

Directorate for Planning and Environmental Appeals

Telephone: 01324 696459» Fax: 01324 696444  
E-mail: Christine.Brown@scot.gov.uk

Ms K MacKay»  
Argyll and Bute Council

Our ref: ENA-130-2011

8 April 2014

Dear Ms MacKay

**ENFORCEMENT NOTICE APPEAL: UNAUTHORISED ERECTION OF  
FLAGPOLE; FORESHORE OPPOSITE 7 SHORE STREET PORTNAHAVEN ISLE  
OF ISLAY PA47 7SH**

Please find attached a copy of the decision on this appeal

The reporter's decision is final. However you may wish to know that individuals unhappy with the decision made by the reporter may have the right to appeal to the Court of Session, Parliament House, Parliament Square, Edinburgh, EH1 1RQ. An appeal **must** be made within six weeks of the date of the appeal decision. Please note though, that an appeal to the Court of Session can only be made on a point of law and it may be useful to seek professional advice before taking this course of action.

I trust this information is clear. Please do not hesitate to contact me if you require any further information.

Yours sincerely

*Christine Brown*

**CHRISTINE BROWN**  
**Case Officer**  
**Directorate for Planning and Environmental Appeals**



## Appeal Decision Notice

T: 01324 696 400  
F: 01324 696 444  
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Decision by Janet M McNair, a Reporter appointed by the Scottish Ministers

- Enforcement notice appeal reference: ENA-130-2011
- Site address: Foreshore opposite 7, Shore Street, Portnahaven, Islay PA47 7SH
- Appeal by Mr Seumas MacArthur against the enforcement notice dated 8 January 2014 served by Argyll and Bute Council
- The alleged breach of planning control: unauthorised erection of flagpole
- 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 any breach of planning control which may be constituted by the matters stated in the notice or, as the case may be, to remedy any injury to amenity which has been caused by any such breach; and

(g) that the period for compliance specified in the notice falls short of what should reasonably be allowed.

#### *Ground (d)*

4. In order for the appeal to succeed under this ground, I would require to be satisfied that, on the balance of probability, the flagpole had been erected on the site at least 4 years prior to the date on which the notice was served. Whether the 4 year period is achieved is a matter of fact and degree, and ultimately judgement, and it is not essential for the flagpole to have remained on the site continuously for 4 years, without any interruption whatsoever.

5. In this case, the alleged unauthorised flagpole is made up of two parts, a lower metal angle, which is concreted to rock, and the flagpole itself, which fits into the angle. While the two parts are not welded to each other as the council states in its submissions, they fit sufficiently firmly together to be treated as one integral structure.

6. The submissions indicate that the flagpole is likely to have been first placed on the site in 2007. This is significantly longer than the 4 year period referred to above. However, the appellant explains that the flagpole was initially held up by wooden stobs and loose boulders; was, on occasions, damaged or washed away; and was normally unshipped in winter, especially during high tides and rough weather. In any event, he agrees that the metal angle was not installed until 2011. This is clearly less than 4 years before the notice was served. It is not wholly clear whether the flagpole remained in position from 2011 until late October 2012, when it is not disputed that it was removed. It is also not disputed that it not re-erected until May 2013. Accordingly, for at least 6 months in the 4 period prior to the service of the notice, the upper section of the structure was not on the site. I regard that gap as significant and sufficient to amount to a clear break in that 4 year period. As the installation of the metal angle and the gap both occurred less than 4 years before the notice was served, the flagpole is not immune from enforcement action. The appeal under ground (d) therefore fails.

#### *Ground (f)*

7. On the basis of my conclusion at paragraph 5, the council would have been entitled to require the removal of both parts of the structure in order to remedy the breach of planning control.

8. However, the council has elected to impose a lesser requirement, whereby the lower part, which also serves as a boat mooring, can remain. It therefore follows that the steps that the notice requires to be taken do not exceed what is necessary to remedy the breach of planning control. The council may have regarded this requirement as what would be necessary to remedy what it perceived as an injury to amenity. In any event, it is not open to me to impose a stricter requirement than the notice. Accordingly, this ground of appeal also fails.

#### *Ground (g)*

9. The appellant submits under this ground that he has not been given enough time to deal with matters arising from what he describes as an “anonymous libellous letter” posted on the council’s website. The contents of that letter have had no bearing on the determination of the appeal, which is based solely on planning issues. In any event, the appellant does not argue that it is impractical to remove the flagpole in a month. Given its construction, I am satisfied that is likely to be a straightforward operation that could easily be completed in a month. However, to take account of the provisions of sections 237 and 238 of the Act, have decided to extend the period for compliance with the notice to two months.

10. The notice also refers, incorrectly, to the “welded” fixing on the rock, whereas this fixing is actually concreted to the rock. However, the appellant is clearly in no doubt as to what the notice alleges he has done wrong, or what it requires him to do to remedy it. I am satisfied that it is open to me to correct this minor factual error under section 132(2) of the Act without causing injustice to the appellant or to the planning authority.

11. Drawing these matters together, the appeal fails on ground (d) and on ground (f), but succeeds on ground (g), to the extent that the period for compliance is extended to two months. I have also corrected the notice as described above. I considered all the relevant matters raised, but find none that outweighs those that have led to my conclusions.

12. My decision relating to a planning appeal (PPA-130-2039) regarding the flagpole is the subject of a separate notice.

*Janet M McNair*

Reporter

**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**

To: Mr James McArthur  
7 Shore Street  
Portnahaven  
Isle of Islay  
Argyll  
PA47 7SH

The Crown Estate Commissioners  
6 Bell's Brae  
Edinburgh  
EH4 3BJ

**ISSUED BY: ARGYLL AND BUTE COUNCIL, KILMORY, LOCHGILPHEAD**

1. **THIS IS A FORMAL NOTICE** which is issued by Argyll and Bute Council, as Planning Authority, because it appears to them that there has been a breach of planning control, under Section 127 of the Town and Country Planning (Scotland) Act 1997 ('the Act'), at the Land Affected as hereinafter defined. Argyll and Bute Council consider that it is expedient to issue this notice, having regard to the provisions of the development plan and to other material considerations.

2. **THE LAND AFFECTED**

The area of ground shown edged red on the attached plan forming part of the Foreshore Opposite 7 Shore Street, Portnahaven, Isle of Islay PA47 7SH (hereinafter referred to as 'the Land Affected').

3. **THE BREACH OF PLANNING CONTROL ALLEGED**

In terms of Section 123 (1) (a) of the Act, the carrying out of development without the required planning permission, relative to:

**The unauthorised erection of flag pole** on the Land Affected

#### 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 **14<sup>th</sup> 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

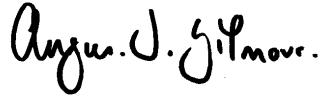
#### 7. YOUR RIGHT OF APPEAL

You can appeal against this notice, but your appeal must be received or posted in time to be received by the Scottish Government before **14<sup>th</sup> 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 14<sup>th</sup> 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

A handwritten signature in black ink that reads "Angus J. Gilmore". The signature is written in a cursive style with a large initial 'A' and a distinct 'G'.

Head of Planning and Regulatory Services  
Kilmory  
Lochgilphead

On behalf of Argyll and Bute Council, Kilmory, Lochgilphead, PA31 8RT

<p style="text-align: center;"><b>SCHEDULE 1</b> <b>EXPLANATORY NOTE FOR THOSE IN RECEIPT OF</b> <b>AN ENFORCEMENT NOTICE</b></p>
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**RELEVANT LEGISLATION**

**RELEVANT LEGISLATION**

A summary of Sections 127 to 134 of the Town and Country Planning (Scotland) Act 1997 (as amended) are attached. You will wish to note in particular the points referred below.

**RIGHT OF APPEAL**

If you wish to appeal against this notice, you should write to the Directorate for Planning and Environmental Appeals, 4 The Courtyard, Callendar Business Park, Callendar Road, Falkirk, FK1 1XR. The appeal must be received, or posted in time to be received, by the Scottish Government before **14<sup>th</sup> February 2014**. The Scottish Government has no power to consider an appeal lodged out of time.

The appeal, which must be made in writing, must be based on one or more of the grounds set out in Section 130 of the 1997 Act, and you should state the facts on which you propose to rely in support of each of the grounds of the appeal. The grounds of appeal and statement of facts must be submitted with your appeal or within 14 days of your being required to do so by the Scottish Government.

If you lodge an appeal, the enforcement notice is suspended and will not take effect unless the appeal is withdrawn or dismissed.

**PENALTIES FOR NON-COMPLIANCE WITH AN ENFORCEMENT NOTICE**

Where an enforcement notice requires the discontinuance of a use of land or compliance, in respect of a use of land or the carrying out of operations, with any conditions or limitations, then any person who, without the grant of planning permission uses the land or causes or permits it to be used, or carries out those operations or causes or permits them to be carried out, is guilty of an offence and liable on summary conviction to a fine not exceeding Twenty Thousand Pounds or on conviction on indictment to an unlimited fine. Furthermore, if the use is continued after conviction the person may be convicted of a second or subsequent offence.

**FIXED PENALTY NOTICE**

Section 136A of the 2006 Act amended the 1997 Act to introduce a new planning enforcement power enabling planning authorities to issue a fixed penalty notice (FPN) as an alternative to prosecution where a person fails to comply with the terms of an enforcement notice.

Failure to comply with this notice may result a fixed penalty notice being issued, with a fine of £2000 in respect of a breach of an enforcement notice. Please note that while payment of this fine prevents future prosecution this does not remove your responsibility to comply with



the terms of this notice and may, as a result, instigate the undertaking of further planning enforcement proceedings.

### **DIRECT ACTION FOR NON-COMPLIANCE WITH AN ENFORCEMENT NOTICE**

If the steps required by an enforcement notice are not taken within the specified period(s) the Council may enter on the land, take those steps and recover the cost from the owner or lessee of the land.

### **FURTHER OFFENCES**

Compliance with the terms of an enforcement notice does not discharge the notice. It will continue in effect and any repetition of the breach of control may incur further penalties or may result in direct action by the Council.

## Enforcement Sections of the Town & Country Planning (Scotland) Act 1997

Issue of enforcement notice.

**127.** - (1) The planning authority may issue a notice (in this Act referred to as an "enforcement notice") where it appears to them-

- (a) that there has been a breach of planning control, and
- (b) that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations.

(2) A copy of an enforcement notice shall be served-

- (a) on the owner and on the occupier of the land to which it relates, and
- (b) on any other person having an interest in the land, being an interest which, in the opinion of the authority, is materially affected by the notice.

(3) The service of the notice shall take place-

- (a) not more than 28 days after its date of issue, and
- (b) not less than 28 days before the date specified in it as the date on which it is to take effect.

Contents and effect of notice.

**128.** - (1) An enforcement notice shall state-

- (a) the matters which appear to the planning authority to constitute the breach of planning control, and
- (b) the paragraph of section 123(1) within which, in the opinion of the authority, the breach falls.

(2) A notice complies with subsection (1)(a) if it enables any person on whom a copy of it is served to know what those matters are.

(3) An enforcement notice shall specify the steps which the authority require to be taken, or the activities which the authority require to cease, in order to achieve, wholly or partly, any of the following purposes.

(4) Those purposes 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.

(5) An enforcement notice may, for example, require-

- (a) the alteration or removal of any buildings or works,
- (b) the carrying out of any building or other operations,
- (c) any activity on the land not to be carried on except to the extent specified in the notice, or

(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 breach of planning control consisting of demolition of a building may require the construction of a building (in this section referred to as a "replacement building") which, subject to subsection (7), is as similar as possible to the demolished building.

(7) A replacement building-

(a) must comply with any requirement imposed by or under any enactment applicable to the construction of buildings,

(b) may differ from the demolished building in any respect which, if the demolished building had been altered in that respect, would not have constituted a breach of planning control, and

(c) must comply with any regulations made for the purposes of this subsection (including regulations modifying paragraphs (a) and (b) of this subsection).

(8) An enforcement notice shall specify the date on which it is to take effect and, subject to section 131(3), shall take effect on that date.

(9) An enforcement notice shall specify the period for compliance with the notice at the end of which any steps are required to have been taken or any activities are required to have ceased, and may specify different periods for different steps or activities.

(10) Where different periods apply to different steps or activities, references in this Part to the period for compliance with an enforcement notice, in relation to any step or activity, are to the period at the end of which the step is required to have been taken or the activity is required to have ceased.

(11) An enforcement notice shall specify such additional matters as may be prescribed.

(12) Regulations may require every copy of an enforcement notice served under section 127 to be accompanied by an explanatory note giving prescribed information as to the right of appeal under section 130.

(13) Where-

(a) an enforcement notice in respect of any breach of planning control could have required any buildings or works to be removed or any activity to cease, but does not do so, and

(b) all the requirements of the notice have been complied with,  
then, so far as the notice did not so require, planning permission shall be treated as having been granted under section 33 in respect of development consisting of the construction of the buildings or works or, as the case may be, the carrying out of the activities.

(14) Where-

- (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 be taken, or the activities required by the notice to cease, 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;
- (g) that any period specified in the notice in accordance with section 128(9) falls short of what should reasonably be

allowed.

(2) An appeal under this section shall be made either-

(a) by giving written notice of the appeal to the Secretary of State before the date specified in the enforcement notice as the date on which it is to take effect, or

(b) by sending such notice to him in a properly addressed and prepaid letter posted to him at such time that, in the ordinary course of post, it would be delivered to him before that date.

(3) A person who gives notice under subsection (2) shall submit to the Secretary of State, either when giving the notice or within the prescribed time, a statement in writing-

(a) specifying the grounds on which he is appealing against the enforcement notice, and

(b) giving such further information as may be prescribed.

Appeals: supplementary provisions.

**131.** - (1) The Secretary of State may by regulations prescribe the procedure which is to be followed on appeals under section 130 and, in particular, but without prejudice to the generality of the foregoing provisions of this subsection, in so prescribing may-

(a) specify the matters on which information is to be given in a statement under section 130(3);

(b) require the planning authority to submit, within such time as may be specified, a statement indicating the submissions which they propose to put forward on the appeal;

(c) specify the matters to be included in such a statement;

(d) require the authority or the appellant to give such notice of an appeal as may be specified to such persons as may be specified;

(e) require the authority to send to the Secretary of State, within such period from the date of the bringing of the appeal as may be specified, a copy of the enforcement notice and a list of the persons served with copies of it.

(2) Subject to section 132(3), the Secretary of State shall, if either the appellant or the planning authority so desire, give each of them an opportunity of appearing before and being heard by a person appointed by the Secretary of State for the purpose.

(3) Where an appeal is brought under section 130 the enforcement notice shall be of no effect pending the final determination or the withdrawal of the appeal.

(4) Schedule 4 applies to appeals under section 130, including appeals under that section as applied by

regulations under any other provisions of this Act.

General provisions relating to determination of appeals.

**132.** - (1) On the determination of an appeal under section 130, the Secretary of State shall give directions for giving effect to the determination, including, where appropriate, directions for quashing the enforcement notice.

(2) On such an appeal the Secretary of State may-

(a) correct any defect, error or misdescription in the enforcement notice, or

(b) vary the terms of the enforcement notice,

if he is satisfied that the correction or variation will not cause injustice to the appellant or the planning authority.

(3) The Secretary of State may-

(a) dismiss an appeal if the appellant fails to comply with section 130(3) within the prescribed time, and

(b) allow an appeal and quash the enforcement notice if the planning authority fail to comply with any requirement imposed by virtue of paragraph (b), (c) or (e) of section 131(1).

(4) Where it would otherwise be a ground for determining an appeal in favour of the appellant that a person required by section 127(2) to be served with a copy of the enforcement notice was not served, the Secretary of State may disregard that fact if neither the appellant nor that person has been substantially prejudiced by the failure to serve him.

Grant or modification of planning permission on appeal against enforcement notice.

**133.** - (1) On the determination of an appeal under section 130, the Secretary of State may-

(a) grant planning permission in respect of any of the matters stated in the enforcement notice as constituting a breach of planning control or any of those matters so far as relating to part of the land to which the notice relates,

(b) discharge any condition or limitation subject to which planning permission was granted,

(c) grant planning permission for such other development on the land to which the enforcement notice relates as appears to him to be appropriate, and

(d) determine whether on the date on which the appeal was made, any existing use of the land was lawful, any operations which had been carried out in, on, over or under the land were lawful or any matter constituting a failure to comply with any condition or limitation subject to which the permission was granted was lawful and, if so, issue a

certificate under section 150.

(2) The provisions of sections 150 to 153 mentioned in subsection (3) shall apply for the purposes of subsection (1)(d) as they apply for the purposes of section 150, but as if-

(a) any reference to an application for a certificate were a reference to the appeal and any reference to the date of such an application were a reference to the date on which the appeal is made, and

(b) references to the planning authority were references to the Secretary of State.

(3) Those provisions are sections 150(5) to (7), 152(4) (so far as it relates to the form of the certificate), (6) and (7) and 153.

(4) In considering whether to grant planning permission under subsection (1), the Secretary of State shall have regard to the provisions of the development plan, so far as material to the subject matter of the enforcement notice, and to any other material considerations.

(5) The planning permission which may be granted under subsection (1) is any planning permission which might be granted on an application under Part III.

(6) Where the Secretary of State discharges a condition or limitation under subsection (1), he may substitute for it any other condition or limitation.

(7) Where an appeal against an enforcement notice is brought under section 130, the appellant shall be deemed to have made an application for planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control.

(8) Where-

(a) the statement under section 130(3) specifies the ground mentioned in subsection (1)(a) of that section,

(b) any fee is payable under regulations made by virtue of section 252 in respect of the application deemed to be made by virtue of the appeal, and

(c) the Secretary of State gives notice in writing to the appellant specifying the period within which the fee must be paid,

then, if that fee is not paid within that period, the appeal, so far as brought on that ground, and the application shall lapse at the end of that period.

(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.

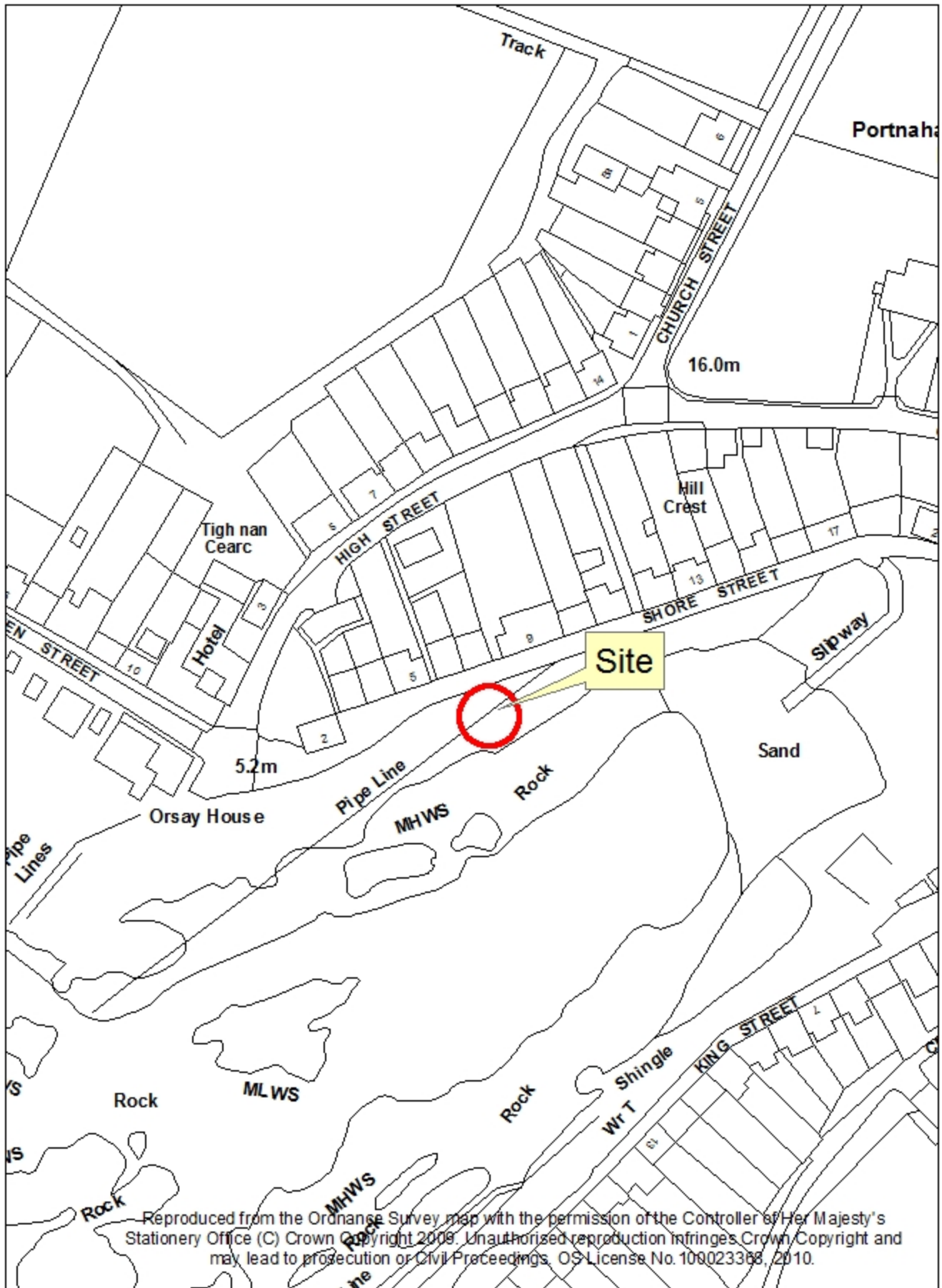
(10) In relation to a grant of planning permission or a determination under subsection (1) the Secretary of State's decision shall be final.

(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





**Enforcement Ref. 13/00188/ENFOTH2**  
**Unauthorised Erection of Flagpole**  
**Foreshore, Opposite 7 Shore Street, Portnahaven, Islay**



Date: 09.01.14

Drawn By: KMK

Scale: 1:1,250