

# APPENDIX A

## Paper I - 08/272/CP

Developer's information including extracts from environmental report, capercaillie mitigation plan and design drawings of houses

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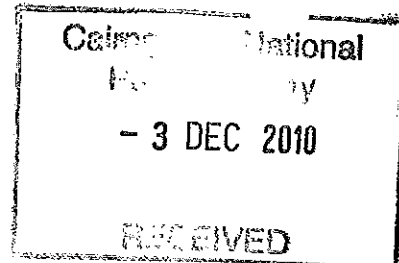
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26 November 2010

**TILlicOUNTRY**

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Cairngorms National Park Authority  
Albert Memorial Hall  
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For the attention of Mr Andrew Tait

Dear Mr Tait

## Proposed Housing Development and Provision of a Primary School Site at Deishar Road, Boat of Garten - Davall Developments Ltd. Amended Ecological/Mitigation Report and Amended Layout

I refer to various meetings and discussions regarding the above site and particularly updating a response to SNH comments regarding ecological issues and any resultant changes required to the layout.

I now enclose a further report which updates the ecological matters arising with particular regard to Capercaillie and also an amended layout which we feel properly addresses all the relevant issues while allowing development to proceed.

I would ask you to note that the site owners are Seafield and Strathspey Estate and they are prepared to co-operate fully on any matters of woodland or estate management outwith the site in terms of mitigation.

In relation to the Planning situation, we are fully aware that this development site was formally proposed to be included within the Local Plan and was only deleted after consideration of the Reporters' comments arising from the public inquiry. At that time however, neither the Reporters, nor CNPA, had before them the further ecological information and mitigation strategy on Caper and were not able therefore to take these matters into account. It is worthy of note however, that the village envelope boundary has been drawn to include the Application site.

Boat of Garten has been clearly recognised as an important intermediate settlement in Strathspey which supports a level of community services. The existing primary school is situated outwith the immediate community and there is in our view a strong community aspiration to achieve a modern primary school as well as to fulfil housing demand for affordable and other housing needs.

These aspirations were articulated most recently at the Boat of Garten Working Group meeting held in Boat of Garten Hall on 19<sup>th</sup> October 2010, attended by members of the Highland Council, Boat of Garten Community Council, CNPA, SNH, Seafield Estates, Cairn Housing Association and the Highlands Small Communities Housing Trust. Minutes of this meeting should be in your possession.

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There is no substantive land available for development in Boat of Garten in the newly adopted Local Plan. This in our view results in a most unsatisfactory and unsustainable situation whereby an important and established settlement which supports a critical level of community services, cannot consolidate and support these by necessary new housing development.

In this situation and given the current economic climate and reduced levels of public spending, it is unlikely to achieve the levels of funding which might justify the capital expenditure on a new school.

In addition, Boat of Garten is at a threshold level in relation to its existing sewage treatment facility which can barely cope with the current discharge. It is our understanding that if this development was granted Planning Approval then Scottish Water, who are only funded for growth, would programme a new sewage treatment facility to full modern standards which would materially improve the current situation.

In our view, the development now proposed reaches a necessary balance within the four aims of the National Park, to allow Boat of Garten to maintain itself as a sustainable community. It remains within the village boundary. The need for this development has been recognised in the past by both CNPA officials and members, and evidenced in earlier drafts of the Local Plan. I hope therefore that the further information now submitted can allow you to report favourably on the proposals to your committee and that Planning Permission can be granted.

Please contact me if you require any further information.

Yours sincerely



Bill Hepburn  
for Bracewell Stirling Consulting

**Encs**

MBEC Report (6 Copies)  
Drawing 2532-SP01 Rev I (6 Copies)  
Drawing 2532-LP02 Rev I (6 Copies)

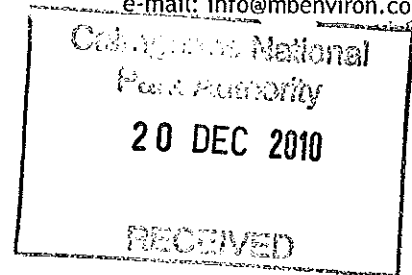
16<sup>th</sup> December 2010.

cc. Anne Elliott, Scottish Natural Heritage

enc. Draft Plan

**Boat of Garten Capercaillie Mitigation Proposals**

**Additional Information on behalf of Davall Developments and Seafield and Strathspey Estate in response to Anne Elliott's email, 2/12/10 and subsequent telephone conversation on 15/12/10.**



Dear Mr Tait,

I am writing this letter to make you aware of recent further work regarding the Boat of Garten proposed housing site, on behalf of Davall Developments Ltd.

A meeting was held between SNH (Anne Elliott), CNPA (Matthew Hawkins), the Seafield and Strathspey Estate (Will Anderson) and the Developer's consultants (Allan Rennie and Andy Mackenzie) on 15<sup>th</sup> November 2010. Matthew Hawkins encouraged the Developer's consultants to produce more detail on the capercaillie mitigation proposed and Anne Elliott agreed with this. The meeting was concluded with the agreement that the Developer and the Estate would create a draft plan for detailed comment and consideration by the CNPA and SNH. Matthew Hawkins noted that he would ask access colleagues for their comments and respond. This draft plan was sent to SNH (Anne Elliott) and the CNPA (Matthew Hawkins) by email on 18<sup>th</sup> November 2010. Since then the same draft set of capercaillie mitigation proposals were included with the ecology information submitted to the CNPA at the end of November 2010. This information included a draft plan and written outline principles. It was fully acknowledged at that time that further discussion, comments and agreement on the precise details of the mitigation and implementation would be necessary but the key thing was that both the Estate and the Developer were in full agreement with the provision of this mitigation as part of the future implementation of the proposed development.

To date (16/12/10), no response has been received from Matthew Hawkins of the CNPA but Anne Elliott of SNH has responded fully to the draft proposals by email on 2<sup>nd</sup> December 2010, giving further advice of how SNH would like to see the draft proposals further developed. The attached plan to this email is an updated draft to move towards addressing SNH's further detailed comments.

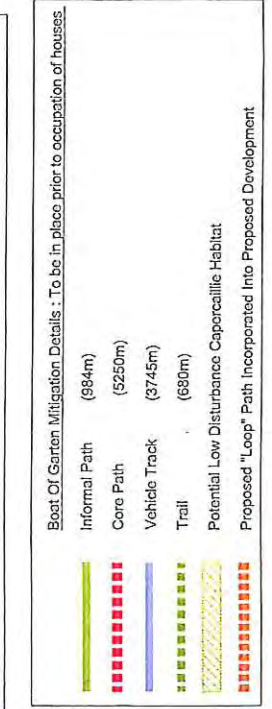
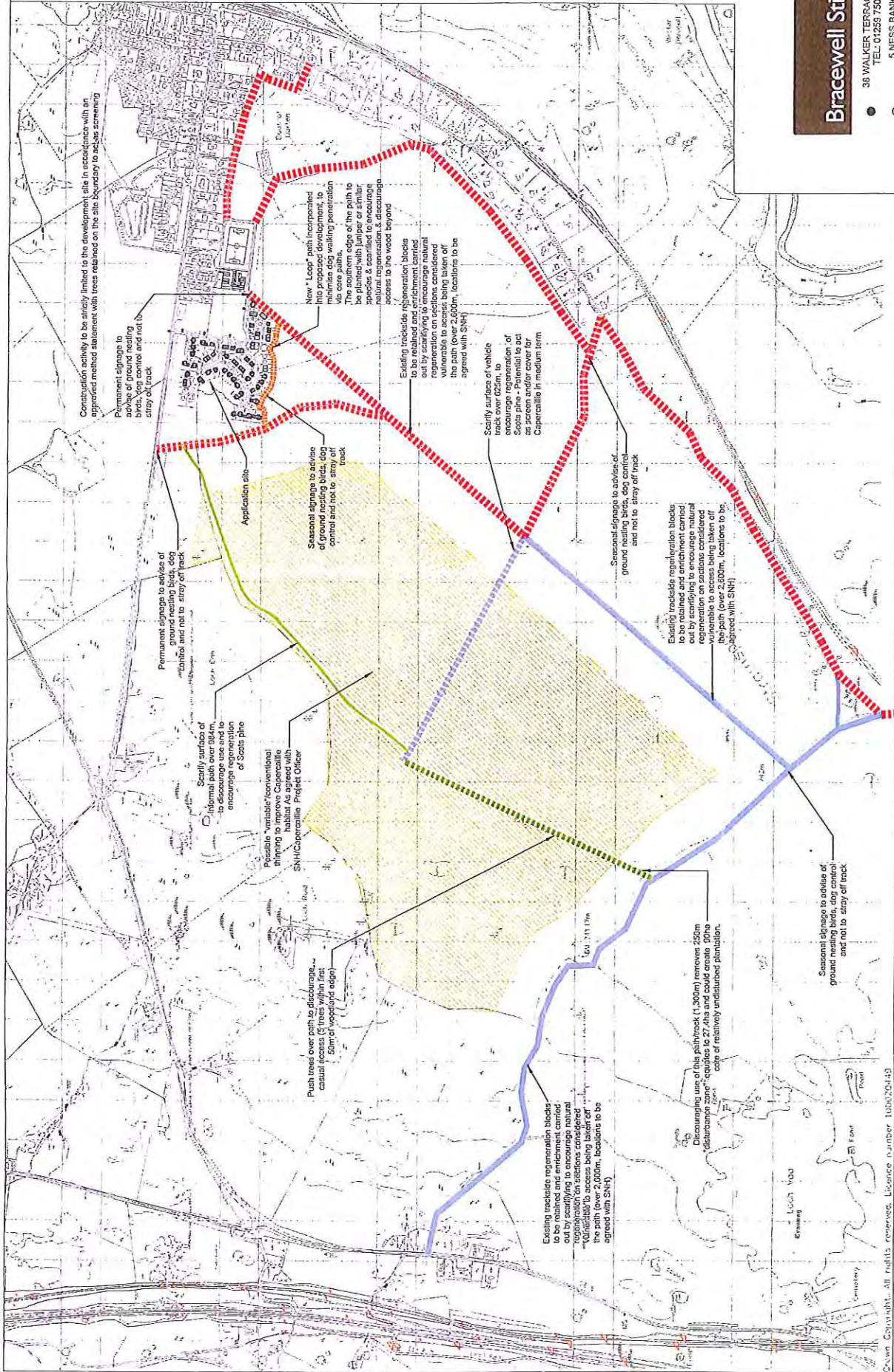
The Developer does not view this as the final detail on the mitigation but rather further development of the principles and detail involved. The Developer and the Estate continue to emphasise that they are committed to implementing this and hope this further work indicates their willingness to undertake best practice ecologically based mitigation to avoid/minimise all impacts on capercaillie in relation to the proposed development while acknowledging the important issues surrounding continued public access. This further information also indicates our willingness to develop this further and implement suitable measures in agreement with SNH, CNPA and the Capercaillie Project Officer should the proposed housing development be consented.

Yours Sincerely,



Dr Andy Mackenzie.  
Independent Ecologist working with Bracewell Stirling Architects

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**SIGNAGE**  
 Type and wording of signs to be agreed with SNH/Caper Project Officer to ensure it does not encourage access into the most sensitive areas

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BOAT OF GARTEN  
 AVIEMORE  
 DAVALL DEVELOPMENTS

OFFSITE CAPERCAILLIE  
 MITIGATION PROPOSALS

SCALE 1:10000 DATE NOV 10 BY DWG SIZE A3

DWG NO 2532 / CMP - 001 REV D

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## 1. INTRODUCTION

- 1.1.1 Bracewell Stirling Architects act for Davall Developments (the Developer), a local house-building client who propose to construct a housing development on the western edge of the village of Boat of Garten, Inverness-shire. The land on which this proposed development is located and the surrounding land within the wood is in the ownership of Seafield and Strathspey Estate. Seafield and Strathspey Estate are fully supportive of this proposed development and have been instrumental in putting forward and agreeing to much of the on site and off site mitigation proposed within this report. The proposals also include land designated for a new primary school, which it is understood the local community are very supportive of. The proposed development location plan and site plan are included in this report as Figure 1 and Figure 2.
- 1.1.2 The site is currently a Scot's pine (*Pinus sylvestris*) plantation, with a number of tracks and footpaths crossing it. Both the tracks and footpaths are fairly well used, particularly by dog walkers from the village and some now form part of the core path network. The plantation in this northern edge area of the wood and to the immediate south has evidence of past ploughing and is a commercial plantation. It is understood from the Estate records that the natural woodland was gradually cleared around 1900 and used for grazing but had a number of standard trees left for animal shelter and amenity and some natural regeneration occurring through to the 1920's. Part of the area was also accidentally burned in 1920. Natural regeneration then occurred and some including the area close to Boat of Garten was clear felled in 1940/41. It is noted that the rest of the area was destroyed by fire in 1942. Since then the woodland area has been re-planted in the 1960's and thinned once in 1994. A few of the older Scot's pines still remain further south in the wood but well outside of the proposed development area in the north.
- 1.1.3 The site is bounded to the north by National Cycle Network Route 7 (Loch and Glens Cycle Route North and part of the Aviemore to Slochd loop) and Deshar Road and by the housing of Craigie Avenue and the community centre in the top north-eastern corner. The rest of the proposed development site to south west and east is bounded by the Scot's pine plantation. Vehicular access to the site will be via Deshar Road, immediately to the west of a small car park adjacent to Craigie Avenue.
- 1.1.4 Bracewell Stirling Architects initially commissioned Mackenzie Bradshaw Environmental Consulting (MBEC) to carry out a red squirrel (*Sciurus vulgaris*) survey to confirm the extent of the population within the plantation on the proposed development site and to provide advice on mitigation. This aspect of the ecological site investigation was to update a previous squirrel survey by Steve Austin in May of 2008, providing baseline information in a concise format to aid further detailed scheme design and mitigation by the Developer. Subsequent to this red squirrel investigation, the site was also assessed for badger (*Meles meles*) and wood ant (*Formica sp.*) presence and all this work is presented here as a Survey Report in Appendix 1.
- 1.1.5 As part of the Local Plan procedures within the Cairngorms National Park, the Local Plan was subject to examination through a Local Plan Inquiry. In light of the issues raised by the Reporter to the Inquiry for this site in Boat of Garten, and in particular the issue of capercaillie (*Tetrao urogallus*) using the wider area, MBEC have been requested to submit further independent ecological reporting, as supporting information, to assist the Cairngorms National Park Authority (CNPA) for the

determination of this detailed planning application. All this information is also of importance to Scottish Natural Heritage, as a statutory consultee.

- 1.1.6 Recent planning decisions relating to protected species are of relevance to this application, principally: the Public Local Inquiry Reporters' decisions for the Aberdeen Western Peripheral Route (AWPR) and the 400kV Beauly to Denny powerline upgrade projects. The later decision being partly within the CNPA's jurisdiction and forming an important part of the red squirrel discussion within this report.
- 1.1.7 The 2009 Survey Report by MBEC also provides an introduction to the ecological/biodiversity interest of the site and is included as Appendix 1 to this document.
- 1.1.8 An Outline Ecological Management Plan has been developed to indicate the principles and outline process involved in implementing this development, should it receive planning consent (Appendix 2). It is MBEC's and the Developer's opinion that this outline plan indicates a clear commitment to the minimisation of all ecological impacts, the protection of important wildlife and indicates a method by which the development can proceed to implementation in a lawful and fully acceptable manner.

## **2. BOAT OF GARTEN, CAPERCAILLIE AND THE 2009 LOCAL PLAN INQUIRY**

### **2.1 Capercaillie Presence in Boat of Garten Woods**

- 2.1.1 At no time during the 2009 MBEC surveys (Appendix 1) were either sightings or any signs of current or recent capercaillie presence identified on or within the vicinity of the proposed development site. While it is fully recognised that these were not specific ornithological surveys, the surveying was carried out by qualified and experienced ecologists who while undertaking the specific surveys for other species were consciously looking for all evidence of other species and species groups that may be of importance. In particular, these ecologists were familiar with the feeding signs and droppings of capercaillie but did not find any evidence of their presence within the northern section of the wood.
- 2.1.2 The wider area of Badenoch and Strathspey is noted for capercaillie and red squirrel presence and these two species have been noted within the wider Boat of Garten to Kinveachy coniferous plantation (Boat of Garten Woods). This wider area of woodland has been noted to be on the edge of an undesignated area of land used by capercaillie as a "linking habitat" between a number of well used sites in the wider area. One site that has been used as a lek has been identified within the plantation, at >1km from the edge of the proposed development site.
- 2.1.3 Various capercaillie surveys have been completed in the wider woodland area. MBEC are aware of surveys in 1994 and every year from 2001 to and inclusive of 2010. Of these surveys, only the 1994 survey showed any presence of capercaillie in the immediate vicinity of the proposed development site (numbering two records outside of the proposed red line boundary, but adjacent to it).
- 2.1.4 The 2009 capercaillie surveys (March and July) show presence at some distance from the main village along Deshar Road and south west from the existing housing along Kinchurdy Road. MBEC have not seen the location details of surveys



undertaken in 2010. Moss *et al.* (2009) specifically identifies the area of the proposed development (BG/H1 at that time) as a heavily disturbed area where no capercaillie droppings were found.

2.1.5 It should be noted that the current housing proposals have gone through several design iterations, influenced by the capercaillie surveys, in order to satisfy SNH's concerns and objections to the original designs. The most significant was as a result of the 2003/04 survey programme which was conducted by Dr Philip Ratcliffe with the agreement of SNH. This survey resulted in the reduction of the red-line boundary to 57% of the original area and the housing numbers of 120 reduced to 103 (Rennie, 2005i). The current proposals have further reduced the housing to 77 units within an even smaller area. More recently, with the emergence of red squirrel presence as a significant CNPA planning issue within the Park, a number of surveys have been conducted specifically for this species, the most recent in June 2009.

## 2.2 Local Plan Inquiry Reporter's Comments Regarding the Proposed Site

2.2.1 During the Local Plan Inquiry in December 2009, two main issues were raised. Of primary importance to the Reporter was the presence of capercaillie in the woodlands south of Deshar Road, with red squirrel (*Sciurus vulgaris*) as a secondary issue.

2.2.2 The Reporter's commentary can be summarised as follows:

- While the need for housing is recognised, the development on this site is not deemed essential;
- An Appropriate Assessment (AA) has not been carried out, though CNPA appears to indicate otherwise;
- An AA is deemed appropriate, even though SNH has not designated the area for capercaillie;
- While the presence of capercaillie and some use of the whole area is not in question, the level of presence and use of the proposed development site is, especially as doubt has been ascribed to the SNH methodology for estimating the population;
- The SNH mitigation conditions are deemed inadequate;
- The development could have a significant impact on the wider area, including the SPAs, though to what extent is unknown;
- Development should be presumed against; and
- The zoned area for development should be dropped from the local plan.

## 2.3 Discussion on this Proposed Housing Area

2.3.1 The 2008 SNH Natura Appraisal for the area indicated that the one recorded lek is well away from the proposed development area (previously referred to as BG/H1) (SNH, 2008). Collated records from 1994 to 2005 indicate a wide presence through much of the wood and the April 2006 study also showed that birds were widely dispersed (the SNH Natura Appraisal notes that this work was detailed enough to

show that the birds generally avoid the existing houses and the tracks and the areas adjacent to them). The sensitivity of capercaillie to human disturbance is outlined but their response to the regular recreational use of these woodlands is not so well understood. A number of recent studies have, however, indicated a varying flushing distance exhibited between male and female birds when disturbed by hikers, with the distances increasing with a more open wood structure. Of the recorded distances, 90% were within 50m of the flushing "event". Further work is quoted and the distance of the recorded lek site within the wood is noted as being beyond the median alert distance from woodland paths. The birds generally avoid woodland near paths, which is suggested as a limiter to the area of woodland that is available to the birds. The removal of unnecessary paths would appear to be the recommendation arising from the various study results.

2.3.2 It should be noted that the SNH Appraisal document identifies that only one of the three surveys (in 1994) showed any capercaillie presence in the immediate vicinity of the Boat of Garten proposed housing area (previously called BG/H1 and zoned in the deposit draft Local Plan).

2.3.3 The following summary is of particular note (SNH, 2008):

- *"The proportion in the whole of the Boat of Garten Woods of the total Scots pine woodland resource in Badenoch and Strathspey is 0.019%,*
- *Capercaillie have only once been recorded as using this part of the woodland in three separate surveys,*
- *New habitat has been created elsewhere in Strathspey (which can be shown to be successful),*
- *The larger area of woodland will not be fragmented by the development,*
- *Specialist advice (SNH and Capercaillie Project Officer) states that the loss of 5.8ha of habitat, in this instance, is not important.*

*Therefore, regarding the loss of habitat arising from the proposed zoning of the land for development, and its subsequent development, this would not be significant in terms of effects on the SPAs."*

2.3.4 However, the document continues with:

*"Although potential loss of habitat is not in itself believed to be significant, the level of use of Boat of Garten Wood by capercaillie, its proximity to SPAs, the known dispersal distances of capercaillie, the need to manage capercaillie at metapopulation scale and their sensitivity to disturbance lead us to conclude that the development is likely to have a significant effect on capercaillie in the SPAs."*

2.3.5 The final conclusion section states that it has not been demonstrated that there would be no affect on the metapopulation of birds which use the nearby SPAs and that the proposal therefore risks adversely affecting SPA integrity. However, the mitigation proposed by SNH as a suggested condition to development consent was considered to reduce disturbance to a level where it would be unlikely to cause a negative effect on capercaillie within the Boat of Garten Wood and any knock-on impact to the maintenance and distribution of the SPA populations. With the mitigation in place, the

"stepping stone" function of the wider woodland would not be significantly impaired (SNH, 2008).

2.3.6 SNH (2008) recommended that the Local Plan should state that this mitigation "...be part of an access management plan produced by the developers, and enforced via a Section 75 agreement with the Cairngorms National Park Authority or Highland Council (whichever determines any planning application)."

2.3.7 The SNH position was further clarified for Bracewell Stirling Architects on 11 February 2010, by Anne Elliott, SNH Area Officer (Strathspey and Nairn):

*"For the Deposit Draft Local Plan, we advised that there is likelihood of significant negative effect on Natura interests. We therefore note that development will only be permitted if CNPA is able, after an appropriate assessment, to conclude that it will not adversely affect the integrity of these interests.*

*In our appraisal of the principle of developing this site shown in the Deposit Draft Local Plan for housing, our view was that there is a likely significant effect on the nearby capercaillie Natura sites. However adverse impacts on the integrity of the sites could be avoided by off-site mitigation to reduce impacts of disturbance to capercaillie. As you know, we objected to the most recent planning application because it lacked any mitigation. The Deposit Draft Local Plan contained details of off-site mitigation required in the event of development here, and these are still relevant. This off-site mitigation was necessary to enable the appropriate assessment of the Deposit Draft Local Plan to conclude no adverse effect on the integrity of nearby capercaillie Natura sites by allocating this land for housing development."*

2.3.8 With regards to appropriate off-site mitigation, as stated in the Natura Appraisal, SNH want this to be signed up to and guaranteed prior to any development being implemented, to off-set any potential impacts to the SPAs – mitigation which the Reporters at the Local Plan Inquiry apparently considered to be inadequate. The Reporters appear to be dismissing the opinion of the statutory consultee (SNH) with the expertise required to determine such things.

2.3.9 The importance of the wider area of Boat of Garten wood as a "stepping stone" between SPA areas is not disputed by any of the parties involved, though it should be noted that the majority of movement would be likely to be between the Abernethy and Kinveachy areas or vice versa (approximately east to west/west to east). The Boat of Garten plantation lies between these SPAs, in line with the northern edges of three of the designated areas (Craigmore Wood lies to the east of Nethy Bridge and the Abernethy Forest), thus effectively providing a continuous habitat for the metapopulation of these areas. However, the proposed Boat of Garten housing site is adjacent to the main road into the village and existing development and already subject to a high level of disturbance (by vehicles, humans, dogs and cats). While development of this area may push the limits of disturbance slightly further into the plantation, the wood is actually quite broad and long and the less-disturbed "stepping stone" would remain unaffected slightly further south. With the mitigation proposed in later sections of this report it is arguable that in future the core area for capercaillie may be effectively increased in size. The wider Boat of Garten Woods area is of a substantial size in comparison to the disturbed edge which has been identified for the proposed development.

- 2.3.10 An important issue in relation to the whole of the Boat of Garten Woods must also be borne in mind in this consideration and that regards the commercial status of this area of plantation. This is an area of commercial forestry and will be likely to be subject to felling at some point in the future, meaning the loss of a much larger area of suitable capercaillie habitat as a normal part of forestry management and harvest operations. This occurs regularly within the wider surrounding area and adds context to the likely effect of the proposed housing development on the capercaillie interest of the area.
- 2.3.11 As noted during the MBEC field studies in June and September 2009, the area proposed for housing is commercial plantation (there is evidence of some previous felling, ridge and furrow ploughed topography and younger trees are present, i.e. currently too young to be of any particular commercial value). The development aims, however, include using the woodland setting, which would mean retaining the essential character of the woodland. While basically addressing the landscape issue, retention of the character of the area should also facilitate a reduction in the disturbance effect of the proposed new houses (as well as the existing houses). It is recognised however, that this does not address the issue of moving the potential zone of disturbance, by recreational users, further south into the woodland. It should be noted that the paths into the wider area of the plantation are limited, though MBEC surveyor experience shows that they are reasonably well-utilised by both recreational walkers and for exercising dogs from and to Boat of Garten.
- 2.3.12 It should be noted that at no time was there a reported sighting of capercaillie within the proposed development area in the 10 years prior to a September 2005 communication between Allan Rennie of Bracewell Stirling Architects and SNH (Rennie, 2005ii) and "signs" were limited to four records within the original larger proposal area. None of the subsequent surveys have identified either signs or sightings either in or within the immediate vicinity of the revised scheme red line boundary.
- 2.3.13 The September 2005 communication (Rennie, 2005ii) reiterated an earlier capercaillie study conclusion that the construction of housing on the revised site was unlikely to impact on the capercaillie population and that the proposed mitigation measures, habitat enhancement of and reduction of recreational access to the southern part of the wood, should increase the suitability of this area for capercaillie (i.e. a net gain of suitable habitat).
- 2.3.14 Recently in 2010 Seafield and Strathspey Estate have been in correspondence with RSPB after a letter was written by the RSPB to the CNPA regarding the housing allocation in the local plan which included this proposed site. The RSPB have said that "they do not wish to see housing at this site", however, they do not appear to have really justified why in terms of the relative locations of the proposed housing and the main area of capercaillie use and they have not seen any of the detailed mitigation proposed. This is merely recorded here for accuracy but not discussed further because it is SNH that are the statutory consultee on nature conservation in this situation and they have carried out the detailed previous appraisal and are aware of the detail proposed in relation to this development.

## **2.4 Measures Proposed Specifically in Relation to Capercaillie**

- 2.4.1 Seafield and Strathspey Estate and Davall Developments Ltd. have agreed in principle a range of on-site and off-site proposals which will specifically address the

concerns in relation to capercaillie. At the time of writing these are in a draft plan which was sent to SNH and CNPA on 18<sup>th</sup> November 2010, following a meeting on 15<sup>th</sup> November 2010, where Matthew Hawkins of the CNPA specifically requested more details on this issue. This draft plan is included within this report as Figure 3, while Figure 2 shows the proposed development layout. MBEC were hoping to be in a position to have addressed any CNPA and SNH comments on these before the submission of this report but as of 25<sup>th</sup> November 2010 we have had no response. As the Developer's team have stressed to SNH and CNPA, we are happy to adjust the mitigation proposed as directed within the principles outlined and Seafield and Strathspey Estate and Davall Developments Ltd. are fully supportive of this approach. To implement this on the ground we suggest that Seafield and Strathspey Estate, SNH, the Capercaillie Project Officer and the Developer's ecologist should agree the detail of this on the ground just prior to the works being undertaken.

- 2.4.2 This draft plan (Figure 3) has been constructed to address SNH's Natura appraisal proforma (CNS/DC/HI/BOGH), specifically conditions 1-6 within item 3d. The implementation of this mitigation has been judged by SNH to reduce disturbance to a level that the housing proposal would be unlikely to negatively affect capercaillie within Boat of Garten Wood or adversely affect the ability of the wood to act as a potential stepping stone linking other surrounding Natura sites (Section 4. Conclusions). In other words, the implementation of this mitigation as part of the housing works would allow a conclusion of no effect on integrity to be reached for the relevant Natura sites in the surrounding area in relation to capercaillie (Section 4. Response, a). For this application, the completion of such an appropriate assessment for the surrounding Natura sites would be down to the CNPA as the competent authority. It is a matter for the CNPA whether they judge that an appropriate assessment is necessary under the Conservation Regulations 1994 and amendments. However, given that the CNPA has stated recently that a specific appropriate assessment was not carried out for the Boat of Garten Woods in relation to the recent core paths implementation, then comparing the relative levels of capercaillie disturbance in relation to their respective locations and closeness to lek and capercaillie rearing areas, this would suggest to the ornithologically based observer that one is not necessary for this proposed development.
- 2.4.3 MBEC believe that this draft plan (Figure 3) does address these "conditions" and provides a workable solution for both public access and capercaillie mitigation; two things which are quite difficult to reconcile in practice. Further, it is clear that both Seafield and Strathspey Estate and the Developer can implement this mitigation and are committed to doing so in line with constructing the proposed housing development.
- 2.4.4 Further details of the proposed capercaillie mitigation are explained in the text in Section 5 of this report.

### **3. RED SQUIRREL**

#### **3.1 Current Status of the Population within Boat of Garten Woods**

- 3.1.1 The 2009 Survey Report (Appendix 1) showed a relatively even spread of red squirrel dreys across the plantation area within and adjacent to the proposed housing site boundaries. The concentrations of higher-rated dreys indicated the presence of up to

approximately six individuals. A distinct cluster of dreys was noted, 100m in from the road and to the west side of the site (see Figure 2 which indicates that no houses are proposed for this area). This cluster included a slightly higher concentration of higher-rated dreys than within the rest of the proposed development area. The only factors which would appear to influence this pattern are the density of the canopy, providing greater connectivity between trees and therefore more protection, and possibly the slightly greater physical distance from the existing residential area.

- 3.1.2 The estimation of up to six animals within the study area agrees with the number suggested by the earlier 2008 survey report and fits within the relatively low population density expected for this type of coniferous plantation. With generally little age difference between trees in this area, this type of monoculture provides a sub-optimal habitat for red squirrel. This section of woodland is currently subject to a relatively high level of disturbance due to the proximity of the current residential area and the number of dog walkers using the woodland (plus a number of cats capable of hunting squirrel). From surveyor observations (an ecologist was present on the site from early morning through to beyond dusk), disturbance is fairly constant throughout the day close to Deshar Road. The road just to the north of the proposed development area is not thought to be a significant source of mortality for this population, as can occur in some circumstances, because the habitat to the north is not suitable for them and therefore they have no reason to cross into it.

### **3.2 Red Squirrels and Development within the Cairngorms National Park**

- 3.2.1 The presence of the red squirrel dreys within the proposed housing area has implications for the proposed development at Boat of Garten, as a number of trees will need to be felled in order for the housing to be constructed. The identification of high-rated squirrel dreys had already influenced the design iteration before the 2009 protected species survey programme and this detailed investigation further influenced the design of the specific housing proposals, particularly with regards to the cluster of dreys identified within the western edge of the site – a number of houses and loop of road were removed from the earlier design (see Figure 2).
- 3.2.2 As identified in the 2009 Survey Report (Appendix 1), red squirrel is subject to protection under the Wildlife and Countryside Act 1981, as amended itself and as amended by the Nature Conservation (Scotland) Act 2004. They are also listed within local and UK Biodiversity Action Plans. The relevance of this is that there is currently no development licensing system in place to permit the destruction, damage or disturbance of red squirrel dreys for the purposes of development, even while protecting the status of the species. Guidance related to forestry tree felling is available and is provided by the Forestry Commission and this is used in large parts of Scotland, along with careful ecological supervision during felling works and deemed to be lawful and reasonable. Indeed these guidelines are used by forest managers/private landowners within the Park on a regular basis for large scale tree felling operations down to local thinning operations. However, recently officers of the CNPA have been taking quite a different and, it is fair to say, a unique stance on such widely accepted mitigation techniques and appearing to say that they are unlawful and therefore planning consent cannot be granted. Given this known situation, which in MBEC's experience is exclusive to the CNPA, this development has been designed along with new types of ecological mitigation to ensure the proposed development can proceed under the CNPA's terms.

3.2.3 As a result of a lack of development guidance, it is fair to say that there is currently some uncertainty, in relation to the planning application process, in the interpretation of the law governing the protected status of red squirrel and inconsistency in relation to the protection afforded to other species of conservation concern in a European context. The approach of the CNPA is extremely precautionary and extends protection to all dreys, no matter whether they are actually in use or not. However, given that red squirrels use multiple dreys and can build a new drey in under a day, it can be sensibly argued that, within the law, only those recently or currently in use are protected. Such a view would ensure the buildability of the Boat of Garten proposals, while at the same time applying "top-notch" mitigation through the provision of "reasonable precautions" (as stated in the Nature Conservation (Scotland) Act 2004). It is very important to note that the current status of the red squirrel population in the local area is not at threat here and even individual animals are not at threat, given the mitigation proposed and the determination of the ecologists involved to find a common sense and lawful approach to resolve this uniquely CNPA issue. MBEC have seen Senior Counsel advice given on this situation and are content that they can work within the basis of this eminent planning QC's advice.

### 3.3 Recent Developments in Planning and Legal Opinion

3.3.1 The Reporters' opinions for two recent pivotal Public Local Inquiries (PLIs) for development projects with similar issues in Scotland (the Aberdeen Western Peripheral Route [AWPR] and the Beauly to Denny 400kV power line upgrade), have relevance for the Boat of Garten proposals, as red squirrel presence was identified as an issue for both these proposed developments (AWPR PLI, 2010; Scottish Government, 2009). Importantly, cognisance has also been taken of the closing submissions of an eminent planning advocate (Ailsa Wilson QC) for these Inquiries and her carefully reasoned written comments specifically to another local developer dealing with a similar set of issues to this proposed Davall Developments site.

3.3.2 Red squirrels and their wider conservation/range maintenance are arguably more of an issue for the Beauly to Denny project than for the AWPR, as the CNP area is considered to be a more important area for this species, due principally to the current absence of grey squirrels. In March 2009, Forestry Commission Scotland proposed the designation of "stronghold" areas (FCS, 2009) to help manage the land involved in a more 'squirrel-sensitive' way (essentially by encouraging "best practice" land management). The designation of stronghold sites was subsequently announced in December 2009 (Wildlife Extra, 2009). The closest of the 18 designated sites to the transmission line is the South Rannoch woodland, c. 12km to the west of the transmission line route; the closest site within the Park is the Inshriach & Glenfeshie site, c. 19km to the north-east of where the line crosses Glen Truim. Similarly, the proposed housing site referred to here is outside of any stronghold site for red squirrels.

#### Discussion of the Relevant PLI Considerations with Regards to the Boat of Garten Proposed Housing Site

3.3.3 A number of important points have been identified within the two PLI determinations which are of primary importance to the Davall Developments' housing development application in Boat of Garten. The AWPR and Beauly to Denny projects are clearly of a much larger-scale than this small housing development, nonetheless, the same principles should apply in relation to the context of the National Park and CNPA's

position, in relation to planning determination for the sites (i.e. the presence of red squirrel dreys).

- 3.3.4 The AWPR PLI decision provides some legal clarity in relation to the precautionary approach taken to dreys by the objectors and the suggestion that a nationally protected species should receive more protection than a European Protected Species. While a licensing system for development related disturbance is not in place, it does not follow that destruction of a drey is necessarily a criminal activity under the WCA 1981, as amended (Section 9[1 & 4]). The development would be consented and there are relevant mitigation measures in place to avoid and minimise impacts to red squirrel and therefore no actions would occur which could be classed as "intentional" or "reckless" under criminal law and the conditions specified under WCA Section 10, subsections 3 and 3A would apply. As pointed out by the Reporters, statutorily consented activity is *lawful activity*; as long as reasonable precautions are taken to prevent accidental damage to red squirrels and their places of shelter/protection; developmental activities satisfy 10(3) and 10(3A).
- 3.3.5 SNH (2010) provides a three-stage test for the defence of inadvertent wildlife crime as a result of lawful activities; this test clarifies the legal position of an inadvertent offender thus:
1. *The unlawful act was an incidental result of an otherwise lawful activity or operation.*
  2. *The person who committed the unlawful act must have taken reasonable precautions in order to avoid committing the act or, alternatively, the person must show that he or she did not foresee and could not reasonably have been expected to foresee that the action would result in an offence being committed.*
  3. *It must be shown that steps were taken to minimise any damage or disturbance (including, for example, disturbance to a nest site) once it became apparent that a contravention of the provisions of the 1981 Act had occurred."*
- 3.3.6 SNH suggests that under these conditions, proof of best practice and reasonable precautions in place to prevent inadvertent wildlife crime (as prescribed under the WCA) will satisfy the Judiciary of a developer's best intentions as regards their operations.
- 3.3.7 The UK Red Squirrel Group (2004) reflects a similar approach to accidental infractions of the WCA (as amended), i.e. that the act was incidental to the main purpose of the work; the work was legal (not in contravention of any other legislation/regulation); and that the unlawful act could not reasonably have been avoided. In the absence of a licensing system, the Group states that ultimately only a court can decide what is "reasonable" under law, but that a developer should take all reasonable steps to avoid, or if not possible, to minimise, damage to places red squirrels use for shelter or protection (through survey and mitigation measures, etc.). Such mitigation as is required is also best derived through agreement between the conservation agencies (i.e. SNH in Scotland), planners and the developer.
- 3.3.8 The AWPR PLI endorses the approach to mitigation presented by MBEC here working on behalf of Davall Developments with regards to red squirrel presence on the proposed development site at Boat of Garten. It should be noted that the



proposed mitigation for the housing development goes further than that proposed and accepted as lawful for the AWPR, giving more guarantees for avoiding direct disturbance to squirrels: this clearly demonstrates *current best practice* and *reasonable* precautions taken by the developer and should therefore satisfy all the necessary tests to be undertaken by the officers of the CNPA in relation to red squirrels and their protection.

- 3.3.9 The Beauly to Denny PLI has highlighted what the Reporters have termed a "misunderstanding" of the National Parks (Scotland) Act 2000 in how CNPA determines planning applications: "*It does not follow that every square centimetre of the area designated as a National Park must necessarily be regarded as being of outstanding national importance.*" A coordinated and "reasonable" approach to development needs to be applied and this does not mean that every application has to satisfy every aspect of all four aims of the CNPA. MBEC believe that, under these terms, the current CNPA officers approach to red squirrels and planning is currently what would be considered an *unreasonable* approach to development and it is presumed that the same thinking will be stated for Boat of Garten, as has previously been the case for Carrbridge and other proposals.
- 3.3.10 A point of further interest brought out in the Beauly to Denny PLI is the Reporters' attitude towards commercial coniferous plantation, which clearly implies a low "value" given to such plantation within the wider landscape, especially when compared to natural afforestation. Commercial plantation is a crop and harvest is therefore an expected stage in the forestry process (with forestry being counted a *lawful* activity as stated by SNH, 2010), whether under private or Forestry Commission ownership. The Boat of Garten proposed housing site is characterised by coniferous monoculture plantation (straight lines of Scots pine with access tracks and rides separating the forest blocks). The Boat of Garten site has a history of previous cropping and thinning: in addition to the ridge and furrow topography of ploughed plantation forestry, this site also has regular lines of tree stumps as evidence of thinning operations. None of this woodland is identified by the Woodland Trust as being of Ancient Origin (Ancient Tree Hunt, 2010), confirmed by checking the SNH Ancient Woodland Inventory held in GIS form by MBEC. The majority of the woodland to the south of the site is, however, identified as Ancient Woodland by SNH and "Ancient Wood (replanted – 2b)" by the Woodland Trust; the closest part of this designated area is c. 100m beyond the proposed development site housing boundary.
- 3.3.11 While essentially for purposes other than forestry, housing, road development and power line developments require felling on vastly different scales: the Beauly to Denny power line requires approximately a 100m-wide clear-felled wayleave through forest (varying in width depending on localised issues and forest design planning), while for this proposed small housing development the trees will be selectively felled to retain the essential edge character of the woodland on the edges of the housing area. These differing methods obviously have different implications for the long-term presence of squirrels in the local area. Anecdotal evidence indicates domestic gardens being used by red squirrel if mature trees are retained close by; an example of this has happened is Rowan Park, Carrbridge, where the housing is fairly recent (c. 10 years old) and immediately adjacent to a proposed development site (Carrbridge Wood, Tulloch Homes Ltd.). Red squirrels are frequently observed (often daily) using the gardens for foraging, especially when food is put out for them (which it commonly is). At least one of the properties is also reported to have a drey in a tree in the garden. The nearby Landmark Heritage Park in Carrbridge is also known for its feeding of squirrels and would appear to both support a population of the animals on

site and have a number of animals commuting from adjacent areas (indicated by the number of road kills on the adjacent B9153). This suggests that sympathetic development, with long-term retention of mature food trees locally, while causing an indirect relocation of animals during construction, may actually be of potential long-term benefit in safeguarding suitable habitat and encouraging higher winter survival rates (evident from MBEC's recent work at Carrbridge).

### Conclusions

- 3.3.12 By implementing appropriate ecological mitigation through design and working practices, the Developer would be carrying out what constitutes "*reasonable precautions*" to avoid any unlawful actions under either section 9(1) or section 9(4) of the WCA (paragraph 2.248, AWPR PLI Report, Vol. 1, Chapter 2; AWPR PLI, 2010). The Reporters endorse the approach which has, in parallel, been proposed by MBEC for Davall Developments, in that appropriate mitigation "*...would also justify a mitigation strategy that involved differentiating between active dreys and abandoned dreys at the time of construction*", as this strategy would "*...seek to avoid any direct impacts that would constitute an unlawful act, such as the deliberate killing or injuring of a red squirrel or deliberate destruction of an active drey whilst occupied by a red squirrel.*"
- 3.3.13 While the Reporters for the Beaully to Denny Inquiry have not focused precisely on the same issue, they have obviously formed similar views to those for the AWPR consent as similar issues and mitigation apply for this project as well. A specific email highlighting this very issue was sent to the Scottish Government for the attention of the Reporters during their deliberations on the Beaully to Denny project (email to Scott Mackenzie from Don McKee of the CNPA dated 12 September, 2008) and they were clearly aware of it, took account of it but decided that a lawful consent could be granted in their advice to the Scottish Ministers.
- 3.3.14 MBEC having been involved in and studied the mitigation for red squirrels for the AWPR and the Beaully to Denny project carefully are clear that the approach that the to the Boat of Garten site with regards to red squirrel presence on the proposed development site is even more precautionary and clearly best practice. In summary, it includes total avoidance of known and likely active dreys; continuous surveying of dreys to determine activity (using state of the art equipment which allows 24hr a day surveillance from a safe distance); and felling in a direction which will assist squirrels to safely temporarily move from the area, if they wish. All such work would be completed by qualified and experienced ecologists and the time-frames involved at the site would specifically allow for felling to be undertaken over an extended time period, as necessary to ensure no disturbance of red squirrels. In relation to the construction process, all surrounding plantation areas would be undisturbed and suitable additional landscaping proposed for the development area will mature in the longer-term. This outline approach was conveyed to the CNPA at a meeting held in Grantown on Spey on 18<sup>th</sup> August 2009. To emphasise, this clearly demonstrates *current best practice* and *reasonable* precautions taken by the developers and should therefore satisfy planners as to the good intentions of Davall Developments in relation to the site. Suitable safeguards could be further ensured through the use of detailed conditions, which MBEC, on behalf of Davall Developments, would be happy to discuss and agree with officers of the CNPA.
- 3.3.15 The approach to the implementation of this mitigation are further detailed in an Outline Ecological Management Plan which is appended as Appendix 2 to this report.

This approach is intentionally flexible to allow for drey movements over time and MBEC are confident that, with this flexibility built in and understood that squirrel can be fully and lawfully mitigated on this site.

## 4. OTHER POTENTIAL ECOLOGICAL ISSUES

### 4.1 Introduction

- 4.1.1 A number of other ecological issues have been identified over the course of the iterations of the housing proposals for this site. In addition to the capercaillie and red squirrel issues, concern has been previously expressed over the potential impact to the habitat itself and a number of other species of potential interest including badger, wood ants, other bird species and several other insects.
- 4.1.2 A serial objector to development proposals within the National Park is the Badenoch and Strathspey Conservation Group (BSCG). Evidence, shows that this group, a small number of whom are extremely active, are following an anti-development agenda within the Park's boundaries (even arguably an anti-sustainable development agenda). This group have made comments in relation to certain aspects of this proposal, as they do for virtually every proposal, and where relevant these are discussed below. We have ignored some of the obviously ridiculous comments made concerning this proposed development, including for example those concerning potential disturbance to otter and their connection to the Spey SAC.

### 4.2 Ancient Woodland

- 4.2.1 In their 2002 objection to the development of this site (BSCG, 2002), the implication was that the trees are part of the "Caledonian forest (native pine)" classification. A 1994 source is quoted, identifying the forestry of most of this area as "self-sown Scots pine". However, the lack of "exotic" conifer species to be found in the proposed development area does not mean that the forestry is not plantation. It is clear from looking at the site that the forestry is plantation: the trees are for the most part in straight lines, with ploughed ridge and furrows including felled stumps providing evidence of an earlier thinning. Age class structure is fairly uniform amongst the planted trees. Information MBEC have been given from the owner, Seafield and Strathspey Estate, and summarised in Paragraph 1.1.2 clear shows that BSCG are totally wrong about this proposed housing area of land and its immediate surroundings, alongside Deshar Road. While some self-sown trees are present, this is not uncommon in this area within slightly more open areas of plantation forestry.
- 4.2.2 In defence of the BSCG position, their 2002 objection was made on the original outline application which included a small area within the designated Ancient Woodland and part of an adjacent area identified in the Semi-natural Woodland Inventory (SNH GIS dataset held by MBEC) and as "Ancient Wood (semi-natural – 2b)" by the Woodland Trust (Ancient Tree Hunt, 2010): the area now being proposed is significantly smaller and is completely outwith these non-statutory areas.
- 4.2.3 The issue of habitat fragmentation that could be caused by development of this area was also raised in the objection (BSCG, 2002). However, this is clearly not now an issue as the site will not cause any severance of the overall canopy from the River Spey to Kinveachy. Retention of more mature trees all around the development edge

will also reduce the potential loss of habitat and limit even very localised fragmentation. It is important to note that this proposed development will be next to Deshar Road and will extend the existing village edge slightly.

### 4.3 Plants

- 4.3.1 The Badenoch and Strathspey Conservation Group (BSCG) have reported the presence of several notable plant species in the wider woodland area. These were the presence of Juniper (*Juniperus communis communis*) and creeping lady's-tresses (*Goodyera repens*). An MBEC botanist has also seen these two notable species in the wider Boat of Garten Woods and they are locally frequent within the valley. However, MBEC have checked the current proposed development area and neither has been seen within it or on its immediate surroundings – they are present further south within the woodland. BSCG also mention bearberry (*Arctostaphylos uva-ursi*) as being present. It is respectfully suggested that the surveyor must have got their identification wrong – to the inexperienced eye this species can be confused with cowberry, which is a common and present species. An MBEC botanist has confirmed that there is no bearberry present within the proposed development site or its immediate surrounds, however, it could be present further south on edge habitat approximately 1km south of the proposed site but even this is not ideal habitat and not where it would be expected to be found.
- 4.3.2 BSCG also mention fungi and although not actually classified as plants we have mentioned them here just to be comprehensive. MBEC have not carried out specific fungal surveys of the site but have noted the presence of common fungi while surveying on the site (e.g. oyster mushroom, fly agaric, hedgehog fungus and common chanterelle – most of which were outside of and south of the proposed development site) and we would have picked up any rarer fungal fruiting structures had they been present. MBEC do not feel that detailed fungal surveys are necessary for this site because of its lack of past woodland continuity, it ploughed and drained soil and disturbed recent past.

### 4.4 Badger

- 4.4.1 As reported in the Survey Report (Appendix 1), experienced mammal surveyors found no evidence of badger presence on the proposed site or its immediate surroundings in either the 2008 or 2009 surveys. Anecdotal evidence, does suggest badger to be present in the wider area, even although they are not resident within the proposed development area or its immediate surroundings.
- 4.4.2 The commercial coniferous plantation provides a generally sub-optimal habitat for badger, which usually prefer a more varied environment, to include open grassland and broadleaved tree edge areas. While open grassland and some edge habitat is potentially available beyond Deshar Road, the level of disturbance in this section of the plantation, close to the village, is fairly high and has probably resulted in badgers avoiding this part of the plantation edge. The currently regular level of off-lead dog-walking, with clear evidence of dog investigation of rabbit holes, will also be a factor in this avoidance. Badgers are well known to avoid setting in areas with regular dog activity, when they have a choice, as they do here, of much less disturbed areas in the surroundings.

#### 4.5 Wood Ants

- 4.5.1 In their 2002 objection, BSCG stated that habitat would be lost for wood ant.
- 4.5.2 As noted in the MBEC Survey Report (Appendix 1), Boat of Garten Woods provides a range of forest floor habitat, some of which is suitable for wood ant species. However, only Scottish wood ants (*Formica aquilonia*) were found on the site at that time and in low densities.
- 4.5.3 The absence of the narrow-headed wood ant (*F. exsecta*) may be explained by the limited amount of open space on the site and the historical disturbance due to past forestry clearance operations within the area. While the hairy wood ant (*F. lugubris*) shares its range with *F. aquilonia*, the past land use including grazing and the removal of the past native cover may also be a factor in its absence. No survey of the wider area surrounding the proposed site was undertaken to establish the presence of either of these species locally, though they are known to be present and locally abundant in suitable habitat in the Strathspey area.
- 4.5.4 Opening-up the canopy around the edges of the proposed development and future Seafield and Strathspey estate management for capercaillie in the surrounding area of the woodland would significantly increase the opportunities for nest-building, particularly for *F. exsecta*, through increasing the penetration of sunlight to the woodland floor.
- 4.5.5 Recent carriageway improvement work on the A9 in the Carrbridge area, on behalf of Transport Scotland, has highlighted the potential for translocating whole nests away from development, if necessary. The results have so far been reasonably positive, with a reasonable proportion of nests surviving in their new locations; where the translocated nest has failed, a new nest has sometimes been constructed by the colony as well. While this would be a "last resort", if any new nests, as well as the existing nests of Scottish wood ant were within the footprint of the proposed housing at that time and disturbance was to be unavoidable, then translocation would be a suitable option. Again, this could be easily conditioned, should the CNPA so wish.
- 4.5.6 Restructuring of the woodland edge combined with translocation (if assessed as necessary) would ensure the continued presence of the existing Scottish wood ant population. The development of this small area of land would not threaten their presence within the wider woodland, in other words their status would be maintained.

#### 4.6 Other Bird Species

- 4.6.1 A number of bird species have been noted to use the wider woodland area (BSCG, 2002), including crested tit (*Lophophanes cristatus*), crossbill (*Loxia sp.*) and siskin (*Carduelis sp.*). Highly mobile, the loss of a small area of the woodland would not impact these species. Of these birds, only siskin was observed by MBEC surveyors in the vicinity of the proposed development site during the 2009 surveys. Felling at the correct time of year and careful pre-construction survey would avoid any chance of disturbing any nesting activity.

#### 4.7 Other Mammals

- 4.7.1 As noted in the MBEC Survey Report (Appendix 1), the only other evidence of mammalian wildlife noted during surveying was the observation of rabbit (*Oryctolagus cuniculus*) and roe deer (*Capreolus capreolus*) in the area.