



NON-COMPLIANCE WITH THE REQUIREMENTS OF A LISTED BUILDING ENFORCEMENT NOTICE REGARDING THE ERECTION OF A FASCIA SIGN AT 41 HIGH STREET, DALKEITH.

Report by Chief Officer Place

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 erection of a fascia sign at 41 High Street, Dalkeith.**
- 1.2 The enforcement notice required the removal of the fascia signage panel from the shopfront and make good any holes created for fixings. These steps have not been taken, either by the enforcement notice compliance date of 7 November 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 41 High Street, Dalkeith is a Category C listed building and within the Dalkeith House and Park Conservation Area.**
- 2.2 On 20 October 2022 an application for listed building consent (reference 22/00646/LBC) for a fascia sign was refused for the following reasons:**
 - 1 *The design of the proposed signage is not of such high quality to be suitable on the principle elevation of this listed building.***

2. *The materials and fixings of the proposed signage are a non-traditional material which are not appropriate on this listed building.*
 3. *For the above reasons, the proposed signage will have a significant adverse impact on the character, appearance, fabric, setting and historic context of this C listed building and therefore does not comply with Historic Environment Scotland policy and guidance.*
- 2.3 At the time of determining the application the signage had not been installed. Following the refusal of the application officers engaged proactively with the applicant to explore potential acceptable alternative signage (It is worth noting that there is certainly no prohibition on listed building having signage per se, indeed the previous signage on this building was consented by the Council in 2019).
- 2.4 No appeal was submitted to the Scottish Ministers in respect of the refused application within the prescribed period. In early 2023 it was identified that notwithstanding the refusal of the application the signage had been installed. A formal enforcement investigation was opened in February 2023
- 2.5 The applicant was contacted and asked for his intentions in relation to the signage given that it was unauthorised and that the period to submit an appeal had elapsed. He indicated that his intentions were to leave the signage in situ.
- 2.6 A listed building enforcement notice was issued on the occupiers and owner of the property on 31 May 2023, with a take effect date of 8 July 2023 and a compliance date of 7 November 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 the fascia signage panel from the shopfront and make good any holes created for fixings.
- 2.7 The owner did not appeal the listed building enforcement notice.
- 2.8 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”.
- 2.9 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”.

- 2.10 To assist the occupier of the shop to resolve the breach of planning control the Council's Planning Service sketched out an indicative plan of an acceptable replacement sign and the Council's Economic Development Service offered to support the business in applying for business support grants – the occupier of the shop did not take up these offers of assistance.

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/occupiers who decided to install a fascia sign 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.
- 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
Appendix A: A copy of the listed building enforcement notice issued 8 November 2022 with regard 41 High Street, Dalkeith;
Appendix B: A copy of the unauthorised signage details at 41 High Street, Dalkeith.

**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
31 May 2023**

This Notice is served on:

- 1 Mr Sam Flynn
11 Maxton Court
Dalkeith
EH22 1BL**

- 2 Roberts Properties (Scotland) Limited
C/O Philip Bald Accountancy
3b Ormiston Terrace
Edinburgh, EH12 7SJ.**

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

41 High Street, Dalkeith, EH22 1JB

It forms part of a Category C, Listed Building (listed building Reference 24383, date of listing 9 March 1992.

It is located within the Dalkeith House and Park Conservation Area.

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

Without listed building consent:

- Installation of fascia sign

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”.

41 High Street is a Category C listed building.

The signage that has been installed without consent does not reflect the traditional features of a modern shop frontage. The use of traditional materials, colours and designs for the shopfront and signage are encouraged to preserve the historic interest of the listed building and prevent detrimental impact to the character and appearance of the conservation area. With the signage installed being an aluminium board placed above the entrance doors, the proposed design, position and materials of the proposed signage does not respect the historic character and appearance of the shopfront and detract from the character, appearance and historic interest of the property.

A listed building application for this signage (reference 22/00646/LBC) was refused for the following reasons

- 1. The design of the proposed signage is not of such high quality to be suitable on the principle elevation of this listed building.*
- 2. The materials and fixings of the proposed signage are a non-traditional material which are not appropriate on this listed building.*
- 3. For the above reasons, the proposed signage will have a significant adverse impact on the character, appearance, fabric, setting and historic context of this C listed building and therefore does not comply with Historic Environment Scotland policy and guidance.*

No appeal was submitted within the prescribed period in respect of this decision and the signage has been installed and is unauthorised.

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

5. WHAT YOU ARE REQUIRED TO DO

- (1) Remove the fascia signage panel from the shopfront and make good any holes created for fixings

6. TIME FOR COMPLIANCE

Requirement 5(1) and 5(2) to be complied with by 7 November 2023.

7. WHEN THIS NOTICE TAKES EFFECT

This Notice takes effect on 8 July 2023 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: 31 May 2023

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 8 July 2023. 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 8 July 2023 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

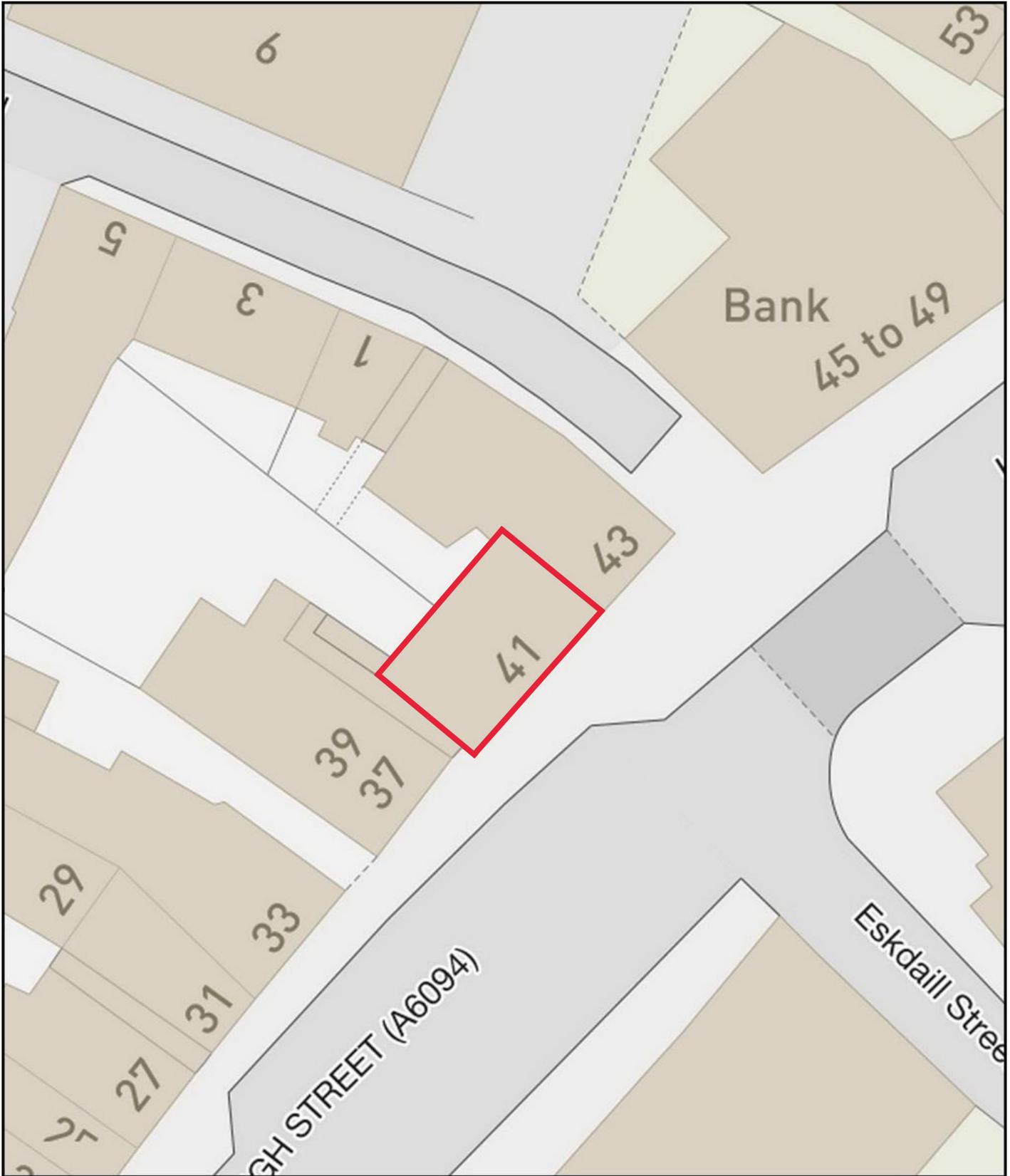
Where, after the end of the period for compliance with this notice, any steps required to be taken have not been complied with, unless a valid appeal has been made to the directorate, the person who is, for the time being the owner of the building shall be in breach of this notice and guilty of an offence. Any person guilty of such an offence shall be liable on summary conviction to a fine of £50,000 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.




Education, Economy & Communities
 Midlothian Council
 Fairfield House
 8 Lothian Road
 Dalkeith
 EH22 3AA

Listed Building Notice
 41 High Street, Dalkeith, EH22 1JB

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File No. E/23/23

Scale: 1:300



Midlothian Council Licence No. 100023416 (2018)



Mr Melts signage, 41 High Street, Dalkeith

White aluminium sign tray 2000mm x 580mm x 40mm

"MRMELTS-WAX" 19mm black foamex on stand off locators

"WAX MELTS BATH & BODY PERFUME" 10mm black foamex double sided tape to the tray

Top and bottom lines fabricated matt black acrylic face and sides, 30mm returns

