Planning and Environmental Appeals Division

Appeal Decision Notice

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Decision by Rob Huntley, a Reporter appointed by the Scottish Ministers

- Enforcement notice appeal reference: ENA-340-2041
- Site address: Dollar Equestrian, Blairingone, Dollar, FK14 7ND
- Appeal by Charles and Charmaine McLeish against the enforcement notice dated 12 July 2018 served by Perth and Kinross Council
- The alleged breach of planning control: that development exists in breach of condition 1 of local planning authority reference number 14/00278/FLL
- Date of site visit by Reporter: 25 October 2018

Date of appeal decision: 1 November 2018

Decision

I dismiss the appeal and direct that the enforcement notice dated 12 July 2018 be upheld, subject to the variation of the terms of the notice by deleting the words "STEP 1:" in paragraph 5 of the notice. 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.

Procedural Matter

1. In parallel with my consideration of this appeal, I have also considered an appeal against a second enforcement notice issued by the council concerning the same site. My decision on that appeal (ref: ENA-340-2042) is the subject of a separate decision notice.

Reasoning

2. The appeal against the enforcement notice is made on all 6 of the grounds provided for by section 130(1) of the Town and Country Planning (Scotland) Act 1997, namely:

(b) that the matters which have been stated in the notice have not occurred;
(c) that the matters stated in the notice (if they occurred) do not constitute a breach of planning control;
(d) that, at the date 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 of the 1997 Act;

(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 stated in the notice, or to remedy any injury to amenity caused by that breach;
(g) that the period for compliance falls short of what should reasonably be allowed.

3. By notice dated 27 June 2014 the council granted planning permission reference 14/00278/FLL for development at the appeal site. The permitted development was described in the decision notice as "Erection of stable building (temporary for two years) (in retrospect)". The plans submitted in connection with the application for planning permission illustrated 4 timber stable buildings, with these stated on the drawings to be temporary. Condition 1 attached to the planning permission states:

"Consent is hereby granted for a period of 2 years only from the date of this decision notice. Upon the expiry of the 2 years, the stables shall be removed and the land reinstated to the satisfaction of the Council as Planning Authority."

4. The breach of planning control alleged in the enforcement notice is the failure to remove the stables from the land at the end of the period specified in condition 1 attached to the planning permission. I address each of the grounds of appeal in the following paragraphs, in the same order as these are listed above.

Ground (b) - the matters stated in the notice have not occurred

5. During my site inspection I observed 4 timber buildings to be present at the site. These were arranged to accommodate horses, together with storage of related items including tack and equipment. These buildings are in the same positions as those shown on the drawings submitted in connection with application 14/00278/FLL and I am satisfied that they are the same buildings as permitted for a limited period by that planning permission. The appellants explain that the permitted development had been undertaken prior to the submission of that application, and this is confirmed by the council's use of the phrase "in retrospect" on the decision notice. I therefore conclude that the development referred to in the planning permission granted in 2014 has indeed taken place.

6. The carrying out of the development permitted by the 2014 planning permission had the effect of triggering the operation of condition 1, requiring the stables to be removed from the land upon the expiry of 2 years from the date of the decision notice. The relevant date in this regard is 27 June 2016. The existence of the stable buildings on the land at the time of my site inspection leads me to conclude that their removal as required by condition 1 had not occurred at the date of the enforcement notice, or since. For these reasons I find that the breach of planning control referred to in the notice has taken place. The appeal on ground (b) therefore fails.

Ground (c) - the matters stated in the notice do not constitute a breach of planning control

7. The matters that may amount to a breach of planning control are specified in section 123 of the Town and Country Planning (Scotland) Act 1997. Subsection 123(1)(b) provides that a breach of planning control includes failure to comply with a condition of a planning permission. It appears to be common ground between the council and the appellants that some of the stable buildings to which planning permission 14/00278/FLL relates had been in place for some time prior to the grant of that permission. I address the implications of the

timing of this in my consideration of the appeal on ground (d), but I am satisfied that failure to remove the stables from the land, as required by condition 1 of the planning permission, constitutes a breach of planning control. The appeal on ground (c) therefore fails.

Ground (d) – too late to take enforcement action

8. The appellants explain that the stable buildings had been in place at the site prior to the submission of the application which resulted in planning permission reference 14/00278/FLL. This is accepted by the council, but there is disagreement between the parties as to the timing of this development and the resulting implications. The appellants assert that the 2 more southerly of the 4 stable buildings were erected on the site in May 2009. This would have been more than 4 years before the date of the grant of that planning permission on 27 June 2014, and also more than 4 years before its submission in February 2014. The appellants therefore maintain that by May 2013 these 2 stable buildings would have become immune from enforcement action by virtue of the time limit specified in s124(1) of the 1997 Act. They comment that, for this reason, the application submitted in February 2014 need not have sought planning permission for the 2 more southerly stable buildings.

9. The appellants have not, however, provided any convincing explanation of why that immunity argument was not taken previously, at the time of 2014 application or subsequently. I note that this point was not referred to in the appellants' case for review of the council's refusal of application 16/01743/FLL, which sought planning permission for the retention of the same stable buildings. Paragraph 5.1 of the appellants' statement submitted to the local review body in this regard stated that the stables had been in place for 7 years in November 2017, the date of that statement. This implies that the buildings were in place in November 2010. This would seem to be at odds with the appellants' claim that the stables had been in place for more than 4 years by the time the 2014 application was made, ie. by February 2010.

10. The appellants have provided an invoice from GNS Construction Ltd dated 20 May 2009 and claim that this is in respect of work involved in the construction of the 2 southernmost stable buildings. The invoice describes the services provided by GNS at that time as;

> "Supply of labour, machinery, fuel and fixings to erect three stables/shelters. Materials used were already on site."

This invoice is stated to be in respect of "work carried out at site near Saline", but this does not make explicit that the work to which it relates was undertaken at the appeal site. Nor can I be sure that the stables/shelters referred to are amongst those to which the enforcement notice relates. The reference in the invoice to 3 stables/shelters adds further uncertainty, as this is not consistent with the appellants' claim that only 2 of the stable buildings were constructed in May 2009.

11. In an appeal on ground (d), the standard of proof required is the same as would apply in the case of an application for a certificate of lawfulness under the provisions of section 150(3) of the 1997 Act. This places the onus firmly on the appellant in this respect. For the above reasons, I am not able to be satisfied, on the balance of probabilities, that all or any of the timber stable buildings were immune from enforcement action at the date of the grant of planning permission. In any event, that grant of planning permission

retrospectively authorised the development of the stable buildings for a limited period, thereby resetting the timescale of any immunity period. The appeal on ground (d) therefore fails.

Ground (e) - notice not served as required by section 127 of the 1997 Act

12. The appellants point out that the enforcement notice was served neither on the lessees of the equestrian centre building, nor on the owner and occupier of the adjacent house. The timber stable buildings enforced against are, I am told, used to accommodate the appellants' own horses and are not in use in connection with the separately run equestrian business, or by the occupants of the house. There appears to be some lack of clarity or precision as to the ownership boundary between the land occupied by the stable buildings and the curtilage of the house. However, the stables are clearly identifiable on the site and are situated within an area separated by timber post and rail fencing from other parts of the site, which I am told are separately occupied. I was able to observe that the appeal site contained only one group of 4 timber stable buildings. The requirement of the notice is clear in providing for the removal only of the timber stable buildings and I am satisfied that there is no doubt about which buildings the notice refers to.

13. Section 132(4) of the Town and Country Planning (Scotland) Act enables me to disregard the failure to serve the notice on any person, if that person has not been substantially prejudiced by that failure. The enforcement notice does not impose any requirement in respect of the large equestrian building or in respect of the house. I am therefore satisfied that, even if some of the land encompassed within the site defined on the enforcement notice plan is owned or occupied by persons on whom, strictly, copies of the notice should also have been served, none of these parties has been substantially prejudiced by that omission. The appeal on ground (e) therefore fails.

Ground (f) - the steps required by the notice to be taken are excessive

14. Under this ground of appeal the appellants maintain that the stable buildings which are the subject of the notice are not objectionable in planning terms. They suggest that they do not give rise to harm in visual, noise, odour or other terms. In this context the appellants argue that no detrimental impact on amenity arises from the breach of planning control and that requiring removal of the stables exceeds what would be necessary to remedy any injury to amenity.

15. 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 that the development may or may not have is not directly relevant to my consideration of this appeal. Those aspects are matters for consideration in the context of the determination of an application for planning permission, and I note that the council has previously considered and refused 2 previous applications seeking the retention of the stables at the site beyond the period specified in condition 1 of the 2014 permission. The second of these decisions was reviewed on appeal to the local review body, with the result that the decision to refuse planning permission was upheld.

16. Section 128(3) of the Town and Country Planning (Scotland) Act 1997 requires an enforcement notice to specify the steps required to be taken to achieve any of the purposes set out in section 128(4) of the Act. The purposes stated in that sub-section 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."*

17. An appeal against an enforcement notice on the ground of exceeding what is necessary to remedy injury to amenity, is available only if the steps required by the notice are for the purpose of removing or alleviating injury to amenity which has been caused. Paragraph 5 of the enforcement notice states the requirement as being:

> *"Remove the timber stable buildings."*

This makes clear that the council's purpose in issuing the notice is to remedy the breach of planning control by requiring removal of the stable buildings from the land. This is the purpose provided for in section 128(4)(a) of the 1997 Act. It is not stated as being to remedy injury to amenity pursuant to sub-section 4(b). The inclusion of references to adverse effects on amenity, amongst the reasons for issuing the notice listed in paragraph 4 of the notice, does not alter the purpose for which the notice was issued.

18. I therefore conclude that it is not open to me, in deciding this appeal, to modify the notice so as to substitute requirements to achieve a purpose consistent with section 128(4)(b) of the 1997 Act when the stated purpose of the notice as issued derives from sub-section 4(a). However, I consider that the inclusion of the words "Step 1:" in paragraph 5 of the notice is potentially confusing. This could lead the reader to assume that further steps were also required to be taken, whereas the notice specifies a single requirement. In my formal decision I have directed that this modification to the notice be made. I am satisfied that this would not cause hardship to any party. Subject to this variation, and for the reasons set out above, the appeal on ground (f) fails.

Ground (g) - the period for compliance falls short of what should reasonably be allowed

19. Under this ground of appeal, the appellants seek an extension of the time for compliance with the requirements of the notice, from the 90 days stated in the notice to a minimum of 12 months. They suggest that 90 days would allow insufficient time to enable compliance with the requirements of the notice as this would involve alternative arrangements having to be made for the stabling of the 5 horses said to be accommodated there. However, no detailed explanation has been provided sufficient to persuade me that a period close to 3 months would be inadequate for any necessary arrangements to be made. I note that other stabling exists elsewhere within the site edged red on the plan attached to the enforcement notice, including in the large equestrian centre building. The appellants have also drawn attention to other stables existing in the wider vicinity. I have no knowledge of whether those specific facilities would be available to accommodate the appellants' horses displaced from the site, but no detailed evidence has been put before me on which I could conclude that alternative stabling arrangements could not be readily made.

20. I have been provided with no evidence sufficient to persuade me that there are any particular or site-specific reasons why the physical removal of the stable buildings could not

be undertaken within the 90 days specified in the notice. Having inspected the site and viewed the stables which the notice requires to be removed, I see no reason why the process of removal, including any necessary service disconnections, need take longer than a few days to complete. The pre-fabricated and modular nature of the stables, and the timber material, facilitates their ability to be quite speedily erected or removed. This leads me to conclude that the time required for this work would amount to a few days or weeks, not many months as sought by the appellants.

21. Taking these considerations into account, I consider that the 90 days compliance period specified in the notice gives adequate time for its requirements to be met. For these reasons, the appeal on ground (g) also fails.

Overall conclusions

22. For the reasons set out above, the appeals made on each of the grounds (b) to (g) fail. Subject to the minor variation I have made for the sake of clarity, the enforcement notice is therefore upheld.

Rob Huntley
Reporter