TOWN AND COUNTRY PLANNING (SCOTLAND) ACT 1997, as amended
The Town and Country Planning (Schemes of Delegation and Local Review Procedure) (Scotland) Regulations 2013

BEFORE THE SCOTTISH BORDERS COUNCIL LOCAL REVIEW BODY

SUBMISSION

on behalf of

Mr David Neave, West Loch Farm Steading, West Loch, Eddlestone EH45 8QY, and three other residents and neighbours (together "the Objectors)

in response to an **Application for Review** (the Application) of the delegated refusal dated 6 October 2022 of an application for planning permission *in principle* (the Planning Application) for the proposed erection of timber storage and a processing facility with new access junction, yard area, landscaping, tree planting, SUDs and associated works and planning permission *in principle* for associated dwellinghouse with office for the timber processing facility (the Proposal).

at Land southwest of West Loch Farmhouse, Peebles (no postcode given)

LRB reference: 23/00001/RREF

Planning Application Reference: 22/00933/FUL

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Introduction

1 This document is submitted on behalf of four close neighbours of the Proposal (the Objectors) to the Scottish Borders Council's Local Review Body (LRB).

2 It responds to the Application, and in particular to the *GROUNDS OF APPEAL STATEMENT* submitted on behalf of the Applicant by John Handley Associates Ltd, and the *LEGAL OPINION* of Messrs Brodies LLP submitted as an annex.

3 The Objectors all objected in writing to the Planning Application before it was determined.

Form of Review

4 The Objectors submit that the LRB should visit the site, but can otherwise determine the Application on the papers. However, if a Hearing is convened at which parties are invited to speak, the Objectors wish to participate and make oral submissions. If that is not possible, they will attend. The Objectors are meantime content to allow this Submission to speak for itself.

Grounds for review

5 The Appellant asserts (§2) that the Planning Officer has "*completely misunderstood*" the scale, nature and type of development proposed and has thus misinterpreted the relevant planning policies. Had the assessment been correct, then a "*positive determination **could** have been made."* *(emphasis added)*

As written on behalf of the Applicant, that lukewarm assertion leaves open the possibility that the application *could* have been refused, as was indeed the case.

6 Four "key grounds" are stated. Abbreviated, they are

- Failure to discuss
- Misunderstanding of scale and nature
- Incorrect policy interpretation
- Failure to ask for supporting information which *would* have allowed a conditional permission.

Structure of this Submission

7 This response will attempt to follow the structure of the Applicant's Appeal Notice.

8 Failure to discuss. That is not a valid ground of appeal. While circumstances may make it desirable, there is no legal obligation on a local planning authority to discuss an application for planning permission with an applicant. Speculation about the outcome of discussions which have never taken place is irrelevant, since the "outcome" can never be known. This "ground" should be rejected.

9 Misunderstanding of scale and nature Paragraph 16 asserts a "*clear misunderstanding"* by the Planning Officer, but does not say what the misunderstanding was. Paragraph 33 asserts a misunderstanding of "*type and scale"*, but goes no further.

10 Paragraph 16 asserts that the application is supported *only* by "*material planning considerations*" thereby implying that it is not supported by policy. The 1997 Act, by

ss. 25 and 37 requires that when determinations are made under the Planning Acts, they must be made in accordance with the Development Plan, unless material considerations indicate otherwise. At best, the assertion in paragraph 16 is unclear, since the material considerations themselves are not identified. This Ground should be rejected.

11 Paragraphs 19 – 29 repeat the application, in substance. They do not amount to a ground of appeal.

12 Paragraph 30 – 34 assert that the proposed development is not an industrial one, but that it IS a timber processing "facility". Those words are inconsistent. It is submitted that on any view, and using the Applicant's own words, the proposal is for an *industrial process*. Wood processing is carried out for the benefit of industry. If that is not the case, then that fact should be explained. If this is a Ground of Appeal, it should be rejected.

Reasons for Refusal

13 The Application notes six reasons for refusal, and addresses them one at a time.

Contravention of Policy ED7.

14 Firstly, the Applicant has misquoted Policy ED 7 (LDP page 69) by asserting that it says that applications *will be granted*. It does not say that.

15 Secondly, the Applicant has conspicuously failed to note that the policy and any grant of planning permission is conditional on fulfilment of criteria a) to d), and in addition fulfilment of a second group of criteria, also identified as a) to e).

16 Thirdly, the use proposed is for a) forestry operations, and c) for business, provided that the Council is satisfied of an economic or operational need for that location. It was not. In addition, the use proposed must respect amenity. It does not. It must have no significant adverse impact on nearby uses, and comply with policies PMD 2 and IS 4. It does not do so.

THE REPORT OF HANDLING

17 The Planning Officer's report speaks for itself and the Objectors agree with it. It is clear, cogent, comprehensive and exhaustive. The Objectors observe that at all times the onus rests with the Applicant to satisfy the terms of the Policy. He has failed to do so.

18 Fourthly, the Applicant's conclusions on ED 7 seem to be entirely predicated on an Opinion by Messrs Brodies LLP. In this instance, and with great respect, it is

submitted that the Opinion's conclusions are mistaken. They assert that this proposal does not need planning permission because, in essence, it consists of "forestry operations" which are in the ordinary course of matters exempt from the need for planning permission.

19 The Opinion relies entirely on a case called *Farleyer Estates.* This is not a case which sets out general principles. It turned on its own specific facts. The case is not authority for the broad proposition advanced by Brodies that, because timber operations are involved in this instance, Policy ED 7 is widely permissive and/or does not apply, and in any event has been misunderstood by the Planning Officer.

20 Put shortly, (1) *Farleyer* was an enforcement case (2) Only loading of timber was involved, and (3) it did not involve buildings. This case is an application. It goes far beyond mere loading of timber, and it involves construction of both buildings and bunds. *Farleyer* is attached here as Annex 1.

21 The Objectors have taken the advice of Senior Counsel. He reaches a conclusion contrary to that of Messrs Brodies LLP. His opinion of Senior Counsel is attached here as Annex 1.

Noise impact

22 The Applicant acknowledges that he has not provided a Noise impact statement "because he was not asked to do so". Frankly, that is inadequate. The Applicant appears to know that his proposed use is a noise generating one. Since the onus rests with him, he must satisfy the decisionmaker that noise will not be a local issue.

23 Conditions in Midlothian, which are widely cited in paragraphs 45-57 and included a plan for a potential late-in-the-day Noise study are irrelevant. The Objections show that Noise from the operations and traffic servicing the proposal site would be a very real concern for nearby residents and for undeveloped housing sites.

24 Landscape Impact,
25 Housing,
26 Trees and
27 Ecology

28 The Objectors agree with the Planning Officer's conclusions on these last four matters.

29

CONCLUSION

30 At its highest, the Applicant proposes that the proposal *could* be supported by the applicable policies and the use of conditions. But they are not.

31 At no point in the Application does he submit that the Planning Application is in accordance with the Local Development Plan. If it has any strength at all in its argument, it is that a move of operations from Loanhead in Midlothian to West Loch, Scottish Borders would better suit the Applicant's personal/and/or business considerations. That is not a valid Ground for Review of the Planning Officer's decision.

32 Since no proper grounds are advanced for *de novo* consideration of the Planning Application, this Application should be dismissed.

RESPECTFULLY SUBMITTED
JOHN CAMPBELL, KC for the Objectors
25 January 2023

ANNEX 1

OPINION FOR MR DAVID NEAVE

I have been asked to advise an objector in appeal 23/00001/RREF, in respect of an application for a Review by the local LRB of a refusal by the local authority of an application for planning permission at Land at West loch Farmhouse, Peebles.

The Report of Handling of the application was followed by a decision letter dated 5 October 2022 which refused the application on 6 grounds. These are that it was contrary to policies ED 7, HD3, BMD 2, HD2, EP13 and policies EP1, 2 and 3. I deal here with only the first of these.

Along with the application for review, the applicant has lodged *and expressly relies on* an opinion by Brodies, Solicitors, dated 28 December 2022. My Opinion is confined to the operation of Policy ED 7. It does not consider the other policies which apply in this case.

Policy ED7 supports proposals for business development in the countryside (including timber operations) *provided* (among other things not relevant here) *that* the development is to be used directly for "forestry operations." The appellant says that his proposal fits that description and amounts to no more than "forestry operations". Brodies argue that because "forestry operations" in themselves do not require planning permission, this proposal does not need planning permission. With respect, I am not able to agree.

Brodies have perilled their advice on the case of *Farleyer Estate v Secretary of State for Scotland* in 1992 as excluding the operation of Policy ED7, because what is proposed by their client are "forestry operations", and (as is common ground) forestry operations do not need planning permission. Certainly, on the facts of that case, the Court held that the use of a piece of land for storing and loading timber, where that land is divorced from the plantation where the trees were being felled was a "forestry operation." But the land was being used there only for timber storage and transfer onto lorries. There were no sheds or buildings, no timber chipping or processing; only storage and transfer.

The case turned on its own facts. First of all, it involved an enforcement process, not an application for permission. Secondly, it has a logic of its own; if the timber could not be loaded at the plantation in *Farleyer* but had to be transferred somewhere, and that piece of land was evidently appropriate. Thirdly, the facts of that case were wholly different to the present application/review because in *Farleyer* no construction of buildings for the conduct of the operations was taking place. In the Wewst Loch case. The Report of Handling makes it plain that at least three buildings are contemplated (see highlights below).

It follows that in my opinion *Farleyer* is not authority enabling the LRB to simply ignore policy ED7, nor for saying that it does not apply.
If that were the case, there would be no need for ED 7(a) to mention forestry at all, because any operations such as those now proposed involving timber would be automatically lawful. And that would be absurd.

THE OPINION OF

John Campbell

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13 January 2023

ANNEX
The Report of Handling explains (I have extracted sections) that

"There are two strands to this application. The first is for full planning permission for a timber processing facility (Class 5) and storage yard (Class 6). Associated with that would be extensive groundworks to level the site and create screening bunds, car and HGV parking and the erection of a buildings associated with the timber processing operation.

The second element would be for planning permission in principle for a new dwellinghouse located to the south east of the timber facility. There is nothing set out in legislation which prevents such applications but, as it would not be competent to "part refuse" an application, it follows that if one of the developments proposed is unacceptable, the whole application must be refused.

The timber processing facility would see the formation of an access at roughly the central point on the southern boundary of the site. The majority of the site (the eastern portion) would be given over to timber storage on a permeable hardstanding.

Three buildings are proposed within the western portion of the timber processing yard. They would be: a 19m by 18m chipping shed. That would be 6m high to ridge and finished in a mix of concrete panels and brown profile metal sheeting; a 6.3m by 18.3m processing shed. That would be 4m high and finished in brown profile sheeting and vertical timber boarding and; a 3.15m by 9.85m office and staff facilities building. That would be 2.65m high and finished in vertical timber boarding.

The operation proposed encompasses both Class 6 storage and Class 5 industrial uses, which have no requirement to be sited and operated in this particular location and the council is not convinced that the development cannot be accommodated reasonably within the development boundary of a settlement.

Farleyer Estate v Secretary of State for Scotland

Court of Session (Inner House, Second Division)
Judgment Date
31 January 1992

Report Citation
1992 S.C. 202

No. 19

Second Division
Jan. 31, 1992

Representation
FARLEYER ESTATE, Appellants.— Currie .
THE SECRETARY OF STATE FOR SCOTLAND, Respondent.— Doherty .

Town and country planning—Enforcement notice—Planning permission—Authorised use of land for "purposes of forestry"—

Use of land as timber storage and transfer area—Whether breach of planning control— Town and Country Planning (Scotland) Act 1972 (cap. 52), secs. 19 and 20 (1) .

Section 19 of the Town and Country Planning (Scotland) Act 1972 describes what is meant by "development" in terms of the Act and, by sec. 19 (2) (e) the use of any land for the purposes of agriculture or forestry (including afforestation) and the use for any of those purposes of any building occupied together with land so used shall not be taken for the purposes of the Act to involve development of the land. Section 20 (1) enacts that subject to the provisions of sec. 20 , planning permission is required for the carrying out of any development of land.

An enforcement notice was served by the local planning authority upon the appellants relating to the alleged unauthorised use by them as a timber storage and transfer area of land at Croftnamuick farm, Camserney, by Aberfeldy. The appellants appealed under sec. 85 (1) of the 1972 Act against the enforcement notice on the ground that the matters alleged in the notice did not constitute a breach of planning control.

The Secretary of State for Scotland appointed a reporter to determine the appeal. The reporter issued his decision concluding that a breach of planning control had taken place and dismissed the appeal. The enforcement notice related to a rectangular piece of ground on the east side of the minor road serving the scattered small village of Camserney and immediately north of the B846 road. The minor road was narrow and very winding in places and was unsurfaced beyond the last houses of the village. Beyond those houses the road continued as a rough hill road providing the only access to forestry plantations on the high ridge which was a backcloth to Camserney as seen from the south. Those plantations began some 1500 metres from the area described in the enforcement notice. The enforcement notice alleged a breach of planning control in the carrying out since the end of 1964 of a change of use of the land to a timber storage and transfer area without planning permission. The appellants contended that at the material time the land was being used for the purposes of forestry and that accordingly the use of the land did not constitute development of the land by reference to sec 19 (2) of the 1972 Act. The local authority, on the other hand, contended that the use of the land for storage and *203 the transfer of timber required planning permission in terms of sec. 20 (1) of the 1972 Act and was not an excepted use. The reporter found that a breach of planning control had taken place on the basis that the site was so physically divorced from the forest that he could not regard it as an operation or use ancillary to forestry. The appellants thereafter appealed to the Court of Session against the reporter's decision.

Held (1) that the cultivating of forests and the management of growing timber included the felling of trees and the extraction of the timber from plantation for there would be little in cultivating or managing forests unless

the fruits of the operation in the sense of felled timber were to be taken away from the plantation for commercial purposes so that the extraction of timber was included in the general term “forestry”; and (2) that in light of the reporter's findings it was plain that if timber were to be extracted from the plantations in question there was no alternative to the movement of the timber on the road through the village and that the use of the subjects described in the enforcement notice for stock-piling timber extracted from the forest and transferring on to lorries was functionally essential to the running of those plantations so that at the material time the subjects referred to in the enforcement notice being used for the purposes of forestry and it did not matter that the subjects referred to in the enforcement notice were situated some 1,500 metres from the plantations for what was important was not the fact that the subjects were physically divorced from the plantations but the use to which the subjects were being put; and appeal allowed.

Farleyer Estate were served with an enforcement notice under the terms of the Town and Country Planning (Scotland) Act 1972 dated 30th January 1990 by Perth and Kinross District Council relative to the alleged unauthorised use by them as a timber storage and transfer area of land at Croftnamuick, Camserney, by Aberfeldy. The appellants appealed in terms of sec. 85 (1) (b) of the 1972 Act on the grounds that the matters alleged in the notice did not constitute a breach of planning control.

The Secretary of State for Scotland appointed a reporter to determine the appeal and after making an accompanied inspection of the locality on 22nd May 1990, the reporter, on 26th July 1990, issued his decision concluding that a breach of planning control had taken place and dismissed the appeal. The material facts and circumstances, including the findings of the reporter are adequately set forth in the opinion of the court.

The appellants thereafter appealed to the Inner House of the Court of Session, the cause coming before the Court of Session, the cause coming before the Second Division comprising the Lord Justice-Clerk (Ross), Lord Murray and Lord Morison for a hearing thereon.

At advising, on 31st January 1992, the opinion of the court was delivered by the Lord Justice-Clerk (Ross).

Opinion Of The Court .—An enforcement notice dated 30th January 1990 was served by Perth and Kinross District Council upon the appellants relating to the alleged unauthorised use by them as a timber storage and transfer area of land at Croftnamuick farm, Camserney, by Aberfeldy. The appellants appealed in terms of sec. 85 (1) of the Town and Country Planning (Scotland) Act 1972 against the enforcement notice. The appeal was made under ground (b) of sec. 85 (1) of the Act of 1972, namely, that the matters alleged in the notice did not constitute a breach of planning control. The respondent appointed a reporter to determine the appeal, and after making an accompanied inspection of the locality on 22nd May 1990, the reporter on 26th July 1990 issued his decision concluding that a breach of planning control had taken place, and dismissing the appeal.

Against that decision of the Secretary of State the appellants have appealed to this court.

The enforcement notice related to a rectangular piece of ground on the east side of the minor road serving the scattered small village of Camserney and immediately north of the B846 road. The minor road is narrow and very winding in places and is unsurfaced beyond the last houses of the village. Beyond these houses the road continues as a rough hill road providing the only access to forestry plantations on the high ridge which is a backcloth to Camserney as seen from the south. These plantations begin some 1,500 metres from the area described in the enforcement notice. The enforcement notice alleged a breach of planning control in the carrying out since the end of 1964 of a change of use of the land to a timber storage and transfer area without planning permission. Before the reporter a number of issues were canvassed, but counsel for the appellants explained that before this court the only submission being made was that at the material time the land was being used for the purposes of forestry, and that accordingly the use of the land did not involve development of the land. The district council, on the other hand, contended that the use of the land for the storage and transfer of timber required planning permission and was not an excepted use.

In sec. 19 (1) of the Act of 1972 development is defined as including inter alia “the making of any material change in the use of any buildings or other land”. Section 19 (2) of the Act of 1972 provides inter alia . [Their Lordships quoted sec. 19 (2) as set out *supra* and continued thereafter.]

Counsel for the appellants' principal submission was that the land in question was used for the purposes of forestry at the material time, and that accordingly that use did not involve development, with the result that planning permission was not required in terms of sec. 20 (1) of the Act of 1972. He made that submission in the light of the findings which the reporter had made, and he submitted that the reporter had erred in law in holding that there had been a breach of planning control and that there had been development requiring planning permission.

In stating his conclusions the reporter made a number of findings in fact. In para. 6 he stated inter alia : "I appreciate that if timber is to be extracted from the plantations behind Camserney there is no evident alternative to the movement of timber on the road through the village. It is also obvious that the nature of the access does not allow haulage lorries to be loaded in the forest itself."

Subsequently in para. 7 he stated inter alia : "The use for stockpiling timber extracted from the forest and transferring it onto lorries is on the evidence functionally essential to the management of the commercial plantations. However, the site is so physically divorced from the forest that I cannot regard it as an operation or use ancillary to forestry and I consider it rather to be a use of industrial character, similar to other haulage depots and transfer stations for bulk loads."

Counsel for the appellants relied strongly upon the finding that the use of the subjects for stock-piling timber and transferring it to lorries was essential to the management of the commercial plantations. He submitted that it did not matter that the subjects were physically divorced from the place where the trees were grown. In any event his contention was not that the use of the subjects was ancillary to forestry but that the subjects themselves were used for purposes of forestry. He drew attention to the dictionary definition of forestry and to a dictum of Lord Patrick in Assessor for the County of Midlothian v. Buccleuch Estates Ltd. 1962 S.C. 453 .

He submitted that the reporter had erred in not recognising what was meant by "forestry" and in not giving reasons for his conclusion that there was a use of industrial character of the subjects.

Counsel for the respondent maintained that there had been no error of law, but that the reporter had been entitled on the basis of the evidence to decide that the subjects were not being used for the purposes of forestry. He too referred to the dictionary definition. He submitted that forestry did not normally include the extraction of timber; but even if it did he submitted that the reporter was entitled to conclude that the storage and transporting of timber was not within the normal meaning of use "for the purposes of forestry". He contended that whether or not land was being used for the purposes of forestry was a question of fact and degree, and he maintained that it had not been shown that the reporter had applied any wrong test or had taken any irrelevant matter into account. He submitted that since there had been no misdirection in law on the part of the reporter, and the decision was one at which he was entitled to arrive, the appeal should be refused.

In fairness to the reporter it must be recognised that a number of different issues were canvassed before him, including whether the land was used for the depositing of timber on a temporary basis only and whether the use of the subjects could be regarded as ancillary to forestry. The fundamental question however was whether the subjects to which the enforcement notice related were themselves being used for the purposes of forestry.

Before that question can be answered it is necessary to decide what is meant by "forestry". At no part of his decision letter does the reporter indicate what he took to be meant by the expression "forestry". In sec. 19 (2) (e) reference is made to "the use of any land for the purposes of agriculture or forestry (including afforestation)"; the expression "agriculture" is defined in sec. 275 of the Act of 1972, but the Act contains no definition of "forestry". In these circumstances we agree with counsel that it is appropriate to have regard to the dictionary definition. Counsel pointed out that in the Oxford English Dictionary the meaning ascribed to forestry includes "The science and art of forming and cultivating forests, management of growing timber".

In our opinion the cultivating of forests and the management of growing timber would include the felling of trees and the extraction of the timber from plantations. There would be little point in cultivating or managing forests unless the fruits of the operation in the sense of the felled timber were to be taken away from the plantation for commercial purposes. Accordingly we are satisfied that the extraction of timber is included in

the general term “forestry”. This appears to us to be in accordance with the definition of “forestry” to which both counsel referred.

Counsel drew attention to a number of cases where the court had given consideration to the question of whether land was being used for the purposes of agriculture— Hidderley v. Warwickshire C.C. (1963) 14 P. & C.R. 134 and Warnock v. Secretary of State for the Environment [1980] J.P.L. 590 . We have not found these cases of assistance in determining the present appeal. Counsel also referred to Assessor for Midlothian v. Buccleuch Estates Ltd . Although that case related to valuation for rating, the court did express views upon what was meant by “agriculture” and “forestry”. At p. 459 Lord Patrick said: “I would agree that agriculture and pasturage do not cease when the crops are grown or beasts raised, but may properly include operations reasonably necessary to make the product marketable or disposable to profit. Similarly forestry, use of lands as woodlands, does not cease when the timber is grown, but may well include operations necessary to render the timber marketable as timber or disposable to profitable use as timber.”

Likewise Lord Sorn at p. 462 stated: “Occupation of the woodlands of an estate involves more than planting trees in a plantation and letting them grow. There is the crop to be handled which may take the form of thinnings, or windfalls, or fellings.”

The dictum of Lord Patrick in Assessor for Midlothian v. Buccleuch Estates Ltd. was approved of in the House of Lords in W. & J. B. Eastwood Ltd. v. Herrod [1971] A.C. 160 . At p. 169 Lord Reid agreed with the dictum , although per incuriam he attributed it to Lord Hunter.

In the light of the findings which the reporter has made in the present case, it is plain that if timber was to be extracted from these plantations, there was no alternative to the movement of timber on the road through the village, and that the use of the subjects described in the enforcement notice for stockpiling timber extracted from the forest and transferring it onto the lorries was functionally essential to the running of these plantations commercially. That being so we are satisfied that at the material time the subjects referred to in the enforcement notice were being used for the purposes of forestry. We respectfully agree with Lord Patrick that forestry includes operations necessary to render the timber marketable and disposable. That must include the extraction of the timber and its being stockpiled preparatory to its onward removal. In our opinion it does not matter that the subjects referred to in the enforcement notice were situated some 1,500 metres from the plantations; what is important is not the fact that the subjects were physically divorced from the plantations but the use to which the subjects were being put.

The reporter expressed the conclusion that the use of the subjects was of industrial character “similar to other haulage depots and transfer stations for bulk loads”, but he gives no reasons for arriving at such a conclusion, and his conclusion appears to us to be flawed in that he has failed to recognise what is properly meant by the expression “forestry”.

For the foregoing reasons we are satisfied that the reporter erred in law in holding that the use by the appellants of the subjects **as a timber storage and transfer area** constituted development within the meaning of the Act. We are satisfied on the findings which the reporter made that the use of the subjects constituted the use of land for the purposes of forestry within the meaning of sec. 19 (2) (e) of the Act of 1972.

We shall accordingly sustain this appeal and quash the decision of the Secretary of State contained in the letter of 26th July 1990. In the light of what is stated in this opinion, the Secretary of State will no doubt give effect to what we have decided by directing that the enforcement notice should be quashed in terms of sec. 85 (5) of the Act of 1972.

The Court allowed the appeal.