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Decision by Andrew Fleming, a Reporter appointed by the Scottish Ministers

- Enforcement notice appeal reference: ENA-270-2035
- Site address: Land at Croft 4, Upper Inverroy, Roy Bridge, PH31 4AQ
- Appeal by: Ross MacGregor against the enforcement notice dated 3 March 2020 served by The Highland Council
- The alleged breach of planning control: excavation and reprofiling of land and formation/significant upgrade of a track without planning permission
- Date of site visit by Reporter: 11 September 2020

Date of appeal decision: 07 October 2020

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## Decision

I dismiss the appeal and direct that the enforcement notice dated 3 March 2020 be upheld subject to the following corrections and variations.

The notice is to be corrected by amending the text under the heading: 1. THE LAND TO WHICH THIS NOTICE RELATES to read as follows: "This Notice relates to land at Croft 4, Upper Inverroy, Roy Bridge, PH31 4AQ shown within the red line boundary on the location plan submitted by the council on 15 September 2020 ("the land")."

The notice is also to be corrected with the replacement of the location plan included in Schedule 1 with the plan submitted by the council on 15 September 2020.

The notice is to be varied under the heading: 4. WHAT YOU ARE REQUIRED TO DO by deleting the text under "iv" and replacing it with the following: "Surface dress areas within woodland close to the A86 with uncompacted soil to allow natural regeneration of the land."

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.

## Preliminary matters

Land associated with a house and small croft holding to the north of Croft 4, was identified as land related to the enforcement notice. Whilst this land had previously formed part of Croft 4, it was subsequently sold and is now a separate property and landholding referred to as 'Banada'. I therefore issued a further information request and asked the council to



provide a revised location plan to show the land subject to the enforcement notice. The council provided a revised location plan on 15 September 2020 showing the land, within a red line boundary.

The original plan accompanying the enforcement notice is replaced by the plan submitted by the Council on 15 September 2020 and which excludes the land associated with the property referred to as 'Banada'. The description of the land, subject of the enforcement notice, has been amended to reflect this.

## Reasoning

1. The appeal against the enforcement notice was made on the following grounds as provided for by section 130(1) of the Town and Country Planning (Scotland) Act 1997:

c) the matters stated in the notice (if they occurred) do not constitute a breach of planning control;

e) copies of the enforcement notice were not served as required by section 127 of the Act;

f) 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 stated in the notice, or to remedy any injury to amenity caused by that breach; and

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

### Ground e)

2. The appeal has been argued with most force in respect of ground e). I therefore deal with this ground of appeal first before turning to grounds c), f) and g) which I deal with in that order. Section 127(2) of the Act requires that an enforcement notice shall be served on the owner and occupier of the land to which it relates and 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 landowner was identified by the council, for the purposes of serving the notice, as a Mr A MacGregor of Taigh Breagh, Achhabobane, Spean Bridge and the notice was issued by recorded mail and duly signed for by A MacGregor. The use of a first name initial in correspondence is an accepted means of addressing an individual and I do not consider that this creates ambiguity in this case. The fact that the intended recipient signed for the notice clearly demonstrates this point. This notwithstanding that the appellant confirms that his father, Alistair MacGregor, as the owner of Croft 4, is resident at the above address.

4. As per section 127(2) of the Act, the council is of the opinion that the appellant has an interest in the land. In arriving at this opinion, the council references the siting of caravans upon the land, subject of a separate enforcement action, and references discussions about the storing of a bin lorry on this land by the appellant. These references

represent, what I consider, to be interest in the land, materially affected by the notice. Whilst I acknowledge that the appellant does not reside at the address referred to in the notice, I consider that the council used its best endeavours to serve the notice on the appellant. This included emailing the notice to the appellant's agent, requesting that the notice was forwarded to the landowner and the appellant. I consider this a logical approach, particularly given that the appellant had previously been copied into email correspondence between the agent and the council in respect of the works subject of this enforcement notice.

5. In light of the above, I am satisfied that the appellant had notice of the works subject of the breach to which the enforcement notice related and that all those with an interest in the land were properly served with the enforcement notice. The appeal on ground e) therefore fails.

Ground c)

6. The appellant advises that Croft 4 historically had two access points, one to the north and one to the south and that land at the northern end of the croft contained an agricultural access running down the western boundary. I noted during my site inspection that from the turning head at the end of the single track road serving Upper Inverroy, there is a short section of track, formed by compacted hardcore. This provides access to Croft 4 and also vehicular access to the property referred to as 'Banada'.

7. Whilst there may previously have been sections of informal track along the western boundary of Croft 4 i.e. grassed areas worn down by vehicle tyres, the council's photographs (May 2019) do not show any obvious signs of a track along the western boundary of Croft 4. The area west and south of the croft land associated with 'Banada' appears in the photographs as rough grassland comparable with the agricultural land on the eastern side of the croft. The photographs showing the middle section of the croft, similarly, do not include any obvious signs of a track running along its western boundary. The photograph taken from the A86 to the south looking towards the southern access gate shows woodland and undergrowth and depicts an entrance which is overgrown and appears unused with undergrowth and trees.

8. Beyond the property 'Banada', the land along the western boundary of Croft 4, has been excavated and base material imported, clearly with the intention of forming a track where previously there was a field. Significant excavation and reprofiling work has been undertaken near the southern edge of croft land associated with 'Banada'. During the site inspection, there was a significant amount of standing water in the low lying part of the excavated area, the result of heavy rainfall, soil conditions and the extent of excavation works. I noted that the land on the eastern side of the excavated area, near to two caravans, was being used to store the excavated material.

9. The excavation and reprofiling extends along the western boundary of Croft 4 into the middle section of the land holding with the excavated material stored to the eastern side of the works. The ground has been significantly excavated in this area with the excavated ground level, significantly lower than that of the surrounding croft land. An extensive area has been excavated and levelled and this coincides with the proposed siting of an agricultural building, the subject of an application for Prior Notification. As demonstrated in

the council's photographs, the middle section of the croft was previously an open grass field.

10. The southern section of the croft has also been subject to significant ground excavation and reprofiling, clearly for the formation of a track. As with the other sections, the ground has been excavated and reprofiled and soil heaps stored on the eastern side of these works. Several trees have been cleared in order to create space for the track linking with the access gate and A86 road. The reprofiling of the land is also significant in this section given that the land slopes steeply down towards the A86. The newly created ground levels in this section are in part significantly lower than that of the adjacent crofting land. The council photograph shows the tree cover and undergrowth that previously existed at this southern end of Croft 4 and this has been substantially altered as a result of the works.

11. In light of the material before me and based on my observations during my site inspection, I consider the works carried out involve more than simply the maintenance or improvement of a private road or private way. In turn, Class 18 of the Town and Country Planning (General Permitted Development) (Scotland) Order 1992 (as amended) is applicable to this type of development. This Class permits the formation, alteration, or maintenance of private ways on agricultural land comprised in an agricultural unit provided this is necessary for the purposes of agriculture within the unit. Amongst other things, in order to benefit from the permitted development rights of this Class, the developer must before beginning the development, apply to the planning authority for a determination as to whether the prior approval of the authority is required in respect of the design, manner of construction or route of the private way.

12. I am satisfied that the council was not contacted prior to any of the works being carried out and no application for Prior Notification was submitted to the council before these works commenced. I consider that the works involving excavation and reprofiling and the formation/ significant upgrade of a track represent unauthorised engineering operations in breach of planning control. I am satisfied that a breach of planning control has occurred and the appeal on ground c) therefore fails.

Ground f)

13. The appellant considers the requirement to grub up areas within the woodland close to the A86, to allow natural regeneration of the land, potentially damaging to trees in the vicinity. According to the appellant, this action risks further disturbance to tree roots alongside the excavations already carried out. I noted during my site inspection, the extent of the excavations and that this had impacted on trees in the southern section of Croft 4, towards the A86. I also noted that there are a significant number of mature trees in this part of the Croft. I agree that works likely to cause further damage to trees here should be avoided. The council is supportive of avoiding further damage to tree roots and has suggested an alteration to paragraph 4 (iv) of the notice as a result. I am satisfied that the council's suggested alteration to paragraph 4 (iv) of the notice is appropriate.

14. The appellant accepts that the works in the southern section should be reinstated as per the requirements of 4 ii) and 4 iii) of the enforcement notice and directs me to the application for Prior Notification currently with the council. However, I am mindful that this

application for Prior Notification is for the development of an agricultural building on Croft 4 and was submitted to the council after the works, subject of the enforcement notice, were carried out. This application process does not take account of the works carried out which I have found, above, to represent unauthorised engineering operations in breach of planning control. It is not part of my remit nor is it within my power to grant planning permission for the works, subject of this enforcement notice. In the absence of planning permission, I consider that the requirements set out in paragraph 4 of the notice (excepting the variation to paragraph 4(iv)) provide a reasonable remedy to the breach of planning control that has occurred. The appeal on ground f) therefore fails.

#### Ground g)

15. The appellant accepts that the works, required by the notice, would normally be possible to complete within a two month period. However, the appellant considers this time period unreasonable given the need to secure the services of an alternative machine operator and excavator and due to the restrictions on travel and working practices in response to the COVID-19 pandemic.

16. I accept that securing the services of alternative machine operators and excavators might take additional time. However, that, ultimately is a decision for the landowner and not something I can concern myself with. I acknowledge that, at the time the notice was served, restrictions put in place by the Scottish Government meant it was not possible to comply with the requirements of the notice. That said, the most recent Scottish Government Coronavirus (COVID-19) guidance does not prevent outdoor work such as that necessary to comply with the requirements of the notice. I am satisfied that the works required would be capable of being carried out within the two month period. Therefore, I do not consider that the time allowed in the notice for carrying out the various works is unreasonable. The appeal on ground g) therefore fails.

17. Land associated with 'Banada' was identified as land related to the enforcement notice although the owners of this property were not served with the enforcement notice. As per the 'Preliminary matters' above, at my request, the council provided a revised plan for the land subject to the enforcement notice, excluding land associated with 'Banada'. I am satisfied that no party would suffer injustice from the correction of this enforcement notice.

18. I have taken account of all the matters raised in the submissions but find none that outweigh the considerations on which my decision is based.

*Andrew Fleming*

Reporter