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**Report to Planning Committee**

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**Date of Meeting: 17 February 2011**

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**Subject: Unauthorised Use of Land as Garden Ground to the Rear of 5  
Woodburn Way, Alva**

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**Report by: Julie Hamilton, Service Manager (Development) and  
Andrew Wyse, Solicitor, Finance and Corporate Services**

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**1.0 Purpose**

- 1.1. This report informs members of the outcome of enforcement action taken under planning legislation to seek to regulate the use of land to the rear of 5 Woodburn Way, Alva and updates the Report submitted to the Planning Committee on 28 October 2010 (deferred pending the report to Council on 04 November 2010). The Planning Committee of 25 November 2010 acknowledged that no further consideration was required in the light of the aspects considered by the Council on 04 November 2010.

**2.0 Recommendations**

- 2.1. It is recommended that members **note**:

(a) in deciding the appeal, the Reporter, on behalf of Scottish Ministers quashed the Enforcement Action on the basis that on the balance of probabilities new information produced to him late in the appeal process by the owners led him to conclude that no breach of planning control has occurred.

(b) the Reporter rejected the claim by the owners for expenses against the Council, the Reporter having concluded that the Council had "adopted a most reasonable approach" in initially seeking an application in response to a Section 33A Notice and "did not act unreasonably in seeking to remedy the perceived breach" (of planning control).

- 2.2 It is recommended that members **agree** not to appeal to the Court of Session against the Reporter's decision.

**3.0 Background Summary**

- 3.1 The Council concluded, on an assessment of the information then available to it, that the use of an area of ground to the rear of 5 Woodburn Way Alva (originally part of the former Alva Gas Works) as part of the domestic garden ground of that house was unauthorised since no planning permission had been granted for its change of use. The site had been acquired in October

2001 by the owners and occupiers of No. 5 Woodburn Way from British Gas/Transco Property Division who marketed it as vacant land that was formerly part of the gas works site.

- 3.2 The Council considered that the use as garden ground could be made acceptable in planning terms by way of a grant of Conditional Planning Consent to restrict the manner in which the land is used as garden ground. As a result, the Council served a Notice under Section 33A of the Planning Acts requiring the owners to submit an application for planning permission. The owners responded by a solicitors' letter indicating that they did not consider that planning permission for change of use was required. No application for planning permission was forthcoming.
- 3.4 As a result, the only course of action available to the Council under Planning legislation to seek to regulate what it considered to be a breach of planning control, was to pursue further enforcement action in accordance with the Council's agreed Enforcement Strategy. Accordingly, an Enforcement Notice was served upon the owners, dated 15 October 2010 requiring that the unauthorised use of the site as garden ground cease, either permanently, or until a scheme acceptable to the Council has been implemented to eliminate the risk of exposure to the contamination lying beneath the ground.

The owners duly appealed to Scottish Ministers against the Enforcement Notice and this report deals with the outcome of that appeal.

#### **4.0 Considerations**

- 4.1 The appellants' planning consultants lodged detailed grounds of appeal with the Reporter appointed by Scottish Ministers to determine the appeal and at the same time lodged a claim against the Council for their expenses of the appeal. The Council then lodged detailed answers to the grounds of appeal and the Reporter invited the appellants to comment on the Council's response.
- 4.2 At that late stage in the process the appellants then lodged new evidence in the form of a letter dated 15 December 2010, obtained by them from Mr John M Forsyth, whose family had been the last persons to occupy Gas Works House and whose mother had lived in the House until 1996. Mr Forsyth had lived there as a youngster and moved out in 1977. Mr Forsyth's statement referred to use which his family had made of the appeal site as part of their occupation of Gas Works House and was accompanied by photographs.
- 4.3 The Reporter concluded (at paragraph 6 of his report) that "The most compelling evidence of the use of the appeal site is that of Mr Forsyth whose father worked for the Scottish Gas Board and the family lived in Gas Works House from 1957 to 1996....." and (at paragraph 7) "there is no evidence of any intervening change of use on this land nor of any deliberate intention by the family to abandon the garden use."
- 4.4 The Reporter further concluded "The appellants bought the land in 2001 when it was clearly overgrown but I have seen no evidence to suggest that, apart from the area along the northern gas works site boundary, on which a gas reducing station is now sited, there has ever been any gas works development on the appeal site. Therefore, (the land) having been in place for

at least 10 years in the 1960s, I consider that the lawful use of the appeal site is garden ground and drying green ancillary to Gas Works House..... I therefore find that on the balance of probability the previous use of the appeal site was garden ground and drying area ancillary to Gas Works House and that the use of the appeal site as residential curtilage does not constitute a breach of planning control."

- 4.5 In reaching his decision to refuse an award of expenses in favour of the appellants the Reporter states:- "The Council did not act unreasonably in issuing the Notice because it had reasonable grounds for doing so, particularly as it served a Section 33A Notice first to give the appellants the opportunity to make an application" (paragraph 8) and "This is not a clear cut case but, as s127(1) of the Act enables a planning authority to issue a notice where it appears to them (a) that there has been a breach of planning control and (b) that it is expedient to do so, the Council did not act unreasonably in seeking to remedy the perceived breach. The Council also gave the appellants the opportunity to submit an application under Section 33A before issuing the notice, which was a most reasonable approach even suggesting that permission would probably have been granted."
- 4.6 In the light of the Reporter's decision, the Council has exhausted all practical remedies available to it under Planning legislation and there is no further action which the Council can take in that context.
- 4.7 The Reporter's decision on the enforcement notice appeal is final. However, anyone that is unhappy with the decision of the Reporter has the right of "appeal" to the Court of Session within 6 weeks of the appeal decision. Any appeal can only be on a point of law. Having considered the terms of the decision letter, and the weight attributed to the late evidence from a previous resident, there is no evidence of any failure to properly consider or apply the terms of the relevant planning legislation. Accordingly, we recommend at paragraph 2.2. above that the Council does not appeal to the Court of Session.
- 4.8 This decision does not affect the wider issues which the Council has considered and determined in previous reports to Council under the Contaminated Land regime (Environmental Protection Act 1990). In particular it does not alter the previous considerations which the Council determined differentiated the appeal site from other land in respect of which the Council undertook voluntary remediation measures. The legal responsibility remains with the owners to ensure that the use of the appeal site is appropriately managed to limit potential risks which might arise from certain uses of the appeal site as garden ground. The use of enforcement powers under the Contaminated Land Regime may be required if the owners fail to manage those risks.

#### **4.0 Sustainability Implications**

- 5.1 None

## **5.0 Resource Implications**

- 6.1 There are no resource implications for the Council from the recommendations of this report.

## **7.0 Equalities Impact**

- 7.1 Have you undertaken the required equalities impact assessment to ensure that no groups are adversely affected by the recommendations?

Not required

## **8.0 Legality**

- 8.1 It has been confirmed that in taking the actions detailed in this report and in adopting its recommendations, the Council is acting within its legal powers.

## **9.0 Appendices**

- 9.1 None

## **10.0 Background Papers**

- 10.1 Section 33A Notice dated 09 September 2010
- 10.2 Enforcement Notice dated 15 October 2010
- 10.3 Decision letter dated 25 January 2011 by John H Martin, Reporter, DPEA, for Scottish Ministers on Enforcement Notice appeal
- 10.4 Decision letter dated 25 January 2011 by John H Martin, Reporter, DPEA, for Scottish Ministers on claim by appellants for expenses
- 10.5 Environmental Protection Act 1990

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### **Approved by**

<b>NAME</b>	<b>DESIGNATION</b>	<b>SIGNATURE</b>
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