Planning and Environmental Appeals Division

Appeal Decision Notice

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Decision by Chris Norman, a Reporter appointed by the Scottish Ministers

- Enforcement notice appeal reference: ENA-270-2031
- Site address: High View, Lower Muckovie, Inshes, Inverness, IV2 5BB
- Appeal by Brian Rizza against the enforcement notice dated 30 May 2019 served by Highland Council.
- The alleged breach of planning control: Unauthorised development of a gabion wall and garage without the required planning permission.
- Date of site visit by Reporter: 20 August 2019

Date of appeal decision: 11 September 2019

Decision

I uphold the enforcement notice dated 30 May 2019 but allow the appeal to the extent that I vary the terms of the notice by deleting the words "by 31 October 2019" in section 4 of the notice and replacing them with the words "within 9 months of this notice taking effect". 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.

Reasoning

1. The appeal against the enforcement notice was made on the following grounds as provided for by section 130(1) of the Town and Country Planning (Scotland) Act 1997 (the 1997 Act): (c) the matters alleged in the notice do not constitute a breach of planning control; (f) the steps required by the notice to be taken 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; and (g) that the period specified in the notice falls short of what should reasonably allowed.

Ground (c)

2. Despite making a retrospective planning application for the development referred to in the council's notice the appellant pleads that there has not been a breach of planning control and does not expand this view in his grounds of appeal. His appeal statement confirms that a garage has been erected to the east of 'High View' and that "associated works to the river bank" comprising a wall formed from gabion baskets has been constructed and adjoins the adjacent Screten Burn. It is submitted that the purpose of the

structure, in line with professional advice, was to protect the adjoining burn during construction works.

3. From the adjacent farm access road I observed the extent of the work that is the subject of the council's enforcement notice. The garage building, which has fenestration within its roof space, is located between the recently completed 'High View' and is less than 6 metres from the adjoining watercourse. Located on the boundary between the curtilage of the house and the watercourse the greater part of the retaining wall essentially comprises of a linear row of gabion baskets which tapers eastwards at its southern end. I estimate that its height is around 2 metres for the greater part of its length. Towards the northern boundary of the house the burn is culverted under a bridge carrying the farm access track and here the gabion wall is replaced with a concrete structure that is partially stone-finished. Retrospective planning application 19/00622/FUL for this development was refused by the council on 30 May 2019 and has not been the subject of an appeal. On the same day the council issued the enforcement notice which is now the subject of this appeal.

4. Section 26 of the Town and Country Planning (Scotland) Act 1997 (the1997 Act) defines development as the carrying out of building, engineering, mining or other operations in, on, over or under land. I have no doubt in my mind that the garage, any made-up land on which it is located and the retaining structure between the house and the Screten Burn constitute development. Section 28 (1) of the 1997 Act provides that planning permission is required for the carrying out of development on land. Section 123 (1) (a) of the 1997 Act provides that the carrying out of development without the required planning permission constitutes a breach of planning control.

5. Class 3A of the Town and Country Planning (General Permitted Development) (Scotland) Order 1992 (development within the curtilage of a dwellinghouse) provides, amongst other things, that any building exceeding 4 metres in height does not benefit from being permitted development. Drawing CASL1901001, part of the planning application refused by the council on 30 May 2019, confirms that the height of the garage exceeds 4 metres and it is therefore not permitted development.

6. Class 14(1) of the 1992 Order (temporary buildings and uses) provides that works required temporarily in connection with, and for the duration of operations being carried out on adjoining land, are 'permitted development' but must be removed when the operations have been carried out. The appellant submits that, on the basis of technical advice, the gabion baskets were placed to protect the burn "during the construction of the property". Regardless of the technical advice received by the appellant, the continued presence of retaining structure, following the completion of the adjacent building works, does not constitute permitted development.

7. The appeal under ground (c) fails.

Ground (f)

8. The council's enforcement notice requires that the breach of planning control is remedied by completely removing from the land the unauthorised garage and associated infill material and the gabion wall, all baskets, stones, blockwork, foundations and infill materials. Additionally the notice requires the reinstatement of the banks of the Screten

Burn by forming the surrounding land consistent with the plans that are part of planning permissions 14/03375/FUL and 15/03857/FUL. To the appellant these requirements go beyond what is required to remedy the breach of planning control as his professional advice has concluded that the effect of the development subject to the notice is not significant in terms of potential flood risk.

9. I have noted the personal circumstances that have affected the appellant's ability to oversee development at 'High View'. I am also mindful that since the refusal of planning application 19/00622/FUL the appellant has received further technical advice which seeks to address the flood risk concerns of the council that could be a consequence of the unauthorised development. Specifically, the appellant appreciates that the council required additional information about the effects of the unauthorised development on the adjoining watercourse for its determination of planning application 19/00622/FUL. Subsequently a flood risk assessment has now been undertaken and specific remediation details have been proposed. To the appellant these proposed remedial works are "more appropriate" than the removal of the unauthorised development required by the enforcement notice.

10. Based upon the appellant's evidence I note that the unauthorised development is reported to be structurally sound. I am also aware that the appellant's technical advice concludes that the gabion wall provides support to the headwall of the culvert under the farm track and that this is regarded, by the appellant's advisors, as a betterment. I have been advised that the alignment of the Screten Burn has not changed, except to the south. In the appellant's technical assessment the setting back of the watercourse on land controlled by the appellant, over a distance of some 10 metres, could improve channel capacity and address any resultant localised impacts.

11. The repeal of section 130(1)(a) of the 1997 Act does not allow me to grant planning permission for the unauthorised development referred to in the council's enforcement notice. It is the appellant's view that the watercourse realignment works set out in his updated technical advice are appropriate. Notwithstanding the appellant's technical advice the structural survey and flood risk assessment require to be assessed by both the council and the Scottish Environment Protection Agency (SEPA). I am not aware whether the less onerous steps sought by the appellant could address the concerns expressed by SEPA and the council in the refusal of application 19/00622/FUL and the council's resultant decision to take enforcement action. In any event, I am not empowered, through this decision notice, to authorise realignment work to the watercourse which, although proposed in order to address the concerns of SEPA and the council, would constitute further development. If I was to uphold the appeal, and even if the appellant was to carry out the remedial work suggested by his technical advisers to the satisfaction of the council and SEPA, the garage, any made-up land and the retaining wall would remain as unauthorised development under the 1997 Act.

12. I therefore conclude that the less onerous remediation work proposed by the appellant, even if it was carried out to the satisfaction of the council and SEPA, would not address the planning status of the unauthorised development specified in the council's notice. Only the removal of the development and the reinstatement of the site, or a grant of planning permission for the development already carried out would remedy the breach of panning control that I have identified above in response to the appeal made under ground (c).

13. The appeal under ground (f) fails.

Ground (g)

14. Issued on the 30 May 2019, and taking effect on 5 July 2019, the enforcement notice allowed a compliance period of some 4 months, until 31 October 2019, by which time the unauthorised works were required to be removed. To the appellant the time allowed for compliance with the notice is insufficient

15. I am mindful of the understandable difficulties that have arisen for the appellant during the carrying out of development at 'High View'. As I have set out above I have concluded that the appellant's appeal fails on both grounds (c) and (f). As a consequence the garage, the gabion wall and any made-up ground are not authorised under the 1997 Act. I have noted the technical solutions that have been suggested by the appellant's advisers. Against this background it remains open for the appellant under section 33 of the 1997 Act to submit a further retrospective application to the council with a view to regularising the planning status of the development that has already been carried out and containing details of the remedial work now proposed by his technical advisers. Similarly the council can issue a notice under section 33A of the 1997 Act requiring an application for planning permission for the development already carried out.

16. I have therefore varied the terms of the enforcement notice to allow a period of 9 months from the date of my decision before the appellant must complete the steps set out in the enforcement notice. This should allow sufficient time for a further application and additional information to be determined and, if approved in the light of the appellant's more recent information on flood risk, so potentially regularise the planning status of the development carried out without planning permission and that of the required remedial works.

17. I have taken into account all other matters raised but there are none that would lead me to alter my conclusions. For the reasons given above I dismiss the appeal and, subject to the variation of section 4, uphold the enforcement notice dated 9 November 2018.

Chris Norman
Reporter