

**From:** Ben Christman

**Sent:** 03 November 2025 12:00

**To:** Dods, Ranald <...@scotborders.gov.uk>

**Subject:** RE: [OFFICIAL] Proposed development at Kingsmeadows House, Peebles - appropriate assessment duty (185.0625)

Dear Ranald,

Thank you for your response.

You did not confirm whether any appropriate assessments have been carried out with respect to the proposed development. I assume no appropriate assessment has been carried out.

Dr Marshall has asked that we request the Council to reconsider its position on the need for an appropriate assessment.

There are two reasons why an appropriate assessment is required.

First, NatureScot appears to have misunderstood the nature and implications of 24/00031/FUL and 24/00247/FUL. NatureScot's advice should be interpreted accordingly.

Second, advice received from the Council's ecology officer indicates that 24/00031/FUL and 24/00247/FUL are likely to have a significant effect on the River Tweed SAC.

### **1. NatureScot's advice**

24/00031/FUL and 24/00247/FUL are both applications made under Section 42 of the Town and Country Planning (Scotland) Act 1997.

Granting a S42 application creates an independent permission to carry out the same development as previously permitted and does not affect the original planning permission. This is explained in the [Scottish Government's Planning Circular 3/2022](#) (Annex H, paragraph 2).

NatureScot's 16 July 2025 advice to the Council appears to be based on the incorrect assumption that 24/00031/FUL and 24/00247/FUL are applications to vary planning conditions in 19/00182/PPP. Both of NatureScot's emails to the Council on those applications begin "Thank you for consulting NatureScot on this proposed variation to a planning condition applied to application 19/00182/PPP".

S42 is titled "Determination of applications to develop land without compliance with conditions previously attached". A S42 application is not an application to vary a prior consent.

The variation of planning permissions is dealt with under a separate provision in the 1997 Act (Section 64).

When it advised the Council, NatureScot does not appear to have understood the nature and implications of 24/00031/FUL and 24/00247/FUL. NatureScot's advice should therefore be interpreted with caution.

The original planning application is 19/00182/PPP. That permission cannot be implemented for the reasons set out at page two of Sandy Fowler's 26 March 2024 letter to the Council (see attached).

The Council's duty under Regulation 48(1) of the Habitats Regulations requires it to consider the implications of giving consent for the River Tweed SAC.

The proposed development cannot be built without a new consent. If the Council was to grant consent for 24/00031/FUL or 24/00247/FUL, that decision would provide a new consent for the proposed development.

In order to discharge its Regulation 48(1) duty, the Council must consider the overall effect of granting a new planning permission for the River Tweed SAC.

NatureScot's advice is clear that construction of the residential development is likely to have a significant effect on the River Tweed SAC. An appropriate assessment is therefore necessary.

## **2. Ecology officer advice**

Even if the Council disputes the argument made above, an appropriate assessment remains necessary for 24/00031/FUL and 24/00247/FUL.

The Council received a consultation response from its ecology officer Raffaella Diesel dated 17 July 2025 (see attached). Your response did not mention this.

Ms Diesel's response explains that the proposed removal of the requirement for an open plan area from condition 7 would have the following consequences:

- It "would go against the no-development buffer required to protect the river Tweed SAC".
- It would make the implementation of the requirement of 19/00182/PPP condition 10 to protect the River Tweed SAC "a lot more difficult".
- It would "be in direct contradiction to condition 13 which requires a Landscape and Habitat Management Plan".
- If the open plan strip of land which is currently required by condition 7 is turned into private gardens, she noted that "I'm not sure how an appropriate level of habitat management can be achieved. I can't comment on the landscape impacts private gardens would have, I expect it would be negative".
- She concluded that, "if there were gardens along the river, divided by

fences, walls etc, it would likely impact otters and possibly also water quality, depending on the details. Thinking about it now, with regards to fences, any application for such fences would, in my opinion, likely fail and HRA/Appropriate Assessment because of potential impacts on otters.”

Ms Diesel’s response indicates that 24/00031/FUL and 24/00247/FUL are likely to have a significant effect on the River Tweed SAC.

There is caselaw to the effect that if it cannot be excluded on the basis of objective information that a project will have a significant effect on a European site (such as the River Tweed SAC), that project must be subject to an appropriate assessment (*Waddenzee* [2004] C-127/02).

Having received this response from its ecology officer, the Council is unable to exclude that there will be a significant effect on the SAC. An appropriate assessment should be carried out for 24/00031/FUL and 24/00247/FUL.

### **3. Appropriate assessment duty**

Our view is that if the Council determines 24/00031/FUL and 24/00247/FUL without an appropriate assessment, there would be grounds for a judicial review arising from a breach of the Regulation 48(1) duty.

We would be grateful if you could confirm that the Council will reconsider its position on this matter.

Kind regards,

Ben Christman

**In-house solicitor**

Mobile: ...

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**From:** Dods, Ranald <...@scotborders.gov.uk>

**Sent:** 17 October 2025 08:24

**To:** Ben Christman <...@ercs.scot>

**Subject:** [OFFICIAL] Proposed development at Kingsmeadows House, Peebles - appropriate assessment duty (185.0625)

Dear Dr Christman,

Thank you for your emails. I apologise on behalf of the council for the delay in responding.

The Screening Opinion to which you refer related to a proposed development

of 14 flats and 5 houses. No application was submitted for that proposal. The HRA referred to in the Screening Opinion 21/01563/SCR was not, therefore, undertaken. It follows that an appropriate assessment was not carried out.

In terms of 24/00031/FUL and 24/00247/FUL, the council having consulted the relevant bodies, is entitled to determine the applications based on the responses received. In these cases, the council notes NatureScot's consultation response and the advice contained therein that an HRA is not required for either application. The council is therefore minded to determine the applications without an appropriate assessment being carried out.

Again, apologies for the length of time it has taken to provide a response.

Yours sincerely,

Ranald Dods

**From:** Ben Christman <...@ercs.scot>

**Sent:** 14 August 2025 16:57

**To:** Dods, Ranald <...@scotborders.gov.uk>

**Cc:** Planning & Regulatory Services <[prs@scotborders.gov.uk](mailto:prs@scotborders.gov.uk)>

**Subject:** RE: Proposed development at Kingsmeadows House, Peebles - appropriate assessment duty (185.0625)

**CAUTION: External Email**

Dear Mr Dods,

I refer to my 9 July e-mail below.

I don't appear to have received a response from you.

I would be grateful if you could indicate when you intend to respond.

Kind regards,

Ben Christman

**In-house solicitor**

Mobile: ...

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**From:** Ben Christman  
**Sent:** 09 July 2025 12:28  
**To:** Ranald Dods  
**Cc:** [prs@scotborders.gov.uk](mailto:prs@scotborders.gov.uk)  
**Subject:** Proposed development at Kingsmeadows House, Peebles - appropriate assessment duty (185.0625)

Dear Mr Dods,

**Proposed development at the grounds of Kingsmeadows House,  
Peebles  
Planning applications 24/00031/FUL and 24/00247/FUL  
Duty to carry out an appropriate assessment under the Habitats  
Regulations  
Our reference: 185.0625**

We have been asked to write to you regarding the above by Dr Michael Marshall. Dr Marshall has objected to the above planning applications.

The planning applications concern a proposal to build residential apartments at the grounds of Kingsmeadows House. The site of the proposed development is adjacent to the River Tweed, which is designated as a special area of conservation ('SAC').

Regulation 48(1) of the Conservation (Natural Habitats, &c.) Regulations 1994 ('the Habitats Regulations') requires that:

*A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—  
(a) is likely to have a significant effect on a European site in Great Britain [or a European offshore marine site ] 2 (either alone or in combination with other plans or projects), and  
(b) is not directly connected with or necessary to the management of the site, shall make an appropriate assessment of the implications for the site in view of that site's conservation objectives.*

SACs are included in the definition of European sites in Regulation 10(1) of the Habitats Regulations.

The Regulation 48(1) duty is recognised in Scottish Borders Council's planning policies. At page 98 of the Council's local development plan, in relation to policy EP1, it states that:

*1.4 Where a proposal could have a 'likely significant effect' on a European site, an 'appropriate assessment' will be required, to demonstrate that the proposal will not adversely affect the integrity of the site. This is known as a Habitats Regulations Appraisal (HRA).*

The Council recognised the need for an HRA with respect to a previous planning application relating to the proposed development. The attached EIA screening opinion 21/01563/SCR mentions the need for an HRA at page 5.

Despite recognising the need for an HRA, there does not appear to be any information on the planning portal which confirms that the Council has carried one out in connection to the proposed development.

Dr Marshall is concerned that the above planning applications will be determined without proper prior consideration of the potential effects of the proposed development on the River Tweed SAC.

In order to help us advise Dr Marshall, we would be grateful if you could provide the following information:

1. Please confirm whether the HRA mentioned in screening opinion 21/01563/SCR was completed (and provide a copy if it was completed).
2. Please confirm whether any appropriate assessments have been carried out with respect to the proposed development (and provide copies if any have been carried out).
3. Please provide an explanation if no appropriate assessment has yet been carried out with respect to the proposed development.
4. Please confirm whether the Council intends to carry out an appropriate assessment vis-à-vis 24/00031/FUL and 24/00247/FUL prior to their determination.
5. Please provide an explanation if the Council does not intend to carry out an appropriate assessment vis-à-vis 24/00031/FUL and 24/00247/FUL prior to their determination.

Dr Marshall has also requested that, given the high levels of public interest in 24/00031/FUL and 24/00247/FUL (evidenced by the number of objections to both applications), if the Council decides to carry out an appropriate assessment that it exercises its discretion under Regulation 48(4) of the Habitats Regulations to consult the public during that process.

We look forward to hearing from you.

Yours sincerely,

Ben Christman

**In-house solicitor**

Mobile: ...

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