

Directorate for Planning and Environmental Appeals

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Ms K MacKay»

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Appeal Decision Notice

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

- x Enforcement notice appeal reference: ENA-130-2011
- x Site address: Foreshore opposite 7, Shore Street, Portnahaven, Islay PA47 7SH
- x Appeal by Mr Seumas MacArthur against the enforcement notice dated 8 January 2014 served by Argyll and Bute Council
- x The alleged breach of planning control: unauthorised erection of flagpole
- x Date of site visit by Reporter: 12 March 2014

Date of appeal decision: 8 April 2014

Decision

I uphold the enforcement notice dated 8 January 2014, direct that the notice be upheld, but allow the appeal to the extent that I vary the terms of the notice by deleting the words “1 month” as the period for compliance with the notice and replacing them with the words “two months”. I also correct the notice by deleting the word “welded” in the first line of the requirement of the notice and replacing this with the word “metal”. 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 flagpole that is the subject of the notice has been erected on the foreshore on the north side of Portnahaven Harbour. It takes the form of a 2.5 metre (m) high tubular metal pole set into two cylindrical metal sleeves fixed to a 0.5 m high angular steel section. This angular section is concreted into rock.
2. The enforcement notice requires “the upper section of the flagpole to be removed from the welded fixing on the rock upon which the pole is mounted” within one month from the date on which the notice was due to take effect, which was 14 February 2014. It allows the metal fixing to remain attached to the rock “given its primary purpose for the mooring of a boat and given that fixing is considered *de minimis*, at approx 0.5 m high”.

3. The appeal against the notice was made on grounds (d), (f) and (g) as provided for by section 130(1) of the Town and Country Planning (Scotland) Act 1997. In this case these grounds are:

(d) that, at the date the notice was issued, no enforcement action could be taken in respect of the breach of planning control alleged in the notice;

(f) that the steps required by the notice to be taken exceed what is necessary to remedy

**IMPORTANT - THIS COMMUNICATION AFFECTS YOUR PROPERTY
OR PROPERTY THAT YOU HAVE AN INTEREST IN**

TOWN AND COUNTRY PLANNING (SCOTLAND) ACT 1997

ENFORCEMENT NOTICE

REFERENCE NUMBER: 13/00188/ENOTH2

4. REASONS FOR ISSUING THIS NOTICE

Following a decision taken by Argyll and Bute Council as Planning Authority to refuse a retrospective planning permission for the development it appears to Argyll and Bute Council that as:

The Development has been carried out on the Land Affected without the benefit of planning permission and it is unauthorised

The development by virtue of its lack operational justification to occupy a prominent foreshore location, its adverse visual impact on the foreshore and its adverse consequences for the Portnahaven/Port Wemyss Conservation fails to satisfy the provisions of STRAT DC 1, and STRAT DC 9 of the 'Argyll and Bute Structure Plan' 2002 and, policies LP ENV 14, LP ENV 19, LP CST 1 and LP CST4 of the 'Argyll and Bute Local Plan' 2009.

There has been a breach of planning control and it is expedient to issue this notice having regard to the provisions of the Development Plan and other material considerations.

5. WHAT YOU ARE REQUIRED TO DO

You are required to:

Remove the upper section of the flagpole from the welded fixing on the rock upon which the pole is mounted. The metal fixing may remain attached to the rock given its primary purpose for the mooring of a boat and given that fixing is considered de minimis at approx. 0.5m high.

Time period for compliance: **1 month from the date this notice takes effect.**

6. WHEN THIS NOTICE TAKES EFFECT

This notice takes effect **14th February 2014** subject to section 131(3) of the Act which provides that where an appeal is made to the Scottish Government before the date this notice takes effect that this notice shall be of no effect pending the final determination or the withdrawal of the appeal

7. YOUR RIGHT OF APPEAL

You can appeal against this notice, but your appeal must be received or posted in time to be received by the Scottish Government before **14th February 2014**. Schedule 1 to this notice gives information on your rights of appeal. **READ IT CAREFULLY.**

8. WHAT HAPPENS IF YOU DO NOT APPEAL

If you do not appeal against this notice, it will take effect on the 14th February 2014 and you must then ensure that the required steps for complying with it, for which you may be held responsible, are taken within the period(s) specified in the notice. Failure to comply with an enforcement notice which has taken effect can result in prosecution and/or remedial action by the Council.

Dated: 08 January 2014

(d) the contour of a deposit of refuse or waste materials on land to be modified by altering the gradient or gradients of its sides.

(6) An enforcement notice issued in respect of a bTjEQ.24 reW*nq137.78 674.62 38

- (a) an enforcement notice requires the construction of a replacement building, and
 - (b) all the requirements of the notice with respect to that construction have been complied with,
- planning permission shall be treated as having been granted under section 33 in respect of development consisting of that construction.

Variation and withdrawal of enforcement notice. **129.** - (1) The planning authority may-

- (a) withdraw an enforcement notice issued by them, or
- (b) waive or relax any requirement of such a notice and, in particular, may extend any period specified in accordance with section 128(9).

(2) The powers conferred by subsection (1) may be exercised whether or not the notice has taken effect.

(3) The planning authority shall, immediately after exercising the powers conferred by subsection (1), give notice of the exercise to every person who has been served with a copy of the enforcement notice or would, if the notice were reissued, be served with a copy of it.

(4) The withdrawal of an enforcement notice does not affect the power of the planning authority to issue a further enforcement notice.

Appeal against enforcement notice.

130. - (1) A person on whom an enforcement notice is served or any other person having an interest in the land may, at any time before the date specified in the notice as the date on which it is to take effect, appeal to the Secretary of State against the notice on any of the following grounds-

- (b) that those matters have not occurred;
- (c) that those matters (if they occurred) do not constitute a breach of planning control;
- (d) that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters;
- (e) that copies of the enforcement notice were not served as required by section 127;
- (f) that the steps required by the notice to nsat (s) **TEQ256.25**

(9) Any planning permission granted under subsection (1) on an appeal shall be treated as granted on the application deemed to have been made by the appellant.

(10) In relation to a grant of planning permission or a determination under subsection (1) the Secretary of State's decision shall be final.

(11) For the purposes of section 36 the decision shall be treated as having been given by the Secretary of State in dealing with an application for planning permission made to the planning authority.

Validity of enforcement notices.

134. The validity of an enforcement notice shall not be questioned in any proceedings whatsoever on any of the grounds specified in section 130(1)(b) to (e) except by appeal under that section

