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Mr A Brennan
Highland Council
Sent By E-mail

Our ref: ENA-270-2038
Planning Authority ref: 21/00246/ENF

16 December 2021

Dear Mr Brennan

ENFORCEMENT NOTICE APPEAL: LAND 90M SOUTH WEST OF BIRCHWOOD LODGE MIGDALE BONAR BRIDGE IV24 3AR

Please find attached a copy of the decision on this appeal.

The reporter's decision is final. However you may wish to know that individuals unhappy with the decision made by the reporter may have the right to appeal to the Court of Session, Parliament House, Parliament Square, Edinburgh, EH1 1RQ. An appeal **must** be made within six weeks of the date of the appeal decision. Please note though, that an appeal to the Court of Session can only be made on a point of law and it may be useful to seek professional advice before taking this course of action. For more information on challenging decisions made by DPEA please see <https://beta.gov.scot/publications/challenging-planning-decisions-guidance/>.

DPEA is continuing to look at how we can improve the services we deliver and welcomes contributions from all those involved. In this regard I would be grateful if you could take five minutes to complete [our customer survey](#).

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I trust this information is clear. Please do not hesitate to contact me if you require any further information.

Yours sincerely

Laura Walker

LAURA WALKER
Case Officer
Planning And Environmental Appeals Division



Decision by Steve Field, a Reporter appointed by the Scottish Ministers

- Enforcement notice appeal reference: ENA-270-2038
- Site address: land 90 metres south-west of Birchwood Lodge, Migdale, Bonar Bridge, IV24 3AR
- Appeal by Ms Eve Wilder against the enforcement notice dated 2 September 2021, served by The Highland Council
- The alleged breach of planning control: the unauthorised erection of a dwelling house without the required planning permission
- Date of site visit by Reporter: 25 October 2021

Date of appeal decision: 16 December 2021

Decision

I allow the appeal but only to the extent that I direct the enforcement notice, dated 2 September 2021, be upheld subject to the variation of the terms of the notice by deleting the words “The time period for compliance: 3 months” and replacing them with the words “The time period for compliance: 4 months”. 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:

- (e) that copies of the enforcement notice were not served as required by section 127 of the Act;
- (f) that the steps required by the notice to be taken...exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach; and
- (g) that any period specified in the notice in accordance with section 128(9) of the Act falls short of what should reasonably be allowed.

I consider the three grounds of appeal, in turn, below.



Ground (e) – the enforcement notice was not served as required by the legislation

2. The appellant contends that service of the notice failed to comply with section 127(2)(a) of the Act. This requires that a copy of an enforcement notice shall be served on the owner and occupier of the land to which it relates. The appellant considers that this alleged failure arises from the council's decision to post the notice on the property, as opposed to serving it directly on the appellant, and that this prejudiced her rights. The appellant also comments that, contrary to good practice and procedure, before the enforcement notice was issued, the council did not serve a planning contravention notice under section 125 of the Act to seek clarity on the alleged breach and confirmation of the owner's name and address.

3. In my experience, a planning authority would usually serve a notice in line with the provisions of section 271(1) of the Act. This typically means delivering the notice to the person on whom it is to be served, leaving it at the usual or last known place of abode of that person, or at an address given for that purpose, or by posting it in a registered letter, or by recorded delivery.

4. The council advises that the notice was not served in line with the provisions of section 271(1) as the appellant was known to reside in the United States of America and the site was for sale. The council advises that it was keen to act expeditiously for two reasons. Firstly, it did not want any new owner to inherit an unauthorised development. Secondly, it was keen to ensure that it could take enforcement action against the person responsible for the alleged breach of planning control. The council also states that there is no statutory requirement to serve a planning contravention notice. The council makes the same point in relation to potential service of a notice under section 272 of the Act. This gives the council power to require information as to interests in land.

5. As service of an enforcement notice in line with the provisions of section 271(1) of the Act and power to serve a notice under either section 125 or section 272 of the Act is discretionary, I do not consider that the council's decision to proceed directly to service of the enforcement notice by placing a site notice without recourse to either potential preliminary course of action provides support for this ground of appeal.

6. The council advises that, as well as posting the enforcement notice on site, it served the notice electronically on the appellant. Section 271(1)(cc) of the Act makes provision for the electronic service of notices. However, this is subject to section 271(5)(k) which states that this provision shall not apply to serving a copy of any enforcement notice by a planning authority. Therefore, I conclude that the electronic service of the notice does not comply with section 127 of the Act.

7. Section 271(3) of the Act provides that, where a notice is required to be served on or given to all persons who have interests in or are occupiers of premises comprised in any land, and it appears to the authority that any part of that land is unoccupied, the notice shall be taken to be duly served on all persons having interests in, and on any occupiers of, premises comprised in that part of the land (other than a person who has given to that authority an address for the service of the notice on [her or] him) if it is addressed to 'the owners and any lessees and occupiers' of that part of the land (describing it) and is affixed conspicuously to some object on the land.

8. The council has produced photographic evidence which shows the enforcement notice attached to the door of the property. These photographs were taken on 2 September 2021, the date on which the notice was served. The notice is addressed to the appellant by name, as the council were aware of the appellant's name but not her address in the States. The site is described as 'land 90M SW of Birchwood Lodge'. The notice is marked 'Do not ignore this communication, it affects your property or property in which you have an interest'. I consider that this demonstrates compliance with the provisions of section 271(3). Consequently, I conclude that the notice was served in accordance with section 127(2)(a) of the Act.

9. The appellant advises that she became aware of the notice when the site notice was observed by her estate agent a few days before it was due to come into effect. As this resulted in the appeal to Scottish Ministers, I consider that the rights of the appellant have not been prejudiced by the way in which the notice was served. Furthermore, I have no evidence that there are any other interests in the property that may have been prejudiced by the posting of a site notice.

10. I find that the appeal under ground (e) fails.

Ground (f) – the steps required by the notice are excessive

11. The appellant advises that the site has the benefit of an extant planning permission in principle for a house and that the building that is the subject of the enforcement notice could be altered to meet the design requirements of the council. It is suggested that this could be achieved through a retrospective planning application, and that demolition is unnecessary.

12. The enforcement notice has been served for the purpose of remedying a breach of planning control, that is the erection of a house without compliance with the conditions attached to the planning permission in principle for the site. It is not the purpose of this appeal to provide an alternative to the planning application process. Achieving the necessary compliance can only be done through the proper consideration by the council of a planning application for approval of reserved matters or a stand-alone, detailed planning application. This would enable the council to come to a balanced decision in line with the development plan and other material considerations, including representations from neighbours and the advice of technical consultees.

13. I consider that only removal of the unauthorised development would address the purpose of the enforcement notice. The appellant states that enforcement action runs counter to the council's undertaking to try to resolve planning breaches through negotiation. If the appellant wishes to apply for retrospective planning permission, she is entitled to do so. That would provide a locus for negotiation not available through this appeal.

14. The council advises that the appellant has requested that the enforcement notice be dismissed or postponed for the time it takes the council's local review body to review the outcome of planning application council reference 21/00465/FUL. This relates to the erection of a house and temporary siting of a caravan at Farr. I understand this proposal has been dismissed by the local review body. Regardless, I do not consider the outcome of that process has any material bearing on the enforcement of unauthorised development on the appeal site.

15. I find that the appeal under ground (f) fails.

Ground (g) - the time allowed to comply with the notice is too short

16. The appellant considers that, as she lives in the United States of America, a period of six months for compliance would be more appropriate than the three months specified in the enforcement notice. The appellant advises that this would allow for the logistics of instructing and managing such an operation at distance.

17. Whilst pointing out that the house was built whilst the appellant was living abroad, the council advises that it is open to the appellant to provide a detailed alternative timescale for compliance. No such alternative timescale has been suggested by the appellant. However, I appreciate that the timing of my decision precedes the annual shut-down of much of the construction industry over the Christmas and New Year period. The Covid pandemic may also impact on the availability of resources. Therefore, I consider it reasonable to extend the period for compliance to four months.

18. I find that the appeal succeeds under ground (g).

Overall conclusion

19. Having found that the appeal fails under grounds (e) and (f) and succeeds under ground (g), I uphold the enforcement notice but allow the appeal to the extent that I vary the terms of the notice by changing the time period for compliance to four months.

20. I have considered all the other matters raised but there are none which would lead me to alter my conclusions.

Steve Field

Reporter