

## Sub-division of listed buildings

*City of Edinburgh Council v Scottish Ministers* [2012] CSOH 180.

With fewer new builds being undertaken, there is perhaps an increasing temptation on the part of developers to refurbish some of Edinburgh's many listed buildings to create smaller units for onward sale. This case serves as a reminder that Edinburgh Council still jealously protects its stock of historic buildings so that care should be taken to investigate fully in advance whether or not Listed Building Consent ("LBC") is required for any such works.

In this instance, the original applicant carried out works to a Category C(S) listed building on Ferry Road, Edinburgh, at its junction with Newhaven Road. That particular listing denotes an architectural or historical interest of local importance only, albeit that legally speaking, the protection afforded to it is the same as for building of national or regional importance which might be Category A or B listed. The works in question constituted the sub-division of a principal front room, which still retained its original plan form, but had not been carried out with the benefit of LBC. Ironically, those works had been undertaken under the guidance of the Council's own Social Work department who had made stipulations to ensure that the newly created accommodation met the National Care Standards for supported accommodation for vulnerable adults. As a further twist, the planning authority was only alerted to the unauthorised works as a result of the subsequent application for an HMO licence by the owner. The authority served an enforcement notice requiring the owner to reinstate the principal room to its prior plan form and to make good any damage to the original cornicing and building fabric caused by those reinstatement works. The owner appealed to the Scottish Ministers on the basis that the works did not require LBC or, if they did, LBC ought to be granted. The reporter who considered the appeal upheld it on the basis that, although the works did indeed require LBC, the effect on the listed building was modest and that "only the keenest students of this case are ever likely to be aware of the sub-division" as it was not even visible from the exterior. Further, he considered that the special needs argument in favour of the new development ought to be accorded considerable weight. He therefore quashed the enforcement notice with the proviso that the principal room be

reinstated if the use for special needs housing should ever cease in the future. City of Edinburgh Council appealed to the Court of Session.

The Court rejected the appeal holding that the reporter had applied himself to the relevant statutory requirement, namely, to have special regard to the desirability of preserving the building or any features of special architectural interest which it possesses (s 14(2) of the Listed Buildings and Conservation Areas (Scotland) Act 1997). The national and local plan policy guidance were subsidiary to that and had been taken into account without the need for the reporter to specifically say so. In addition, the listing of a building does not constitute a blanket ban on development and the statute allows the decision maker to apply his discretion as to whether a particular form of development to a listed building ought to be permitted.

As noted above, the fact that this appeal was successfully resisted by the Scottish Government, does not indicate a general weakening of the protection afforded to listed buildings: the circumstances justifying the grant of LBC by the reporter were wholly exceptional and unique to this case. A second point to note is that whereas in the case of an appeal against a listed building enforcement notice, one of the grounds of appeal is that LBC ought to be granted, the equivalent is no longer true of unauthorised development otherwise requiring planning permission. Schedule 1(1) of the Planning Etc. (Scotland) Act 2006 abolished s 130(1)(a) of the Town and Country Planning (Scotland) Act 1997 so that it is no longer possible to argue in an appeal against an enforcement notice that unauthorised development ought to be granted planning permission. That particular second bite at the cherry has been eliminated. Perhaps the listed building equivalent will one day follow suit.