

Directorate for Planning and Environmental Appeals

Appeal Decision Notice

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

- Certificate of lawful development appeal reference: CLUD-270-2005
- Site address: Plot 3, on land 400 metres north-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 14/02537/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 to the planning authority and were also refused. These related to the development of houses on Plots 1 and 2 on nearby land at Culbo Mains Farm. These decisions have also been the subject of appeals, and I have dealt with those in separate decision notices.

Reasoning

1. The 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 16 May 2003 constituted the commencement of the development comprised in the erection of a house. Highland Council had granted of outline planning permission (ref: RC/1996/487) for the erection of a house and had approved a subsequent reserved matters application (consent ref: 99/00567/REMRC) for that development. On that basis, it is contended that the consents for the erection of the house remain valid, and have not lapsed.

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2. 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 septic tank and a water supply pipe. Further evidence related to these works is contained in two sworn affidavits, invoices and correspondence.
3. 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/1996/487* was carried out prior to expiry of that permission on 16 May 2003.”
4. 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.
5. I confirmed on my site inspection that initial works have been undertaken consistent with the formation of the road access and associated lay-by, as shown in an aerial photograph which was submitted with correspondence in 2010. Excavations have also been undertaken of an area broadly commensurate with the footprint of the approved house, and a septic tank has been installed on the site. Significant areas of the site have become overgrown with gorse and whin, and there was no readily visible evidence of the water supply pipe stated to have been installed at the site boundary.
6. A number of invoices were submitted in support of the application which are consistent with the work having been undertaken prior to 16 May 2003. These consist of: a paid invoice for delivery of 10 tonnes of gravel, dated 7 April 2003; an invoice for sand and scalpings dated 10 April 2003; an invoice for the hire of an excavator and driver for work between 7 and 10 April; an invoice dated 22 April 2003 for the purchase of a septic tank; and an invoice for the delivery on 6 May 2003 of re-inforcing mesh.
7. Sworn affidavits were also submitted from the appellant and his brother. These give a clear account of the work undertaken:
 - The pegging out of the site;
 - The formation of the access to the site;
 - The stripping back of topsoil along the access;
 - The installation of a water supply pipe to the site;
 - The installation of a septic tank at the site;

- The removal of topsoil and subsoil to create an excavated level working platform at the site;
- The excavation of partial foundation trenches.

8. The appellant and his brother also confirmed that they had engaged contractors to carry out this work. The appellant confirmed that he was personally involved in directing the machine operator as to the work to be done, and assisted him in installing the septic tank. The invoices gave them certainty as to when the work was undertaken in April 2003, and the machine operator had worked through until the specified items of work were completed.

9. An aerial photograph of the site sent to the council in 2010 clearly showed that the formation of the access had been carried out, together with the excavated platform, which were both referred to in the application.

10. There is no other contrary evidence to indicate that these works were undertaken after 16 May 2003, or for any purpose other than in relation to the start of the development of the approved house. Although the location of the installed water supply pipe was not identified on my site inspection, I accept the evidence of its installation contained in the sworn affidavits and consider it likely that the invasion of dense gorse and whin has served to obscure it. Although not identifiable on my site inspection, I also accept the evidence contained in the affidavits of the partial excavation of trenches, and also of their subsequent infilling in the interests of safety.

11. I acknowledge the discrepancies pointed out by the council in the contents of the affidavits and of a letter from the appellant, but accept the explanation given on behalf of the appellant. There is no other evidence which would lead me to doubt the evidence contained in the affidavits.

12. Correspondence between the appellant's then agent and a planning officer in July and August 2001, which relates to Plots 1 and 2 which are the subject of separate appeals, was also submitted as evidence in relation to this appeal. This showed that the appellant understood that there was a deadline by which he had to have undertaken excavations in relation to those consents. Accordingly I consider it very likely that he would have also applied this understanding to the consents for this house, and to the relevant deadline here which was 16 May 2003.

13. 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 would have lapsed on 16 May 2003.

14. The remaining question that I must address, therefore, is whether these works represent the commencement of the development of the authorised house. The council states that its planning officers carried out thorough inspections of the site at least three times. They only identified a 'scraped area', but considered that it lacked any clear relationship with the consented house. However, from the aerial photograph I am satisfied that the excavated area is generally, although not wholly, consistent with the position of the house shown in the approved reserved matters application.

15. The council also confirmed that a small amount of material appeared to have been laid at some time between the house plot and the public road, although not in the position of the access shown on the plan submitted with the reserved matters application. However, the council had imposed a condition on the consent it issued, requiring access arrangements incorporating both a layby and visibility splays of 75 metres to be provided. Unlike the location of the access which was shown on the submitted plans, the location of the access which was commenced is consistent with those requirements.

16. I am therefore satisfied that both the excavation work and the formation of the access do represent material operations comprised in the erection of the house, which is the approved development in this case. I also consider that the installation of the septic tank, although not in the position shown on the submitted plan, also constitutes such a material operation, as it can reasonably be defined as a 'work of construction in the course of the erection of a building'. The installation of the water supply pipe to the site boundary would not in itself constitute such an operation, as it had not been laid to the foundations of the approved house.

17. Nonetheless, my overall conclusion is that the material operations which have been undertaken prior to 16 May 2003 when the relevant consents would have lapsed, are sufficient to represent the commencement of the approved development.

18. Accordingly I find that the authority's reason for refusal is not well-founded, and therefore conclude that the certificate should be issued.

David A. Russell
Principal Inquiry Reporter

Certificate of Lawful Use or Development

**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/1996/487 and reserved matters consent reference 99/00567/REMRC were carried out prior to expiry of that consent on 16 May 2003.

DAVID A. RUSSELL
Reporter

Date: 6 March 2015

First Schedule: Erection of a house, in accordance with the outline planning permission (ref: RC/1996/487) and reserved matters application consent (ref: 99/00567/REMRC) issued by Highland Council.

Second Schedule: Plot 3, on land 400 metres north-east of Culbo Mains Farm, Culbokie, Dingwall, IV7 8JU

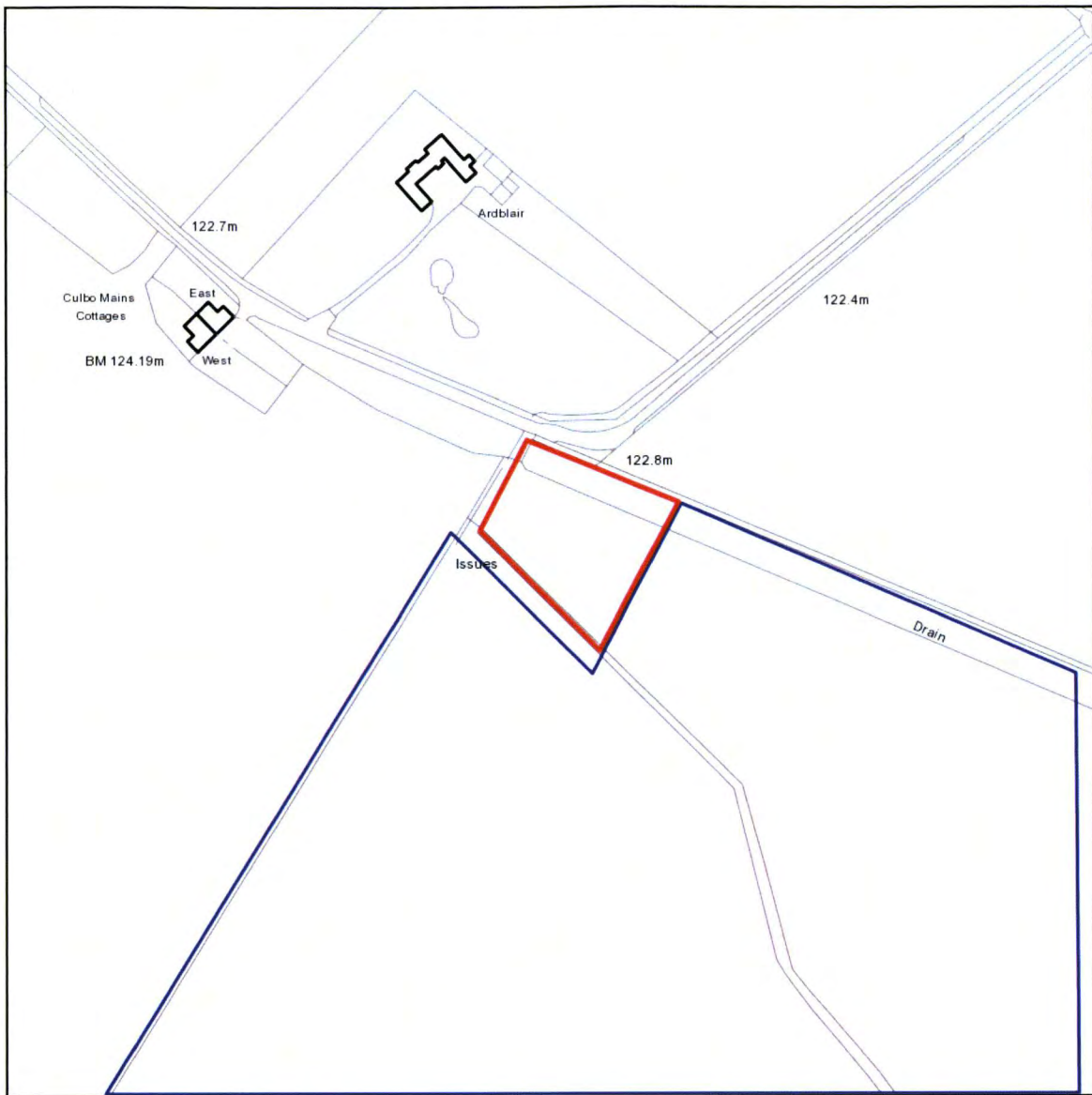
Notes

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 operations which are materially different from that described or which relate 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: 264639 - Northing: 861796

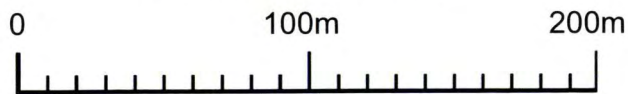


-  Application Boundary
-  Land in Ownership

Information

Online Ref:
000092096
Date: 6/6/2014

Scale 1:2500 (16Ha)



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Directorate for Planning and Environmental Appeals
Claim for an Award of Expenses Decision Notice

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

- Appeal reference: CLUD-270-2005
- Site address: Plot 3, on land 400 metres north-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