

felled in accordance with the permitted thresholds and these trees are not within the "sensitive areas", as accepted by Forestry Commission Scotland. Three individual planning submissions were subsequently lodged with Falkirk Council and are currently the subject of a Planning Review. However, if unsuccessful then the appellants can consider the following options:

1. to allow regeneration,
2. to replant,
- or
3. to apply for a change of use.

2.9 It is a matter of fact that no planning consent existed at the time works were carried out or exists now. The appellants are not entitled to develop the land to another type of land-use without planning consent (other than in very limited circumstances). It can therefore be argued that deforestation has not occurred. Unless and until a planning consent for development is granted, there can be no alternative land-use and this can be evidenced from the position on the ground where initial signs of natural regeneration are evident as new tree saplings can be seen on site. (Reporter's note: At the hearing session the appellants suggested that a change of use to allotments could be applied for as an alternative to housing and that deforestation has not occurred until the change of use happens).

2.10 On felled woodland areas, it is fairly common woodland practice to leave the land "fallow" for a period of time, also the area is not enclosed with fencing and would regenerate. If Forestry Commission Scotland had not classified the tree felling works as "deforestation" and as such then regarded the operation to be a "relevant project", then enforcement action would not have been served. The appellants are aware of other broadly similar situations where it would appear that Forestry Commission Scotland has decided to take no enforcement action. (Reporter's note: At the hearing session the appellants confirmed that the works on-site were carried out, in part, "in preparation for an application for a change of use").

Whether the tree felling is likely to have significant effects on the environment

2.11 The Environmental Impact Assessment screening process carried out by Forestry Commission Scotland only consulted with ten parties in total (the appellants included), even though in the letter dated 29 November 2013, Forestry Commission Scotland were asked to obtain a screening opinion from all of the residents in dwellings located on either side of the site and directly opposite. This would have obtained a true, accurate and balanced opinion of all of the most affected residents. (The appellants also object to the heavy handed approach by the Woodland Trust in threatening to no longer use the arboricultural contractors who carried out the works. This does not suggest that an impartial approach was taken in their screening opinion).

2.12 The appellants summarise the screening reports as follows:

- Four consultees did not have any material comment to make including Scottish Natural Heritage and the Scottish Environment Protection Agency.
- One consultee considered that there would be “moderate” changes to the local character and natural amenity.
- One consultee from Falkirk Council considered that the impact on the landscape would be “moderate” and the visual impact would be “moderate to major” from the adjacent properties, but not adverse.
- Both consultees from Falkirk Council have recommended that an acceptable form of mitigation could be imposed if planning permission was to be granted by the Local Hearing Review Panel.
- The remaining 2 consultees are the Torwood Woodland Group and the Larbert, Stenhousemuir & Torwood Community Council (who had sight of the Torwood Woodland Group draft response). These co-joined into providing a response which basically comes down to the emotive subject of the tree felling in 2002, which instigated the formation of the Torwood Woodland Group.

2.13 Forestry Commission Scotland’s argument is that it is entitled to consider that exceptional circumstances have occurred, that have had a significant effect on the environment. However, where in any of the screening consultations, do these exceptional circumstances occur? The term “exceptional circumstances” must be considered as exactly that. It is not simply a hook upon which Forestry Commission Scotland can hang any decision to exercise powers that cannot be otherwise justified. The circumstances in question must by their very nature be truly exceptional in the context in which they are being considered.

2.14 There has been limited judicial consideration of the meaning of the expression “exceptional circumstances”. In one case, *R. v. Offen* [2001] 1 W.L.R. 253, CA. Lord Woolf C.J. said that “quite apart from the impact of the Human Rights Act 1998, the rationale of the [section of the Act which was being considered] should be highly relevant in deciding whether or not exceptional circumstances existed. The question whether circumstances were appropriately regarded as “exceptional” must be influenced by the context in which the question was being asked.” In another, *R v Kelly (Edward)* [2000] QB 198, Lord Bingham of Cornhill CJ gave a construction of the word “exceptional” which was then followed in later English cases. He said “We must construe ‘exceptional’ as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered”.

2.15 The question must be what makes these circumstances so exceptional that Forestry Commission Scotland must override the legislative presumption that this is not a “relevant project” and deem it so; circumstances so outwith the norm, so unusual or so extreme that they can properly be regarded as exceptional. Forestry Commission Scotland has sought to justify the decision by issuing a statement of reasons in the letter dated 14 February 2014. That letter refers to impacts of differing extents in relation to people, fauna, flora and landscape. Taking each of these in turn:-

People - Forestry Commission Scotland refers to views of the Torwood Community Woodland Group who described the removal of the trees as upsetting for local people. Woodland Trust Scotland said that the impact on local people had been moderate. Forestry Commission Scotland said that Falkirk Council had stated the impact was major and irreversible. By contrast the appellants have submitted evidence of considerable local support for the project and also that Falkirk Council are not opposed as suggested. It is unfair to base an opinion without having the overall viewpoint of the Torwood residents as a whole.

Fauna - The only response referred to was that of the Woodland Trust who concluded that the impact was merely moderate. Tree cutting was carried out over less than 0.08 hectares with small, regenerating birch removed from a further 0.5 hectares; the balance of removal was dense bracken. As the site is adjacent to a forest of around 135 hectares, this does not represent a significant loss of fauna habitat.

Flora - Forestry Commission Scotland concludes that the impact was moderate-major. The evidence submitted suggests wholly conflicting views on this aspect. Prior to the recent tree cutting, the site was comprised of approximately 60 percent native woodland – the balance being dense and invasive bracken. However of the native woodland, only a narrow roadside strip (10 to 12 metres wide) was comprised of trees of any size or age. The majority had only recently been invaded by dense birch scrub. A distinction must be made between this recently arisen birch regeneration and woodland with any natural qualities. Reference to the Forestry Commission Native Woodland Survey of Scotland shows native qualities only applying to 0.19 hectares of the project area – approximately 20 percent and a substantial element of this has been retained. In 2010, while considering an appeal to the refusal of a previous planning application, the reporter noted “limited numbers of mature birch, willow and rowan” and found that the site is “of limited ecological value”.

Landscape - The concerns of the partisan Torwood Community Woodland Group and the local Community Council were recorded. No account appears to have been taken of the significant local support for the project from the residents of Torwood village itself as evidenced by the petition submitted by the appellants. Nor indeed of the immediate neighbours at either end of the three plots who support the project. Falkirk Council concluded that the landscape impact was moderate. Removal of the narrow tree belt has exposed wider views of the woodland beyond and removed potentially hazardous trees due to overhanging. The removal of the view of a roadside tree belt but still retaining longer views of the mature woodland edge forming the backdrop to the village should not be considered as having a significant and irreversible detrimental impact.

2.16 Taken as a whole, it is difficult to understand the conclusion reached by Forestry Commission Scotland that there are “exceptional circumstances”. It is submitted that the reasons provided for the decision represent a quite normal set of conflicting views

presented by those with differing interests. In the case of a larger scale development, there is provision for a greater in-depth review of the impact on the environment, but the Regulations contain minimum thresholds to address exactly this kind of situation. Unless the circumstances are truly “exceptional” and can be justified as such, the Regulations do not permit Forestry Commission Scotland to declare that this is a “relevant project”.

2.17 From the reasons given by Forestry Commission Scotland in the letter dated 14 February 2014 and an examination of the information and documentation provided in prior communications and in the context of this appeal, there is little apparent evidence of Forestry Commission Scotland having taken into account the selection criteria identified in Schedule 3 as is required. On the contrary, Forestry Commission Scotland appears to have identified their own criteria and reached a conclusion based on those instead.

Whether the felling is a “relevant project”, as defined in the 1999 Regulations

2.18 Forestry Commission Scotland has suggested that the advice in their published document “Environmental Impact Assessment of forestry projects” differs from the Environmental Impact Assessment (Forestry) (Scotland) Regulations 1999. Schedule 2 of the Regulations, confirms that the threshold for the tree removal is 1 hectare and “if the area of work proposed falls below these thresholds then it is not likely to be a relevant project and our consent under the Environmental Impact Assessment Regulations will not be required”. The gross extent of the three individual landholdings is 0.96 hectares. Regulation 6(3) provides for the Forestry Commissioners to disregard the threshold where there are “exceptional circumstances”. Regulation 6(6) directs the Commissioners to form an opinion of “exceptional circumstances” in line with Schedule 2, paragraph 4. Paragraph 4 of Schedule 2 is concerned with the evaluation of the potential cumulative impact of smaller projects in cases where “the project adjoins or is near to another project”. The project at Glen Road is not next to, nor near another project and the Forestry Commission has not made the argument that it is. The “exceptional circumstances” required by the 1999 Act do not exist.

2.19 Within the “Environmental Impact Assessment of forestry projects” document there is important information that advises permission is not necessary due to the size and nature of the operations. If the Environment Impact Assessment booklet is to be taken as a legal document, spelling out in detail, exactly what is, or is not permissible, then as such, the felling operations are not classified within any areas defined as one of the ten “sensitive areas” and the information then taken from appendix 1 states that the threshold for deforestation is 1 hectare. (The European Commission screening booklet also makes specific reference to minimum thresholds and criteria, for example project size below which an Environmental Impact Assessment is never required, in this case below 1 hectare). This is not a matter of the appellants’ interpretation or assumptions; the position is clearly stated in the Regulations. Under the heading “Thresholds” it is advised that if the work proposed falls below the threshold, then it is not likely to be a “relevant project” and consent under the Environmental Impact Assessment Regulations will not be required.

Mitigation

2.20 Some 10 acres of adjoining “long-established woodland of plantation origin” in the ownership of one of the plot owners, Peter Hoggan, was felled of commercial spruce woodland through a licensing agreement with the Forestry Commission. This has subsequently been established with a range of native species including oak, ash, rowan and birch which represents a substantial overall environmental gain. In addition, the appellants have offered mitigation proposals to plant broadleaved native trees on 2 hectares of land immediately adjacent to Torwood Castle (on land owned by Peter Hoggan), a 12 metre wide tree strip along the Glen Road frontage and native hedgerows on the house plot boundaries.

2.21 Forestry Commission Scotland has not responded to these proposals to date. Falkirk Council Legal Services were requested by the Local Hearing Review Panel, at a meeting on 9 June 2014, to write to Forestry Commission Scotland for their opinion on acceptable mitigation measures, prior to making a determination on the current planning applications. Falkirk Council's landscape and biodiversity officers have both confirmed to the Local Hearing Review Panel committee members acceptable mitigation measures should planning permission be granted. (Reporter's note: Mr Mitchell states in his email received on 11 August 2014 that Forestry Commission Scotland's response to the above request has now been received. It states that mitigation for the removal of the woodland is not considered appropriate).

Additional written legal submissions on the impact of Regulation 21(9) of the 1999 Act on the ability of the reporter to allow these appeals.

2.22 Regulation 21(9) provides that “The Scottish Ministers shall not allow an appeal against an enforcement notice served by virtue of regulation 20(1)(a) where it appears to them that consent is required by regulation 4”. It follows therefore that the Scottish Ministers require to form a view as to whether or not consent is required by regulation 4. This in essence turns on whether the work is, or is not, a “relevant project” as described by the Regulations. To reach that view, it is necessary for the Scottish Ministers to consider the Regulations as a whole.

2.23 In terms of regulation 20(9), in the event that the Scottish Ministers determine that this is “relevant project” the appeals must fail. If not, the appeals must be allowed and the enforcement notices withdrawn. To be a “relevant project” the work must both (i) comprise deforestation; and (ii) be likely, by virtue of factors such as its nature, size or location, to have significant effects on the environment. Neither of those tests has been satisfied. To comprise deforestation, the extent of the removal of trees must be sufficient to constitute deforestation and the work itself must be carried out for the purposes of conversion to another type of land use. It is submitted that neither of those apply in this situation.

2.24 It is not in dispute that the works have been carried out on land that falls below the relevant threshold identified in the Regulations. The purpose of the Government setting that threshold is to impose a presumption in favour of freedom for small projects of this kind. Consequently, to be a “relevant project” there must be “exceptional circumstances which,

taking account of the selection criteria in Schedule 3, make it likely that the project will have significant effects on the environment". It is submitted that there are no such exceptional circumstances. For the reasons given, it is submitted that there is no "relevant project" (meaning in turn that Forestry Commission Scotland did not therefore have the power to serve an enforcement notice). The Scottish Ministers should determine that to be the case and the appeals should be allowed.

2.25 Notwithstanding the following:

- (i) all of the arguments, discussions, correspondence, meetings, submissions and an appeal hearing since June 2013;
- (ii) the very substantial and varied costs incurred by all parties in terms of both time and money since Forestry Commission Scotland first visited the site on 28 June 2013;
- (iii) the full disclosure by the appellants of their intentions on site on 28 June 2013 and subsequently; and
- (iv) the service of enforcement notices dated 14 February 2014 which stated quite clearly that the appellants had a right to appeal "to the Minister."

Forestry Commission Scotland is now effectively, for the first time in over one year, seeking to argue that all of this was entirely irrelevant and a waste of the appellants' and the reporter's time because Forestry Commission Scotland's decision on whether this is or is not a "relevant project" under the Regulations is absolute, final and unchallengeable. In support of this argument, Forestry Commission Scotland refers to regulation 8(3) and regulation 8(4). The appellants disagree with this submission. It is not the intention of the Regulations that Forestry Commission Scotland has the final say on whether there is a "relevant project", nor that regulations 8(3) and 8(4) are intended to usurp the role of the Scottish Ministers in determining any relevant appeal. By way of example, in regulation 21(7), the Scottish Ministers are directed in determining an appeal to take into consideration various matters including "the direct and indirect effects of the relevant project". That provision simply would not work if this contention is correct.

2.26 It is a matter of fact that until now no decision has been made by the Scottish Ministers as to whether or not the works carried out are a "relevant project" for the purposes of the Regulations. However, the appellants submit that this is probably the single most important question to be considered by the Scottish Ministers in these appeals. If the Scottish Ministers agree that for the reasons stated by the appellants there is no "relevant project" that in itself will constitute a direction by the Scottish Ministers under regulation 7. The Scottish Ministers have the power to decide that issue at any time (either by application under regulation 7(1) or in the absence of an application under Regulation 7(8)) subject of course to the provisions of regulation 7 itself). Regulation 8(4) provides that where the Scottish Ministers have issued a direction under regulation 7, the opinion of the Commissioners on the matter is superseded.

2.27 For all of the reasons stated (and we note that the same provisions apply to any decision by the Scottish Ministers in terms of regulation 7), Forestry Commission Scotland was not entitled to reach the conclusion that this is a "relevant project". Forestry

Commission Scotland has failed to adhere to the directions given to them by regulation 6(3). Even if the position submitted by Forestry Commission Scotland is correct - which is disputed - and the appeal is dismissed by the Scottish Ministers on what is in effect a technicality, this argument is presented against a backcloth of knowing that the appellants would subsequently make a separate application to the Scottish Ministers seeking a direction on exactly the same point. The appellants can do so under the Regulations at any time. The entire process would then have to be repeated at even greater cost to the parties and the public purse, only to come back to exactly the same arguments once again. This cannot be what was intended by the Regulations and is wholly contrary to the public interest.

2.28 As a public body, Forestry Commission Scotland has an overriding obligation to act openly, reasonably and fairly in dealings with the general public. If Forestry Commission Scotland were of the view that this was a "relevant project" based on "exceptional circumstances" - for that is the only basis upon which they can reach this conclusion - this opinion should have been issued at a very much earlier stage. In similar manner, Forestry Commission Scotland ought to have made it quite clear to the appellants that the decision on the matter is final and that there is no effective right of appeal (which the appellants dispute). In the event that the reporter agrees that the combined effect of regulations 8(3), 8(4) and 20(9) is such that the Scottish Ministers have no option but to dismiss this appeal, the appellants submit that in the circumstances an award of all expenses against the Commissioners is appropriate.

2.29 The works carried out did not constitute a "relevant project" under the Regulations for the reasons stated and it is submitted that the Scottish Ministers must conclude that consent under regulation 4 was not required. Contrary to the position argued by Forestry Commission Scotland, the decision as to whether or not consent is required by regulation 4 is quite clearly stated in this Regulation to be the decision of the Scottish Ministers. It is not a decision for Forestry Commission Scotland. In order to reach that conclusion, it is respectfully submitted that the Scottish Ministers require to decide whether or not in their opinion there is a "relevant project". If the Scottish Ministers decide that there is a "relevant project", the appeals must fail. In the event that the Scottish Ministers determine that there is not a "relevant project", the provisions of regulation 7 state that the earlier opinion of Forestry Commission Scotland is superseded. Consequently, the Scottish Ministers are the sole judges of whether or not consent is required by regulation 4 and as such have unfettered discretion to allow or dismiss the appeal as they see fit.

Chapter 3 – Summary of evidence for Forestry Commission Scotland

Background

3.1 The initial investigation, on 28 June 2013, was conducted using powers under the Forestry Act 1967. Section 9 of the 1967 Act provides that a felling licence is required for the felling of all growing trees unless certain specified exemptions apply. These exemptions include formal garden areas, orchard trees, dangerous or diseased trees and situations where only small volumes of timber would be generated. Trees with a diameter of less than 8 centimetres are also exempt. The exemption for volumes is 5 cubic metres of which 2 cubic metres can be sold over a single land ownership in any calendar quarter. Calendar quarters run January to March, April to June, July to September and October to December.

3.2 Felling trees without a felling licence is a criminal offence by virtue of Section 17 of the 1967 Act. If felling is taking place or has taken place without a licence, and there is enough evidence, Forestry Commission Scotland is able to submit a report to the Procurator Fiscal requesting that the landowner is prosecuted for illegal felling under the Forestry Act. Forestry Commission Scotland does not have powers under the Forestry Act to force a stop to work even where it is suspected that the felling may be illegal. No powers exist to serve a “stop notice” to stop work on a site. (Reporter’s note: It was confirmed at the hearing session by Forestry Commission Scotland that there are also no powers to stop work immediately under the Environmental Impact Assessment Regulations).

3.3 The total volume of licensable timber felled across the whole project area in the first phase, as recorded by the appellants’ arboricultural contractor, was 35 trees totalling 9.13 cubic metres. An additional 4 to 5 cubic metres (total 13 to 14 cubic metres) was felled at the beginning of October across the three land holdings. Subsequent investigations confirmed that the woodland was owned under three separate titles. This meant that each owner could take advantage of the 5 cubic metres per calendar quarter exemption. Notwithstanding that the felling appeared to be have been scheduled in such a way as to purposefully exploit the exemptions available under the Forestry Act (the felling was carried out across three calendar quarters at the end of June, beginning of July and beginning of October), it was nevertheless concluded that the felling was not illegal felling for the purposes of the Forestry Act. (On 27 November 2013, an email was received from Woodland Trust Scotland, explaining that they had met with the appellants’ arboricultural contractor. The email stated that the Directors of the firm considered their involvement in the project “an error of judgement” and that they had since put internal measures in place to prevent them being involved in similar projects in the future).

3.4 Felling work at the project area was paused during these initial inquiries but resumed when it was concluded that no offence was being committed under the Forestry Act. The appellants’ arboricultural contractor indicated that the work was being done in readiness for a planning application to develop the land for residential use. On 3 July 2013, Falkirk Council confirmed that there were no active planning applications for the project area.



3.5 The 1999 Regulations cover projects that can be expected, in a forestry context, to require an Environmental Impact Assessment but are not covered by the Environmental Impact Assessment Regulations associated with the Town and Country Planning Act. These projects include afforestation, forest quarries, forest roads and deforestation. Forestry Commission Scotland is the competent authority for projects which come under the 1999 Regulations. Forestry Commission Scotland's role includes the role of "information gatherers" and experts in the Environmental Impact Assessment screening and decision making process, using internal knowledge and records of sites and forestry practice and ecosystems. This supplements responses from other competent bodies and representative elected groups and other interest groups/charities.

3.6 In processing this gathered information, a view is taken as to whether a given project will require consent (and therefore a full Environmental Impact Assessment including an Environmental Statement) or not. The 1999 Regulations do not have the same limitations as the Forestry Act. For example there is no exemption for the size of tree or the volume of the trees cleared. There are also different techniques that can be used for deforestation rather than 'felling'. These include the use of mulching machinery. Deforestation can also be done by excavator or even by chemical means where herbicide is used to kill off the woodland in readiness for a change of use.

3.7 According to the Scottish Government's policy on the control of woodland removal, "There is a strong presumption in favour of protecting Scotland's woodland resources. Woodland removal should be allowed only where it would achieve significant and clearly defined additional public benefits." There is also a "strong presumption against woodland removal where it would lead to fragmentation or disconnection of important forest habitat networks." Additional guidance to Forestry Commission Scotland staff on implementing the Scottish Government's policy states that there is a strong presumption against the removal of "United Kingdom Biodiversity Action Plan (UK BAP) priority woodland types in areas mainly composed of ancient, semi-natural woodland, ancient woodlands planted with native species, long-established woodlands of plantation origin with significant biodiversity interest, or well-established semi-natural priority woodland types. The Native Woodland Survey of Scotland gives data on ecological condition and this can help to define the nature conservation value of native and ancient woodlands."

3.8 The designation "long established woodlands of plantation origin" refers to woodlands which appear as established on the first edition ordinance survey map which dates to around 1860. Such woodlands are at least 150 years old although many are much older – over 200 years. The 'Tor Wood' was a Royal timber reserve dating back more than 250 years and so it is possible that this woodland is at least 200 years old and therefore nationally rare and afforded the highest level of protection by the Scottish Government. A long established woodland of plantation origin of 150-200 years old represents an inextricable and complete ecosystem of soils, micro-organisms, birds, mammals, insects, ground vegetation and tree species. Scottish Natural Heritage's Scottish Ancient Woodland Inventory gives details of where long-established woodlands of plantation origin can be found. The project area is entirely designated as such a woodland.

3.9 Semi-naturalness is quantified as a percentage of the canopy that was considered semi-natural with 100 percent semi-naturalness being the highest possible score (and therefore the highest value in terms of semi-naturalness). A woodland with 100 percent semi-naturalness is nationally rare as many types of woodland are intensively managed and maintain very few natural characteristics. Similarly the Native Woodland Survey Scotland measures “nativeness” as a percentage with 100 percent being the highest score and therefore the greatest value in terms of biodiversity and in terms of national rarity. This is because most woodlands in Scotland contain at least some non-native species. To find a woodland which has 100 percent nativeness is very rare. The deforested woodland included an area of native woodland which was a long established woodland of plantation origin, semi-natural (100 percent) and native (100 percent). (Reporter note: At the hearing session Forestry Commission Scotland stated that according to the mapping system, 0.24 to 0.28 hectares of the project area was 100 percent semi-natural and 100 percent native).

3.10 A proportion of the project area does not appear to have been included in the Native Woodland Survey Scotland. From our records and site assessment, the remainder comprised 100 percent native species (mainly regenerating birch) which is likely to have had a high degree of semi-naturalness. Even the smallest remnant of mature woodland which is a long established woodland of plantation origin, 100 percent semi-natural and 100 percent native is unimaginably rare and has rightly been afforded the strongest possible protection by the Scottish Government.

3.11 Tree Preservation Order legislation is seen as unwieldy and inappropriate for woodland sites and was not considered appropriate by Falkirk Council for this site given the large areas of woodland in the Torwood area. There are difficulties in placing Tree Preservation Orders on live planning applications. Most local authorities are reluctant to place new Tree Preservation Orders given the administrative and monetary cost. The placing of a Tree Preservation Order on woodland can also act as a potential barrier to sustainable forest management. The absence of a Tree Preservation Order should not therefore be considered to reflect negatively on the quality or importance of a particular woodland.

3.12 In August 2013, Forestry Commission Scotland became aware that three similar planning applications for residential development on the project area had been submitted to Falkirk Council. The submission of the three planning applications added to concerns that the owners did not intend to restock the cleared area and that the works were with the express intention to bring about a change in land use. If this was the case, the project would be considered deforestation, a “relevant project” under the Environmental Impact Assessment (Forestry) (Scotland) Regulations 1999. The following evaluation was made by the Biodiversity Policy Adviser on 13 September 2013 indicating that the project area had a ‘moderate-high’ conservation value:

“The site was recorded as upland birchwood, 100 percent native species, condition status good; mainly silver birch some downy birch, rowan and [pedunculate] oak, with a presence of holly, gean and grey willow. Mature and pole stage with areas of regeneration. Most of the area and adjacent areas to

the south-west is recorded as native woodland that is now dominated by downy birch regeneration and looks to have been felled over and regenerated in recent times (from photos). The Ordnance Survey map suggests mixed conifer/ broadleaved predecessor stands there. On this basis I would say that the site you sent me had a moderately high nature conservation value. If you want a scale of 1-10, I would say 7. The mature trees on this recently felled site were virtually the last ones on the whole area so were more important in that context.”

3.13 As a consequence, there were grounds to consider this as a “relevant project” even though the cleared area was below the thresholds stated in the 1999 Regulations (1 hectare). Forestry Commission Scotland wrote to the 3 landowners (3 October 2013) informing them of this view and requesting that they provide details of their project to assist in determining whether the work carried out constituted a “relevant project” under the Environmental Impact Assessment (Forestry) (Scotland) Regulation 1999. The three owners were informed that if they did not provide further details, the decision would be based on the information collated to date. The appellants responded in a letter dated 24 October 2013. This stated that because the area was below the threshold for deforestation, the land owners had assumed that no permission was required from the Forestry Commission Scotland. The letter requested confirmation that this was correct. No other information on the project was included.

3.14 Around this time the European Union Environmental Impact Assessment screening checklist was initially completed suggesting that it was likely that an Environmental Impact Assessment would be required to assess the impacts of the project on the environment. Forestry Commission Scotland responded to the appellants in a letter dated 11 November 2013 explaining the position in relation to regulation 6(3), which allows the consideration of exceptional circumstances which make it likely that the project would have significant effects on the environment. Therefore the appellants’ interpretation of the Regulations was incorrect and consent might be required. Between 13 November and 14 November 2013, Forestry Commission Scotland proceeded to gather information on the project. Details were sent to the following consultees:

- Woodland Trust Scotland
- Scottish Environment Protection Agency
- Falkirk Council (Biodiversity)
- Falkirk Council (Landscape)
- Falkirk Council (Archaeology)
- Torwood Community Woodland Group Limited
- Larbert, Stenhousemuir and Torwood Community Council
- CM Solutions (representing neighbouring Torwood Forest)
- Scottish Natural Heritage

3.15 A copy of the documentation was also sent to the appellants. Of these consultees, the Scottish Environment Protection Agency, Scottish Natural Heritage and CM Solutions declined to comment on the project. The remainder provided responses. The appellants also provided a response which was taken into account during the screening process. The consultation responses were processed through an internal decision making matrix. This

process resulted in Forestry Commission Scotland forming the opinion under regulation 6(5) that the deforestation carried out was a “relevant project” and that consent would have been required.

3.16 Under normal circumstances, forming an opinion under regulation 6(5) would lead to advising the proposer that consent would be required and that an Environmental Statement needed to be produced to enable the assessment of the effects of the project on the environment. However as the work had already taken place it was considered more appropriate to give formal notice of the opinion and proceed directly with enforcement action. This was communicated to the land owners in a letter dated 14 February 2014, which summarised the responses from the screening process, confirmed for the purposes of regulation 6(5)(a) that the removal of the woodland was a “relevant project” and advised that the project would have required consent. Also included was an enforcement notice, a map and a schedule of works required to restock the deforested area.

3.17 Forestry Commission Scotland were only in a position to issue an opinion under regulation 6(5) on 14 February 2014 because it is imperative to have evidence that woodland removal is being carried out for the purposes of conversion of the woodland to another type of land use. Evidence of the intended change of use in this case only came to light when planning applications for residential development were submitted and came to the attention of Forestry Commission Scotland in August 2013.

3.18 A conclusion that there has been deforestation is only the first element in establishing that a project is a “relevant project” under regulation 3. Once the Forestry Commission concluded that there was deforestation an appraisal of the status of the woodland was initiated. As the appraisal indicated that the status of the woodland was such that it warranted a high degree of protection under the Scottish Government’s policy, a rigorous screening process was instigated to ascertain what other environmental effects might result from the removal of the woodland. The screening process was carried out in accordance with standard protocol and methodologies and involved consulting with a number of various third parties. It was only when these important steps were concluded, that Forestry Commission Scotland was in a position to issue an opinion in terms of regulation 6(5).

Has deforestation occurred in terms of the 1999 Regulations

3.19 Deforestation is defined in regulation 2 (1) as “deforestation for the purposes of conversion to another land use”. (Reporter’s note: At the hearing session, Forestry Commission Scotland also referred to Annex 2 of the Environmental Impact Assessment Directive (consolidated) which states “initial afforestation and deforestation for the purposes of conversion to another type of land-use”). The project area was systematically cleared of tree cover on or around the dates of 28 June 2013, 1 July 2013 and 6 October 2013. The work was carried out using hand held chainsaws, a telescopic forklift truck and tractor mounted chipper/mulcher. Dead wood which was lying in the woodland area was also chipped and mulched. Mulching also caused a degree of soil disturbance which can be seen in some of the photographs and has had a lasting effect on the site. The more mature trees were cut by chainsaw while the younger trees were mulched. Photographs taken on

the 13 June 2014 show the project area in very poor condition with no vegetation in many places and extensive and near complete destruction of the woodland habitat. Photograph 20 from the June 2014 photos shows an example of the approximate size of the younger native birch trees which were mulched over much of the site.

3.20 The Scottish Government's Policy on the "Control of woodland removal-2009" considers the terms "deforestation" and "woodland removal" to be interchangeable. Forestry Commission Scotland's opinion is that the works carried out in the project area were in no way consistent with clear felling/restocking or an internal re-design to meet the United Kingdom Forestry Standard. The appellants have been given the opportunity to demonstrate that this is some form of woodland management and not deforestation on more than one occasion. It should be noted that the appellants' appeal dated 13 March 2014 is titled "Change of Woodland to Non-Woodland" and that the submission dated 12 May 2014 confirms that planning permission is being sought for a change of use of the project area.

3.21 The appellants' intentions were intimated to Forestry Commission Scotland on 28 June 2013 and confirmed when the three planning applications for residential development were submitted in relation to the project area. All three planning applications were refused in December 2013. Reasons for refusal 2 and 4 relate to trees, woodland and hedgerows. All three applicants have requested reviews but the Local Review Body has not yet issued its decisions. As the woodland was removed immediately prior to and following submission of the planning applications for a change of use, there can be no doubt that deforestation has occurred in terms of the 1999 Regulations.

Is the Deforestation likely to have significant effects on the environment

3.22 The internal guidance note "Environmental Impact Assessment code - March 2013" states that "Screening is the process by which the Forestry Commission, as competent authority decides whether a project is likely to have significant effects on the environment by virtue, inter alia, of its nature, size or location". It further states that "The final decision about whether or not the applicant must apply for consent will be made solely by the Forestry Commission based upon the information provided by the screening group and any other relevant information." The project was screened in accordance with the European Commission booklet "Guidance on Environmental Impact Assessment screening".

3.23 Firstly, the European Commission screening checklist was completed. This assisted in deciding whether an Environmental Impact Assessment was required based on the characteristics of the project. The European Commission booklet states that "The questions are designed so that a "yes" answer will generally point towards the need for an Environmental Impact Assessment". On the completed Environmental Impact Assessment screening checklist, 19 questions were answered with a "yes". The project details were then sent out to a range of consultees in line with the suggestions in the European Commission booklet "Guidance on Environmental Impact Assessment screening - section B3.4.3 - consultations during case-by-case screening".

3.24 These responses were processed through the Forestry Commission Scotland Environmental Impact Assessment spreadsheet which is an internal decision making matrix based on the European Commission checklist of criteria for evaluating the significance of environmental effects. The conclusions from this were that there were likely to be significant effects on People and Disturbance, Flora, Fauna and Landscape based on the impact on these features being either major or moderate and irreversible. Non-significant effects in relation to Noise, Air and Dust, Soil, Water, Climate and Recreation were noted. Responses from Falkirk Council, Larbert, Stenhousemuir and Torwood Community Council, the Torwood Community Woodland Group Limited and the Woodland Trust Scotland indicated a significant impact on people. Falkirk Council's Biodiversity Officer identified the woodland at Glen Road as being an important forest habitat network and that removal of this woodland would sever the connectivity of the woodland habitats. (Reporter's note: At the hearing session, Forestry Commission Scotland conceded that "sever" might not be the correct term to use. However, habitat networks are not simply about corridors but about functionality so any reduction in overall size does affect the vitality of the network). Falkirk Council's Landscape Officer gave an in-depth analysis of the likely landscape effects as moderate and irreversible at a local level and the visual effects as moderate to major from adjoining dwellings but not necessarily adverse.

3.25 Based on the information provided by the consultees and Forestry Commission Scotland's knowledge and assessment of the site, it was concluded that the deforestation was likely to have significant effects on the environment and therefore the project would have required consent.

Is the Deforestation a "relevant project" as defined in the 1999 Regulations

3.26 The requirements of regulation 3(1)(a) are met in the present case on the basis that the project is deforestation in terms of 3(2)(b).

3.27 With regard to 3(1)(b), as explained at length above, the project would be likely to have significant effects on the environment. Regulation 3(3) provides that a project shall be taken not to be likely to have significant effects on the environment if the area covered does not exceed the threshold specified in the Regulations for deforestation projects. In this case the relevant threshold for the purposes of regulation 3(3) is 1 hectare. The woodland has an area of 0.96 hectares and therefore falls below the threshold. Regulation 3(3) is however, subject to regulations 6(3) and 7(6).

3.28 Regulation 6(3) provides that even where a project does not exceed the relevant thresholds, in exceptional circumstances the Forestry Commission may, taking account of certain criteria, nevertheless form the opinion that the project will have significant effects on the environment. Regulation 6(3) was applied in the present case. The exceptional circumstances being the nature, location, national rarity and moderate-high conservation value of the project area. The requirements of 3(1)(b) have therefore been met. The appellant's have pointed out that paragraph 4 of Forestry Commission's letter of 14 February 2014 fails to intimate that exceptional circumstances existed for the purposes of regulation 6(3). However, exceptional circumstances were already intimated by paragraph 3 of the letter.

3.29 One of the main reasons for Forestry Commission Scotland coming to the conclusion that exceptional circumstances existed in this case was the status of the woodland in terms of the Native Woodland Survey Scotland (“Long established woodland of plantation origin” with 100 percent nativeness) and the Scottish Government’s policy on the control of woodland removal which affords woodland of this status a high level of protection and creates a strong presumption against the removal of such woodland for any reason. The status of the woodland is mentioned in the letter of 24 February 2014 under “flora”. While the Scottish Government’s policy and the presumption against removal of woodland of this status created by that policy was not specifically mentioned in the letter of 14 February 2014, this was explained in Forestry Commission’s letters to the landowners of 3 October 2013.

3.30 The requirements of 3(1)(c) are met on the basis that the project does not involve development. By virtue of regulation 2(1), for these purposes ‘development’ has the same meaning as development within the meaning of Section 26 of the Town & Country Planning (Scotland) Act 1997. Removing a woodland (unless carried out in the course of facilitating another development) does not constitute development for the purposes of the 1997 Act. The woodland removal works did not involve “development” as they were not carried out in implementation of a planning permission which permitted a change of use but the works were nevertheless carried out for the purposes of a change of use. The appellants’ submission is that there can be no change of use for the purposes of the Regulations unless there is a planning permission authorising a change of use. That submission overlooks the comprehensive scheme provided by the Regulations.

3.31 Regulation 3(1)(c)(i) covers the situation where the carrying out of the project does not involve development (as is the case here); regulation 3(1)(c)(ii) covers the situation where the project involves development but which doesn’t amount to Environmental Impact Assessment development; and regulation 3(1)(c)(iii) covers the situation where the project involves development but for which permitted development rights exist. In the event that planning permission were granted for a change of use to residential development, the Regulations would nevertheless be engaged if and when that consent came to be implemented as regulation 3(1)(c)(ii) would apply (3 houses would almost certainly not be Schedule 1 or 2 of the Environmental Impact Assessment Regulations).

3.32 Notwithstanding the foregoing, as Forestry Commission Scotland has given an opinion under regulation 6(5) that the project is a “relevant project”, regulation 8(4) provides that this opinion determines the issue (see section on additional written legal submissions below).

Mitigation

3.33 Reporter’s note: At the hearing session, Forestry Commission Scotland explained that the woodland fell within Annex 2 – “Woodlands with a strong presumption against removal” of the “Guidance to Forestry Commission Scotland staff on implementing the Scottish Government’s policy on control of woodland removal”. Given the nature of the woodland, mitigation was not considered appropriate. The woodland should be restocked

on-site and retained as existing woodland. Its removal could not be mitigated for elsewhere and no mitigation measures would satisfy Forestry Commission Scotland. If mitigation had any role to play it would be as part of any planning application consents and would be informed by the Environmental Impact Assessment process. (This is confirmed in the Commission's response to Falkirk Council's Planning Review Committee referred to in Mr Mitchell's email dated 11 August 2014.)

Additional written legal submissions on the impact of Regulation 21(9) of the 1999 Act on the ability of the reporter to allow these appeals.

3.34 On 14 February 2014 Forestry Commission Scotland issued opinions under regulation 6 to the owners of the three parts of the site that the works to remove the woodland which had been carried out constituted a "relevant project" for the purposes of the Regulations. The opinions were issued by the Forestry Commission under regulation 6(5) as none of the landowners had requested an opinion under regulation 5. None of the landowners made an application to the Scottish Ministers under regulation 7 for a direction as to whether the works carried out were a "relevant project". As no direction has been given by the Scottish Ministers, by virtue of regulations 8(3) and 8(4) the opinions given by Forestry Commission Scotland dated 14 February 2014 have the effect of determining that the works carried out are a "relevant project" for the purposes of the Regulations. On the basis of regulations 8(3) and 8(4) the reporter should find that the works carried out constitute a "relevant project" irrespective of what view might be reached on the merits of the issue.

3.35 On the basis that the works carried out constitute a "relevant project" (either by virtue of regulations 8(3) and 8(4)) or on the merits), regulation 4 is engaged. The landowners have not applied for or obtained consent in terms of the Regulations for the works which have been carried out. Forestry Commission Scotland has not given a direction under regulation 4(2) that the project in question is exempted from the Regulations. The woodland removal works carried out were therefore in breach of regulation 4(1).

3.36 All of the conditions required for service of an enforcement notice under regulation 20(1)(a) have been met in this case. The appeals in question concern enforcement notices served by the Forestry Commissioners under regulation 20(1)(a) and it seems clear that consent would have been required for the works under regulation 4. On that basis, by virtue of regulation 21(9) it would not be competent for the Scottish Ministers to allow the appeals.

3.37 The appellants' suggestion that regulation 8(4) and the consequences thereof were only mentioned for the first time in Forestry Commission Scotland's legal submission of 15 July 2014 doesn't bear scrutiny. The regulation 8 issue was specifically referred to in Forestry Commission Scotland's hearing statement. The status of Forestry Commission Scotland's opinion was also one of the preliminary legal points in the e-mail of 17 June to the Directorate for Planning and Environmental Appeals. This issue was briefly addressed at the hearing session and, in accordance with the procedure notice of 4 July, a more detailed legal submission was provided on 15 July 2014.

3.38 Regulation 8(4) is not, as appears to be suggested by the appellants, an argument that the Commission has pulled out of thin air and is at liberty to waive in the present case. Regulation 8(4) is simply part of the Regulations and applies automatically in all cases where an opinion has been issued by Forestry Commission Scotland but there has not been a subsequent direction by the Scottish Ministers. Having identified that regulation 8(4) applied to the circumstances of the current case, it would have been remiss of Forestry Commission Scotland not to point this out during the appeal process.

3.39 The appellants could have applied to the Ministers for a direction at any time after the opinion issued on 14 February 2014. Their right to do so was clearly explained in the Forestry Commission Scotland letter of 14 February 2014. Had they done so at the same time as appealing against the enforcement action, it is anticipated that the appeal against the enforcement notice would have been suspended pending the Ministers giving a direction. The appellants bear sole responsibility for not applying for a direction before now and for any inconvenience or cost which that may cause. The Regulations do not appear to set a time limit for a party applying for a direction but in the particular circumstances of this case there are strong arguments that the appellants' failure to apply for a direction until such a late stage in the appeal process, and the impact such an application would have, should prevent them from now making an application.

3.40 All of that said, Forestry Commission Scotland has no desire to put the reporter, the Ministers, the appellants or themselves to any unnecessary time, trouble or expense and is keen to find a practical solution to the unfortunate situation which has developed. As mentioned above however, it is not open to Forestry Commission Scotland to simply waive regulation 8(4). If the appellants wish to apply for a determination or the reporter thinks it appropriate to ascertain from the Ministers whether they would wish to initiate a direction under regulation 7(8), Forestry Commission Scotland would be happy to leave it to the Ministers to decide whether a direction is competent and appropriate. If the Ministers decide that a direction is competent and appropriate, Forestry Commission Scotland would wish to see the decision making process for such a direction integrated with the pending appeal to the fullest possible extent. It would not appear to be in the interests of any of the parties for a direction application to give rise to a separate decision making process which may duplicate much of the work which has been undertaken to date and would likely delay the issue finally being resolved.

3.41 The reporter has had the benefit of reviewing all of the relevant documents, has considered written submissions by each of the parties, has heard oral evidence during the hearing session and has had the benefit of having visited the site. If the Ministers are to issue a direction, one possible solution might be for the Ministers to ask the reporter to submit her report and recommendation so that this could inform the Ministers decision on the direction.

Chapter 4 – Reasoned conclusions and recommendations

Preliminary matter

4.1 During the appeal process, Forestry Commission Scotland drew my attention to regulations 8(3) and 8(4) which state:

“(3) This paragraph applies to a direction given under regulation 7 that a project is or would be a relevant project or, in the absence of a direction under that regulation, to an opinion given under regulation 6 to that effect.

(4) A direction or opinion to which paragraph (3) applies shall have the effect of determining for the purposes of these Regulations that the project specified in the direction or opinion is or would be a relevant project.”

4.2 Forestry Commission Scotland issued opinions under regulation 6 that the works carried out did constitute a “relevant project” and argues that this should be seen as conclusive of the issue. I should, therefore, find that the works carried out constitute a “relevant project” regardless of my view on the merits of the appeals. However, I have also noted regulation 21(7) which states:

“(7) In determining an appeal, the Scottish Ministers shall take into consideration any environmental information, any representations received by them in relation to the appeal and any other material consideration, including in particular its assessment of the direct and indirect effects of the relevant project on the environmental factors specified in Schedule 4.”

4.3 As a consequence, having considered all of the written submissions and heard oral evidence during the hearing session, I am satisfied that the most proportionate and cost-effective way to proceed would be for me to reach a conclusion on whether the works are a “relevant project” or not. All parties have agreed that this would be the best approach.

Reasoned conclusions

Regulation 4

4.4 Regulation 4 of the 1999 Regulations provides that (subject to paragraph 2) no person shall carry out, on any land, work or operations relating to a “relevant project” unless consent has been granted for that project by the Commissioners or by the Scottish Ministers. The appellants have not applied for consent for the works which are the subject of these appeals. I must consider whether or not the works carried out relate to a “relevant project” in terms of regulation 4. (Paragraph 2 refers to circumstances where the Commissioners direct that a particular project is exempted from the application of these Regulations. The Commissioners have not made such a direction in this case and so this paragraph is not relevant to my determinations).

Regulation 3(1)(a)

4.5 The tests for what qualifies as a “relevant project” are set out in regulation 3. Regulation 3(1)(a) requires that it must be a project of a type specified in regulation 3(2), one of which is deforestation. Deforestation is defined in regulation 2(1) as meaning “deforestation for the purposes of conversion to another type of land-use”. Reference is made to paragraph 1(d) of Annex II of the Environmental Impact Assessment Directive, which refers to deforestation as “initial deforestation for the purposes of conversion to another type of land-use”. The Scottish Government’s policy on “Control of Woodland Removal - 2009” similarly defines woodland removal as the permanent removal of woodland “for the purposes of conversion to another type of land-use”. I agree with Forestry Commission Scotland that the terms deforestation and woodland removal are, for the purposes of these cases, interchangeable.

4.6 There is no dispute that the felling has taken place. Despite this, the appellants maintain that as there has not yet been any permanent change of use, deforestation has not occurred. The appellants consider that until planning consent for development is granted, there can be no alternative land-use and the project area could be left to regenerate or be re-planted. No re-planting proposals for the project area have been submitted by the appellants either to Forestry Commission Scotland or during the appeal process.

4.7 While I agree that the project area does not have planning permission at this time and that it could be left fallow or re-planted, this does not negate the fact that felling has taken place on the 3 plots. The Regulations are clear, deforestation occurs where the works are “for the purpose” of conversion to another type of land-use. The Regulations do not stipulate that the other type of land-use has to be implemented or have planning permission before the works can be termed “deforestation”. Furthermore, there has been no suggestion by the appellants that the felling has been undertaken for the purposes of woodland management and I have no substantive evidence of their intention to replant.

4.8 I have also taken into account the appellants’ assertion at the hearing session that the works on-site were carried out, in part, in preparation for an application for a change of use and that 3 planning applications for dwellings were subsequently submitted to Falkirk Council, refused planning permission and are now the subject of review. The majority of evidence before me supports the conclusion that the purpose of the felling was for conversion to another type of land-use. Taking all of this into consideration, I find that regulation 3(1)(a) is satisfied in that this project is of a type which can be specified as “deforestation”.

Regulation 3(1)(b)

4.9 Regulation 3(1)(b) states that (subject to paragraph 3) a project is a “relevant project” if it is likely, by virtue of factors such as its nature, size or location, to have significant effects on the environment. Paragraph 3 stipulates that subject to regulations 6(3) and 7(6), a project shall be taken not to be likely to have significant effects on the environment if the area covered, or to be covered by the project does not exceed any relevant threshold set

out in Schedule 2. I accept that the project area at approximately 0.96 hectares is under the relevant 1 hectare threshold in Schedule 2 (the threshold where no part of the land is in a sensitive area). However, regulation 6(3) in relation to the Commissioners and 7(6) in relation to Scottish Ministers states that in a case where the project does not exceed any relevant threshold set out in Schedule 2, the Commissioners shall form their opinion or the Scottish Ministers shall make its decision in accordance with regulation 3(3) “except where, in their opinion, there are exceptional circumstances which, taking account of the selection criteria in Schedule 3, make it likely that the project will have significant effects on the environment”. (I agree with the appellants that regulations 6(6) and 7(9) which relate to cases where a project adjoins or is near another project are not relevant to these cases).

4.10 I am aware that Scottish Government policy on “Control of woodland removal – 2009” states that there is a strong presumption in favour of protecting Scotland’s woodland resources. Annex 2 of the “Guidance to Forestry Commission Scotland staff on implementing the Scottish Government’s policy on control of woodland removal - 2013” describes in more detail the types of woodland with a strong presumption against removal. These include United Kingdom Biodiversity Action Plan (UK BAP) priority woodland types in areas mainly composed of “long-established woodlands of plantation origin” with significant biodiversity interest or well established “semi-natural” priority woodland types. Slightly more flexibility can be applied to other areas of priority native woodland habitats, of lower biodiversity value, including semi-natural woods established within the last 25 years or so, and recently planted native woods.

4.11 I note that all of the project area is designated as a long-established woodland of plantation origin on the Scottish Ancient Woodland Inventory and that part of the project area, between 0.19 hectares (appellants’ figure) and 0.28 hectares (Forestry Commission Scotland figure), is defined as 100 percent native in the Native Woodland Survey of Scotland and 100 percent semi-natural in the Scottish Semi-Natural Woodland Inventory. I acknowledge the rarity of 100 percent native and semi-natural woodlands in not only a local but national context. The identified native and semi-natural woodland is shown as a strip along Glen Road and a strip along the north-western boundary which separates the project area from an adjoining property. Some trees have been retained along this boundary but these now constitute an isolated group of trees rather than an area of woodland.

4.12 A further fragment of the woodland exists on land to the south-east and separates the project area from another property. The majority of this land which is approximately a third of the size of the project area, is also identified as 100 percent native and 100 percent semi-natural. This area has not been felled. The appellants argue that the trees along Glen Road constituted a safety hazard due to branch drop, shading of frost on the public road and physical interference with overhead telephone wires, but neither this nor the absence of any Tree Preservation Orders alters the status of the woodland as 100 percent native and semi-natural.

4.13 I appreciate that felling already took place in the central part of the project area in 2003 and that this area does not appear to have been included in the Native Woodland Survey. Despite this, both parties refer to evidence of woodland regeneration on this

central area in their submissions. In addition, the location is described, in a previous appeal decision in February 2010 (PPA-240-2002), as “a sloping , semi-wooded site covered by young, self-seeded silver birch and bracken. There are limited numbers of more mature silver birch and some English oak, willow and rowan along the northern, western and eastern boundaries... The recent loss of tree cover on the site has not substantially diminished the essential landscape character of the site and the local area around Glen Road. There are clear signs of woodland regeneration within the site. The apron of mature trees along the northern boundary to Glen road, and to a lesser extent along the eastern boundary, help reinforce the site's rural and woodland character and its contribution to the setting of this part of Torwood.” On my site visit I saw evidence of the remains of young trees and other vegetation over this central area and this is also shown in the Forestry Commission Scotland photographs. I am satisfied that the project area in its entirety could be described as having been woodland in character.

4.14 Given the strong, national policy protection for woodland in general and for “long-established woodlands of plantation origin” and “semi-natural” priority woodland types in particular, I find that the identification of all of the project area as a “long-established woodland of plantation origin” and at least 20 to 29 percent of the project area as 100 percent “native” and 100 percent “semi-natural” constitutes exceptional circumstances which, taking account of the selection criteria in Schedule 3 with regard to the characteristics of the project, its location and the characteristics of the potential impact, make it likely that the project would have significant effects on the environment. My site inspections of the project area itself, the surrounding area and the remaining woodland of a similar nature fronting onto Glen Road together with the results of the screening process carried out by Forestry Commission Scotland, serve to reinforce my view that the impact on flora, fauna and the landscape would be unacceptable (Schedule 4). The relatively small size of each of the plots is outweighed by the rarity of the woodland, the irreversibility of the loss of long established woodland of plantation origin and the cumulative impact of felling across the entire project area.

4.15 I therefore find that, contrary to the view of the Director of Development Services at Falkirk Council referred to in Mr Mitchell's email of 11 August 2014, regulation 3(1)(b) is satisfied in that this project is likely, by virtue of factors such as its nature, size or location, to have significant effects on the environment. The support or otherwise of the Torwood community for the proposed erection of dwelling houses on the land or the acceptance by the reporter in the previous 2010 appeal decision of the conclusions of the appellants' ecological survey (which I have not seen) stating that the site was of limited ecological value do not modify my opinion.

Regulation 3(1)(c)

4.16 Regulation 3(1)(c) states that a project is a “relevant project” if the carrying out of the project satisfies one of 3 criteria. I find that the project is not permitted development and does involve development mentioned in column 1 of the table in Schedule 2 of the 1999 Regulations (deforestation). Accordingly, it does not satisfy criteria (ii) or (iii). Nevertheless, the removal of woodland does not constitute development in terms of Section

26 of the Town and Country Planning (Scotland) Act 1997. I, therefore, find that regulation 3(1)(c)(i) is satisfied in that the carrying out of the project does not involve development.

4.17 In summary, I find that the project is of a type specified in paragraph 2 of regulation 3 (deforestation), is likely to have significant effects on the environment, does not involve development and as a consequence I find that the deforestation is a “relevant project” as defined in regulation 3 of the 1999 Regulations. The mitigation offered by the appellants does not change the fact that it is a “relevant project” in terms of the 1999 Regulations.

4.18 I have taken into account all of the environmental information and representations received, together with any other material considerations and have assessed the direct and indirect effects of the relevant project on the environmental factors specified in Schedule 4. Taking all of the submitted evidence into account, I conclude that the deforestation on land adjacent Glen Road, Torwood, Larbert constitutes a “relevant project” in terms of regulation 4 of the Environmental Impact Assessment (Forestry) (Scotland) Regulations 1999 and would require consent. Accordingly, I consider that the appeals against the enforcement notices should be dismissed.

4.19 Finally, I have noted the appellants’ complaints about Forestry Commission Scotland’s handling of certain aspects of these cases and the sometimes less than clear wording of both internal and external documents produced by the Commission. However, the wording of the Regulations is clear and such matters cannot form part of my considerations which must be based on the merits of the cases, in terms of the relevant legislation.

Additional written legal submissions on the impact of Regulation 21(9) of the 1999 Act on my ability to allow these appeals.

4.20 Regulation 21(9) states that the Scottish Ministers shall not allow an appeal against an enforcement notice served by virtue of regulation 20(1)(a) where it appears to them that consent is required by regulation 4. The argument advanced by Forestry Commission Scotland is that their opinions issued under regulation 6 stating that the works to remove the woodland constituted a “relevant project” are the determining factors in this matter (regulation 8(4)). For the reasons given above, I concur with the opinions of Forestry Commission Scotland that this project constitutes a “relevant project” in terms of regulation 4 and would require consent. Therefore, regardless of whether or not the Forestry Commission Scotland assertion is correct, I find that, in either event, in accordance with regulation 21(9), the appeals against the enforcement notices should not be allowed.

Recommendation

4.21 For these reasons, I recommend that the Scottish Ministers dismiss the appeals and uphold the enforcement notices dated 14 February 2014.

Katrina Rice

Reporter

Appendix 1 – List of documents

Appellants' list of documents

1. Environmental Impact Assessment of forestry projects
2. Roy Military map of 1750
3. Scottish Natural Heritage map of 1860
4. Forestry Commission aerial view showing the extent of woodland on the site prior to removal, extending to 0.19 hectare
5. Petition in support of residential development on the application site, signed by the majority of the Torwood households
6. Copies of all the correspondence with the Directorate & Forestry Commission
 - a) Forestry Commission letter dated 3 October 2013
 - b) Roy Mitchell letter dated 24 October 2013
 - c) Forestry Commission letter dated 11 November 2013
 - d) Forestry Commission letter dated 13 November 2013
 - e) Roy Mitchell letter dated 29 November 2013
 - f) Forestry Commission letter & enforcement notice dated 14 February 2014
 - g) Roy Mitchell letter dated 13 March 2014 registering appeal
 - h) Forestry Commission letter dated 25 April 2014
 - j) Roy Mitchell letter dated 12 May 2014
 - k) Roy Mitchell letter dated 18 June 2014 - Further written submissions
 - l) Roy Mitchell letter dated 18 June 2014 - Hearing session
7. Plan indicating location of mitigation measures adjacent to Torwood Castle in ownership of Mr. Peter Hoggan, plot 1, as submitted to Falkirk Council in connection with the on-going discussions with the Local Hearing Review Panel

Forestry Commission Scotland's list of documents

1. Email from Gordon Patterson, Biodiversity Policy Adviser, dated 13 September 2013
2. Letters to three landowners dated 3 October 2013
3. Letter from Mr Mitchell dated 24 October 2013
4. European Commission screening checklist
5. Letter to Mr Mitchell dated 11 November 2013
6. Screening map
7. Email from Tim Hall – Woodland Trust Scotland – appellants' arboricultural contractor involvement dated 27 November 2013
8. Screening consultation responses
9. Enforcement letter, map, enforcement notice and schedule of works – Mitchell dated 14 February 2014
10. Email from Harry Wilson – volumes from first phase of project dated 1 July 2013
11. Guidance to Forestry Commission Scotland staff on implementing the Scottish Government's policy on the control of woodland removal
12. Scottish Government's policy on the control of woodland removal policy
13. Map from planning application – plot 1
14. Map from planning application – plot 2

4 The Courtyard, Callendar Business Park, Falkirk, FK1 1XR
DX 557005 Falkirk www.scotland.gov.uk/Topics/Planning/Appeals



15. Map from planning application – plot 3
16. Forestry Commission internal guidance – Environmental Impact Assessment code page 10
17. European Commission booklet - Guidance on Environmental Impact Assessment screening
18. Forestry Commission Scotland Central Scotland Conservancy – Environmental Impact Assessment decision making matrix
19. Response to the Directorate for Planning and Environmental Appeals dated 25 April 2014
20. Spatial metadata – Native Woodland Survey Scotland
21. Native Woodland Survey Scotland – Torwood “nativeness” map
22. Native Woodland Survey Scotland – Torwood “semi-naturalness” map
23. Scottish Ancient Woodland Inventory – Torwood “long-established woodlands of plantation origin” (LEPO) map
24. Spatial metadata – Scottish Semi-Natural Woodland Inventory
25. Email to Keith Wishart from Neil White – 28 June 2013 summarising findings from investigation into alleged illegal felling
26. Map index for photos from 28 June 2013, 11 October 2013 and 13 June 2014 showing approximate location of photograph and direction picture was taken in
27. Planning application decision notice – Mitchell
28. Planning application decision notice – Gilmour
29. Planning application decision notice - Hoggan

Mr Roy Mitchell
Beechcroft
Carronvale Road
LARBERT
FK5 3LG



14 April 2015

Dear Mr Mitchell

**ENVIRONMENTAL IMPACT ASSESSMENT (FORESTRY) (SCOTLAND) REGULATIONS 1999
ENFORCEMENT NOTICE APPEAL – LAND ADJACENT TO GLEN ROAD, TORWOOD,
LARBERT**

This letter contains the Scottish Ministers' decision on the conjoined appeals lodged by you on behalf of yourself, Peter and Janet Hoggan and Allan Gilmour on 13 March 2014, in terms of regulation 21 of the Environmental Impact Assessment (Forestry) (Scotland) Regulations 1999 ("the 1999 Regulations"). Your appeal is against the service of one of three enforcement notices, identical in terms, by the Forestry Commissioners dated 14 February 2014 under regulation 20 of the 1999 Regulations ("the enforcement notices").

The enforcement notices stated that consent was required under regulation 4 of the 1999 Regulations for work carried out at land adjacent to Glen Road, Torwood, Larbert, in relation to a "relevant project" without consent, namely deforestation on three adjoining plots totalling approximately 0.96 hectares.

Your appeal was dealt with conjointly with the appeals against the other two enforcement notices, as agreed by all parties.

The grounds of the appeal lodged by you were, principally: that the felling did not constitute a "relevant" project because it was under the 1 hectare threshold and there were not exceptional circumstances; that deforestation had not taken place under the terms of the 1999 Regulations; and that, accordingly, consent was not required.

The Scottish Ministers appointed Katrina Rice, a Reporter of the Scottish Government Directorate of Planning and Environmental Appeals, to investigate the further matters at issue in the appeal, hold a hearing, and make findings of fact and make a recommendation to Ministers as to the disposal of the appeal. This was agreed by both the appellants and the Forestry Commissioners.

A hearing was held on 9 July 2014 within Stenhousemuir Football Club, Ochilview Park, Gladstone Road, Stenhousemuir. The Reporter then made a report to Scottish Ministers dated 8 October 2014 ("the report"). A copy of the report is enclosed for your information.

A description of the site and its surroundings, and of the enforcement notices, is contained at paragraph 1.1 – 1.5 of the report.

Summary of evidence

A summary of the evidence for the appellants is given at paragraphs 2.1 - 2.29 of the report. A summary of the evidence for Forestry Commission Scotland is given at paragraphs 3.1 – 3.41 of the report.

Conclusions and recommendation

The Reporter's conclusions are set out at paragraphs 4.4 – 4.20 of the report, and her recommendation at paragraph 4.21 of the report.

The Scottish Ministers' Decision

The Scottish Ministers have carefully considered the written submissions and the evidence put forward, including the environmental and other material considerations, and the report of the Reporter.

Scottish Ministers accept and agree with the Reporter's findings, reasoning and conclusions and adopt them for the purposes of their own decision. They also accept the Reporter's recommendation to dismiss the appeals and to uphold the enforcement notices issued by the Forestry Commissioners dated 14 February 2014.

It is the Scottish Ministers' view that the felling constituted deforestation for the same reasons given by the Reporter. The Scottish Ministers are also of the view, in line with the reasoning of the Reporter, that environmental factors around the character of the woodland felled constitute exceptional circumstances to the effect that there were likely to be significant effects on the environment. As such the felling was a "relevant project". That being the case, the deforestation required consent from the Forestry Commissioners or the Scottish Ministers which was not sought or given, and it is correct in the circumstances for the Forestry Commissioners to have served the enforcement notices.

In accordance with the 1999 Regulations, the Scottish Ministers cannot allow an appeal against an enforcement notice where it appears to them that consent is required. Accordingly, the Scottish Ministers hereby dismiss your appeal and uphold the enforcement notice issued by the Forestry Commissioners on 14 February 2014. This letter constitutes their decision to that effect.

The foregoing decision of the Scottish Ministers is final, subject to any right to apply to the Court of Session for a judicial review of this decision. Judicial review is the mechanism by which the Court of Session supervises the exercise of administrative functions, including how the Scottish Ministers exercise their statutory functions under the 1999 Regulations. The rules relating to the judicial review process can be found on the website of the Scottish Courts – <http://www.scotcourts.gov.uk>.

This determination of the appeal brings to an end the suspension of the enforcement notices under regulation 21 of the 1999 Regulations. You are now obliged to comply with the terms of the enforcement notice.

A letter in similar terms to this one and a copy of the report has been sent to each of the other appellants.

Yours faithfully

DAVID BARNES



Falkirk Council
Corporate & Housing Services

Enquiries to: Antonia Sobieraj
Direct Dial: (01324) 501277
Email - Antonia.sobieraj@falkirk.gov.uk
Our Ref: AS
Date: 29 June 2015

1st Class Post

Mr Andhi Gardiner
1 Forrester Gait
Torwood
FK5 4TB

Dear Mr Gardiner,

**LOCAL PLANNING REVIEW COMMITTEE – PLANNING APPLICATIONS
P/13/0513/FUL, P/13/0514/FUL AND P/13/0509/FUL ERECTION OF
DWELLINGHOUSE AND DETACHED DOMESTIC DOUBLE GARAGE
(PLOT 1), (PLOT 2) AND (PLOT 3) AT LAND TO THE SOUTH EAST OF
BYWAYS, GLEN ROAD, TORWOOD**

I refer to the above planning applications. You will recall that decision notices were issued on 8 December 2014 narrating that the Council was minded to grant planning permissions subject to conclusion of satisfactory planning obligations.

The Scottish Ministers recently decided to refuse appeals by the applicants against enforcement notices issued by Forestry Commission Scotland. The Council sought specialist advice on this and I attach copies of two letters by Brodies, Solicitors, to the applicants' agent and Forestry Commission Scotland. You will note that it is Brodies' advice that the matter requires to come back to the Council's Planning Review Committee in order that it may consider the Scottish Ministers' decision. The position is explained by Brodies in the letters.

It is the intention of officers of the Council to convene a further meeting of the Planning Review Committee on the matter. I will, of course, keep you advised of the date of the meeting. If, in light of the above, you have any comments you would wish put before the Planning Review Committee at its meeting, I should be grateful if you could supply them to me within 21 days of the date of this letter.

Yours sincerely,

Committee Services Officer
for Chief Governance Officer

Director: Stuart Ritchie
Municipal Buildings,
Falkirk FK1 5RS
LP 1 Falkirk-2
Telephone: 01324 506070

Enquiries to: Antonia Sobieraj
Direct Dial: (01324) 501277
Email - Antonia.sobieraj@falkirk.gov.uk
Our Ref: AS
Date: 29 June 2015



Falkirk Council
Corporate & Housing Services

Ist Class Post

George & Maryann Laing
Bracken-Lea
Glen Road
Torwood
FK5 4SN

Dear Mr & Mrs Laing

**LOCAL PLANNING REVIEW COMMITTEE – PLANNING APPLICATIONS
P/13/0513/FUL, P/13/0514/FUL AND P/13/0509/FUL ERECTION OF
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Yours sincerely,

Committee Services Officer
for Chief Governance Officer

Director: Stuart Ritchie
Municipal Buildings,
Falkirk FK1 5RS
LP 1 Falkirk-2
Telephone: 01324 506070

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www.falkirk.gov.uk

Enquiries to: Antonia Sobieraj
Direct Dial: (01324) 501277
Email - Antonia.sobieraj@falkirk.gov.uk
Our Ref: AS
Date: 29 June 2015



Falkirk Council
Corporate & Housing Services

1st Class Post

Mr and Mrs J Bell
Netherlee
Glen Road
Torwood
FK5 4SN

Dear Mr Bell,

**LOCAL PLANNING REVIEW COMMITTEE – PLANNING APPLICATIONS
P/13/0513/FUL, P/13/0514/FUL AND P/13/0509/FUL ERECTION OF
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Yours sincerely,


Committee Services Officer
for Chief Governance Officer

Director: Stuart Ritchie
Municipal Buildings,
Falkirk FK1 5RS
LP 1 Falkirk-2
Telephone: 01324 506070

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Direct Dial: (01324) 501277
Email - Antonia.sobieraj@falkirk.gov.uk
Our Ref: AS
Date: 29 June 2015



Falkirk Council
Corporate & Housing Services

Ist Class Post

Rowandale
Torwood
Larbert
FK5 4SN

Dear Sir/Madam,

**LOCAL PLANNING REVIEW COMMITTEE – PLANNING APPLICATIONS
P/13/0513/FUL, P/13/0514/FUL AND P/13/0509/FUL ERECTION OF
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Yours faithfully,

Committee Services Officer
for Chief Governance Officer

Enquiries to: Antonia Sobieraj
Direct Dial: (01324) 501277
Email - Antonia.sobieraj@falkirk.gov.uk
Our Ref: AS
Date: 29 June 2015



Falkirk Council
Corporate & Housing Services

Ist Class Post

Mr and Mrs Paton
Wallacebank
Glen Road
Torwood
FK5 4SN

Dear Mr and Mrs Paton,

**LOCAL PLANNING REVIEW COMMITTEE – PLANNING APPLICATIONS
P/13/0513/FUL, P/13/0514/FUL AND P/13/0509/FUL ERECTION OF
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I refer to the applications made for review of the original decisions in relation to the above planning applications. I note that you submitted representations in relation to these matters.

Yours sincerely,

Committee Services Officer
for Chief Governance Officer

Director: Stuart Ritchie
Municipal Buildings,
Falkirk FK1 5RS
LP 1 Falkirk-2
Telephone: 01324 506070

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Direct Dial: (01324) 501277
Email - Antonia.sobieraj@falkirk.gov.uk
Our Ref: AS
Date: 29 June 2015



Falkirk Council
Corporate & Housing Services

1st Class Post

Mrs Joanna Stevenson
Yew Bank
Central Park Avenue
Larbert
FK5 4GR

Dear Mrs Stevenson,

**LOCAL PLANNING REVIEW COMMITTEE – PLANNING APPLICATIONS
P/13/0513/FUL, P/13/0514/FUL AND P/13/0509/FUL ERECTION OF
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Yours sincerely,

Committee Services Officer
for Chief Governance Officer

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Director: Stuart Ritchie
Municipal Buildings,
Falkirk FK1 5RS
LP 1 Falkirk-2
Telephone: 01324 506070

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Enquiries to: Antonia Sobieraj
Direct Dial: (01324) 501277
Email - Antonia.sobieraj@falkirk.gov.uk
Our Ref: AS
Date: 29 June 2015



Falkirk Council
Corporate & Housing Services

Ist Class Post

Alison and David Neilson
Willowdene
Glen Road
Torwood
FK5 4SN

Dear Mr and Mrs Neilson,

**LOCAL PLANNING REVIEW COMMITTEE – PLANNING APPLICATIONS
P/13/0513/FUL, P/13/0514/FUL AND P/13/0509/FUL ERECTION OF
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Yours sincerely,

Committee Services Officer
for Chief Governance Officer

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Municipal Buildings,
Falkirk FK1 5RS
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Telephone: 01324 506070

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Enquiries to: Antonia Sobieraj
Direct Dial: (01324) 501277
Email - Antonia.sobieraj@falkirk.gov.uk
Our Ref: AS
Date: 29 June 2015



Falkirk Council
Corporate & Housing Services

Ist Class Post

Yvonne Weir
Secretary
Larbert, Stenhousemuir & Torwood Community Council
c/o 92 Stirling Road
Larbert
FK5 4NF
Copy also sent by email: yvonneandbrian@blueyonder.co.uk

Dear Ms Weir,

**LOCAL PLANNING REVIEW COMMITTEE – PLANNING APPLICATIONS
P/13/0513/FUL, P/13/0514/FUL AND P/13/0509/FUL ERECTION OF
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Yours sincerely,


Committee Services Officer
for Chief Governance Officer

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Director: Stuart Ritchie
Municipal Buildings,
Falkirk FK1 5RS
LP 1 Falkirk-2
Telephone: 01324 506070

www.falkirk.gov.uk

OUR REF RHS/FAL0014.00039
YOUR REF

Fao Mr Neil White
Forestry Commission Scotland
Bothwell House
Hamilton Business Park
Caird Park
Hamilton
ML3 0QA

25 June 2015

Dear Mr White

TORWOOD: PLANNING APPLICATIONS P/13/0509/FUL, P/13/0513/FUL AND P/13/0514/FUL

- 1 Falkirk Council have appointed Brodies to advise them in respect of the above planning applications and the implications of the Scottish Ministers' recent decision to refuse appeals in respect of enforcement notices issued under the Environmental Impact Assessment (Forestry) (Scotland) Regulations 1999 ("the 1999 Regulations") in respect of the same plots.
- 2 My understanding is that the purpose of the 1999 Regulations is to ensure that the requirements of the Environmental Impact Assessment Directive are complied with in respect of forestry projects where such projects do not form part of a development that falls within one of the classes in schedule 1 or 2 (disregarding the thresholds in schedule 2) of the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011 ("the 2011 Regulations").
- 3 On 8 December 2014, the Council's Planning Review Body decided that it was minded to grant planning permission on the basis of the above planning applications, to which Forestry Commission Scotland had objected. The Planning Review Body sought and received a screening opinion from Council officers which concluded that environmental impact assessment (EIA) was not required. The Planning Review Body accepted that opinion although it was aware that Forestry Commission Scotland had previously issued an enforcement notice under the 1999 Regulations in respect of deforestation of the site for the purpose of change of land use to housing. The Planning Review Body's assessment, following its considerations of the screening opinion, was that EIA was not required even though deforestation of the application site (in the sense of a change of use from forestry to housing) was part of the three housing developments. Planning permission was to be issued upon the conclusion of a planning agreement securing replanting elsewhere on Whinnie Muir.
- 4 The Planning Review Body is required to take account of any material change in circumstances between

the submission of the appeal and the grant of permission (even if a minded-to-grant decision has previously been issued – see *John G Russell (Transport) Ltd v Strathkelvin DC* 1992 SLT 1001). In our view, the Scottish Ministers' decision to refuse the appeals against the enforcement notices issued under the 1999 Regulations is a circumstance that the Council are required to take into account.

- 5 Brodies have therefore advised the Council's officers that they should bring the applications back before the Planning Review Body so that it can consider the Scottish Ministers' decision. It appears to us that the Planning Review Body would then have three options:
 - 5.1 To determine that, notwithstanding the Scottish Ministers' decision, it was still minded to grant planning permission without EIA;
 - 5.2 To determine itself, in the light of the Scottish Ministers' decision, that EIA is required;
 - 5.3 To request a screening direction from the Scottish Ministers under the 2011 Regulations.

It would of course be possible for any person other than the Council to request a screening direction from the Scottish Ministers before planning permission is granted, even if the Planning Review Body took the first option. Since we know of no relevant circumstance that has changed other than the Scottish Ministers' decision on the 1999 Regulations enforcement appeal, it does not appear to us that the Planning Review Body could at this stage lawfully refuse permission except on the basis of new environmental information supplied should it be determined either by the Council or the Scottish Ministers that an environmental impact assessment is required. The proposed replanting near Torwood Castle might properly be seen as part of the overall project for EIA purposes, and therefore to be taken into account in any screening decision.

- 6 For your information, our advice to the Council on the relationship between the enforcement action under the 1999 Regulations and the planning applications is that grant of the applications would supersede enforcement notices. The matter is far from straightforward but our reasons for taking this view are: that grant of planning permission will include permission for change of the land use at the site from forestry to housing; that the planning applications do fall within a description in the 2011 Regulations (urban development project); that (in the absence of the enforcement notices) operation of the 1999 Regulations would therefore be displaced by the planning applications; the purpose of enforcement action under the 1999 Regulations is solely to ensure compliance with EIA requirements (and is not to be conceived as a punishment); EIA requirements would have been met under the 2011 Regulations; there would be no further purpose in the enforcement notices if EIA requirements had been met. Therefore, although the 1999 Regulations do not state expressly that an enforcement notice under the 1999 Regulations ceases to have effect upon grant of planning permission (nor indeed do they state expressly that enforcement notices cease to have effect if consent is granted under the 1999 Regulations), it appears to us that this is the effect such a grant must have (just as a planning enforcement notice would cease to have effect on grant of planning permission). Even if we are wrong in this, we cannot see that it would be in the public interest to prosecute a breach of an enforcement notice issued under the 1999 Regulations where the planning authority, to whom Parliament has given the authority for such decisions (rather than Forestry Commission Scotland), has granted planning permission that includes a change of use from forestry. It would be appropriate in those circumstances for Forestry Commission Scotland to withdraw the enforcement notices.