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## **NON-COMPLIANCE WITH THE REQUIREMENTS OF A LISTED BUILDING ENFORCEMENT NOTICE REGARDING THE INSTALLATION OF SIXTEEN UPVC WINDOWS AT 130 HIGH STREET, DALKEITH**

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 a listed building enforcement notice served by the Council pursuant to Section 34 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 as amended, with regard the removal of sixteen singled glazed, timber framed, sash and case windows, and the installation of sixteen double glazed, uPVC (un-Plasticised Polyvinyl Chloride) framed, tilt and turn windows in the front, rear and side facades at 130 High Street, Dalkeith.**
- 1.2 The enforcement notice required the removal of the uPVC windows and their replacement with timber sash and case windows. None of these steps have been taken, either by the enforcement notice compliance date of 30 August 2023 or to date (at the time of drafting this report). Non-compliance with a listed building 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 39 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997. The maximum penalty on successful prosecution is a fine of up to £50,000 per offence.**

### **2 BACKGROUND**

- 2.1 130 High Street, Dalkeith is a Category B listed building. It is part of a B Group of listed buildings with Nos 100 – 134, 140 and 142 High Street, Dalkeith. It is also within the Dalkeith House and Park Conservation Area.**

2.2 A listed building enforcement notice was issued on the occupiers and owner of the property on 8 November 2022, with a take effect date of 8 December 2022 and a compliance date of 30 May 2023. A copy of the enforcement notice is attached to this report as Appendix A. The enforcement notice required the owner and occupier of the property to:

(1) Remove all uPVC windows of the property and replace them with white painted, timber frame, sash and case windows which match the removed timber windows in glazing pattern, profile of frames and astragals and all externally visible parts of the case/frames.

(2) Reinststate the traditional metal support bar across window cill in three bays on the top floor of the front (north) elevation, matching those still in place in the bays on the floor below.

2.3 The owner appealed the listed building enforcement notice - a Scottish Government Reporter appointed to determine the appeal dismissed it and upheld the listed building enforcement notice subject to the deletion of the requirement to reinststate the traditional metal support bars. A copy of the appeal decision is attached to this report as Appendix B. As a consequence of the appeal the compliance period was extended to 30 August 2023. The appeal decision was reported to the Committee at its meeting of 28 March 2023.

2.4 Section 6 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 provides; “no person shall execute or cause to be executed any works for the demolition of a listed building or for its alteration or extension in any manner which would affect its character as a building of special architectural or historic interest, unless the works are authorised”.

2.5 Section 14 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 places a specific legal duty on decision makers “In considering whether to grant listed building consent for any works, the planning authority or the Secretary of State, as the case may be, shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses”.

### **3 THE LEGISLATIVE POSITION**

3.1 Section 39 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 provides that; “Where, after the end of the period for compliance with the notice, any step required by a listed building enforcement notice to be taken has not been taken or any works required by the notice to cease have not ceased, the person who is for the time being owner of the land is in breach of the notice. If at any time the owner of the land is in breach of a listed building enforcement notice he shall be guilty of an offence”

- 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, but 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 Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 also provides (at Section 39 (6)) 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 install uPVC windows without the required listed building consent or 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 and the enforcement notice has been upheld on appeal.
- 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 listed building consent or planning permission. The Council has lawfully served an enforcement notice in relation to unauthorised development. 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 39 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 as amended.

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

**Date:** 12 January 2024

**Contact Person:** Matthew Atkins, Lead Officer Planning Obligations  
[matthew.atkins@midlothian.gov.uk](mailto:matthew.atkins@midlothian.gov.uk)

**Appendix A:** A copy of the listed building enforcement notice issued 8 November 2022 with regard 130 High Street, Dalkeith;

**Appendix B:** A copy of the listed building enforcement notice appeal decision dated 1 March 2023.

## IMPORTANT – THIS COMMUNICATION AFFECTS YOUR LAND OR PROPERTY

*Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997, as amended (“the Act”)*

# LISTED BUILDING ENFORCEMENT NOTICE

Issued by Midlothian Council  
08 November 2022

***This Notice is served on:***

The Owner 130 High Street  
Mrs G Silvestri  
19-21 High Street  
Bonnyrigg  
EH19 2DA

Miss A Gavrill & Mr G Nst (the occupiers)  
130C High Street  
Dalkeith  
EH22 1AU

Mr W Williams (the occupier)  
130A High Street  
Dalkeith  
EH22 1AU

Mr I & Mrs T Francis (the occupiers)  
130D High Street  
Dalkeith  
EH22 1AU

Mr S & Mrs A Cazan (the occupier)  
130B High Street  
Dalkeith  
EH22 1AU

**1. THIS IS A FORMAL NOTICE** which is issued by Midlothian Council under Section 34 of the Act because the Council considers that there has been a breach of planning control within Sections 6 and 8(1) of the Act at the listed building described below. The Council considers that it is expedient to issue this notice, having regard to the effect of the character of the building as one of special architectural or historic interest and provisions of the development plan.

**2. THE LISTED BUILDING AFFECTED**

130 High Street, Dalkeith, EH22 1AU.

It forms part of a Category B listed building address 128-134 High Street, Dalkeith (Listed Building Reference 24414, date of listing 30 June 1983.

**IMPORTANT – CONTINUES ON NEXT PAGE**

This listed building is in a B Group with Nos 100 and 102, 104 and 106, 108 and 110, 112 and 114, 116-120, 122-126, and 140 and 142 High Street.

It is in the Dalkeith House and Park Conservation Area.

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

Without listed building consent:

- The removal of sixteen single glazed, timber framed, sash and case windows;
- the removal of traditional metal support bar across window cill in three bays on the top floor of the front (north) elevation.
- The installation of sixteen double glazed, uPVC framed, tilt and turn windows in the front, rear and side facades.

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

Section 6 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 states “no person shall execute or cause to be executed any works for the demolition of a listed building or for its alteration or extension in any manner which would affect its character as a building of special architectural or historic interest, unless the works are authorised”. The test for whether Listed Building Consent is required is whether the works “would affect its character as a building of special architectural or historic interest”.

130 High Street is a Category B listed building.

The features of original windows are an essential part of the character of the windows and buildings. These features include materials, glazing pattern, colour of frames, method of opening, dimensions and profiles of frames and astragals, all externally visible parts of the case/frames, and the size and position of the windows in the building.

The materials, glazing pattern, method of opening, profiles of frames and astragals and the externally visible parts of the case/frames of all the replacement windows differ from the window which were removed. The replacement windows therefore materially detract from the character and appearance of the listed building. Given this, it is concluded that listed building consent is required for the alterations. Listed building consent has not been granted or sought in relation to the replacement windows. A breach of listed building control has therefore occurred.

In view of the harmful impact of the replacement windows, enforcement action is required.

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

- (1) Remove all uPVC windows of the property and replace them with white painted, timber frame, sash and case windows which match the removed timber windows in glazing pattern, profile of frames and astragals and all externally visible parts of the case/frames.
- (2) Reinststate the traditional metal support bar across window cill in three bays on the top floor of the front (north) elevation, matching those still in place in the bays on the floor below.

## **6. TIME FOR COMPLIANCE**

Requirement 5(1) and 5(2) to be complied with by 30 May 2023.

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

This Notice takes effect on 08 December 2022 unless an appeal is made against it beforehand.

Signed



Matthew Atkins  
Lead Officer – Planning Obligations  
Planning, Sustainable Growth and Investment Service  
Place Directorate  
Midlothian Council

Date: 08 November 2022



## **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 09 December 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 enforcement notice, it will take effect on 09 December 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. Failure to comply with an enforcement notice which has taken effect may also result in the Council taking direct action to correct the breach.

## **SCHEDULE 1**

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

#### **RELEVANT LEGISLATION**

Sections 6, 8 and 34-39 of the Planning (Listed Building and Conservation Areas) (Scotland) Act 1997, as amended.

You may wish to note in particular the points referred to below.

#### **RIGHT OF APPEAL**

If you wish to appeal against this notice, you should write to The Directorate for Planning and Environmental Appeals, Ground Floor, Hadrian House, Callendar Business Park, Callendar Road, Falkirk, FK1 1XR or contact the DPEA via their website <https://www.dpea.scotland.gov.uk/>. 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 35 of the Planning (Listed Building and Conservation Areas) (Scotland) Act 1997, as amended. 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 enforcement notice is suspended and will not take effect unless the appeal is withdrawn or dismissed.

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

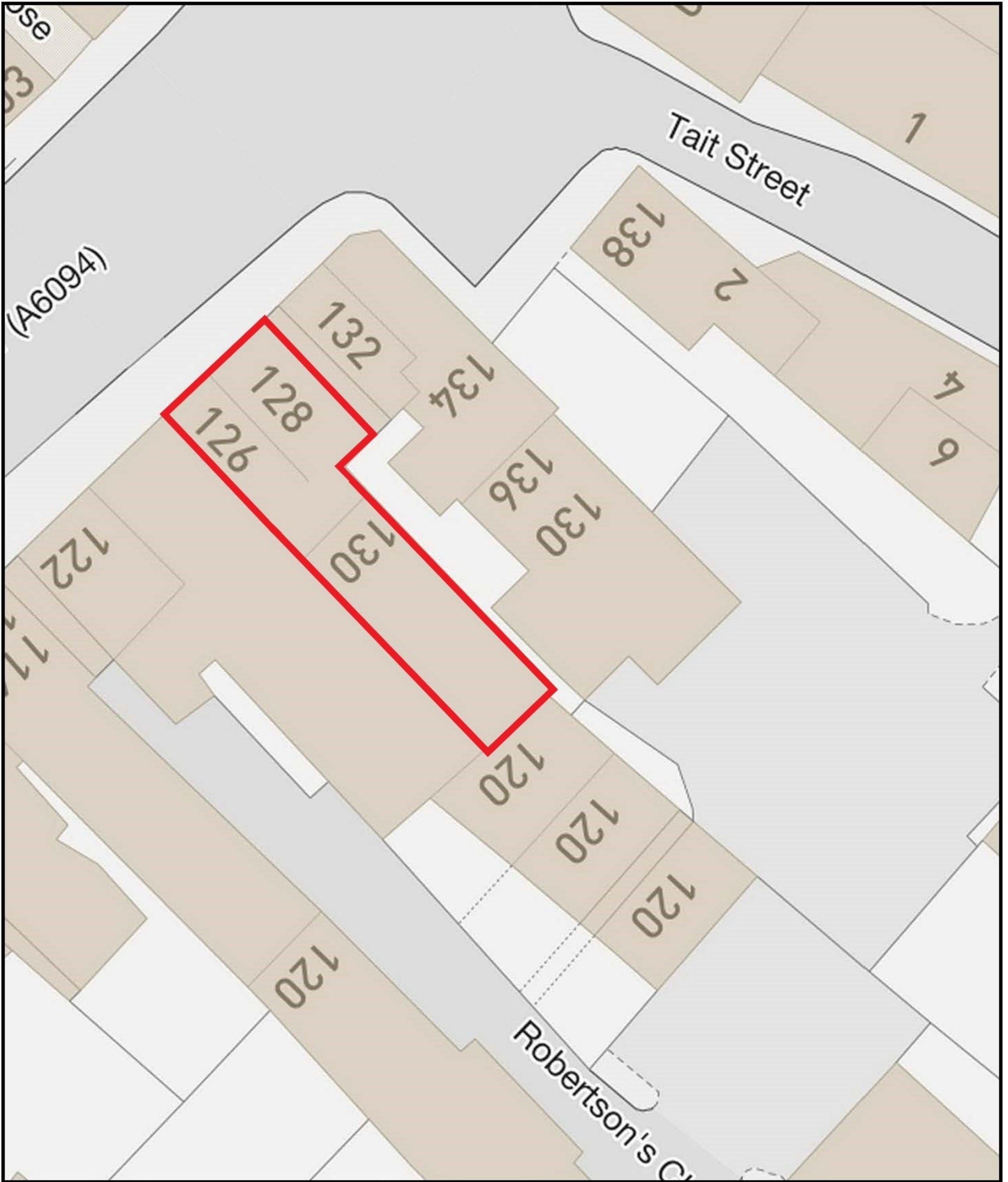
Where, after the end of the period for compliance with this notice, any steps required to be taken have not been complied with, unless a valid appeal has been made to the directorate, the person who is, for the time being the owner of the building shall be in breach of this notice and guilty of an offence. Any person guilty of such an offence shall be liable on summary conviction to a fine of £20,000 or on conviction on indictment to an unlimited fine.


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

If the steps required by a Listed Building Enforcement Notice are not taken within the specified period(s) the Council may enter on the land, take those steps and recover as a civil debt from the person who is then the owner, or the lessee of the land, any expenses reasonably incurred.

## **FURTHER OFFENCES**

Compliance with the terms of a listed building 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.



 <p><b>Midlothian</b>  <b>Education, Economy &amp; Communities</b>          Midlothian Council          Fairfield House          8 Lothian Road          Dalkeith          EH22 3AA</p>	<p><b>130 High Street, Dalkeith, EH22 1AU</b></p>
<p><small>Reproduced from the Ordnance Survey map with the permission of the controller of Her Majesty's Stationary Office. Crown copyright reserved. Unauthorised reproduction infringes Crown copyright and may lead to prosecution or civil proceedings</small></p> <p><b>Midlothian Council Licence No. 100023416 (2018)</b></p>	<p>File No. E/22/39</p> <p>Scale: 1:300</p>



Planning and Environmental Appeals Division

Hadrian House, Callendar Business Park, Falkirk, FK1 1XR

E: [dpea@gov.scot](mailto:dpea@gov.scot)

T: 0300 244 6668



Scottish Government  
Riaghaltas na h-Alba  
[gov.scot](http://gov.scot)

## Appeal Decision notice

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Decision by C Leigh, a Reporter appointed by the Scottish Ministers

- Listed building enforcement appeal reference: LBE-290-2000
- Site address: 130 High Street, Dalkeith, EH22 1AU
- Appeal by Mrs Gloria Silvestri against the listed building enforcement notice dated 8 November 2022 served by Midlothian Council.
- Alleged breach of listed building control: The removal of sixteen single glazed, timber framed, sash and case windows; the removal of traditional metal support bar across window cill in three bays on the top floor of the front (north) elevation; the installation of sixteen double glazed, uPVC framed, tilt and turn windows in the front, rear and side facades.
- Grounds of appeal under s.35(1) of the Act: (d), (e) and (g)
- Date of site visit by Reporter: 9 February 2023

Date of appeal decision: 1 March 2023

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### Preliminary matters

Following submissions from the appellant the Council accepted that there had not been the removal of the metal support bar across the window cill in three bays on the top from of the front (north) elevation. I therefore do not consider this matter in the appeal.

### Decision

I dismiss the appeal, refuse to grant listed building consent for the matters covered in the listed building enforcement notice, and direct that the notice be upheld subject to variation of the terms of the notice by the deletion of the words “(2) Reinstate the traditional metal support bar across window cill in three bays on the top floor of the front (north) elevation, matching those still in place on the bays on the floor below”. Subject to any application to the Court of Session, this notice takes effect on the date of the decision, which constitutes the determination of the appeal for the purpose of Section 35(3) of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997.

### Reasoning

1. The appeal was made on the following grounds as provided for by section 35(1) of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 (‘the Act’):

- (d) that (i) works to the building were urgently necessary in the interests of safety or health, or for the preservation of the building; (ii) it was not practicable to secure safety or health or, as the case may be, the preservation of the building by works of repair or works for affording temporary support or shelter; and (iii) the works carried out were limited to the minimum measures immediately necessary;

- (e) that listed building consent ought to be granted for the works, or that any relevant condition of such consent which has been granted ought to be discharged, or different conditions substituted;
- (g) except in relation to such a requirement as is mentioned in section 34(2)(b) or (c), that the requirements of the notice exceed what is necessary for restoring the building to its condition before the works were carried out;

(d) That the works to the building were urgently necessary

2. I am informed the original windows that have been replaced had deteriorated, causing issues with draughtproofing, damp and noise levels, and being poor in terms of thermal efficiency. I have no reason to doubt that the previous windows, which were original timber windows, were in such a condition. However, to be successful on ground (d) it must be demonstrated that works to the building were urgently necessary for safety or health reasons, or to preserve the building, and that temporary works would not have sufficed for the purposes. It must also be demonstrated that the works done were limited to the minimum measures immediately necessary.

3. The evidence presented to me explains that the windows deteriorated over time, rather than there being an event that led to an urgent need for the works. Nor is there any evidence of temporary works having been considered to suffice for any purpose, or of alternative works being undertaken to the original windows. I further consider the replacement of those original windows with uPVC to not represent the minimum measures immediately necessary.

4. The removal of the sixteen original windows and installation of sixteen uPVC windows were therefore not urgently necessary in the interests of safety or health, or for the preservation of the building. The appeal on ground (d) fails.

(e) That listed building consent out to be granted for the works

5. 130 High Street is a Category B listed building and is an attractive example of a 19<sup>th</sup> Century tenement with shop. The property sits within a group of other Category B listed buildings with Nos. 100 and 102, 104 and 106, 108 and 110, 112 and 114, 116-120, 122-126, and 140 and 142 High Street. These properties lie within the wider Dalkeith House and Park Conservation Area, where I saw at my site visit a high quality mixed commercial area with windows being predominately timber sash and case design with astragals. Under section 14(2) of the Act I have a duty to have special regard to the desirability of preserving the building or its setting, or any features of special architectural or historic interest which it possesses. I also have a duty to pay special regard to the preservation or enhancement of the conservation area under section 64(1) of the Act.

6. I have been provided with photographs of the original windows that have been replaced at the front of the property, and I saw at my site visit the remaining original windows in the building. Those original windows were sliding sash with a 6 over 6 pane patter, and with slim proportions to their frame and astragals. Their design and use of materials are a suitably elegant and restrained part of the overall composition of the listed building, and represent an essential part of the historic and architectural interest of the property.

7. The new windows at the front of the property do not display a sensitivity of design to the building. The frames are of chunkier dimensions made of uPVC, the glazing sees

applied astragals to create a 4 over 4 pane design, and the windows are tilt and turn opening. These features combine to create windows that significantly jar with the building and harm its special historic and architectural interest. This harmful effect is widely visible in the area due to views along the road, and the inappropriate design further contrasts with the character of nearby buildings.

8. The windows to the rear and side of the building can be seen from Robertson's Close, and from areas and residential properties between High Street and Tait Street/St Andrews Street. I acknowledge these windows are seen from fewer location than those on the front elevation, but I saw at my site visit that, in those more limited locations, the windows are clearly visible and are an important element in the historic and architectural interest of the property.

9. The uPVC windows that have replaced the original windows to the rear and side display similar shortcomings to those at the front: the dimensions of the frames create a heavy appearance, with poor proportions to the windows, and the appearance of the uPVC is a jarring use of modern materials that contrasts with the building. I saw that the rear of the property and the wider area sees a number of changes to buildings, but in this context the windows that have been installed still appear as discordant elements.

10. It is my conclusion regarding the whole building that the windows which have been installed have a harmful impact on the architectural and historic interest of the property.

11. The Midlothian Local Development Plan 2018 is a material consideration in this appeal, and Policy ENV 22 in essence addresses the same provisions in the Act in respect of the preservation of listed buildings, their setting, or any features of architectural or historic interest that they possess. The Council's Dalkeith House & Park Conservation Area Character Appraisal 2004 identifies that sash and case windows with astragals and original fenestration are part of the character of the Area, and states that such windows should almost always be retained. For the same reasons as expressed above, I consider the works that have been undertaken conflict with Policy ENV 22 and the Character Appraisal, leading to harm to the architectural and historic interest of the property and to the character and appearance of the Conservation Area.

12. I acknowledge the appellant's submissions that the installed windows have been installed to improve energy and sound insulation. The publication from Historic Environment Scotland (HES) Managing Change in the Historic Environment: Windows is a further material consideration in this appeal. This advises that the energy efficiency of existing windows can be improved through measures other than replacement and I have not seen any evidence that such measures were considered or rejected for any specific reason. I also note that, although I have no reason to doubt the original windows were poorly deteriorated, I have not seen any evidence as to why the windows could not be repaired and any improvements to efficiency undertaken. Moreover, even if the original windows were beyond repair, the HES publication advises that new double-glazed windows may be acceptable if they can closely match the original window design, detail and materials. As noted earlier, the windows at the appeal property have not done this.

13. The appeal on ground (e) therefore fails.

(g) The steps required by the notice are excessive

14. The notice requires the removal of all the uPVC windows and replacement with windows to match the original in terms of design, appearance and materials.

15. I have found that the works have harmed the architectural and historic interest of the listed building and harmed the character and appearance of the Conservation Area. The requirements of the notice to remove those harmful windows and replace with windows that match the original windows removed is therefore not excessive: the steps are necessary to restore the building to its condition before the works were carried out.

16. I acknowledge the financial burden to which the appellant will be put through compliance with the notice. However, this is not a material consideration in whether the requirements of the notice exceed what is necessary for restoring the building to its condition before the works were carried out. The appeal on ground (g) fails.

### **Conclusion**

17. The appellant states that she has replaced 11 windows at the property, not 16. It is clear that all 16 windows have been replaced at some time, and no firm evidence has been provided to substantiate the claim regarding only 11 being replaced. In any event, even if some windows may have been replaced in the past there is no provision in the Act for an appeal on the ground of immunity from enforcement action. On the basis of what I have read and seen it is my view on the balance of probability that 16 windows have been replaced.

18. I note representations in support of the windows being retained. However, for the reasons set out in this decision the works that have been undertaken are harmful to the listed building and to the Conservation Area, and are thus contrary to the purposes of the Act, as well as conflicting with the development plan and guidance from HES. This support therefore does not alter my findings regarding the replacement windows.

19. I have considered all the other matters raised but there are none which would lead me to alter my conclusion that the appeal fails. I have, though, modified the terms of the notice to remove reference to the need to reinstate the metal support bars on the front elevation to accord with the confirmation from the Council that such works had not occurred.

*C Leigh*  
Reporter