

Directorate for Planning and Environmental Appeals

Appeal Decision Notice

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Decision by Claire Milne, a Reporter appointed by the Scottish Ministers

- Enforcement notice appeal reference: ENA-290-2002
- Site address: 15 Dundas Street, Bonnyrigg, EH19 3AT
- Appeal by Mr Mark Robertson against the enforcement notice dated 30 April 2015 served by Midlothian Council
- The alleged breach of planning control: The formation of two dormer windows on the rear elevation of the dwellinghouse on the land without the benefit of planning permission
- Date of site visit by Reporter: 4 September 2015

Date of appeal decision: 10 September 2015

Decision

I dismiss the appeal and direct that the enforcement notice dated 30 April 2015 be upheld subject to the variation of the terms of the notice in relation to the time period for compliance by deleting the words "3 calendar months" and replacing them with the words "9 calendar months".

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 Town and Country Planning (Scotland) Act 1997 (as amended) hereon referred to as '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 Act:

(f) that the steps required by the notice to be taken 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; and

(g) that any period specified in the notice in accordance with section 128(9) falls short of what should be reasonably be allowed.

2. The appeal property comprises of a two storey traditional stone built dwelling house which forms part of a pair within 13 Dundas Street. At the rear of the property is a single storey hipped roof extension, and a flat roof garage. Two dormer windows, the subject of this appeal have been formed within the rear of the property. As confirmed at the site visit,



each dormer window measures 2.06 metres wide with a gap of around 28 centimetres separating the two dormers. The appeal property, along with the properties numbered 13, 17 and 19 Dundas Street, are category C listed.

3. The enforcement notice was issued because it appears that there has been a breach of planning control under section 123(1)(a) of the Act. The breach is described as the formation of two dormer windows on the rear elevation of the dwellinghouse on the land without the benefit of planning permission. The notice specifies 3 steps (options) to be chosen and implemented to remedy the breach. These are summarised as follows:

- The removal of both unauthorised dormer windows and remedial works to return the resultant open external parts of the same roof plane to its original enclosed condition; or
- The removal of both unauthorised dormer windows and thereafter form both dormer windows subject of approved planning permission reference 08/00623/FUL; or
- Carry out alteration works to both unauthorised dormer windows to form both dormer windows subject of approved planning permission reference 08/00623/FUL.

Appeal on Ground (f)

4. The appellant argues that in issuing the enforcement notice the council have failed in their duty to have proper regard to the provisions of the development plan any other material considerations, or Circular 10/2009 Planning Enforcement. In particular the council has not considered whether any breach of control would affect unacceptably either the public amenity or use of land and buildings meriting protection in the public interest particularly given the fact that the original character of the property has already been substantially and permanently altered.

5. As the appeal is made on ground (f), the key consideration is whether the steps specified in the notice exceed what is necessary to remedy any breach or remove any injury to amenity which has been caused by such breach. My role therefore is to decide whether these requirements are excessive and not whether the notice should have been issued in the first place.

6. The appellant considers the steps set out above to be excessive and disproportionate relative to the breach of planning control and submit that all 3 options should be deleted. This argument is made on the basis that the dormers as installed do not have a materially adverse or detrimental impact upon the character or amenity of the area and are in compliance with the relevant development plan policies and supplementary guidance.

7. I note that retrospective planning permission for the two dormer windows was refused by the council in 2011 and an appeal was dismissed by the Local Review Body in 2012. Although my remit is confined to dealing with an alleged breach of planning control, I agree with the concerns of the council in that the dormer windows have an adverse impact on the character and appearance of the listed building.



8. The wording of the enforcement notice is clear in that it has been issued because it appears that there has been a breach of planning control. The reasons given for issuing the notice also relate to concerns over the significant adverse impact of the two dormers on the rear elevation of the house, and in particular the character and appearance of the listed building, they do not refer to any wider impact on the general amenity of the area.

9. The actual steps to remedy the breach relate to making the development comply with the terms of the approved planning permission or restoring the land to its condition before the breach took place. I therefore conclude from all of this that the notice has been served under subsection 128(4)(a) of the Act to address a perceived breach of planning control, and not under subsection 128(4)(b) which is to remedy any injury to amenity which has been caused by the breach.

10. Court judgements have confirmed that the final clause in section 130(1) ground (f) of the Act - "or, as the case may be, to remedy any injury to amenity which has been caused by any such breach" - only applies where the enforcement notice has been served with the express purpose to remedy the injury to amenity (section 128(4)(b)). I do not find this to be the situation in this case. Therefore, it is not within my remit to either quash the enforcement notice or substitute a lesser requirement on the grounds that the steps required exceed what is necessary to remedy any injury to amenity caused by that breach.

11. Any one of the 3 options specified in the enforcement notice would satisfactorily remedy the breach of planning control which has occurred and I conclude therefore that the steps are appropriate and are not excessive or disproportionate. I do not find that the amenity arguments that have been put forward by the appellant in support of the retention of the dormer windows provide an effective remedy to the breach of planning control. Accordingly the appeal on ground (f) fails.

Appeal on Ground (g)

12. Turning to the appeal on ground (g). I consider that the period of 3 calendar months specified for compliance is not reasonable in terms of the actual works which would be involved in physically removing, replacing or altering the dormer windows, particularly over the winter months. Given the need to agree a particular option with the planning authority, and then allow time to carry out the works at a suitable time of year, an alternative maximum period of 9 months as suggested by the council is considered appropriate. I conclude therefore that the enforcement notice should be varied to that extent and the appeal on ground (g) succeeds in that respect.

Conclusions

13. I have considered all the other matters raised in the submissions relating to this appeal, but there are none which leads me to alter my conclusions.

Claire Milne
Reporter