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## **NON COMPLIANCE WITH THE REQUIREMENTS OF AN ENFORCEMENT NOTICE REGARDING THE ERECTION OF A GARAGE AND SUN ROOM AT 1 LAUREL BANK ROAD, MAYFIELD.**

Report by Chief Officer Place

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### **1 REPORT SUMMARY AND RECOMMENDATION**

- 1.1 This report relates to the non-compliance with the requirements of an enforcement notice served by the Council pursuant to Section 127 of the Town and Country Planning (Scotland) Act 1997, as amended, with regard the erection of a building comprising a garage and sun room at 1 Laurel Bank Road, Mayfield.**
- 1.2 The enforcement notice required the dismantling of an unauthorised building that comprises a garage and sun room and to also remove the dismantled materials from the site. None of these steps have been taken, either by the enforcement notice compliance date of 23 November 2022 or to date (at the time of drafting this report). Non-compliance with an enforcement notice constitutes an offence.**
- 1.3 This report recommends that the Committee instruct the Planning, Sustainable Growth and Investment Manager to refer the case to the Crown Office and Procurator Fiscal Service for consideration to be given to prosecutorial action in relation to the parties who have breached the enforcement notice, pursuant to Section 136 of the Town and Country Planning (Scotland) Act 1997. The maximum penalty on successful prosecution is a fine of up to £50,000 per offence.**

### **2 BACKGROUND**

- 2.1 A retrospective planning application (19/00687/DPP) for the erection of garage, sun room and decking (retrospective) at 1 Laurel Bank Road, Mayfield was refused 13 September 2019 and a subsequent notice of review was dismissed by the Local Review Body (LRB) at its meeting of 18 February 2020. The planning application was refused and subsequent review dismissed for the following reasons:**

- 1 *As a result of a combination of its forward projection, design and materials the building appears as an incongruous feature out of***

*keeping with the character of the original house at the application property and has a detrimental impact on the visual amenity of the surrounding area.*

- 2 *For the above reason the proposal is contrary to policy DEV2 of the adopted Midlothian Local Development Plan 2017 which seeks to protect the character and amenity of the built-up area.*

- 2.2 Despite the refusal of planning permission and the LRB decision to dismiss the review the property owner had not taken action to remedy the breach of planning control and the unauthorised building remained in situ and as such an enforcement notice was issued 17 February 2022, with a take effect date of 23 March 2022 and a five month compliance period. A copy of the enforcement notice is attached to this report as Appendix A. The enforcement notice required the property owner to:
1. Dismantle the building that houses the unauthorised garage and sun room; and
  2. Remove all dismantled materials permanently from the land subject of this notice.
- 2.3 Although the decking does not have the benefit of planning permission it is considered to be acceptable in planning terms and as such it was considered not to be expedient to require its removal as part of the enforcement notice. The reason to refuse the retrospective planning application did not include reference to the decking.
- 2.4 The property owners appealed the enforcement notice - a Scottish Government Reporter appointed to determine the appeal dismissed it and upheld the enforcement notice. A copy of the appeal decision is attached as Appendix B. As a consequence of the appeal the compliance period is extended to 23 November 2022 (five months after the appeal decision).
- 2.5 In reaching the decision the Reporter confirmed that a breach of planning control had taken place onsite as alleged and that the proposed steps to address the breach of planning control were not excessive.
- 2.6 Because of the nature and scale of the breach of planning control, rather than recommending referral to the Crown Office and Procurator Fiscal Service (COPFS) as a financial punitive step the Council issued a Fixed Penalty Notice on 24 January 2023 as an alternative course of action to see if this would resolve the breach of planning control.
- 2.7 Section 136A of the Town and Country Planning (Scotland) Act 1997 as amended provides that a local planning authority may serve a Fixed Penalty Notice (FPN) if it is identified that a person is in breach of a valid enforcement notice. A FPN requires a fine of £2,000 to be paid (reduced by a quarter if paid within 5 days of being issued) as an

alternative to prosecutorial action. The issuing of a FPN precludes other prosecutorial action if it is paid within 30 days. The FPN has not been paid.

- 2.8 During a site inspection by a Council officer in early March 2023 it was established that none of the enforcement notice requirements had been complied with by the required date (see photographs attached as Appendix C). The land owners have formally been informed that as the FPN has not been complied with and the enforcement notice has also not been complied with, that being an offence, the matter would be referred to the Committee for consideration of prosecutorial action.

### **3 THE LEGISLATIVE POSITION**

- 3.1 It is not a criminal offence for development to take place without the requisite planning permission, but it is an offence to fail to comply with an enforcement notice. There is a 6 month period from the date of the offence occurring (that is the date by which the notice should have been complied with, not the date from which the breach of planning control occurred) in which a prosecution could be potentially brought.
- 3.2 In Scotland the Crown Office and Procurator Fiscal Service (COPFS) are responsible for making decisions about prosecutorial actions. In the majority of instances, criminal offences are referred to COPFS by Police Scotland. However, other bodies who are the responsible regulatory organisation for particular legislative areas will also refer cases. This includes the Health and Safety Executive, the Scottish Environmental Protection Agency and local authorities in relation to planning and other matters.
- 3.3 It should be noted that failure to comply with an enforcement notice is not only an offence, it is also a continuing offence should a prosecution be successfully brought, a conviction secured and the enforcement notice requirements remain outstanding. For example, if non-compliance with the enforcement notice requirements continued for a further month after conviction that would be a further 31/30 offences occurring which would bring further potential implications for a defendant in terms of further potential convictions, criminal records and levels of fines.
- 3.4 The Town and Country Planning (Scotland) 1997 Act provides that *“In determining the amount of any fine to be imposed on a person convicted of an offence under this section, the court shall in particular have regard to any financial benefit which has accrued or appears likely to accrue to him in consequence of the offence”*
- 3.5 The failure to comply with an enforcement notice is clearly regarded as a serious matter and understandably so by the Scottish Ministers because of its implications for the integrity of the planning system and indeed in relation to the upholding of the rule of law. The Planning

(Scotland) Act 2019 which has now been enacted specifically provided for the increasing of fines for a number of enforcement related matters. In relation to enforcement notices the level of fine on successful prosecution has increased from a maximum of £20,000 to £50,000.

#### **4 OTHER CONSIDERATIONS**

- 4.1 The Scottish Government Policy on planning enforcement is contained in Circular 10/2009: Planning Enforcement. It includes the following guidance that is particularly relevant to the consideration of this case :

*“Planning authorities should bear in mind the statutory time limits for taking enforcement action and, in particular, the possibility that a referral to the Procurator Fiscal to determine whether to initiate a criminal prosecution may need to be made promptly in those cases where breaches have to be prosecuted within 6 months of the date on which the offence was committed. This is not the date of the alleged breach of planning control but the last date of failure to comply with the Notice requiring the breach to be remedied.”*

*“The integrity of the development management process depends upon the planning authority's readiness to take effective enforcement action when necessary. Public respect for the development management system is undermined if unauthorised development, which is unacceptable on its planning merits, is allowed to proceed without any apparent attempt by the planning authority to intervene before serious harm to amenity results from the breach.”*

#### **5. CONCLUSION**

- 5.1 The responsibility of the outstanding breach of planning control lies with the landowners who decided to erect the unauthorised building without the benefit of planning permission. All of the unauthorised development which is the subject of the enforcement notice remains on site in breach of the enforcement notice requirements. The unauthorised development has been the subject of public complaint.
- 5.2 It is for COPFS to make the final decision with regard prosecutorial action against the non-compliance with an enforcement notice. In this case, unauthorised development has been carried out which does not have the benefit of planning permission. A planning application for the erection of garage, sun room and decking (retrospective) at 1 Laurel Bank Road, Mayfield was refused and a subsequent notice of review was dismissed by the Council's LRB. The Council has lawfully served an enforcement notice in relation to unauthorised developments and that notice has been upheld on appeal by the Scottish Ministers. The notice has not been complied with within the period specified by the notice. It is an offence for an enforcement notice not to be complied with. Therefore having regard to the guidance provided by Scottish Ministers in Circular 10/2009, the serious nature of the breach of

planning control and the Council's responsibility to uphold confidence and integrity in the planning system and the rule of law, it is considered to be in the public interest for the Council to refer this case to COPFS.

## **6 RECOMMENDATION**

- 6.1 It is recommended that the Committee determine to instruct the Planning, Sustainable Growth and Investment Manager (or an alternatively appropriately appointed officer) to refer the case to the Crown Office and Procurator Fiscal Service for consideration of prosecutorial action pursuant to Section 136 of the Town and Country Planning (Scotland) Act 1997 as amended.

**Peter Arnsdorf**  
**Planning, Sustainable Growth and Investment Manager**

**Date:** 20 March 2023  
**Contact Person:** Matthew Atkins, Lead Officer Planning Obligations  
matthew.atkins@midlothian.gov.uk

**IMPORTANT  
THIS COMMUNICATION AFFECTS YOUR PROPERTY**

**Town and Country Planning (Scotland) Act 1997, as amended  
by the Planning (Scotland) Act 2019 (“the Act”)**

**ENFORCEMENT NOTICE**

**Issued by Midlothian Council**

**17 February 2022**

**Mr. James Bevis and Ms. Louise Axon  
1 Laurelbank Road  
Mayfield  
Dalkeith  
EH22 5HT**

- 1. THIS IS A FORMAL NOTICE** issued by Midlothian Council (“the Council”) because it appears that there has been a breach of planning control under the terms of section 123(1)(a) of the Act (as amended) at the land described below. The Council considers it expedient to issue this Enforcement Notice (“EN”) having regard to the provisions of the development plan and to other material planning considerations. Note that Schedule 1 of this EN contains important information.

**2. THE LAND TO WHICH THE NOTICE RELATES**

Land at 1 Laurelbank Road, Mayfield, Dalkeith, EH22 5HT, as shown edged in red on the location plan attached to this EN.

**3. THE MATTERS WHICH APPEAR TO CONSTITUTE THE BREACH OF PLANNING CONTROL**

Without planning permission, the erection of a detached garage and sun room on the land referred to in Part 2 of this Notice (above) which was completed within a period of four years prior to the date of service of this EN (17 February 2022).

**(IMPORTANT – CONTINUES ON NEXT PAGE)**

#### **4. REASONS FOR ISSUING THIS NOTICE**

- (a) Retrospective planning permission (reference 19/00687/DPP) for the erection of the garage and sun room subject of this Notice, was refused by Midlothian Council on 13 September 2019.
- (b) A Notice of Review for the refused planning permission - referred to in part 4 (a) above - was submitted by the joint owner of the property on 13 December 2019. The Council's Local Review Body (LRB) dismissed the review at its meeting on 18 February 2020.
- (c) Notwithstanding the decision of the LRB - referred to in part 4(b) above - the unauthorised development subject of this Notice remains in place, at the date of service of this Notice (17 February 2022).
- (d) The Council's planning authority has deferred taking enforcement action - following the decision of the LRB - due to the circumstances relating to the Covid 19 pandemic. However, that situation has now improved and the unauthorised building that houses both developments now needs to be removed. Its continuing presence on the land - beyond the allowances already made for the Covid 19 pandemic - is in conflict with the democratic, planning, decision making process (as referred to in parts 4(a) and 4(b) of this Notice above) and would thereby undermine the credibility of the planning system and public trust in its outcomes.

#### **5. WHAT YOU ARE REQUIRED TO DO**

- A Dismantle the building that houses the unauthorised garage and sun room and
- B remove all dismantled materials permanently from the land subject of this Notice.

#### **6. TIME PERIOD FOR COMPLIANCE**

Within 5 calendar months from when this Notice takes effect, namely by 23 August 2022.

#### **7. WHEN THIS NOTICE TAKES EFFECT**

This notice takes effect on 23 March 2022 unless an appeal is made against it beforehand.

**(IMPORTANT – CONTINUES ON NEXT PAGE)**

Signed

A handwritten signature in black ink, appearing to read 'M. A.', is positioned above the printed name Matthew Atkins.

Matthew Atkins

Lead Officer Planning Obligations  
Midlothian Council.

On behalf of:

Derek Oliver

Chief Officer - Place,  
Midlothian Council.

Date: 17 February 2022

**(IMPORTANT – CONTINUES ON NEXT PAGE)**



## **8. YOUR RIGHT OF APPEAL**

You can appeal against this notice, but any appeal must be received, or posted in time to be received by the Scottish Ministers before 23 March 2022. Any other person who has an interest in the land to which this notice relates may also appeal to the Scottish Ministers by the same date.

**Schedule 1 of this notice gives information on your Right of Appeal.**

## **9. WHAT HAPPENS IF YOU DO NOT APPEAL**

If you do not appeal against this EN, it will take effect on 23 March 2022 and you must then ensure that the required steps for complying with it, for which you may be held responsible, are taken within the period specified in the notice. Failure to comply with an enforcement notice which has taken effect can result in prosecution or the service of a Fixed Penalty Notice on the relevant person(s) who have not complied with its requirements in terms of s145A(1) of the Act. Failure to comply with an enforcement notice which has taken effect may also result in the Council taking direct action to correct the breach.

**(IMPORTANT – CONTINUES ON NEXT PAGE)**

## **SCHEDULE 1**

### **EXPLANATORY NOTE FOR THOSE IN RECEIPT OF AN ENFORCEMENT NOTICE**

#### **RELEVANT LEGISLATION**

A copy of copy of Sections 123, 124, 127-139 of the Act is attached. You may wish to note the points referred to below.

#### **RIGHT OF APPEAL**

If you wish to appeal against this EN, you should write to Planning and Environmental Appeals Division, Ground Floor, Hadrian House, Callendar Business Park, Callendar Road, Falkirk, FK1 1XR. The appeal must be received, or posted in time to be received by the Scottish Ministers before the date on which this notice takes effect. The Scottish Ministers have no power to consider an appeal lodged out of time.

The appeal, which must be made in writing, must be based on one or more of the grounds set out in section 130 of the Act. If you decide to appeal you should state the facts on which you propose to rely in support of each of the grounds of appeal. The grounds of appeal and the statement of facts must be submitted with your appeal or within fourteen days of your being required to do so by the Scottish Ministers.

If you lodge an appeal, the EN is suspended and will not take effect unless the appeal is withdrawn or dismissed.

#### **PENALTIES FOR NON-COMPLIANCE WITH AN ENFORCEMENT NOTICE**

Where an enforcement notice requires the discontinuance of a use of land or compliance, in respect of a use of land or the carrying out of operations, with any conditions or limitation, then any person who, without the grant of planning permission uses the land or causes or permits it to be used, or carries out these operations or causes or permits them to be carried out, is guilty of an offence and liable on summary conviction to a fine not exceeding £50,000 or on conviction on indictment to an unlimited fine. If the use or operations are continued after conviction, the person may be convicted of a second or subsequent offence. In determining the amount of any fine for any convicted person, in either circumstance, the court shall in particular have regard to any financial benefit that has accrued - or appears likely to accrue - to any person who has committed the offence. That consideration will similarly apply to the level of fine imposed by the court on any convicted person who complies with an enforcement notice requiring the removal or alteration of a building(s) or works, in cases where the building(s) or works are subsequently re-instated or restored at any time after the compliance date.

**(IMPORTANT – CONTINUES ON NEXT PAGE)**

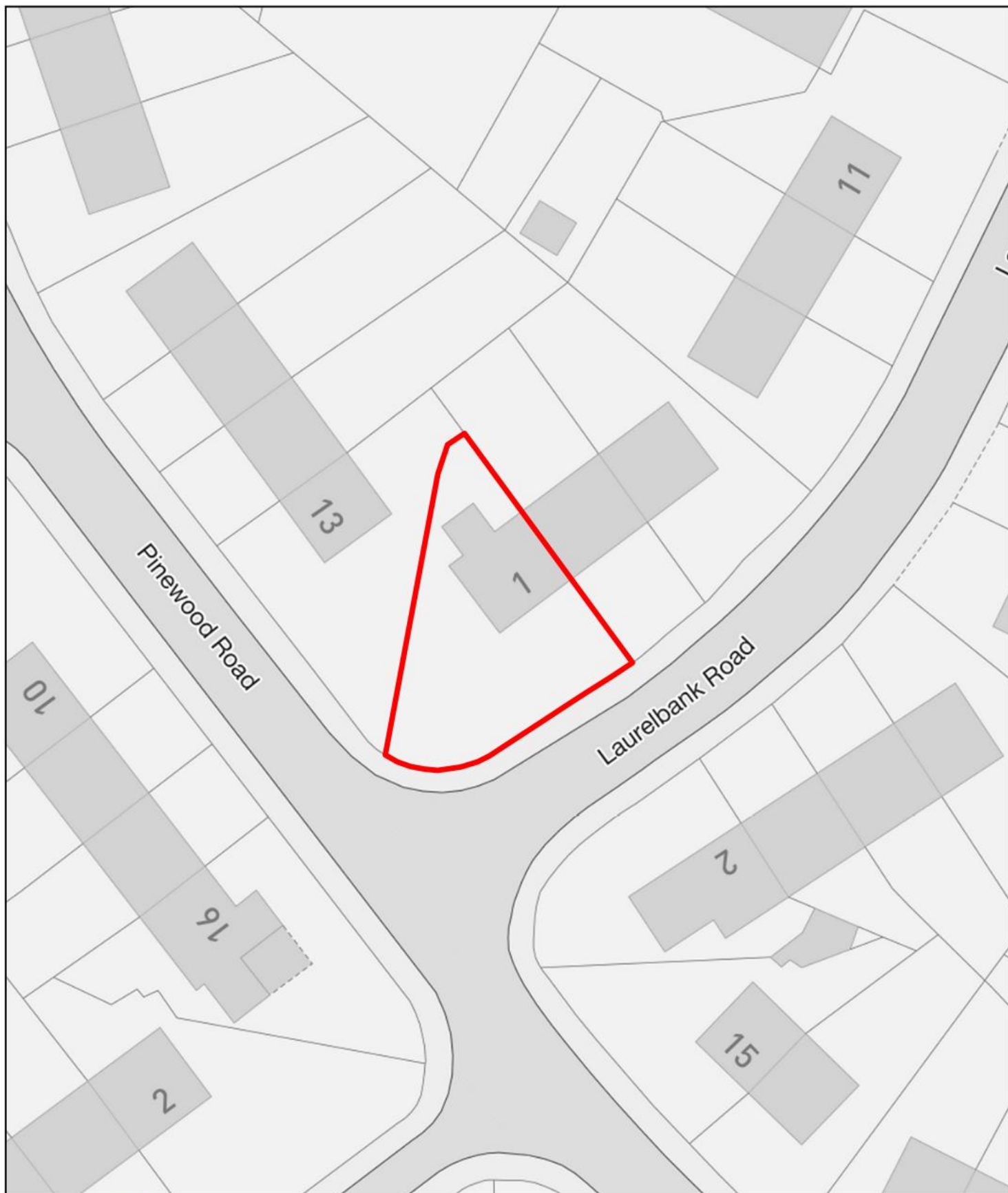
As an alternative to prosecution the Council may serve a Fixed Penalty Notice. This requires payment of a fine to be made within 30 days of its service, which will be retained by them. The level of fine is £2,000 for non-compliance with an enforcement notice. If payment is made within the first 15 days following service of a Fixed Penalty Notice the amount to be paid to the Council is reduced to £1,500.

#### **DIRECT ACTION FOR NON-COMPLIANCE WITH AN ENFORCEMENT NOTICE**

If the steps required by an enforcement notice are not taken within the specified period(s) the Council may also enter on the land, take those steps and recover the costs involved, from the owner or lessee of the land.

#### **FURTHER OFFENCES**

Compliance with the terms of an enforcement notice does not discharge that notice. It will continue in effect and any repetition of the breach of control may incur further penalties or may result in direct action by the Council.



**Planning Service  
Place Directorate**  
Midlothian Council  
Fairfield House  
8 Lothian Road  
Dalkeith  
EH22 3AA

## Enforcement Notice

Land at 1 Laurelbank Road, Mayfield, EH22 5HT

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Scale: 1:400



	<b>PART VI ENFORCEMENT</b>		
	<i>Application</i>		
Expressions used in connection with enforcement	<b>123</b>	(1)	For the purposes of this Act -
		(a)	carrying out development without the required planning permission, or
		(b)	failing to comply with any condition or limitation subject to which planning permission has been granted, or
		(c)	initiating development without giving notice in accordance with section 27A (1) of this Act, or
		(d)	carrying out development without displaying a notice in accordance with section 27C (1) of this Act
			constitutes a breach of planning control.
		(2)	For the purposes of this Act -
		(a)	the issue of an enforcement notice, or
		(b)	the service of a breach of condition notice,
			under this Part constitutes taking enforcement action as does the issuing of a notice under section 33A
		(3)	In this Part “planning permission” includes planning permission under Part III of the 1947 Act and Part III of the 1972 Act.
Time Limits	<b>124</b>	(1)	Where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of 4 years beginning with the date on which the operations were substantially completed.
		(2)	Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwellinghouse, no enforcement action may be taken after the end of the period of 4 years beginning with the date of the breach.
		(3)	In the case of any other breach of planning control, no enforcement action may be taken after the end of the period of 10 years beginning with the date of the breach.
		(4)	Subsections (1) to (3) do not prevent -
		(a)	the service of a breach of condition notice in respect of any breach of planning control if an enforcement notice in respect of the breach is in effect, or
		(b)	taking further enforcement action in respect of any breach of planning control if, during the period of 4 years ending with that action being taken, the planning authority have taken or purported to take enforcement action in respect of that breach.
	<b>Enforcement Notices</b>		
Issue of enforcement notice	<b>127</b>	(1)	The planning authority may issue a notice (in this Act referred to as an “enforcement notice”) where it appears to them –
		(a)	that there has been a breach of planning control, and
		(b)	that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations.
		(2)	A copy of an enforcement notice shall be served -
		(a)	that there has been a breach of planning control, and
		(b)	on any other person having an interest in the land, being an interest which, in the opinion of the authority, is materially affected by the notice.
		(3)	The service of the notice shall take place -

			(a)	not more than 28 days after its date of issue, and
			(b)	not less than 28 days before the date specified in it as the date on which it is to take effect.
Contents and effect of notice	<b>128</b>	(1)	An enforcement notice shall state -	
			(a)	the matters which appear to the planning authority to constitute the breach of planning control, and
			(b)	the paragraph of section 123(1) within which, in the opinion of the authority, the breach falls.
		(2)	A notice complies with subsection (1) (a) if it enables any person on whom a copy of it is served to know what those matters are.	
		(3)	An enforcement notice shall specify the steps which the authority require to be taken, or the activities which the authority require to cease, in order to achieve, wholly or partly, any of the following purposes.	
		(4)	Those purposes are –	
			(a)	remedying the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land by discontinuing any use of the land or by restoring the land to its condition before the breach took place; or
			(b)	remedying any injury to amenity which has been caused by the breach.
		(5)	An enforcement notice may, for example, require -	
			(a)	the alteration or removal of any buildings or works,
			(b)	the alteration or removal of any buildings or works,
			(c)	any activity on the land not to be carried on except to the extent specified in the notice, or
			(d)	the contour of a deposit of refuse of waste materials on land to be modified by altering the gradient or gradients of its sides.
		(6)	An enforcement notice issued in respect of a breach of planning control consisting of demolition of a building may require the construction of a building (in this section referred to as a “replacement building”) which, subject to subsection (7) is as similar as possible to the demolished building.	
		(7)	A replacement building -	
			(a)	must comply with any requirement imposed by or under any enactment applicable to the construction of buildings,
			(b)	may differ from the demolished building in any respect which, if the demolished building had been altered in that respect, would not have constituted a breach of planning control, and
			(c)	must comply with any regulations made for the purposes of this subsection (including regulations modifying paragraphs (a) and (b) of this subsection).
		(8)	An enforcement notice shall specify the date on which it is to take effect and, subject to section 131(3), shall take effect on that date.	
		(9)	An enforcement notice shall specify the period for compliance with the notice at the end of which any steps are required to have been taken or any activities are required to have ceased, and may specify different periods for different steps or activities.	
		(10)	Where different periods apply to different steps or activities, references in this Part to the period for compliance with an enforcement notice, in relation to any step or activity, are to the period at the end of which the step is required to have been taken or the activity is required to have ceased.	
		(11)	An enforcement notice shall specify such additional matters as may be prescribed.	
		(12)	Regulations may require every copy of an enforcement notice served under section 127 to be accompanied by an explanatory note giving prescribed information as to the right of appeal under section 130.	

		(13)	Where
		(a)	an enforcement notice in respect of any breach of planning control could have required any buildings or works to be removed or any activity to cease, but does not do so, and
		(b)	all the requirements of the notice have been complied with,
			then, so far as the notice did not so require, planning permission shall be treated as having been granted under section 33 in respect of development consisting of the construction of the buildings or works or, as the case may be, the carrying out of the activities.
		(14)	Where -
		(a)	an enforcement notice requires the construction of a replacement building, and
		(b)	all the requirements of the notice with respect to that construction have been complied with,
			planning permission shall be treated as having been granted under section 33 in respect of development consisting of that construction.
Variation and withdrawal of enforcement notice	<b>129</b>	(1)	The planning authority may -
		(a)	withdraw an enforcement notice issued by them, or
		(b)	waive or relax any requirement of such a notice and, in particular, may extend any period specified in accordance with section 128(9).
		(2)	The powers conferred by subsection (1) may be exercised whether or not the notice has taken effect.
		(3)	The planning authority shall, immediately after exercising the powers conferred by subsection (1), give notice of the exercise to every person who has been served with a copy of the enforcement notice or would, if the notice were reissued, be served with a copy of it.
		(4)	The withdrawal of an enforcement notice does not affect the power of the planning authority to issue a further enforcement notice.
Appeal against enforcement notice	<b>130</b>	(1)	A person on whom an enforcement notice is served or any other person having an interest in the land may, at any time before the date specified in the notice as the date on which it is to take effect, appeal to the Secretary of State against the notice on any of the following grounds -
		(a)	Repealed by 2006 Act.
		(b)	that the matters which, by virtue of section 128(1)(a) have been stated in the notice, have not occurred;
		(c)	That the matters (if they occurred) do not constitute a breach of planning control;
		(d)	that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters;
		(e)	that copies of the enforcement notice were not served as required by section 127;
		(f)	that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach;
		(g)	that any period specified in the notice in accordance with section 128(9) falls short of what should reasonably be allowed.
		(2)	An appeal under this section shall be made -
		(a)	by giving written notice of the appeal to the Secretary of State before the date specified in the enforcement notice as the date on which it is to take effect, or

			(b)	by sending such notice to him in a properly addressed and prepaid letter posted to him at such time that, in the ordinary course of post, it would be delivered to him before that date ; or
			(c)	by sending such notice to them using electronic communications at such time that, in the ordinary course of transmission, it would be delivered to them before that date
		(3)		A person who gives notice under subsection (2) shall submit to the Secretary of State, either when giving the notice or within the prescribed time, a statement in writing -
			(a)	specifying the grounds on which he is appealing against the enforcement notice, and
			(b)	giving such further information as may be prescribed.
Appeals: supplementary provisions	<b>131</b>	(1)		The Secretary of State may by regulations prescribe the procedure which is to be followed on appeals under section 130 and, in particular, but without prejudice to the generality of the foregoing provisions of this subsection, in so prescribing may -
			(a)	specify the matters on which information is to be given in a statement under section 130(3);
			(b)	require the planning authority to submit, within such time as may be specified, a statement indicating the submissions which they propose to put forward on the appeal;
			(c)	specify the matters to be included in such a statement;
			(d)	require the authority or the appellant to give such notice of an appeal as may be specified to such persons as may be specified;
			(e)	require the authority to send to the Secretary of State, within such period from the date of the bringing of the appeal as may be specified, a copy of the enforcement notice and a list of the persons served with copies of it.
		(2)		Repealed by 2006 Act
		(3)		Where an appeal is brought under section 130 the enforcement notice shall be of no effect pending the final determination or the withdrawal of the appeal.
		(4)		Schedule 4 applies to appeals under section 130, including appeals under that section as applied by regulations under any other provisions of this Act.
General provisions relating to determination of appeals	<b>132</b>	(1)		On the determination of an appeal under section 130, the Secretary of State shall give directions for giving effect to the determination, including, where appropriate, directions for quashing the enforcement notice.
		(2)		On such an appeal the Secretary of State may -
			(a)	correct any defect, error or misdescription in the enforcement notice, or
			(b)	vary the terms of the enforcement notice,
				if he is satisfied that the correction or variation will not cause injustice to the appellant or the planning authority.
		(3)		The Secretary of State may -
			(a)	dismiss an appeal if the appellant fails to comply with section 130(3) within the prescribed time, and
			(b)	allow an appeal and quash the enforcement notice if the planning authority fail to comply with any requirement imposed by virtue of paragraph (b), (c) or (e) of section 131(1).
		(4)		Where it would otherwise be a ground for determining an appeal in favour of the appellant that a person required by section 127(2) to be served with a copy of the enforcement notice was not served, the Secretary of State may disregard that fact if neither the appellant nor that person has been substantially prejudiced by the failure to serve him.



Grant or modification of planning permission on appeal against enforcement notice.	133	(1)	On the determination of an appeal under section 130, the Secretary of State may	
			(a)	Repealed by 2006 Act
			(b)	Repealed by 2006 Act
			(c)	Repealed by 2006 Act
			(d)	determine whether on the date on which the appeal was made, any existing use of the land was lawful, any operations which had been carried out in, on, over or under the land were lawful or any matter constituting a failure to comply with any condition or limitation subject to which the permission was granted was lawful and, if so, issue a certificate under section 150.
		(2)	The provision of sections 150 to 153 mentioned in subsection (3) shall apply for the purposes of subsection (1)(d) as they apply for the purposes of section 150, but as if -	
			(a)	any reference to an application for a certificate were a reference to the appeal and any reference to the date of such an application were a reference to the date on which the appeal is made, and
			(b)	references to the planning authority were references to the Secretary of State.
		(3)	Those provisions are sections 150(5) to (7), 152(4) (so far as it relates to the form of the certificate), (6) and (7) and 153.	
		(4)	Repealed by 2006 Act.	
		(5)	Repealed by 2006 Act.	
		(6)	Repealed by 2006 Act.	
		(7)	Repealed by 2006 Act.	
		(8)	Repealed by 2006 Act.	
		(9)	Repealed by 2006 Act.	
		(10)	Repealed by 2006 Act.	
		(11)	Repealed by 2006 Act.	
Validity of enforcement notices	134	The validity of an enforcement notice shall not be questioned in any proceedings whatsoever on any of the grounds specified in section 130(1) (b) to (e) except by appeal under that section.		
Execution and cost of works required by enforcement notice	135	(1)	If any steps which are required by an enforcement notice to be taken have not been taken within the compliance period, the planning authority may -	
			(a)	enter the land take those steps, and
			(b)	recover from the person who is then the owner or lessee of the land any expenses reasonably incurred by them in doing so.
		(2)	If that person did not appeal to the Secretary of State although entitled to do so, he shall not be entitled to dispute the validity of the action taken by the planning authority under subsection (1) in accordance with the enforcement notice.	
		(3)	In computing the amount of the expenses which may be recovered by them under subsection (1), a planning authority may include in that amount such proportion of their administrative expenses as seems to them to be appropriate.	
		(4)	Where a copy of an enforcement notice has been served in respect of any breach of planning control -	
			(a)	any expenses incurred by the owner, lessee or occupier of any land for the purpose of complying with the notice, and
			(b)	any sums paid by the owner or lessee of any land under subsection (1) in respect of expenses incurred by the planning authority in taking steps required by such a notice to be taken,
			shall be recoverable from the person by whom the breach of planning control was committed.	

		(5)	If on a complaint by the owner of any land it appears to the sheriff that the occupier of the land is preventing the owner from carrying out work required to be carried out by an enforcement notice, the sheriff may by warrant authorise the owner to go on to the land and carry out that work.
		(6)	A planning authority taking steps under subsection (1) may sell any materials removed by them from the land unless those materials are claimed by the owner within three days of their removal.
		(7)	After any such sale the planning authority shall pay the proceeds to the owner less the expenses recoverable by them from him.
		(8)	Where a planning authority seek, under subsection (1), to recover any expenses from a person on the basis that he is the owner of any land, and such person proves that -
		(a)	he is receiving the rent in respect of that land merely as trustee, tutor, curator, factor or agent of some other person, and
		(b)	he has not, and since the date of the service on him of the demand for payment has not had, in his hands on behalf of that other person sufficient money to discharge the whole demand of the authority,
			his liability shall be limited to the total amount of the money which he has or has had in his hands on behalf of that other person.
		(9)	A planning authority who by reason of subsection (8) have not recovered the whole of any such expenses from a trustee, tutor, curator, factor or agent may recover any unpaid balance from the person on whose behalf the rent is received.
		(10)	Any person who wilfully obstructs a person acting in the exercise of powers under subsection (1) shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.
		(11)	In this section and in sections 136, 136A, 140 and 141 any reference to the compliance period, in relation to an enforcement notice, is a reference to the period specified in the notice for compliance with it or such extended period as the planning authority may allow for compliance. .
Offence where enforcement notice not complied with	<b>136</b>	(1)	Where, at any time after the end of the compliance period in respect of an enforcement notice, any step required by the notice to be taken has not been taken or any activity required by the notice to cease is being carried on, the person who is then the owner of the land is in breach of the notice.
		(2)	Where the owner of the land is in breach of the notice he shall be guilty of an offence.
		(3)	In proceedings against any person for an offence under subsection (2), it shall be a defence for him to show that he did everything he could be expected to do to secure compliance with the notice.
		(4)	A person who has control of or an interest in the land to which an enforcement notice relates (other than the owner) must not carry on any activity which is required by the notice to cease or cause or permit such an activity to be carried on.
		(5)	A person who, at any time after the end of the period for compliance with the notice, contravenes subsection (4) shall be guilty of an offence.
		(6)	An offence under subsection (2) or (5) may be charged by reference to any day or longer period of time and a person may be convicted of a second or subsequent offence under the subsection in question by reference to any period of time following the preceding conviction for such an offence.
		(7)	Where -
		(a)	a person charged with an offence under this section has not been served with a copy of the enforcement notice, and
		(b)	the notice is not contained in the appropriate register kept under section 147,

			it shall be a defence for him to show that he was not aware of the existence of the notice.
		(8)	A person guilty of an offence under this section shall be liable -
		(a)	on summary conviction, to a fine not exceeding £50,000, and
		(b)	on conviction on indictment, to a fine.
		(9)	In determining the amount of any fine to be imposed on a person convicted of an offence under this section, the court shall in particular have regard to any financial benefit which has accrued or appears likely to accrue to him in consequence of the offence.
	<b>136a</b>	<b>Fixed penalty notice where enforcement notice not complied with</b>	
		(1)	Where a planning authority have reason to believe that, by virtue of subsection (1) of section 136, a person is in breach of an enforcement notice they may, provided that the conditions mentioned in subsection (7) are satisfied, serve on him a fixed penalty notice as respects that breach.
		(2)	The fixed penalty notice is to specify—
		(a)	the step specified, under subsection (3) of section 128, in the enforcement notice which has not been taken, or
		(b)	the activity so specified which has not ceased.
		(3)	It is not competent to serve more than one fixed penalty notice in relation to a particular step or activity.
		(4)	For the purposes of this section, a “fixed penalty notice” is a notice offering the person the opportunity of discharging, by paying to the planning authority, within the period of 30 days which immediately follows the day on which that notice is served, a penalty of an amount (being a prescribed amount) specified in the notice, any liability to conviction for an offence under section 136 as respects the breach of the enforcement notice.
		(5)	But if payment is made within the first 15 days of the period mentioned in subsection (4) the amount payable is reduced by 25%.
		(6)	The fixed penalty notice is to identify the period mentioned in subsection (4) and is also to state that if payment is made within the first 15 days of that period the amount payable is reduced by 25%.
		(7)	The conditions are that the fixed penalty notice—
		(a)	is served within the period of 6 months which immediately follows the compliance period in relation to the enforcement notice, and
		(b)	is not served after the person has been charged with an offence under section 136 as respects the breach of the enforcement notice
		(8)	During the period mentioned in subsection (4) it is not competent to commence proceedings against the person for an offence under section 136 as respects that breach.
		(9)	If the amount (or as the case may be the reduced amount) is timeously paid it is not competent to commence proceedings against the person for an offence under section 136 as respects that breach.
		(10)	A penalty received by a planning authority by virtue of subsection (4) is to accrue to that authority.
		(11)	In prescribing an amount for the purposes of subsection (4), the Scottish Ministers may make different provision for different cases or for different classes of case.
Effect of planning permission etc on enforcement or breach of condition notice	<b>137</b>	(1)	Where, after the service of –
		(a)	a copy of an enforcement notice, or
		(b)	a breach of condition notice,

			planning permission is granted for any development carried out before the grant of that permission, the notice shall cease to have effect so far as inconsistent with that permission.
		(2)	Where, after a breach of condition notice has been served, any condition to which the notice relates is discharged, the notice shall cease to have effect so far as it requires any person to secure compliance with the condition in question.
		(3)	The fact that an enforcement notice or breach of condition notice has wholly or partly ceased to have effect by virtue of this section shall not affect the liability of any person for an offence in respect of a previous failure to comply, or secure compliance, with the notice.
Enforcement notice to have effect against subsequent development	<b>138</b>	(1)	Compliance with an enforcement notice, whether in respect of –
		(a)	the removal or alteration of any building or works,
		(b)	the discontinuance of any use of land, or
		(c)	any other requirements contained in the notice,
			shall not discharge the notice.
		(2)	Without prejudice to subsection (1), any provision of an enforcement notice requiring a use of land to be discontinued shall operate as a requirement that it shall be discontinued permanently, to the extent that it is in contravention of Part III; and accordingly the resumption of that use at any time after it has been discontinued in compliance with the enforcement notice shall to that extent be in contravention of the enforcement notice.
		(3)	Without prejudice to subsection (1), if any development is carried out on land by way of reinstating or restoring buildings or works which have been removed or altered in compliance with an enforcement notice, the notice shall, notwithstanding that its terms are not apt for the purpose, be deemed to apply in relation to the buildings or works as reinstated or restored as it applied in relation to the buildings or works before they were removed or altered.
		(4)	A person who, without the grant of planning permission in that behalf, carries out any development on land by way of reinstating or restoring buildings or works which have been removed or altered in compliance with an enforcement notice shall be guilty of an offence, and shall be liable on summary conviction to a fine not exceeding the statutory maximum.
		(5)	In determining the amount of the fine to be imposed under subsection (4), the court is in particular to have regard to any financial benefit which has accrued or appears likely to accrue to the convicted person in consequence of the activity which constituted the offence.
Power of Secretary of State to serve enforcement notice	<b>139</b>	(1)	If it appears to the Secretary of State that it is expedient that an enforcement notice should be served in respect of any land, he may himself serve such a notice under section 127.
		(2)	An enforcement notice served by the Secretary of State shall have the same effect as if it had been served by the planning authority.
		(3)	The Secretary of State shall not serve such a notice without consulting the planning authority.
		(4)	The provisions of this Act relating to enforcement notices apply, so far as relevant, to an enforcement notice served by the Secretary of State as they apply to an enforcement notice served by a planning authority, but with the substitution for any reference to the planning authority of a reference to the Secretary of State, and any other necessary modifications.

Planning and Environmental Appeals Division

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## Appeal Decision Notice

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Decision by Euan McLaughlin, a Reporter appointed by the Scottish Ministers

- Enforcement notice appeal reference: ENA-290-2008
- Site address: 1 Laurelbank Road, Mayfield, Dalkeith, EH22 5HT
- Appeal by Mr James Bevis and Ms Louise Axon against the enforcement notice dated 17 February 2022 served by Midlothian Council
- The alleged breach of planning control: Without planning permission, the erection of a detached garage and sunroom on the land referred to in Part 2 of this Notice.
- Date of site visit by Reporter: 26 May 2022

Date of appeal decision: 23 June 2022

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### Decision

I dismiss the appeal and direct that the enforcement notice dated 17 February 2022 be upheld. Subject to any application to the Court of Session, the enforcement notice takes effect on the date of this decision, which constitutes the determination of the appeal for the purpose of Section 131(3) of the Act.

### Reasoning

1. The appeal against the enforcement notice was made on the following grounds as provided for by section 130(1) of the Town and Country Planning (Scotland) Act 1997:
  - Ground f) the steps required by the notice are excessive and less onerous steps would remedy the breach or remedy any injury to amenity which has been caused by any such breach.
2. The enforcement notice requires the appellant to dismantle the building that houses the unauthorised garage and sunroom and remove all dismantled materials permanently from the land subject of the notice. For ground f) to succeed it must be demonstrated that this exceeds what is necessary to remedy the breach of planning control.
3. Through this appeal process the appellant is essentially seeking that planning permission be granted for the building. It is not open to me, in deciding this appeal, to grant planning permission for the development enforced against. For that reason, consideration of any planning merits related to the development is not directly relevant to my consideration of this appeal.
4. I note that the appellant has previously submitted a planning application for the unauthorised building which has been refused by the council. I was able to observe during my site visit that the garage and sunroom would not be classed as permitted development under Class 3A of The Town and Country Planning (General Permitted Development) (Scotland) Order 1992. Planning permission is therefore required for the building and in its absence the garage and sunroom represent a breach of planning control.

5. Section 5 of the enforcement notice sets out the steps required to be undertaken to remedy this breach, which is effectively to restore the land to its condition before the breach took place. In my view these steps are not excessive and there are no less onerous steps which would remedy the breach of control. For this reason, the appeal on ground f) fails.

*Euan McLaughlin*

Reporter







