

Agenda Item 6

DPEA ref ENA-001-2005
CNPA ref 2023/0018/ENF

Enforcement notice appeal
Decision

Tulquhonie
Carr Bridge
Highland PH23 3NA



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

Decision by Allison Coard, a Reporter appointed by the Scottish Ministers

- Enforcement notice appeal reference: ENA-001-2005
- Site address: Tulquhonie, Carrbridge, Highland, PH23 3NA
- Appeal by Cairngorms Woodland Ltd against the enforcement notice dated 30 April 2024 served by Cairngorms National Park Authority
- The alleged breach of planning control use of land for the placement of two storage containers (being described as a 'caravan'), solar panels, water tanks, toilets, tents, and other ancillary equipment brought onto the Land ("the Development"),
- Date of site visit by Reporter: 26 July 2024

Date of appeal decision: 21 October 2024

Decision

I dismiss the appeal and direct that the enforcement notice dated 30 April 2024 be upheld subject to the variation of the terms of the notice as set out in Annex A below.

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.

Reasoning

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

- (b) that the matters which, by virtue of section 128(1)(a) have been stated in the notice, have not occurred;
- (c) that those matters (if they occurred) do not constitute a breach of planning control; and
- (e) that copies of the enforcement notice were not served as required by section 127

Appeal on Ground b)

2. The planning authority submits photographs showing the container structure and other equipment dated 4 March 2024 and 2 April 2024. The notice refers specifically to two storage containers, water tanks, toilets, tents and other ancillary equipment. My site visit confirmed the container structure, a tented structure and water tanks. Other works have clearly occurred since the enforcement notice was issued, including installation of other structures, a wind turbine and decking around the container unit. I am conscious my consideration here is focussed on the elements of use listed in the notice. Nevertheless,

even the extent of works as included in the notice serve to give the single unit, which is the main subject of this appeal, an appearance of permanence. The container structure (described by the appellant as a caravan) is sited on an area of cleared ground within a coniferous forest. It is clad in metal sheeting with window openings but is placed on level ground. It is not on wheels and has been converted internally to provide living space. I also noted pipework leading to the water tanks. From the photographs and as confirmed through my site visit it is clear that the matters as stated in the notice have occurred.

3. The appeal is made on grounds including b) but the appellant does not explain why it is considered that the matters have not occurred. Instead, an issue is raised as to the extent of the land subject to the notice. I accept the area shown on the notice extends to the wider landholding. That wider area, outwith the clearing described above, has an access track but is otherwise occupied by a coniferous woodland. The important issue is that it remains clear that the notice includes the land on which the matters have occurred. I find that to be the case. The appeal on ground b) fails.

Appeal on ground c): Definition of a caravan

4. The submissions in this case require me to determine whether the works constitute permitted development such that they are exempt from enforcement.

5. Class 16 of The Town and Country Planning (General Permitted Development) (Scotland) Order 1992 (GDPO) confers permitted development rights for the use of land as a caravan site in certain circumstances. In summary these include where incidental to the use of a dwelling, on landholdings of a certain size for less than 28 days, in association with building and engineering sites or for seasonal use for people employed in agricultural or forestry. In addition, there is provision for sites for caravan use for the purposes of recreation where supervised by an exempted organisation. I return to these provisions below.

6. I accept the planning authority's view that these provisions can only be enjoyed in the event that the use of the land involves a structure that can legally be defined as a caravan.

7. The Caravan Act 1960 set out that a "caravan site" is: "land on which a caravan is stationed for the purpose of human habitation and land which is used in conjunction with land on which a caravan is so stationed". Section 29 of the Caravan Act references a caravan as any structure designed or adapted for human habitation which is capable of being moved from one place to another by means of towing or transporting by motor vehicle.

8. Further clarification is provided by Section 13(1) of the Caravan Act 1968 in relation to twin unit caravans. This references a structure designed or adapted for human habitation which is composed of not more than two sections separately constructed and designed to be assembled on a site by means of bolts, clamps or other devices; and is, when assembled, physically capable of being moved by road from one place to another (whether by being towed, or by being transported on a motor vehicle or trailer)". It further clarifies that the structure can still be a caravan even if it is not legally capable of being moved by road. It also specifies maximum dimensions. However, given the structure falls within those dimensions I find no contravention in that specific respect.

9. The planning authority refers me to document CNPA9 which is an English Court of Appeal decision on the case of *Carter and Another v Secretary of State for the Environment* 1994. This considered whether a structure constituted a caravan for the purposes of section

29 of the Caravan Act. It concludes that whilst each case should be considered on its merits a distinction can be made between structures capable of being moved as a single unit rather than in component parts. Weight is to be attached to the description of the structure as a whole. I note the referenced court case involved a unit made up of 4 sections rather than the 2 containers that apply in this case.

10. I consider that the shipping containers on which the structure is based would have been transported initially by road. The site is in a forest and only accessible by a rough track lined by trees. The appellant's submitted photographs show one half of the structure being moved on detachable wheels, by tractor, to the site. The section being towed has window openings and cladding so clearly recognisable as one half of the unit I observed on my site visit. I agree with the planning authority that the nature of the forest access track and the trees either side would prevent the structure being moved back to a public or metalled road without splitting it again into its two component parts. I am not considering the planning merits of this proposal so my remit does not extend to consideration of the suitability of the site and its access.

11. However, on my reading, the structure in its assembled form need only be physically capable of being moved from one place to another by road. The appellant's evidence indicates that transport as a single unit is unlikely to be economical. Nevertheless, a letter from a former Royal Engineer supports the appellant's case that it would remain possible to transport the structure, in one piece, when towed on wheels or loaded onto a heavy goods vehicle. There is nothing to suggest the structure benefits from a sub frame that would perhaps more conclusively demonstrate the structural integrity of the unit and its mobility. On the other hand, I find nothing conclusive to suggest the two containers would need such a structure if fixed together by other means. In this case the structure is indicated to be reinforced by timber and steel with mechanical fixings to join the two halves.

12. I find insufficient evidence to conclude the single structure could not be defined as mobile. I understand the planning authority's concern about application of a hypothetical scenario and acknowledge the obvious restriction on the movement of the unit as a whole within its current forest locality. Nevertheless, I find these considerations do not rule out a conclusion that the unit as a whole is physically capable of being transportable.

13. Consequently, I do not find the council's reliance on the submitted court case conclusive in the particular circumstances of this case. The court decision indicates that each case must be considered on its merits. The decision re-enforces the wording of the Act in relation to the need for the structure to be capable of being moved as a single unit. The referenced case was in relation to a structure in four sections and it is not clear to me the circumstances are entirely similar.

14. In conclusion I consider that the structure can be considered in the context of the relevant provisions for the use of the land as a caravan site.

Appeal on Ground c) : Exemption Certificate

15. Having concluded, on the balance of evidence, that the structure can be considered as a caravan I must determine whether permitted development rights can apply in the context of the submitted "exemption certificate".

16. The submitted copy is headed "Moonrise camp and caravan club". It states that it was presented to Cairngorm Woodland for recreational caravan use of land at Tolquohonie Wood and subject to the membership code of conduct. It includes text stating that it is valid

from 5 November 2023 to 4 November 2024. The Moonrise camp and caravan club is stated to be an organisation exempted under Schedule 1 part 4 and 5 of the 1960 Act.

17. Section 5(1) of the first schedule to the Caravan Act states that a site licence shall not be required for the use as a caravan site of land where there is a certificate issued by an exempted organisation; where there are not more than five caravans stationed for the purposes of human habitation on the land to which the certificate relates. Section 5 (2) goes on to state that for the purposes of this paragraph an exempted organisation may issue a certificate stating that the land has been approved by the exempted organisation for use by its members for the purposes of recreation for a period not exceeding one year.

18. I note the planning authority's questions around the status of this exemption including the alleged involvement of the appellant with the exempted organisation. The onus of evidence in this appeal lies with the appellant. However, I understand that the appellant may have assumed that the planning authority and I would be familiar with the process of exemption, its application in Scotland and any terms that apply. To clarify these matters I sought further written submissions so that my decision could be properly informed as to the status and role of an exempted organisation.

19. The further submissions received include the exempted organisation certificate, the code of conduct and clarification that the granting of exemptions is a devolved function of the Scottish Government. The appellant accepts being a founding member of Moonrise and being involved in its due diligence process. However, I consider my remit extends only to determining whether a valid exemption certificate is in place for the land subject to the enforcement notice. I consider that to be the case and that it would be beyond the scope of this appeal to interrogate the status of the approved granting organisation.

20. I note that the code of conduct states that hosts must only use land and caravan types that have been approved by Moonrise and that exemption certificates can be reviewed and repealed by Moonrise at any time. Whilst exemption certificates are issued for a maximum of 1 year, a renewal application can be lodged 2 months prior to the expiry date, or exempted site status will automatically lapse. There is nothing in the submissions to indicate that a renewal application has not been lodged and nothing that would appear to prevent such a renewal. A material breach or repeated breach of the code of conduct may result in suspension or termination of an Exemption Certificate. However, those are matters at the discretion of Moonrise rather than the planning system.

21. I agree with the planning authority that any valid exemption can only apply to a site licence. However, I accept in turn there is provision for that to translate to an exemption from the need to apply for planning permission. Nonetheless I must also consider the extent to which that assumption extends to any other relevant provisions of the Planning Act and any conditions and exemptions that apply in exercising the permitted development rights that are applied to exempted organisations. I return to that matter below.

22. The appellant references the Highland Council's determination that the site can be lawfully used for caravans being confirmed by the grant of a short term let licence. However, I am conscious this is a separate legislative process and not one of direct relevance to the enforcement notice in this case.

23. There is also reference to forestry use. In that specific respect the licence and other references to leisure and tourism serve to confirm to me that the caravan is not intended for the purposes of forestry, but rather as short term let accommodation. Whilst I accept that forestry can confer some permitted development rights to the siting of caravans the focus of

the appellant's evidence is on leisure use, an exemption certificate for leisure use and a short term let licence. None of that suggests to me the use of the caravan solely for the purposes of Forestry. In any event it is not clear that there are current ongoing forestry operations other than the clearing of the site for the use of the land subject of this enforcement notice.

24. Taking all of the above together I accept that in principle the submitted exemption certificate may provide grounds to quash the notice given the stated exemption applies until November 2024. That in principle conclusion is however subject to my further detailed consideration below.

Appeal on ground c) : other regulatory controls

25. Paragraph 23 of Scottish Government Circular 1-2017 explains the application of the Environmental Impact Assessment (EIA) Regulations. Paragraph 68 explains that Schedule 2 development does not constitute permitted development unless the planning authority has adopted a screening opinion to the effect that EIA is not required. Permanent caravan sites within a National Park fall within Schedule 2. There is an established process whereby a screening opinion can be requested from the planning authority. Alternatively, a screening direction can be requested from Scottish Ministers. Unlike in the circumstances of a planning appeal I am unable to address the issue by carrying out my own screening given my remit here is only to decide whether a breach of planning control has occurred.

26. The appellant relies on the stated exemption certificate being for a temporary period until November 2024. However, the evidence for that assumption is based purely on the terms of that certificate. My observations on site, as to the extent of works carried out, would not suggest to me the intention is to cease the use in November. It is unclear how long the stated exemption could apply but it is capable of being rolled forward and so establishing this use in the longer term. If the intention is to remove the caravan site on expiry of the certificate, then the terms of the enforcement notice would be met.

27. Given my conclusion on permanence I consider that a precautionary approach reflecting the objectives and intent of the regulations would apply. Consequently, prior screening was required in this case. I do not consider I have persuasive evidence that the matters stated in the notice are permitted development as I am not in receipt of a prior screening opinion or direction. Quashing this enforcement notice would by consequence accept that the matters are permitted development. That premise could apply so long as the exemption was successfully renewed. As a result, such a decision could enable permanent establishment of the use. In conclusion, I find that an EIA screening would have been necessary before it could be established that the permitted development rights, otherwise conferred by the exemption certificate, could be applied.

28. In addition, Paragraph 3(1) of GPDO makes all classes of permitted development subject to certain provisions of the Conservation (Natural Habitats, & c.) Regulations 1994 (the "Habitats Regulations"). The planning authority confirm that the woodland is not within a Special Protection Area but alerts me to the presence of capercaillie within the woodland which includes the appeal site. I am aware that the protection of the qualifying interests of a Special Protection Area extend beyond the site and that in this case a number of objectives apply. These include avoidance of deterioration of the habitats of the qualifying species and any significant disturbance to ensure the integrity of the site is maintained. The planning authority states that having commenced development without having sought and obtained approval under Regulation 62, the appellant is in breach of regulation 60(1) of the

Habitats Regulations. It explains that overnight stays and human activity in this woodland would have a potential adverse effect on the integrity of five Special Protection Areas.

29. Regulation 61 states that where it is intended to rely on permitted development rights applications may be made in writing to the appropriate nature conservation body. This could enable confirmation or otherwise as to whether the proposal is likely to have a significant effect. In that circumstance an opinion from NatureScot could have been considered conclusive. However, in this case I have no such opinion.

30. The National Park Authority indicates that there could be a potentially significant effect on the qualifying interests of the Special Protection Area. Document CNPA 12 advises that both the historical records and recent surveys indicate the presence of capercaillie in Tolquhonie Wood. In turn the appellant questions the presence of capercaillie but presents no conclusive evidence in that respect other than questioning the description of his land and the nature of the surrounding habitat.

31. A document is submitted indicating the land under the name Dalbuaick Plantation, Baddengorm Wood. The ground is described as closed canopy forest that does not provide habitat for ground nesting birds. However, the council confirm that the land subject to the enforcement notice is the land on which it raises the issue of Capercaillie. This applies irrespective of any different name that may be applied. The potential of a significant effect is enough to trigger the need for screening. In the absence of a response from NatureScot, to confirm that there is no potentially significant effect, I find a breach of planning control is further confirmed in this respect.

32. The appellant refers to biodiversity promotion as a requirement of the exemption certificate as well as an opportunity to work constructively on this with the park authority. However, I do not consider this a relevant matter as I am not considering the planning merits of a proposal but rather the grounds for enforcement.

33. I am conscious that the specific matter of the habitats regulations was introduced at appeal and is not referenced in the breach of planning control. Nevertheless, I must determine whether a breach in planning control has occurred. It was the appellant's responsibility to have sought confirmation as to any such requirements that applied prior to commencing with the change of use of the land. Permitted development rights, including those conferred by exemption certificates, can only be exercised in certain circumstances. I find those circumstances have not been demonstrated, by the appellant, in this case.

Conclusion on ground c)

34. For the reasons stated above I consider that irrespective of the other matters rehearsed there has been a clear breach of planning control. It is not demonstrated that the limitations that restrict the application of permitted development rights in this case have been met. In an enforcement case the onus of proof lies with the appellant. On the balance of evidence, I conclude that the proposal was subject to EIA screening. Whilst not referenced in the enforcement notice I am also unable to conclude that permitted development is confirmed given the application of the Habitats Regulations.

35. I do not consider that omission from the certificate, of the habitats issue, justifies quashing the notice. Whilst I have not agreed fully with the planning authority's reasons this does not lead me to the conclusion there has been no breach of planning control. In that respect the substance of the notice in identifying a breach of planning control and the steps

to address that breach remain valid and supportable. I have scope to amend the notice so long as this does not cause injustice to the appellant.

36. The matter of screening was raised in the context of the Environmental Impact Assessment Regulations. The notice signals the main issue being that the matters are not confirmed as permitted development. Consequently, I consider the notice would be capable of standing as served. Nevertheless, for the reasons stated above I find the text on the definition of a caravan should be removed and replaced with a factual statement as to the submitted exemption certificate. This reflects the case presented by the appellant but only in part. Notwithstanding my own conclusion above on the applicable terms of the Habitats Regulations, I find the planning authority's reason based on the application of the EIA regulations still stands and is capable alone of supporting the notice. Consequently, the appeal fails on Ground c).

Appeal on ground e)

37. Turning to the final ground I note ground e) is not ticked on the appeal form but is otherwise referenced. However, there is no corresponding detail. The Planning Authority provides evidence of service (CNPA 5 and 6). I find no evidence to the contrary.

Other Matters

38. The appellant raises other matters of impartiality, fairness and misconduct but these are not matters for this enforcement appeal. My consideration is limited to the stated grounds.

Overall Conclusion

39. As the appeal fails under the stated grounds, I dismiss the appeal and uphold the enforcement notice subject to the stated variations as set out in Annex A.

Allison Coard

Reporter

Annex A

In Section 3 "The Breach of Planning Control Alleged" delete paragraph 3 and the first sentence of paragraph 4.

Replace the first sentence of paragraph 4 as follows:

There is a caravan exemption certificate issued by Moonrise Camp and Caravan Club for the period up to 4 November 2024.

Add "However" at the start of the following sentence so it reads as follows:

However, this Development is 'Schedule 2' development as described in Schedule 2, para 2, designation 12(e) of the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017 and has been carried out in a sensitive area (an area designated as a National Park by a designation order made by the Scottish Ministers under section 6(1) (making of designation orders) of the National Parks (Scotland) Act 2000).

Retain all remaining paragraphs.