

Agenda Item	<b>11</b>
Report No	<b>ECI/32/20</b>

## THE HIGHLAND COUNCIL

**Committee:** Economy and Infrastructure

**Date:** 4 November 2020

**Report Title:** Application for an order to exempt access rights during the construction of a wind turbine development, Limekiln, Reay.

**Report By:** Executive Chief Officer Infrastructure and Environment

### 1. Purpose/Executive Summary

- 1.1 Where it is considered necessary to exclude public access rights on a designated core path an application must be made to the Council under Section 11 of the Land Reform (Scotland) Act 2003 [the Act]. This is known as a Section 11 Order.
- 1.2 The Council has received a Section 11 application from Limekiln Wind Ltd who have consent to construct a wind farm at Limekiln Forest near Reay, Caithness. Limekiln Wind Ltd wishes to exclude the public from a circular 7.8km core path within Limekiln Forest for a period of 2 years. Limekiln Wind Ltd believes that, in this case, public access cannot be accommodated alongside the construction activity.
- 1.3 Where a Section 11 application seeks to exclude public access for period in excess of 6 days, the Act requires the Council to give public notice of the intended purpose and effect of the proposed Order and consider any objections and representations made to them. The Act also requires the application to be confirmed by Scottish Ministers. Where the public consultation process results in outstanding objections, it is for this Committee (as per the Scheme of Delegation) to consider, in light of the objections, whether or not the Section 11 application should be approved and forwarded to Scottish Ministers for confirmation.
- 1.4 In this case a 4 week consultation has been undertaken. The Community Council, Ramblers Association and ScotWays have lodged and maintain objections to this application – these, and the Council’s response, are included in the Appendices.
- 1.5 Members should note that such applications are unusual and to date this is the first such application to be made in Scotland for the purposes of facilitating construction.

### 2. Recommendations

- 2.1 Members are asked to consider the outstanding objections and representations and either:

- i. approve the Section 11 Order (with outstanding objections) to exclude public access rights for a period of 2 years and **forward** the application to Scottish Ministers who may confirm the order (with or without modifications) or refuse to confirm it.

OR

- ii. Not approve the Section 11 Order to exclude public access rights for a period of 2 years and **not forward** the application to Scottish Ministers thereby requiring the developer to facilitate open public access on the core path whilst construction of the wind farm takes place.

### **3. Implications**

- 3.1 Resource – Scottish Ministers may cause an inquiry to be held for the purposes of enabling them to decide whether to confirm the order. Officer time may be required for any inquiry.
- 3.2 Legal – The Highland Council does not have the power to confirm such an order, this lies with Scottish Ministers.
- 3.3 Community (Equality, Poverty and Rural) – Potential loss of local amenity for period of construction.
- 3.4 Climate Change / Carbon Clever – Not approving the order may result in delay to wind turbine development.
- 3.5 Risk – No financial risk, potential reputational risk for not upholding access rights. The decision on whether or not to confirm the order lies solely with Scottish Ministers. This may create precedent for similar exemption applications in the future but will also help clarify for all parties the circumstances in which a Section 11 order can be considered.

### **4. Background**

- 4.1 Limekiln Forest core path (CA11.03) was adopted into The Highland Council core paths plan in September 2011. The planning application for the Limekiln Wind Farm, which intends to use the core path as an access track from which to construct turbines, was submitted in 2016 (16/02752/S36). The application was refused by Highland Council but, following a successful appeal (and Public Local Inquiry), granted consent by Scottish Ministers (DEPA ref. WIN-270-8).
- 4.2 As a condition of consent, Limekiln Wind Ltd is required to produce an Access Management Plan (AMP). The AMP should ensure that public access is retained in the vicinity of Limekiln Wind Farm during construction. The AMP must be approved by the Planning Authority prior to commencement of development. Unfortunately, the wording of the condition, ‘...in the vicinity of...’, is not precise and does not reference the core path specifically.
- 4.3 An AMP was submitted to the Access Officer requesting a Section 11 Order as the developer considered this was the only mechanism by which public safety could be ensured. No alternative access arrangements that would retain public access at or in the vicinity of development during construction were proposed, i.e. accommodating provision through segregation, phasing, alternatives, marshalling etc. As such the AMP was not considered to satisfy the planning condition and was not approved.

- 4.4 In order to progress the AMP, Limekiln Wind Ltd submitted an application to the Council for a Section 11 Order, which was subsequently put out to public consultation in accordance with the Act.
- 4.5 The effect of the Order will be to exempt a 7.8km length of forest track at Limekiln Forest from access rights which would otherwise be exercisable in respect of the land by virtue of Part 1 of the Act. Limekiln Wind Ltd proposes the Order in the interests of safety and security to allow the construction of a wind turbine development. Limekiln Wind Ltd proposes that the Order will take effect from 0001hrs on 7 December 2020 and shall expire at 2400hrs on 6 December 2022, not including Sundays from 27 June 2021 to 24 April 2022 inclusive, unless revoked earlier. A site plan of the proposed area to be exempted from access rights is shown in **Appendix 1**.

## 5. Section 11 Consultation

- 5.1 As is required by the Act, both the landowner and the Caithness Local Access Forum have been consulted on the application; neither party has objected to the proposed 2 year closure of the core path. The Caithness Local Access Forum members would, however, prefer the option of the core path being reopened at weekends and holidays. Limekiln Wind Ltd has subsequently offered a limited period of Sunday opening.
- 5.2 The Section 11 application was open for public consultation between the 10 August 2020 and 4 September 2020. The proposed Order (**Appendix 2**) was advertised in local newspapers, displayed on the site entrance and at Wick Service Point. Local community councils, adjacent landowners and recreation groups were forwarded notice of the proposed Order.
- 5.3 Four timeous representations were received by The Highland Council, 1 was neutral and 3 objected to the proposed Order (**Appendix 3**). Considerations raised are summarised as follows:
- a) loss of local amenity and access resource during the 2 year period;
  - b) no alternative provision is being provided on the site or any links to adjacent access resource or core path as is suggested by Scottish Government guidance;
  - c) the path is open now during forestry operations, why is closure needed to allow construction activities;
  - d) signage and communication with the public should be utilised, not complete exclusion;
  - e) Scottish Government Guidance does not support the use of Section 11 orders to allow construction activity to take place;
  - f) the order is for the maximum proposed timescale allowed by the legislation, such an application shows no regard or consideration for keeping public disruption to the minimum period of time as suggested by guidance; and
  - g) unnecessary use of such an order where it is has not been clearly demonstrated why it is needed and alternative arrangements cannot be used.

## 6. Assessment

- 6.1 The applicant has requested a Section 11 Order for the following reasons:
- i. to protect the public from construction activities, movement of plant and quarry activities;
  - ii. the core path is an arterial route for the site, and it will be used for almost the entirety of the construction period;

- iii. any limitations on the use of the core path would severely limit the ability of the contractor to deliver the construction programme where flexibility is required;
- iv. construction of a segregated route is considered disproportionate;
- v. opening and closing the core path on a Sunday, or other times, would likely lead to confusion and additional duties for the contractor; and
- vi. once the development is in operation there will be an improvement to access along the core path within the site.

- 6.2 Scottish Government guidance to Local Authorities on the implementation of the functions of the Land Reform (Scotland) Act 2003 provides details of when Section 11 access exemption orders should be considered. Section 11 orders may be considered for safety and security purposes, but they should not *usually* be considered for land management or construction activities. However, the Council's own legal advice has confirmed that the Section 11 Order in this case is valid and has been submitted in accordance with the guidance; a Section 11 can, in some circumstances, be made for the purposes of construction (see **Appendices 4 and 5**). Nonetheless, no Section 11 access exemption order has been granted to date in Scotland to allow the construction of a wind farm or for any other construction activity.
- 6.3 No alternative route or diversions have been suggested by the applicant other than that the public should utilise other paths and tracks in the core path network. No other route that starts directly from the settlement of Reay offers a circular path of any length. The nearest comparable core path is at Broubster which is not a circular route and the start is approx. 8km from the village. The Scottish Government guidance clearly suggests alternative provision should be considered where a core path is to be closed to the public.
- 6.4 Whilst there have been three objections to the Section 11 order, it is notable that the Local Access Forum have supported the closure. Members should note that this application has been discussed with Caithness Area members at their Ward Business Meeting on 19 October – the opinion of Caithness Members will be reported verbally to this committee.
- 6.5 Members should further note that it is not for the Council to decide whether or not the order should be granted, but rather this Committee must decide whether or not the Order should be approved and passed to Scottish Government for them to confirm. Given the uncertainty in the Act and accompanying guidance on this issue (as is reflected by the difference of opinion between the objectors and our own legal advice), this is an opportunity to obtain further clarity from Scottish Ministers on the use of Section 11 orders.

Designation: Executive Chief Officer, Infrastructure and Environment

Date: 10 October 2020

Author: Matt Dent, Access Officer, Caithness and Sutherland

Background Papers:

Appendix 1 – Site Layout of Proposed Access Exemption Area

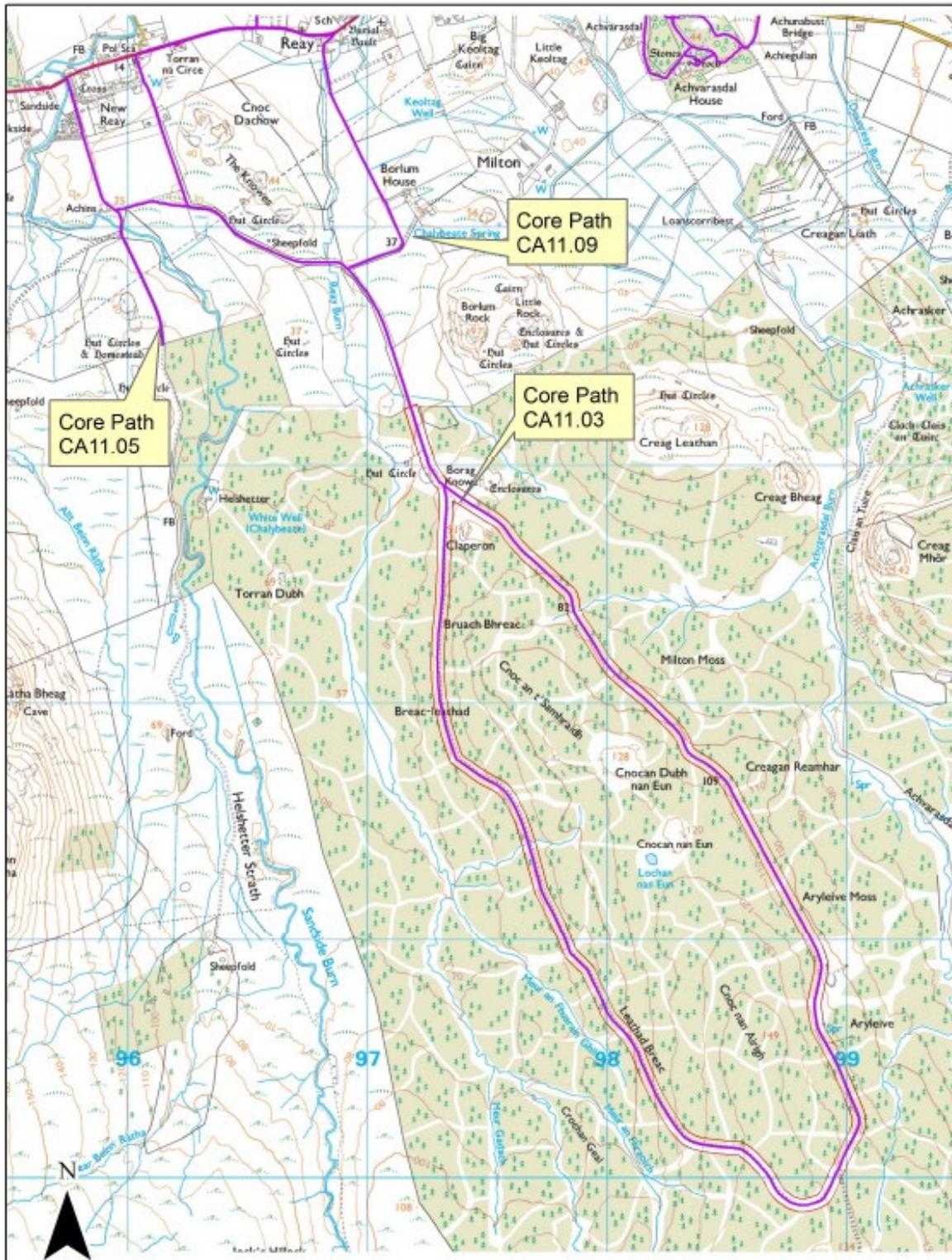
Appendix 2 – Notice of Proposed Order

Appendix 3 – Objections/Representations

Appendix 4 – Council Response to Representations

Appendix 5 – Follow-up Responses

# Appendix 1 - Site Layout of Proposed Access Exemption Area



**Section 11 Application Limekiln Forest 2020**

 Land proposed to be exempted from access rights by order

0 250 500 1,000 Meters 1:21,000 at A4 © Crown Copyright. All rights reserved 100023369 2020

 **The Highland Council**  
Comhairle na Gàidhealtachd

[www.highland.gov.uk](http://www.highland.gov.uk)



**NOTICE OF PROPOSED ORDER TO  
EXEMPT LAND FROM ACCESS RIGHTS**

**THE HIGHLAND COUNCIL  
(LIMEKILN FOREST, REAY, CAITHNESS) ORDER 2020**

Notice is hereby given under section 11(2) (b) of the Land Reform (Scotland) Act 2003 (“the Act”) that Highland Council proposes to make The Highland Council (Limekiln Forest, Reay, Caithness) Order 2020 (“the Order”) under section 11(1) of the Act.

The effect of the Order will be to exempt a 7.8km length of forest track at Limekiln Forest, Reay, Caithness (part of Limekiln Forest Core Path CA11.03) from the access rights which would otherwise be exercisable in respect of the land by virtue of Part 1 of the Act. A map of the exempted area (shown delineated in red) can be viewed on site at (GR 297,174 963,248), at Wick Service Point, Caithness House and online at: [www.highland.gov.uk/countrysideaccess](http://www.highland.gov.uk/countrysideaccess)

The purpose for which the Order is being proposed is in the interests of safety and security to allow the construction of a wind turbine development. It is proposed that the Order will take effect from 0001hrs on 7 December 2020 and shall expire at 2400hrs on 6 December 2022, not including Sundays from the 27 June 2021 to 24 April 2022 inclusive, unless revoked earlier.

Objections or representations in respect of the proposed Order may be made to the Council for its consideration by Friday 4 September 2020. Given current homeworking arrangements, if possible, please submit objections or representations via email to [karen.lyons@highland.gov.uk](mailto:karen.lyons@highland.gov.uk). Alternatively, please address your letter to: Highland Council, FAO K Lyons - Legal Services, Council Offices, Glenurquhart Road, Inverness, IV3 5NX. If your representation is an objection, please state the grounds on which it is made. As the proposed exemption is for six or more days, the Order will require confirmation by Scottish Ministers before taking effect.

Stewart D Fraser, Head of Corporate Governance  
The Highland Council, Glenurquhart Road, INVERNESS IV3 5NX

## Appendix 3 – Representations to Notice of Proposed Order

### 1. From Caithness West Community Council:

Dear Ms Lyons,

Caithness West Community Council wishes to object to the proposal to close the above core path for an extended period during construction of Limekiln Windfarm.

In support of our objection we would wish to make the following points;

1. This will be a significant loss of local amenity. The Limekiln track is the only longer, circuitous route available in the vicinity and is used regularly by local people and also organised groups, eg Caithness Harriers.
2. Limekiln tends to be used by more “serious” walkers, runners and cyclists and is not a family or all access walk. It is not easily accessible and is not a place where children or young people would gather. We therefore see no reason why the entire site needs to be closed.
3. It has remained open during initial forest operations with no issues at all. The circuit is 7.8km long and any activity which poses any risk to the public will be in specific areas for set durations. It would seem perfectly possible for the developers to cordon off those areas as required, or to shut the site only on specific days when higher risk activities (eg rock blasting) were taking place.
4. We believe signage and communication within the local area is required, rather than full closure which is easier for the developers, but impacts local people for a full two years.
5. There are many cases where forest operations, windfarm construction and other industrial activity has taken place in the vicinity of core paths, without recourse to closure. We can see no obvious reason why closure is required here.
6. We note that the order does not include Sundays for some of the period. If there is absolutely no alternative to closure, then we would request that Saturdays are also exempt, so that at least local people can use the paths at weekends.
7. We would also request, that given such a lengthy period of proposed closure, the developers provide an alternative walking route in the area. For example it would be possible to create a link from 11.03 to 11.05 at the north end of Limekiln, through the area of forest where there will be no turbines or construction activity.

We trust that alternative approaches can be taken and would request that HC strongly supports us in rejecting the application for blanket closure.

Regards

## 2. From Ramblers Scotland

Dear Ms Lyons

### **NOTICE OF PROPOSED ORDER TO EXEMPT LAND FROM ACCESS RIGHTS, THE HIGHLAND COUNCIL (LIMEKILN FOREST, REAY, CAITHNESS) ORDER 2020**

I am writing on behalf of Ramblers Scotland to object to the above order on the grounds that the stated reason of “being in the interests of safety and security to allow the construction of a wind turbine development” is not an appropriate use of s 11 of the Land Reform (Scotland) Act 2003. Health and safety requirements relating to the construction of a wind farm are covered by other legislation, to be used in conjunction with the Scottish Outdoor Access Code.

We strongly believe that the purpose outlined in this order is not reflective of the intention of the Scottish Parliament with regard to use of s 11 or in the advice subsequently issued by Scottish Ministers with regard to the implementation of the 2003 Act. Section 27(1) of the 2003 Act requires local authorities to have regard to guidance given by Scottish Ministers. The current [guidance](#) from 2014 makes it clear that Ministers envisaged that local authorities would primarily use a s 11 order in relation to managing access for events, including the charging of an entry fee, or to ensure health and safety was protected during that event. This is not the purpose of this Order. The guidance also explicitly states s 11 should not normally be considered for reasons relating to construction sites.

In addition, we have not previously heard of any developer of wind farms across Scotland attempting to exempt the land from access rights through a s 11 order and are not aware of any exceptional circumstances at the Limekiln Forest site that would justify such an exemption.

[Guidance](#) issued by NatureScot on good practice during wind farm construction, developed in association with the Health & Safety Executive, makes it clear that “*a range of mechanisms can be used to manage access during construction, including informal, proportionate and short-term limitations on access (for the minimum necessary time and area), providing signposted alternative routes and active management of access where work is underway. Both the areas where construction work is taking place and routes which lead into and across the site from public roads should be considered*”.

Any limitation on the exercise of access rights on land where construction work is being carried out should only apply to “*areas where building operations are active, rather than the whole area under the developer’s control, and the Scottish Outdoor Access Code underlines that restrictions should be kept to the minimum area and the minimum duration that is reasonable and practicable. Management arrangements should therefore be flexible enough to take reasonable account of public access requirements and to adapt as the site develops, so that access controls are focused on where the actual risks are present. This ensures that limitations on access are seen to be proportionate and credible by recreational users.*”

If, during the construction of the windfarm, it is felt necessary for health and safety reasons to close part of the core path - or any other part of the site - for a short period of time, this should be done through temporary signage and other appropriate means.

All the above considerations need to be addressed in the preparation of the Access Management Plan. We are surprised that the developer does not appear to have produced such a Plan. We believe that all the issues regarding public access to this windfarm site

during both construction and operation can be addressed through this Plan, without recourse to a s 11 Order.

We would be happy to discuss any of these points if that would be useful.

### 3. From Scotways

Dear Ms Lyons,

#### **Re: Notice Of Proposed Order To Exempt Land From Access Rights The Highland Council (Limekiln Forest, Reay, Caithness) Order 2020**

The above proposed Order under Section 11(2)(b) of the Land Reform (Scotland) Act 2003 was notified to ScotWays on 26<sup>th</sup> August 2020 by your colleague Matt Dent inviting objections or representations. Concerns have been separately raised with us about the purposes stated for use of a Section 11 Order here.

The **effect** of the Order is stated to be the exemption of 7.8km of forest track with core path designation. As the forest track is a loop route, in effect public access rights are also excluded from the encircled area, albeit this is forestry. The **purpose** of the exemption is stated to be in the interests of safety and security to allow the construction of a wind turbine development. The **duration** of the Order is for two years, with the exception of 10 months of Sundays, unless revoked earlier.

Scottish Government guidance on the use of Section 11 Orders to temporarily close land (including core paths) states that "*Circumstances where exemptions under section 11 should not usually be considered include reasons of land management or construction*". No details have been provided as to why construction of this particular wind turbine development (unusually) requires a Section 11 Order.

Section 6(1)(g) of the 2003 Act provides that land on which construction work is taking place is land where access rights are not exercisable, unless that land is a core path [Section 7(1)]. As the area specified in the Order appears not to be the construction site itself, it appears possible that the Section 11 Order is being used here precisely because the specified area of land is a core path. If it is necessary to temporarily close a core path for the purposes of construction then there are other more appropriate mechanisms to use and which could also secure path improvements. Furthermore, the above Scottish Government guidance also states that "*When a core path is to be temporarily closed by a section 11 order, it is good practice for alternative arrangements to be organised by the land manager working with the access authority (e.g. a well signed substitute route)*". There is no note provided of any alternative arrangements for public access nor any explanation as to why such alternative arrangements are deemed unnecessary here.

As it is specified that this is a windfarm development, regard should also be taken of the guidance for *Good Practice During Wind Farm Construction*. This points to the Scottish Outdoor Access Code and indicates that restrictions should be kept to the minimum area and duration that is reasonable and practicable. This proposed Order's blanket closure for a possible maximum two years unless revoked does not fit with this guidance's principle of a flexible and adaptive approach to public access management. Signage for the benefit of both recreational users and construction workers is suggested alongside alternative routes and local publicity. In the absence of information about an access management plan for this site, it appears the Section 11 Order is being proposed as an alternative to it.

ScotWays **objects** to this Section 11 Order on the grounds that it is an unnecessary use of this power as it has not been demonstrated that other access management arrangements and other appropriate mechanisms have been considered.

I hope the comments provided are useful to you. Please do not hesitate to contact us if you have any queries.

Yours sincerely,

#### 4. From Reay Farms

Dear Karen

I act on behalf of Reay Farms Limited, the proprietors of the Sandside Estate. I have received a copy of your notice under Section 11 of the Land Reform (Scotland) Act 2003 in relation to the proposed Order.

The nature of my query is not so much in connection with the merits of the Order, but my clients are slightly surprised to see that access is contemplated through three tracks in their property in connection with the Limekiln Wind Farm. As far as my clients are concerned, there are no servitude rights through their property which would support the development of a wind farm on neighbouring property.

I would therefore be grateful if you would pass this email on to the developer who is asking the Council to make the Order, so that we may discuss this matter with them. Alternatively if you have comments yourself based on your involvement in the project then perhaps you could let me know.

I look forward to hearing from you as soon as possible.

Kind regards



Jillian Bundy  
Chair  
Caithness West Community Council  
By email [jgbreay@icloud.com](mailto:jgbreay@icloud.com)

Please ask for: Karen Lyons  
Direct Dial: 01463 702194  
Our Ref: L/KL  
Your Ref:  
Date: 29 September 2020  
DX No: DX IN 5  
Please reply to Legal Services, The Highland Council  
Glenurquhart Road, Inverness IV3 5NX

Dear Madam,

## **SECTION 11 EXEMPTION FROM ACCESS RIGHTS at LIMEKILNS FOREST, REAY, CAITHNESS**

In response to your objection, received 2<sup>nd</sup> September 2020, to the proposed order to exempt land from access rights at Limekilns Forest please see the response below.

### **1. Loss of Amenity**

It is accepted that the closure of the core path for such a long period will lead to a loss of access resource but we have taken into account that the amenity value will be significantly reduced during the intensive construction works which will be taking place on the site. The proposed closure was discussed by the Caithness Local Access Forum at their 9 March meeting and the Forum supported the exemption order partly because of the view that the site will not be attractive to visit during the construction phase.

### **2. Used by “Serious” Walkers etc. Only**

The competency/fitness of the members of the public who use the area does not affect how the site would be managed during any forestry or construction activities. An occupier of a site cannot alter their management of the public because, say, hill runners are more used to being in a forest with excavators or quarrying activities, it assumes the occupier understands and can second guess the actions of the public when, clearly, they cannot. Furthermore, that the public travel to the site to undertake exercise implies that, should this site be closed, they will have the ability to travel elsewhere. The nearest comparable circular routes are at Borgie Forest, Causeymire Wind Farm, Dunnet Forest, Camster Wind Farm and Loch More. Non-circular routes are available at the close by Broubster Forest.

### **3. The Track is Open during Forestry Operations, why not cordon off in sections for the Construction**

The felling of trees takes place away from the track and, whilst the track is used to transport the timber out of the forest, during forestry operations the track is not required to be significantly upgraded or used to transport plant around the site. Quarry specific vehicles, that is very large non-road-legal dumpers, will be travelling along the track during both the track upgrading and the turbine-base formation. After that, large plant, crane and abnormal loads will use the track for the erection of the turbines. The use of the track for construction activities is not considered to be comparable to the use of the track for forestry operations.

### **4. The public can be managed by signage and communication**

The Highland Council does not consider it reasonable or proportionate for the contractor constructing the development to change and alter the management of the site during the construction period as this would lead to unacceptable conflict in the planning of the works which is both plant, labour and weather dependent.

### **5. Why not open on a Saturday as well as the Sunday as proposed**

Noise generating construction activity is only consented for the development for Mon-Fri (0700-1900) and Saturdays (0700-1300). Some construction activities can take place out of these times, but the scope of the works is limited which allows Sunday opening as specified in the proposed order but not Saturdays.

### **6. Alternatives provided during the closure**

The nearby Broubster Forest is unaffected by this development and there is the opportunity to exercise access rights during the Limekilns closure period. Broubster can be accessed from existing tracks starting at Achvarasdal. From Reay directly there is a core path to Helshetter which continues alongside Sandside Burn for approx. 3km which can be used throughout the construction period. The link path you have highlighted would be of limited use during the construction period as it could only be used as a circuit by passing through the proposed access exemption area.

Please consider the above responses to the points raised in your letter of objection and confirm to me whether you wish to maintain or withdraw your objection. I would be grateful to receive your response within 7 days of the date of this letter. Thank you.

Yours faithfully,

*K Lyons*

**Principal Solicitor (Planning)**



Don Macleod  
Turcan Connell for Reay Farms Ltd  
By email  
[don.macleod@turcanconnell.com](mailto:don.macleod@turcanconnell.com)

Please ask for: Karen Lyons  
Direct Dial: 01463 702194  
Our Ref: L/KL  
Your Ref:  
Date: 29 September 2020  
DX No: DX IN 5  
**Please reply to Legal Services, The Highland Council  
Glenurquhart Road, Inverness IV3 5NX**

Dear Sir,

**SECTION 11 EXEMPTION FROM ACCESS RIGHTS at LIMEKILNS FOREST,  
REAY, CAITHNESS**

In response to your neutral representation, received 13 August 2020, to the proposed order to exempt land from access rights at Limekilns Forest please see the response below.

The approved construction access for Limekilns Wind Turbine Development is as shown on the attached figure 1.1.

The recently advertised proposed order for the exemption of access rights covered an area within the Limekiln forest which is shown on the second attachment. Whilst the proposed order covers only the area bounded in red, The Highland Council included the core paths in the area for reference – shown as purple lines. The core paths shown on this plan do not imply any works or access is required (or not required) by the developers for the wind turbine development.

Please confirm that this answers the query raised in your representation.

Yours faithfully,

*K Lyons*  
**Principal Solicitor (Planning)**

**Enc.**



Eleisha Fahy  
Senior Access Officer  
Scotways  
By email  
[eleisha\\_fahy@Scotways.com](mailto:eleisha_fahy@Scotways.com)

Please ask for: Karen Lyons  
Direct Dial: 01463 702194  
Our Ref: L/KL  
Your Ref:  
Date: 29 September 2020  
DX No: DX IN 5  
Please reply to Legal Services, The Highland Council  
Glenurquhart Road, Inverness IV3 5NX

Dear Madam,

## **SECTION 11 EXEMPTION FROM ACCESS RIGHTS at LIMEKILNS FOREST, REAY, CAITHNESS**

In response to your objection, received 3 September 2020, to the proposed order to exempt land from access rights at Limekilns Forest please see the response below.

### **1. Not Intention of Scottish Parliament to Use Section 11 for this Purpose**

The guidance to Access Authorities regarding Section 11 orders does advise that they 'should not usually be considered' for construction activities. However, neither the 2013 modification order (which permitted core paths to be excluded from access rights by Section 11 order) nor the subsequent guidance published on the 14 January 2014, specifically prohibits core paths from being included in a Section 11 order for the reasons of construction. The 2005 Scottish Executive guidance to Access Authorities is silent on the matter of construction activities and Section 11 orders.

If Scottish Ministers intended Section 11 to not be used for construction activities in any circumstance their wording could have been more unequivocal than "...*not usually be considered*..". To advise an authority to 'not usually consider' something does imply that in certain circumstances the authority can consider a Section 11 order to allow construction activities to take place and that this is within the powers provided to it by the Land Reform (Scotland) Act 2003 and subsequent Land Reform (Scotland) Act 2003 Modification Order 2013. This being an application for 2 years, it is then for the Scottish Government to determine whether to confirm the order.

The 14 January 2014 Scottish Government Guidance implies core paths may be exempted from access rights through UK legislation, the guidance does not specifically say which UK acts, or parts of, it is referring to but primarily it would appear to be the Health and Safety at Work etc Act 1974. This act does not provide

an occupier of a site any powers to disregard primary UK or Scottish statute with respects managing the public in otherwise public spaces, for example a site affecting a road/footway would still need a further consent/permission etc. to close a road or footway in the interests of safety. This is made clear in the Health and Safety Executive guidance which Scottish Government refer to in their 14 January 2004 modification order guidance (['Protecting the public: Your next move'](#) (HSG151)). By following Scottish Government advice to follow HSG151 the developer at Limekilns is seeking permission from the relevant authority to close the core path as set out in para. 34 of that document.

The Health and Safety at Work etc Act 2002, by Section 2, places a duty on an occupier to make a site safe for persons other than their employees (i.e. the public in this case). However, it does not state that such persons should or must be excluded from a site, the onus (duty) of the occupier is to make the site safe for the public. As above, the developer is of the view that, to keep the public safe, the core path needs to be closed and to close the path an order requires to be promoted.

## **2. Alternatives -Signage and Other Measures to Manage the Public**

Except for approx. 350m of the core path within the Limekilns forest holding, all of the remaining 7.5km of the core path will be widened and strengthened for use during the construction of the wind turbine development. Following information provided by the developer and subsequent discussions, it was not considered proportionate or reasonable to i) construct an alternative track/path adjacent to the core path for public use during the construction ii) open and close the core path frequently during the construction period to allow public access at, say, weekends and evening (though the core path will be open on Sundays from 27 June 2021 to 24 April 2022) iii) phase the works so to open sections of the core path as the main re-grading works are completed on those sections – construction traffic (including borrow pit vehicles) will use the whole circular core path to access parts of the site and no sections of track will be unused for any specified period.

## **3. Management of the core path through the Access Management Plan for the Development**

No Access Management Plan has been approved by the Access/Planning Authority in relation to this development.

Please consider the above responses to the points raised in your letter of objection and confirm to me whether you wish to maintain or withdraw your objection. I would be grateful to receive your response within 7 days of the date of this letter. Thank you.

Yours faithfully,

*K Lyons*

**Principal Solicitor (Planning)**



Helen Todd  
Campaigns and Policy Manager  
Ramblers Scotland  
By email  
[helen.todd@ramblers.org.uk](mailto:helen.todd@ramblers.org.uk)

Please ask for: Karen Lyons  
Direct Dial: 01463 702194  
Our Ref: L/KL  
Your Ref:  
Date: 29 September 2020  
DX No: DX IN 5  
**Please reply to Legal Services, The Highland Council  
Glenurquhart Road, Inverness IV3 5NX**

Dear Madam,

## **SECTION 11 EXEMPTION FROM ACCESS RIGHTS at LIMEKILNS FOREST, REAY, CAITHNESS**

In response to your objection, received 3 September 2020, to the proposed order to exempt land from access rights at Limekilns Forest please see the response below.

### **1. Not Intention of Scottish Parliament to Use Section 11 for this Purpose**

The guidance to Access Authorities regarding Section 11 orders does advise that they 'should not usually be considered' for construction activities. However, neither the 2013 modification order (which permitted core paths to be excluded from access rights by Section 11 order) nor the subsequent guidance published on the 14 January 2014, specifically prohibits core paths from being included in a Section 11 order for the reasons of construction. The 2005 Scottish Executive guidance to Access Authorities is silent on the matter of construction activities and Section 11 orders.

If Scottish Ministers intended Section 11 to not be used for construction activities in any circumstance their wording could have been more unequivocal than "*...not usually be considered*". To advise an authority to 'not usually consider' something does imply that in certain circumstances the authority can consider a Section 11 order to allow construction activities to take place and that this is within the powers provided to it by the Land Reform (Scotland) Act 2003 and subsequent Land Reform (Scotland) Act 2003 Modification Order 2013. This being an application for 2 years, it is then for the Scottish Government to determine whether to confirm the order.

The 14 January 2014 Scottish Government Guidance implies core paths may be exempted from access rights through UK legislation, the guidance does not specifically say which UK acts, or parts of, it is referring to but primarily it would appear to be the Health and Safety at Work etc Act 1974. This act does not provide

an occupier of a site any powers to disregard primary UK or Scottish statute with respects managing the public in otherwise public spaces, for example a site affecting a road/footway would still need a further consent/permission etc. to close a road or footway in the interests of safety. This is made clear in the Health and Safety Executive guidance which Scottish Government refer to in their 14 January 2004 modification order guidance (['Protecting the public: Your next move'](#) (HSG151)). By following Scottish Government advice to follow HSG151 the developer at Limekilns is seeking permission from the relevant authority to close the core path as set out in para. 34 of that document.

The Health and Safety at Work etc Act 2002, by Section 2, places a duty on an occupier to make a site safe for persons other than their employees (i.e. the public). However, it does not state that such persons should or must be excluded from a site, the onus (duty) of the occupier is to make the site safe for the public. As above, the developer is of the view that, to keep the public safe, the core path needs to be closed and to close the path an order requires to be promoted.

## **2. Alternatives - Signage and Other Measures to Manage the Public**

Except for approx. 350m of the core path within the Limekilns forest holding, all of the remaining 7.5km of the core path will be widened and strengthened for use during the construction of the wind turbine development. Following information provided by the developer and subsequent discussions, it was not considered proportionate or reasonable to i) construct an alternative track/path adjacent to the core path for public use during the construction ii) open and close the core path frequently during the construction period to allow public access at, say, weekends and evening (though the core path will be open on Sundays from 27 June 2021 to 24 April 2022) iii) phase the works so to open sections of the core path as the main re-grading works are completed on those sections – construction traffic (including borrow pit vehicles) will use the whole circular core path to access parts of the site and no sections of track will be unused for any specified period.

## **3. Management of the core path through the Access Management Plan for the Development**

No Access Management Plan has been approved by the Access/Planning Authority in relation to this development.

Please consider the above responses to the points raised in your letter of objection and confirm to me whether you wish to maintain or withdraw your objection. I would be grateful to receive your response within 7 days of the date of this letter. Thank you.

Yours faithfully,

*K Lyons*

**Principal Solicitor (Planning)**

## **Appendix 5 – Responses to the Council Replies to Representations.**

### **1. Caithness West Community Council**

Dear Ms Lyons,

Thanks for your response. CWCC wishes to retain our objection and offer the following response;

1. We are very disappointed not to have had the opportunity to be represented or feed in to the local access meeting. It would appear that decisions with a significant impact on local people have been made without any form of representation.
2. The Limekiln path is used both by local people and to a lesser extent by those who travel. For local people, it is the only longer distance path in the area that can be accessed without the need to firstly travel by car. All of the other routes you mentioned (apart from Broubster) are around one hour each way by car. Apart from being impractical from a time and cost perspective for regular walking, it is not an environmentally responsible option.
3. We still believe the option to have the path available on Saturdays and Sundays is not unreasonable and offers a good compromise.

Thank you.

### **2. Ramblers Scotland**

Dear Ms Lyons

#### **NOTICE OF PROPOSED ORDER TO EXEMPT LAND FROM ACCESS RIGHTS, THE HIGHLAND COUNCIL (LIMEKILN FOREST, REAY, CAITHNESS) ORDER 2020**

We are writing in response to your letter of 29 September to confirm that we are maintaining our objection to the proposed section 11 order to exempt land at Limekiln Forest for the reasons below.

#### **1. Use of s.11 for this purpose**

According to s.27(1) and (3) of the Land Reform (Scotland) Act 2003:

- (1) Ministers may give guidance to local authorities on the performance of any of their functions under this Part of this Act.
- (3) A local authority to which such guidance is given shall have regard to it.

Therefore, The Highland Council is under a statutory duty to have regard to the SG Guidance. We acknowledge that the guidance is not mandatory but there is nothing in the council's letter of 29 September to suggest the council has had any regard to the guidance. We acknowledge the council's point that 'in certain circumstances' a section 11 Order may be appropriate in relation to construction work, but we have not seen any evidence relating to the present circumstances that justifies the council's decision to depart from the statutory guidance.

In addition, statutory access rights apply over the entire forest area (albeit there may be some small exceptions such as the curtilage of any buildings within the forest) and not just to the core path, so an exemption of access rights along the core path does not exempt access rights elsewhere. Therefore the developer must plan the construction work in line with both health and safety regulations and access legislation to ensure that someone who is exploring the forest away from the core path, for example collecting mushrooms or identifying flora and fauna, is not going to put themselves at risk from the construction work. This is best done by restricting access to the specific area under active construction work at any one time, as stated in the guidance published by NatureScot, informing the public through updated signage on site and engaging with the public in nearby communities who are most likely to be using the forest for recreational purposes. The core path is a key element of the access management of the site, but is not the only aspect to be considered.

We draw the comparison between a windfarm construction site and the management of harvesting operations within woodlands, which is also subject to [guidance](#) developed by the Forestry Commission in association with the National Access Forum, and which states:

The establishment of access rights does not prevent landowners and land managers from carrying out a wide range of land management operations as safely and effectively as possible (and so meeting obligations under the Health and Safety at Work Act 1974 and other relevant legislation). A key responsibility placed on those exercising access rights is to not hinder this work (SOAC, paragraph 4.11) and, by law, land managers must take reasonably practicable steps to ensure that the public is not put at risk by their work. They must also undertake forest operations in a way that takes account of access rights and minimises the time and area affected by any necessary restrictions (Figure 2). This is best achieved through the dynamic and flexible management of access during forest operations at sites when health and safety risks necessitate restricting access

We believe that the phasing of the management of access during the construction period is best achieved using a dynamic and flexible approach on this windfarm site.

## **2. Alternative routes and other measures**

Again, we would suggest that we have not seen evidence to suggest that alternative routes are not feasible. The designation of a core path shows that there is a public interest in taking access in this woodland area, and the fact that it has already been agreed to keep the core path open on Sundays during part of the construction period is a recognition of that. Therefore, if the evidence is undisputable that there is no way of accommodating access during the construction period, we would expect to see efforts made to promote alternative woodland walks nearby or, ideally, the creation of a new route which would keep the public away from the construction area. This would help to ensure high levels of public understanding and compliance with any restrictions.

### **3. Access management plan**

We are unsure as to why no access management plan (AMP) has been prepared, in line with the relevant planning condition. An AMP would consider all the issues above and set out responses to ensure any problems are mitigated. For example, we would expect to see alternative routes investigated and explanations of why they were not suitable if that was the case, or alternative places nearby promoted to visitors to help them enjoy woodland walks elsewhere. In addition, the AMP would enable the developer to zone the area and identify which zones were likely to be of concern with regard to access and which were not. A phased approach to the construction would mean that the active areas under construction could be identified during each phase, with access restrictions introduced and then removed as the construction stages progressed. Finally, an AMP would identify the key users of the forest and what the best way of communicating messages would be for the different audiences, such as mountain bikers, local residents, etc.

In conclusion we would like to make it clear that we are not trying to put obstacles in the way of this development, but in the interests of public safety it is imperative that compliance levels with any restrictions are high. It is our belief this is best achieved by engaging with a wide range of stakeholders and managing the site in a way which recognises that public access and health and safety should be managed in a complementary way, rather than being seen as health and safety over-riding the other.

If this section 11 order is passed to Scottish Ministers for approval, we would be grateful if the council could confirm that all correspondence from ourselves will be forwarded to Ministers.

We would be happy to discuss any of these points if that would be useful.

### **3. Scotways**

Dear Ms Lyons,

Your ref: L/KL

#### **Section 11 Exemption from Access Rights at Limekilns Forest, Reay, Caithness**

Thankyou for your letter of 29<sup>th</sup> September 2020 in response to our letter of objection dated 4<sup>th</sup> September regarding the above proposed Order. For ease of cross-reference, we will use the headings in your most recent letter.

#### **1 Not Intention of Scottish Parliament to Use Section 11 for this Purpose**

We note your letter acknowledges that Scottish Government guidance on the use of Section 11 Orders advises that they *should not usually be considered* for construction activities. We accept that this means that there might be a situation where they could be considered, however, if the circumstances of this particular construction activity require a Section 11, an explanation of why one is required should be provided. As indicated in our letter of objection, no details have been provided as to why construction of this particular wind turbine development (unusually) requires a Section 11 Order.

It is suggested that if it is necessary to close or divert the core path to enable construction work, then Section 208 of the Town and Country Planning (Scotland) Act 1997 is a more appropriate mechanism and can also be used in relation to path improvement.

#### **2 Alternatives – Signage and Other Measures to Manage the Public**

In our letter of objection we drew attention to the above Scottish Government guidance indicating that good practice included alternative access arrangements, and noted that there was no such provision made nor any reason given why there was none. Your letter notes that in discussion with the developer, it was not considered proportionate or reasonable to either i) provide a nearby alternative, or ii) open & close the core path, or iii) phase the works in order to be able to re-open

regraded sections of the core path. No explanation of these assertions is given, other than in relation to iii) it is stated that construction traffic will be using the whole of the circular core path, so no section is un-used for a specific period.

As elsewhere access users already use routes also used by vehicles, it is not clear that the presence of construction traffic justifies use of a blanket Section 11 closure instead of the principles set out in the guidance for *Good Practice During Wind Farm Construction*, i.e. restrictions being kept to the minimum area and duration that is reasonable and practicable. There is no explanation of why another path could not be provided by the developer or why it is not proportionate to provide one. There is also no explanation of why it is possible for the developer to open & close the path on Sundays from 27<sup>th</sup> June 2021 to 24<sup>th</sup> April 2022, but not otherwise.

Despite the above given heading "signage and other measures", the only measure identified to manage public access is the Section 11 Order. For example, we have still seen no detail about signage or local publicity. It thus still appears that the Section 11 Order is being proposed as an alternative to public access management.

### **3 Management of the core path through the Access Management Plan for the Development**

I note that your letter states that no Access Management Plan has been approved by the Access/Planning Authority. To that we can only ask, why not?

We confirm that we wish to maintain our objection.

Yours sincerely,