



Town and Country Planning (Scotland) Act 1997 Appeal Decision Notice

Decision by Robert Seaton, a Reporter appointed by the Scottish Ministers

- Planning appeal reference: PPA-270-2296
- Site address: land 35 metres north of Birdston, Kirkhill, IV5 7PG
- Appeal by Dipper Developments Ltd against the decision by the Highland Council
- Application for planning permission 21/03060/FUL dated 22 June 2021 refused by notice dated 4 December 2023
- The development proposed: Change of use of site from storage and distribution (landscaping and construction operations (class 6)) and office (class 4) to include storage and distribution for leisure equipment including caravans, campervans, boats and kayaks
- Application drawings listed in schedule
- Date of site visit by Reporter: 4 April 2024

Date of appeal decision: 17 June 2024

Decision

I allow the appeal and grant planning permission subject to the seven conditions listed at the end of the decision notice. Attention is drawn to the two advisory notes at the end of the notice.

Preliminary matters

By effect of the Town and Country Planning (Use Classes) (Scotland) Order 1997 and section 26(2)(f) of the Town and Country Planning (Scotland) Act 1997, a change of use of land from one use to another use within a single use class is not development and does not require planning permission. The existing use of the site appears to fall into class 6 (storage and distribution). Although there is also a (probably ancillary) class 4 office use on part of the site, I do not understand any change of use is proposed in respect of it. I raised the question with parties whether these provisions applied to the proposed change of use in the present case such that planning permission was not required. The planning authority responded that planning permission was required for the proposed change of use. The appellant did not specifically respond on this point, but the necessary implication of its having made the application and appeal is that it considers permission is required. It may be that the proposed use falls outwith use class 6. I therefore have not considered this point further and proceed on the basis that planning permission is required for the proposed use.

Reasoning

1. I am required to determine this appeal in accordance with the development plan, unless material considerations indicate otherwise. The development plan is comprised of the Fourth National Planning Framework (NPF4) adopted in 2023, the Highland-Wide Local Development Plan (HWLDP) adopted in 2012, and the Inner Moray Firth Local Development Plan (IMFLDP) adopted 2015. The IMFLDP states that the HWLDP contains

the general policies for determining planning applications in the Highlands. I do not understand any other element of the IMFLDP to be directly relevant to determination of the appeal.

2. The council's reasons for refusal refer to HWLDP policy 28 on sustainable design. Given the issues raised in respect of transport, amenity and fire safety, NPF4 policies 13 (on sustainable transport), 14 (on design) and 23 (on health and safety) also come into contemplation. The council's committee report mentioned a number of other policies including NPF4 policy 26 (business and industry), policy 29 (rural development), policy 22 (flood risk), and HWLDP policy 29 (design quality and place-making), policy 42 (previously used land), and policy 64 (flood risk). The council does not suggest that the proposed development is contrary to any of these policies. The committee report appears to suggest that the proposed development may be contrary to HWLDP policy 41 (business and industrial land). Given that the appeal site plainly accommodates an existing employment use, I disagree with the committee report on this point. The proposed development accords with HWLDP policy 41. No other provision of the development plan has been drawn to my attention as determinative in the appeal.

3. Having regard to the provisions of the development plan and the representations made, the main issues in this appeal are:

- The proposed development's impact on road safety, in particular in respect of the junction between its access and the public road, but also in respect of the effect of additional traffic on the fabric of the public road arising from the new use and on the safety of pedestrians, cyclists and equestrians on the public road.
- The impact of the proposed development on the amenity of neighbouring houses (in terms of its visual effect, noise and light in particular).
- The fire risk that storage of caravans at the site represents.

4. The application states that it is for storage and distribution of leisure equipment including caravans, campervans, boats and kayaks. I understand that this description also comprehends the mobile trailers in which boats and kayaks may be stored. For brevity, I will refer to all caravans, campervans, boats and kayak trailers all as "caravans" in this decision, except where I need to refer to any particular type of item to be stored at the site.

The existing use as a consideration

5. I have little information on the degree of intensity of the existing use. It appeared to me on my site inspection that the appeal site is not used particularly intensely at present, or was not on the day of my inspection, at least. There was some road salt on a small area in the south east of the site. The appellant informed me that there had been more, but that it had been collected that morning. Otherwise the yard at the appeal site was largely vacant, though there was a variety of equipment being stored at the north end of the yard, beyond the application boundary. I did not inspect inside the warehouse.

6. Even if the present intensity of the use is low, since the use falls within use class 6, the intensification of the existing use would not require planning permission. Similarly, any change to another more intense use within class 6 would not require permission. As the council's planning officer has acknowledged, the established use and the range of uses to which the site could be put without the requirement for planning permission are a material consideration.

7. Essentially this means I should take into account in my decision that certain of the issues raised by the council and objectors in respect of the proposed use are either existing issues (they are associated with the current use) or they could arise or could arise more frequently in association with a more intense use of the site or a lawful change of use within class 6 without any requirement for planning permission.

Effect on the road and road safety

8. The council's transport-planning team objected to the proposed development on the basis that the proposed new use would generate more vehicular trips than the current use, that the C1102 public road was not suitable for such a considerable increase in traffic, that there would be an impact on vulnerable road users (such as pedestrians, cyclists and equestrians), and that there was insufficient evidence to demonstrate that visibility splays in line with council guidance could be delivered.

Traffic likely to be generated by the proposed development

9. The proposed use would replace the existing use, which already involves heavy vehicles entering and leaving the site. The transport-planning team's objection was based upon the appellant's proposal that up to 400 caravans should be stored at the site. The appellant is now proposing that the use should be restricted to 110 spaces. The reduced intensity of use now proposed must necessarily reduce concern about the amount of additional traffic on the road and the weight of the traffic somewhat. Nonetheless, it does seem likely that the proposed use would put more traffic, and most likely more heavy traffic, on the road than the current use at its present level of intensity.

10. The appellant estimates that from April to October each of the caravans stored at the site would enter and leave the site four times. While this estimate is really not much more than an informed guess, it does not seem an unreasonable one. Similarly, the estimated peak of 30 vehicle movements a day in that season (assuming entering and leaving the site is counted as two movements) would involve removal of ten to fifteen percent of the caravans stored. This also seems a reasonable estimate.

11. It seems likely to me that almost all traffic to and from the proposed development would travel along the section of the C1102 from the A862 to the site entrance (in both directions). It is unlikely much traffic to the site associated with the proposed development would come up the C1102 from the south.

The condition of the C1102 and the proposed development's impact on its fabric

12. The C1102 is a relatively narrow country road, though it is sufficiently wide between the A862 and the appeal site for two cars to pass. The road is narrow enough, though, that a large car may have to exercise some caution in passing a heavy vehicle. There are no formal passing places, so in such circumstances, it seems possible that vehicles will sometimes enter the soft verge or will use the drive entrances at the site or of the houses near the site to allow heavy vehicles travelling in the opposite direction to pass. On my site inspection, I did see some evidence of vehicles having entered the verge.

13. The C1102 is a public road. It can be used by any vehicles that are licensed to travel on a public road. This includes heavy vehicles. The law limits the axle weight of vehicles licensed to travel on public roads. A campervan or a lorry carrying a boat or caravan would not put any more weight on the road at any axle than any other heavy vehicles licensed to travel on public roads.

14. The road connects a number of farms to the A862. On the day of my site inspection, I saw that it was used by some heavy agricultural equipment. There is commercial forestry to the south. I saw that the road was used by vehicles associated with forestry. The evidence indicates that the school bus uses the road. There is a bus stop just south of Moniack Bridge. And the road is used by heavy vehicles associated with the current lawful use of the appeal site, including those that moved the road salt from the site. There is therefore some use of the road by heavy vehicles at present. There is no precise estimate before me of how much the proposed development would increase the number of heavy vehicles on the road or what the percentage increase might be.

15. While some of the vehicles to be stored in the proposed storage area (such as campervans or vehicles carrying mobile lodges or boats) or and some vehicles that might bring items for storage would be heavier vehicles, it seems unlikely that most or even a large part would be. The appellant states that many of the vehicle movements to and from the site would be of owners in private cars arriving to collect their caravans or leaving having delivered their caravans. I accept that this would be the case.

16. As regards the impact of traffic generated by the proposed use on the road's fabric, the council (as roads authority) has power under section 96 of the Roads (Scotland) Act 1984 to recover certain expenses from the operator of traffic on the road. It can do so where, having regard to the average expense of maintaining the road (or other similar roads in the area) extraordinary expenses have been incurred by the council in maintaining a road by reason of damage caused to it by excessively heavy (or other extraordinary) vehicles or traffic. In such circumstances, the council has power to recover from an operator in consequence of whose orders the vehicles or traffic have been on the road so much of the expenses of maintenance as is likely to be attributable to that damage. It appears to me that the council could apply this section to recover any extraordinary expenses arising from the proposed use. A survey of the road can be required by planning condition before the proposed use is commenced, so that the council can identify the baseline state of the road.

17. Therefore I do not find that the impact of the proposed development on the road fabric is a consideration that weighs heavily against the proposed development.

Visibility and road safety at the site junction with the C1102

18. The appellant has provided a plan showing visibility at the junction of its site with the C1102. The visibility splay both north and south of the junction runs through land that is not in the appellant's control. To the south, the splay runs through the garden of Westbrook where there is vegetation that partially limits visibility. If the vegetation was removed, the visibility would most likely be sufficient, but the garden of Westbrook is not within the appellant's control. It is somewhat unsatisfactory at present for a vehicle emerging from the junction, particularly given that vehicles on the C1102 are permitted to travel at the national speed limit. To the north, the splay runs through the garden of Birdston, where there is presently little obstruction of visibility (other than the negligible impact of a post-and-wire fence and some small bushes noted by the council), though it is possible that that might change.

19. The inadequacy of visibility to the south at the junction is an existing inadequacy and the risk involved is an existing risk. The intensification of the site's use would make an accident more likely to occur as a result of the inadequacy of the visibility. However, the site's use could intensify anyway without the need for planning permission.

20. It is evident that the site has been used for storage and distribution for some considerable time, and before that was used as a fish hatchery. The appellant states that articulated lorries presently enter and leave the site as part of the present use, and no other party has suggested that is incorrect. Notwithstanding the partial restriction on visibility to the south, no evidence has been submitted by any party of any specific accident or near-miss having occurred at the site entrance.

21. It was suggested to me on my site inspection that the owner of Westbrook might reduce visibility further by growing a hedge along the boundary. Since Westbrook shares the access onto the C1102 with the appeal site, and by growing a hedge the owners would be restricting their own visibility at the junction, that would not seem a sensible thing to do. In any case, it is a problem that could arise with the existing use as much as for the proposed use. Similarly, as regards visibility across the garden of Birdston, the possibility that it might be obstructed is also a possibility arising with the existing lawful use.

22. Objectors also raised the possibility that a vehicle might have to wait on the road before turning into the appeal site at the junction. It seems to me that relatively little risk arises from this. Most vehicles that might have to wait to turn into the site are likely to approach from the north. There is good visibility over a long distance along the C1102 for vehicles travelling from the north. If a vehicle is waiting to turn left into the junction, the driver of another vehicle behind it arriving from the north is likely to be able to see it and stop in good time. Where a vehicle arriving from the south is waiting to turn into the site, it will be on the left-hand side of the road. I estimate that another vehicle approaching behind it from the south over the blind summit at Moniack bridge, even taking account of the curve of the road and the vegetation on the inside of the curve, would still have at least 90 to 100 metres to observe a stationary vehicle on the northbound side of the road and stop. The lack of specific evidence of previous accidents or near-misses at the site junction suggests that this distance is sufficient. A similar point can be made about large or articulated vehicles arriving from the north that have to swing out into the opposite lane to enter the site.

23. No steps have been proposed either by the council or the appellant to mitigate the existing risk arising particularly from poor visibility at the junction of the appeal site. There are perhaps actions that the council, as roads authority, could take. The speed limit at present on this section of the C1102 is the national speed limit. There is no warning sign presently on the C1102 south of the site of a hidden entrance ahead. There are no traffic-calming measures. Any or all of these measures might be taken to reduce traffic speeds and limit the existing risk at the appeal-site junction. A mirror opposite the site junction might also mitigate the problem. It is understandable that the council would not wish to permit a development at a new site relying upon a junction that requires a mirror to improve visibility. But in this case, where there is an existing risk arising from inadequate visibility particularly to the south, it might be appropriate to provide a mirror. Given that intensification of the site's existing use could occur without planning permission, it would make sense (whether or not planning permission granted in this appeal is implemented) for the roads authority to consider, together with the site's owner, what steps could appropriately be taken to improve the junction's safety.

The risks to pedestrians, cyclists and equestrians

24. Objectors pointed out that there is a circular footpath, which runs along the Newton Burn from the A862 and then along the western side of the site past Eileantulloch. Walkers who use that path then use the C1102, passing the entrance of the site, to reach Moniack bridge or to pass on towards Reilig Glen.

25. It seems likely to me that pedestrians would mostly arrive at the C1102 either by the minor road over Moniack bridge (which has a footpath at its entrance from the A862 and which is pedestrianised at the bridge) or by the footpath from Kirkhill. Relatively few pedestrians would walk along the C1102 to or from its junction with the A682. It seems to me that the key area in which a concern about pedestrian safety associated with the proposed use of the site is likely to arise is the short section between the junction of the Kirkhill path with the C1102 and the site's junction with the C1102. I saw a large party of walkers pass this way at the time of my site inspection, heading towards Moniack Bridge.

26. It may be that cyclists and horse-riders would arrive at the C1102 by the Kirkhill path or Moniack Bridge road. The C1102 north of the Kirkhill path is not obviously attractive to horse-riders, given that it emerges on the relatively busy A862. It may well be used by cyclists though.

27. It seems to me that any risk to pedestrians, equestrians or cyclists would arise from conflict with vehicles when walking on the road or would be associated with the risk of road accident arising from poor visibility at the site entrance. Both of these risks are existing risks. The proposed development is likely to increase the degree of risk, but – again – that could happen anyway without planning permission if the existing use is intensified.

28. On the day of my site inspection, I found that the grass verges of the C1102 from its junction with the A862 to the junction with the site were relatively flat and accessible. That section of road is straight, with good visibility, over most of its length. The C1102 in the section of greatest concern has a narrow grass verge on its north eastern side. There is room for pedestrians or even cyclists or equestrians to step off the road onto the verge, out of the way of traffic.

29. I have already noted the use of the C1102 by some heavy vehicles. If heavy vehicles on the C1102 present a risk to pedestrians, cyclists and equestrians, then plainly there is an existing risk. No party has submitted evidence of any accident involving pedestrians, cyclists or equestrians on the road in conflict with heavy vehicles. No evidence has been provided of any steps the council, as roads authority, has taken to mitigate the existing risk.

Conclusion in respect of the proposed development's effect on the road and road safety

30. While there is evidently a problem with existing visibility at the appeal site's junction and may be some issue as regards safety of pedestrians, equestrians and cyclists, those problems already exist and may increase in degree without any planning permission being granted in this appeal. I do not consider that the change brought about by the proposed development is unacceptable in terms of road safety or other effects of associated traffic on the road. I do not find the proposed development to be contrary to HWLDP policy 28 or NPF4 policies 13 or 14 in these respects.

Impact on the amenity of neighbouring properties

31. There are three houses immediately neighbouring the site to the south and south west (Lower Achnagairn, Birdston and Westbrook) while Eileantulloch lies to the north west of the appeal site. It is adjacent to land belonging to the appellant and forming part of the appellant's wider existing site, though it does not form part of the appeal site. The houses at Birdston and Westbrook in particular lie close to the site boundary.

32. Concerns were raised about the possibility of nuisance to neighbouring properties from lighting and noise, including noise associated with traffic movements. These are issues that could arise in connection with the site's present lawful use. Should such impacts cause nuisance at present, residents would have to rely on the common law of nuisance and on the statutory provisions on nuisance under part III of the Environmental Protection Act 1990.

33. In respect of the proposed development, the council has proposed conditions limiting the number of caravans that can be parked on the site (which will in turn limit movements that might cause disturbance), a limit on the operating hours so that operations would not take place outside the hours 7 a.m. to 7 p.m., and a requirement for the lighting design to be approved (with a requirement that lights should not be directed outside the site). In the context of a site that has existing permission for class 6 storage and distribution, these protections appear adequate to me. They would also ensure any impact of site lighting on wildlife was minimal.

34. One objector, resident at Eileantulloch, referred to the visual impact of the existing fencing of the appellant's site. I agree that the existing fencing around the site is not attractive and could cause noise in high wind. However, it is associated with the site's present lawful use. The proposed use would not make any difference. The appellant has carried out planting around the site, which will limit the visual impact of the fencing as it matures.

35. The effect of planting around the site edges has also been raised. But the existing planting is not something that requires planning permission. Furthermore, it is associated with the site's existing use, and is not brought about by the proposed development. The question of whether any element of the planting ought to be controlled as a high hedge is not a matter for this appeal.

36. I do not find that the proposed development is contrary to HWLDP policy 28 or NPF4 policies 14 or 23 on the basis of its impact on neighbouring amenity either.

Fire risk

37. Fire risk was a third matter raised by objectors. A wide range of items may lawfully be stored at the appeal site presently under the existing class 6 storage and distribution use. As with the potential impacts on amenity and from traffic discussed above, there could be fire hazard associated such storage.

38. While fire risk, as with other safety concerns, is relevant to planning, other statutory requirements also apply. In particular, part 3 of the Fire (Scotland) Act 2005 requires a person who has control of a site such as the appeal site to carry out an assessment for the purpose of identifying any risks of harm to any person whose safety would be at risk in the event of a fire and to take such fire safety measures as it is reasonable to take to ensure the safety of such people. While the presence of gas canisters and batteries in caravans undoubtedly presents a fire hazard, it is not a hazard that falls among those requiring separate consent under the Planning (Hazardous Substances) (Scotland) Act 1997.

39. The appellant indicates that fire hazard has been considered in the design of the site and proposals for operation of the site. It states that each parking bay will be at least two metres from the boundary and points out that there is a bund and fencing around the boundary. It proposes to impose rules on users of the site requiring gas canisters to be left in a manner that is safe and to reinforce those rules by signage. While the appellant makes

no express mention of providing fire-suppression equipment on site, I have no doubt that that would be a requirement arising from the statutory fire-risk assessment.

40. The imposition of rules on users of the site is not a guarantee that the rules will be obeyed. The appellant has not commented directly on objectors' claims that the separation distance from neighbouring houses, taken together with the bund and fencing at the boundary, is insufficient to protect neighbouring residents from harm. However, it appears to me likely that the separation distance proposed, together with the existing bund and fencing, would be sufficient to reduce the risk to a level that might normally be expected from having an occupied site next door. In any case, it appears to me that items that items presenting the same degree of fire hazard as the proposed storage of caravans can lawfully be stored on the site in its current use, without planning permission being required.

41. On the basis of the measures for fire safety proposed by the appellant and the level of fire hazard that can be brought onto the site under the existing lawful use, I do not find that the proposed development is contrary to HWLDP policy 28 or NPF4 policies 14 or 23 on the basis of its effect on fire risk. Given the statutory duties to which the appellant is subject under the Fire (Scotland) Act 2005, I impose no additional requirements by condition.

Other issues

42. It is acknowledged that the site is within the 1:200-year flood plain. The proposal would not reduce flood storage. It would not increase the degree of flood risk as compared with the present lawful use. Neither the Scottish Environment Protection Agency nor Highland Council's flood-risk-management team have objected. I do not consider flood risk represents an impediment to a grant of permission.

43. Objectors have claimed that the appellant does not have the right to use part of the access road to the appeal site. An application for planning permission can lawfully be made over land not owned by the applicant. Ownership or rights over land are not matters that can be determined in a planning appeal. Even if part of the access road is not lawfully used by the appellant in private law, the current lawful use of the appeal site and access road will remain if the appellant is prevented from using a section of the access road. The appellant may continue to access the site over those parts of the access road that it is entitled to use. It would not, therefore, fundamentally change the considerations to be taken into account in the present appeal.

Conditions

44. The council has proposed six conditions to be attached to permission, should it be granted. I have made two substantial changes to its proposed condition 3: I consider that the parking spaces ought to be marked as shown on the drawing provided, unless the council approves a change, and also that parking of caravans outside those spaces should be prohibited. I have made some other minor adjustments to the wording of the conditions.

45. I have added a further condition, requiring the appellant to provide a photographic survey of the condition of the C1102 from its junction with the A862 to the junction of the site before commencement of the proposed use. This would provide a record of the road's condition should the council, as roads authority, find it necessary to consider using its powers under section 96 of the Roads (Scotland) Act 1984.

Conclusion

46. I find that the proposed development accords with the development plan. No material consideration has been drawn to my attention that would cause me nonetheless to refuse permission. I therefore uphold the appeal and grant planning permission.

Robert Seaton

Reporter

Conditions

1. The development to which this permission relates shall be begun not later than the expiration of three years beginning with the date of grant of this permission.

Reason: Section 58 of the Town and Country Planning (Scotland) Act 1997 requires a condition to be attached to permissions limiting their duration. Three years is the default period set by law and there is no material reason indicating that a different period should be set.

2. The approved use shall not commence unless the developer has first surfaced the first 6 metres of the access from its junction with the public road in a bound and sealed bituminous material.

Reason: In the interests of road safety, to prevent loose material from the current surface being dragged onto the public road, and so that the works involved comply with applicable standards.

3. The approved use shall not commence until 110 parking spaces have been marked out within the application site. The spaces must be marked as shown on the caravan parking layout (drawing reference 2018 067 – 005) unless otherwise approved by the planning authority. Thereafter, all parking spaces shall be maintained for this use in perpetuity. No caravan, campervan, boat or trailer storing boats or kayaks shall be parked and left unattended outwith a parking space.

Reason: To ensure that sufficient space is provided within the application site for the parking (and, where necessary, turning) of vehicles, so they do not have to park within or reverse onto the public road.

4. A vehicle turning area shall be provided within the application site formed in accordance with the Highland Council's Road Guidelines for New Developments. The turning area shall be provided prior to the first use of the development and thereafter maintained as a turning area, free of obstruction, in perpetuity.

Reason: To ensure that sufficient space is provided within the application site for the parking (and, where necessary, turning) of vehicles, so they do not have to park within or reverse onto the public road.

5. No development shall commence until full details of any external lighting to be used within the site and/or along its boundaries and/or access have been submitted to, and approved in writing by, the planning authority. Such details shall include full details of the location, type, angle of direction and wattage of each light which shall be so positioned and angled to prevent any direct illumination, glare or light spillage outwith the site boundary. Thereafter the approved details only shall be implemented and no external lighting shall be used except as approved.

Reason: In order to safeguard the amenity of neighbouring properties and occupants.

6. The development hereby approved and thereafter, any operations on site shall only be carried out between 0700 hours and 1900 hours Monday to Sunday.

Reason: For the avoidance of doubt and in order to safeguard the amenity of occupants of the adjacent properties

7. The approved use shall not commence until a photographic survey of the condition of the C1102 road from its junction with the A862 to the junction with the appeal site has been submitted to the council and approved by the council as adequate for the purpose of providing a record of the road's condition at the time of commencement of the use.

Reason: To provide a baseline record of the condition of the C1102 public road before commencement of the approved use so that the impact on the road of heavy traffic associated with the approved use can be assessed for the purpose of exercise of the council's powers under section 96 of the Roads (Scotland) Act 1984.

Advisory notes

1. **Notice of the start of development:** The person carrying out the development must give advance notice in writing to the planning authority of the date when it is intended to start. Failure to do so is a breach of planning control. It could result in the planning authority taking enforcement action (See sections 27A and 123(1) of the Town and Country Planning (Scotland) Act 1997).

2. **Notice of the completion of the development:** As soon as possible after it is finished, the person who completed the development must write to the planning authority to confirm the position (See section 27B of the Town and Country Planning (Scotland) Act 1997 (as amended)).