

CAIRNGORMS NATIONAL PARK AUTHORITY

Title: REQUEST FOR AUTHORITY TO SERVE SECTION 33A ENFORCEMENT NOTICES

Prepared by: BRUCE LUFFMAN: PLANNING MONITORING & ENFORCEMENT OFFICER (DEVELOPMENT MANAGEMENT)

Summary:

This paper seeks authority from the Planning Committee to serve up to two Section 33A Enforcement Notices on an estate owner and/or his agent. The estate is the Glenavon Estate near Tomintoul and the agents are Bidwells based at Inverness.

There are two areas on the estate where unauthorised works have taken place and each area of works is considered by CNPA Development Management to require an application for planning permission.

There may be an opportunity for a positive outcome and neither of the notices may need to be served but this paper seeks the authority from the Committee to serve one or both of these Section 33A Enforcement Notices should it prove necessary.

Section 33A Notice:

1. Section 33A of the Town and Country Planning (Scotland) Act 1997 (introduced by Section 9 of the Planning etc (Scotland) Act 2006) gives planning authorities the power to issue a notice requiring a retrospective planning application to be submitted. This section of the Act came into effect on 3rd August 09.
2. Prior to 3 August 2009, where a planning authority determined that development had taken place without planning permission, but that permission if applied for would have been granted (or, where appropriate, granted subject to conditions to make the development acceptable), they could invite a person to submit a retrospective application. However, there was no obligation on the person to do so.
3. The intention in introducing this notice was to encourage the submission of a retrospective planning application, which would then allow the planning authority to

consider the grant of planning permission subject to any conditions or limitations that would make the development acceptable in planning terms. It should be noted that the retrospective planning application would be determined in the same manner as a planning application submitted by the applicant in the normal manner.

4. Before issuing a notice under section 33A the CNPA should, as with any enforcement action, consider whether the action is commensurate to the breach. There would be no purpose in issuing such a notice where the planning authority was of the view that permission would clearly not be granted but service of the notice does not mean that permission would be granted. That would be a matter for the Planning Committee on the basis of the application before it.

Background:

- 5 The Enforcement Officer was contacted by telephone by a member of the public on 22nd June 09 with a complaint about the well known Country Walk at Tomintoul. The complainant was asked to write to the CNPA office and put the complaint in writing which was received on 26th June 09. The complainant expressed great concern as she had been using the track in its former form for over 25 years.
- 6 The Country Walk at Tomintoul runs from the Victoria Car Park to Keppoch Cottage and is a widely used walk. A map is attached to this paper with the particular part of path marked in red.
- 7 Following a visit to take photographs of the site, Moray Council and the agents for the estate were contacted for their comments. Moray Council has made no response to date. The agent for the estate responded by saying that the works were for maintenance of the track and it was their understanding that this was permissible under Permitted Development Rights and did not require a planning application.
- 8 In the first week of July 09, photographs were submitted by a member of the public cycling along the track towards the bridge crossing the Allt Loin Bheag which is about 12 miles from Tomintoul on the Glenavon Estate. There are two maps attached to this paper, one showing the position in the wider context marked in red box and a closer-in map with position of bridge marked in red.
- 9 Following a visit to the site, where a number of photographs were taken which indicated a large scale of unauthorised works, the agent and Moray Council were contacted for their comments. SEPA and SNH were also contacted for their responses as this is a very highly designated area of the Park. Moray Council have not responded to date. SNH, SEPA, Fishery Board, CNPA officers and the estate's agents agreed to have an on-site meeting for both of these track issues on 23rd July 2009.

- 10 The meeting produced a useful exchange of views from all the parties (apologies but comments from Fishery Board) but CNPA officers were of the view that both areas of works required separate planning applications. SEPA and SNH contributed to the note of the meeting which was sent by the CNPA to the factor at Bidwells.
- 11 After a number of reminders for a response, a further meeting was held by the factor and a CNPA Development Management officer on 28th October to discuss the Country Track. The outcome of that meeting was that the factor would produce a proposed course of action but CNPA officers were still of the opinion that a planning application was required.
- 12 On 2nd November 09, an email from the assistant factor indicated that a retrospective planning application would be submitted to Moray Council for the bridge over the Allt Loin Bheag. At the time of writing this application had not been submitted.
- 13 Following the 28th October meeting, a letter was received on 11th December 09 from the agent at Bidwells proposing a number of remedial works to the Country Track and anticipating most of the work to be completed by the end of January 2010. A response was sent on 23rd December 09 outlining a need for more detail and requesting a submission of a planning application.

Appraisal:

- 14 A Section 33A is an enforcement notice which is issued to require an applicant to submit a retrospective planning application. An application would be considered in the normal manner by the CNPA Planning Committee. A Section 33A Notice would not be used if there was a breach that was such that planning permission would definitely not have been granted in the view of officers.
- 15 In both of these areas on the estate the engineering works are to such a degree as to be far in excess of general maintenance of a track permitted under Class 18 (1)(b) and (c) of the Town and Country Planning (General Permitted Development) (Scotland) Order 1992. This part of the order permits alteration and maintenance of private ways for the purposes of agriculture and Class 22 (1)(b) and (c) of that same order permits a similar permission with regard to the purposes of forestry.

Country Walk Track:

- 16 Of the two tracks, the submission of a planning application for the Country Track is the bigger concern of the estate's agent as he maintains that it is primarily for agricultural purposes and is therefore permitted development. I understand that the estate is not farming as such and their land at the end of this track is let to stock farmers for grazing, primarily with sheep.

- 17 Historically, the access for transporting these animals and Inchroy Lodge has been either by the public highway to the west by Delnabo which has a restriction at a bridge or via this Country Walk track. This track has served the estate before and since the present owner purchased the estate around 1995
- 18 When this track was first visited by the CNPA Enforcement Officer, it was clear that articulated lorries had been using it following the widening of the track and the corners along the track. Further investigation indicated that considerable work was being carried out at Inchroy Lodge – about 7 miles further into the estate – resulting in the need for articulated lorries, which were not for agricultural purposes.
- 19 The works on this Country Walk track have been extensive with a widening of the existing track; felling of many semi-mature trees; widening of corners and extensive cutting into the bank and there is no doubt that from a Development Management view, the extent of these works require a retrospective planning application.
- 20 SNH also voiced concerns about a number of issues, primarily the very poor standard of work through which the enlargement of the track has been achieved. There has been no attempt to conserve excavated soils for landscaping and excavated spoil, tree trunks and limbs have been removed by digger and pushed to the sides of the road. Specifically, the angled bank on the east side of the new track near the Jubilee car park remains bare of all organic soil and vegetation and it was considered unlikely to recolonise in any reasonable timescale. However, the angle of the created slope is considered to be shallow enough to support regrowth if soils and/or spot divots of turf were placed on it.
- 21 There were further observations by SNH about a number of areas all along the length of the track where engineering works had taken place. SNH made a number of recommendations which could form part of the consultations etc of a retrospective planning application. Many of these were predicated on the close proximity of the River Avon designated under the SAC of the River Spey. This section of the Country Walk is also all in the Ancient Woodland designation.

Allt Loine Beag Bridge

- 22 This area is further into the Park and is in a highly designated area within the National Scenic Area; the SAC of the River Spey catchment and directly adjacent to a Special Protection Area and an SSSI. There are no permitted development rights available under the 1992 Order in an area designated as a National Scenic Area.
- 23 There have been considerable engineering operations carried out in this area by the estate over a number of years. At the meeting, advice was given by SNH, SEPA and the CNPA about a number of the operations and the estate has already complied with some of that advice.

- 24 The specific area surrounding the new bridge which replaced a bridge that was washed away in a recent flood has raised a number of concerns with SEPA. These include the excavation of the channel of the Allt Loine Beag above and below the bridge. This is a very dynamic area of channel with a significant amount of exposed sediment upstream and the readiness of this sediment to descend to the flatter area around the bridge crossing and the junction with the River Avon.
- 25 SEPA expressed the view that the type of bridge structure with pipes that had been constructed was not the ideal formation for such a situation and a wider bridge on piers – effectively several small bridges – would have been more appropriate and more expensive. Further concern was expressed about the change in gradient created by excavation of the channel bed and straightening of the channel planform. This could create instability as the river adjusts to the imbalance caused by the change in gradient and alignment. The instability could then threaten the new crossing as the channel alignment adjusts and more sediment is released from the bed and banks upstream.
- 26 There is a need to formalise the works which will give an opportunity for them to be conditioned by a successful retrospective planning application (should it be granted) following further input from all agencies. A pre application discussion could provide a more acceptable outcome in terms of longevity of the bridge and address the concerns and requirements in a heavily designated area of the Park.
- 27 The estate’s agents responded by email on 2nd November 09 stating that a retrospective planning application would be submitted to Moray Council for this site. Whilst that would be welcomed by the CNPA and negate the need to serve the Section 33A Notice, no application has so far been forthcoming. The Section 33A Notice ‘stops the clock’ in terms of the enforcement process by not permitting a period of 4 years to elapse which would bar the need for a retrospective planning application.
- 28 Section 124 (1) of the Town and Country Planning (Scotland) Act 1997 states that “Where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of 4 years beginning with the date on which the operations were substantially completed”. This bridge construction etc had been up for about 2 years or so and the matter has been under discussion by the CNPA for over 6 months already. It is therefore considered prudent to ask the Committee for the permission to serve a Section 33A on the estate, if a planning application is not submitted within a definite time period; 28 days is suggested.

Recommendation:

That Members of the Committee AGREE to authorise the serving of TWO Section 33A Notices on Glenavon Estate and/or their agents with regard to:

- i) the Country Walk at Tomintoul (Victoria Car Park to nr Keppoch Cottage)**
- ii) the area surrounding the crossing of the Allt Loine Beag on the track to Faindouran Lodge.**

**Bruce Luffman
29th December 2009**