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Decision by Philip Barton, a Reporter appointed by the Scottish Ministers

- Enforcement notice appeal reference: ENA-270-2022
- Site address: 16 Burnside Place, Aviemore. PH22 1SG
- Appeal by Esther Ewing Cumming against the enforcement notice dated 24 May 2018 served by The Highland Council.
- The alleged breach of planning control: “erection of an outbuilding housing a biomass unit within the rear curtilage of 16 Burnside Place, Aviemore without the required planning permission”.
- Date of site visit by Reporter: 5 September 2018

Date of appeal decision: 25 September 2018

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## Decision

I uphold the enforcement notice but allow the appeal to the extent that I vary the terms of the notice by deletion of the words: “...and outbuilding that houses the unit...” contained within section 4 of the notice WHAT YOU ARE REQUIRED TO DO. 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 (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:
  - (d) at the date when the notice was issued, no enforcement action could be taken in relation to the matters stated in the notice;
  - (f) 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, and
  - (g) the period specified in the notice (to comply with the steps taken) falls short of what should reasonably be allowed.



2. In its submissions, the council refers also to grounds (b), (c) and (e). The appellant does not dispute that the biomass unit (the unit) was installed and is housed within a wooden shed with a monopitch roof (the shed). Neither does the appellant dispute that the flue was subsequently extended such that the development was no longer permitted by Order. Nor does the appellant dispute that the enforcement notice was duly served. I consider that the narrative provided by the appellant in respect to these matters does not constitute formal grounds of appeal but is rather intended as background information to help me understand all of the circumstances surrounding the appeal. I have treated the appeal, therefore, as one made under grounds (d), (f) and (g) only.

#### *Ground (d)*

3. During my site inspection I noted that the unit is sited within the rear garden of the appeal property. I have seen a quotation, dated 26 February 2016, from the installer of the unit and an installation certificate (reference: MCS-00970817-X), which indicates that the unit was commissioned on 5 April 2016. I note that the unit and the shed were originally sited on land outside the appellant's ownership, but were subsequently moved to their current location, a few metres to the north, during the autumn of 2017. The relevant period for immunity from enforcement action in this case is four years. As this period has not yet expired, the appeal under ground (d) fails.

#### *Ground (f)*

4. The appeal property is one of a pair of semi-detached houses. The flue is separated from the rear elevation of the building by about 2 metres and extends upwards to a point roughly level with the first floor window sills. I have been presented with video recordings which show fumes being blown across the rear garden and potentially into first floor rooms of the neighbouring property. I accept that the fumes are mixed with condensed water vapour during colder weather, but it is clear to me that the flue is too short to allow fumes generated by the unit to dissipate effectively without having a significantly detrimental effect upon the living conditions of occupants of the neighbouring property.

5. The flue outlet is about 4.2 metres above the ground. According to the evidence before me, it is generally accepted that a minimum flue height of 4.5 metres is required for the adequate dissipation of fumes and that the flue outlet should be above the roof of the building within which the unit is contained. All of the guidance that I have seen pertaining to flues, however, assumes that the unit is contained within a dwelling, not an outbuilding. I have considered whether it would be appropriate to vary the enforcement notice to require an extended flue to be installed, such that it would project no more than 1 metre above the roof ridge height of the house. However, according to the appellant, if the flue were to be extended to such a height, the efficacy of the unit would be seriously impaired. Thus, I can see no reasonably practical solution that would satisfactorily address the harm to living conditions that I have identified. Therefore, the unit must be removed in its entirety from the land, as required by the enforcement notice.

6. The appellant states that maintaining a warm home environment is necessary for medical reasons. However, I have been provided with no evidence to show that the installation was primarily required for this purpose, nor that it is the only possible method of heating available to the household. I accept that the unit may be more cost-effective to

operate than heating systems using other fuel sources but this is an economic argument that could be made to justify any similar installation.

7. In my judgment, the shed within which the unit is housed is causing no harm to the living conditions of neighbours. Moreover, the council refers only to the flue when describing the harm that the breach is causing. In my assessment, the removal of the shed would exceed what is necessary to remedy the injury to amenity being caused by the breach in this case. I shall vary the enforcement notice accordingly. The appeal under ground (f) therefore succeeds in part.

*Ground (g)*

8. The unit is relatively small. Its decommissioning, dismantling and removal from the site could, I find, reasonably be undertaken within the period specified in the enforcement notice. Therefore, the appeal under ground (g) fails.

*Philip Barton*

Reporter