
CAIRNGORMS NATIONAL PARK AUTHORITY

Title: REQUEST FOR REMOVAL OF SECTION 75
AGREEMENT

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HEAD OF PLANNING

DEVELOPMENT WITH S75: ERECTION OF CROFT HOUSE, LAND
50 METRES SOUTH WEST OF
GRIANAN, STRONE ROAD,
NEWTONMORE

REFERENCE: 06/485/CP

APPLICANT: ALISTER DONALD MACKENZIE

ORIGINAL DETERMINATION: 9 FEBRUARY 2007

RECOMMENDATION: REFUSE THE REQUEST AND WORK
WITH MORTGAGE LENDERS TO FIND
A RESOLUTION TO FUNDING FOR
CROFT HOUSES

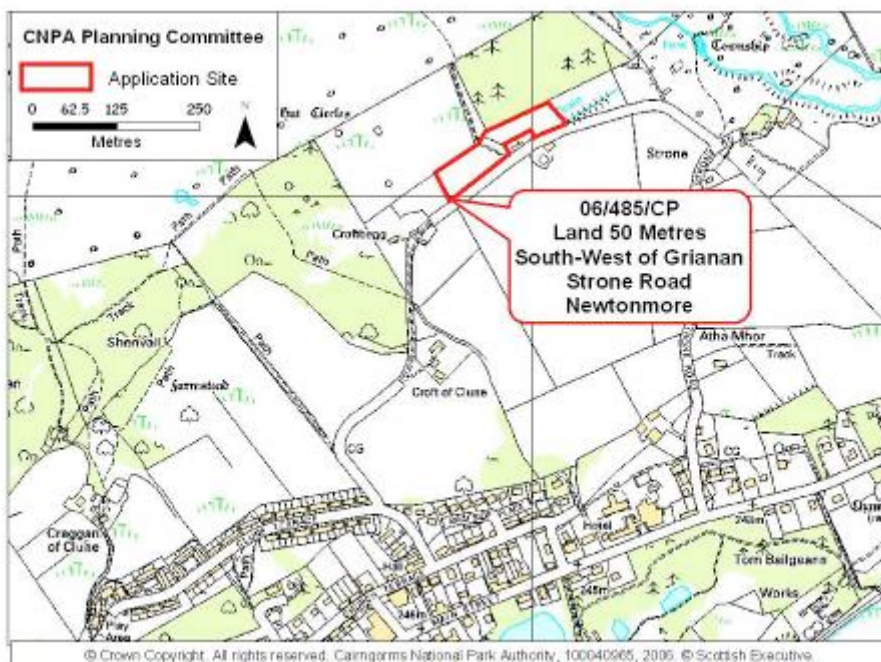


Fig. 1 - Location Plan

PURPOSE OF REPORT

1. This paper is to allow Members to consider a request to remove the Section 75 Agreement that restricts the occupancy of the new house and ties it to the croft. The request is from the applicant and his father, who are both signatories to the Agreement, and the applicant's partner who was witness to their signatures. The letter of request and supporting information is attached to this report.

BACKGROUND

2. The site lies to the north of Newtonmore on the Strone Road which forms a loop through croft lands to the north of the settlement (see Fig 1).
3. The site was an open field adjacent to an existing cottage known as Grianan and on the other side of the road from a tourist accommodation business. The field slopes down gently towards the road where an existing agricultural access has been utilised as the access for the house.



Fig 2 view of site prior to development from Strone Road with Grianan in background

4. The application for outline planning permission (06/485/CP) was considered by the Planning Committee on 9 February 2007. The site is located in an area of Restricted Countryside in the existing Badenoch & Strathspey Local Plan 1997 where there is a presumption against new housing other than for management of land, related family and occupational reasons. The Highland Structure Plan 2001 and Highland Council's Development Plan Policy Guidelines (April 2003 and March 2006) reinforced this position. The application had support from the Crofters Commission. It was considered that there was sufficient crofting justification and the Committee resolved to grant out line planning permission subject to completion of a Section 75 Agreement ensuring that the house is occupied by a person working the croft

and which does not permit the house to be disposed of separately from the croft.

5. A Section 75 Agreement to that effect was completed and registered in the Land Register in October 2007 and outline planning permission issued on 29 October 2007. The applicant had a crofting tenancy of 1.36 hectare of the croft, but his father is the proprietor of a much larger area that included the tenancy. The applicant's portion of the larger croft became a croft in its own right in 2005, but is still owned by his father. It was therefore necessary for both parties to sign the Section 75 Agreement.
6. The detailed application for approval of reserved matters (07/469/CP, THC Ref 07/00322/REMBS) was not called in by CNPA and was approved by The Highland Council on 20 March 2008.
7. A smaller area for the house and garden was decrofted by the Crofters' Commission in June 2009 following a request from the initial intended mortgage lender. It is understood that this is common practice both for the Crofter's Commission and lenders. Construction commenced on the house in summer 2009.



Fig 3 House substantially completed Feb 2010

8. The applicant's partner contacted CNPA planning staff in January 2010 and said that they were having difficulties securing a mortgage because of the restrictions in the Section 75 Agreement. This followed an informal approach in November 2009 by the applicant's builder to the same effect. Although not part of their role, CNPA planning staff have since been in dialogue with mortgage lenders and the Crofter's Commission to ascertain the nature of difficulties and to see if they can be overcome. To date, no solution has been found. In the meantime construction of the house has continued.

9. The applicant, his partner and his father have now written with a formal request that the Section 75 Agreement be removed so they can secure a mortgage. The letter with enclosures is attached as **Appendix 1** to this report.

APPRAISAL

10. Since its inception the CNPA has approved 19 applications where a Section 75 Agreement has been required to secure the ongoing occupation of a house for the purposes for which planning permission was sought at the outset. These Agreements have been completed, decision notices have been issued and many developments have been completed.
11. This is the first request for removal of a Section 75 Agreement. It is therefore critical that Members consider it within the wider context and take account of:
 - The planning reasons for the Section 75 Agreement being required.
 - Assessment of whether the planning reasons still apply.
 - The case advanced for removal of the Section 75 Agreement.
 - The planning implications in this instance if it is removed.
 - The wider planning implications if it is removed.
12. The Town and Country Planning (Scotland) Act 1997 requires decisions to be made in accordance with the development plan unless material considerations indicate otherwise. Material considerations should be related to the development and use of land and should fairly and reasonably relate to the particular application.
13. In this case the development plan is the Badenoch & Strathspey Local Plan 1997 along with the Highland Structure Plan 2001. The site is within an area where development of housing is restricted except where required for management of land and related family purposes. In this instance the crofting justification was accepted as justifying the exception to the normally restrictive policy.
14. Having established the principle it is then necessary to consider the reason for the Section 75 Agreement. If planning permission is granted as an exception for a new house to fulfil a particular purpose then there has to be a mechanism to ensure that it is retained for that purpose. Otherwise there is no guarantee that it will not be disposed of separate from the croft at some point in the future and occupied by someone with no connection to the original justification. In this case, the house was required to allow the family to live on site to work and develop the croft, so a mechanism was needed to cover both the occupancy of the house and the relationship with the croft that led to the justification.
15. The alternatives available to the CNPA, acting as planning authority, were the use of a planning condition as part of the planning permission, or an agreement under Section 75 of the Town and Country Planning (Scotland)

Act 1997. The CNPA solicitors, Ledingham Chalmers, have prepared an Advice Note in respect of "Sale and Occupancy Restrictions in Section 75 Agreements" and this is attached to this report as **Appendix 2**. This Note explains the rationale behind the CNPA approach to date and reassesses it in light of some of the issues that have been raised.

16. In summary, a Section 75 Agreement is a contract voluntarily entered into with normal contractual remedies available to CNPA, it is not open to challenge via the appeals process, and it runs with the land and forms part of the title deeds to a house thereby binding successors in title. By contrast, a planning condition is open to challenge on appeal, it relates only to a specific consent and does not prevent the sale of land leading to potential enforcement difficulties down the line. The Advice Note confirms that Section 75 Agreements offer enhanced protection and are far more effective in ensuring policies remain complied with throughout the lifetime of the house.
17. The decision in 2007 to grant planning permission was subject to the Section 75 Agreement, so it is necessary to take stock and assess if the reasons behind this course of action still apply. Until the Cairngorms National Park Local Plan is adopted, the development plan is still the Badenoch & Strathspey Local Plan 1997 and the Highland Structure Plan 2001. Policy in the draft Cairngorms National Park Local Plan restricts housing developments outside settlements to cases where there is a rural worker justification and proposals will be secured by planning condition or legal agreement. So, the rationale that led to the original requirement for the Section 75 Agreement still applies.
18. The recent Scottish Planning Policy February (SPP) 2010 refers to the use of conditions and planning agreements. Conditions imposed on the grant of a planning permission can enable development to proceed where it would otherwise have been necessary to withhold planning permission (para 26). The Advice Note in Appendix 2 highlights some of the deficiencies of conditions. They also have to be used consistent with the tests set out in Circular 4/1998 *The Use of Conditions in Planning Permissions*. These tests require a condition to be, inter alia, "reasonable" and "enforceable". To impose a condition restricting the sale of the croft owned by the applicant's father would be neither – whereas an agreement voluntarily entered into by all parties is appropriate. The SPP acknowledges (para 27) that planning agreements can be used to overcome obstacles to the grant of planning permission. The approach should only used where the obligation cannot be secured by condition or other means. The Advice Note in Appendix 2 sets out this justification. The CNPA use of Section 75 Agreements to secure compliance with policy is therefore in line with Scottish Planning Policy.
19. Turning to the applicant's case which is set out in the letter and enclosures in Appendix 1. It is quite clear that there is a strong family commitment to working the crofts and there are long established ties with the area. The crofting case was sufficient to merit a new house as an exception to established planning policy. It is also clear that there have been strenuous

efforts made to secure a mortgage and since January CNPA staff have been involved in an intensive dialogue with lenders. At the time of writing this is still ongoing and Members will be updated at the meeting.

20. Whilst it is accepted that lending in such circumstances is never straightforward, it is clear that there would appear to be a recent hardening of attitudes by lenders which will have implications, not only for this case, but for others in the future. In this respect it is noted that the most recent lender approached by the applicant [see email in Appendix 1] is resistant to lending on the basis of a full market valuation not being reached, irrespective of the burdened value being sufficient to still cover the loan proposed. There appears to be either a misunderstanding, or a fundamental hardening of attitudes to lending compared with previous years and this is something that we wish to discuss further with the lenders as a house with a full market value would not exist under current planning policy i.e. the value reflects that policy and is in other words the market value for that location.
21. The financial circumstances of individuals are not material planning matters. This is not to diminish the circumstances that the applicants find themselves in, but it is important that the development plan is the focus of planning decisions. In this case planning permission was granted for a new house in an area where it would not normally be permitted. The reason to grant permission was because of the crofting justification. It was therefore necessary to ensure that the house is retained for the purpose for which the exception was granted. This required the Section 75 Agreement for the reasons outlined in this report. The alternative would have been to refuse planning permission.
22. There are implications if Members agree to this request and remove the Section 75 Agreement. Effectively a house will have been permitted against policy. It will be unencumbered and capable of being sold on the open market as the area of the house has been decrofted.
23. There will be wider implications as there 11 Section 75 Agreements attached to crofts and farms in the Park all required for similar reasons. The applicants in these cases could come forward with requests to remove their Section 75 Agreements arguing for parity of treatment as they may also have experienced financial difficulty in funding their house. This could be difficult to resist and would lead to wholesale departure from policy.

CONCLUSION

24. This is the first request for complete removal of a Section 75 Agreement. The implications are extremely significant and it is therefore crucial that Members approach the request in the context of planning policy and take a decision that will not set a precedent or compromise policy.
25. In granting permission the Committee accepted the crofting case. The Section 75 Agreement ensures the house is retained for the purposes for

which permission was granted. The alternative would have been to refuse planning permission.

26. CNPA staff continue to have discussions with mortgage lenders. The Crofters Commission are involved in this dialogue. This is in the context of the CNPA wishing to actively encourage a vibrant crofting community in the Park. Granting planning permission for open market housing in rural areas will not support crofting or address wider issues of affordability, particularly for young people, in rural communities. It is therefore imperative that houses granted as an exception to policy are retained for crofting.
27. Although not a planning issue, it is equally imperative that the CNPA, as far as it is able, continues to work with lenders and others to facilitate the provision of funding for croft houses. If an alternative form of words in the Section 75 Agreement assists in this wider process then it can be considered, but removal of a single Section 75 Agreement is not justified in terms of planning policy or the wider encouragement of crofting as way of life.
28. As part of the ongoing discussions with lenders, CNPA staff are meeting with the Council for Mortgage Lenders on 26 April. So at the time of writing we are unable to offer alternative proposals, but we will be pressing lenders at that meeting and we will report back to the Committee on 30 April. If progress is made then it will be reflected in a further recommendation.
29. In the meantime and to conclude, the recommendation is that the request for removal of the Section 75 Agreement be refused, but CNPA staff continue to work actively with mortgage lenders and others to resolve issues in relation to Section 75 Agreements and funding for croft houses.

RECOMMENDATION

30. That Members of the Committee refuse the request for removal of the Section 75 Agreement.
31. That Members of the Committee agree to CNPA working with mortgage lenders and others to resolve issues in relation to Section 75 Agreements and funding for croft houses and report back to the Planning Committee with the outcome of this process.

Don McKee
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21 April 2010

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