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Dear Mr MacDonald

Kenovara, Benderloch

I have had a chance to consider the terms of your planning consent and the S42 application you have submitted to seek the deletion of condition 2. You have asked for a legal view on a number of the issues arising.

I should make clear at the outset that where a s42 application is granted, the outcome is that the recipient receives a free-standing planning permission with the same or new conditions applying. This arises as a consequence of the terms of s42 itself which provides that the section applies to "applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted". The section accordingly talks of applications under s42 being applications for planning permission and that is what is granted where the application is approved.

The effect if this is to bring into play the terms of sections 25 and 37 of the Act - the provisions which require applications for planning permission to be determined in accordance with the development plan unless material considerations indicate otherwise. The key consequence of those provisions is that the s42 application submitted by you should be assessed against the development plan and material considerations which exist as at the date of determination, not the date upon which the original consent was granted or the condition imposed in 2011. The practical effect of this legal requirement is that the planning authority have to decide whether the condition can be deleted taking into account the development plan which is currently in effect and bearing in mind also any material considerations which now apply. The most compelling material consideration is that the buildings currently in place have been in situ since the house was built following the 2011 consent and, whatever the position then, the key consideration is whether there is now a planning justification for the removal of the outbuildings.

In addressing this question, the policy justification for the imposition of the condition in 2011 is, in my view, of limited relevance given the passage of time. That was then, and the s.42 application has to be assessed on the basis of what is there now. Had there been a compelling planning reason for the removal of the outbuildings that would surely have justified enforcement action being taken before now. The fact that no such action has been taken strongly suggests that there is not a compelling planning case for the removal of the buildings. One may question the wisdom of imposing a condition which sought to bring the proposed development within the ambit of the definition of redevelopment by requiring part demolition of the outbuildings when

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then existed but that issue is no longer of relevance given that the s42 application must, as a matter of law, be assessed against current policy and current material considerations.

In conclusion therefore, the critical question in my opinion is whether or not there is a sound reason now for the removal of the remaining outbuildings. If there is not, a decision to refuse the s42 application would in my view be unsound.

Yours sincerely

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