



Town and Country Planning (Scotland) Act 1997 Appeal Decision Notice

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

- Enforcement notice appeal reference: ENA-270-2086
- Site address: Ardmachree, Brinkman Terrace, Inverness, IV2 5BL
- Appeal by Mr and Mrs Jochen and Fiona Schmerbitz against the enforcement notice dated 24 May 2025 served by The Highland Council
- The alleged breach of planning control: the erection of timber decking, timber screen fencing and groundworks associated with the erection of decking carried out without the required planning permission
- Date of site visit by Reporter: 7 July 2025

Date of appeal decision: 04 September 2025

Decision

I uphold the enforcement notice but allow the appeal to the extent that I vary the terms of the notice by deleting the requirement in part 4 ii. to “reinstate the land that was reprofiled and cleared to form the area of decking”. 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 Act.

Preliminary matters

The appellants requested consideration of this appeal be delayed pending the outcome of a separate appeal to the council’s local review body regarding refusal of planning permission for the works. I do not consider there are any exceptional circumstances in this case that indicate a delay would be in the public interest. The outcome of this appeal does not prejudice the local review body’s consideration of the planning merits of the development.

The appellants’ appeal form and original appeal statement plead grounds (d), (f) and (g), while their amended appeal statement adds reference to ground (b). The council has had the opportunity to respond to all four grounds.

Reasoning

1. The appeal against the enforcement notice is made on the following grounds as provided for by section 130(1) of the Act:

- (b) the breach of planning control alleged in the notice has not occurred;
- (d) at the date the notice was issued, no enforcement action could be taken in respect of any breach of planning control stated in the notice;

- (f) the steps required by the notice are excessive and less onerous steps would remedy the breach of planning control or any injury to amenity that has been caused by the breach; and
- (g) the time allowed to comply with the notice is too short.

Appeal on ground (b)

2. The breach alleged in the notice is the erection of timber decking, timber screen fencing, and associated groundworks. The appellants do not dispute that the timber decking and screen fencing are in place and are a breach of planning control. I saw them on my site inspection. The decking's floor level clearly exceeds 0.5 metres above ground level and 'permitted development rights' would therefore not apply.

3. However, the appellants take issue with the notice's reference to groundworks. In particular, they dispute that any reprofiling of the ground has occurred, providing photos in support of this position. I take 'groundworks' to mean any works to prepare ground for construction, which does not necessarily mean reprofiling. I consider whether reprofiling has taken place in relation to ground (f). As regards the broader concept of groundworks, I consider some preparatory works are likely to have been required, although they may not have been extensive. In reaching this conclusion I note that the appellants' photos of the works in progress apparently show concrete foundations or footings.

4. Overall, I am satisfied the breach of planning control described in the notice has occurred. The appeal on ground (b) fails.

Appeal on ground (d)

5. Ground (d) usually relates to the 4 and 10 year rules regarding immunity from enforcement, in other words that it is too late to take action. The appellants do not argue this is the case. They plead ground (d) on the basis that no enforcement action can take place when the time period to appeal the refusal of planning permission had not expired.

6. An appeal has now been lodged to the council's local review body. I understand the appellants' position to be that the council cannot or should not pursue compliance with the enforcement notice before that separate appeal process has concluded. However, it is entirely possible in planning law for these processes to be concurrent. The reasonableness or expediency of the council's actions are not for me to make a finding on.

7. I am satisfied enforcement action is feasible. The appeal on ground (d) fails.

Appeal on ground (f)

8. In respect of ground (f), I first consider whether the steps required by the notice exceed what is necessary to remedy the breach itself. There are two steps: (1) remove all unauthorised decking, including fencing, structural supports, fixings and fittings; and (2) reinstate the land that was reprofiled and cleared to form the area of decking.

9. For the notice's requirements not to be excessive in terms of remedying the identified breach of control, they need to be proportionate to and commensurate with the breach. The first step does not exceed the breach as it does not require any more than the removal of the unauthorised decking and fencing (including structural supports, fixings and fittings). It is not my role to consider on a hypothetical basis whether lesser steps than complete removal might address the breach. I am satisfied that what is required by the notice's first step does not exceed what is necessary to remedy the breach. It is not disputed that there has

previously been other decking in a similar position in the garden (albeit smaller and lower) but this does not alter the fact that the current decking is a breach.

10. The notice's second step requires reinstatement of the land that was "reprofiled and cleared". As noted above, the appellants dispute that any reprofiling has occurred. Photos taken before and during construction of the current decking appear to me to show grass or other vegetation growing on part of the ground, while bare earth is apparent below where the previous decking was located. In my view these images corroborate the appellants' claim on this point, and I am not persuaded otherwise by the council's evidence.

11. It follows that I consider the notice's requirement to "reinstate the land that was reprofiled and cleared to form the area of decking" is excessive. I agree with the appellants that it is unclear how compliance would be achieved. I therefore conclude this second step should be deleted from the notice.

12. Turning to the question of whether the notice's requirements exceed what would be necessary to remedy the unauthorised development's effects on amenity, I need only consider the first step in this regard (i.e. removal of the entire decking and fencing), having already concluded the second step should be deleted. I note concerns raised by the council and neighbours on this matter, and the appellants' submissions. These address various issues including the development's impact on the privacy and amenity of neighbouring properties, the extent to which this differs from that of the previous decking, and whether it could be mitigated by altering the fence. Works to boundary hedges are also mentioned.

13. The planning merits of the development will more properly be considered through the local review body process, including the potential for mitigation of any adverse impacts. This enforcement appeal cannot turn on the question of amenity effects, as removal of the decking and fencing is nevertheless required to remedy the breach of planning control. For this reason I cannot consider this requirement to be excessive, even if lesser steps might be capable of adequately addressing amenity effects.

14. Therefore, while I consider the terms of the notice should be varied by deleting the requirement in part 4 ii., the remainder of the appeal on ground (f) fails.

Appeal on ground (g)

15. To succeed on ground (g) an appellant must demonstrate that any period specified in the notice falls short of what should reasonably be allowed. The notice specifies a compliance period of three months. The appellants submit this timescale is insufficient given the pressures on local contractors and current waiting times, although do not provide any specific evidence regarding this. I can accept that securing a contractor may not be easy but I do not consider a three-month timescale is unreasonable given the relatively modest scale of the development to be removed.

16. As noted above, the appellants also sought delay of my decision to enable the separate appeal process to the council's local review body to conclude. I have not agreed to this request but it is appropriate for me to consider whether this matter justifies allowing more time for compliance.

17. I do not speculate on the likelihood of permission being granted by the local review body but I accept that the appellants would be put to abortive expense and inconvenience if they complied with the notice and later received permission. The appeal to the review body was made in July 2025 and might well be decided before the compliance period ends. Section 129 of the Act enables the council to withdraw an enforcement notice or amend it

by waiving or relaxing any of its requirements, including the compliance period. It could thus extend the compliance period in future if circumstances warrant this.

18. For these reasons, I do not consider the time allowed to comply with the notice is too short. The appeal on ground (g) fails.

Conclusion

19. I have considered all the other matters raised by the parties and there are none that would lead me to alter my conclusion that the enforcement notice should be upheld subject to the variation I have set out above.

20. I acknowledge the appellants' concerns regarding the council's handling of the case, including the timing of the enforcement notice relative to their planning application's refusal. However, these procedural matters are beyond the scope of my decision.

Philip McLean

Reporter