



APPEALS AND LOCAL REVIEW BODY DECISIONS

Report by Head of Communities and Economy

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 April 2018; 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 10 April 2018 the LRB made the following decisions:

	Application Reference	Site Address	Proposed Development	LRB Decision
1	17/00734/DPP	3 Bankmill View, Penicuik	Installation of replacement windows – review was against a condition restricting the use of uPVC at the front of the house.	Permission granted, but review against conditions dismissed at LRB meeting of 10.04.2018
2	17/00801/DPP	10 Broomhill Avenue, Penicuik	Extension to dwellinghouse	Permission granted at LRB meeting of 10.04.2018

	Application Reference	Site Address	Proposed Development	LRB Decision
3	17/00828/DPP	75 Castlelaw Crescent, Bilston	Extension to dwellinghouse	Permission refused at LRB meeting of 10.04.2018
4	17/00872/PPP	Land north west of Braidwood House, Penicuik	Planning permission in principle for the erection of a dwellinghouse	Permission granted at LRB meeting of 10.04.2018

4 APPEAL DECISIONS

- 4.1 Two appeal decisions have been received from Scottish Ministers regarding two enforcement notices issued at land to the rear of 180 Main Street, Pathhead. Following the Local Review Body's decision to refuse retrospective planning permission for the erection of a building at its meeting of October 2017, two enforcement notices were issued on the owner of the land. The notices required:
1. The demolition of the unauthorised building on the site and the removal of the resulting material; and
 2. The cessation of the use of the land for storage purposes and the removal of the unauthorised vehicles, trailers, caravans and other ancillary items and parts thereof associated with the vehicles, building materials including stone, bricks and timber, building equipment including portable building, scaffold, ladders, tarpaulin, fencing and other ancillary building materials from the land.
- 4.2 The appeal decisions upheld the enforcement notices, a copy of the decisions are attached to this report. The recipient (landowner) has until 30 June 2018 to comply with the notices.

5 RECOMMENDATION

- 5.1 The Committee is recommended to note the decisions made by the Local Review Body at its meeting in April 2018 and the appeal decisions by Scottish Ministers.

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Head of Communities and Economy

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Background Papers: LRB procedures agreed on the 13 June 2017.



Decision by Richard Hickman, a Reporter appointed by the Scottish Ministers

- Enforcement notice appeal reference: ENA-290-2004
- Site address: Land to the rear of 180 Main Street, Pathhead, Midlothian
- Appeal by Mr M Macintosh against the enforcement notice (EN/17/06) dated 29 November 2017 served by Midlothian Council
- The alleged breach of planning control: The carrying out of building operations comprising the erection of a building
- Date of site visit by Reporter: 5 March 2018

Date of appeal decision: 29 March 2018

Decision

I uphold the enforcement notice dated 29 November 2017 but allow the appeal to the extent that I vary the terms of section 5 of the notice by deleting the words “including any foundations, concrete hardstanding, drains, pipes and services” and replacing them with the words “including any drains, pipes and services above ground level”. For the avoidance of doubt the last part of the text of section 5 of the notice (“and remove the resulting material from the land”) remains in place.

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.

Description and background

1. The appeal site is a rectangular plot of land to the rear of 180 Main Street, a house which in turn is situated to the rear of 176 Main Street. The latter is a long established house fronting onto the main road in Pathhead. A shared lane running alongside these properties gives access to land at the rear.
2. At the time of the site visit, the appeal site was partly occupied by an incomplete building. A vehicle body was stored within the building, along with various items and tools, and more items were stored in the open in the outdoor section of the site.
3. The appeal against the enforcement notice is made on the following grounds as provided for by section 130(1) of the Town and Country Planning (Scotland) Act 1997:



- (b) That the breach of control specified in the notice has not occurred.
- (c) That those matters, if they occurred, do not constitute a breach of planning control.
- (d) That, at the date when the notice was issued, it was already too late to take enforcement action.
- (f) That the steps required by the notice exceed what is necessary to remedy any breach of planning control or any injury to amenity which has been caused by any such breach.

4. The appellant, assisted by the previous owner of the site, has provided the planning history of the incomplete building on the appeal site. It was approved as a garage in October 1991. The then owner carried out construction of the shell to wall head level. The building was then left awaiting the roof for over 20 years, due to a lack of funds. It was then sold to Mr Macintosh, as was the associated land at a later date. Mr Macintosh continued the construction work, putting a roof onto the blockwork shell. With good intentions, he formed a new roof structure with a dormer window, not included in the earlier application, accessed by ladder (not a staircase).

5. When this matter came to the attention of the council, Mr Macintosh submitted a retrospective planning application to regularise the variations from the consent for the building. This application was refused.

6. The council has issued two enforcement notices : this one (ENA-290-2004) relating to the erection of the building, and the other (ENA-290-003) relating to the use of the land for storage purposes. The latter is covered by a separate appeal decision notice.

7. The notice relating to the erection of the building requires it to be demolished or dismantled, including the foundations and various other items, within 3 months of the enforcement notice taking effect.

The appeal under ground (b) - That the breach of control specified in the notice has not occurred.

8. In support of this ground of appeal, it is contended that the 1991 permission remains extant, as work on the approved building commenced. The building as constructed corresponds in size (including height) to that approved, although it is in a slightly different position so as not to directly abut the outbuilding within the plot of 180 Main Street. The main differences are that the garage door arrangement is different and the introduction of the dormer window. These differences are not significant.

9. The council states that the garage approved in 1991 was associated with 176 Main Street (the front property) but was separated from that plot by the plot of 180 Main Street. Consequently the garage did not constitute permitted development (as a building within the curtilage of a dwellinghouse for a purpose incidental to the enjoyment of the dwellinghouse). The garage has not been built in accordance with the approved plans, and is consequently unauthorised.

10. Plans and elevations of the originally approved garage and the modified version in course of construction have been supplied. The footprint of the two buildings is essentially identical, and the slight repositioning of the building (many years ago) to avoid directly

abutting the outbuilding on the neighbouring plot can be regarded as so minor as to be unimportant in planning terms. However, as the original approval was for a simple single storey garage served by two separate side by side garage doors, the introduction of the dormer window on the southwest facing pitch of the roof, and the installation of a single double width garage door amount to significant changes in the external design of the building. I agree with the council that these changes are too significant (relative to the original approved design) to be set aside as unimportant. Consequently I agree with the council that the scheme under construction does not conform to the original permission. Thus it does not have planning permission, either as permitted development or by a specific consent, so that the appeal under ground (b) fails.

The appeal under ground (c) : That these matters do not constitute a breach of planning control

11. The appellant's submissions in relation to ground (c) are similar to those for ground (b) – that the changes to the design of the garage are sufficiently consistent with the original approval as to be within the terms of that permission.

12. The council's position on this ground is also basically similar to that for ground (b).

13. I have already concluded (in paragraph 10 above) that the changes to the external design of the garage are sufficiently significant such that the building that has been partly constructed cannot be construed to be within the terms of the scheme approved in 1991. Consequently I agree with the council that these works do not have the benefit of planning permission, and that there has therefore been a breach of planning control. Thus the appeal against the notice under ground (c) fails.

The appeal under ground (d) : That, at the date when the notice was issued, it was already too late to take enforcement action

14. For the appellant, it is stated that the walls and roof structure of the garage were in place at the time that the enforcement notice was served, and the building was in use for the storage of the appellant's items. It was therefore substantially completed at that time.

15. The council states that the front wall with the double garage door, and the roof structure incorporating the dormer window, were added to the original 3 walls in 2016. In addition, the works to the building were not substantially completed at the time that the notice was served. Consequently the service of the enforcement notice in November 2017 was not time barred.

16. Section 124(1) of the Act requires any enforcement action relating to the construction of a building (and other works) to be served within 4 years of the date on which the works are substantially completed. I note that work on the new roof was in progress in 2016, and that the council's assertion that the recent construction work took place in 2016 has not been disputed. Photographs taken at that time show the works in progress, but far from complete, with the roof unfinished, exposed blockwork walls, and no garage doors. On this basis, I am satisfied that the works were not substantially completed at the time when the enforcement notice was served, and that the date of service was well within the 4 year

period required by the legislation. Consequently the council's action was not time barred, and the appeal under ground (d) therefore fails.

The appeal under ground (f) : That the steps required by the notice exceed what is necessary to remedy the breach of planning control or to remedy any injury to amenity caused by the breach

17. For the appellant, it is stated that the government guidance on enforcement action (circular 10/2009) states that remedial action to be taken should be appropriate to the scale of the breach. The council's requirements to demolish the garage and to remove the foundation slab and other services, and to remove all the materials from the site, amount to extreme actions that exceed what is necessary to remedy the breach.

18. The council's appeal statement does not address this aspect of the grounds of appeal.

19. As noted above, there is disagreement between the appellant and the council as to whether the 1991 permission has lapsed or not. I note that no work on the approved scheme had been carried out during a period of 20 years, and the new purchaser of the site did not set out to complete that building according to the approved plan but instead introduced significant changes. I think it reasonable to conclude that the intention to complete the building as approved in 1991 was abandoned.

20. Although there is a minor difference between the approved position of the 1991 garage and the building shell subsequently constructed, I have concluded above that this small difference is not significant, with no noticeable planning implications, and that it can be disregarded.

21. I agree with the appellant that removal of the concrete hardstanding and foundations that form the base of the garage structure, and any associated underground drains, pipes and services, is not necessary to achieve the removal of the unauthorised partially completed building that has given rise to this enforcement action. Once the building has been demolished and the resulting materials removed from the site, I consider that the physical presence of the hardstanding will have little or no effect on the general external appearance of the site or its impact on local amenity. The council's objective in serving this notice will have been achieved. Accordingly, in the context of the government guidance on the appropriate requirements of enforcement notices, I conclude that the appeal under ground (f) is partially successful, and that the reference to the demolition or dismantling of "any foundations, concrete hardstanding, drains, pipes and services" in section 5 of the enforcement notice should be removed, subject to clarification that this applies only to any drains, pipes and services that are above ground/floor level.

Conclusions

22. For the above reasons, I conclude that the appeal under grounds (b), (c) and (d) of section 130(1) of the act fail, but that the appeal under ground (f) is partially successful in that the requirements to remove the foundations, concrete hardstanding, and any associated drains, pipes, and services works below ground level should be omitted. Accordingly I uphold the enforcement notice but allow the appeal to the extent that I vary

the terms of the notice by rewording the steps set out in section 5 of the notice to omit the requirements relating to works below ground/floor level.

23. I have taken account of all the other matters raised by both sides in this appeal, but they do not alter my conclusions.

Richard Hickman

Reporter



Decision by Richard Hickman, a Reporter appointed by the Scottish Ministers

- Enforcement notice appeal reference: ENA-290-2003
- Site address: Land to the rear of 180 Main Street, Pathhead, Midlothian
- Appeal by Mr M Macintosh against the enforcement notice (EN/17/05) dated 29 November 2017 served by Midlothian Council
- The alleged breach of planning control: The change of use of the land to a use of the land for storage purposes, including the storage of : vehicles, trailers, caravans and other ancillary items and parts thereof associated with the vehicles, building materials including stone, bricks and timber, building equipment including portable building, scaffold, ladders, tarpaulin, fencing and other ancillary building materials.
- Date of site visit by Reporter: 5 March 2018

Date of appeal decision: 29 March 2018

Decision

I dismiss the appeal and uphold the enforcement notice (EN/17/05) dated 29 November 2017.

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.

Description and background

1. The appeal site is a rectangular plot of land to the rear of 180 Main Street, a house which in turn is situated to the rear of 176 Main Street. The latter is a long established house fronting onto the main road in Pathhead. A shared lane running alongside these properties gives access to land at the rear.
2. At the time of the site visit, the appeal site was partly occupied by an incomplete building. A vehicle body was stored within the building, along with various items and tools, and more items were stored in the open in the outdoor section of the site.
3. The appeal against the enforcement notice is made on the following grounds as provided for by section 130(1) of the Town and Country Planning (Scotland) Act 1997:
 - (b) That the breach of control specified in the notice has not occurred.



- (c) That those matters, if they occurred, do not constitute a breach of planning control.
- (d) That, at the date when the notice was issued, it was already too late to take enforcement action.
- (f) That the steps required by the notice exceed what is necessary to remedy any breach of planning control or any injury to amenity which has been caused by any such breach.

4. The appellant, assisted by the previous owner of the site, has provided the planning history of the incomplete building on the appeal site. It was approved as a garage in October 1991. The then owner carried out construction of the shell to wall head level. The building was then left awaiting the roof for over 20 years, due to a lack of funds. It was then sold to Mr Macintosh, as was the associated land at a later date. Mr Macintosh continued the construction work, putting a roof onto the block work shell, and brought various items onto the site.

5. When this matter came to the attention of the council, Mr Macintosh submitted a retrospective planning application to regularise the variations from the consent for the building. This application was refused.

6. The council has issued two enforcement notices : this one (ENA-290-003) relating to the use of the land for storage purposes, and the other (ENA-290-2004) relating to the erection of the building. The latter is covered by a separate appeal decision notice.

7. The notice relating to the use of the land requires the use of the land for storage purposes to cease within 3 months after the notice has taken effect, and the various items (listed in section 3 of the enforcement notice and repeated in the fourth bullet point at the start of this decision notice) to be removed from the land within the 3 month period for compliance.

The appeal under ground (b) - That the breach of control specified in the notice has not occurred.

8. In support of this ground of appeal, it is stated that Mr Macintosh continued the construction of the approved garage building with the intention of using it for his own purposes, notably the restoration of a Classic Land Rover. The items and materials that have been brought to the site are for the construction work to complete the building. This work halted when the council intervened, but the materials have remained on site since then. The building cannot be completed if the building materials are removed from the site. They are legitimately on the site to complete the lawful construction of the building, and hence there is no breach of planning control.

9. The council contends that the recent building work that has been carried out to complete the garage is unauthorised (see appeal decision notice ENA-290-2004), and hence that the storage of building materials for that work does not have the benefit of permitted development under the terms of Class 14 of the Town and Country Planning (General Permitted Development) (Scotland) Order 1992.

10. I have concluded in the appeal decision relating to the enforcement notice alleging unauthorised building work (ENA-290-2004) that the recent construction work carried out

does not have the benefit of planning permission, principally because it represents a significant departure (relative to the scale of the building) from the garage approved in 1991. Subsection (2)(b) of class 14 of the 1992 permitted development order (relating to Temporary Buildings and Uses) states that this category of permitted development does not apply where planning permission for the development giving rise to the temporary buildings and uses has not been granted. Thus the storage of these and related items cannot benefit from this category of permitted development, and constitutes an unauthorised use, so that the appeal under ground (b) fails.

The appeal under ground (c) : That these matters do not constitute a breach of planning control

11. The appellant's submissions in relation to ground (c) are similar to those for ground (b) – that the storage of the building materials is legitimate and necessary to complete the lawfully approved garage building.

12. The council's position on this ground is also similar to that for ground (b). The council contends that the condition of the site has an adverse effect on the amenity of this part of the built up area, and on the character and appearance of the conservation area.

13. I have already concluded (in paragraph 10 above) that the storage of building and related materials at the site in connection with the continuation of construction work on the garage constitutes a breach of planning control. I agree with the council that the stored items and materials have an adverse effect on the amenity of the area, due to their amount and appearance. Thus the appeal against the notice under ground (c) fails.

The appeal under ground (d) : That, at the date when the notice was issued, it was already too late to take enforcement action

14. The grounds of appeal do not contain any detailed submissions in support of this ground of appeal, in relation to this enforcement notice.

15. Section 124(3) of the Act requires any enforcement action relating to this type of alleged breach (a material change of use, not being a change of use to use as a single dwellinghouse) to be served within 10 years beginning with the date of the breach. The items and materials have been brought to the site by the appellant to carry out construction work on the building, which has apparently mainly taken place during 2016. The activity has therefore commenced well within the 10 year period required by the legislation. Consequently the council's action was not time barred, and the appeal under ground (d) therefore fails.

The appeal under ground (f) : That the steps required by the notice exceed what is necessary to remedy the breach of planning control or to remedy any injury to amenity caused by the breach

16. For the appellant, it is argued that the steps required by the notice are unreasonable, and will not result in a positive outcome. If the building materials are removed, the garage cannot be completed. It has a valid consent but is prevented from being finished, which would then allow the building materials to be removed from the site.

Scottish Government guidance on enforcement advises that action should be appropriate to the scale of the breach. The council is itself creating the circumstances causing the breach.

17. The council's appeal statement does not explicitly address this aspect of the grounds of appeal, other than to state that cessation of the use of the land for storage and the removal of all of the items listed in the enforcement notice is reasonable, in the context of the adverse effect on the amenity of the area and the character and appearance of the conservation area.

18. I agree with the council that the presence on the site of the various items listed in the enforcement notice has an undesirable adverse effect on the amenity of the area, which is closely adjoined by residential properties. This is due to the amount and appearance of the items and materials involved.. As I have agreed with the council that the storage of these items constitutes a breach of planning control, their removal is a necessary step to remedy the breach. Allowing them to remain on site to facilitate the completion of building works which are themselves unauthorised would not be likely to achieve the objective of the council's enforcement notice.

Conclusions

19. For the above reasons, I conclude that the appeal against this notice fails under all 4 of the grounds that have been lodged, and that the enforcement notice should be upheld. I have taken account of all the other matters raised, but they do not alter my conclusions.

Richard Hickman

Reporter