

Directorate for Planning and Environmental Appeals

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E-mail: Christopher.Kennedy@scot.gov.uk

Ms K MacKay
Argyll and Bute Council
Sent By E-mail



Our ref: ENA-130-2017

16 February 2015

Dear Ms MacKay

ENFORCEMENT NOTICE APPEAL: NORTH BEACHMORE HOUSE NORTH BEACHMORE TARBERT PA29 6XD

Please find attached a copy of the decision on this appeal.

The reporter's decision is final. However you may wish to know that individuals unhappy with the decision made by the reporter may have the right to appeal to the Court of Session, Parliament House, Parliament Square, Edinburgh, EH1 1RQ. An appeal **must** be made within six weeks of the date of the appeal decision. Please note though, that an appeal to the Court of Session can only be made on a point of law and it may be useful to seek professional advice before taking this course of action.

I trust this information is clear. Please do not hesitate to contact me if you require any further information.

Yours sincerely

Christopher Kennedy

CHRISTOPHER KENNEDY
Case Officer
Directorate for Planning and Environmental Appeals



Appeal Decision Notice

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Decision by Richard Hickman, a Reporter appointed by the Scottish Ministers

- Enforcement Notice Appeal reference: ENA-130-2017
- Site Address: North Beachmore House, North Beachmore by Tarbert PA29 6XD
- Appeal by Robin Nolan against enforcement notice served by Argyll and Bute Council
- Enforcement notice No 14/00150/ENFHS dated 19 September 2014
- The alleged breach of planning control: Erection of fence and gates in excess of 1m in height.
- Steps required by the Council to remedy the alleged breach of planning control: Lower the height of the fence and gates to 1m in height or below.
- Period allowed by the Council for compliance with the notice: 2 months from when the notice takes effect.
- Date of site visit by Reporter: Site visit not required

Date of appeal decision: 16 February 2015

Decision

I allow the enforcement notice appeal and direct that the enforcement notice dated 19 September 2014 be quashed.

Conclusions

1. The fence and gates that are the subject of this enforcement action are located on the road frontage of the North Beachmore House property, and are in excess of one metre in height. The house itself is set well back from the road frontage. The road in question is a short cul-de-sac accessed from a rural section of the A83, terminating at the small group of properties at North Beachmore.
2. The reason for serving the enforcement notice is that (in summary) the council considers the unauthorised fence to be a prominent and incongruous feature which gives rise to a significant adverse effect on the character and amenity of the locale and the wider landscape setting.
3. The appeal against the enforcement notice was made under ground (c) of section 130(1) of the Town and Country Planning (Scotland) Act 1997, ie that the subject of the enforcement notice does not constitute a breach of planning control. This is based on the argument that the fence and gates are permitted development under the terms of the Town and Country Planning (General Permitted Development) (Scotland) Order 1992, as amended.



4. The relevant provision of the order is found in paragraph two of the Town and Country Planning (General Permitted Development) (Scotland) Amendment Order 2011, where Class 3E states that “The erection of any gate, fence, wall or other means of enclosure which would be within or would bound the curtilage of a dwellinghouse” is permitted development; but not where any part of the means of enclosure would exceed two metres in height; nor where “any part of the resulting means of enclosure would exceed one metre in height where it (i) fronts a road or (ii) extends beyond the line of the wall of the principal elevation or side elevation that is nearest a road”.

5. I note that the council’s appeal statement refers to the North Beachmore access road as a private road; that it has a gate across it at the junction with the main road; and that it terminates at the North Beachmore properties. Since the restrictions on the permitted development of means of enclosure (stated above) relate to road frontages, and that a road is defined for this purpose as “Any way over which there is a public right of passage”, for the avoidance of doubt, I requested further information from the appellant and the council on whether the North Beachmore access road is indeed a road for the purposes of the permitted development order.

6. The council’s response (15 January 2015) confirmed that the road is a private road, not adopted by the council, over which the public have a right of access, currently serving 4 houses. The gate at the bottom of the road is never locked, and is apparently intended to prevent livestock straying onto the main road.

7. The appellant’s response (22 January 2015) notes that the answer to the question hinges on whether there is a public right of passage over the North Beachmore Road. He has provided an extract from Scottish Roads Law (second edition) titled “4.6.1 NO PUBLIC RIGHT OF PASSAGE OVER PRIVATE ACCESSES”. This explains the distinction between private roads and private accesses, noting that there is no public right of passage over a private access.

8. The appellant states that the North Beachmore access road is privately owned, serving 4 houses. The residents of these houses have a servitude right to use the road for access to their properties. The roadway terminates at these properties. The owner of the remaining fields at the end of the road, which historically comprised North Beachmore Farm, also uses the road to reach these fields. On this basis, the appellant contends that the North Beachmore road is a private access over which there is no public right of passage. The council has not disputed this conclusion.

9. Having considered these submissions, I conclude that there is no public right of passage over this road, for the following reasons :

- (a) The road is conceded to be private, not a highway adopted by the council.
- (b) The owners of the properties served by the road have the right to use it through a servitude, not as a public right of way.
- (c) The road terminates at these properties.
- (d) There is no suggestion that the road end connects to any continuing way across the farmland over which the public might have a right of passage.

10. Accordingly, on the basis of the information that has been supplied by the appellant and the council, I find that this is not a road for the purposes of the permitted development

order. This means that the restrictions on means of enclosure relating to road frontages set out in the order do not apply at the appeal property. I therefore agree with the appellant that the erection of the fences that are the subject of this enforcement notice does not constitute a breach of planning control. Thus the appeal under ground (c) of section 130(1) of the Act succeeds, and the notice quashed.

Richard Hickman

R M HICKMAN
Reporter

**IMPORTANT - THIS COMMUNICATION AFFECTS YOUR PROPERTY
OR PROPERTY THAT YOU HAVE AN INTEREST IN**

TOWN AND COUNTRY PLANNING (SCOTLAND) ACT 1997

ENFORCEMENT NOTICE

REFERENCE NUMBER: 14/00150/ENFHS

To: Mr Robin Nolan and Mrs Louise Nolan
North Beachmore House
North Beachmore
By Tarbert
Argyll
PA29 6XD

ISSUED BY: ARGYLL AND BUTE COUNCIL, KILMORY, LOCHGILPHEAD

1. **THIS IS A FORMAL NOTICE** which is issued by Argyll and Bute Council, as Planning Authority, because it appears to them that there has been a breach of planning control, under Section 127 of the Town and Country Planning (Scotland) Act 1997 ('the Act') , at the Land Affected hereinafter defined. Argyll and Bute Council consider that it is expedient to issue this notice, having regard to the provisions of the development plan and to other material considerations.

2. **THE LAND AFFECTED**

That plot or area of ground shown edged red on the attached plan forming the garden ground of North Beachmore House, North Beachmore, by Tarbert PA29 6XD (hereinafter referred to as 'The Land Affected')

3. **THE BREACH OF PLANNING CONTROL ALLEGED**

In terms of Section 123 (1)(a) of the Act the carrying out of development upon the Land Affected without the required planning permission relative to:

The erection of a fence and gates in excess of 1m in height

4. **REASONS FOR ISSUING THIS NOTICE**

The development has been carried out without the benefit of planning permission and as such is unauthorised.

The unauthorised fence is considered, by virtue of its scale, design and general appearance, to be a prominent and incongruous feature which is substantially out of character and as such gives rise to a significant adverse effect upon the character of the existing built environment, the amenity of the locale, detracts from a valued wider

landscape setting and is therefore considered to be contrary to adopted Local Plan policies ENV 1 and LP ENV 19.

In addition the fence and gates are not considered 'permitted development' as The town and Country Planning (General Permitted Development) (Scotland) Order 1992 Schedule 1, Part 1 Class 3E (2) (b) (ii) removes permitted development rights for the erection, construction, maintenance, improvement or alteration of any gate, fence, wall or other means of enclosure which would exceed 1 metre in height where it extends beyond the line of the wall of the principal elevation or side elevation that is nearest a road.

There has been a breach of planning control and it is expedient to issue this notice having regard to the provisions of the Development Plan and other material considerations.

5. **WHAT YOU ARE REQUIRED TO DO**

You are required to;

Lower the height of the fence and gates to 1m in height or below.

Time period for compliance: **2 months from the date this notice takes effect.**

6. **WHEN THIS NOTICE TAKES EFFECT**

This notice takes effect on **22nd October 2014** subject to section 131(3) of the Act which provides that where an appeal is made to the Scottish Government before the date this notice takes effect that this notice shall be of no effect pending the final determination or the withdrawal of the appeal

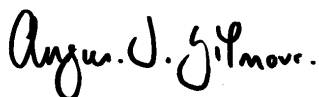
7. **YOUR RIGHT OF APPEAL**

You can appeal against this notice, but your appeal must be received or posted in time to be received by the Scottish Government before **22nd October 2014** . Schedule 1 to this notice gives information on your rights of appeal. **READ IT CAREFULLY.**

8. **WHAT HAPPENS IF YOU DO NOT APPEAL**

If you do not appeal against this notice, it will take effect on 22nd October 2014 and you must then ensure that the required steps for complying with it, for which you may be held responsible, are taken within the period(s) specified in the notice. Failure to comply with an enforcement notice which has taken effect can result in prosecution and/or remedial action by the Council.

Dated: 19th September 2014



Head of Planning and Regulatory Services
Kilmory

Lochgilphead

On behalf of Argyll and Bute Council, Kilmory, Lochgilphead, PA31 8RT

<p style="text-align: center;">SCHEDULE 1 EXPLANATORY NOTE FOR THOSE IN RECEIPT OF AN ENFORCEMENT NOTICE</p>

RELEVANT LEGISLATION

RELEVANT LEGISLATION

A summary of Sections 127 to 134 of the Town and Country Planning (Scotland) Act 1997 (as amended) are attached. You will wish to note in particular the points referred below.

RIGHT OF APPEAL

If you wish to appeal against this notice, you should write to the Directorate for Planning and Environmental Appeals, 4 The Courtyard, Callendar Business Park, Callendar Road, Falkirk, FK1 1XR. The appeal must be received, or posted in time to be received, by the Scottish Government before **22nd October 2014**. The Scottish Government has no power to consider an appeal lodged out of time.

The appeal, which must be made in writing, must be based on one or more of the grounds set out in Section 130 of the 1997 Act, and you should state the facts on which you propose to rely in support of each of the grounds of the appeal. The grounds of appeal and statement of facts must be submitted with your appeal or within 14 days of your being required to do so by the Scottish Government.

If you lodge an appeal, the enforcement notice is suspended and will not take effect unless the appeal is withdrawn or dismissed.

PENALTIES FOR NON-COMPLIANCE WITH AN ENFORCEMENT NOTICE

Where an enforcement notice requires the discontinuance of a use of land or compliance, in respect of a use of land or the carrying out of operations, with any conditions or limitations, then any person who, without the grant of planning permission uses the land or causes or permits it to be used, or carries out those operations or causes or permits them to be carried out, is guilty of an offence and liable on summary conviction to a fine not exceeding Twenty Thousand Pounds or on conviction on indictment to an unlimited fine. Furthermore, if the use is continued after conviction the person may be convicted of a second or subsequent offence.

FIXED PENALTY NOTICE

Section 136A of the 2006 Act amended the 1997 Act to introduce a new planning enforcement power enabling planning authorities to issue a fixed penalty notice (FPN) as an alternative to prosecution where a person fails to comply with the terms of an enforcement notice.

Failure to comply with this notice may result in a fixed penalty notice being issued, with a fine of £2000 in respect of a breach of an enforcement notice. Please note that while payment of this fine prevents future prosecution this does not remove your responsibility to comply with

the terms of this notice and may, as a result, instigate the undertaking of further planning enforcement proceedings.

DIRECT ACTION FOR NON-COMPLIANCE WITH AN ENFORCEMENT NOTICE

If the steps required by an enforcement notice are not taken within the specified period(s) the Council may enter on the land, take those steps and recover the cost from the owner or lessee of the land.

FURTHER OFFENCES

Compliance with the terms of an enforcement notice does not discharge the notice. It will continue in effect and any repetition of the breach of control may incur further penalties or may result in direct action by the Council.

Enforcement Sections of the Town & Country Planning (Scotland) Act 1997

Issue of enforcement notice.

127. - (1) The planning authority may issue a notice (in this Act referred to as an "enforcement notice") where it appears to them-

- (a) that there has been a breach of planning control, and
- (b) that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations.

(2) A copy of an enforcement notice shall be served-

- (a) on the owner and on the occupier of the land to which it relates, and
- (b) 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 service of the notice shall take place-

- (a) not more than 28 days after its date of issue, and
- (b) not less than 28 days before the date specified in it as the date on which it is to take effect.

Contents and effect of notice.

128. - (1) An enforcement notice shall state-

- (a) the matters which appear to the planning authority to constitute the breach of planning control, and
- (b) the paragraph of section 123(1) within which, in the opinion of the authority, the breach falls.

(2) A notice complies with subsection (1)(a) if it enables any person on whom a copy of it is served to know what those matters are.

(3) An enforcement notice shall specify the steps which the authority require to be taken, or the activities which the authority require to cease, in order to achieve, wholly or partly, any of the following purposes.

(4) Those purposes are-

- (a) remedying the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land by discontinuing any use of the land or by restoring the land to its condition before the breach took place; or
- (b) remedying any injury to amenity which has been caused by the breach.

(5) An enforcement notice may, for example, require-

- (a) the alteration or removal of any buildings or works,
- (b) the carrying out of any building or other operations,
- (c) any activity on the land not to be carried on except to the extent specified in the notice, or

(d) the contour of a deposit of refuse or waste materials on land to be modified by altering the gradient or gradients of its sides.

(6) An enforcement notice issued in respect of a breach of planning control consisting of demolition of a building may require the construction of a building (in this section referred to as a "replacement building") which, subject to subsection (7), is as similar as possible to the demolished building.

(7) A replacement building-

(a) must comply with any requirement imposed by or under any enactment applicable to the construction of buildings,

(b) may differ from the demolished building in any respect which, if the demolished building had been altered in that respect, would not have constituted a breach of planning control, and

(c) must comply with any regulations made for the purposes of this subsection (including regulations modifying paragraphs (a) and (b) of this subsection).

(8) An enforcement notice shall specify the date on which it is to take effect and, subject to section 131(3), shall take effect on that date.

(9) An enforcement notice shall specify the period for compliance with the notice at the end of which any steps are required to have been taken or any activities are required to have ceased, and may specify different periods for different steps or activities.

(10) Where different periods apply to different steps or activities, references in this Part to the period for compliance with an enforcement notice, in relation to any step or activity, are to the period at the end of which the step is required to have been taken or the activity is required to have ceased.

(11) An enforcement notice shall specify such additional matters as may be prescribed.

(12) Regulations may require every copy of an enforcement notice served under section 127 to be accompanied by an explanatory note giving prescribed information as to the right of appeal under section 130.

(13) Where-

(a) an enforcement notice in respect of any breach of planning control could have required any buildings or works to be removed or any activity to cease, but does not do so, and

(b) all the requirements of the notice have been complied with,
then, so far as the notice did not so require, planning permission shall be treated as having been granted under section 33 in respect of development consisting of the construction of the buildings or works or, as the case may be, the carrying out of the activities.

(14) Where-

- (a) an enforcement notice requires the construction of a replacement building, and
 - (b) all the requirements of the notice with respect to that construction have been complied with,
- planning permission shall be treated as having been granted under section 33 in respect of development consisting of that construction.

Variation and withdrawal of enforcement notice. **129.** - (1) The planning authority may-

- (a) withdraw an enforcement notice issued by them, or
- (b) waive or relax any requirement of such a notice and, in particular, may extend any period specified in accordance with section 128(9).

(2) The powers conferred by subsection (1) may be exercised whether or not the notice has taken effect.

(3) The planning authority shall, immediately after exercising the powers conferred by subsection (1), give notice of the exercise to every person who has been served with a copy of the enforcement notice or would, if the notice were reissued, be served with a copy of it.

(4) The withdrawal of an enforcement notice does not affect the power of the planning authority to issue a further enforcement notice.

Appeal against enforcement notice.

130. - (1) A person on whom an enforcement notice is served or any other person having an interest in the land may, at any time before the date specified in the notice as the date on which it is to take effect, appeal to the Secretary of State against the notice on any of the following grounds-

- (b) that those matters have not occurred;
- (c) that those matters (if they occurred) do not constitute a breach of planning control;
- (d) that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters;
- (e) that copies of the enforcement notice were not served as required by section 127;
- (f) that 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 which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach;
- (g) that any period specified in the notice in accordance with section 128(9) falls short of what should reasonably be

allowed.

(2) An appeal under this section shall be made either-

(a) by giving written notice of the appeal to the Secretary of State before the date specified in the enforcement notice as the date on which it is to take effect, or

(b) by sending such notice to him in a properly addressed and prepaid letter posted to him at such time that, in the ordinary course of post, it would be delivered to him before that date.

(3) A person who gives notice under subsection (2) shall submit to the Secretary of State, either when giving the notice or within the prescribed time, a statement in writing-

(a) specifying the grounds on which he is appealing against the enforcement notice, and

(b) giving such further information as may be prescribed.

Appeals: supplementary provisions.

131. - (1) The Secretary of State may by regulations prescribe the procedure which is to be followed on appeals under section 130 and, in particular, but without prejudice to the generality of the foregoing provisions of this subsection, in so prescribing may-

(a) specify the matters on which information is to be given in a statement under section 130(3);

(b) require the planning authority to submit, within such time as may be specified, a statement indicating the submissions which they propose to put forward on the appeal;

(c) specify the matters to be included in such a statement;

(d) require the authority or the appellant to give such notice of an appeal as may be specified to such persons as may be specified;

(e) require the authority to send to the Secretary of State, within such period from the date of the bringing of the appeal as may be specified, a copy of the enforcement notice and a list of the persons served with copies of it.

(2) Subject to section 132(3), the Secretary of State shall, if either the appellant or the planning authority so desire, give each of them an opportunity of appearing before and being heard by a person appointed by the Secretary of State for the purpose.

(3) Where an appeal is brought under section 130 the enforcement notice shall be of no effect pending the final determination or the withdrawal of the appeal.

(4) Schedule 4 applies to appeals under section 130, including appeals under that section as applied by

regulations under any other provisions of this Act.

General provisions relating to determination of appeals.

132. - (1) On the determination of an appeal under section 130, the Secretary of State shall give directions for giving effect to the determination, including, where appropriate, directions for quashing the enforcement notice.

(2) On such an appeal the Secretary of State may-

(a) correct any defect, error or misdescription in the enforcement notice, or

(b) vary the terms of the enforcement notice,

if he is satisfied that the correction or variation will not cause injustice to the appellant or the planning authority.

(3) The Secretary of State may-

(a) dismiss an appeal if the appellant fails to comply with section 130(3) within the prescribed time, and

(b) allow an appeal and quash the enforcement notice if the planning authority fail to comply with any requirement imposed by virtue of paragraph (b), (c) or (e) of section 131(1).

(4) Where it would otherwise be a ground for determining an appeal in favour of the appellant that a person required by section 127(2) to be served with a copy of the enforcement notice was not served, the Secretary of State may disregard that fact if neither the appellant nor that person has been substantially prejudiced by the failure to serve him.

Grant or modification of planning permission on appeal against enforcement notice.

133. - (1) On the determination of an appeal under section 130, the Secretary of State may-

(a) grant planning permission in respect of any of the matters stated in the enforcement notice as constituting a breach of planning control or any of those matters so far as relating to part of the land to which the notice relates,

(b) discharge any condition or limitation subject to which planning permission was granted,

(c) grant planning permission for such other development on the land to which the enforcement notice relates as appears to him to be appropriate, and

(d) determine whether on the date on which the appeal was made, any existing use of the land was lawful, any operations which had been carried out in, on, over or under the land were lawful or any matter constituting a failure to comply with any condition or limitation subject to which the permission was granted was lawful and, if so, issue a

certificate under section 150.

(2) The provisions of sections 150 to 153 mentioned in subsection (3) shall apply for the purposes of subsection (1)(d) as they apply for the purposes of section 150, but as if-

(a) any reference to an application for a certificate were a reference to the appeal and any reference to the date of such an application were a reference to the date on which the appeal is made, and

(b) references to the planning authority were references to the Secretary of State.

(3) Those provisions are sections 150(5) to (7), 152(4) (so far as it relates to the form of the certificate), (6) and (7) and 153.

(4) In considering whether to grant planning permission under subsection (1), the Secretary of State shall have regard to the provisions of the development plan, so far as material to the subject matter of the enforcement notice, and to any other material considerations.

(5) The planning permission which may be granted under subsection (1) is any planning permission which might be granted on an application under Part III.

(6) Where the Secretary of State discharges a condition or limitation under subsection (1), he may substitute for it any other condition or limitation.

(7) Where an appeal against an enforcement notice is brought under section 130, the appellant shall be deemed to have made an application for planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control.

(8) Where-

(a) the statement under section 130(3) specifies the ground mentioned in subsection (1)(a) of that section,

(b) any fee is payable under regulations made by virtue of section 252 in respect of the application deemed to be made by virtue of the appeal, and

(c) the Secretary of State gives notice in writing to the appellant specifying the period within which the fee must be paid,

then, if that fee is not paid within that period, the appeal, so far as brought on that ground, and the application shall lapse at the end of that period.

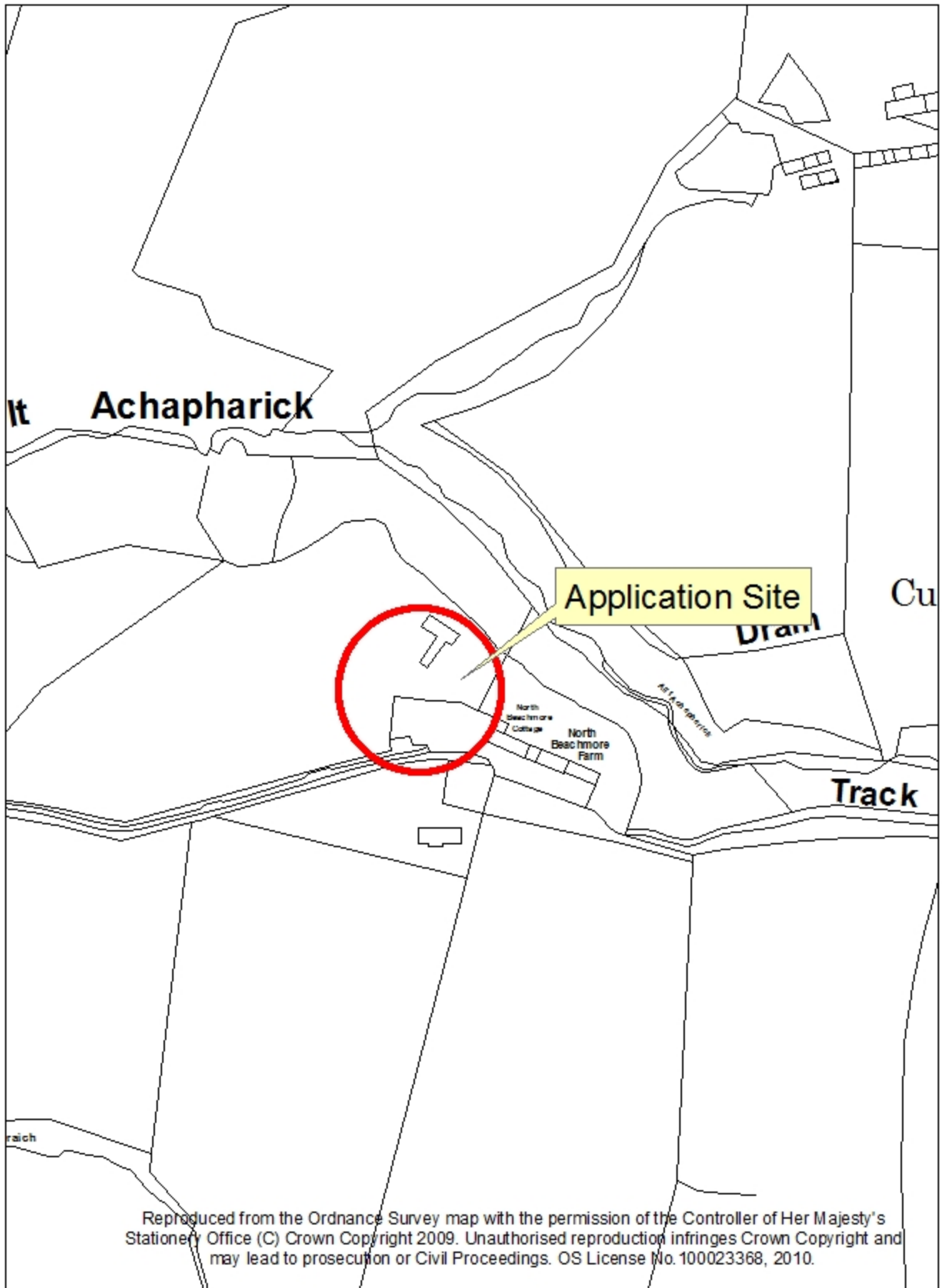
(9) Any planning permission granted under subsection (1) on an appeal shall be treated as granted on the application deemed to have been made by the appellant.

(10) In relation to a grant of planning permission or a determination under subsection (1) the Secretary of State's decision shall be final.

(11) For the purposes of section 36 the decision shall be treated as having been given by the Secretary of State in dealing with an application for planning permission made to the planning authority.

Validity of enforcement notices.

134. The validity of an enforcement notice shall not be questioned in any proceedings whatsoever on any of the grounds specified in section 130(1)(b) to (e) except by appeal under that section



Enforcement Ref. No. 14/00150/ENFHS
North Beachmore House, North Beachmore

Date: 17.09.14

Drawn By: KMK

Scale: 1:2,500

