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**CAIRNGORMS NATIONAL PARK AUTHORITY**

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**Title: REPORT ON CALLED-IN PLANNING APPLICATION**

**Prepared by: SIMON HARRISON  
HEAD OF PLANNING**

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**DEVELOPMENT PROPOSED:** Approval of Matters Specified in Conditions 1 (plans & particulars), 4 (landscaping information re-trees), 8 (details required by condition 1), 9 (management & maintenance statement), 10 (details required by condition 1), 11 (phasing plan), 12 (detailed design statement), 14 (contoured site plan), 16 (construction method statement), 17 (management & maintenance statement) and 19 (programme of archaeological work) of Planning Permission in Principle 07/144/CP on Land north west of Dalfaber Farm, Dalfaber Drive, Aviemore

**REFERENCE:** 2013/0073/MSC

**DEVELOPMENT PROPOSED:** Approval of matters specified in conditions 1 (in part) (plans & particulars), 8 (details required by condition 1), 9 (management & maintenance statement), 10 (details required by condition 1), 12 (phasing plan), 13 (detailed design statement, 15 (site plan), 17 (construction method statement), 18 (management & maintenance statement), and 20 (programme of archaeological work) of Planning Permission in Principle 07/145/CP on Land north west and south of former Steadings, Dalfaber Farm, Aviemore

**REFERENCE:** 2013/0074/MSC

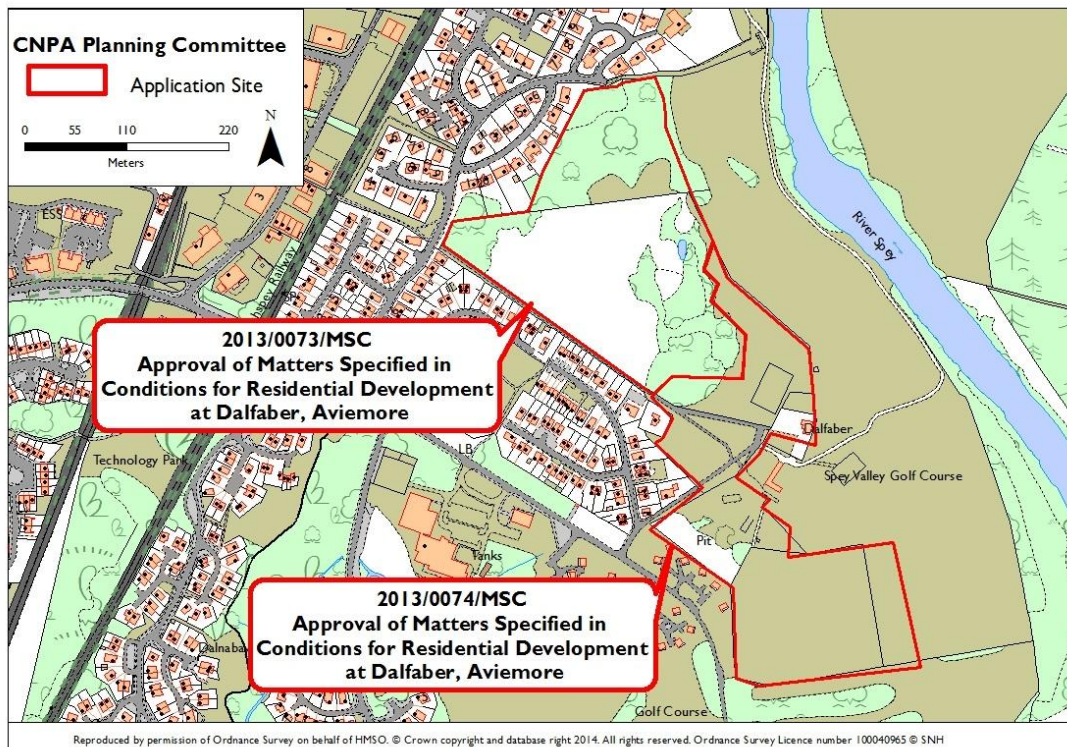
**APPLICANT:** REIDHAVEN ESTATES

**DATE CALLED-IN:** 11 March 2013

**RECOMMENDATION:**

The Members of the Committee support a recommendation to **REFUSE** planning permission for the **MSC** applications 2013/0073/MSC and 2013/0074/MSC, on the following grounds:

- (1) That the Planning Permissions in Principle to which the two **MSC** applications relate (Ref: 07/0144/CP and 07/145/CP) are no longer capable of being implemented and have expired.



**Grid reference: (E/275424, N/801039)**

**Fig. 1 - Location Plan**

## **SITE DESCRIPTION AND PROPOSAL**

1. This report covers two interlinked applications seeking approval of matters specified in the conditions and other matters (MSC applications) of the related planning permissions in principle (PPIP's – ref: 07/0144/CP and 07/145/CP). These all relate to proposed residential developments on adjacent areas of land in Dalfaber, in the northern area of the settlement of Aviemore (see Figure 1 above).
2. The sites to which these MSC applications relate are allocated as H2 and H3 in the Local Plan. They are shown in the Finalised Modified Draft LDP 2015 as sites with Existing Permissions and within the Aviemore Settlement Boundary. The combined site extends to 11.2 ha lying east and north of Aviemore and west of the River Spey. The sites are within the Cairngorm Mountain National Scenic Area.
3. The overall area of land is bounded to the north-west, west and south west by existing residential developments in Dalfaber. The character of these residential areas varies from detached properties in individual plots in the site at the north to higher density semi-detached properties, holiday lodges and 'four-plex' units in the site to the south. The sites are bounded by the golf course and open land to the east and south.

## **PURPOSE OF THIS REPORT**

4. The purpose of this report is not to assess the relative planning merits of the MSC applications referred to. That task was undertaken in the report dated August 2014 on the basis of the information available at that time but that report was withdrawn ahead of the August 2014 Planning Committee (copy of Officer's previous Report at Appendix 1). Similarly, the Planning Committee are not being asked to make a decision on the merits of these applications, and based upon the Officer's assessment, as would normally be the case.
5. Rather, it is the purpose of this report to provide an update to Committee Members on the status of the above applications and to seek the agreement and a decision from the Planning Committee on the way forward, so that certainty can be re-established for the benefit of the applicant and local community.

## BACKGROUND

6. Planning Permission in Principle (PPIP) for residential development on two adjoining parcels of land at Dalfaber was granted to Reidhaven Estate following an appeal in March 2010. The PPIPs contained a number of matters specified in conditions “MSC’s” (MSCs are broadly equivalent to “reserved matters” which applied under the previous “outline planning permission” regime) which need to be applied for and approved before development can commence. Section 59 (2) of the 1997 Planning Act requires that applications for all MSCs must be submitted within 3 years of the date of the Decision Notices relating to the two relevant PPIPs. The 3 year period can be extended in certain circumstances but these circumstances do not pertain here.
7. In early March 2013, Reidhaven Estates submitted an MSC application for each of the two PPIPs to Highland Council. CNPA exercised its right to call these applications in. The information and documentation in respect of some of the MSCs was considered to be incomplete or inadequate and CNPA requested further information and documentation from the applicants. Supplementary information and documentation to address these shortcomings was provided to CNPA on a piecemeal basis by the applicant’s agent throughout the remainder of 2013 and in the first half of 2014. By summer 2014, despite the applicants not having provided all of the information and documentation requested by CNPA, it was considered that there was nevertheless sufficient information to allow the applications to be determined.
8. The applications were on the agenda for the 1 August 2014 Planning Committee. The officer’s recommendation at that time was that the applications be approved subject to a number of conditions. While it is not conventional for MSC approvals to be conditioned in this way, the proposed approach reflected the fact that not all of the information and documentation requested by CNPA had been provided. The alternatives would have been to refuse the applications on the basis of there being insufficient information or further defer consideration of the applications still further until the required information had been provided.
9. While reviewing the applications with CNPA’s legal adviser in preparation for the Committee meeting, it was identified that the pending MSC applications may not address all of the matters set out in condition 1 of each of the PPIPs. Specifically, the applications did not appear to address in detail the siting, design and external appearance of buildings. CNPA’s planning officers carried

out a review of the pending MSC applications and the information and documentation lodged in support. This concluded that no application had been made in relation to the siting, design and external appearance of the proposed buildings.

10. Moreover, as the three year period allowed for making MSC applications under Section 59(2) had expired in March 2013, it appeared that it would no longer be competent for the applicant to make an MSC application in relation to siting, design and external appearance. This cast doubt on the validity of the PPIPs and the MSC applications which were scheduled to be considered by the planning committee. Following discussion with the applicants and their representatives, the MSC applications were withdrawn from the agenda of the 1 August 2014 planning committee to allow matters to be further investigated.
11. Following the Committee meeting, the applicants and their advisers met with CNPA to try to find a way forwards. Two issues were identified by CNPA and acknowledged by the applicant:
  - (1) The need for, and previous lack of, all required information in support of the MSC applications. The applicant indicated their willingness to provide this, such that if an answer to issue (2) below could be found, then the applications could be determined favourably but without the issue of “conditions on conditions”; and
  - (2) To establish: (1) whether all of the MSCs had been applied for within the required timescale, (2) if not, whether or not this meant that the underlying PPIPs had already expired, and (3) the impact of such expiry of the PPIPs on the pending MSC applications, and (4) whether there was any mechanism for the situation being retrieved.
12. The applicant was made aware that Harper Macleod’s initial view was that the two underlying PPIPs for Dalfaber (PPA-001-2000 and PPA-001-2001) had expired due to the fact that no application for approval of the siting, design and external appearance of the buildings had been made within the three years of the date of these planning permissions (i.e. by 11 March 2013 and 9 March 2013 respectively). As such, the Head of Planning at CNPA recommended that the best course of action would be for the applicant to withdraw the MSC applications and submit a fresh PPIP application. The additional information referred to in (1) above could be utilised in the fresh application that would reduce the number of MSC’s and re-start the clock for submission of the remaining MSC applications. The Head of Planning also offered to consider an extension in the default three-year time limit for such a new PPIP, to an extended period (for example 5 years), so as to ensure

sufficient time would be available to the applicant for the submission of all required MSC applications for all phases of the development.

13. The applicant contended that: (1) in the particular circumstances of this case it was not necessary for siting, design and external appearance of buildings to be approved at the MSC stage; (2) irrespective of whether that contention was correct the PPIPs had not expired; and (3) applications under Section 42 could be submitted which would rectify matters.
14. In relation to the first contention, the applicants have pointed out that the PPIPs allow the sites to be either built out as a single development by a builder and then sold, or alternatively built out on a plot by plot basis by individuals. CNPA acknowledge that is the case. The applicants argue, however, that the requirement to have siting, design and external appearance approved as an MSC is only relevant in the event that site was developed as a single development and, as it was now their intention for the site to be built out on a plot by plot basis, then no MSC application was required. They argue that a design statement which they have submitted fulfils any requirements in relation to siting and design on a plot by plot build basis. The design of individual plots would either be submitted for approval at some point prior to implementation or would be the subject of a separate application for full planning permission.
15. CNPA's officers consider that the siting, design and external appearance of all buildings and structures is an essential feature of any proposed development. There are no planning reasons why approval of these matters shouldn't be approved by the planning authority at the MSC stage, irrespective of the build-out model which is followed. If the original applications had been for full planning permission rather than PPIPs, it is inconceivable that full planning permission could have been granted without details of the siting, design and external appearance of all buildings being supplied and approved. The position should be no different with PPIPs where siting, design and external appearance of buildings has been made the subject of an MSC.
16. CNPA made it clear to the applicant that their understanding of the legislation was not consistent with the applicant's contentions and so would have to be persuaded of this, and advised that the onus was on the applicant to explain this to the satisfaction of CNPA and their legal advisors within a reasonable timescale.
17. Harper Macleod LLP (CNPA legal advisors) was then instructed to engage with the applicants' solicitor, Neil Collar of Brodies, to try to understand the reasons for their contentions. Discussions were held and e-mail

exchanges took place up to December 2014. The purpose of engaging in this way was to allow Harper Macleod LLP to fully understand and test the arguments being advanced so that these could be taken into account by CNPA when coming to a conclusion. Despite shortcomings with the wording of the planning legislation (acknowledged by both sides) Harper Macleod were not persuaded by the applicants' arguments. The legal opinion of Harper Macleod, which was given to CNPA late in December 2014, was that: (1) the PIPs could no longer be implemented even if the MSCs were approved (as the time limit for applying for the remaining MSC had expired), and (2) while the position was not entirely clear due to the shortcomings with the planning legislation, in their view the PIPs expired in March 2013 and could not be revived by Section 42 applications or otherwise.

- a) Attached as Appendix 2 is a summary by Peter Ferguson of Harper Macleod of his view on these matters.
  - b) Attached as Appendix 3 is a summary by Neil Collar of Brodies of his view on these matters.
18. The applicant, in the meantime, and against the explicit advice of CNPA, has made applications to The Highland Council under S42 to seek to try and rectify the matter. Harper Macleod advised that they did not consider the Section 42 applications to be competent as such applications cannot be made after the original permission has expired. CNPA therefore declined to call-in these applications. At the time of writing this report, The Highland Council were understood to be considering their position in relation to these S42 applications.
19. The applicant also initiated with The Highland Council the formal three month pre-application consultation (PAC), in line with the recommendation of CNPA Head of Planning for them to start afresh with a new application, which being categorised as a "major" application therefore required formal PAC. They declined, however, to withdraw the MSC applications. We understand the PAC Notice was served on The Highland Council on 28 October 2014, meaning that no planning application could be made until 22 January 2015 at the earliest.

## **CURRENT SITUATION**

20. CNPA advised the applicant in late December 2014 that the matter must now be drawn to a conclusion. The engagement between the two legal advisers had run its course but no consensus had been reached. In these

circumstances it was felt appropriate for CNPA to ask again that the applicant should formally withdraw the two MSC applications. The applicant did not wish to do this and preferred the applications to be continued. CNPA considered that it would not now be in the public interest to determine the applications on their merits, because there would be no practical purpose to be served in doing so as even if the applications were to be approved the PPIPs could never be implemented.

21. On 13 January 2015 the applicants submitted further information in relation to the MSC applications. Receipt of this information has been acknowledged but our preliminary assessment still shows this additional information to be lacking details in relation to certain of the matters which require approval. It does not contain any information in relation to the siting, design and external appearance of buildings and structures. The applicant's agent claims that these details have already been provided in the Design Guide January 2014, but that view is not held by Officers at CNPA.

## **THE WAY FORWARDS**

22. There are, in our opinion, only two options that are now available and these are described below:
  - a) *Option 1: Determine the MSC applications on their planning merits.* This would involve a revised version of the paper which was on the agenda for the August 2014 planning committee (see Appendix 1), being tabled at a future planning committee. It could also involve a full appraisal, consultation on and consideration of the recently received additional supporting information. In view of the need for consultation and third party input on the additional information, the earliest this matter could be put before the Committee for consideration is the April 2015 meeting. If this option was followed it would have to be made clear to everyone that even if the applications were approved, development could not proceed as there would be no opportunity to lawfully allow for a further MSC application for consideration and approval of details of the siting, design and external appearance of the buildings.
  - b) *Option 2: Refuse the MSC applications – not on their planning merits – but on the basis that the PPIPs to which they relate are no longer capable of being implemented and have expired.* In these circumstances we consider it would be not be in the public interest to determine academic applications on their merits against the terms of the development plan and any other relevant material considerations, as would normally be the case, as such an exercise would be without public benefit.



23. The applicants are of the view that this approach would remove the PIPs without compensation or due process; would be incompatible with their Convention Rights under the Human Rights Act 1998; and is without legal authority (see Appendix 3).
24. The applicants would, however, still have a right of appeal to DPEA against this decision. If the Reporter concluded that, notwithstanding the fact that the PIPs can no longer be implemented and/or the PIPs have not in fact expired, as was argued by the applicant's solicitors, the Scottish Government Reporter would determine the applications on their planning merits.
25. In summary, neither of the options open to CNPA are straightforward or without risk. Option 2 does, however, appear to be the most logical approach to what is an unprecedented situation and this is the approach recommended by officers.

## **CONCLUSION**

26. The following conclusion is therefore reached:
  - a) In the opinion of Officers, the decision should be taken to refuse the two MSC applications, not on their planning merits, but rather on the basis that the PIPs to which they relate are no longer capable of being implemented and have expired (see Option 2 above).

## RECOMMENDATION

**The Members of the Committee support a recommendation to REFUSE planning permission for the MSC applications 2013/0073/MSc and 2013/0074/MSc, on the following grounds:**

- (1) That the Planning Permissions in Principle to which the two MSC applications relate (Ref: 07/0144/CP and 07/145/CP) are no longer capable of being implemented and have expired.**

**Simon Harrison**  
**Head of Planning**  
13<sup>th</sup> February 2015.

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**Date: 13/02/15**

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