Directorate for Planning and Environmental Appeals

Appeal Decision Notice

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The Scottish Government

Decision by David Russell, a Reporter appointed by the Scottish Ministers

- Certificate of Lawful Development appeal reference: CLUD-270-2004
- Site address: Plot 2, on land 50 metres south-east of Culbo Mains Farm, Culbokie, Dingwall, IV7 8JU
- Appeal by Mr Simon MacKenzie against the decision by Highland Council
- Application for certificate of lawful development 14/02536/CLE dated 26 June 2014, which was refused by notice dated 29 September 2014
- The subject of the application: Commencement of development (erection of house)
- Date of site visit by Reporter: 10 February 2015

Date of appeal decision: 6 March 2015

Decision

I allow the appeal and grant a certificate of lawful development in the terms set out in the certificate at the end of this notice.

Notes:

1. A claim for an award of expenses has been lodged on behalf of the appellant. I will deal with that matter in a separate decision notice.

2. Two other applications for certificates of lawful development were also submitted by the applicant to the planning authority and were also refused. These related to the development of a house on Plot 1, which adjoins this appeal site, and at Plot 3 at a nearby site elsewhere on Culbo Mains Farm. These decisions have also been the subject of appeals, and I deal with these in separate decision notices.

Reasoning

1. This application for a certificate of lawful development under section 151(1) of the Act was submitted on the basis that the works carried out on the site by 24 August 2001 constituted the commencement of the development comprised in the erection of a house. Consent for the house had been granted in respect of outline planning permission ref: RC/1996/485; the related consent for reserved matters ref: 99/00566/REMRC which was approved by the council on 23 August 1999; and the subsequent consent for reserved matters ref: 01/00380/REMRC. On that basis it is argued that the consents the erection of the house remain valid, and have not lapsed.

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2. This is one of two houses granted consent through the outline planning permission. The other is on an adjoining site to the east (Plot 1). It is accepted that, if it is found that the development of one of the houses has commenced, then that will also apply to the other house even though it was the subject of separate applications for the approval of reserved matters.

3. The evidence put forward in support of the application consists of the evidence on the ground of initial works to form the road access, excavation works, and the installation of a water pipe. Further evidence related to these works was contained in two sworn affidavits, an invoice, and in correspondence between the appellant and the planning authority.

4. The reason given by the council for the refusal of the application for the certificate is:

> "It is the view of the planning authority that the applicant has failed to provide sufficient evidence which would allow the planning authority to find that, on the balance of probabilities, a material operation comprised in the development for which planning permission was granted under reference *RC/1996/485* was carried out on either Plot 1 or Plot 2 prior to expiry of that permission on 24 August 2001."

5. Section 154(3) (a) of the Act requires a certificate to be issued on appeal if the appeal decision maker is satisfied that the authority's reason for refusal is not well-founded. In this case, the questions to be addressed are, on the balance of probabilities:

1. Whether the works have been carried out;

2. Whether they were carried out before the relevant permissions lapsed; and if so,

3. Whether they represent, or are sufficient to represent, the commencement of the development authorised for the erection of a house on the site by the outline planning permission and approval of the reserved matters;

6. The appellant contends that initial work towards the formation of an access to both approved house sites was undertaken at the existing field entrance. This involved pegging out the access, removal of topsoil and laying of hardcore. This account is supported by the evidence contained in the invoice made out to the appellant for the delivery of 40 tonnes of hardcore, for which the delivery address is 'New House Site', Culbo Mains Farm, and is dated 25 May 2001. Sworn affidavits from the appellant and his brother state that the appellant pegged out and excavated an area of turf and topsoil at the site entrance and then laid the hardcore there when it was delivered. Most of the work was undertaken by the appellant using the farm's own digger, and his brother assisted in labouring work.

7. The position of the works, as shown to me on the site inspection, is consistent with the vehicular access shown on the consented plans for the approved house. Although the hardcore was not visible at the time of my site inspection, the area has continued to be used as a field entrance for farm vehicles and livestock over the intervening period of over 13 years. I accept that it is likely that this is the explanation for the hardcore no longer being visible. However some elements of hardcore do appear evident in a submitted

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photograph of the access area taken by a planning officer in 2010. There is no contrary evidence which leads me to doubt what is contained in the invoice and affidavits with regard to the pegging out and formation of the access. I am therefore satisfied that these works were carried out at the time of the delivery of the hardcore in May 2001.

8. A rectangular area has been excavated on the site which is unrelated to the footprint of the approved house on Plot 2 as shown on the approved plans. The affidavits state that a 'platform' was formed by the excavation of topsoil and subsoil by the appellant, and the partial excavation of foundation trenches. These trenches were subsequently backfilled for the safety of livestock. Although the excavated platform is clearly visible, the position of the in-filled trenches was not discernible at the time of my site inspection.

9. I accept that contradictory evidence regarding the foundation trenches was given earlier by the applicant in correspondence to the council, but I accept the explanation given for the apparent confusion and find that greater weight should be given to the account contained in the sworn affidavits. I therefore accept that these works were carried out, and I also accept on the basis of the evidence contained in the affidavits that these works were also undertaken prior to 24 August 2001.

10. The affidavits also state that a water supply pipe was installed at this time. It was visible at the time of my site inspection on the boundary of the site of Plot 1, which is some distance from the boundary of the site of Plot 2. There is no evidence to suggest that it was installed at any other time or for any other purpose, and I therefore accept that this work was also carried out prior to 24 August 2001.

11. I therefore find that, on the balance of probabilities, these works have been carried out, and that they were undertaken before the relevant consents for the proposed house on Plot 2 would have lapsed on 24 August 2001.

12. The remaining question that I must address, therefore, is whether these works represent the commencement of the development of the authorised house.

13. The works relating to the formation of the access are material operations comprised in the development of the approved houses, both on Plot 1 and Plot 2. Given the evidence of the invoice for the delivery of 40 tonnes of hardcore, I am also satisfied that the scale of these operations should not be defined as minimal (or *de minimis*).

14. I agree with the council that, as the excavated area on Plot 2 does not relate to the position of the house on the approved plans, those works cannot be regarded as material operations which are comprised in the approved development.

15. With regard to the partial excavation of foundation trenches, these were not visible at the time of my site inspection due to being back-filled in 2001 and have not been located. In the absence of a confirmed location, and given that the excavated area does not align with the position of the approved house, on the balance of probabilities I consider it unlikely that these trenches are sufficiently related to enable them to constitute material operations which are comprised in the approved development.

16. While I have found that a water supply pipe has been installed to the site boundary of Plot 1 prior to 24 August 2001, this does not in itself constitute a material operation which is comprised in the development, as it has not been laid to the foundations of either of the approved houses.

17. Nonetheless, my overall conclusion is that the material operations which have been undertaken prior to the relevant consents lapsing on 24 August 2001, in relation to the formation of the access for both Plot 1 and Plot 2 are sufficient to represent the commencement of the approved development.

18. In addition, in dealing with the appeal relating to Plot 1 (CLUD-270-2003), I have found that the works relating to the excavated area for that house do constitute material operations which are comprised in that approved development. As the outline planning permission authorised both houses, on Plots 1 and 2, I conclude that those works also represent the commencement of the approved development of both houses.

19. Accordingly I find that the authority's reason for refusal in relation to Plot 2 is not well-founded, and I therefore conclude that the certificate should be issued.

David A. Russell
Principal Inquiry Reporter

Certificate of Lawful Use or Development

The Scottish Government

TOWN AND COUNTRY PLANNING (SCOTLAND) ACT 1997: SECTION 150 AND 151
The Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2008 Regulation 41(6)

I hereby certify that on 26 June 2014 the matter described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged red on the plan attached to this certificate would have been lawful within the meaning of section 150 of the Town and Country Planning (Scotland) Act 1997, for the following reason:

> Material operations comprised in the development for which consent was granted by Highland Council under outline planning permission reference RC/1996/485 and reserved matters consents references 99/00566/REMRC and 01/00380/REMRC were carried out prior to expiry of that consent on 24 August 2001.

DAVID A. RUSSELL
Reporter

Date: 6 March 2015

First Schedule: Erection of a house, in accordance with the outline planning permission (ref: RC/1996/485) and reserved matters application consents (refs: 99/00566/REMRC and 01/00380/REMRC) issued by Highland Council.

Second Schedule: Plot 2, on land 50 metres south-east of Culbo Mains Farm, Culbokie, Dingwall IV7 8JU

Notes

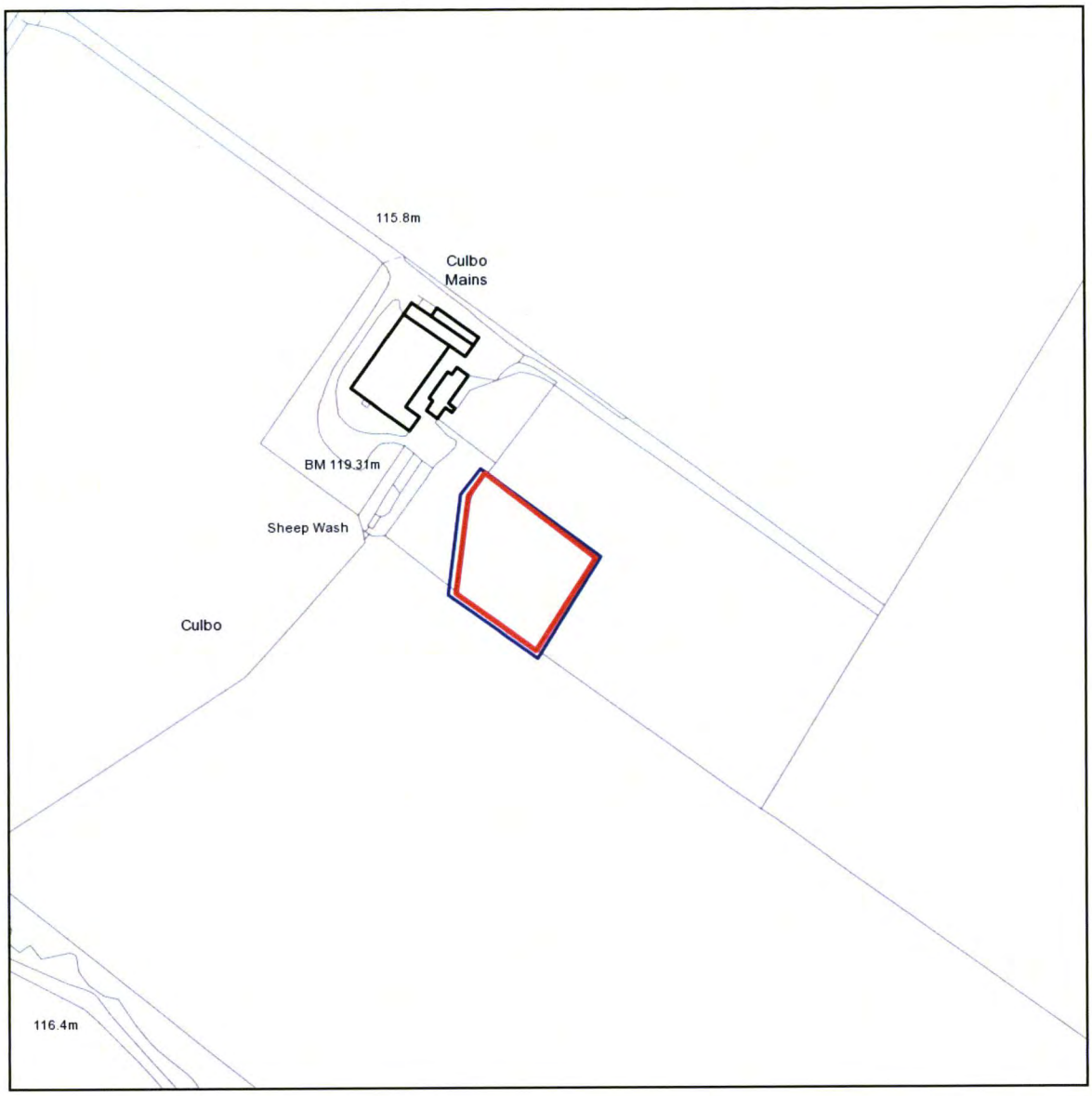
1. This certificate is issued solely for the purpose of section 151 of the Town and Country Planning (Scotland) Act 1997.

2. It certifies that the matter described in the First Schedule taking place on the land specified in the Second Schedule would have been lawful, on the specified date and, thus, would not have been liable to enforcement action under section 127 of the 1997 Act on that date.

3. This certificate applies only to the extent of the matter described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any matter which is materially different from that described or which relates to other land may render the owner or occupier liable to enforcement action.

4. The effect of the certificate is also qualified by the proviso in section 151(4) of the 1997 Act, which states that the lawfulness of a described use or operation is only conclusively presumed where there has been no material change, before the use is instituted or the operations begun, in any of the matters relevant to determining such lawfulness.

Easting: 264319 - Northing: 861565



Application Boundary

Land in Ownership

Information

Online Ref:
000092095

Date: 6/6/2014

N

Scale 1:2500 (16Ha)

0 100m 200m

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Directorate for Planning and Environmental Appeals

Claim for an Award of Expenses Decision Notice

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The Scottish Government

Decision by David Russell, a Reporter appointed by the Scottish Ministers

- Appeal reference: CLUD-270-2004
- Site address: Plot 2, on land 50 metres south-east of Culbo Mains Farm, Culbokie, Dingwall, IV7 8JU
- Claim for expenses by Mr Simon MacKenzie against Highland Council

Date of decision: 6 March 2015

Decision

I find that the council has not acted in an unreasonable manner resulting in liability for expenses and, in exercise of the powers delegated to me, I decline to make any award.

Reasoning

1. Circular 6/1990 explains that parties are normally expected to meet their own expenses in planning appeals. Awards of expenses do not follow the decision on the merits of the appeal itself, and are made only where each of the following tests is met:
   - The claim is made at the appropriate stage in the proceedings;
   - The party against whom the claim is made has acted unreasonably; and,
   - This unreasonable conduct has caused the party making the application to incur unnecessary expense, either because it was unnecessary for the matter to come before the Scottish Ministers, or because of the way in which the party against whom the claim is made has conducted its side of the case.

2. Here, the appellant's agent has lodged the claim at an appropriate stage in the proceedings, prior to my determination of the appeal.

3. With regard to the second test, my consideration is not affected by the merits of the appeal, in which I found that the planning authority's reason for refusing the application was not well-founded.

4. In seeking a certificate of lawful development, the onus is on the applicant to provide the evidence, and it is not for the planning authority to seek it. The planning authority is also required to exercise its own judgement, as decision maker, about the relevance and veracity of the evidence, and it is entitled to attach such weight to that evidence as it thinks fit.

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5. For an aggrieved applicant, the principal means of redress is to lodge an appeal. In the circumstances of this case, although my conclusions on the evidence differed in certain respects from the council's, I do not consider that it had acted unreasonably in assessing the evidence or in reaching its own conclusions. Nor do I consider that it had applied the stricter test of 'beyond reasonable doubt', rather than the test of 'the balance of probabilities'.

6. I therefore conclude that the council has not acted unreasonably in relation to the appeal, and it is therefore not necessary for me to consider the final test as to whether the appellant has incurred expenses unnecessarily.

David A. Russell
Principal Inquiry Reporter