

## Badenoch & Strathspey Conservation Group

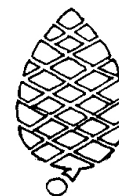
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17 April 2022

The Highland Council  
Council Headquarters  
Glenurquhart Road  
Inverness  
IV3 5NX

Uploaded to Highland Council's '[report a breach of planning control](#)' webpage and the Cairngorms National Park Authority's '[report a planning breach](#)' webpage. Also sent by email to: [complaints@highland.gov.uk](mailto:complaints@highland.gov.uk); [eplanning@highland.gov.uk](mailto:eplanning@highland.gov.uk) and [planning@ Cairngorms.co.uk](mailto:planning@ Cairngorms.co.uk).

Dear Sir/Madam,

### **Glenmore Forest Highland Council roadside parking development Breach of planning control Judicial review and report to Police Scotland**

This letter concerns a development which we understand was carried out by the Highland Council (THC) on the edge of the road which runs alongside the shore of Loch Morlich and Glenmore Forest.

**We urgently request THC to cease any further work on this development**, and to remedy any environmental damage which has been caused by the development.

### **Background**

We understand that work on this development started on or around 14 March 2022, and that it is intended to formalise roadside car-parking arrangements.

You will be aware that the land adjacent to the development on the north side is designated as a site of special scientific interest (SSSI), a special area of conservation (SAC), a special protection area (SPA) and a national scenic area (NSA). To the south of the development is Loch Morlich, which has SAC and NSA designations.

As part of the development, THC has: excavated tree roots; damaged tree roots; deposited materials including aggregate and tarmac onto tree roots and around tree trunks; cut numerous tree branches; and created embankments with the deposited materials.

We are concerned about the environmental impacts of this development, particularly on the native pine trees which it has affected. Beyond the visible damage which has been caused to some native pine trees, it is foreseeable that the development will have caused damage to other flora and fauna such as juniper trees, wintergreen plants and the narrow-headed ant *Formica exsecta*.

We understand that no impact assessment was carried out prior to the development and no planning permission or any other consent or licence has been obtained.

We note that THC appears to have suspended work on the development and that work on the development is expected to re-start shortly.

We have obtained legal advice that the development is unlawful for at least four reasons, which are detailed below.

### **Failure to obtain planning permission**

The works carried out on the road constitute a 'development' within the meaning of Section 26 of the Town and Country Planning (Scotland) Act 1997 (as amended). Planning permission is required by Section 28(1), and carrying out development without the required planning permission constitutes a breach of planning control as per Section 123(1) of the same Act.

Our view is that THC's work on the development in the absence of planning permission is unlawful.

### **Damage to SSSI natural features**

Glenmore forest is designated as an SSSI. One of the 'natural features' included in the SSSI notification (see the enclosed 'citation' document) is native pinewood woodlands. Alder, Rowan and Birch are also referred to.

Another feature of the designation is that there is a list of 'operations requiring consent' from Scottish Natural Heritage (see enclosed 'operations requiring consent' document). The relevant operations requiring consent are:

*11 The destruction, displacement, removal or cutting of any plant or plant remains, including tree, shrub, herb, dead or decaying wood, moss, lichen, fungus, leaf-mould, turf etc.*

*12 Changes in tree and/or woodland management.<sup>1</sup>*

*21 Construction, removal or destruction of roads, tracks, walls, fences, hardstands, banks, ditches or other earthworks, or the laying, maintenance or removal of pipelines and cables, above or below ground.*

*24 Modification of natural or man-made features, clearance of boulders, large stones, loose rock or scree and battering, buttressing or grading rock-faces and cuttings, infilling of pits and quarries.*

As you will be aware, Section 19(3)(a) of the Nature Conservation (Scotland) Act 2004 provides that it is a criminal offence for a public body or office-holder to carry out any operation on land which they own or occupy which is likely to damage any natural feature specified in an SSSI notification, except in certain circumstances or if they have a 'reasonable excuse'.

Further, Section 19(1) of the Nature Conservation (Scotland) Act 2004 sets out that it is an offence for any person to intentionally or recklessly damage any natural feature specified in an SSSI notification (except for certain circumstances where any damage takes place as part of a 'lawful operation').

Similar offences apply in relation to SACs and SPAs, which are not discussed here for brevity.<sup>2</sup>

Our view is that the acts by THC of both carrying out of the development (which was likely to cause damage to the trees), and any damage which the development has caused to the trees amount to offences under the 2004 Act.

### **Failure to carry out an 'appropriate assessment'**

As the development occurred adjacent to sites with SAC and SPA designations, public bodies such as THC are subject to the following duty set out in Regulation 48 of The Conservation (Natural Habitats, &c.) Regulations 1994:

*A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which–*

*(a) is likely to have a significant effect on a European site in Great Britain or a European offshore marine site (either alone or in combination with other plans or projects), and*

*(b) is not directly connected with or necessary to the management of the site,*

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<sup>1</sup> Defined in the operations requiring consent document in the following terms. "Woodland management" includes afforestation, planting, clear and selective felling, thinning, coppicing, modification of the stand or underwood, changes in species composition, cessation of management.

<sup>2</sup> The Conservation (Natural Habitats, &c.) Regulations 1994, Regulation 18.

*shall make an appropriate assessment of the implications for the site in view of that site's conservation objectives.*

The development constitutes a development which is likely to have a significant effect on the SPA/SAC site and is not directly connected with or necessary to the management of the site. The failure by THC to carry out any assessment before deciding to undertake the development was unlawful.

### **Breach of the biodiversity duty**

Section 1(1) of the Nature Conservation (Scotland) Act 2004 (as amended) imposes a duty on THC to further the conservation of biodiversity in the following terms:

*(1) It is the duty of every public body and office-holder, in exercising any functions, to further the conservation of biodiversity so far as is consistent with the proper exercise of those functions.*

The Council's duty to further the conservation of biodiversity is engaged by the development, due to the significant biodiversity value of the various adjacent nature conservation areas which have been damaged and are threatened by the development.

Section 1(2) of the 2004 Act requires that, when complying with the Section 1(1) duty, a public body must have regard to: (a) any strategy designated under Section 2(1), and (b) the United Nations Environmental Programme Convention on Biological Diversity of 5 June 1992 as amended from time to time (or any United Nations Convention replacing that Convention).

In terms of any strategy designated under Section 2(1), we note that the current strategy appears to be the Scottish Government's 2013 '2020 Challenge for Scotland's Biodiversity' strategy document. Said document includes the overarching aims to "protect and restore biodiversity on land and in our seas, and to support healthier ecosystems" and also to "connect people with the natural world, for their health and wellbeing and to involve them more in decisions about their environment" (page 6).

Said strategy document refers to the 2020 Aichi Targets, including target 5 that "By 2020, the rate of loss of all natural habitats, including forests, is at least halved and where feasible brought close to zero, and degradation and fragmentation is significantly reduced" (page 80).

In terms of the UN Convention on Biological Diversity, we note that Article 8(c) requires that each contracting party to the Convention shall, as far as possible and as appropriate: "Regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use".

Article 8(d) of the Convention further requires that each contracting party shall, as far as possible and as appropriate, “Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings”.

We further draw your attention to the explanatory notes which accompany the Act in the following terms:

*11. In essence, the Act requires attention not only to be given to the means (such as establishing protected sites or preventing the killing of wildlife) but also to the ends — that is, to the long-term objectives underlying nature conservation legislation. The Act requires public bodies to do more than simply to adhere to prescriptive rules defining what may or may not be done in any given situation. It requires, and empowers, them at a general level to take appropriate positive action, within the context of their core functions, to further the conservation of the overall diversity, richness and extent of the natural world.*

*12. Public bodies operating in Scotland will, as a result, be obliged to give proper consideration to, and account for, the impacts which their activities and policies have on the overall balance and health of the natural biological environment, at a local, regional, national and international level. They will be required to act, in ways which are consistent with the exercise of their other statutory functions, in order to ensure that the conservation of that naturally-occurring biological diversity is encouraged and advanced.*

Our position is that THC’s actions with respect to the development breach the Section 1(1) duty for several reasons.

First, by carrying out works on the development THC is in direct contravention of the Section 1(1) duty, because the development is detrimental to the conservation of biodiversity.

Second, we note that no regard appears to have been paid by THC to either the Scottish Government’s 2013 ‘2020 Challenge for Scotland’s Biodiversity’ strategy document or the UN Convention on Biological Diversity in general, and more particularly with respect to the extracts of each document referred to above.

Third, with reference to the 2004 Act’s explanatory notes quoted above, our view is that the Section 1(1) duty imposes positive obligations on the Council to take appropriate positive action to further the conservation of biodiversity. Appropriate positive action in this context would be to carry out an environmental impact assessment and obtain the necessary planning permission and consents/licences prior to commencing any development. THC failed to take any positive action required to protect biodiversity with respect to the development.

## **Request for urgent stop to works and remedial works**

In light of the above various unlawful and illegal acts, we request that THC agrees in writing and as a matter of urgency that it will carry out no further work on the development and that it will commit to a programme of remedial works to address any damage which the development has caused.

**In the event that we have not received written confirmation of the above by Friday 22 April 2022, we intend to pursue further legal action against THC** (including, but not limited to raising judicial review proceedings) and we will seek the expenses of doing so. In these circumstances we will also report the criminal matters to Police Scotland.

*This letter is written wholly without prejudice to our whole rights and pleas and may not be founded upon in any future court action without our express prior written consent.*

Yours faithfully,

Gus Jones  
Convener  
Badenoch & Strathspey Conservation Group

Keith Charman  
Secretary  
Cairngorms Campaign