



Isle of Man
Government

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Response to Tynwald Commissioner Case TCA1801

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Department of Environment, Food and Agriculture

Planning and Building Control Directorate Murray House

1. Purpose

This information report sets out the actions undertaken by the Department in respect of breaches of Planning Control following the Tynwald Commissioner report on Case TCA1801¹

2. Introduction

Effective enforcement contributes to the outcome, "We have a planning system which supports sustainable growth" and to the National Indicator, "Improve confidence in the planning system".

The Tynwald Commissioner report on Case TCA1801 was provided to the Department in response to a complaint in respect of how a planning enforcement matter was handled. It relates to the handling of an enforcement case that was opened in May 2017 and a decision made in November 2017, in relation to a development which was granted planning approval in July 2016 based on a planning application received in March 2016.

The Commissioner's report was finalised on 28 September 2018. That report made a number of comments in respect of the case in question and the enforcement service generally. The Commissioner included a recommendation, "to conduct an internal review by the Department of the way in which such breaches of planning control should be dealt with, and lay the conclusions of it before Tynwald by the end of the coming session".

In respect of general comments the Commissioner felt that officers acted within the framework of the law and under relevant delegated powers, however there were delays in the handling of case work affected by the need of officials to get through a substantial workload and that there was a lack of clarity in respect of actions and timescales. He also commented that drawings submitted as part of applications could be more explicit with regard to height limitations, particularly in urban contexts. The Commissioner felt that there ought to be greater referral to the political Member for the Department in respect of more controversial cases.

It is noted that there is an ongoing Environment and Infrastructure Policy Review Committee considering enforcement matters.

3. Action Taken

A number of actions have been taken in relation to enforcement, some of which pre-date or were concurrent with the Tynwald Commissioner's investigation.

- Two new posts have been created - a Principal Planner (Enforcement) started in June 2017 and a Planning Assistant (with 50% of their time focused on enforcement) started in January 2019;
- In the summer of 2018, the Department undertook a review of its operational procedures in respect of enforcement, following the creation of the Principal Planner post.
- The Department published an updated Enforcement Policy in August 2018².

¹ <http://www.tynwald.org.im/about/TCA/Documents/TCA1801.pdf>

² <https://www.gov.im/media/1355729/planning-enforcement-policy-sept-18-2-link-to-form-updated.pdf>

The Commissioner's Report was published in September 2018. However, the Department had been given the opportunity to see and comment on drafts in relation to factual accuracy. Therefore, the new Enforcement Policy was informed by the emerging investigation even though the updated policy was published before the final Commissioner's Report. The enforcement policy was also informed by consultation with the Attorney General's Chambers. The appendix 1 to this report sets out the findings of the Commissioner and how these are addressed by the new policy or other changes.

4. Conclusion

It is considered that the adoption and implementation of the current operational policy, alongside the creation of 1 1/2 new posts in planning enforcement since 2017 represents a significant step forward in the way planning enforcement is carried out. The production of the policy was informed by reviewing existing processes and the day-to-day experiences of officers. The new policy addresses comments made by the Commissioner in respect of timescales and clarity of what action may be taken and when. The Department has also become stricter in its acceptance of plans submitted as part of applications.

Appendix 1: Response to Findings

Tynwald Commissioner Report	Department Response
<p>(i) Resources and delay</p> <p>There was a delay of 23 weeks in making a decision on the case. The Tynwald Commissioner acknowledges that the case was prioritised in accordance with the then policy, but such a delay was still, "considerable" (Paras 50-51).</p>	<p>Historically there was one enforcement officer within the Directorate. In June 2017 an additional officer (Principal Planner) started and in January 2019 a second officer (Planning Assistant) started who is to focus on enforcement 50% of the time. This additional resource is allowing the historic backlog to be managed down over time, as well as dealing with new cases.</p>
<p>The wording in the standard letter was misleading, there was a lack of public understanding of how enforcement works and that there are no time targets for enforcement cases (Para 52)</p>	<p>The wording of standard letters to complainants has been revised, to ensure that they do not imply that enforcement action will always be taken.</p> <p>The new Enforcement Policy provides much more detail on the enforcement process, including how cases are categorised (3.1), initial investigation (3.2), consideration of formal action (3.4), how decisions are made (3.4) potential outcomes (3.5).</p> <p>It contains time targets for initial site visits (3.1).</p>
<p>(ii) Regularisation</p>	
<p>The report notes that where a breach has occurred a retrospective application can be made (Para 53)</p>	<p>This comment is noted. Clarification of the potential role of retrospective applications is provided in section 3.2 of the new policy.</p>
<p>(iii) Enforcement</p>	
<p>The report notes that the Department cannot compel someone to submit a retrospective application and where one is not forthcoming must decide whether to take action. The report also outlines how someone may respond if a notice is submitted (Para 54)</p>	<p>These comments are noted. The new policy provides advice to those who are being investigated as to how to respond (section 4).</p>
<p>The report notes that the officer acted within the framework for decisions (Para 55)</p>	<p>Noted. The new policy explains how decisions are made (3.4)</p>
<p>(iv) Effect on Neighbours</p>	
<p>Notes that professional judgement was used and that such judgement should take account of all the evidence. Noted the views of neighbours were not sought. No record of the case being discussed with the political Member for the Department. The report indicates that the commissioner does not believe this amounted to good administration (paragraph 56-57).</p>	<p>The comments are noted. There is no legal requirement to carry out consultation in relation to enforcement investigations, and to do so would have significant resource implications, as well as potentially raising an expectation that further action would be taken. The request to investigate form has been published provides an opportunity for complainant to set out their concerns. The new enforcement policy provides additional</p>

Tynwald Commissioner Report	Department Response
	<p>guidance and encourages complainants to set out how the activity causes them harm (2.4 of the new policy).</p> <p>The enforcement policy sets out under which circumstances cases will be discussed with the Political Member (3.4).</p>
(v) Excess Height	
<p>The report highlights issues with the way the height of the development was measured, and communicated and considered. Given errors within this, this is considered sufficient to constitute maladministration (Paras 58–60).</p>	<p>The Department has accepted that there was miscommunication between Building Control and the Planning Officer and this led to a decision being taken in part on inaccurate information. However, it is significant to note that the Officer's conclusion is based not only on the measurements, but also from having visited the site on a number of occasions and seeing the completed roof in context. It may be that such visits were more instructive on reaching a conclusion as to the level of harm than the measurement itself, but it is accepted that it is difficult to ascertain this either way from the paperwork within the file.</p> <p>As part of the implementation of the new policy, we are ensuring there is better internal communication and also a clearer reporting mechanism (either harm assessment or full report) so it is clear what factors have been taken into account and how in reaching a decision.</p>
(vi) The retrospective approval assumption	
<p>The report notes that the previous application on the site had been approved by the Planning Committee and if a retrospective application had been submitted it would have been "wise" to bring this before committee also. The report indicates that, in relation to the officer's assessment that a retrospective application would be likely to be approved, "it was bold to predict so confidently what the committee would decide" (Paras 61-62).</p>	<p>The Planning Committee Standing Orders have been updated (DEFA SO 2018/01) May 2018 and include clarification of which applications are within the committee's remit. The enforcement decision making records (harm assessment or full report) include assessment against Planning Policy rather than only a broad prediction of the likelihood of a retrospective application being approved. The new policy provides clarity on the process (section 3).</p>
(vii) Due Process	
<p>The report indicates that the Department provided misleading advice in relation to her being deprived of due process as there was no retrospective application. The report indicates that the Department raised expectations and, when these were not met, created a sense of grievance (Paras 63–64).</p>	<p>The comments are noted. The policy seeks to clarify the process and manage expectations of the scope of planning enforcement, the timescales and potential outcomes.</p>

Tynwald Commissioner Report	Department Response
(viii) Permitted Development	
<p>The report notes that one of the considerations the officer had related to the potential undermining of conditions attached to the planning approval if the view were taken that the development was materially different to the approved plans. The report indicates that he was unable to see much force in this. The report notes that if enforcement action (i.e. a notice) were taken and upheld or not appealed a "retrospective application would very probably be needed in order to avoid the prospect of prosecution" (paras 65-67).</p>	<p>The comments are noted. The new policy clarifies the role of retrospective applications (3.2) and the factors taken into account in considering formal action (3.3). The new approach to reporting also helps to clarify what and how considerations are taken into account in reaching decision.</p>
(ix) Legal Action	
<p>The report suggests that the consideration of whether to serve an enforcement notice should be separate, and to a different standard of proof, as to when considering prosecution. It suggests that it was not reasonable to not serve a notice in part on the basis that any subsequent prosecution may fail (paras 68-70).</p>	<p>The new policy provides clarity on when formal action will be considered and the role of the Attorney General's Chambers in this (3.3). The new approach to reporting also helps to clarify what and how considerations are taken into account in reaching decision.</p>
Conclusions	
<p>The report notes the substantial workload and that officers acted within the delegation of powers however that the failures noted above amount cumulatively to poor handling and notes that a review by the Department has already begun (Para 71).</p>	<p>The comments are noted and the review referred to resulted in the publication of the new policy.</p>
<p>The report suggests planning applications should have better quality plans in relation to heights (Para 72)</p>	<p>Work is ongoing to improve the quality of submissions.</p>
<p>The report notes delays in the handling of the case (Para 73).</p>	<p>The new policy more clearly sets out the process and timescales. As noted above, additional staffing resources are in place.</p>
<p>The report notes that there were faults, but these may not have resulted in a different outcome (Para 74)</p>	<p>Noted</p>
<p>The report made 3 recommendations – an apology be issued, an internal review be carried out and the conclusions laid before Tynwald and reimbursement of reasonable expenses (Para 75)</p>	<p>The Department has given an apology and offered to pay expenses. This report is intended to fulfil the second recommendation.</p>
<p>The report indicates that implementation of the 3 recommendations would adequately remedy the failures of administration (Para 76)</p>	<p>Noted.</p>