

Update on Planning Appeal Reference: ENA-130-2045 – Invergare, Glenarn Road, Rhu G84 8LL

1. INTRODUCTION

This report provides an update on the recent decision by the Planning and Environmental Appeals Division in relation to Planning Appeal Reference ENA-130-2045, whereby the enforcement notice was upheld but the appeal allowed to the extent that the Reporter varied the terms of the notice.

2. RECOMMENDATION

Members are asked to note the content of this report.

3. DETAILS OF APPEAL DECISION

Decision by: Mr Rob Huntly, a Reporter appointed by the Scottish Ministers;

Planning Appeal Ref.: ENA-130-2045;

Site Address: Invergare, Glenarn Road, Rhu G84 8LL

Appeal by: Mr and Mrs Graham Gardner against the enforcement notice reference 19/00238/ENFHS dated 15th October 2021 served by Argyll and Bute Council;

The alleged breach of planning control: The unauthorised material change of use of the Land Affected from a dwellinghouse (Class 9 of the Town and Country Planning (Use Classes) (Scotland) Order 1997) to use for short term visitor letting;

Date of Site Visit by Reporter: none;

Date of Appeal Decision: 11th February 2022.

A copy of the appeal decision is appended at Appendix 1.

The enforcement notice was upheld but the appeal allowed insofar as the Reporter varied the terms of the notice by modifying the requirements.

The Reporter considered the appeal failed on the following statutory grounds of appeal:

- (b) that the change of use alleged has not occurred;
- (c) what has occurred does not mount to a breach of planning control; and,
- (g) that the period (for compliance) specified in the notice in accordance with S.128(9) falls short of what should be reasonably allowed.

The reporter allowed the appeal under the following ground:

- (f) that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy the breach of planning control or, as the case may be, to remedy any injury to amenity which has been caused by the breach.

The enforcement notice served by the planning authority required the appellants to:

“Cease the Use of the Land Affected for short term visitor letting.”

The Reporter finds that *“there is force in the appellants’ argument that that, as worded, the enforcement notice could be regarded as potentially preventing the occupation of the appeal property as a dwellinghouse in a manner which might not amount to a material change of use.”*

However, the Reporter is able to address this by modifying the requirements set out in the enforcement notice as follows:

“You are required to;

Cease the use of the Land Affected for short term visitor letting, other than any letting which comprises a private residential tenancy as defined in the private Housing (Tenancies) (Scotland) Act 2016.”

This modification to the notice provides clarity that the letting of the property by means of a private residential tenancy would not breach its terms. The Reporter also considers that this modification would be consistent with the principles set out by established legal judgements.

There is a right of appeal to the Court of Session only in regard to a point of law and an appeal must be made within six weeks of the date of the appeal decision.

4. IMPLICATIONS

- 4.1 Policy – None
- 4.2 Financial – None
- 4.3 Legal – None
- 4.4 HR – None
- 4.5 Fairer Scotland Duty: None
- 4.5.1 Equalities – protected characteristics – None
- 4.5.2 Socio-economic duty – None
- 4.5.3 Islands - None
- 4.6 Climate change - None
- 4.7 Risk – None
- 4.8 Customer Service – None

Kirsty Flanagan – Executive Director with Responsibility for Development and Economic Growth

Councillor David Kinniburgh – Policy Lead for Planning and Regulatory Services

Fergus Murray – Head of Development and Economic Growth

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Appendices:

Appendix 1 – Appeal Decision Notice

APPENDIX 1: APPEAL DECISION NOTICE

Planning and Environmental Appeals Division

Appeal Decision Notice

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Decision by Rob Huntley, a Reporter appointed by the Scottish Ministers

- Enforcement notice appeal reference: ENA-130-2045
- Site address: Invergare, Glenarn Road, Rhu G84 8LL
- Appeal by Mr and Mrs Graham Gardner against the enforcement notice reference 19/00283/ENFHS dated 15 October 2021 served by Argyll and Bute Council
- The alleged breach of planning control: The unauthorised material change of use of the Land Affected from a dwellinghouse (Class 9 of the Town and Country Planning (Use Classes) (Scotland) Order 1997) to use for short term visitor letting.
- Date of site visit by Reporter: none

Date of appeal decision: 11 February 2022

Decision

I uphold the enforcement notice but allow the appeal to the extent that I vary the terms of the notice by modifying its requirements, as set out at the end of this 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 Act.

Preliminary matter

1. Taking account of the nature of the breach of planning control alleged in the notice and of the grounds on which the appeal is made, I reached the conclusion that my consideration of the appeal would not be assisted by an-on-the ground inspection of the appeal premises. A visual inspection of the site on a single occasion would not, in any event, have provided me with material which would be determinative in this regard. I am satisfied that the written and other material provided to me by the appellant, the council and in representations by others has enabled me to give full and proper consideration to the appeal, without undertaking a physical on-the-ground inspection of the site. I have therefore not needed to visit the appeal site in person, and I have not done so.

Reasoning

2. An appeal against an enforcement notice may be made only on one or more of the grounds (b) to (g) specified in section 130(1) of the Town and Country Planning (Scotland) Act 1997. The appeal is stated, on the appeal form and in the appellants' statement submitted in support, to be made on grounds b), g) and f). These grounds provide, respectively:

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- b) that the matters stated in the notice have not occurred;
- f) that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy the breach of planning control or, as the case may be, to remedy any injury to amenity which has been caused by the breach;
- g) that any period specified in the notice in accordance with section 128(9) falls short of what should reasonably be allowed.

3. It is suggested on behalf of the appellants that there is overlap between statutory ground of appeal b) (that the change of use alleged has not occurred) and ground c), namely that the change of use (if it has occurred) does not constitute a breach of planning control. I have therefore considered the appeal in the context of each of the grounds b), c), f) and g) as specified in section 130(1) of the Town and Country Planning (Scotland) Act 1997.

Ground b)

4. An appeal on ground b) of section 130(1) of 1997 Act is concerned with whether the matter alleged in the enforcement notice has occurred as a matter of fact. An appeal claiming that what has occurred does not amount to a breach of planning control falls more directly within the scope of an appeal on ground c), which I address separately below.

5. The appellants take issue with the specific wording of the use alleged to have occurred, preferring the term "short stay commercial visitor accommodation" to "short term visitor letting", which is the phrase used in the enforcement notice. However, they confirm that the property has, from 2019, been let for short periods to groups occupying the whole property. They have provided a table giving details of the periods and durations of such lettings between April 2019 and October 2021. The table reveals that during 2019 there were 39 separate letting periods. A total of 19 lettings took place during 2020, with a further 16 during 2021 up to October of that year. During parts of 2020 and 2021 covid-related measures restricted the ability of the property to be occupied by groups and I have no doubt that demand for such occupation was also affected by the pandemic during this period, irrespective of the existence of any formal restrictions.

6. The appellants advise that during 2020 the property was additionally used for 28 nights to accommodate military personnel involved in the covid vaccination programme. I agree with the appellants that, because of the unique circumstances involved, this period of occupation should not be treated, of itself or together with the other lettings summarised above, as forming a component of the use at which the enforcement notice is directed.

7. From the above, and leaving any military covid-related occupation out of account, it is evident that the majority of lettings have been for 2 or 3-night periods, and that such lettings have been for occupation by visitors. A smaller number of lettings have been for a longer duration, but none is recorded in the table provided by the appellants as exceeding 7 nights. I find that over the period for which the appellants have provided records, the occupation of the appeal property can properly be described as short-term visitor letting, as is alleged in the enforcement notice.

8. In the emailed response of 10 December 2019 to the council's Planning Contravention Notice, the appellants confirmed that the property was being rented out. The

description of the use of the property included in the statement which accompanied an application for planning permission subsequently submitted to the council (application reference 21/01404/PP), mentions "short term rental" and "exclusive use self-catering accommodation" with a 2-night minimum letting period being specified. The appellants have also confirmed that the property is not their principal home, although they say they do visit on occasion.

9. I find there to be a close consistency between the appellants' own evidence of the number and duration of lettings and the information provided in representations made by interested parties in response to this appeal. I am therefore satisfied that the letting of the property for occupation by short-term visitors, as alleged in the enforcement notice, has occurred as a matter of fact. Although I note that the appellants' take issue with the use of the phrase "short term visitor letting" in the enforcement notice, I do not consider that there is any difference of substance between this and the appellants' preferred term of "short stay commercial visitor accommodation". For the above reasons the appeal on ground b) fails.

Ground c)

10. It has not been suggested to me that any planning permission is in force to authorise the use of the property as described in the enforcement notice. Indeed, the council has refused application reference 21/01404/PP, which sought planning permission for use of the property as "exclusive use visitor accommodation". Nor has it been suggested to me that a short-term letting use is specifically authorised by any of the provisions of the Town and Country Planning (General Permitted Development) (Scotland) Order 1992 (as amended), or otherwise.

11. The appellants rightly point out that a change of use will only amount to development where such a change is material. If a change is not material, then no development would be involved, no requirement for planning permission would arise and no breach of planning control would have occurred. I agree that in such circumstances, there would be no basis for the issue of an enforcement notice. The appellants also correctly comment that whether a change of use is material so as to constitute development involves consideration of the particular circumstances in each case.

12. In this regard, my attention has been drawn to a judgement of the English Court of Appeal in the case of *Moore v Secretary of State for Communities and Local Government*¹. In that case the court determined that whether a material change of use is involved is a question of fact and degree in each case. It would not be correct to regard all instances of short-term lettings as inevitably involving a material change of use, nor that such use could never be material. Although the Moore case was decided in the context of the separate legislation of the English planning jurisdiction, and on its own facts, I accept that the same principles are also relevant to my consideration of this appeal.

13. I note that representations by interested parties in response to the appeal make reference to numerous reports being made to police and the council's environmental health service of noise disturbance at Invergare. In this regard stag and hen parties, amplified music and singing are mentioned. I have been provided with no details in this regard, but I note that the appellant has not denied such occurrences. I cannot be certain that all such

¹ *Moore v Secretary of State for Communities and Local Government* [2012] EWCA Civ 1202

disturbances as may have arisen have been directly associated with short-term lettings at the property. However such problems are more likely to arise with large groups in occupation for short periods than would be expected from use of the property as a house.

14. I find that the short-term nature of lettings at the property must inevitably result in more frequent coming and going associated with turnover of occupation. This, and the accommodation of groups of up to 24 individuals on the appellants' evidence, gives rise to a significant number of traffic movements, as referred to by those making representations in response to this appeal. These factors together lead me to conclude that the nature of the occupation of Invergare has, since 2019, been materially different from what would be expected from use as a house by a single household, with or without visitors in the normal course of occupation.

15. The appellants have drawn my attention to decision on an enforcement appeal concerning a property at West Linton in the Scottish Borders council area referred to as Greenloaning². That appeal was against an enforcement notice which alleged an unauthorised material change in the use of that property from a residential dwelling to short-stay commercial visitor accommodation. The appellants suggest that, because the Greenloaning appeal reporter found that use of that property for holiday letting for 12 weeks before 9 November 2008 was ordinarily incidental to its main use as a house, that is to be taken as defining a threshold below which a material change of use cannot be held to have occurred. The appellants claim that because occupation of the present appeal property, Invergare, by short-stay visitors occurred for less than 84 nights (equivalent to 12 weeks) in each of the years 2019, 2020 and 2021 (excluding any covid-related military occupation) it must follow that no material change of use has occurred. I reject that proposition for the reasons set out below.

16. In the Greenloaning case there was an appeal on ground d). The reporter therefore had to determine whether the material change of use alleged had occurred more than 10 years before the date of the enforcement notice. If it had, the breach of planning control would potentially have gained immunity from enforcement action. The relevant date in that respect was 9 November 2008 and it was in that context that the reporter addressed the nature of the use of the property before that date. The reporter had conflicting evidence on when the Greenloaning property ceased to be occupied as a house comprising the main residence of the appellant and his family (paragraph 11 of the decision notice dated 25 April 2019). He was however able to conclude that whenever that occurred it was later than 9 November 2008. The reporter found that during the period more than 10 years before the date of the enforcement notice, the lawful use of the property had been as a house within class 9 of the Town and Country Planning (Use Classes) (Scotland) Order 1997.

17. That aspect of the reporter's consideration of the Greenloaning appeal was directly relevant to his consideration of when any material change of use was initiated, and whether this meant that the enforcement action in that case was time-barred. It cannot be read as determining that an accumulated period of short-term occupation of not more than 12 weeks is to be taken as a threshold below which there would be no material change of use. The reporter found that during that period Greenloaning continued to be the appellant's main residence. That finding was central to his conclusion that the limited holiday letting

² Greenloaning appeal decision reference ENA-140-2013 dated 25 April 2019

use of the property for a total of 12 weeks was ordinarily incidental to its main use as a house, and that enforcement action was not time-barred.

18. There is no suggestion in this appeal that any breach of planning control at Invergare is time-barred because it took place more than 10 years before issue of the enforcement notice. There is no appeal on ground d). By contrast with the Greenloaning position, there is also no suggestion in this appeal that, during the period since short-term letting of Invergare commenced in 2019, the property has been occupied by the appellants or their family as a house, whether as their sole or principal residence or otherwise. Nor is it suggested that Invergare has been occupied as the sole or main residence of any other household. It follows from this that I am unable to conclude that any short-term occupation of Invergare has been incidental to a main use of the property as a house.

19. The reporter's determination of the Greenloaning enforcement appeal was challenged in the Court of Session³. The appellants suggest that, because the court did not interfere with the reporter's finding that the limited use of the Greenloaning property for holiday letting before 9 November 2008 was ordinarily incidental to its main use as a house, that is to be taken as endorsing the use of a 12-week threshold for materiality in this appeal. In his opinion delivering the judgement of the Court, Lord Malcolm confirmed that it was relevant and appropriate for the reporter to consider the issue of when the appeal property ceased to be used as the appellant's residence. That consideration does not arise in this appeal as it is not suggested that the use of Invergare was, at the time of the issue of the enforcement notice or since, occupied as a house within Class 9 of the Use Classes Order. The short-term letting use at Invergare has not therefore been incidental to its use as a house. I therefore conclude that the present appellants' case is not assisted by the Court's non-interference with the reporter's finding on that point in relation to Greenloaning.

20. I address whether, or to what extent, the requirements of the enforcement notice may exceed what is necessary to remedy the breach of planning control in my consideration of the appeal on ground (f) below. However, for the reasons above, I conclude that a material change of use of the property, as referred to in the enforcement notice, has occurred. The terms of ground of appeal c) are not met and an appeal on this ground cannot succeed.

Ground (f)

21. Section 128(3) of the Town and Country Planning (Scotland) Act 1997 requires an enforcement notice to specify the steps required to be taken to achieve any of the purposes set out in section 128(4) of the Act. The purposes stated in that sub-section are:

- "(a) remedying the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place; or*
(b) remedying any injury to amenity which has been caused by the breach."

22. In its response to the appeal, the council has drawn my attention to an enforcement decision notice on an appeal relating to a short-term letting use of accommodation at

³ Michael Gerard Cameron v Scottish Ministers [2020] CSIH 6 (30 January 2020)

7-8 Baxters Place, Edinburgh⁴. I am familiar with that case as I was the reporter appointed to decide that appeal.

23. In the Baxters Place decision I determined that an appeal against an enforcement notice on the ground of exceeding what is necessary to remedy injury to amenity is available only if the steps required by the notice are for the purpose of removing or alleviating injury to amenity which has been caused. The council's purpose in issuing the Baxters Place notice was to remedy the breach of planning control by requiring cessation of unauthorised use of those premises. That was the purpose provided for in section 128(4)(a) of the 1997 Act. It was not a purpose of remedying any injury to amenity pursuant to sub-section 4(b). I therefore concluded that it was not open to me, in deciding the Baxters Place appeal, to modify the notice so as to substitute requirements to achieve a purpose consistent with section 128(4)(b) of the 1997 Act (to remedy injury to amenity), when the stated purpose of the notice as issued derives from sub-section 4(a) (to remedy a breach of planning control).

24. Although those same principles would also be applicable in relation to this appeal, the appellants have not suggested that requiring cessation of the short-term letting use is excessive because lesser steps would remedy any effect on amenity. Rather, they argue that the enforcement notice should not place a bar on all or any short-term visitor letting, as specifying the requirements of the notice in such wide terms could prevent lettings which would not amount to a material change of use. In this context the appellants make reference to persons staying at the property where no fee is paid; visitors accommodated for work purposes; and house swaps, as potential examples of circumstances which they suggest may not amount to a material change of use.

25. I have not been provided with sufficient detail of any such hypothetical occupation to enable me to determine whether a material change of use would or would not occur in such circumstances. In any event, for the purposes of my consideration of this appeal, it is not necessary for me to come to any firm conclusion in that regard, and I have not done so.

26. The appellants have drawn my attention to principles established by the English Courts in the Mansi case⁵, in which aspects of a decision on an appeal against an enforcement notice were reviewed. In its judgement the court made clear that the terms of an enforcement notice must not go beyond what is necessary to remedy the breach of control complained of, and that the notice should ensure that existing lawful uses are preserved. That case involved consideration of the legislative provisions in England under the Town and Country Planning Act 1962 then in force and turned on its own facts. However, I accept that the principles the court set out are also applicable in the separate Scottish planning jurisdiction of this appeal. Applying these principles, I conclude that the requirements of the enforcement notice should not be drawn so widely as to prevent occupation of the appeal property in a manner that may not amount to a breach of planning control.

27. Section 26B of the Town and Country Planning (Scotland) Act 1997 refers to changes of use involving short-term lettings. Sub-section 3(a) provides that a private residential tenancy under section 1 of the Private Housing (Tenancies) (Scotland) Act 2016 does not constitute a short-term let. A tenancy of a dwellinghouse (or part of it) is also not a

⁴ Appeal decision ENA-230-2144 dated 19 February 2019

⁵ Mansi v Elstree Rural District Council [1965] 16 P&CR

short-term let where all or part of the dwellinghouse is the only or principal home of the landlord or the occupier, as provided by sub-section 3(b) of section 26B.

28. Section 1 of the Private Housing (Tenancies) (Scotland) Act 2016 specifies that a 'private residential tenancy' is one where the property is let as a separate dwelling as the tenant's only or principal home and is not one of the 21 categories of occupation excluded by schedule 1 of the 2016 Act.

29. I accept that occupation of the appeal property under a private residential tenancy in accordance with the terms of section 1 of the 2016 Act would not amount to a short-term let and would therefore be unlikely to amount to a material change of use. Nor would a material change of use arise in the case of a 'house swap' referred to as an example by the appellants. However, in both such cases, and potentially other circumstances too, the underlying occupation of the property would necessarily be as the occupier's only or principal home. The appellants have confirmed that the appeal property is not occupied by them as their only or principal home. Nor is it suggested that any of the lettings that have taken place have been to provide the only or principal home of the tenants. The short-term nature of the individual occupations listed in the schedule provided by the appellants supports this position.

30. I do not consider that there is any significant potential for confusion as to the nature of the occupation of the appeal property that the enforcement notice requires to cease. However, reflecting the legislative provisions I have referred to above, a modification to the provisions of the enforcement notice to make clear that it would not prohibit letting by means of a private residential tenancy, is appropriate. This would clarify the effect of the enforcement notice and ensure that there would be no inadvertent infringement of the principle established by the court in the Mansi case. Accommodating visitors at the property in conjunction with its occupation as the only or principal home of its main occupants would also not amount to a material change of use and would therefore not be in breach of the terms of the notice. As explained above, it is not necessary for me to set out a definitive list of all potential occupations by visitors that would be ordinarily incidental to occupation of the property as a house. Nor is it appropriate for me to seek to do so, but as an example I would regard guests visiting the occupant's home to be a normal and incidental aspect of residential occupation which would not be prohibited by the enforcement notice.

31. Section 132(2)(b) of the Town and Country Planning (Scotland) Act 1997 enables me to modify the terms of the enforcement notice provided I am satisfied that no injustice would be caused to either the appellant or the planning authority by such modification. I am satisfied that no injustice would be caused either to the appellants or to the council by the modification I make to the notice in this regard.

32. To that limited extent, the appeal on ground (f) therefore succeeds. The requirement of the enforcement notice is modified as set out under the heading Modification to the enforcement notice at the end of this decision notice.

Ground (g)

33. The notice provides a period of 28 days from the date on which the notice takes effect for compliance with its requirements. In the absence of any appeal, the notice would

have required compliance by 17 December 2021. That would have meant that an already booked letting of the property for the period 28 December 2021 to 4 January 2022 would, unless cancelled, have been in contravention of the terms of the notice. The appellants regard this as unreasonable and maintain that they may incur financial penalties if such a pre-existing booking were to be cancelled. They therefore seek a longer period for compliance to enable current bookings to be honoured.

34. However, the appellants explain that they had declined to take further bookings until the outcome of this appeal is known, so it was only the single booking over the New Year period 2021-2022 referred to above that could potentially be affected. Section 131(3) of the 1997 Act provides that the effect of the enforcement notice is suspended until final determination or withdrawal of any appeal. The 28-day compliance period does not therefore commence until the date of this decision notice. As my determination of this appeal, as expressed in this decision notice, postdates the only booking referred to by the appellants, it is apparent that a 28-day period for compliance with the notice would not require any committed booking to be interfered with. For these reasons, I have no basis to conclude that the 28-day period for compliance with the enforcement notice is unreasonably short. The appeal on ground (g) consequently fails.

Other Matters

35. I note that the appellants comment that the enforcement notice is defective because, they say, it does not specify what it requires to be done. In this regard the appellants suggest that the council should have described the nature of a use of the property for short-term letting occupation of the property that would not amount to a material change of use. It is not the purpose of an enforcement notice to seek to specify what use of the property would not amount to a material change of use. The breach of planning control alleged is specified in section 3 of the notice, and section 5 requires cessation of that unauthorised use. Although I have modified the requirements of the notice for the reasons explained above, I am satisfied that there is no inherent deficiency in the notice in this regard.

36. I note that Rhu and Shandon Community Council makes reference to works being carried out at the property without the benefit of listed building consent, planning permission, or building warrants. However, the enforcement notice is concerned with the use of the property and not any operational development. These matters are not therefore relevant to my consideration of this appeal.

Conclusion

37. I have found that there is force in the appellants' argument that, as worded, the enforcement notice could be regarded as potentially preventing the occupation of the appeal property as a dwelling house in a manner which might not amount to a material change of use. However, I am able to modify the notice so as to make clear that letting of the property by means of a private residential tenancy would not be a breach of its terms. This would be consistent with the principle set out in the judgement of the English Courts in the Mansi case, that an enforcement notice should preserve existing lawful uses.

38. Subject to the modification below, which I make in response to the appeal on ground (f), I determine that none of the other statutory grounds raised in this appeal against the

enforcement notice, can succeed. The notice is therefore upheld, subject to the modification set out at the end of this notice.

Rob Huntley
Reporter

Modification

Delete section 5 of the enforcement notice and replace it with the text below:

5. WHAT YOU ARE REQUIRED TO DO

You are required to:

Cease the use of the Land Affected for short term visitor letting, other than any letting which comprises a private residential tenancy as defined in the Private Housing (Tenancies)(Scotland) Act 2016.

Time period for compliance: 28 days from the date this notice takes effect.