

## Appeal Decision Notice

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

- Enforcement notice appeal reference: ENA-270-2009
- Site address: Friars Croft, Milton of Culloden, Inverness IV2 7NU
- Appeal by Miss Melody Robertson against the enforcement notice dated 18 November 2014 which was served by Highland Council
- The alleged breach of planning control is the unauthorised importation and deposit of inert waste materials, the creation of an embankment and raising of ground levels, and the culverting of a water course
- Date of site visit by Reporter: 10 February 2015

Date of appeal decision: 27 July 2015

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### Decision

I uphold the enforcement notice dated 18 November 2014, but allow the appeal to the extent that I vary the terms of the notice by:

1. In Section 2 'The Breach of Planning Control', inserting the words: "except as required to construct the access road which forms part of the development approved in planning permission ref. 08/00443/FULIN", after the words: "... along the western boundary of the site".
2. In Section 4 'What You Are Required To Do', amending the time period for compliance to read: "Nine months from the date that this notice takes effect."

**Note:** 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.

### Background

a) In the enforcement notice the council set out in full the description of the alleged breach of planning control, as follows:

"Unauthorised importation and deposit of inert waste materials comprising soils, road planings, concrete and other construction waste arisings and subsequent engineering operations to form a shoreline bund; the creation of an embankment and

raising of ground levels at the south-west boundary of the site adjacent to the site entrance and the watercourse running along the western boundary of the site; and the culverting of the watercourse near the shoreline.”

b) The notice also set out the council’s reasons for issuing the enforcement notice:

1) The uncontrolled importation and deposit of inert waste materials is having an adverse impact on the environment and general amenity of the area, contrary to Policy 28 (Sustainable Design) of the Highland-wide Local Development Plan;

2) The uncontrolled deposit of inert waste materials adjacent to the shoreline has the potential to adversely affect the Inner Moray Firth Special Protection Area and the Longman and Castle Stuart Bays Site of Special Scientific Interest (SSSI) contrary to Policy 57 (Natural, Built and Cultural Heritage) of the Highland-wide Local Development Plan.

c) The enforcement notice requires the following steps to be undertaken:

1. Cease the importation and deposit of inert waste materials comprising soils, road planings, concrete and other construction waste arisings;
2. Remove all deposited waste materials used to form the shoreline bund from the land;
3. Remove all deposited waste materials used to form the embankment and raised ground levels towards the south-west boundary of the site at the site entrance and adjacent to the Cairnlaw Burn watercourse along the western boundary of the site, in so far as the works do not comply with the terms of planning permission 08/00443/FULIN, from the land;
4. Remove the pipe and associated waste materials used to form a culvert on the Cairnlaw Burn near the shoreline from the land.

d) The notice sets out that the time period allowed for compliance is to be two months from the date that the notice takes effect.

## Reasoning

1. The appeal against the enforcement notice was made on grounds (b), (c), (f) and (g) as provided for by section 130(1) of the Town and Country Planning (Scotland) Act 1997, which are to the effect that:

- (b) The matters which are alleged to be a breach of planning control have not occurred;
- (c) There has been no breach of planning control;
- (f) The steps for compliance are too onerous; and
- (g) The time allowed for complying with those steps is too short.

I will deal with each of these grounds of appeal in turn, and in reaching my findings I will apply the test of the balance of probabilities.

*The appeal on ground (b)*

2. With regard to ground (b), from the evidence of my own site inspection, together with the photographs submitted by the council for the purposes of the appeal, I find that it is clear that a large volume of inert waste materials have been brought to the site and deposited on it. From the evidence of the photographs submitted by the council, I accept that the deposited materials along the shoreline had the appearance of a bund at that time.

3. I noted at the time of my site inspection that these deposited materials had been consolidated to form an extension to the land along the shore and an embankment facing onto the shore. While I have since been informed by the appellant that the deposited material along the shore has been removed by tides and storm conditions, the matter before me concerns the position at the time of the notice being served. Accordingly I find, in respect of the material deposited along the shoreline, that the matters constituting the breach of control alleged by the notice have occurred.

4. Similarly, both from my observations on the site inspection and from the photographic evidence submitted by the council, I am satisfied that waste materials as described in the notice have been imported to and deposited within the site near its south-western boundary. This has extended the raised level of the ground leading from the public road, and has formed a new embankment which is set back from the burn and leads towards the shore.

5. Although the alleged culverting of the watercourse was not evident at the time of my site inspection, the council had submitted photographs with its appeal documents which showed that a culvert had been formed by the use of a pipe to enable water to pass through what was effectively a weir comprising mainly rocks and gravel, and which also carried a track across the burn. As my consideration of the appeal relates to the position at the time the notice was served, rather than at the date of my site inspection, I am satisfied on the basis of the photographic evidence submitted that the culverting of the watercourse had also taken place.

6. I therefore conclude that the matters specified in the enforcement notice have occurred. Accordingly, the appeal on ground (b) fails.

*The appeal on ground (c)*

7. I next turn to the appeal on ground (c), to consider whether these matters constitute a breach of planning control. The appellant's possession of a waste licence from the Scottish Environment Protection Agency does not obviate the need also to obtain planning permission, where this would be necessary. A specific planning permission has neither been sought nor obtained for any of these matters, and this is not disputed. However I must also consider whether any of these matters fall within any permitted development rights, or are permitted as a result of an existing planning permission for a separate development.

8. Planning permission for the erection of two houses on the appeal site was granted in October 2011 (Ref: 08/00443/FULIN). It was due to expire in October 2014, unless the development had been commenced by then. In granting the planning permission the council had imposed a planning condition which stated that no development was to commence until the approved access road was completed. The council now contends that, because the access road was not completed by October 2014, the planning permission has lapsed.

9. However it is clear from the approved plans which were submitted and approved as part of that planning permission, that the provision of the access road was an integral part of the development applied for, and for which planning permission was granted. If a material operation which is comprised in that approved development has been carried out before October 2014, then the planning permission for the erection of the two houses has itself been commenced. This would be despite the terms of the planning condition imposed by the council, which implied that the access road was not part of the approved development.

10. The officer's report on the planning application had confirmed that construction of the access road would be through a former quarry and involve considerable fill material. It is clear from the submissions that the importing and depositing of waste materials on the south-west side of the appeal site did take place prior to October 2014, and the council's enforcement team recorded that it was brought onto the site for the purpose of constructing the access road. In referring the case to the enforcement team, the planning officers had recorded that the fill material had been deposited outwith the boundary of the approved access road, and the owner had been advised to re-instate the site and complete the construction of the access road. The appellant has confirmed that the deposited material in this area is intended for the construction of the access road.

11. From the evidence of my site inspection, together with the submitted photographs, I find firstly that some of the material deposited to the south-west of the site is consistent with the works required for the construction of the two houses for which planning permission has been granted. In that respect, it constitutes a material operation in the construction of the access road which is comprised in the approved development. As the depositing of the material for that purpose was carried out before October 2014, I conclude that it was authorised by the planning permission then and, as a result, for the reasons explained above, I also find that this planning permission has not lapsed.

12. However, I also find that the materials deposited in this part of the site extend beyond what is necessary for the construction of the access road. Planning permission has not been granted for that additional element. Given its proximity to the Inner Moray Firth Special Protection Area, there are no permitted development rights which would be applicable, including those which relate to the improvement of agricultural land or the making of farm tracks, as has been suggested by the appellant. To that extent, therefore, the importation and depositing of that material constitutes a breach of planning control.

13. I now turn to the material deposited on the foreshore and the culverting of the burn. Both can reasonably be defined as engineering operations which therefore constitute development. No planning permission has been granted in relation to these elements, whether for coastal protection or other purposes. The area of foreshore lies within the Inner Moray Firth Special Protection Area, and the burn where the culverting has taken place is in

very close proximity to it. Any proposed developments such as these would require first to be the subject of a habitats regulations appraisal under the terms of the EU Habitats Directive and the habitats regulations, to assess the potential effects on the special protection area. Such an appraisal has not been undertaken. There is also a prior requirement which has not been undertaken for a screening opinion to be sought from the council as to whether the proposed developments would require to be the subject of an environmental impact assessment.

14. In these circumstances, no permitted development rights can apply, including in relation to the construction of a boundary wall, as the works on the foreshore has been described by the appellant. I therefore conclude that both the importation and depositing of that material on the foreshore, and the culverting of the burn, constitute breaches of planning control.

15. The appeal against the enforcement notice on ground (c) therefore succeeds only to the extent that the importation and depositing of material towards the south-west of the site is consistent with the construction of the access road required to implement the planning permission granted for two houses within the site.

16. I note that this conclusion is consistent with the steps for compliance in this part of the site which have been specified by the council in enforcement notice. These require the removal of the deposited waste materials “in so far as the works do not comply with the terms of planning permission 08/00443/FULIN”. In these circumstances I consider that it would be appropriate to amend the description of the breach of planning control to be consistent. I am also satisfied that doing so would not be prejudicial the appellant.

17. In all other respects, however, I conclude that the appeal on ground (c) fails.

#### *The appeal on ground (f)*

18. I am now required to address the appeal on ground (f), to consider whether the steps for compliance specified in the notice are excessive, and less onerous steps would be sufficient to remedy the breach of planning control.

19. Given that the importation and depositing of the inert waste material on the foreshore is in breach of planning control, I consider that the requirement for this to cease, and for the deposited material which formed the shoreline bund to be removed, are steps which are both necessary and reasonable in order to remedy the breach. Although it has been stated subsequently that wave action may have removed this material in the course of this appeal, that is not relevant to my consideration of the steps specified in the enforcement notice.

20. Similarly I am satisfied that the requirement to remove the pipe and waste materials used to form the culvert on the Cairnlaw Burn near the shoreline is a necessary step to remedy the breach of planning control related to the culverting of the burn. Again, it is not relevant to my consideration of whether the steps specified in the enforcement notice are excessive, that they may already have been undertaken prior to the date of my site inspection.

21. Finally, with regard to the materials deposited towards the south-west of the site, I note that the steps specified in the notice by the council would allow the retention of the material that is required for the construction of the access road which forms part of the development of two houses, as it is authorised by planning permission ref. 08/00443/FULIN. I consider that to be appropriate, as I have found that, to the extent that the depositing of waste materials in this part of the site is consistent with works required for the construction of that road, it is also not a breach of planning control and the planning permission, as a result, has not lapsed.

22. However I am satisfied that the requirement to remove all the rest of the deposited materials in this part of the site is necessary to remedy the breach of planning control which has occurred through the depositing of additional waste materials in excess of that required to form the access road.

23. The appeal on ground (f) therefore fails.

*The appeal on ground (g)*

24. Finally, under this ground of appeal I am required to consider whether the time allowed for compliance is too short. The enforcement notice allows a period of two months within which the steps for compliance are to be carried out. This includes the six week period within which an aggrieved party may lodge a court challenge to this decision. The removal of the materials from the site involves work of a significant scale which is likely to require the use of heavy plant and vehicles, and consideration of potential safety issues.

25. In these circumstances I agree that two months is too short a period, and I consider that it should be extended to nine months, which should provide sufficient time to enable the work to be specified, organised, and undertaken. To that extent, therefore, the appeal on ground (g) succeeds.

*David A. Russell*

Principal Inquiry Reporter