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## **APPEALS AND LOCAL REVIEW BODY DECISIONS**

Report by Head of Communities and Economy

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### **1 PURPOSE OF REPORT**

- 1.1 This report informs the Committee of notices of reviews determined by the Local Review Body (LRB) at its meeting in September 2016, October 2016 and November 2016; and two appeal decisions received from Scottish Ministers.

### **2 BACKGROUND**

- 2.1 The Council's LRB considers reviews requested by applicants for planning permission, who wish to challenge the decision of planning officers acting under delegated powers to refuse the application or to impose conditions on a grant of planning permission.
- 2.2 The decision of the LRB on any review is final, and can only be challenged through the Courts on procedural grounds.
- 2.3 Decisions of the LRB are reported for information to this Committee.
- 2.4 In addition, this report includes two decisions on appeal which have been considered by Scottish Ministers.

### **3 PREVIOUS REVIEWS DETERMINED BY THE LRB**

- 3.1 At its meeting on 6 September 2016 the LRB made the following decisions:

	<b>Planning Application Reference</b>	<b>Site Address</b>	<b>Proposed Development</b>	<b>LRB Decision</b>
<b>1</b>	16/00213/DPP	47 Arthur View Terrace, Danderhall	Erection of extension to dwellinghouse	Review upheld. Permission granted
<b>2</b>	16/00193/DPP	Lothian Cottage, Dalkeith	Erection of two storey and single storey extension to dwellinghouse	Review upheld. Permission granted

3.2 At its meeting on 26 October 2016 the LRB made the following decisions:

	<b>Planning Application Reference</b>	<b>Site Address</b>	<b>Proposed Development</b>	<b>LRB Decision</b>
<b>1</b>	16/00470/DPP	Grange Dell Lodge, Penicuik	Subdivision of single dwellinghouse to form two dwellinghouses and associated extension and alterations.	Review upheld. Permission granted
<b>2</b>	16/00474/DPP	2 Lamb's Pend, Penicuik	Change of use office to residential (5 flats) and associated external alterations	Review upheld. Permission granted subject to securing developer contributions
<b>3</b>	12/00111/DPP	Land South of Hilltown House, Woolmet, Dalkeith	Erection of 4 dwellinghouses	Reaffirmed decision taken in September 2012 to grant permission subject to securing developer contributions. The LRB gave the applicant 6 months to conclude the legal agreement

3.3 At its meeting on 29 November 2016 the LRB made the following decisions:

	<b>Planning Application Reference</b>	<b>Site Address</b>	<b>Proposed Development</b>	<b>LRB Decision</b>
<b>1</b>	16/00429/DPP	Land at Howgate Restaurant, Howgate	Erection of 3 dwellinghouses	Review upheld. Permission granted subject to securing developer contributions
<b>2</b>	16/00575/DPP	5 Thornyhall, Dalkeith	Alterations to roof of conservatory	Review upheld. Permission granted

	<b>Planning Application Reference</b>	<b>Site Address</b>	<b>Proposed Development</b>	<b>LRB Decision</b>
<b>3</b>	16/00568/DPP	7 Cochrina Place, Rosewell	Erection of extension to dwellinghouse	Review upheld. Permission granted

## **4 APPEAL DECISIONS**

- 4.1 An appeal against a refusal of advert consent (16/00407/ADV) for display of non-illuminated signage (retrospective) at 21 The Square, Penicuik has been upheld and consent granted. The Scottish Government Reporter upheld the appeal after considering the advert preserves the character and appearance of the conservation area, does not detract from the special interest of any nearby listed building and it is not harmful to amenity. A copy of the appeal decision accompanies this report.
- 4.2 An appeal against a refusal of a Certificate of Lawful Use (16/00368/CL) for the use of outbuilding and adjacent outdoor space as boarding kennels at The Smithy, Mossend, Gorebridge has been dismissed and a Certificate of Lawful Use has not been issued. The Scottish Government Reporter dismissed the appeal after considering there was not sufficient evidence to support the applicant's assertion that the stated use had been in operation for at least ten years. A copy of the appeal decision accompanies this report.

## **5 RECOMMENDATION**

- 5.1 The Committee is recommended to note the decisions made by the Local Review Body at its meetings in September 2016, October 2016 and November 2016 and the two appeal decisions by Scottish Ministers.

**Ian Johnson**  
**Head of Communities and Economy**

**Date:** 21 December 2016  
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**Background Papers:** LRB procedures agreed on the 26 November 2013.





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Decision by Jo-Anne Garrick, a Reporter appointed by the Scottish Ministers

- Advertisement appeal reference: ADA-290-2000
- Site address: 21 The Square, Penicuik, EH26 8LH
- Appeal by Mr P Sweeney against the decision by Midlothian Council
- Application for advertisement consent 16/00407/ADV refused by notice dated 15 July 2016
- The advertisement proposed: display of non-illuminated signage (retrospective)
- Date of site visit by Reporter: 10 November 2016

Date of appeal decision: 18 November 2016

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## Decision

I allow the appeal and grant advertisement consent subject to the standard conditions for the display of advertisements that are specified in the Town and Country Planning (Control of Advertisements) (Scotland) Regulations 1984.

## Reasoning

1. Regulation 4(1) of the Town and Country Planning (Control of Advertisements) (Scotland) Regulations 1984 (the advertisement regulations) limits the exercise of the powers of control of advertisements solely to the interests of amenity and public safety, and these matters are elaborated in regulation 4(2). In this case, the effects on public safety are not referred to in the Council's reasons for refusing the application. Based on the site inspection, the written submissions and as there is no objection in relation to public safety, the determining issue in this appeal is whether the proposed display would be contrary to the interest of amenity.
2. In dealing with this issue, I take account of the location of the appeal site within the Penicuik conservation area and that it is adjacent to listed buildings at numbers 23/ 24 as well as at 17/ 18 The Square.
3. The appeal relates to an advertisement consisting of a non-illuminated sign, that has been erected at the site without consent. The submitted plans indicate that the sign measures approximately 7 metres wide by 0.84 metres tall and is displayed on the front elevation of the building, 2.9 metres above ground level. The sign is positioned between the ground and first floor windows and is constructed from an aluminium panel tray, finished with pvc vinyl graphics.



4. The appeal site is located on the eastern side of The Square, which is on the edge of the town centre. The immediately surrounding area comprises a mixture of retail, commercial and residential uses and building styles. Residential uses become more prominent to the south and east of the appeal site.
5. Regarding amenity, regulation 4(2)(a) of the advertisement regulations, states that the determination of the suitability of a site for the display of advertisements should be in the light of the suitability of the general characteristics of the locality, including the presence of any feature of historic, architectural, cultural or similar interest.
6. Representations from residents raised concerns that the sign, by virtue of its materials, size and colour, has an adverse impact on the amenity of the area and particularly on the conservation area and adjacent listed buildings.
7. Within its appeal statement, the council refers to Policy DP8 of the Midlothian Local Plan (2008). Policy DP8 provides detained development guidelines regarding advertisements. While a council may adopt and publish policy guidelines, possibly in a local plan, which often serve a useful purpose, failure to conform to such policies or guidelines cannot be cited as the sole or main reason for the refusal of express advertisement consent. Each application falls to be considered on its merits against the above determining issues of amenity and public safety. That said, I note that the policy and guidance mentioned in this case amplifies these issues.
8. I note the concerns expressed by the council and other representations and acknowledge that the building has a scale and appearance of a residential property. I also pay special attention to the desirability of preserving or enhancing the character or appearance of the conservation area, in so far as this relates to amenity. However, given the variety of building styles, sizes and conditions in the area, I conclude that the advert preserves the character and appearance of the conservation area, does not detract from the special interest of any nearby listed buildings and it not harmful to amenity.
9. I have considered all the matters raised in the submissions but none lead me to alter my conclusion. Accordingly, I allow the appeal and grant advertisement consent. The council has not suggested any conditions other than the standard conditions set out in Part 1 of Schedule 1 of the 1984 regulations, which are imposed on all advertisement consents. I agree that no additional conditions are necessary in this case.

*Jo-Anne Garrick*  
Reporter



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Decision by David Russell, a Reporter appointed by the Scottish Ministers

- Certificate of Lawful Use appeal reference: CLUD-290-2001
- Site address: The Smithy, Mossend, Gorebridge, EH23 4NL
- Appeal by George Forsyth and Patrick Vaughan against the decision by Midlothian Council
- Application for certificate of lawful use (ref. 16/00368/CL), which was dated 16 May 2016 and was refused by notice dated 26 August 2016
- The subject of the application: use of outbuilding and adjacent outdoor space as boarding kennels

Date of appeal decision: 12 December 2016

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## Decision

I dismiss the appeal and refuse to issue the certificate sought.

## Reasoning

1. For the avoidance of doubt, this appeal does not concern whether planning permission should be granted for the use of the site as a boarding kennels. Rather, the appeal relates to an application made by the appellant for a certificate of lawfulness of proposed use to be issued under section 151(1) of the Act. The application for the certificate was submitted on the basis that the use as boarding kennels existed at the appeal site for at least ten years, and is therefore now immune from enforcement action and accordingly should be certified as lawful.

2. The evidence put forward in support of the application consists of a number of licences, an approved building warrant, and photographs. Statements were also made in support of the application by the appellant and by a number of members of the public.

3. The initial licence was for the breeding of dogs at The Smithy. It was issued under the Breeding of Dogs Act 1973, and covered the period from April to December 1999. The licence restricted the breeding to King Charles Cavalier Spaniels and to Boxers. Although this is evidence of dogs being kept at the premises during this period, I consider that the use for breeding is a different use from use as boarding kennels. No further evidence has been submitted that shows that the use of the premises for breeding dogs continued beyond December 1999. Subsequently, in May 2000, the council issued a building warrant for works to alter the kennels accommodation to individual stalls.



4. The next licence was issued after that, on 30 June 2000 under the Animal Boarding Establishments Act 1960. It authorised the previous occupier to keep an animal boarding establishment at the premises known as 'The Smithy' until the end of that year. Subsequently similar, but not identical, licences were issued annually until 2011.

5. In the first two years the conditions of the licence restricted the facility to 10 dogs and 10 cats; in the third year to 10 cats only, with no reference at all to dogs; in the fourth year, the conditions of the licence have not been provided to me; in the next three years the facility was restricted to 15 cats only, with no reference at all to dogs; in the eighth year, the facility was restricted to 50 dogs and 50 cats; and in the final two years, the facility was again restricted to 15 cats only, with no reference at all to dogs, with the address of the licence holder being given as 'The Smithy Cattery'. That licence expired at the end of 2011 and no further licences have been submitted as evidence.

6. It is not disputed that the previous occupier ceased to use the premises as an animal boarding establishment when he retired around 2011. Photographs submitted by the council showing the stalls area being used for storing furniture and household belongings are consistent with this. Further photographs submitted by the appellants showing the recently upgraded facilities are evidence of their current intentions, although I do not consider that they assist in providing evidence of past use.

7. In assessing all of this evidence, I am required to apply the test of 'the balance of probabilities' in considering whether it demonstrates that the premises were used as boarding kennels over a period of at least ten years, prior to the date of the application to the council for the certificate of lawful use. The date of the application was 16 May 2016.

8. I am satisfied, based on the evidence of the submitted licences, that the premises were used as an animal boarding establishment continually for at least a ten year period between July 2000 and December 2011. However I also find that this does not demonstrate that the premises were used as boarding kennels, due to the conditions of the licences not providing for the boarding of dogs except in three of those years.

9. I have also sought to identify any other evidence in the statements made by or on behalf of the appellants, or by those who submitted representations, which would contradict that conclusion. Of over 30 representations, four made a reference to the premises previously being used as boarding kennels. These statements were based on the writer's understanding, or relied on the evidence of the licences, or were simply asserted. While these representations also provided reasons why the operation of the boarding kennel would be beneficial and should be permitted, none provided any substantive evidence which demonstrates that the premises had been used as boarding kennels over the period from 2000 to 2011, contrary to the terms of most of the licences issued. In these circumstances I can attach little weight to the unsupported statements which contradict the evidence of the licences.



10. Many of the others who wrote in support of the application also noted the benefits of the proposed new business, but did not refer to the proposal as being a resumption of a previous boarding kennels use or business. Some had attended an open day held by the appellants at the premises, and while many confirmed that they would be happy to use the premises for boarding their own dogs there, and emphasised the need for such a facility in this area, none stated that they had previously used, or been were aware of, a boarding kennels operated by a earlier owner at the premises.

11. The appellants also submitted comments they had received from members of the public who had attended the open day. These also provided clear evidence of support and of a need for the facility, but again none indicated that they had used, or known of, boarding kennels operating there previously.

12. I have also considered whether there is anything else which would still justify allowing the appeal and issuing the certificate sought. Statements made by the appellants and members of the public regarding the suitability of the premises for use as boarding kennels, and the benefits that would arise from it, would be relevant in considering an application for planning permission to be granted, but that is not what is before me in this appeal. There is also no evidence that planning permission has been granted for the use of the premises as boarding kennels at any time in the past.

13. Accordingly in the absence of substantive evidence being provided which demonstrates that the appeal premises have been used as boarding kennels over a ten year period, I find that the council's reason for refusal is well-founded, and I therefore conclude that the certificate should not be issued.

14. If further evidence of past use of the boarding kennels emerges, this decision would not preclude another application being made to the council for a certificate of the lawfulness of the use to be issued. Neither would this decision preclude the council from granting an application for planning permission for the use of the premises as boarding kennels in future.

*David A. Russell*

Principal Inquiry Reporter