

Appeal Decision Notice

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Decision by Roger Wilson, a Reporter appointed by the Scottish Ministers

- Enforcement Notice appeal reference: P/ENA/270/54
- Site address: Land at, and extension to, access track at Sallachy Estate, Lairg IV27 4EF
- Appeal by HH Roesner Land and Forestry Management Ltd against the enforcement notice dated 1 July 2008 served by The Highland Council.
- The alleged breach of planning control: that without planning permission, an access track approximately 3900m in length and approximately 2.5m in width has been formed, within an area shown edged in red on the attached plan.
- Date of site visit by Reporter: 6 March 2009

Date of appeal decision: 19 March 2009

Decision

I dismiss the appeal and direct that the enforcement notice dated 1 July 2008 be upheld, subject to the variation of the terms of the notice by the deletion of the words under Section 5(1): *“You are required to supply a Restoration Plan and Method Statement, prepared in accordance with SNH’s advice and ANNEX C (attached). For the avoidance of doubt, the proposed restoration works shall be agreed in writing with the Planning Authority in consultation with SNH prior to any restorative works being undertaken. Once approved, the above Restoration Plan and Method Statement should be implemented before the bird breeding season, i.e. 28 February 2009”* and the substitution therefor of the words ***“Reinstate the land edged red on the attached plan; firstly, (a) by submitting a Restoration Plan and Method Statement and timetable of implementation in general accordance with Annex C (attached to the Enforcement Notice); and secondly, (b) by carrying out the approved works in accordance with the approved Method Statement and timetable. The period for compliance for submission of (a) (the Restoration Plan and Method Statement) is 6 weeks from the date of this decision notice; and for completion of (b) (the works) by 28 February 2010.***

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 Town and Country Planning (Scotland) Act 1997: -

- (a) that in respect of any breach of planning control which may be constituted by the matters stated in the Enforcement Notice, planning permission should be given;
- (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, 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; and
- (g) that any period specified in the Notice in accordance with section 128(9) falls short of what should reasonably be allowed.

(a) That planning permission should be granted

2. The site is some 6km northwest of Sallachy Lodge, northwest of Lairg. The track extends a previously existing track up to the northeast flank of Loch Sgeireach. There is no dispute that the access track is development requiring planning permission, and I agree that it falls within the definitions set out in the Act under section 26. Moreover, it has already been the subject of a retrospective planning application (ref 08/00131/FULSU) dated 30 April 2008, refused by the council on 30 June 2008. The site is situated within an area subject to the designations of the Caithness and Sutherlands Peatland Special Area of Protection (SPA). The government's Circular 6/1995 at paragraph 12 (as amended June 2000) sets out the legislative requirements for consideration.

3. The hill track lies within the boundary of European and National Interest sites: -

- (1) Caithness and Sutherland Peatlands SAC and RAMSAR site, identified for this internationally important blanket bog and wet heath habitats. The blanket bog is a qualifying interest of these sites; and
- (2) Grudie Peatlands SSSI, which is nationally important blanket bog habitat, also supporting nationally important breeder wader densities for dunlin, greenshank and golden plover

4. The proposal is not connected with, or necessary for, the conservation management of the SAC and RAMSAR site.

5. The appellant's Environmental Assessment was undertaken after the track had been constructed and therefore cannot be regarded as fully objective in terms of its assessment of impact. Neither does it make the assessment against the conservation objectives for the site, i.e. that the qualifying habitats for a range of features are maintained in the long term. Conversely, SNH's assessment identifies 4 out of 7 conservation objectives that would not be met. On this point, I conclude that the track has had an adverse effect on the integrity of the SAC, contrary to the aims of Highland Structure Plan policy G2.

6. Damage to habitats by All Terrain Vehicles (ATVs) is recognised, and through Regulation 49 of the Habitats Regulations, alternative solutions may be considered; a track is one alternative response. In this instance the Caithness and Sutherland Peatland

Management Scheme was an alternative promoted by SNH, but not taken up by the appellants. However, the evidence of damage by ATVs is inconclusive, and it is understood from the site inspection, that the appellants no longer use such vehicles, although visiting parties may do so. The avoidance of further damage to the peat is a worthy aim, but I am not convinced that this justifies or adequately balances the more fundamental damage to the structure of the land by carving a 3.9km track through it. Moreover, the track does not eliminate the need to move deer carcasses from other areas not immediately adjacent to the track. Thus, I am not satisfied that there are no alternative solutions.

7. Secondly, and by reference to the Habitats Regulations 49(2), I must consider whether there is an over-riding public interest, i.e. human health, public safety or beneficial consequences of primary importance to the environment or any other imperative reasons. The appellants have not suggested public interest grounds of critical importance to justify the track. To my mind, the sporting interest, though no doubt of local benefit, is not of sufficient weight to qualify as an over-riding public interest. I have considered the appellant's Environmental Assessment, but it has a number of shortcomings when set against SNH's Constructed Tracks in the Scottish Uplands guidance, e.g. justification for the track, alternatives, avoidance and mitigation measures, adherence to due process etc. In addition, and following my site inspection, I agree with SNH's evaluation that the damage to verges is unlikely to be temporary because it is clear that re-vegetation of similar undercutting has not restored the qualifying habitat. On the quantum of damage, I also agree that the 6m width of the track claimed by the appellants could be some distance short of the real impact when taking account of verges and ditches. Other positive features of the track and possible replacement of habitat to benefit other species are unsupported, while the damage to the international importance of the blanket bog is underplayed. Neither am I satisfied that the improved accessibility justifies the damage to the qualifying interests of the SPA. This conclusion is supported by structure plan paragraph 2.13.3, which notes that for such developments to be acceptable, they should be compatible with maintaining the features for which the sites are designated.

8. In summary on this matter, the damage to conservation interests of the SAC, and similarly the SSSI, is unjustified, and does not accord with the Circular 6/1995. Accordingly, the track, as development, does not comply with the aims of the Highland Structure Plan policies G2 (Sustainability), G3 (Impact Assessments), G6 (Conservation and Promotion of the Highland Heritage), N1 (Nature Conservation) and NPPG14 (Natural Heritage). The draft local plan policy 4.3 underpins this reasoning.

9. The estate's reliance on Tourism is understood, but there is no substantive evidence that the track positively benefits tourism, or that its removal would be a tourist disincentive (structure plan policy T2: Tourism). Previous damage to the area does not justify the extended damage identified in this proposal. In any event, and on balance, the development as constructed does not fulfil the development plan objectives and there are insufficient material considerations to outweigh the presumption against granting planning permission. For all these reasons, the appeal on this ground (a) fails and planning permission is refused.

Ground (e) the Enforcement Notice was not served as required by Section 127

10. I accept that section 5(1) of the Enforcement Notice is unconventional in its terms. However, the nature of the breach of planning control and the suggested remedial work justifies an 'agreed' approach in order to avoid further damage to the land. In any event, the date set out for implementation would necessarily require a timely submission of the 'Restoration Work and Method Statement' for approval prior to its execution. Although the use of the word "should" applies to the implementation stage not the preliminary submissions, I propose to amend the wording, as allowed under section 132(2)(a) of the Act, in order to give clarity and precision to the works required and their implementation. When read in its entirety, the intent of the required works as originally set out is clear and I am satisfied firstly, that such alteration as now proposed does not go to the substance of the notice; and secondly, it would not prejudice the appellant's position or cause him injustice. For these reasons, the appeal under ground (e) fails.

Ground (f) the steps required by the Notice to be taken, exceed what is necessary to remedy any breach of planning control

11. From my site inspection, it is clear that areas of the track have not 'settled', as the appellant suggests. The damage has been sustained at the expense of the conservation objectives of the SPA. The anticipated works are expected to restore lost qualifying habitat and would be confined to the footprint of the track and borrow pits and therefore would not further harm the qualifying habitat. The proposed timing of works outside the bird-breeding season will avoid their disturbance. The introduction of unspecified vegetation over the track would not, by definition, restore the blanket bog and wet heath. For these reasons, the appeal under ground (f) fails.

Ground (g) that any period specified in the Notice in accordance with section 128(9) falls short of what should reasonably be allowed.

12. The specified date for compliance was related to the date of the Enforcement Notice, giving some 7-8 months for implementation. The appellant suggests that the works would require 12-16 weeks, i.e. 3-4 months and thus the period for compliance was not unreasonable. Given the nature of the works and the process to be agreed with the council, I propose to amend the completion date to the 28 February 2010. I also consider it necessary to insert a preliminary date for the submission of restoration proposals and a method statement, and in the circumstances, I consider that 6 weeks is reasonable, thus giving adequate time overall for the works and its preparation outwith the bird breeding season. Accordingly, the appeal under ground (g) succeeds, and I have amended the notice accordingly.

This is a true and certified copy of the decision issued on 19 March 2009.

ROGER WILSON
Reporter