

**ANGUS COUNCIL**

**DEVELOPMENT STANDARDS COMMITTEE – 21 NOVEMBER 2017**

**ENFORCEMENT ACTION - KEITHOCK, STRACATHRO**

**REPORT BY HEAD OF HOUSING, REGULATORY AND PROTECTIVE SERVICES**

**Abstract:**

This report advises Committee on the circumstances relative to a breach of planning control involving the formation of a game bird rearing facility on land at Keithock, Stracathro.

**1. RECOMMENDATION**

It is recommended that Committee: -

- (i) authorise the service of a planning enforcement notice requiring the cessation of the use of the land for the rearing of game birds for sporting purposes and the siting and storage of associated buildings, caravans, structures, pens and its clearance of other related equipment and materials, and return to agricultural use, all by the 31 March 2018;
- (ii) notify the recipients of the enforcement notice that the period for compliance will be extended until 30 September 2018 subject to the approval, implementation and ongoing compliance with measures to control odour, noise, pollution and vermin emanating from the site in the interests the residential amenity and environment of the area.

**2. ALIGNMENT TO THE ANGUS LOCAL OUTCOMES IMPROVEMENT PLAN/CORPORATE PLAN**

This report contributes to the following local outcome(s) contained within the Angus Local Outcomes Improvement Plan and Locality Plans:

- Safe, secure, vibrant and sustainable communities
- A reduced carbon footprint
- An enhanced, protected and enjoyed natural and built environment

**3. INTRODUCTION**

3.1 Observations were received by the Planning Service in February 2017 regarding the use of land at Keithock for the rearing of game birds.

3.2 Subsequent investigation confirmed the presence of the facility and its associated structures. Discussion with the land owner/ operators indicated that the facility was rearing game birds for the restocking of sporting estates. It was identified that the facility had been in operation at this location since early 2016. It amounts to around 12.5 hectares in area and has capacity for in the region of 300,000 birds, operating from around March to September. It was indicated that the business had been given independent planning advice to the effect that planning permission was not required for the facility.

3.3 Officers researched the planning status of game rearing facilities. There appears to be little doubt that the rearing of game birds for direct supply to the food chain constitutes an agricultural use. However, there is less certainty regarding the rearing of game birds for sporting purposes. Notwithstanding that, there are a number of appeal decisions that indicate the rearing of birds for sporting purposes does not constitute an agricultural use. In particular a very recent planning enforcement notice appeal decision (March 2017 - ENA-340-2031) in Perth & Kinross supported the opinion that the rearing of game birds for sporting purposes is

not an agricultural use, and further, that the use of agricultural land for such a purpose constitutes a material change of use.

- 3.4 On the basis of this research officers determined that the operation at Keithock required planning permission. That position was conveyed to the land owners/ operator who responded in a positive manner and confirmed that a planning application would be submitted.
- 3.5 A planning application for the establishment of the facility was submitted on 11 July 2017 (Ref: 17/00570/FULL). That application was subject of statutory publicity and consultation.
- 3.6 Fourteen letters (from 5 households) of objection to that application were submitted by occupants and/or owners of properties in the vicinity of the site. The main objections raised related to: -
- The presence of caravans on site
  - Adverse impacts on amenity by virtue of odour, noise, hours of operation, and general activity in the vicinity of houses resulting in loss of privacy;
  - Concern regarding visual impact of development;
  - Increase in number of flies;
  - Impacts from the burning of material and associated smoke;
  - Impact on roads and road safety;
  - Impact on water environment, source of water supply, adequacy of drainage and potential flood risk;
  - Adequacy of waste disposal arrangements;
  - Need for a decommissioning plan;
  - Failure of site to comply with good practice guidance;
  - Potential failure to comply with other statutory requirements;
  - Risk of avian flu;
  - Potential adverse health implications for neighbours;
  - Potential availability of more suitable sites to accommodate the development in the wider area.

Those letters indicate that the concerns raised are based on real-life experience of the site in operation.

- 3.7 In addition, a number of consultation responses identified the need for additional information in order to allow full and proper consideration of the acceptability of the site for the use. This included additional information in relation to transport, noise, odour and flood risk.
- 3.8 Unfortunately, during consideration of the planning application it was identified that it was invalid for technical reasons. This included the inclusion of properties out with the applicants control within the application site boundary and the associated provision of incorrect land ownership declaration forms.
- 3.9 Throughout this process the land owner/ operators have remained in dialogue with officers. The concerns raised by interested parties and the information requirements identified through the consultation process were discussed. In response to issues raised the land owner/ operators have agreed to cease the operation and to relocate to an alternative site.
- 3.10 Discussions regarding a possible alternative site are ongoing. However, the likely size of the site and associated development is such that a resultant application may constitute a major development. An application for major development requires statutory pre-application consultation with communities and the submission of a proposal of application notice. A planning application cannot be submitted for a period of 3-months following submission of the requisite proposal of application notice. The statutory timescale for determination of a major planning application is 4-months. A proposal of application notice has yet to be submitted but even if submitted within the next few weeks the earliest an application for major development could be submitted would be February/ March 2018.

#### **4. CURRENT POSITION**

- 4.1 There are currently no birds on the site although the associated structures, including huts and netted pens remain in situ.

- 4.2 Recent appeal decisions support the opinion that the use of agricultural land for the establishment of a game rearing facility for the supply of birds for sporting purposes constitutes a material change of use. That position does not appear to have been tested or confirmed by the Courts in relation to planning legislation. Therefore that position, and the materiality of any difference between rearing birds for agricultural purposes and rearing game birds for sporting purposes, is one that could be challenged through the Courts.
- 4.3 Notwithstanding that, it is considered that appeal decisions support the opinion that the use instigated at Keithock and the associated siting of structures constitutes development that requires planning permission. That position has not been disputed by the land owners/operators and as matters stand, there is agreement that the game rearing facility at Keithock represents a breach of planning control.
- 4.4 The land owner/ operators have indicated that the use will cease and that it will be cleared and returned to agricultural use. However, they have also indicated that immediate cessation, without an alternative site for relocation, would have a significant impact on the business. Whilst there are currently no birds at the facility, orders are currently being taken for the new year and the business requires certainty that it can operate in order to fulfil any orders. In this respect they have asked that any enforcement action be delayed to allow a further breeding season and have indicated a willingness to implement measures to mitigate impacts on those that live nearby. They have suggested the undernoted as timescale for withdrawal from the site: -
- Cease laying operations in East and West Burnside: June 2018  
Remove all laying equipment: June-September 2018  
Cease all rearing operations: September 2018  
Remove all equipment: October 2018
- 4.5 Against this background, officers have also been in dialogue with members of the public who live close to or own property in the vicinity of the site. Those parties have reiterated the concerns that were raised in relation to the planning application as outlined above. They support the land owners/ operators decision to cease operations at the site but have indicated that they are strongly opposed to any concession that would allow the site to be repopulated with birds for a further season given the associated amenity/environmental impacts. There has been some suggestion that the Council should sanction the relocation of the facility to an alternative site in advance of the grant of a planning permission for such an alternative site.

## **5. DISCUSSION**

- 5.1 It is clear that a number of residents in the area and the business operation are seeking significantly different outcomes. Residents do not wish to see the facility recommence operation at the site; the business wishes to operate for a further season. There is no ready means of resolving this matter in a manner that is likely to satisfy all parties. Formal enforcement action with a short timescale for cessation of the use would have potentially significant adverse impacts on the business but would address the amenity and environmental concerns raised by those that live nearby. Conversely, a delay in formal enforcement action and unregulated use of the site would not address the amenity and environmental concerns of people living in the area but would meet the economic needs of the business.
- 5.2 Similarly, there are practical difficulties associated with enforcement options available to the Council.
- 5.3 The Council can adopt an informal approach that involves negotiation. That general approach is supported by government guidance on enforcement in relation to small businesses as provided in Circular 10/2009. The guidance indicates that the initial aim should be to explore the possibility of the business being allowed to continue on the site at its current level of activity, or perhaps less intensively. Such an approach may result in the grant of a planning permission that enables the business to operate without harm to local amenity. This approach can also allow discussion of possible relocation of the business to another site. Whilst there are benefits with an approach of this nature it also has limitations as any mitigation measures or agreement is voluntary. There is a danger that it provides an operator little immediate imperative to find an alternative site. There is a risk that a business may not voluntarily vacate the site within timescales that are acceptable to the Council. In such circumstances the Council could resort to formal enforcement action but it results in delay. The Circular cautions

that informal discussion should not be allowed to delay formal enforcement action being taken where the planning authority consider such action is required.

- 5.4 In this case officers have had positive dialogue with the business. A planning application was requested and that was submitted, albeit it had limited supporting information and was subsequently declared invalid for technical reasons. Through ongoing positive dialogue it has been agreed that it would be beneficial for the business to relocate and there has been some preliminary discussion about an alternative site. However, it appears that submission of an application for an alternative site may be some time away given likely procedural requirements associated with any proposal. The business has also indicated a willingness to implement voluntary mitigation measures whilst it remains at the current site but as indicated above any such voluntary mitigation would not be enforceable by the Planning Authority.
- 5.5 The Council can take formal planning enforcement action through the service of an enforcement notice. Such a notice could require cessation of the unauthorised use and removal of the associated structures and equipment. Government Circular 10/2009 states amongst other things that *'If formal enforcement action is likely to compel a small business or self-employed person to relocate their trading activities, the planning authority should aim to agree on a timetable for relocation which will minimise disruption to the business and, if possible, avoid any permanent loss of employment as a result of the relocation.'* It would be a matter for the Council, in the first instance, to specify a timescale for the required measures to be implemented. However, the recipients of any such notice would have a right to appeal it to the Directorate for Planning and Environmental Appeals (DPEA). The Planning Authority would not be in a position to enforce the terms of the notice pending the outcome of the appeal. The DPEA may uphold the appeal and quash the notice or might vary its terms. Any decision on the appeal could be subject of legal challenge.
- 5.6 In the Perth & Kinross case referenced above a planning enforcement notice was served on or around 8 November 2016. That notice effectively allowed a period of around 3-months for the cessation of the use. The notice was appealed on 30 November 2016. Whilst the Reporter appointed by the DPEA upheld the fundamental requirements of the notice, he did amend it to allow a period up to 30 September 2017 for compliance with its terms. In reaching his decision the Reporter stated that *'If I were to uphold the compliance period of 60 days stated in the notice, it would be unrealistic to expect the appellants to find alternative premises and obtain planning permission in time to rear birds this year. The business would therefore suffer a year of inactivity..... I therefore consider it appropriate to allow the appeal on ground (g) and to extend the period for compliance to 30 September 2017. This will give the appellants time either to regularise the position by applying for planning permission on the present site, or to seek an alternative site.'*
- 5.7 The Reporter also stated, *'I recognise that local residents have made representations both to the council and to Scottish Ministers, about the visual appearance of the site and other impacts on amenity including noise, disturbance, odour and burning. It appears to me that effects on visual amenity arise from the structures on the site, which are not the subject of the enforcement notice, although their continued presence is likely to be required as long as the bird rearing activity remains. The other matters are disputed by the appellants. Since there was no game bird rearing at the time of my visit, I am unable to form a view. However, I consider that any noise, disturbance or odour impacts which might occur would not be very different from those arising from other forms of intensive poultry rearing which come within the definition of agriculture.'*
- 5.8 The Perth & Kinross case has resulted in the facility at that location being allowed to operate for a further season with no enforceable planning mitigation measures. It is understood that the facility remains in situ at that site and that a planning application is to be submitted to seek continuation of use.
- 5.9 There are some similarities between the Perth & Kinross case and the situation at Keithock. If an enforcement notice with a short compliance period was served in this case and an appeal was subsequently lodged, it is at least possible that a Reporter would adopt a similar approach and allow a season for the business to relocate. That would result in a similar situation to that detailed above where the facility could operate for a further season with no enforceable planning mitigation measures.
- 5.10 An alternative, having regard to the outcome of the Perth & Kinross appeal, would be to serve a formal enforcement notice with an extended timescale for compliance, potentially 30

September 2018. That approach may be supported in the event of any appeal of the notice. However, again that would result in a situation where the facility could operate for a further season with no enforceable planning mitigation measures.

- 5.11 It can be seen from the above that there are limitations in relation to pursuing the matter through negotiation. However, it is also clear that serving a formal enforcement notice may not give immediate resolution and may result in a situation where the site can operate for an extended period with no enforceable planning control.
- 5.12 In this case the business has located at the site without the requisite planning permission. It is accepted that this was done in good faith in the belief that planning permission was not required on the basis of independent planning advice. The business has indicated that it will cease operation and relocate. Government guidance indicates that in such circumstances the planning authority should aim to agree a timetable for relocation that minimises disruption to the business. The recent appeal decision in Perth & Kinross has reflected that approach by allowing an extended period for relocation of a similar business operation. Balanced against that are the concerns raised by residents that live in the vicinity of the operation. Those residents have raised concerns regarding amenity and environmental impacts associated with the development and have expressed a strong desire to see the business relocate before the 2018 season.
- 5.13 In circumstances where relocation of the business is seen to be desirable it is considered appropriate to pursue formal enforcement action in order to secure that outcome. However, as outlined above there are practical difficulties associated with doing that in a manner that minimises disruption for the business but at the same time minimises impact on the amenity of residents in the area. The Perth & Kinross appeal decision suggests that it may be unlikely that an approach requiring immediate cessation and clearance would withstand the appeal process.
- 5.14 An option appears to be the service of an enforcement notice with a reasonably short timescale for compliance. Such a notice could require cessation of use before the site is repopulated with birds. Clearly that could have significant impacts on the business and could be subject of appeal. However, Circular 10/2009 also states that once an enforcement notice has taken effect the planning authority may, where circumstances justify it, relax any requirement in it, including the compliance period. In this case the planning authority could indicate that, despite the service of the notice, it would be prepared to extend the compliance period until the end of September 2018 provided the operator agreed to implement approved mitigation measures in advance of the facility being restocked in March. This would give similar effect to the approach adopted by the DPEA Reporter in the Perth & Kinross case but with the benefit that the Council could ensure that appropriate mitigation was provided for the extended period of operation. There would be limited risk to the business as compliance with any agreed mitigation would be within its control. This approach would not deliver the immediate cessation or clearance of the site that is sought by residents but as indicated above that is unlikely to be achievable given the appeal process. However, it would give some comfort that the business would be required to operate in accordance with approved mitigation.
- 5.15 It is suggested that an enforcement notice is served that requires cessation of use and clearance of the site by 31 March 2018. However, it is also suggested that the recipients of that notice are advised that the compliance period will be extended until 30 September 2018 provided that the mitigation proposals addressing the undernoted are submitted by 19 January 2018 and are approved and implemented on or before the date that birds are brought back onto the site. The mitigation measures required are: -

- An odour and waste management plan, including details of minimum separation distances to neighbouring property and measures for the management and disposal of waste;
- A noise management plan, including details of minimum separation distances to neighbouring property and hours of operation;

(The content of the noise and odour management plans would require to be informed by generic noise and air quality assessment (including night and daytime operation).)

- A pollution management plan, including details of minimum separation distances to the Keithock Burn and measures for the management and disposal of waste;

- A vermin and pest control plan.

5.16 The recipients of the enforcement notice would have a right of appeal to the DPEA and that process and the outcome of any appeal could affect timescales for resolution.

5.17 However, the approach advocated should ensure the cessation of the use and return of the site to agricultural purposes by 30 September 2018. It allows for business continuity whilst at the same time securing some mitigation of impacts on the amenity of neighbours and the environment, accepting that the site could be used for any agricultural purpose, including the rearing of poultry potentially without the requirement for planning permission.

## 6. CONSULTATION

Legal & Democratic Services have been consulted in the preparation of this report.

## 7. FINANCIAL IMPLICATIONS

The normal costs associated with investigating and pursuing enforcement action will be met from the Planning Service budget.

## 8. OTHER IMPLICATIONS

### HUMAN RIGHTS

The recommendation to take enforcement action in relation to a breach of planning control has potential implications for the subject of the enforcement action in terms of the proprietors entitlement to free enjoyment of their possessions (First Protocol, Article 1) and/or in terms of alleged interference with home or family life (Article 8). It is considered that any such actual or potential infringement of such Convention rights is justified. Any actual or alleged infringement is in accordance with the Council's legal powers under the Planning Acts and is necessary in the general interest for the proper control of land use and development in Angus. It is also necessary for the protection of the right and freedom of others to freely enjoy their property without the restriction of their enjoyment and detriment of their amenity caused by the present breach of planning control. The interference is also proportionate given that the breach of planning control is, on the information available, not considered to be one which would attract the granting of planning permission. Further, the interference will be the minimum required to achieve the objective of remedying the breach of planning control in question.

### EQUALITIES

The issues contained in the report fall within an approved category that has been confirmed as exempt from an equalities perspective.

**STEWART BALL  
HEAD OF HOUSING, REGULATORY AND PROTECTIVE SERVICES**

**NOTE:** No background papers, as defined by Section 50D of the Local Government (Scotland) Act 1973 (other than any containing confidential or exempt information) were relied on to a material extent in preparing the above report.

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