

Appeal Decision Notice

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Decision by Janet M McNair, a Reporter appointed by the Scottish Ministers

- Enforcement notice appeal reference: ENA-270-2005
- Site address: 26 Balnakyle Road Inverness IV2 4BP
- Appeal by Ms Tanya Kennedy against the enforcement notice dated 10 January 2013 served by The Highland Council
- The alleged breach of planning control: Development relating to the construction of a decking area
- Date of site visit by Reporter: 16 April 2013

Date of appeal decision: 16 May 2013

Decision

I dismiss the appeal and direct that the enforcement notice dated 10 January 2013 be upheld, subject to the variation of the terms of the notice by deleting the words “28 days” as the period for taking the steps required by the notice, and replacing them with the words “six weeks”. 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.

Reasoning

1. The timber decking area to which the enforcement notice refers has been constructed at the rear of the appellant’s house, which fronts the eastern side of a residential cul-de-sac. The western part of the decking occupies the north-eastern corner of the appellant’s rear garden. The eastern part overhangs the Lochardil Burn, which flows northwards between the rear gardens of houses in the cul-de-sac and the rear gardens of houses on Laggan Road. Wooden struts extending from the southern edge of the decking to the southern boundary of the appellant’s garden also overhang the burn. A wooden “Wendy House” hut sits on the decking. At the time of the site inspection, the underside of the decking overhanging the burn was between 1.2 m and 0.95 m above the water level.

2. The notice requires the following steps to be taken:

- the removal of the hut and completed decking area above the burn, together with the struts supporting them;



- the removal of the partly completed wooden framework and supporting struts along the embankment of the burn to the south of the completed decking; and
 - the reinstatement of the embankment by returning the land to its former contours to tie in with the adjacent areas and thereafter allowing the natural vegetation to form.
3. The time allowed for compliance with these steps is 28 days from the date on which the notice was due to take effect, which was 11 February 2013.
4. The council served the notice because it regarded the decking as contrary to Policies 28, 29 and 30 of the Highland-wide Local Development Plan (HwLDP), to Policy GP1 of the adopted Inverness Local Plan 2006 (as continued in force), and to the council's Supplementary Guidance on Physical Constraints; and because it conflicted with the council's flood risk duties as it had the potential to have an adverse impact on the watercourse, to the detriment of public safety.
5. Although the appellant's initial submissions indicated that the decking, framework and struts had been constructed, the appeal was originally stated to be made on ground (b) as provided for by section 130(1) of the Town and Country Planning (Scotland) Act 1997 i.e. that the matters stated in the notice to involve a breach of planning control have not occurred. However, the submissions also covered matters that could be construed as relevant to ground (c) and to ground (f). The appellant subsequently sought to amend the grounds of appeal to include ground (f) i.e. that the steps required by the notice 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. The council has had the opportunity to comment on this additional ground and I have determined the appeal as having been made under both ground (b) and ground (f).
6. Dealing with these in turn, the submissions indicate that the decking, the struts that support it, and the framework and struts to the south of the decking, had been constructed at the time the notice was served. The matters that the notice alleges involve a breach of planning control had therefore occurred. Accordingly, the appeal under ground (b) fails.
7. Turning to ground (f), some classes of development, including the construction of decking, can be permitted development and thus not require express planning permission. In order for this to apply here, the development would require to be within a residential curtilage. However, the outer edge of the appellant's rear garden is retained by a stone wall, which I consider, as a matter of fact and degree, to be the extent of the house curtilage. The completed decking is a single platform, a significant part of which extends beyond the wall. The framework and struts to the south extend wholly beyond the wall. Accordingly, none of these is permitted development. The steps required by the notice therefore do not exceed what is necessary to remedy a breach of planning control.
8. As to whether the steps exceed what is necessary to remedy any injury to amenity, the structures described above are hidden from general public view. While they would overlook some garden ground to the east, this is well away from houses and the reduction in privacy would not be significant.

9. However, flood risk can also pose a risk to amenity. Although the Scottish Environment Protection Agency (SEPA) does not object to the decking, the submissions indicate that the site forms part of a functional flood plain and is within the extent of a 1:200 year return period flood. The council's Supplementary Guidance on Physical Constraints, to which Policies 29 and 30 of the HwLDP refer, identifies this category of flood risk area as a physical constraint on development.

10. The structures that are the subject of the notice are high enough above the burn not to come into contact with the water, even in such a flood event. Firstly, an existing bridge and culverts would restrict the water flow upstream of the site. Any flood water that did reach the site would extend over lower ground on the eastern side of the burn before it reached the underside of the decking.

11. However, the council has a statutory duty under the Flood Risk Management (Scotland) Act 2009 to manage and reduce flood risk, including undertaking structural and non-structural flood management measures. Its primary concern is that the decking and struts are prejudicial to the safe management of the watercourse and the prevention of flood risk. As a watercourse is a functional entity, such measures may not be confined to locations where flow is obstructed, or flooding could occur. It is therefore important that, as a general principle, access to watercourses in flood risk areas is maintained. Retaining the structures that are the subject of the notice would contravene that principle.

12. I have considered whether this difficulty could be satisfactorily addressed by varying the notice to allow the part of the decking that does not overhang the watercourse to remain. Council representatives appear to have been prepared at one stage to countenance partial retention, including on the basis that a retained section could be permitted development. However, as matters stand, partial removal would be impractical as the decking, on which the hut sits, has been constructed in the form of a single platform and thus is an integrated whole. The potential for a modified scheme is therefore a matter that ought to be left to the planning authority and the appellant to discuss. While I can understand the appellant's wish to make the rear garden safe for children, I see no reason why this could not be achieved without a structure over part of the burn.

13. I therefore conclude that the appeal should be dismissed and the notice upheld. However, to take account of the provisions of section 239 of the Act regarding any appeal to the Court of Session, I have varied the period for compliance to six weeks.

Janet M McNair
Reporter