

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 We 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 the 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, 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 appears to us it would be appropriate in those circumstances for Forestry Commission Scotland to withdraw the enforcement notices.

- 7 At the same time as writing to you, we are writing to Forestry Commission Scotland to let them know what the Council's view and what it proposes to do. We will also suggest that Forestry Commission Scotland considers exercising its powers under Regulation 20(6)(a) of the 1999 Regulations to vary the enforcement notice so as to allow further time for the planning process to run its course.
- 8 The Council will provide a copy of this letter to Forestry Commission Scotland and other interested parties along with a copy of a letter to Forestry Commission Scotland (attached for your information). Comments are invited from all of these parties within 21 days of the date of this letter which will be put before the Planning Review Committee. If you have any comments you wish put before the Planning Review Body, please provide both me and Antonia Sobieraj, Committee Assistant, Falkirk Council, Municipal Buildings, Falkirk, FK1 5RS with them within the 21 days period.

Yours sincerely



Neil Collar
Partner
On behalf of Brodies LLP
Direct Line: 0131 656 0125
E-mail: neil.collar@brodies.com

Sobieraj, Antonia

From: [REDACTED] in behalf of LST Community Council [lst-cc@virginmedia.com]
Sent: 14 July 2015 23:44
To: Sobieraj, Antonia
Cc: Lauralin Scott; Eric Appelbe
Subject: Fwd: Local Review Body - Additional Comments: P/13/0513/FUL, P/13/0514/FUL, and P/13/0509/FUL by Larbert, Stenhousemuir & Torwood Community Council

Dear Antonia

Many thanks for your letter of 29 June 2015 advising us of the legal advice the Council has sought in relation to the outcome of the Forestry Commission enforcement notice appeal and the impact of this on the 3 planning applications. We note that the application is now due to go back to the Local Review Body.

We discussed the position at our meeting on Monday 29 June 2015 upon receipt of your letter. Our position of objecting to the applications remains unaltered and we see no material considerations that would alter our position.

We would also advise that we are concerned over the decision making processes within this case. We note that the decision to grant planning permission was taken by the Local Review Body and required a casting vote by the Chair. We note that the Chair used their casting vote to grant planning permission to the 3 planning applications. We would have expected that a Chair with a casting vote would be expected to vote to retain the status quo. Given the substantial case history at this site, the recommendations of officers and at the time the Forestry Commission appeal process, we were surprised that this course of action was taken and the applications granted permission.

We would therefore ask that careful consideration is given by the Local Review Body to this case and the outcome of the Forestry Commission enforcement notice appeal.

Yours sincerely

--
 Yvonne Weir
 Secretary
 Larbert, Stenhousemuir & Torwood Community Council

C/O 92 Stirling Road, Larbert, FK5 4NF
 Tel: 01546 511111

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----- Forwarded message -----

From: **Sobieraj, Antonia** <antonia.sobieraj@falkirk.gov.uk>
 Date: 17 February 2015 at 14:57
 Subject: RE: Planning Review - Additional Comments: P/13/0513/FUL, P/13/0514/FUL, and P/13/0509/FUL Comment by Larbert, Stenhousemuir & Torwood Community Council
 To: LST Community Council <lst-cc@virginmedia.com>
 Cc: [REDACTED] "Morris, John" <john.morris@falkirk.gov.uk>

Thank you for your email.

01/10/2015

I attach the decision notices for the three applications and a copy of the minute of the meeting of the Local Review Body on 29 September 2014 when the decision was taken.

As you will note from the decision notices the Planning Review Committee **AGREED** that it was **MINDED** to **GRANT** planning permission in relation to applications P/13/0509/FUL, P/13/0513/FUL and P/13/0514/FUL subject to:-

(a) The satisfactory conclusion of an appropriate legal agreement/planning obligation in respect of:-

(i) The replacement of a conifer woodland elsewhere at Whinnie Muir with a native broadleaved woodland over an area twice the size of the application site; and

(b) Thereafter, subject to the satisfactory conclusion of the foregoing matter, to remit to the Director of Development Services to grant planning permission subject to the detailed conditions within the decision notice.

I hope this is helpful and should you require any further information do not hesitate to contact me.

Tonia

Antonia Sobieraj

Committee Services Officer

Chief Executive Office

Governance

Falkirk Council

Municipal Buildings

Falkirk FK1 5RS

Email:antonia.sobieraj@falkirk.gov.uk

Telephone:01324 501277

From: [REDACTED] | **On Behalf Of** LST Community Council

Sent: 16 February 2015 19:35

To: Morris, John: Sobieraj, Antonia

Cc: [REDACTED]

Subject: Re: Planning Review - Additional Comments: P/13/0513/FUL, P/13/0514/FUL, and P/13/0509/FUL Comment by Larbert, Stenhousemuir & Torwood Community Council

01/10/2015

Hi John/Antonia

I note that we have still not received a response in relation to the Local Planning Review Body meeting for these applications.

Can you please arrange for a copy of the outcome letter and minutes from the meeting to be forwarded to us. Our next meeting is on Monday 23 February and we would be grateful for a response before then.

In light of the Forestry Commission enforcement notice appeal at the site, can you please also advise if the planning applications are sisted until the outcome of the appeal's process.

Kind regards

Yvonne

--

Yvonne Weir

Secretary

Larbert, Stenhousemuir & Torwood Community Council


Tel: 

E-Mail: lst-cc@virginmedia.com

Website: www.lstcommunitycouncil.org.uk

Facebook: www.facebook.com/LSTCommunityCouncil

Twitter: @LST_CC

On 21 January 2015 at 21:43, LST Community Council <lst-cc@virginmedia.com> wrote:

01/10/2015

Hi John

I have checked our records and note we do not appear to have received an update on this planning review.

Can you please forward a copy of the outcome or provide an update on the review.

Kind regards

Yvonne

Yvonne Weir

Secretary

Larbert, Stenhousemuir & Torwood Community Council

C/O 92 Stirling Road, Larbert, FK5 4NF

Tel: 01592 222222

E-Mail: lst-cc@virginmedia.com

Website: www.lstcommunitycouncil.org.uk

Facebook: www.facebook.com/LSTCommunityCouncil

Twitter: @LST_CC

On 26 February 2014 at 10:03, Morris, John <john.morris@falkirk.gov.uk> wrote:

Dear Yvonne

Thank you for your comments in respect of the above. A copy has been placed on each individual file. In accordance with procedures, these will be passed to the applicant for comment. Committee Services will be in touch with details of any further developments in the process.

01/10/2015

Sobieraj, Antonia

From: [REDACTED]
Sent: 20 July 2015 22:40
To: Sobieraj, Antonia
Subject: Planning Review Committee submission P/13/5014 / 0509 / 0513

I would wish the following comments made to the Planning Review Committee.

Brodies advice aside, I am pleased the Council have decided to review their decision of 'minded-to-grant,' planning permission after what in our opinion was a flawed decision ultimately taken by one committee member which has resulted in an embarrassing set of circumstances for the Council.

The conditions attached to the 'minded to grant' planning permission included the planting of a defined area of the Whinnie Muir site, a provision which we believe was out with the jurisdiction of the Council. The Forestry Commission would have had to provide a felling licence? I understand this is a licence the Forestry Commission are not minded to provide. On this same point, I would have thought that if the Council after its review meeting decide to proceed to grant planning, the site now re-stocked would require a felling licence ?

I am again dismayed at the apparent waste of public resource give to this case over a sustained period of time. As residents of Torwood, we have observed numerous planning applications on this site, objections, site visit after site visit, and we were further frustrated to read the recent legal advice offered to the Council by Brodies, which has no doubt cost the tax payer additional unnecessary expense. After two in-depth reports and subsequent decisions by Scottish Ministers both concluding the same outcome, the strong position taken by the Forestry Commission, The Woodland Trust, the local Community Council and the local Woodland Group, I would ask the Committee to consider to make the right decision and reject the decision to grant planning.

The basic facts of the case remain unchanged this site is out with the local plan, there is already a brown field site identified in Torwood for development, there is therefore no further requirement for housing.

Mrs & Mrs J Bell
Netherlee
Glen Road
Torwood
Larbert
FK5 4 SN

Sobieraj, Antonia

From: [REDACTED]
Sent: 20 July 2015 23.15
To: Sobieraj, Antonia
Subject: Planning Review Committee Submission P/13 0513 / 0514 & 0509

I am providing the following submission on behalf of Torwood Community Woodlands Ltd further to your letter dated 29th June 2015.

Firstly, the Torwood Community Woodlands Group Ltd are delighted the site has once again been restocked with native broadleaved woodland as required by the Forestry Commissions enforcement notices. As the Committee will be aware our local woodland group have campaigned for the site to be returned to its natural habitat since 2002 when it was illegally felled.

We duly note the advice received by Brodies dated 25th June 2015. We are pleased that the Council have decided to review their decision of 'minded-to-grant,' planning permission. It is our opinion that this decision was fundamentally flawed in the first instance. The provisions attached to the 'minded to grant' planning permission included the planting of a defined area of the Whinnie Muir site twice the size of the application site, a provision which we believe the Council did not have the authority to enforce. It would have been the Forestry Commission decision to ultimately provide a felling licence in order for this provision to have been fulfilled. We understand from our communications with the Forestry Commission that this is a licence they would not have minded to grant. On this same point, we also believe that should the Council after its review meeting decide to proceed to grant planning, the site now re-stocked would also now require a felling licence. We can only assume the Forestry Commissions position would remain consistent with their earlier position.

The fundamental facts of the case have remain unchanged over a significant period of time as in this site is out with the local plan, there is already a brown field site identified in Torwood for development, there is therefore no further requirement for housing.

The local Community Woodland Group have worked in partnership with the residents of Torwood, Stenhousemuir and Larbert over a number of years along with the Forestry Commission, The Woodland Trust, Larbert, Stenhousemuir and Torwood Community Council to name only a few. We are confident we speak for all those who have been involved in our on going commitment to protect our local natural environment and ask the Planning Review Committee move to reject the previous decision of minded to grant.

Elaine Bell (Mrs)

Trustee

On behalf of Torwood Community Woodlands Ltd

Registered Office: Willowdene, Glen Road, Torwood, Larbert FK5 4SN
Torwood



-Our ref: PFE/383851
Your ref: RHS/FAL0014.00039

FAO Neil Collar
Brodies
DX ED10
EDINBURGH 1

28 August 2015

Dear Mr Collar

**Falkirk Council
Forestry Commission Scotland
Torwood
Applications: P/13/0509/FUL, P/13/0513/FUL and P/13/0514/FUL**

I refer to your letter of 25 June 2015 addressed to Neil White of Forestry Commission Scotland. Your colleague Robert Seaton sent me a copy of the letter on 25 June and subsequently provided a copy of the Screening Opinion provided to the Local Review Body.

Forestry Commission Scotland has considered this matter very carefully and asked me to respond on their behalf.

Two key issues emerge from your letter which I will consider in turn below. There is however a substantial degree of overlap between the issues.

Relationship between Enforcement under 1999 Regulations and Permission Granted under the 1997 Act

The first issue is the relationship between the enforcement action taken under the Environmental Impact Assessment (Forestry) (Scotland) Regulations 1999 ("the 1999 Regulations"), which were engaged by the site owners' unauthorised deforestation of Torwood, and the potential grant of planning permission for a residential development on the Torwood site under the Town and Country Planning (Scotland) Act 1997 ("the 1997 Act.") Environmental impact assessment in relation to applications for planning permission is ordinarily, but not always, dealt with under the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011 ("the 2011 Regulations").

Both the 1999 Regulations and the 1997 Act establish assessment, consenting and enforcement regimes in relation to certain activities. While in the majority of cases the same activities would only engage one of the regimes, it is perfectly possible that both regimes could be simultaneously engaged by the same proposed activity. For example, both regimes would be engaged in relation to projects to which the 1999 Regulations potentially apply (most obviously deforestation) which involve development not mentioned in Schedule 1 or column 1 of Schedule 2 of the 2011 Regulations. Such development would be covered by Regulation 3(1)(c)(ii) of the 1999 Regulations.

In such a situation, the grant of planning permission would not on its own be sufficient to allow the proposed development to go ahead. Consent would also be required under the 1999 Regulations (if it was considered that the project was likely to have significant effects on the environment.) If consent was refused but works nevertheless commenced, enforcement action under the 1999 Regulations would still be competent and appropriate notwithstanding the grant of planning permission.

That was not of course the exact situation at Torwood. As no planning permission for housing development had been granted at the time of determination of the Enforcement Notice appeal, and no actual building works had commenced, the appeal was decided on the basis that there was deforestation not involving development (i.e. under Regulation 3(1)(c)(i) of the 1999 Regulations) as opposed to deforestation involving development not mentioned in Schedule 1 or 2 of the 2011 Regulations.

Once the 1999 Regulations have been engaged with a project, in this case through deforestation actually being carried out, a developer cannot disengage the regulations by subsequently adding to or altering the nature of the project. Any subsequent changes or additions to the original project would also need to be considered under the 1999 Regulations as the potential environmental impacts of the changes or additions would be cumulative to the environmental impacts of the initial deforestation project. If a subsequent change or addition to the project were to be considered separately then there would be a risk of missing the cumulative environmental impacts of the changes or additions. That risk is clearly highlighted in the present case where the screening carried out by the Council has concluded no likelihood of significant environmental effects which would mean no further environmental impact assessment of the housing proposals. Splitting the assessment of EIA projects in this way is colloquially referred to as 'salami slicing' and extensive case law makes clear that this is prohibited.

The Council's position is that the grant of planning permission would be for a development covered by Column 1 of Schedule 2 of the 2011 Regulations (para 10(b)). As such development would not be covered by the 1999 Regulations, the grant of planning permission should supersede enforcement notices served in the context of a Regulation 3(1)(c)(i) situation.

You have acknowledged that the 1999 Regulations do not expressly state that would be the case. Likewise, there doesn't appear to be anything in the 1997 Act to that effect.

You will appreciate that the enforcement notices have been subject to extensive procedure. The landowners appealed the enforcement notices and the appeal was dealt with by way of a hearing and written submissions. It was ultimately determined by the Scottish Ministers and the enforcement notices were upheld. As noted below, the initial replanting works required under the enforcement notices have now been carried out. In these circumstances, in the absence of any specific statutory provisions, there would need to be a very compelling case for Forestry Commission Scotland to accept that the enforcement notices should be superseded and that the 1999 Regulations were not engaged by changes or additions to the original project. We are not persuaded that such a case has been made. On the contrary, we are of the view that once engaged the 1999 Regulations would require Forestry Commission Scotland to assess and take account of cumulative impacts in the event that changes were made to the project originally considered.

brought to the attention of the Local Review Body and considered as part of their decision making process.

The screening opinion given to the LRB concludes that the proposal is not likely to have significant environmental effects and as a consequence EIA is not required. You will appreciate that the Reporter reached the opposite conclusion after a detailed consideration of the available evidence including hearing oral evidence from parties during a hearing session, written submissions and carrying out site inspections. The Scottish Ministers accepted the Reporter's reasoning and recommendation and concluded that *"...the environmental factors around the character of the woodland felled constituted exceptional circumstances to the effect that there were likely to be significant effects on the environment."* Although the Scottish Ministers decision was in relation to what was then a deforestation project not involving development, the environmental effects of that deforestation project would likely be the same or very similar to the development covered by pending planning applications.

The Scottish Ministers' decision seems analogous to a screening direction and post dates the Council's screening opinion. In addition, the screening opinion is arguably out of date in that it contemplates the prevention of regeneration as opposed to the disturbance of the newly replanted woodland.

Forestry Commission Scotland would question whether the proposed replanting at Whinnie Muir, which is proposed to be secured by way of a planning obligation, is really 'mitigation' of the environmental effects of the development. Firstly, the re-planting proposals have been described as "compensatory planting" which would indicate that they will not directly mitigate the environmental effects of the Torwood proposal. Secondly, as Forestry Commission Scotland pointed out to Falkirk Council in an e-mail of 23 June from Simon Amor to Brent Vivian, the proposed replanting scheme doesn't appear to offer any more than the owners of that site would be obliged to do under the Forestry Act and UK Forestry Standard. Thirdly, Forestry Commission Scotland have expressed concerns regarding silvicultural and technical forestry issues and impacts of the proposals and have indicated that the proposals themselves could give rise to adverse environmental impacts.

Conclusion and Recommendation

For the reasons set out above, Forestry Commission Scotland does not accept that the grant of planning permission, or the implementation thereof, would supersede the enforcement notices previously served.

Moreover, Forestry Commission Scotland's view is that the proposed housing development would require consent under the 1999 Regulations on the basis that it is an amendment to or a follow on project to the a project which has already engaged the 1999 Regulations.

If consent were to be granted under the 1999 Regulations, and all conditions of such consent complied with, then the enforcement notices previously served would be rendered obsolete and would at that stage be withdrawn.

I have explained briefly below some of Forestry Commission Scotland's related concerns about the situation which has developed.

The decision and approach to screening the planning application under the 2011 Regulations appears to be flawed as it clearly ignores the deforestation impacts assessed by the Forestry Commission, does not consider the cumulative nature of the project, and effectively allows the salami slicing of an EIA project.

It is not entirely clear that the proposed development is covered by column 1 of Schedule 2 of the 2011 Regulations (and therefore doesn't fall within Regulation 3(1)(c)(ii) of the 1999 Regulations.) While the screening opinion given to the LRB proceeds on the basis that the development is covered by Infrastructure projects – urban development (10(b) of Schedule 2), the Council appears not to have considered the development to be covered by Schedule 2 at the time the applications were originally made and determined. If the development had been regarded as Infrastructure Projects under para 10(b) of Schedule 2 then Regulation 8 of the 2011 Regulations would have applied and the applications would have been deemed to be a request for a screening opinion under Regulation 6. As no such screening opinion was issued, that would suggest the Council originally treated the applications as relating to development not mentioned in Schedule 2. There doesn't appear to be any material changes to the development proposals which would account for this change of treatment.

Given that the issue of whether the deforestation carried out at the site would be likely to have significant environmental effects was one of the key issues in the enforcement notice appeal, Forestry Commission Scotland would be very reluctant to accept that the enforcement notices should be superseded by planning permission granted on the basis of a screening opinion which indicated no likely significant environmental effects. Doing so would result in the development being carried out without a proper assessment of the environmental impacts which is potentially contrary to the EIA Directive.

Even if there was a case for the enforcement notices being superseded, which we don't think there is, the *grant* of planning permission would not appear to be an appropriate trigger point for supersession to take place as this could result in enforcement notices being superseded even though the planning permission was never implemented. The trigger point, if there was to be one, would be completion of the development to which the planning permission relates including completion of all environmental mitigation work specified in the planning permission and/or any related planning agreements.

Material Considerations for Determination of Reviews by Local Review Body

It is appropriate to consider whether any of the events which have occurred since the 1999 Regulations were first engaged are material considerations which should be taken account of by the Local Review Body when determining the Reviews.

On 1 July 2015 Forestry Commission Scotland's officers inspected the Torwood site and established that the majority of the re-stocking and associated works required by the Enforcement Notices had been carried out to a high standard. If the proposed development were to go ahead it would now involve extensive disturbance of the replanted woodland (as opposed to preventing natural re-growth which would have been the position prior to re-stocking.) I think this is a material change of circumstances which should be

While the existence of the enforcement notices is not in itself an impediment to planning permission being granted, a number of matters have been identified above which our clients believe should be brought to the attention of and taken account of by the LRB prior to their determination of the pending reviews.

If the LRB decides to grant planning permission at this stage, we would suggest that it would be appropriate for the planning permissions to include an informative advising that consent should also be obtained under the 1999 Regulations prior to works commencing.

Yours sincerely



Peter Ferguson
Partner
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DATE 5 October 2015
OUR REF RM.SF
YOUR REF

The Director of Planning
Falkirk Council
Municipal Buildings
FALKIRK
FK1 5RS

Dear Sir

TORWOOD : PLANNING APPLICATIONS P/13/0509/FUL, P/13/0509/FUL and P/13/0509/FUL

We refer to the above Planning Applications and in particular to the letter from Brodies LLP to our Rory Milne dated 25 June 2015.

We confirm that we share Brodies opinion in relation to this matter and have nothing to add to the terms of their letter dated 25 June 2015..

We have also seen a much later letter from Harper Macleod LLP dated 28 August 2015 to Brodies on the same matter. We respectfully disagree with Harper Macleod's comments and opinion on the matters at hand. Beyond that, it is noted that Brodies sought a response from Forestry Commission Scotland within 21 days of their letter dated 25 June 2015. It is noted that the response was submitted almost exactly two months later.

Yours faithfully

Milne & Co

