

The Highland Council
Planning, Development and Infrastructure Committee
11 May 2016

Agenda Item	14
Report No	PDI 31/16

Housing in the Countryside

Report by Director of Development and Infrastructure

Summary

This report presents current issues being experienced in relation to housing in the countryside within pressurised development areas (Hinterland areas). The Council's current policy approach has undergone scrutiny through two recent planning appeals which concluded that the use of legal agreements to tie a new house to the operational land that justifies the house conflicts with national policy. This report outlines a number of options and a recommended way forward for handling planning applications for housing in the countryside in Hinterland areas.

1. Background

- 1.1 This report sets out options and a recommended way forward for handling planning applications for housing in the countryside in Hinterland areas. The Council's current policy approach has undergone scrutiny through two recent planning appeals. In light of these cases Scottish Government Reporters have indicated that the use of legal agreements to tie housing development to the land that justifies the development is contrary to national policy. The Council's Development Plan policy approach therefore needs to be re-assessed, and to consider the implications for housing and croft house proposals in Hinterland areas.
- 1.2 The existing Development Plan policy framework for determining proposals for new housing in the countryside in Hinterland areas is set out within Policy 35 of the Highland-wide Local Development Plan (HwLDP), adopted April 2012. Further detail is contained in the associated Housing in the Countryside and Siting and Design Supplementary Guidance (SG), adopted March 2013. This report exclusively relates to housing proposals within Hinterland areas. These are shown in **Appendix 1**.
- 1.3 Within the Hinterland areas there are ongoing pressures for housing development. The HwLDP identifies Hinterland areas in order to safeguard against the impact that such development can have, such as landscape impacts, unsustainable growth in car based commuting and erosion of land for traditional agricultural uses. Policy 35 "Housing in the Countryside (Hinterland Areas)" highlights a presumption against new housing in the open countryside of the Hinterland subject to a number of exceptions listed in the Policy.

- 1.4 The SG offers further advice on how the Policy is applied. In a limited number of circumstances planning permission for a house in the Hinterland area may be granted subject to a legal agreement tying the house to the operational land holding that has justified its approval, for example where planning permission for a house is justified to support a rural business or land management (including croft houses). This approach has served the Council well for many years, helping to ensure that the house is not sold off separately from the operational land concerned, and therefore limiting the potential for the proliferation of housing in the countryside.
- 1.5 There is also a clear distinction to be drawn between general housing and business proposals and proposed croft houses. The Crofting Commission are a statutory consultee for planning applications on croft land and have advised that a succeeding crofting family have the right to a house on their croft. However, in certain instances this has led to the creation of multiple homes on crofts that have been sub-divided. In such instances, the Crofting Commission is in a position to advise on the operational need for a house on a croft. The Council actively promotes and encourages crofting, however there are clear differences in circumstances between crofting in remote and rural areas, and for proposals within Hinterland areas where there are significant development pressures.
- 1.6 Section 2 of this report outlines how the existing planning policy framework is operating, Section 3 identifies the options available and Section 4 outlines the recommended approach. Implications for the Council are set out in Section 5.

2. Existing Planning Policy Framework

- 2.1 Recent statistics, set out within the [HwLDP2 Monitoring Statement](#) Table 4-4, indicate that HwLDP Policy 35 is generally achieving its objectives, with around 90% of housing completions in areas with an associated Hinterland taking place within the defined settlement boundaries of Inverness and Fort William. The remaining 10% equates to around 80 homes per annum being built in the Hinterland areas surrounding Inverness and Fort William. Almost all of these homes (97%) are located within the Inverness Hinterland area.
- 2.2 The use of legal agreements for both new croft houses and other houses justified by an agricultural need has recently been challenged on appeal. Applicants have relied upon the associated cost, title burdens and the potential availability of finance as grounds supporting their appeals. The Council engaged with the Council of Mortgage Lenders (CML) and individual mortgage lenders to investigate this issue. Feedback indicates that the imposition of a legal agreement, which ties the house to the working of the land, could deem certain properties unsuitable for mortgage purposes. This is despite the Council highlighting the presence of a release clause, which allows a Section 75 (S75) obligation to be discharged in the event of re-possession and sale of the property.

- 2.3 The CML highlighted that the presence of the release clause in the S75 agreement addresses their legal requirements, to ensure clear title if selling the property. However, the CML also explained that the willingness of lenders to lend will be influenced by the individual circumstances of each applicant, both in terms of their ability to pay, as well as the individual characteristics of the relevant site. This includes consideration of the imposition of a legal agreement which can be perceived by lenders to have an adverse impact on the potential resale value of the property.
- 2.4 In cases where the property owner is in financial difficulties, the presence of a legal agreement restricts the sale of the house separately from the land unless the lender re-possesses the property. Lenders therefore consider this scenario to result in a property valuation based upon “forced sale value” as opposed to “market value”. The end result has been instances where lenders have been unable to identify an active market for properties, resulting in mortgages not being attainable.
- 2.5 Lenders have offered one potential solution in that the imposition of a legal agreement which restricts the occupancy of the property to agricultural workers, or those with a land related interest, could meet their concerns and would not preclude finance being available. However, this suggested approach is in clear conflict with national planning guidance as set out later in this report.
- 2.6 The inability of applicants to secure funding has resulted in two planning appeals being allowed by Scottish Government Reporters. These recent appeal decisions both relate to housing in the Hinterland proposals: the first a planning appeal against the refusal of planning permission (Scottish Government reference [PPA-270-2133](#) allowed 26 October 2015), and the second a planning obligation appeal against the refusal to discharge an existing S75 agreement (Scottish Government reference [POA-270-2005](#) allowed 17 February 2016). In both cases Reporters acknowledged the financial limitations associated with legal agreements which tie a house to operational land. The second appeal decision notice concluded that the use of legal agreements which prevent access to normal domestic mortgage finance was unreasonable and therefore failed the test of reasonableness in the Scottish Government Circular 3/2012: “Planning Obligations and Good Neighbour Agreements”.
- 2.7 In an effort to resolve this matter, advice was sought from the Scottish Government’s Chief Planner and Chief Reporter.
- 2.8 The Chief Planner’s letter of 21 January 2016, provided at **Appendix 2**, stated that the Scottish Government’s policy on the use of occupancy restrictions is as set out in paragraphs 81 and 83 of Scottish Planning Policy (SPP), published June 2014, and in paragraphs 49 to 51 of Circular 3/2012, published December 2012. This makes clear that: “...*imposing restrictions on use are rarely appropriate and should generally be avoided*”. The Circular also states that such restrictions “...*can be intrusive, resource-intensive, difficult to monitor and enforce and can introduce unnecessary burdens or constraints*”.

The Chief Planner agreed that: “...neither SPP or the Circular deal explicitly with the use of restrictions on the disposal of land which seeks to tie a dwelling house to the relevant operational land holding, nonetheless I consider these policy concerns also arise in such cases”. This advice follows on from the former Chief Planner’s 4 November 2011 letter, which was reported to the 18 January 2012 Planning, Environment & Development Committee, that agreed with the continued use of legal agreements in limited circumstances as described within paragraph 1.4 above.

2.9 More recent correspondence from the Chief Reporter also confirmed that: “I also agree that there is a difference between an occupancy restriction and a planning obligation to prevent the separate disposal of a croft house from the holding with which it is associated.” This is an important distinction which is inconsistent with the position taken by Reporters in the two recent planning appeals. This offers a degree of support for the Council’s current approach to the use of S75s, but this needs to be weighed up against government policy and advice.

2.10 SPP is the Scottish Government’s policy on nationally important land use planning matters. SPP post-dates the adoption of the HwLDP and the SG. The part of SPP relevant to housing in the Hinterland areas is:

“81. In accessible or pressured rural areas, where there is a danger of unsustainable growth in long-distance car-based commuting or suburbanisation of the countryside, a more restrictive approach to new housing development is appropriate, and plans and decision-making should generally:

- *guide most new development to locations within or adjacent to settlements; and*
- *set out the circumstances in which new housing outwith settlements may be appropriate, avoiding use of occupancy restrictions.”*

2.11 The Reporters, in their recent appeal decisions, have drawn a parallel between occupancy conditions and S75 agreements that tie a house to operational land. In doing so, the Reporters concluded in these two instances that they consider the Council’s SG not to be compliant with SPP or the Scottish Government Circular 3/2012 which states:

“51. Where the authority is satisfied that an adequate case has been made, it should not be necessary to use a planning obligation as a formal mechanism to restrict occupancy or use.”

2.12 Given the reasoning and outcomes of these two appeal cases, it is likely that the continued reliance on S75 agreements tying the house to the operational land will result in further successful appeals against the Council’s decisions.

3. Options Appraisal

- 3.1 The options for resolving this matter are distinctly different for policy exemptions related to houses justified by an agricultural / business need (Options 1 - 3), and croft houses where the nature of working a croft is not traditionally intended to be a full time occupation. These options are set out below and have been discussed with colleagues in legal services.

Agricultural / Business Need

Option 1 – Maintain Status Quo

- 3.2 To date there have been two appeal decisions which have concluded that the Council's current position is in conflict with national policy. The Council's policy has been in situ for a considerable period of time and has, up until recently, been considered robust. There has been no change in the Council's policy position. There has been no new or recent planning guidance from the Scottish Government on the matter other than the recent appeal decisions. It should however be noted that the Council's SG does pre-date the updated SPP. The Council's policies are being reviewed in response to changes in the regulation of the financial markets and not changes to planning policies. The situation appears to have arisen due to difficulties related to the raising of finance particularly in relation to self build mortgages.
- 3.3 In this context, maintaining the existing approach is still likely to result in a number of successful planning appeals with the Council being potentially liable for applicant's legal expenses. This is a legitimate concern for new planning applications and applications to remove existing legal agreements.

Option 2 – Remove Use of Legal Agreements and Use Planning Conditions

- 3.4 In Aberdeenshire, agreements are still used in very exceptional circumstances but there is a tendency to depend primarily upon the use of planning conditions relating to land use restrictions. Generally, Aberdeenshire's policy approach is akin to Highland's policy approach, focusing on demonstrating the need for one FTE worker for agriculture and directing single houses towards established clusters.
- 3.5 Argyll and Bute Council have also moved away from the use of legal agreements, and instead apply an occupancy restriction planning condition and an informative on planning permission decision notices. Over the past 12 months, this has been acceptable to applicants and lenders.
- 3.6 The risk associated with adopting this approach is that, as opposed to legal agreements which are recorded on the title deeds and therefore enforceable against the owner and successors in title, occupancy conditions are difficult to enforce. It is also likely that, through due diligence undertaken by mortgage lenders, the application of such an approach may also result in instances where mortgages are still unattainable. Given that the use of occupancy conditions is contrary to SPP, any mortgage difficulties are likely to result in

further planning appeals and this approach may only defer this for a limited period of time.

Option 3 – Preferred Approach – Remove Use of Legal Agreements and Adopt More Stringent Assessment Criteria for Siting and Design and Business Cases

3.7 The preferred approach to managing this issue is to remove the use of legal agreements, and instead adopt more stringent planning application assessment criteria to be set out within a revision to the existing Housing in the Countryside and Siting and Design SG. This approach is similar to that used by Perth and Kinross Council and requires the application of two strands of assessment criteria, both of which must be fully satisfied:

3.8 1) Site Selection, Siting & Design - Demonstration of the best possible site selection. This includes the siting and design of every house being appropriate regardless of operational need. Applicants must also demonstrate prior consideration of the scope to renovate, convert or redevelop existing domestic or non-domestic buildings. In the first instance a sequential approach should be pursued to:

- identify if there are any suitable buildings which lend themselves for conversion;
- identify if there are any opportunities for infill, rounding off either related to existing buildings or groupings; and
- identify the most suitable site available to the applicant based on land ownership.

3.9 2) Business Case - The provision of a business case demonstrating the need to accommodate an agricultural worker on site. The strength of the business case must either be reviewed by the Council or the Council's appointed consultants. If the strength of this business case has secured lending for the business this is generally sufficient. For instances where there is doubt surrounding the strength of the business case, further assessment contingencies require:

- reviewing the planning history of the land holding in recent years, focusing on the sale of property which could have housed agricultural workers and the likelihood for further applications for new housing if the application site in question has been sold off through sub-division of the farm;
- submission of evidence in cases of genuine succession of a business;
- for agricultural accommodation, assessment of the size of the house to ensure this remains ancillary in nature in comparison to the main farmhouse; and
- where there remains sufficient doubt, consider the appropriateness of permitting temporary accommodation on site to allow a new business to establish with the view of a fresh application being submitted at a later date once the business is up and running and can fully justify the need for a house on site.

- 3.10 To allow for this approach to be undertaken, all applicants will be required to submit a planning statement. Where appropriate, this may require applicants to display the extent of the entire land holding in order for the assessment to be completed.
- 3.11 This approach may have resource implications for the Council, and longer determination timescales for certain cases, but is considered to be the best option for the Council. It may also help to reduce the instances of lengthy planning appeals. Upholding this assessment process could result in higher refusal rates of planning applications in the short term, however, this is considered a reasonable compromise in order to more effectively manage development in Hinterland areas. Such an approach will also require details of land holdings to be catalogued to inform future application assessments. This will require additional application processing and monitoring resources.

Croft Houses

- 3.12 For croft houses, application of the above approach will be informed through further discussion with the Crofting Commission. Although the Council actively promotes and encourages crofting in rural areas, within accessible Hinterland areas where there are significant development pressures it is recognised that a pragmatic approach is needed which will take time to develop through further dialogue with the Crofting Commission.

4. Recommended Way Forward

- 4.1 For housing in the countryside for an agricultural / rural business, the Council requires the review of the Housing in the Countryside and Siting and Design SG. This will be based upon the information set out within the preferred approach (Option 3) in Section 3.
- 4.2 For croft houses, the review of the SG will include refreshed assessment criteria to be informed through further dialogue with the Crofting Commission.

5. Implications

- 5.1 Resource
It is anticipated that there will be moderate resource implications for the Council, with the Development Plans team having an ongoing requirement to monitor housing completions to gauge how effective the Council's housing in the countryside policies are, particularly within Hinterland areas. There is also likely to be further Officer training requirements for the assessment of business cases, with a potential need to draw upon consultancy support in order to process applications effectively. That said these resource implications are likely to be partly offset by a reduced S75 workload.
- 5.2 Equality and Climate Change/Carbon Clever
It is not anticipated that there will be any equality or climate change/carbon clever implications for the Council.

5.3 Legal and Risk

It is not anticipated that there will be any legal or risk implications for the Council should the preferred approach be progressed. In the event that other options are favoured, this may result in further planning appeals which will be difficult to defend. This could result in successful claims for expenses being awarded against the Council.

5.4 Rural

The direct rural implications arising from this report include increased availability of finance for self build mortgages and the application of more stringent planning assessment criteria for houses and croft houses located in Hinterland areas.

5.5 Gaelic

There are no Gaelic implications arising from this report.

Recommendation

Members are asked to:

- note the recent appeal decisions, advice from the Scottish Government and analysis of the Council's current approach in Section 2;
- review the options presented in Section 3;
- agree the recommended way forward in Section 4 that Officers undertake the task of reviewing the Housing in the Countryside and Siting and Design SG; and
- agree to remove the use of legal agreements, which tie the house to the working of the land, when determining planning applications from this point onwards.

Designation: Director of Development and Infrastructure

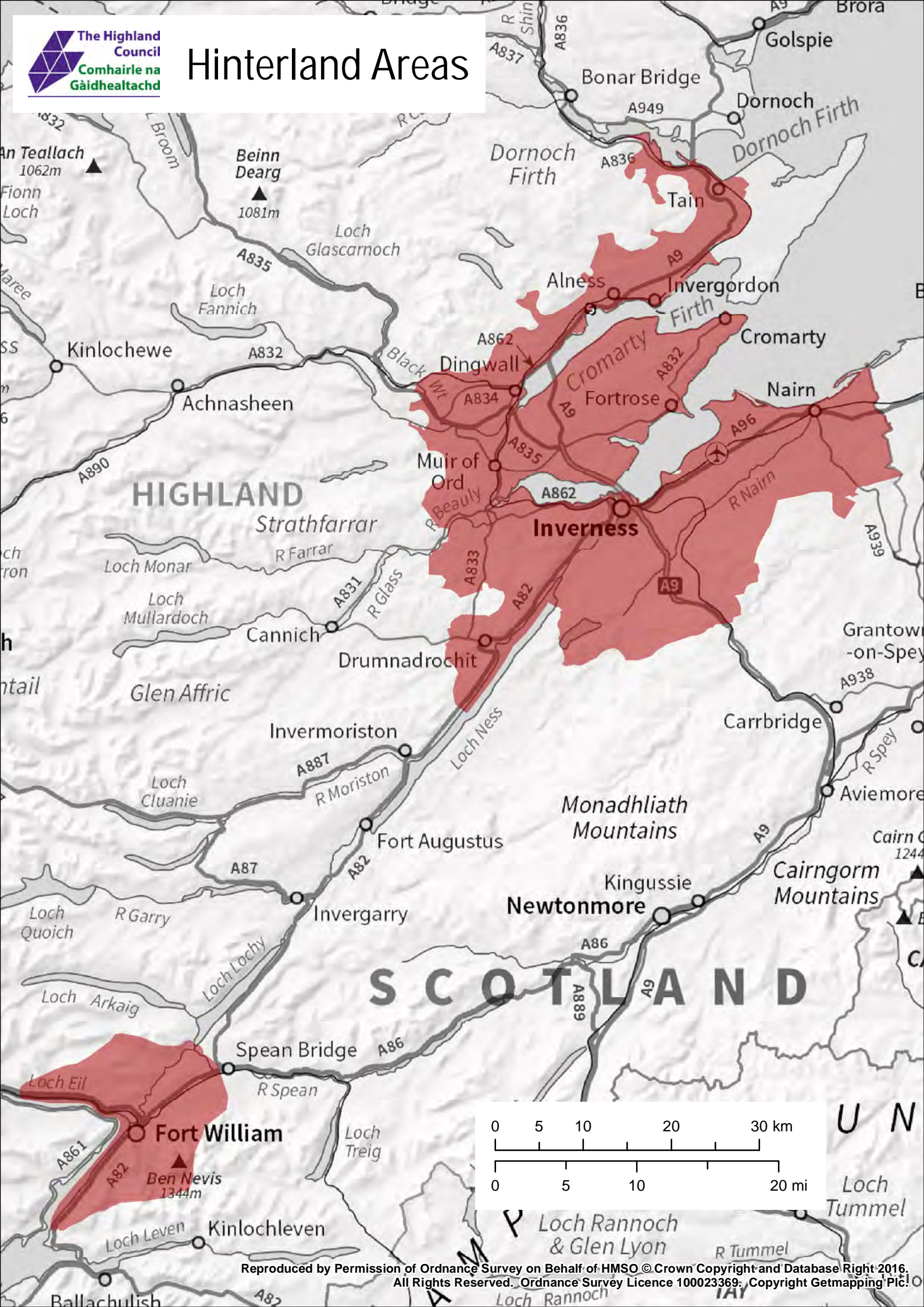
Date: 28 May 2016

Author: Scott Dalgarno, Development Plans Manager

Background Papers:

Appendix 2 Scottish Government Chief Planner's 21 January 2016 Letter

Hinterland Areas



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Malcolm MacLeod
Head of Planning and Building Standards
The Highland Council
Glenurquhart Road
Inverness
IV3 5NX

21 January 2016

Dear Malcolm,

**IMPLICATIONS OF PLANNING APPEAL DECISION ON HIGHLAND WIDE LOCAL
DEVELOPMENT PLAN 2012
PLANNING APPEAL: PPA-270-2133**

Thank you for your letter of 10 December in which you express concern regarding the implications of the above appeal decision. I am also aware of your more recent exchanges with the Chief Reporter on this matter.

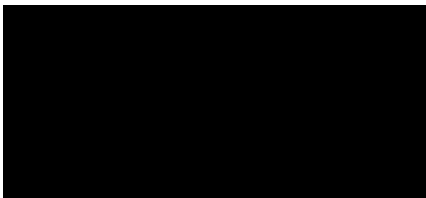
As you know, Scottish Government policy on the use of occupancy restrictions specifically is set out in paragraphs 81& 83 of SPP and in paragraphs 49 to 51 of Circular 3/2012: Planning Obligations and Good Neighbour Agreements¹. The latter translated into policy advice which was previously contained in the then Chief Planner's letter of 4 November 2011, on Occupancy Restrictions and Rural Housing.

Circular 3/2012 make clear that S.75 Planning Obligations imposing restrictions on use are rarely appropriate and should generally be avoided. This approach is reflected in SPP. In particular the Circular sets out the the Scottish Government's view that such restrictions '*can be intrusive, resource-intensive, difficult to monitor and enforce and can introduce unnecessary burdens or constraints.*' Whilst I agree neither SPP or the Circular deal explicitly with the use of restrictions on the disposal of land which seek to tie a dwelling house to the relevant operational holding, nonetheless I consider these policy concerns also arise in such cases. A particular issue, which you acknowledge in your letter, is the availability of finance from mortgage lenders.

¹ <http://www.gov.scot/Resource/0041/00410382.pdf>

Further, where it is proposed to use a planning obligation for such purposes, it will also be a matter for the Council in the first instance to consider whether such a restriction on the disposal of land can be considered to be a planning obligation under section 75 of the Planning Act which relates to obligations restricting or regulating how land is developed or used.

Yours Sincerely,



John McNairney

Chief Planner