



Decision by Frances M McChlery, a reporter appointed by the Scottish Ministers.

- Enforcement notice appeal reference: ENA-270-2027.
- Site address: Land 75 metres north-east of 'Lismore', to include land 50 metres south-east of 'Lismore', Belivat, IV12 5UZ.
- Appeal by Bernadette Cowan against an enforcement notice dated 13 March 2019 served by the Highland Council.
- The alleged breach of planning control: Unauthorised development of a track without the required planning permission.
- Date of site visit by reporter: 21 May 2019.

Date of appeal decision: 29 August 2019

Decision

I uphold the enforcement notice dated 13 March 2019, subject to the variation of the terms of the notice as specified in the appendix to this decision notice.

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. Based on the appellant's submissions, I have approached the appeal on the basis that her intention was to appeal against the enforcement notice on the grounds (b),(c),(f) and (g) of Section 130(1) of the Act, as amended.

Ground (b); that the matters which have been stated in the notice have not occurred.

2. This is a question of fact. The enforcement notice says that the breach of planning control is the unauthorised development of a track on the land identified by the notice without the required planning permission. The notice indicates the land affected and the location of the track by reference to a plan. The notice states that gravel infill material has been imported on to the land to form the track, and is now spread across the track to a depth of 20 to 75 cm, and a width of 3 metres, along a length of approximately 180 metres; and that young trees and scrub have been scraped and removed from the land along the route of the track.

3. The appellant has acknowledged that the work to create a track has been carried out on the land, saying that the creation of a track, as such, was not intended, and was carried out in ignorance of the need for planning permission.

4. On inspection, it was clear that excavation and ground scraping have taken place, and that a clearly defined track or road has been constructed on the line and location indicated in the enforcement notice plan 1. The track can be seen to be of the scale and dimensions described by the council. I could also see that a black plastic membrane has been laid under at least part of the track surface, presumably to form a permanent base, and that material had been imported on to the land to form a level surface. This had left the track fairly level and smooth and suitable for use by pedestrians and vehicles. I noted that the track appeared to be formed in order to permit access on to the land from a private road which lies on the northern boundary of the land identified by the notice.

5. I conclude that a track has been formed on the land as alleged in the notice. The appellant has acknowledged that there was a need for planning permission for the formation of the track, and that there was no such permission when the works were carried out. She explains she was unaware of the need for such permission.

6. This ground of appeal accordingly fails.

Ground(c); that those matters (if they occurred) do not constitute a breach of planning control.

7. It appeared to me that while the appellant concedes that planning permission was required for the formation of the track, she also wished to argue that planning permission was not required for at least some of the works.

8. The appellant narrated the circumstances which led to the formation of the track. The background is that she and her partner, on whom the notice was also served, wish to construct a house on a plot of land which is the southern part of the land identified in the notice ('the appellant's plot'). There are existing houses on either side of the appellant's plot, one of which is the house called 'Lismore' used in the council's description of the land. The appellant and her partner appear to have been working closely with the owner of the adjoining land to the north, a neighbouring farmer, who is the third person named in the enforcement notice, and from whom they acquired the plot. It would appear that the appellant anticipated being able to take access on to her plot from the south west, using an access road on the southern boundary which also serves the existing houses, including 'Lismore'. It would also appear that the neighbours consider that the appellant has no legal right to use this access road, and that they object to the prospect of a further house on the appellant's plot.

9. The appellant explains that during November 2018 a mechanical digger was on the land for the purpose of digging holes to ascertain ground conditions, when one of the neighbours locked the gate over the access road, which prevented the digger from leaving the land. The appellant says the digger was required elsewhere, so it was necessary for an alternative route off the land to the north west to be created to allow the digger to be removed. The digger was used to create an 'escape route' over the land, in the process

forming a new access to the land, including the appellant's plot, from a private road to the north.

10. This narrative discloses a private civil law dispute between neighbours, which is not a factor which the planning system will take into account.

11. The appellant says that while this 'escape route' was being created, it is not true that 'young trees and scrub were scraped and removed from the land along the route of the track'. She says that the digger operator took great care to choose a route which avoided any mature trees being damaged and utilised areas of open ground or clearings. She says that the young trees affected by this work all had a diameter of less than 8cm when measured 1.3m from the ground. The wood removed amounted to far less than 5 cubic metres, therefore it was believed that the removal of them was within the permitted parameters according to the 'Scottish Forestry Regulations'(q.v.).

12. She says that the ground was not purposefully scraped to form a track, and that it was neither straight nor level in nature. She says if the intention had been to form a permanent track an effort would have been made to ensure an even surface. She argues that this shows this particular aspect of the alleged breach of control in the enforcement has not occurred. She says that after the escape route had been formed, gravel was then imported to make a surface, in the mistaken belief that planning permission was not necessary to do this.

13. However, from my inspection of the works summarised above, I take the view that it is clear that the works which have taken place on the land fall within the definition of development in Section 26 of the Act, namely, the carrying out of building, or engineering, operations in, on, over or under land. It has not been argued that the works fall within any of the provisions for development permitted by order. It is acknowledged by the appellant that the works were carried out without the benefit of planning permission.

14. It was clear from my site visit that a number of trees had been removed in order to form the track. In arguing that the works to remove trees were authorised by forestry regulations, the appellant is presumably referring to the powers of the Forestry Commission Scotland (now Scottish Forestry) to oversee tree felling plans and ensure good practice in forestry. In some circumstances it may be the case that works to fell trees might not require planning permission, but insufficient information has been given by the appellant to establish that this is the case here. In any event, the main matter at which the enforcement action is directed is the unauthorised formation of the track, including the implications of that on the surrounding woodland.

15. I find that the matters described in the enforcement notice do amount to a breach of planning control. This ground of appeal also fails.

Ground (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.

16. In addition to the appellant's submissions under this ground, I have noted that some of the terms in which the enforcement notice is framed call into question whether the notice meets the essential legal requirements of an enforcement notice, to the extent that consideration must be given to whether the notice may be a nullity.

17. On page 2 of the enforcement notice, numbered paragraph 4, the council has described what steps the recipients must take to remedy the breach of planning control.

18. The legal principles which underlie all planning enforcement notices reflect the possibility that the notice may be a precursor to criminal prosecution by reason of non-compliance. It is therefore essential that the recipient of an enforcement notice can tell from the terms of the notice exactly and precisely what he should be doing to comply with the notice. A notice which does not do this can be seriously flawed to a greater or lesser degree, depending on the nature of the defect. The steps required by the notice must not be hopelessly ambiguous, because if this is the case the notice will be irremediably flawed to the extent that it is a nullity. However, if on a sensible interpretation of the words used, applied to the circumstances of the case, there is no ambiguity about what is required, and there is a lesser defect, such as excessive enforcement requirements, then it is possible to make remedial changes to the notice using the powers in Section 132 of the 1997 Act, so long as no injustice would result either to the appellant or to the council.

19. Paragraph 4 (i) of the enforcement notice begins by requiring the recipients of the notice to remove the track in its entirety, including the removal of all imported material used to construct the track from the site. I regard this as the main requirement of the notice.

20. As I have found above, in the circumstances of this case, the track is an obvious feature on the land and has been clearly identified and described in the plan attached to the enforcement notice. The track has been formed partly from imported material, which is clearly different from the pre-existing soil. I would take the view that the main requirement in paragraph 4 (i) is both clear and unambiguous to the informed recipient, and requires no further specification of the action which the recipient should take in order to avoid possible prosecution. I am satisfied that the notice is sound to that extent, and is not a nullity.

21. However, the rest of paragraph 4, as currently phrased, is problematic. Paragraph 4(i) goes on to require the recipients to ensure the

“disposal of the material within an appropriate and authorised facility and/or location, details of which shall be submitted to, and agreed in writing by, the Planning Authority prior to the works being undertaken”

22. In my view, the wording above fails to provide the recipient of the notice with a clear description of exactly what works they need to carry out on receipt of the notice in order to rectify matters and avoid possible prosecution. The requirement to clear the destination of the material to be removed also appears to me to be superfluous, and to fall outside the proper ambit of the enforcement action, which should be targeted precisely on the actual breach of planning control, and not something else which has not yet happened. Once the material has been removed from the land the appropriate disposal of the resultant material will be a separate operation, involving different land. It will be subject to monitoring under both planning powers, and the legal frameworks regulating the disposal of waste. I will vary the notice to delete these unnecessary requirements.

23. Secondly, paragraph 4 (ii) of the enforcement notice requires the recipient to
“ii. Restore the ground disturbed by the creation of the track to a condition conducive to supporting the natural regeneration of trees and vegetation, details of which shall be submitted to, and agreed in writing by, the Planning Authority prior to the works being undertaken.”
24. In my view, as it stands, this requirement fails to be sufficiently precise and specific, so as to give the recipients of the notice a clear account of the action they need to take to remove the breach and avoid possible prosecution. In particular, the need to first agree a plan with the council introduces ambiguity and dubiety, and I take the view that this phrase should be deleted. However as explained below, some parts of this requirement may properly be included in the enforcement notice, in a modified form, and I will vary the notice to that effect.
25. In response to my questions on this aspect of the notice, the council has suggested that if I consider there to be a concern, I could substitute alternative wording for this sub paragraph, namely
“Restore the ground disturbed by the track, with the ground grubbed up following the removal of the imported material to allow for natural land regeneration.”
26. I consider that including the grubbing up of the disturbed or compacted ground in the specification of the remedial action, which will obviously help natural regeneration, is an improvement, and have included this element in my variation of the notice. However, I think that the full replacement wording suggested by the council still does not meet the requirement for complete certainty, because the inclusion of suitability for natural land regeneration as a target or standard still casts some doubt on exactly what is required of the recipient.
27. In considering what variations could and should be made to the terms of the enforcement notice, I have had regard to whether any injustice would be caused to either the council or the recipients of the notice.
28. The council as planning authority already has powers to ensure that the disposal of the imported material is carried out in accordance with planning or other controls, and background powers to monitor the effect on the natural environment. The council could if necessary still take action if required in the areas where the notice will no longer expressly require liaison with the council. It may be marginally less convenient to the council that the requirement to agree plans with them before work commences will no longer exist, but I do not consider that this amounts to injustice to the council.
29. The effect of my variations will be that the appellant will require to do fewer things to comply with the notice. It will also be clearer what is required of her. I do not consider that my variations would cause injustice to the appellant.
30. This ground of appeal is successful, to the extent that the notice will be varied.

Ground (g); that any period specified in the notice in accordance with section 128(9) falls short of what should reasonably be allowed.

31. The time for compliance with the notice was originally stated in paragraph 4 of to be “by 17 May 2019”. The appellant argues that the time for compliance should be extended to allow for the outcome of a planning application for the construction of a house to be known.
32. As regards the appellant’s planning application, it is no longer competent for an appeal against enforcement action to have regard to whether planning permission should be granted for the development, and I take no view on this.
33. The unauthorised work on the land has been highly damaging to the amenity of the area and the natural environment of the land and I take the view that as matters currently stand, it should be remediated.
34. It may be the case in future that the council grants permission for development on the land. This would be a change of circumstances, but this is not the situation at present before me.
35. The council confirms that an application for planning permission in principle 19/01278/PIP was submitted on 19 March 2019 for the erection of a house, garage and temporary siting of a caravan on the Land 50M SE of Lismore, Belivat. The application seeks retrospective approval and temporary use of the unauthorised track that is the subject of this appeal. The application is pending consideration and at the time of writing has not been determined. I understand the application will be determined by committee, and if refused, there may be an appeal. In their submissions on the proper period for compliance with the enforcement notice, the council suggests that a period of one month from the date of determination of the planning application would be appropriate, but I do not regard this as a sufficiently clear and certain period to be included in the notice, and this may become unduly extended. The notice should specify a definite date by which compliance should be achieved to meet the requirement for certainty.
36. If it should be that the planning application is successful at a future date, and the council reach the view that compliance with the enforcement notice is no longer necessary, they will have power to withdraw the notice, if they consider that would be justified.
37. In deciding what the most appropriate period for compliance with the notice should be, I consider that an important consideration is the potential effect of the remedial works on the natural environment. The work to remove the track should take place in a manner which causes minimal disturbance to the natural environment, including existing habitats. Any remedial works will still be subject to the legislation which protects the natural environment, fauna and habitats. This will require some care and forward planning, and possibly consultation with expert advisers. As a minimum, the work should take place outside the bird breeding season, largely avoiding the period between the beginning of March and the end of August, and the time for compliance should provide for this. As this will require the works to take place over the winter months, reasonable allowance should be made for the possibility that inclement weather may delay or interfere with the work. Thus I am varying the notice to allow the recipients of the notice until 28 February 2020 to complete the work, so that there is approximately a six month period for compliance.

38. The appellant also asks for more time to avoid inconvenience to the business of the farmer, the owner of part of the land and the third recipient of the notice. I do not regard this as a relevant consideration. The remedial work requires to be done and it is not relevant who undertakes it.

39. The site inspection, and the third party representations made in respect of the appeal demonstrate that the neighbours have suffered considerable disamenity from the damage to the site resulting from the unauthorised development. In considering whether and to what effect the period for compliance with the enforcement notice should be varied, I have had regard to the effect of a longer period for compliance on the immediate neighbours.

40. In extending the period for compliance, I have balanced the protection of the natural environment against the adverse effect on the amenity of neighbours of the track being in existence for a longer period than was envisaged in the original notice, and have given more weight to the former. In my view, the damage to the land by the unauthorised works has been so extensive that it will take several years for the land to recover or re-naturalise in any circumstances, and I consider that a potential delay of a few additional months over the winter without remedial work being done on the land would not make a significant difference to the neighbours' already degraded amenity. I note that several of those making representations have placed importance on the natural environment, and will appreciate the need to minimise disruption to it.

41. The period for compliance has been lengthened, which is to the appellant's benefit. The council was willing to support an extended time for compliance. I do not consider that the extension of time would cause injustice to either party.

42. It follows that this ground of appeal succeeds to the extent that the deadline for compliance with the notice is varied to 28 February 2020.

43. I have considered all other matters raised, whether by the parties or by those making representations, but have identified no other relevant considerations which would lead me to different conclusions.

Frances M McChlery

Reporter

APPENDIX

On the page numbered 2 of 13 of the enforcement notice, in the paragraph numbered 4 and entitled "What you are required to do" the following changes will be made.

- A. The numbering of sub-paragraph (i) shall be deleted.
- B. The following words shall be deleted.

“• Disposal of the material within an appropriate and authorised facility and/or location, details of which shall be submitted to, and agreed in writing by, the Planning Authority prior to the works being undertaken

ii. Restore the ground disturbed by the creation of the track to a condition conducive to supporting the natural regeneration of trees and vegetation, details of which shall be submitted to, and agreed in writing by, the Planning Authority prior to the works being undertaken.”

C. After the words

“Removal of all imported material used to construct the track from the site: and”

insert the words

“ restore the ground disturbed by the track, by grubbing up any compacted ground following the removal of the imported material.”

D. The time period for compliance with the measures required by paragraph 4 of the notice shall be modified, such that the measures required by paragraph 4 shall be completed by 28 February 2020.