favoured route on Enforcement, as the serving of Enforcement Notices (ENs) or taking court action is not as effective.
- 39 EBC's delegation to officers for determining Planning Applications is high, and applications are only determined by the Planning Committee/Sub-Committees if certain 'trigger points' are reached. EBC has three area-based Sub-PCs, which meet at the same time. The main PC tends to deal with Planning Policies and strategically important applications. Area PCs (as opposed to a single PC) are favoured by PC Chairmen, and are popular with residents; but they require more officer time, and there is a risk of inconsistency between the area PCs in their decision-making.
- 40 In addition to induction training, EBC have a rolling programme of Member training on Planning issues, held for one hour before PC meetings. Training subjects are selected by Members. This was seen as successful, and it helped build good Member/officer relationships.
- 41 EBC are not achieving 40% Affordable Housing (AH) in all cases, due to the viability restriction. Few developments exceed 15 dwellings. The majority of new AH is secured through obtaining financial contributions rather than on-site AH (which some developers claim would undermine the viability of the development). Elmbridge has high property values, so these financial contributions are significant. EBC take a rigorous approach to representations from developers over viability of the required AH contribution, and independent consultants are engaged as necessary. EBC were encouraging resolution of this aspect at the pre-application stage. Pre-applications generate significant income for EBC, and a Member panel was set up in one case.

- 42 Elmbridge has some distinctive settlements. There are no Neighbourhood Plans in Elmbridge currently (where there is only one Parish Council). EBC has established seven 'local spending boards' to decide on how the 15% of CIL income is to be spent, the remaining 85% being applied to strategic infrastructure. EBC was one of the 'front runners' for CIL, and is one of the top CIL earning councils outside London. Prior to the introduction of CIL, EBC operated a tariff system under S106. Much of EBC's regulation 123 (infrastructure requirements) list is for Surrey CC items, and the list had recently been reviewed to incorporate new projects. In setting the CIL charges, EBC had not striven to maximise them, as they did not want to stifle development.
- 43 There are c.50 officers in the EBC Planning team, with staffing having been increased in line with the large increase in Planning Applications. This excludes Building Control, which had been externalised in August, run by a wholly-owned EBC company. EBC had transferred its social housing stock (mainly comprising flats) some years earlier. The Housing Service has c.45 officers, and in addition to AH work, its functions include Housing Benefits, Housing Register, Housing Options, Strategy and Enabling, some Environmental Health functions, and Disabled Facility Grants. EBC have a Member Panel on AH, to hold officers to account on the AH programme; this is largely around the spending of S106 monies from the 'Enabling fund' to secure new AH, often by grant-assisting developments by Housing Associations (sometimes proposed by HAs, and sometimes prompted by EBC). EBC gave thought to prospective AH usage when disposing of sites.
- 44 The Housing team is involved at the Pre-application stage, and provide statutory consultee responses to Planning Applications. They also work closely with the planning policy team, for example on the strategic housing needs assessment. RSL's become involved later in the process. EBC prefer to work with community-focussed RSLs, but are obliged to work with whichever RSLs are in partnership with developers.
- 45 Like all boroughs in South East England, Elmbridge has a shortage of AH. Particular challenges are the high value of land, greenbelt issues, and government policy on developers' viability - causing the 40% AH target to be frequently under-achieved. Through removal of the lowest two bands, the Housing Register had been reduced from c.2,500 to c.900 households, but it had since increased to c.1,500. Ex-service personnel attract priority treatment (EBC are signatories to the Military Covenant), and having a local connection for at least five years is one aspect of categorising applicants. Around 250 re-lets became available each year, and EBC aimed to achieve 77 new AH units annually. Homelessness is also a challenge; access to the private rented sector is getting harder, and Elmbridge's average house prices and rent levels are high. There were currently 44 households in Temporary Accommodation. Few are in Bed and Breakfast accommodation (with no facilities in the borough). There are an estimated 3 rough sleepers. EBC had worked with other councils and a local charity to provide an overnight shelter for rough sleepers.
- 46 Cllr Kelly considered that the combination of area sub-committees with the Planning Committee worked well, on the whole, and allowed councillors to get to know their areas well. The increased number of applications had not discernibly affected the committee's agenda size, indeed one of the sub PCs often did not need to meet, consequently EBC might decide to reduce the structure to two area PCs. Area PCs carry out site visits on weekdays and attendance is not always high. EBC has a Cabinet of ten. Cllr Browne described the housing role as including the administration of Housing Benefit (HB) and the promotion of AH. S106 monies were used to financially help registered providers to acquire land and increase the stock of AH.

47 Cllr Cheyne said that the main challenges for the planning function were increases in the number and complexity of applications and changing government requirements, for example on core strategies. Member training on planning issues was important, given the complexity of the matter. Regular training sessions were delivered on different topics. Like other councils, a recurring challenge was for members to understand where their boundaries are, in terms of adhering to planning reasons when making decisions. In terms of the conduct of the PC meetings, Cllr Cheyne said that the Chairman's role was to maintain order. He met case officers before committee meetings, particularly on any major applications. He rarely commented on applications, and very rarely voted on them. Officers' reports were precise, and together with the officers' presentations, this gave enough information for summing-up to be largely unnecessary. The agenda for PC meetings was ordered by the clerk, but the Chairman re-ordered the items as necessary, for example to take public speaking items first. Cllr Cheyne met other committee chairmen a few times each year, to discuss any common issues such as committee processes, and the standard of reports.

48 Other matters arising in discussion were:

- a) A legal officer attended each PC/Sub-PC meeting.
- b) It was thought that Area PC's tended to result in more appeals.
- c) EBC send a weekly list of pre-applications and applications to Members.
- d) EBC do not operate a localised code of conduct for PC Members, instead national arrangements applied.
- e) EBC operate a home ownership assistance (equity loan) scheme with a Housing Association.
- f) There is a fair amount of under-occupation in RSL properties, and S106 monies were deployed to fund a down-sizing scheme.
- g) Elmbridge does not have a single large town.
- h) EBC considered that the trigger of more than five objections (to require a Committee decision on an application) was right. This meant that more than the immediate neighbours were objecting, and it caused the number of applications determined by the PCs to be at a tolerable level.
- i) Elmbridge has just one parish council. If an objection is received from them, the application will be considered by the area PC. Elmbridge has a number of residents' associations, which closely scrutinise some applications.
- j) Elmbridge has 22 electoral wards, one member from each usually being a member of the respective area PC.
- k) The officer delegation arrangements for planning decisions worked well. Members usually only 'promoted' applications for PC determination when necessary.
- l) EBC had had some large costs awarded against them on successful appeals.
- m) It was mentioned that LB Sutton started their PC meetings at 7.00pm, and the meetings had to end by 10.45pm.
- n) There are few Houses in Multiple Occupation (HMO) in Elmbridge.
- o) Responsibility for planning policy was with the Cabinet Member for Planning. Most applications were determined by the area PCs.
- p) EBC did not produce supplementary reports for the PC meetings, instead they gave a list of late representations and correspondence, etc.
- q) EBC have podcasts of their committee meetings.
- r) Part 2 items (i.e. those requiring the exclusion of the public) are always taken last on the agenda.

49 Following the meeting with councillors and officers, the Group observed the proceedings of EBC's West Area Planning Sub Committee, which commenced at 7.45pm.

50 On **16 November**, the Group met planning officers, mainly to review a range of information previously requested by the Group previously. The key points arising were:

- Officers advised that the costs of handling appeals could draw on departmental budgets for legal advice and consultancy support totalling c. £48,000. If there was a major, costly appeal, then additional budget would need to be sought. In cases of unresolved differences of view with developers regarding viability of developments, the Council endeavoured to get the developer to pay for the cost of external viability assessment.
- Officers confirmed that the current practice<sup>1</sup> was for Democratic Services to order the agenda for the Planning Committee, following the planning application case numbers. It might be possible to re-arrange the agenda, for example to reflect the level of interest in individual applications by members of the public attending the Committee meeting, or to bring to the front those applications on which objections had been received.
- We observed that the officers' presentations to Elmbridge BC's Planning Committee had been briefer than those at BFC, which were inclined to repeat what was contained in the officer reports. We expressed the view that presentations should be brief, focussed on the local area, and concentrate on the key issues. Members were more likely to be interested in the external appearance of a development than its internal structure.

### **Information on Enforcement Cases**

51 At our request, officers had provided details of ten enforcement cases, between 2 and 3 years old, and selected at random. Officers gave an update on the cases:

- Having researched inspectors' judgements in similar cases, one had been determined not to have been a breach of planning control
- In another case the inspector had concluded there was no breach of planning control
- In three cases, the Council was awaiting compliance with Enforcement Notices (EN), and were considering whether to proceed to prosecution. Non-compliance with ENs is a criminal offence.
- On one case, four EN's had been served, two of which were recommended by counsel. The defendant had appealed, unsuccessfully against all four ENs. The defendant subsequently challenged one of the Inspector's judgements in the High Court and then the Court of Appeal, which required a re-inspection. The re-inspection led to the EN being quashed. If a further EN were to be issued, this case could take a further 12 months to reach a conclusion, so an alternative approach was being considered.

52 In response to Members' questions, and arising in discussion:

- a) Officers said that the time lapse on some enforcement cases was partly due to staff vacancies and transition, and the prioritisation of cases. There is no statutory time limit on enforcement, though any delay would weaken the Council's position in legal proceedings if it had been previously indicated that enforcement action was not planned. The Council needed to be mindful of the significant costs of prosecution.
- b) Over £100,000 had already been incurred on legal fees in one enforcement case; the Council had won the court action, though as the defendant had pleaded

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<sup>1</sup> Officers subsequently told us in January 2016 that the process has been changed so that applications eligible for public speaking are put at the front of the agenda and the remainder are ordered by the number of objections received.

poverty, payment of the award of costs would run for a protracted period. Members queried the prioritisation of expenditure on enforcement cases. Officers advised that it was valuable from a deterrent perspective for the Council to show that on 'landmark' cases it was prepared to 'go the distance' on enforcement. Members queried whether on this case the Council could have required site clearance and re-planting at an early stage. Officers told us that the Council could have sought a court injunction, however that would have been costly and there was no certainty that it would have been granted by the court. Many enforcement cases looked as serious as this case at the early stage, but only around 10% of cases continued to be as serious.

- c) There is on-going prioritisation and review of live enforcement cases, both new and old. New cases were being progressed using the new Local Enforcement Plan, where cases were promptly despatched or progressed as necessary.
- d) The Enforcement team comprised three officers, one of whom was currently on maternity leave.
- e) The Group considered that more information should be provided to Members on enforcement cases.
- f) Nationally, some 60% of appeal cases were won by local authorities, and the Council exceeded that outcome rate.
- g) The backlog of enforcement cases had been reduced. One year ago, there were some 450 cases older than two years, and currently 60 outstanding cases were more than two years old
- h) Some socio-economic groups tend to be disproportionately represented in enforcement cases, and a minority of people always oppose the enforcement system.

### **Affordable Housing commitments achieved from developers over the last three years**

- 53 We reviewed the information provided: this listed the housing developments which had attracted Affordable Homes (AH), totalling 618 over the three years 2012/15. These ranged from 0.67% to 100% of the individual developments. Officers explained that there was an inherent risk that developers could challenge the viability of AH provisions in S106 agreements; indeed the Government had recently issued a letter encouraging developers to re-negotiate S106 agreements in order to bring developments forward, though the buoyant property market in Bracknell Forest meant there should be a low risk of developers seeking to re-negotiate.

### **A case study of a Planning pre-application**

- 54 The Group reviewed a case study and were told by officers that there had been no difference of opinion between the officers who had handled the pre-application and the subsequent planning application. It was always possible that resolving issues at the pre-application stage could give rise to new issues at the application stage. Officers confirmed that applicants received a report on officers' views about their pre-application, and records were kept of all pre-application cases. The lengthy time-line to progress to determination of the application in this case could have been due to several causes, including awaiting action by the developer or responses from consultees. At our meeting on 16 December we were provided at our request with a time-line of this particular case.

### **Comparisons with Other Councils**

- 55 We reviewed our scrutiny officer's research into other nine other councils' arrangements for delegations of planning decisions to officers. Members noted the wide variation in the

approach taken by different councils, with some delegating more extensively to officers than our council, and others less so.

- 56 We also reviewed the benchmarking of key performance indicators on planning issues. The Group noted that the Council's performance was close to the average for all unitary authorities. Officers commented that the Council's performance on processing major applications had been widely commended.

### **Member and Officer Roles**

- 57 The Group considered whether or not further clarification was required regarding the different roles that officers and members have in the planning process, to further understand what can cause tension between Members and Officers and whether a better understanding of roles might lead to less tension on those relatively few occasions when Officers and Members are unable to reach agreement.
- 58 We noted that this had not been raised by Members when they were all asked if they had any views on the Planning function. Officers commented that Members were not involved in enforcement cases. The Group considered there was a different cultural dynamic in different wards, with some ward councillors being very active, acting as a go-between, between residents and the Council. Officers observed that by reference to other councils, member/officer relationships were good at the Council. The Group considered that the 'Blue sheet' system (whereby, on request from Members, officers provided a confidential note on any planning related reasons which could be deployed to refuse an application) worked well, as did the fact that officers were empowered to put forward reports to the Planning Committee with their own balanced, professional recommendations; and if Members over-turned the officer recommendations, that was for sound planning reasons. One Member commented that a source of tension was that officers viewed applications from a planning perspective, whereas Members viewed applications holistically.
- 59 At our meeting on 16 November, we had a preliminary discussion of the main findings, conclusions and recommendations flowing from our review, to inform the forthcoming discussion with the Executive Member, Chairman of the Planning Committee and Director.
- 60 On **16 December** the Group discussed with **Councillor Chris Turrell, Executive Member for Planning and Transport** and officers the provisional conclusions and recommendations flowing from the O&S review. We had also invited the Chairman of the Planning Committee and the Director of Environment, Culture and Communities, but they were unable to attend.
- 61 In the light of the discussion, we determined to make a number of changes to our preliminary conclusions and recommendations, for incorporation in our draft report. Particular matters arising in discussion were:
- On enforcement, there are relatively few anonymous reports, and officers assured anyone reporting concerns that their identity would be kept confidential.
  - On departures from approved planning conditions, we considered there is a principle that once approved by the Planning Committee (PC), the presumption should be that any subsequent changes needed to be agreed by the PC.
  - The Executive Member commented that confidence in the enforcement process required transparency over the backlog, and a continuing reduction in the backlog. The new Local Enforcement Plan process should lead to faster closure of many enforcement cases. Smaller enforcement cases should not be ignored as they were usually of concern to residents and ward members.

- Officers said that there would be no legal basis for levying fees for enforcement work. However, the council could apply for costs in prosecution cases.
- The Chief Officer for Planning and Transport's delegations require that applications from members of staff in that division have any planning applications determined by planning committee. There are no such restrictions on other officers.
- The Council charges a higher Community Infrastructure Levy rate for housing developments of less than 15 units (currently the threshold for the requirement of affordable housing). Consequently, if there were to be an Affordable Housing contribution required for developments under this threshold, then the CIL rates would have to be reviewed and probably lowered.
- Officers commented that the Government's initiative on starter homes was changing the whole 'tone' of Affordable Housing, and this would require a fundamental review of the Local Plan in due course.

### **Review of Information from Officers**

62 The Group reviewed the information previously requested from officers, circulated before the meeting:

- S106 payments for Affordable Housing (AH) to be provided by others: in the two years 2013/15, there had been two developments where this had been agreed, totalling £7.4 million.
- Enforcement costs (staffing and legal costs): we were given details of staffing costs of the Enforcement team, which totalled some £91,000 in 2014/15, also the direct costs of legal officer time, which totalled some £5,000 in 2014/15.
- Further details of the case study of the planning pre-application: Members considered that the consultation with Highways should have been faster at the pre-application stage, and less time might have been spent on processing the planning application if the same officer had reviewed the pre-application (which had given rise to differing officer views concerning the site exit). Officers commented that this was unusual, and most pre-application/applications were processed without such delays.
- The Group was provided with a breakdown of the 80 Planning Committee decisions in 2014-15.
- The Group was informed that the S106 monies from a major development in the south of the Borough were expected to be received around June 2016, these to be spent on the provision of Housing Association AH in Bracknell town centre. The Council's Housing team decided where and how these sums were to be best spent (for approval in the capital programme); this would often be in partnership with a Housing Association, though it could be used to purchase an existing property, for use as AH (AH does not need to be new-build).

### **Production of the Working Group's Report**

63 The Group met for the last time on **9 February**, when it considered and agreed its draft report, for presentation to the Environment, Culture and Communities O&S Panel for its adoption.

For further information on the work of Overview and Scrutiny in Bracknell Forest, please visit our website on <http://www.bracknell-forest.gov.uk/scrutiny> or contact us at:

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