

Appeal Decision Notice

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Decision by Roger Wilson, a Reporter appointed by the Scottish Ministers

- Planning appeal reference: PPA-250-2034
- Site address: Melville Gates, Ladybank, Fife KY15 7RF
- Appeal by Angle Park Sand and Gravel Company Limited against the decision by Fife Council.
- Application for planning permission ref. 08/01427/EEIA dated 9 May 2008 refused by notice dated 28 October 2009.
- The development proposed: Extension to sand and gravel quarry, extraction and processing of sand and gravel.
- Date of hearing and site visit by Reporter: 22 June 2010

Date of appeal decision: 16 August 2010

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**Decision**

I dismiss the appeal and refuse planning permission.

The appellant's claim for an award of expenses is dealt with in a separate decision notice.

**Reasoning**

1. The determining issues in this appeal are whether the proposal is consistent with the relevant provisions of the development plan and, if not, whether an exception to these provisions is justified by other material considerations. In particular, I will consider the need for the extraction of minerals here and the effect of the proposed development on residential amenity, road safety and natural heritage subjects and protected species, especially, but not exclusively, the red squirrel.

**Mineral extraction**

*Generally*

2. The development covers an area of some 58.4 hectares with an agricultural land area of about 13 hectares and 22 hectares of North Annsmuir Wood. The minerals extraction area would cover some 22.7 hectares. The proposal is designed in 8 phases over 6½ years with a further year for site restoration. It would use the existing access on to the A92 and current employment levels would continue.

3. The Fife Structure Plan 2009 (Chapter 3) addresses minerals and their extraction. Among other things, this section seeks to balance the need for minerals against



safeguarding local communities from the significant adverse effects of extraction, and to protect the local environment. Of its policies: -

- M1: deals with the need for extraction and its locality; and
- M2: addresses the need for a 10-year land bank of construction aggregates.

4. From the Fife Minerals Subject Local Plan 2004, there are a raft of relevant policies:

- MIN5 requires developments to take account of their potential environmental, economic and social impacts as well as Development Control Guidelines;
- MIN6 supports the structure plan policy M3;
- MIN9 refers to development not having a net detrimental impact for the Fife economy, with particular reference to jobs maintained or created;
- MIN12 and MIN13 refer to transportation arrangements;
- MIN14 relates to road damage repairs;
- MIN15 deals with the effects of noise, dust, blasting and light nuisance;
- MIN16 makes provision for works and improvements to be made through legal agreements;
- MIN19 and MIN20 deal with the restoration and aftercare of sites and financial bonding to achieve that end;
- MIN21 seeks to safeguard watercourses and groundwater resources;
- MIN23 seeks to protect existing rights of way;
- MIN24 seeks to retain prime agricultural land after any mineral extraction;
- MIN25 refers to landscape character and landform; and
- MIN 27, MIN28 and MIN29 relate to environmental monitoring and auditing.

5. The development would be an extension to an existing and long-established operation that was nearing the end of its life. The Planning Officer's committee report refers to the site being in a designated area for mineral extraction. The appellant's Planning and Environmental Statement (Statement) sets out the way in which the development would provide continuing employment here. It refers to the demand regionally, the markets and the state of other quarries in the area, e.g. producing similar /different products; closed or dormant. In principle, the proposal meets the terms of the policies outlined above because the extraction would go towards meeting a local need for sand and gravel, it would not exceed the 10-year land bank in terms of extraction quantity, and 13 existing jobs would be retained. I will now review the residential amenity and transport matters.

### *Noise*

6. Apart from policies set out in paragraphs 3-4 above, Scottish Planning Policy and PAN 50 (Annex A) provide additional advice and guidance on the control of noise at minerals sites, and PAN 50 (Annex B) advises on the control of dust. PAN 56 also establishes the best practice and the planning considerations to be taken into account with regard to developments that may generate, or be subject to, noise.

7. The appellant's Statement details the environmental impacts of the proposal with particular reference to the effect on residential amenity. In summary, the predicted noise from tree felling would be felt most acutely at the Annsmuir residential park and the Annsmuir Piggery, a residential property; it would exceed the recommended levels of



PAN50, but would be temporary and of short-term duration, for which PAN50 makes allowances. During the excavation phase, the noise levels at Annsmuir Piggery and Annspark, a residential property owned by the appellant, would not exceed the PAN50 recommendations for daytime. Overall, the techniques currently employed on the adjacent sites would address these matters.



### *Dust*

8. The Statement recognises that dust is an inevitable consequence of (a) tree-felling, (b) soil stripping, (c) quarrying, (d) the transportation of excavated material, (e) screening, (f) stockpiling and (g) restoration. The effects vary according to its particle size, wind speed and direction, uplift mechanisms, e.g. traffic disturbance, and rainfall. In this instance, the Statement records all these factors and a range of matching solutions.

### *Vibration*

9. On and off-site traffic has the potential to cause disturbance at residential properties through engine noise, 'body-slap' and vibration from the movement of heavy vehicles. The separation distances between the aggregates stocking area and those affected dwellings, and the layout of that area would mitigate these effects. Limiting vehicle speeds would also reduce engine noise and body-slap. Since this is an extension to an existing operation, and given the distances of existing dwellings from potential vibration generation, I am satisfied that there would no significant effects on the dwellings identified in paragraph 7 above.

10. Overall, the Statement concludes that dust emissions, noise control and vibration effects can be controlled by a variety of methods including the design of the proposal, its phasing and general management, and these meet the council's Environmental Services requirements. Had I been minded to allow the appeal, these could have been the subject of conditions.

### *Road safety*

11. The council's Transportation Officer, Transport Scotland and BEAR Scotland (the Trunk Roads Authority) have not contested the appellant's traffic flow information, which was found to be broadly in line with existing average flow rates. Staff vehicle numbers would also remain at their present level. Vehicles would serve the Fife and Clackmannan areas and would continue to run between the hours of 7am to 6pm Monday to Saturday.

12. The existing access on to the A92 would continue as now and the volume of extracted material leaving the site would not exceed the permitted maximum allowance already approved on the remainder of the quarry site (i.e. 300,000 tonnes per annum); and the number and type of vehicles involved would not exceed those currently used. On this matter, the proposal would comply with the relevant policies and guidance contained within the Fife Minerals Subject Local Plan.

13. I have also considered the transport implications of the tree felling phases, and as these would use the existing tracks, I find no reason to query this aspect of the proposal.

14. Taken together, the transportation proposals are acceptable, as there would be no implications from a road safety perspective, and it would be compliant with Fife Structure Plan policies T1 and T2, the Cupar and Howe of Fife Local Plan policy T1, and the emerging Finalised Local Plan policies T1 and T2. I have also considered the SPP on transport issues, PAN 50 (Annex C), which provides advice and guidance on the control of traffic at surface mineral workings, and PAN 75, which provides guidance and advice for general transport related issues, but nothing in the proposal is inconsistent with this policy/advice.



### **Natural Heritage**

15. North Annsmuir Wood is made up of a number of different species but primarily Scots and Corsican pine, western hemlock, spruce and some beech. As part of the development phasing, 14.7 hectares of the woodland would be felled, excavated for its mineral deposits, and the land re-graded some 4-5m below its current level. It would then be replanted with trees, incorporating a pond.

### **Red squirrels**

16. North Annsmuir Wood is known to be a home for an indeterminate red squirrel population (but probably in the region of 12-20). The red squirrel is a protected species under Schedule 5 of the Wildlife and Countryside Act 1981, as amended. Under the terms of section 9, and subject to some exceptions that do not apply here, it is a criminal offence to intentionally or recklessly: -

- Kill, injure or take (capture) a red squirrel,
- Damage, destroy or obstruct access to any structure or place which a red squirrel uses for shelter or protection; or to
- Disturb a red squirrel while it is occupying a structure, which it uses for that purpose.

17. The amendment to section 10(3)(c) [under Schedule 6 of the Nature Conservation (Scotland) Act 2004] allowed that notwithstanding anything in section 9, a person shall not be guilty of an offence by reason of any act made unlawful by that section if he shows, among other things, that each of the conditions specified in sub-section (3A) was satisfied in relation to the carrying out of the unlawful act: -

- (a) that the unlawful act was the incidental result of a lawful operation or other activity;
- (b) that the person who carried out the lawful operation or other activity—
  - (i) took reasonable precautions for the purpose of avoiding carrying out the unlawful act; or
  - (ii) did not foresee, and could not reasonably have foreseen, that the unlawful act would be an incidental result of the carrying out of the lawful operation or other activity; and
- (c) that the person who carried out the unlawful act took, immediately upon the consequence of that act becoming apparent to the person, such steps as were reasonably practicable in the circumstances to minimise the damage or disturbance to the wild animal, or the damage or obstruction to the structure or place, in relation to which the unlawful act was carried out.

18. It is not the function of the planning system to determine whether, or not, in certain circumstances, a criminal offence would be committed, although it does have regard to the protection of wildlife as a planning issue through the relevant development plan and government policy.

19. Fife Structure Plan policy ENV4 deals, among other things, with protected species. Developers should detail how any impact would be minimised or mitigated. The policy



stresses the importance of maintaining and where possible enhancing nature conservation interests.

20. Cupar and Howe of Fife Local Plan (2003) policy COU9 seeks to prevent harm to sites containing protected species: - (a) the overall integrity of the site and its natural heritage value should not be compromised; or (b) economic and social benefits arising from the proposal should significantly outweigh the natural heritage value of the site. Policy COU10 seeks to safeguard valuable wildlife habitats. Policy COU11 (Trees and Woodlands) aims to protect from development such areas that have a landscape, amenity and/or nature conservation value.

21. Scottish Planning Policy (2010) recognises the protection offered by the Acts and European law. In this case, paragraph 144 states that "*planning permission should not be granted for development that would be likely to have an adverse effect on a species protected under the Wildlife and Countryside Act, unless the development is required for preserving public health or public safety*". Paragraph 145 notes that supporting evidence should be submitted "*for any development meeting these tests, demonstrating the need for the development and that a full range of possible alternative courses of action have been properly examined and none found to acceptably meet the need identified*".

22. The Fife Local Biodiversity Action Plan 2009-2011 covers a wide range of topics including the red squirrel. It expresses concern about the greys, the importance of coniferous forests for the reds' survival, loss of habitat, and disease. It sets out objectives, including opposing developments that threaten key populations of reds or their habitat, particularly where they have not been compromised by greys. The underlying thrust of SNH's publication Scottish Strategy for Red Squirrel Conservation (2004) is to maintain the reds' population across their current habitat range. I cannot give these documents the full weight of the development plan, but they are consistent with the policies set out above.

23. There is no dispute that this wood is habitat favoured by the red squirrel. There was, however, considerable speculation by all parties and consultees on the number of squirrels to be found here, their feeding and foraging habits, the number of active dreys, the viability of the red squirrel population, and its movement through 'corridors' in search of food and habitat. I am also aware that a 50 metre band of woodland would remain around the east, south and west edges of the woodland, and that this area includes a number of beech trees whose nuts are valued food for the reds.

24. The 14.7 hectares of tree felling, representing about 60% of this woodland and, according to the appellant company, about 7% of the overall squirrel habitat in this area (about 223 hectares) would be carried out in stages over 3½ years. It could be timed to avoid the reds' primary breeding season and this would reduce, though not eliminate, the risk of significant damage or disturbance to reds and their dreys. Leaving to one side the practical difficulties of felling, within the law, large swathes of trees, which, from the current survey information, contain dreys dotted throughout, the inevitable effect would be to displace the reds, and the appellant's Statement foresees this. Thus, the reds would be forced to forage for food and/or live elsewhere.

25. Accepting that the reds would be disturbed and displaced by the tree felling process, the overall impact on the reds may be considered thus: -



- I. A viable red squirrel population depends on a minimum area of 200 hectares (at a density of about 1 squirrel per hectare). While this does not need to be a single forest zone - it can be in separate pieces provided there are connecting corridors - this rule of thumb is subject to variation because no definitive survey has been conducted and the type of food source could be critical.
- II. Apart from the resident population of reds, North Annsmuir Woods is a feeding and foraging area for populations from other areas close by. The 3<sup>rd</sup> party objectors' case is based on the premise that surrounding woodland is already at capacity for reds, but there was no cogent evidence to support that view. Indeed, the survey information was very sparse and too indeterminate, sometimes contradictory, from which to draw any firm conclusions on numbers and capacity.
- III. North Annsmuir Woods is recognised as a high quality feeding/habitat because of its wide biodiversity. It is difficult to reconcile the appellant's claim of North Annsmuir Woods as a *'valuable resource for the red squirrel'* with it *'not being fragile'* because *'it has been subject to regular disturbance and management'*. Similarly, if the area at issue is of *'regional and national value'*, it cannot equate to the impact of its loss being only of *'moderate significance'*. Conversely, the objectors' claim that there is a growing red squirrel population is hard to equate with the claim that the adjoining woodland is already at capacity.
- IV. The effect on the reds of reducing the area of North Annsmuir Woods is a matter of considerable conjecture. On mitigation and management, the appellant's Red Squirrel Survey and Management Plan (Plan) suggests, among other things, that the phased felling outwith the reds' breeding season, checks for dreys immediately prior to felling, traffic management and the maintenance of a 50 metre wide buffer zone would limit potential loss of life and habitat.
- V. That there was not a 'like-for-like' replacement habitat would not necessarily cause a loss of reds in the overall area in the short-term - they would migrate to other areas for food and habitat. More critical was whether there would be enough biomass in surrounding woodland for the displaced reds to survive in the long-term: -
  - (a) The closest area, Triangle Wood, has a perimeter of good feeding ground for reds, as one survey suggests, but the interior is dense thicket, which, in the short-term, is not a suitable habitat for them. There could be some migration here of reds from North Annsmuir Wood, but due to lack of cogent evidence, it would be unsafe to rely on that area as a replacement in the short-term, particularly because the capacity of the suitable habitat is uncertain.
  - (b) There are connecting corridors to the north and Roundabout Woodland, albeit with some vulnerable open ground between them, and the density of reds in Roundabout wood is uncharted. To the south, Ladybank Golf Course is a feeding area and acts as a corridor to South Annsmuir Woods. Heatherhall, to the southwest, is known to include greys and, in any event, it may be too far from the present site to be considered part of the overall habitat. Taken together, the effectiveness of corridors between the wooded areas is unquantified and the loss of 60% of North Annsmuir Woods could be critical.



- (c) I am not convinced by the appellant's submission that the red squirrel population over a wider area (allegedly about 600 hectares) would be sufficiently connected to qualify as continuous habitat accessible to the reds, because the evidence was tenuous and largely based on conjecture.
- VI. I accept that the A92 causes 'road-kill' now, but the loss of North Annsmuir Woods would increase the need for reds to cross this trunk road and a greater death rate could result.
- VII. Accepting that suitable forests can take a generation to produce cones (one of the reds' primary foods), the surrounding woodland would need active management to sustain the reds' population, a factor not entirely within the appellant's control. I understand the Forestry Commission is pursuing a policy based on Option 3 of the Scottish Red Squirrel Action Plan to enable this area to be a reds' stronghold, a move recognised by SNH and the appellant's Plan. However, the Forestry Commission also has commercial objectives.
- VIII. Within Triangle Wood, the Forestry Commission is planning a thinning programme in the near future to encourage its growth to maturity, and the future production of cones there will depend on the success of that continuing management. In time, this and other neighbouring woods could provide alternative habitat. The appellant's proposed introduction of 14 hectares of offset woodland at Pitlessie Common, 1.4 kilometres to the south, would assist the reds, but it could take a number of years to generate suitable and adequate food/habitat. The long-term re-planting of North Annsmuir Woods could take a generation to produce cones.
- IX. SNH firstly objected to the scheme because it had inadequate information to demonstrate that reasonable precautions would be taken to protect and sustain a viable red squirrel population. Following further appellant submissions, it reviewed its position with a heavily caveated report, expressing reservations about the likelihood of retaining the reds' population at the existing level throughout the period of operations. It also highlighted the lack of evidence to support the appellant's hypothesis on the ability of the surrounding woodland to absorb the displaced reds. However, it concluded that if positive management practices were used, the impact on reds could be temporary.
- X. Grey squirrels exist alongside the reds in some areas, even though their feeding and habitat requirements may differ in some respects. The general consensus was that there are no greys in North Annsmuir Woods at the moment, although they are present within the wider Ladybank area; nor was there any evidence that the partial loss of habitat here would encourage the greys to move in and totally displace the reds. Trapping and culling of greys in the surrounding area under the Fife Red Squirrel Group, and supported by the appellant company, may have helped to limit the greys' coverage, but these regimes have been unscientific in terms of understanding their habits. Whether, further culling under the financial support of the appellant company would be effective to offset the loss of the reds' habitat here is inconclusive.





26. Taken together, the balance of evidence suggests that there would be an immediate and adverse impact on the reds through disturbance of their dreys and displacement/disbursement to other areas where there may be competition for suitable food stocks. The appellant's Plan covers the matters set out in paragraph 25 above and also concludes that there would be a medium term impact of major significance. In the longer-term, the Plan suggests that the impact would be temporary, and mitigated by the proposals, but it seems to me that this requires a positive assumption on all aspects, when there is too much uncertainty on each outcome to place significant reliance on it.

27. Turning now to the operation of the development plan, structure plan policy ENV4 is met to the extent that an ecological appraisal has been submitted with the proper credentials. However, from my conclusion in paragraph 26, the heritage interest would not be maintained, still less enhanced.

28. Under local plan policy COU9, North Annsmuir Wood contains habitat and species of national importance and therefore meets the lower threshold of local or regional interest. Since the development would have an adverse impact on this site's heritage interest, I must consider the 2 conditions attached: - (a) the 60% woodland clearance, even with the 50 metre wide buffer zone, would clearly have a significant impact on the site's integrity; (b) there would be economic and social benefits accruing from the sand and gravel extraction here, e.g. employment and economic prosperity in the area, to the extent that the existing workforce (13 people) would be retained. However, there was very little evidence about the business need for the proposal on this specific site or the employment opportunities that would be lost if the development were not to go ahead. A balance must be struck. While there would be some employment benefits and the proposal would help to meet the demand for sand and gravel, these would be measured locally. However, given the potential harm to a protected species, I am not satisfied that these factors significantly outweigh the natural heritage value of the site.

29. The removal of a large section of this woodland habitat would not comply with local plan policy COU10.

30. The underlying emphasis of the Scottish Planning Policy is the protection of species noted in the Wildlife and Countryside Act, and given the adverse impact in the short-term and the indeterminate long-term effects, I am not satisfied that this proposal meets this policy's terms.

#### *Other protected species*

31. Bats are listed on Annex IV of EC Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Flora and Fauna (Habitats Directive) as species of European Interest and in need of strict protection. This is transposed into domestic legislation by means of the Conservation (Natural Habitats & c.) Regulations 1994, The Conservation (Natural Habitats, &c.) Amendment (Scotland) Regulations 2004 and 2007. Bats listed in Annex IV (a) of the Habitats Directive and whose natural range includes any area in Great Britain, are also listed in Schedule 2 of the Conservation Regulations as European protected species of animals, and are thus fully protected.

32. Fife and Kinross Bat Group confirmed the presence of several protected bat species: soprano pipistrelle, common pipistrelle, Daubenton's and Natterer's. Brown long-eared



bats were also identified. The appellant's survey was limited in its methodology and timing, but SNH advised that another survey prior to any development would be required, and if bat roosts were found, mitigation measures must be considered. Licences from the Scottish Government under Regulation 44 (2) of the Conservation (Natural Habitats & c.) Regulations may be required for tree felling. Overall, SNH were satisfied that subject to these constraints, the proposed development would not be detrimental to the maintenance of the bat species at a favourable conservation status within their natural range.

33. There are a variety of breeding birds with North Annsmuir Woods, but SNH confirmed that provided trees are felled outwith the breeding season, any impact on them would be minimal.

#### *Woodlands*

34. Apart from a habitat for red squirrels, North Annsmuir Woods are valued for their general and recreational amenity. In the short term, paths through the woods could be diverted, but this could reduce their recreational value. Although the development foresees the replacement of trees and the introduction of a water feature, this will take many years to mature. Meanwhile, the loss of 60% of the woodland would not comply with the terms of local plan policy COU11.

35. In summary on this natural heritage issue, the loss of a large part of North Annsmuir Woods would have an adverse effect on red squirrels, a nationally protected species, and I am not satisfied that the proposed mitigation would balance or reduce any harm to an acceptable level. I have also considered whether conditions could provide effective controls and monitoring of operations. The Planning Officer's recommendations include for programming and restoration details; working methods; transport and environmental controls; and detailed implementation of the Plan. While they may limit to some extent the adverse impact in the long-term, for the reasons set out in paragraphs 24-30 above, I am not convinced that they would reverse the immediate harm that the loss of woodland would have on the red squirrel population. I have also considered whether a legal agreement covering the culling of greys would be appropriate here, but its terms could not meet the tests for such agreements and its value would be limited. I am, though, satisfied that there would be no significant impact on other protected species.

36. Accordingly, the proposal would not comply with structure plan policies ENV4, local plan policies COU9, COU10 and Scottish Planning Policy. This scheme would not comply with local plan policy COU11 because of the impacts on the red squirrels in North Annsmuir Woods and the loss of general amenity there. I have considered the emerging (Finalised) St Andrews and East Fife Local Plan, but policies E3, E4, E15, E23, and E25 do not take my reasoning on this matter in a different direction. The appellant also refers to other mineral extraction sites where the council has approved development. While consistency of council decision making is a material consideration, these schemes were approved over a period of different development plans and other policy/guidance, and the limited and selected information provided shows that the circumstances were not identical, e.g. site size, heritage wildlife and potential mitigation effectiveness. For these reasons, this matter does not affect my reasoning set out above.



**Conclusion**

37. The principle of the minerals extraction meets the terms of the development plan and other guidance. There would be no significant adverse effects on residential amenity or road safety. Nor would there be a significant impact on protected bats or birds, but the adverse impact on red squirrels, a nationally protected species, cannot be fully reconciled with development plan and government policies. For the reasons given in paragraph 28, and on balance, refusal of planning permission is justified.

*Roger Wilson*

**ROGER WILSON**  
Reporter

