

EAST RENFREWSHIRE COUNCILPLANNING APPLICATIONS COMMITTEE29th November 2023Report by Director of EnvironmentSection 33A notice - 29 East Kilbride Road, Busby, G76 8JY.UPDATE**1.0 INTRODUCTION**

- 1.1. This report follows the decision of the Planning Applications Committee meeting of 4th October 2023 in relation to the service of a Notice under Section 33A of the Town and Country Planning (Scotland) Act 1997, authorised by the Planning Applications Committee on 7th June 2023, in respect of unauthorised development at 29 East Kilbride Road, Busby, G76 8JY.

2.0 BACKGROUND

- 2.1 Members will recall that two timber outbuildings and a 2-metre-high fence were erected without planning permission at 29 East Kilbride Road, Busby. The unauthorised development has been the subject of complaints from adjacent residents.
- 2.2 The Planning Service wrote to the landowner and requested submission of the required planning application. This was submitted on 17th March 2023 but then withdrawn the following day, as the landowner wrongly believed planning permission was not required. An email sent from the Planning Service on the 31st March advised the landowner that formal action would be considered if a planning application were not submitted before 14th April 2023. The landowner declined to submit an application and confirmed that he was taking legal advice on the matter.
- 2.3 At its meeting on 7th June 2023, the Planning Applications Committee authorised the service of a Section 33A Notice. This is a formal notice requiring the landowner to submit the required planning application in retrospect. Whilst there are no penalty provisions for failing to comply with this notice, it constitutes enforcement action under the relevant legislation and leaves it open to the Planning Service to pursue further action in terms of an enforcement notice at any time. In addition, the notice “stops the clock” towards immunity being reached i.e. after four years following the breach of planning control, the development would otherwise become lawful and no enforcement action could be taken.

3.0 UPDATE

- 3.1 To date, the landowner has not complied with the terms of the Section 33A Notice and has refused to submit the required planning application.
- 3.2 At the Planning Applications Committee Meeting of 4th October 23, the officer recommendation was that no further action should be taken in respect of the unauthorised works undertaken at the site. The decision of the Planning Applications Committee (PAC) was to not accept this recommendation and that further

advice/guidance was to be provided to the PAC at a future meeting to enable a decision to be made on further actions.

- 3.3 Given that the Planning Applications Committee has decided that further action is required in respect of the unauthorised works, the following report provides information to Members on potential options to progress this matter. For clarification, the planning authority is not obliged to pursue enforcement action.
- 3.4 The serving of an enforcement notice under S127 (1) of the Town and Country Planning (Scotland) Act 1997 constitutes taking enforcement action (as did the service of the Section 33A Notice.) The power to take further action and serve an enforcement notice is a discretionary power under Section 127 (1) of the aforementioned Act and circular 10/2009 (Planning Enforcement) provides guidance on matters to which the planning authority should have regard when determining the appropriate course of action. Under Section 127 (1) the planning authority may serve an enforcement notice where there has been a breach of planning control and it is expedient to issue the notice having regard to provisions of the development plan and any other material considerations. The breach of planning control here consists of the carrying out of unauthorised works without the required planning permission. The planning application has also not been submitted, as required by the Section 33A Notice. The Planning Applications Committee has determined that taking no action is not an acceptable approach, therefore the service of an enforcement notice is deemed to be the next available step.
- 3.5 Circular 10/2009 (Annex C) states that “Where a planning application is not submitted to the planning authority by the date specified, following the service of a Section 33A Notice, the planning authority should consider further enforcement action. Such further action should be considered particularly if the planning authority were of the view that a retrospective application would have been granted only if it were subject to conditions or limitations. In such cases it may be appropriate to issue an enforcement notice imposing restrictions on the use of the land or on activities carried out on the land.”
- 3.6 For clarification, the Section 33A Notice served sought the submission of a planning application for determination but this Notice or any other correspondence from the Planning Service did not indicate to the owners of 29 East Kilbride Road that the works were unacceptable in amenity terms or required to be controlled through the imposition of planning conditions. In this regard Circular 10/2009 further clarifies that “before issuing a notice under section 33A the planning authority should, as with any enforcement action consider whether the action is commensurate to the breach. There would be no purpose in issuing such a notice where the planning authority were of the view that permission would clearly not be granted.”
- 3.7 Section 128 of the Town and Country Planning (Scotland) Act 1997 states that an enforcement notice shall specify the steps which the authority require to be taken, or the activities which the authority require to cease, in order to achieve, wholly or partly, any of the following purposes:
- 3.8 *These purposes under S128(4) are:*
S128 (4) (a) remedying the breach of planning control by making any development comply with the terms of any planning permission which has been granted on the land by discontinuing any use of the land or by restoring the land to its condition before the breach took place. Planning Permission has not been granted and so only the latter section is applicable.

S128(4)(b) remedying any injury to amenity which has caused by the breach.

An enforcement notice may, for example, require –

- a) *the alteration or removal of any buildings or works;*
- b) *the carrying out of any building or other operations,*
- c) *any activity on the land not be carried on except to the extent specified in the notice*

Given the above, the three options available in relation to serving an enforcement notice are considered to be those outlined below for the removal, or partial removal of the structures (option 1), serving a notice specifying relocation of the building or buildings (option 2), or serving a notice specifying what activity can take place at the site (option 3); having regard to the purposes of restoring the land to its former condition or remedying any injury to amenity.

It is necessary to consider what is expedient having regard to the development plan and any other material considerations. It is also necessary to consider what is reasonable and proportionate and, in relation to amenity, have in mind what the Planning Applications Committee considers to be the injury to amenity they are seeking to remedy. From the Circular, enforcement action should always be commensurate with the breach of planning control to which it relates and the planning authority should consider whether the breach of control would affect unacceptably either public amenity or the use of land and buildings meriting protection in the public interest. It is relevant to consider that if a planning application had been submitted, it is most likely that the recommendation would have been to grant planning permission for the unauthorised works.

3.9 **Option 1** - serve an enforcement notice seeking removal of the structures, with the following sub options available:

- a. Remove both unauthorised outbuildings and fence from the site;
- b. Remove both unauthorised outbuildings from the site only;
- c. Remove the unauthorised building closest to the footpath only.

Option 2 – serve a notice specifying the relocation of one or both buildings to another location within the garden. This would require an alternative site within the garden ground to be identified.

Option 3 – serve an enforcement notice requiring any activity on the land not to be carried on except to the extent specified in the notice. For instance a notice could state that the outbuildings can only be used for a specific purpose (such as storage for domestic/garden materials only).

3.10 In terms of the above options, it should be noted that the advice of officers has been that the breach of planning control (and subsequent failure to comply with the terms of the section 33A Notice by submitting a planning application) was not of such severity to amenity that further enforcement action was deemed expedient. It should be noted that option 3 would generally not be an appropriate route to seek to remedy a breach of planning control where the position and/or appearance of a building was deemed to be the most significant factor in terms of the development being unacceptable.

3.11 Option 3 could be an option if the activities taking place at the site are likely to be a breach of planning control in themselves and unacceptable in amenity terms but the buildings may be acceptable in this location if used in an alternative manner. In this regard, the Planning Service is not aware of any evidence that the unauthorised buildings are used for a purpose that is not incidental to the enjoyment of the main dwellinghouse at the site. However, it is noted that at the Planning Applications Committee meeting of 4th October, some concern was expressed by Members in respect of the potential use of the buildings.

- 3.12 A further option (**Option 4**) to monitor the situation is considered to be available to the Committee. Service of the Section 33A notice prevents the breach of planning control becoming lawful development. If the concerns of the Planning Applications Committee relate, for example, to the potential use and associated noise or other disturbance then monitoring would allow for this to be considered before further action is taken if deemed necessary.
- 3.13 In summary, in terms of options 1 to 3, it is considered that options 1 and 2 are more appropriate to remedy any deemed injury to visual amenity caused by the works. If Members form the view that the buildings are acceptable in this location in visual terms but that the use requires to be restricted, option 3 may be appropriate to control this aspect. Compliance with terms of the enforcement notice can result in deemed planning permission and option 4 might therefore be more appropriate to ascertain what the effect the unauthorised structures have and what the most appropriate remedy would be.
- 3.14 There is a right of appeal to an enforcement notice, with enforcement appeals determined by Scottish Ministers via the Planning and Environmental Appeals Division (DPEA). If the appellant is successful at appeal, the unauthorised works would become lawful in planning terms. A Scottish Government appointed Reporter can impose conditions or other restrictions as deemed necessary when deciding on an enforcement appeal. It should be noted that the applicant can submit an expenses claim alongside an enforcement appeal. If the Reporter deems that the Council has acted unreasonably, it is possible that costs could be awarded against the Council.

4 CONCLUSIONS

- 4.1 Following the decision of the previous Planning Applications Committee meeting of 4th October 2023, an updated position with options to consider is set out above. If the Planning Applications Committee determine that serving an enforcement notice is required, it will be necessary to specify exactly what the enforcement notice requires the land owner to do and also within what timescale.

5.0 RECOMMENDATION

- 5.1 This report sets out options for Members to consider how to progress this matter, which was previously reported to the Planning Applications Committee on 4th October 2023. Officers from the Planning Service will then take forward the action determined by the Planning Applications Committee.

6.0 BACKGROUND PAPERS:

- 6.1 Further information on background papers can be obtained from Mr Alan Pepler on 0141 577 3001.

DATE: 15th November 2023

DIRECTOR OF ENVIRONMENT