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## Appeal Decision

Hearing held on 1 June 2023.

Site visit made on 18 April 2023

**by Paul Freer BA (Hons) LLM PhD MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 10 July 2023**

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**Appeal Ref: APP/Q9495/C/22/3302607**

**Land adjacent to the C2057 Road, Ullock Moss, Portinscale, Keswick, Cumbria**

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (the 1990 Act) as amended by the Planning and Compensation Act 1991.
  - The appeal is made by The Lingholm Private Trust Ltd against an enforcement notice issued by Lake District National Park Authority.
  - The enforcement notice, numbered E/2019/0023, was issued on 8 June 2022.
  - The breach of planning control as alleged in the notice is, without planning permission, operational development, specifically engineering operations consisting of the laying of road planings to create a hard surface.
  - The requirements of the notice are:
    - i. Remove the road planning from the Land, and
    - ii. Undertake the steps set out in the Tree Planting and Management Specification attached as Appendix A to the notice.
  - The period for compliance with the requirements is 10 months.
  - The appeal is proceeding on the grounds set out in section 174(2) (a), (c) and (f) of the Town and Country Planning Act 1990 as amended.
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**Summary Decision: the appeal is dismissed and the enforcement notice is upheld as corrected and varied in the Formal Decision below**

### **Procedural matters**

1. I carried out an accompanied site on 18 April 2023. It became apparent to me at that site visit that I required more information in order to properly inform the appeal made on ground (f): namely, that the requirements of the notice exceed what is necessary. Accordingly, I arranged for a Hearing to be held on 1 June 2023 to specifically consider that point.

### **The enforcement notice**

2. The requirement at paragraph 5(ii) of the notice is to undertake the steps set out in the Tree Planting and Management Specification attached as Appendix A to the notice. In fact, the document attached to the notice is titled "Annex A: Replacement planting specification". It was apparent at the Hearing that the appellant had understood the document (albeit had concerns about it) and I am satisfied that I can correct the notice in this respect without causing injustice.
3. The plan attached to the enforcement notice shows a larger area outlined in red than that covered by the breach of planning control alleged in the notice. I

understand the Authority's reasons for taking that approach, in terms of allowing for a margin of error in defining the area in which the breach of planning control has taken place, and make no criticism in that respect. However, that approach creates problems in relation to the requirements at paragraph 5(ii) of the notice, insofar as it could be interpreted to mean that those requirements apply to those parts of the site where there has not been a breach of planning control. That would be unreasonable.

4. There was discussion at the Hearing as to whether the plan could be corrected to better define the area in which the breach of planning control has taken place and to which the requirements at paragraph 5(ii) of the notice apply. As a result of those discussions, an additional plan has been provided and agreed which identifies the area in which the breach of planning control has taken place more closely, subject to a margin for error. The requirements at paragraph 5(ii) of the notice will only apply to the area identified in that plan. I am satisfied that I can correct the notice in this respect without causing injustice, and will correct the notice accordingly.

### **The appeal on ground (c)**

5. The ground of appeal is that, in respect of any breach of planning control that may be constituted by the matters stated in the notice, those matters do not constitute a breach of planning control. An appeal on this ground is one of the 'legal' grounds of appeal, in which the burden of proof is on the appellant to show, on the balance of probability, that the matters alleged in the notice do not constitute a breach of planning control.
6. The appellant does not dispute that the breach of planning control alleged in the notice constitutes development for the purposes of Section 55(1) of the 1990 Act. It is, however, the appellant's case that there has been a private way and area of hardstanding on the site for a considerable time. The appellant contends that the placing of road planings on the land constitutes the maintenance of a private way, which is development permitted by Class E(b) of Part 6 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO) and which permits the carrying out on land used for the purposes of forestry, the formation, alteration or maintenance of private ways. As the appellant points out, the maintenance of private ways under Class E(b) is not subject to prior approval as required by Class E.2(1) of the GPDO in relation to the formation or alteration of private ways.
7. For the purpose of the GPDO, a "private way" means a highway not maintainable at the public expense and any other way other than a highway. The appellant's case is to some extent supported by the Woodland Officer – West Cumbria for the Forestry Commission who, in an email dated June 2021, recalls that there was a small hardstanding and track to the south of the Felling Licence application that had been present for a considerable time. This evidence is corroborated by the historic mapping, which does show a track of some description across the appeal site in that position. There is no evidence that this track is, or ever had been, maintainable at the public expense.
8. Whilst acknowledging that a track did historically cross the appeal site, the Authority disputes that the track has been used as such more recently, pointing to photographs taken in 2009 and 2015 respectively, in which there is no physical evidence of the track or hardstanding. The more salient point,

however, is the extent of the hard surface created by the laying of the road planings. When compared with the historical mapping, the area covered by the road planings extends across a much larger area, is much broader in width than the track and does not follow the linear route of that track. As a matter of fact and degree, for those reasons the area now covered by the hard surface goes beyond what may be reasonably considered to constitute the maintenance of an existing private way.

9. I find that the breach of planning control does not constitute the maintenance of a private way and is not permitted by Class E(b) of Part 6 of Schedule 2 of the GPDO. It is a different form of development, and one which is not permitted by the GPDO. Section 57 of the 1990 Act provides that planning permission is required for the carrying out of development. There is no planning permission in place, deemed or otherwise, for the development alleged in the notice. I therefore conclude that, on the balance of probability, the matters stated in the notice do constitute a breach of planning control.
10. Accordingly, the appeal on ground (c) fails.

### **The appeal on ground (a) and the deemed planning application**

11. The ground of appeal is that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted. The Council has stated two substantive reasons for issuing the enforcement notice, from which the main issues raised are the effect of the development on:
  - the character and appearance of the area
  - the attributes of the English Lake District World Heritage Site.

#### *Character and appearance*

12. The appeal site falls within the Upland Valley Landscape Character Type (H) and the Keswick and Derwentwater Area of Distinctive Character as the defined in Landscape Character Assessment Supplementary Planning Document (SPD). The overall character and visual sensitivity within these Landscape Character Types are considered in the SPD to be high, and are considered there to have very limited capacity to accommodate change without compromising key characteristics.
13. One of the identified landscape characteristics of the area described in the SPD is the woodland on the western shores of Derwentwater which, the SPD explains, provides a sense of enclosure and a sense of tranquillity. The appeal site forms part of the expansive area of woodland on the western side of Derwentwater and displays many of the landscape characteristics of the Area of Distinctive Character described in the SPD, including a strong sense of enclosure created by the dense woodland.
14. The hard surface created by the laying of the road planings introduces built development into this area of woodland. By reason of its extent and the materials from which it is constructed, the very presence of the hard surface itself harms the highly sensitive character of the Area of Distinctive Character within which the site is located and thereby compromises one of the key characteristics identified in the SPD.

15. Moreover, although the felling of the trees to clear the space for hard surface did not require planning permission, that was a necessary pre-requisite for the breach of planning control alleged in the notice to take place. The area cleared by the felling of those trees facilitated the creation of the hard surface which then made the open space created by the felling of the trees a permanent feature in the landscape that could not be re-stocked or re-colonised with trees. The felling of the trees and the creation of the hard surface are therefore inextricably linked.
16. As a result, the hard surface creates an expanse of open space in an area that is otherwise characterised by a sense of enclosure. The cleared space created by the hard surface erodes and compromises that sense of enclosure identified in the SPD as one of the landscape characteristics of the Area of Distinctive Character within which the appeal site is located. The harm in this respect is localised, but at the same time exacerbated by the proximity of the site to the C2057 Road and therefore the extent to which the harm caused is visible in the public domain.
17. The creation of the hard surface does not itself affect the sense of tranquillity that is another of the landscape characteristics of the Area of Distinctive Character identified in the SPD. Insofar as the hard surface is or would be used in connection with the lawful planning use of the land (i.e for forestry), I consider that any loss of tranquillity would be an integral part of the forestry operations that take place in this area and therefore part of the character of the Area of Distinctive Character identified in the SPD. Any loss of tranquillity arising from the lawful use of hard surface in connection with forestry operations would be acceptable in that context. However, this does not outweigh my findings in relation the visual harm resulting from the development.
18. I conclude that the breach of planning of control alleged in the notice unacceptably harms the character and appearance of the area. I therefore conclude that the development is contrary to Policies 01 and 05 of the Lake District National Park Local Plan (Local Plan). These policies seek, amongst other things, to conserve and enhance the extraordinary beauty and harmony of the Lake District landscape, and indicate that decisions will be guided by the Lake District Landscape Character Assessment (SPD).

*Attributes of the English Lake District World Heritage Site*

19. The appeal property is also located within the English Lake District World Heritage Site (WHS). The significance of the WHS results from three intertwining themes which combine to define its Outstanding Universal Value including, insofar as relevant to this appeal, a landscape of exceptional beauty. I recognise that the WHS is a designated heritage asset of the highest significance, internationally recognised as being of outstanding universal value.
20. Areas of woodland are an important attribute of the WHS and an intrinsic component of the landscape of exceptional beauty which gives the WHS its special character. Areas of woodland therefore make a positive contribution to the significance of this designated heritage asset. For the reasons set out above, the breach of planning control harms the quality of the woodland on the appeal site. This has a harmful effect on, and therefore fails to maintain, the outstanding universal value of the WHS. As such, the proposal harms the

significance of this designated heritage asset. The public benefits that have been advanced, which are set out below, do not outweigh that harm.

21. For these reasons, the development does not meet Policy 07 of the Local Plan which, amongst other things, seeks to conserve and enhance the significance of heritage assets, including the English Lake District World Heritage Site.

*Other considerations*

22. Section 38(6) of the Planning and Compulsory Purchase Act 2004 indicates that if regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be in accordance with the plan unless material considerations indicate otherwise. I have found that the breach of planning control alleged in the notice fails to accord with the development plan. It is therefore necessary for me to consider whether there are any material considerations of sufficient weight to indicate that determination should be made otherwise than in accordance with the development plan.
23. I accept entirely that areas of hardstanding related to forestry operations are necessary in managed woodlands and, in that sense, form part of the character of those areas. I also recognise that forestry operations require the use of large vehicles and equipment, and that space is required to stack the felled timber and for the vehicles to manoeuvre.
24. However, it is in my view instructive that areas of hard surface are not permitted under Class E(b) of Part 6 of Schedule 2 of the GPDO in relation to forestry operations. Indeed, only the formation, alteration or maintenance of private ways are permitted by Class E, and even then the formation and alteration of a private way under that Class is subject to prior approval. To my mind, this suggests that hard surfaces are not automatically deemed to form an acceptable part of the character and appearance of an area, even where the land is in lawful use for forestry. It follows that each case must be assessed on a case-by-case basis and on its own merits.
25. In this case, the area of hard surface is extensive. I recognise that some space is required to store felled trees until such time that as they can be collected but, it seems to me, that requirement must be related to the active felling of trees as part of the ongoing management of the woodland. There is no evidence before me that this amount of space is required for forestry operations now or in the future: for example, I have been provided with a copy of the Woodland Management Plan for the Lingholm Estate up to April 2025, which states that clear felling will be limited and ongoing management will be focused on thinning and moving towards elements of continuous cover where appropriate. That statement is not consistent with an ongoing requirement for the hard surface resulting from the breach of planning control that has occurred. I therefore have no evidence before me to show that the hard surface is required for forestry operations at this time.
26. The appellant points out that the Felling Licence granted by the Forestry Commission in 2016 allows for 20% Open Ground as part of the re-stocking conditions, and considers that the area of hard standing within this part of the site can be retained as open ground and the required planting still delivered. I am not convinced that this would be achievable. I have not been provided with a plan that shows, in percentage terms, that the hard surface would take up

20% or less of the land covered by the 2016 Felling Licence. Moreover, the 2016 Felling Licence only covers the northern part of the site. The southern part of the site is covered by a Felling Licence granted in 2015 but, in relation to the appeal site, this only permitted the thinning of trees rather than clear felling<sup>1</sup> with no attendant re-stocking conditions.

27. Given the extent of the hard surface, I do not accept on the evidence before me that the space could be provided within the terms of the two Felling Licences. In any event, even if it could, that would not overcome the harm to the character of the area caused by the hard surface itself.
28. I have considered whether the imposition of suitably worded conditions could overcome the harms that I have identified above and make the development acceptable in planning terms. However, those harms are intrinsic to the breach of planning control that has occurred and could not be overcome by the imposition of conditions.

*Conclusion on the appeal on ground (a)*

29. For the reasons set out above, the breach of planning control alleged in the notice is contrary to the development plan. Having weighed the factors in support of the development, I am not persuaded that there are any material considerations of sufficient weight, either taken individually or cumulatively, to indicate that determination should be made otherwise than in accordance with the development plan. Accordingly, I conclude that planning permission ought not to be granted for the matters stated in the notice.

**The appeal on ground (f)**

30. The appellant accepts that the requirement at paragraph 5(i) of the notice to remove the road planning is reasonable. The dispute is in relation to the requirement at paragraph 5(ii) of the notice to undertake the steps set out in the Replacement Planting Specification attached as Annex A to the notice (as I intend to correct it). In essence, it is the appellant's case that the felling of trees does not itself constitute development for the purpose of Section 55 of the 1990 Act and does not form any part of the breach of planning control alleged in the enforcement notice. As such, the appellant considers that the replanting required by paragraph 5(ii) of the notice is excessive.
31. The starting point is Section 173(4) of the 1990 Act, which sets out the purposes which an enforcement notice may seek to achieve, either wholly or in part. These purposes are, in summary, (a) the remedying of the breach of planning control 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. In this case, the Authority confirmed at the Hearing that purpose of the notice was to remedy the breach of planning control that has occurred by *restoring the land to its condition before the breach took place* (emphasis added).
32. Photographs dated 2009 and 2015 within the Authority's evidence show the land now covered by the hard surface to be covered by dense woodland on those dates. The evidence before me, albeit limited, is that the condition of the land subject to the notice before the breach of planning control took place was

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<sup>1</sup> Clear felling is only permitted by the 2015 Felling Licence in Compartment 12b of the Lingholm Estate Woodlands, which is not within the appeal site.

dense woodland. Consequently, even though the felling of the trees to form the space for the hard surface did not itself constitute development for the purposes of the 1990 Act, the Authority is entitled to require the land to be restored to that condition through the provisions of Section 173(4) of the that Act.

33. The situation becomes more complicated, however, because the felling of those trees was carried out (in part) through the provisions of the Felling Licence issued by the Forestry Commission in 2016. The terms of that Felling Licence includes a requirement for re-stocking at a density of 1,100 plants per hectare evenly distributed over the site. There are, in addition, specified conditions with which that re-stocking must comply, including in relation to the protection of trees against damage and undertaking adequate weeding. The Forestry Commission has enforcement powers available to it to ensure that the re-stocking and associated conditions are carried out.
34. The courts have held that, in general, the requirements of an enforcement notice should not conflict with or be dependent on consents under other legislation, although the courts have held that the inclusion of any such requirements will not necessarily be fatal to the notice. In this case, it seems to me that as a matter of principle the requirements of the enforcement notice duplicate the re-stocking obligations set out in the 2016 Felling Licence issued by the Forestry Commission rather than conflict with them. Consequently, in principle, I see no reason why the enforcement notice and the 2016 Felling Licence cannot operate in parallel with each other.
35. The difficulty lies with the specifics of the requirements set out in the enforcement notice which, in some respects, go beyond the terms and requirements of the 2016 Felling Licence. That does generate a conflict with the Felling Licence and is therefore something that the courts generally advocate against.
36. Given that the Forestry Commission are the agency responsible for the overall management of woodlands and hold the relevant expertise, the requirements of the notice might appear excessive insofar as they go above and beyond those set out in the 2016 Felling Licence. However, there are considerations which point in the other direction.
37. The Felling Licence granted in 2016, which covers the northern part of the appeal site, requires re-stocking to a density of 1,100 plants per hectare. As indicated above, the Felling Licence granted in 2015, insofar as it relates to the appeal site, permits the thinning of trees rather than clear felling. There are no re-stocking requirements imposed upon that section of the Felling Licence that relates to the thinning of trees.
38. It is evident from the photographs in the Authority's evidence that the area cleared of trees extends beyond the area covered by the 2015 Felling Licence and into that covered by the 2016 Felling Licence. The corollary is that the part of site subject to the 2015 Felling Licence will have no attendant requirement to re-stock the trees that were evidently felled to clear the space on which the road planings were deposited to form the hard surface. Consequently, in order that the land is restored to the condition it was in before the breach of planning control took place, it is necessary for re-stocking to be required through the enforcement notice for that part of the site.

39. Using the 2016 Felling Licence as the benchmark for the standard for re-stocking ordinarily applied by the Forestry Commission, the requirements at paragraph 5(ii) of the notice must be retained in such a way that they at least mirror the re-stocking requirements set out in that Felling Licence, but also take account of any material considerations that might not usually be applied by the Forestry Commission. There are two main considerations in this respect: compaction of the soil as a result of the laying of the hard surface, and timescales.
40. Paragraph 4.1(b) of Annex A of the notice requires that, after the removal of the road planings, the Land shall be de-compacted by air spade. The appellant considers this requirement to be excessive. However, it seems to me that the land beneath the road planings must have been subject to some compaction, not only through weight of the road planings themselves but also through any vehicular traffic and/or storage of timber that may have occurred on or over them. I recognise that this is impossible to quantify but, in order to provide the optimum opportunity for the re-planting to become established, I favour the precautionary approach adopted by the Authority. I am also mindful that this is not a situation routinely contemplated by the Forestry Commission in considering re-stocking conditions, such that it could not be foreseen by the Forestry Commission when it imposed the conditions on the 2016 Felling Licence. I therefore see no reason to vary the notice in this respect.
41. The Felling Licence granted in 2016 initially required re-stocking to take place before 30 June 2022. The appellant provided assurance that this had been done but, as the Authority points out, this evidently does not include the area presently covered by road planings. In any event, in the context of the enforcement notice, the re-stocking required in paragraph 5(ii) of the notice can only take place once the road planning have been removed pursuant to paragraph 5(i).
42. There is a back-up provision within the 2016 Felling Licence whereby, if before 30 June 2027 the restocking envisaged to take place before 30 June 2022 is not achieved, then the land is to be planted or sown before 30 June 2028 in order to secure a stocking of not less than 1,100 trees per hectare. However, that timescale was imposed in the context of forestry operations, whereas the purpose of the enforcement notice is to secure the remedy of a breach of planning control that I have found unacceptably harms the character and appearance of the area in planning terms (including harm to the WHS). It is my view that the timescales set out in the Felling Licence are not appropriate or adequate to secure the purpose of the notice within a reasonable timescale.
43. There is no appeal on ground (g) before me<sup>2</sup>, and I must therefore deal with this issue solely within the remit of ground (f). The requirement at Paragraph 3.1 of Annex A of the notice (as I intend to vary it) is that all trees shall be planted during the first planting season following the notice coming into effect. In the interests of clarity, I will vary that requirement to refer to the first planting season after the requirements set out in paragraph 5(i) have been complied with. I am satisfied that this is a reasonable and proportionate response to the breach of planning control that has occurred, and will not cause injustice to any party.

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<sup>2</sup> Namely, that the period for compliance specified in the notice falls short of what should reasonably be allowed.

44. In order to achieve consistency between the 2016 Felling Licence and the enforcement notice, it is necessary to vary the requirements of the notice in some respects. At the Hearing, the Authority conceded that the reference to 1,980 oak whips in paragraphs 1.1 and 5.1(b) of Annex A of the notice were incorrect. It was agreed that a requirement to transplant oak trees between 20cm and 40cm in height at a density of 1,100 per hectare would be more consistent with the common requirement for planting in broadleaf woodlands. That is also the density for re-stocking specified by the Forestry Commission in the 2016 Felling Licence.
45. The requirement at paragraph 1.1 of Annex A is for the planting to "distributed over the Land", which lacks precision and which, even if fully complied with, could result in the planting not achieving the purpose of the notice to restoring the land to its condition before the breach took place. Equally, I was initially concerned with the phrase "evenly distributed over the site" used in the 2016 Felling Licence which, to my mind, is the very antithesis of a broadleaf woodland. However, at the Hearing, I was assured that in practice this means that the planting will be carried out at a spacing of between 2m and 4m, with an average of 3m. I will therefore vary the notice to adopt the terminology used in the 2016 Felling Licence.
46. In all other respects, I consider that the requirements in Annex A of the notice should match, as far as is practicable, the conditions set out on the 2016 Felling Licence where the two would operate in parallel. In particular, the breach of planning control alleged in the notice is engineering operations consisting of the laying of road planings to create a hard surface. There is no allegation that the land was excavated or that any topsoil was removed before the engineering operation took place. I am therefore satisfied that, provided the soil was de-compacted by air spade following the removal of the road planings, there would be no need to spread new topsoil or mulch over the land.
47. The appellant also questions the reference to the British Standard for Tree Work (BS8545 -2014) in paragraph 4.2 of Annex A. I note that reference is made in the 2016 Felling Licence to the UK Forestry Standard issued by the Forestry Commission in 2011 and which, as I understand it, sets out legal requirements and assurances in relation to forest regulation. It therefore seems to me that reference to BS8545 -2014 in paragraph 4.2 of Annex A is otiose.
48. Those requirements are therefore excessive and I shall vary the notice accordingly.
49. The situation is different insofar as the land not subject to the 2016 Felling Licence is concerned. Paragraph 5 of Annex A of the notice covers "Things to be done or installed to ensure the protection of trees". In that portion of the site not covered subject only to the 2015 Felling Licence, there is no provision that covers those matters. They must therefore form part of the requirements of the notice. In order to ensure consistency between that part of the site covered by the 2016 Felling Licence and that part which is not, I will vary the requirements at paragraphs at paragraph 5.1 to match those set out in Part 2 of the 2016 Felling Licence and by deleting paragraphs 5.2 and 5.3 of Annex A of the notice in their entirety.
50. The appeal on ground (f) succeeds to that extent.

## **Conclusion**

51. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with corrections and variations and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

## **Formal Decision**

52. It is directed that the notice is corrected by:

- in paragraph 5(ii) of the notice, deleting the words "Tree Planting and Management Specification" and "Appendix A", and substituting there the words "Replacement planting specification" and "Annex A".
- adding the plan (Drawing No. 190 (01) 004) attached to this Decision.

53. It is directed that the notice is varied by:

- in paragraph 1.1 of Annex A of the notice, deleting the words "1,980 oak whips distributed over the land" and substituting there the words "25% Oak and 20% Open Ground to achieve not less than 1,100 plants evenly distributed over the site".
- in paragraph 3.1 of Annex A of the notice, deleting the words "Enforcement Notice reference E/2019/0023 coming into effect" and substituting there the words "the first planting season after the requirements set out in paragraph 5(i) of Enforcement Notice reference E/2019/0023 have been complied with."
- in paragraph 4.1 of Annex A of the notice, deleting the requirements at b), c) and d) in their entirety.
- deleting the requirement at paragraph 4.2 of Annex A of the notice in its entirety
- in paragraph 5.1 of Annex A of the notice, deleting the requirements at a), b) and c) in their entirety and substituting there the words "For a period of ten years from the planting set out in paragraph 1.1 of Annex A:
  - a) The plants must be protected against damage and be adequately weeded.
  - b) Any failure or losses should be replaced as necessary to provide a stocking of not less than 1,100 plants per hectare evenly distributed over the site.
  - c) Any planted must be maintained in accordance with the rules and practice of good forestry."
- deleting paragraphs 5.2 and 5.3 of Annex A of the notice in their entirety.

54. Subject to the corrections and variations, the appeal is dismissed, the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

*Paul Freer*  
INSPECTOR



## Plan

This is the plan referred to in my decision dated: 10 July 2023

by **Paul Freer BA (Hons) LLM PhD MRTPI**

**Land at: Land adjacent to the C2057 Road, Ullock Moss, Portinscale, Keswick, Cumbria**

**Reference: APP/Q9495/C/22/3302607**

Scale: Not to scale

