

AGENDA ITEM 10

APPENDIX 3

14/03675/S42

14/03676/S42

REPRESENTATIONS

Our Ref MAC/3039/00002/EFB/VB

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The logo for Burness Paull, featuring the company name in a bold, sans-serif font. A diagonal slash is positioned to the left of the text, extending from the top left towards the bottom right, partially overlapping the letter 'B'.

Attention: Andrew McCracken - Kingussie Office

29 January 2015

Dear Sirs

**MACDONALD HOTELS DEVELOPMENT LTD
OBJECTION TO APPLICATIONS 14/03675/S42 AND 14/03676/S42 FOR VARIATION OF
CONDITIONS ON CONSENT REFERENCES PPA-001-2000 AND 2001
LAND AT NORTH DALFABER, AVIEMORE**

We are instructed by our clients, Macdonald Hotels Developments Ltd, to object to the applications which have been submitted on behalf of Reidhaven Estate for the variation of Conditions 1, 11, 12 and 21 on consent reference PPA-001-2000 and Conditions 1, 12, 13 and 22 on consent reference PPA-001-2001, both permissions being issued by the Scottish Ministers following appeal.

The primary objection relates to the validity of the applications, however our clients also have concerns with aspects of the variations which the applicant is seeking.

Background

It is relevant to first consider the background to the permissions. Macdonald Hotels own and operate Spey Valley Golf Club. The golf course is bound by the land covered by both aforementioned permissions. Consistent with the aims of the National Park Authority, our clients have a particular interest in ensuring that any development adjacent to the golf course does not have a detrimental impact on the golf course.

The potential impact of the development on the golf course was recognised as a key issue during the appeals. The Reporter stressed the need to avoid creating the impression of a hard-edged, angular

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urban sprawl within the National Park, at a location highly visible from the adjacent golf course and from hills and mountains beyond it.

Indeed, in granting the consents, the Reporter rejected the indicative layout which formed part of the appeal proposals PPA-001-2001 and required a revised landscaping drawing to be prepared to soften the visual impact of any houses nearest to the boundary of the site with the Dalfaber golf course, including during seasons when the trees are bare of leaves. The Reporter also made it clear that the approval should not be considered an entitlement to erect 83 dwellings.

Validity of the applications

Section 59(2) of the Town & Country Planning (Scotland) Act 1997 Act requires applications for matters specified by condition to be submitted within 3 years of the date of the consent. Section 59(5) allows a Planning Authority to direct that the 3 year period for submission of matters specified by condition (MSC) details be replaced by either a longer or shorter period. Section 59(7) also allows for the substitution of different periods for different parts of the development (or for no substitution to be made for some part of the development).

The matters requiring subsequent approval are set in condition 1 of both consents. Neither condition can be considered to be a condition imposing a different period for submission of MSC details than that required by the legislation. All applications for MSC required to be submitted by 8 March 2013 in terms of consent reference PPA-001-2001 and by 10 March 2013 in terms of consent reference PPA-001-2000. Conditions 11 and 12 on the consents do not vary the time period for submission of MSC.

It is noted that an earlier application for approval of MSC was submitted in February 2013 (13/00740/MSC) and remains undetermined. The Planning Authority has expressed concerns with the level of detail provided in that application and noted that not all the information sought by the permissions in principle has been provided.

Although that MSC was submitted prior to the expiry of the 3 year period, it is not possible to submit further MSC applications to provide the information not covered by application 13/00740/MSC.

The applications are seeking to breathe new life into permissions in respect of which the time period for submission of MSC has expired. The applications are, in effect, applications for renewal of the permissions and should be treated as such. Seeking to extend the time period for submission of MSC details through varying other conditions on the consents is a misuse of the section 42 process.

It is submitted that the applications are *ultra vires*. The applications ought not to have been registered.

Modifications sought

The applications seek to vary conditions 1 and 12/13 through a reference to a “*plot-by-plot approach*”. The intention appears to be to allow MSC applications not just beyond the statutory 3

year period, but on a phased basis thereafter. No detail is given on the proposed deadlines for submitting further MSC applications. The proposed text suggests that provided a start has been made on infrastructure works on any part of the site, MSC applications for other parts of the site can be submitted at any time in the future. With respect, this approach is fundamentally flawed.

The legislation imposes statutory deadlines for submission of MSC applications in order to give certainty over the timescale for implementing a permission. This certainty is particularly relevant to neighbours and the surrounding area and is consistent with the requirement to review Development Plan policies on a regular basis. The legislation allows for the statutory deadlines to be varied in the circumstances of the particular development, but new periods for submission must be stated instead. The legislation does not allow for an open-ended approach to submission of MSC details as proposed in these applications.

In addition, case law has firmly established that the benefit of a permission in principle will be lost in respect of any part of the site for which MSC details have not been submitted within the specified deadlines. Starting work on infrastructure, such as roads, does not extend the period for submitting details on other aspects of the development which also require approval.

The applicants seek to argue that the Reporter accepted that a plot-by-plot approach to the development may be adopted. That is not disputed. The applicants' claim that their proposed rewording "*changes very little*" is, however, strongly refuted.

It is evident that the Reporter gave consideration to the appropriate phasing of the site: he imposed conditions requiring the development to be carried out in phases, with a detailed phasing plan for both sites to be approved in writing by the Planning Authority, such plan to include details of the development method (for example single entity development or individual plot development). The Reporter went on to require a Design Statement either for the entire development or for each individual plot. It is notable, however, that in imposing these conditions, the Reporter did not specify different deadlines for submission of MSC for different phases of the development. The Reporter clearly envisaged that all MSC approvals would be sought within the 3 year period.

It is further submitted that the applications fail the tests in Circular 4/1998 on the basis that the wording which is proposed is vague and such unenforceable. If the proposed is approved, it would not be possible to ascertain the deadline by when MSC for different parts of the site require to be submitted. As such, it would not be possible to determine the expiry of that period or the period within which development must commence. The Council would be granting permissions which would never expire. This is contrary to planning principles.

No justification has been given for altering the statutory period for MSC. It would be normal practice for a housing development of the size proposed to have all its details approved within a 3 year period. If the necessary approvals are not obtained within the specified period, new planning applications can be submitted for the relevant parts of the site, with such applications considered on their own merits at that time.

Our clients are entitled to know, within a specified period, what development is to be constructed along the boundary with the golf course. They can plan the development of, and investment in, the

golf course accordingly. The Reporter's conditions provided parameters within which the details of the development would be known. The deadlines in the consents have come and gone. It is now almost 8 years since the original proposals were submitted. It is not unreasonable for our clients and the surrounding community to expect matters to be reconsidered afresh given the passage of time. Rather than seeking to artificially extend expired consents, the applicants ought to apply for new permissions for the development.

Conclusion

Against the background outlined in this letter, it is submitted that the applications are invalid and require to be rejected. If the Council is minded to accept the applications and proceeds to approve the variations, the consents would be open to challenge in the Court of Session. The Council would be required to defend such a challenge and would be open to a claim for expenses against the authority.

In addition to our clients' objection to the validity of the applications, they have grave concerns about the proposal to extend the consents indefinitely. This runs contrary to the proper planning of the area and will have a detrimental impact on the operation of Spey Valley Golf Club, with a consequential detrimental impact on the economic activity in the area.

Yours sincerely,

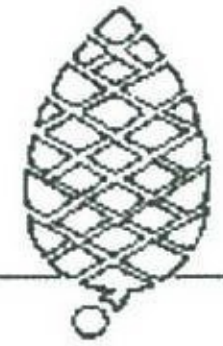


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Dear Mr. McCracken

14/03676/S42 APPLICATION UNDER SECTION 42 TO VARIATION TO CONDITIONS 1, 11, 12, AND 21 ON PERMISSION REF PPA/001/2000 (07/93/OUTBS (07/144/CP)) LAND NORTH WEST OF DALFABER FARM, DALFABER DRIVE, AVIEMORE

14/03675/S42 APPLICATION UNDER SECTION 42 TO VARY CONDITIONS 1, 12, 13 AND 22 OF CONSENT PA/001/2001(07/94/OUTBS (07/145/CP)) LAND NORTH WEST AND SOUTH OF FORMER STEADINGS, DALFABER FARM, DALFABER DRIVE, AVIEMORE

I am writing to object to the above two applications to vary conditions specified in permissions. BSCG's reasons for objection include the following:

BSCG understands that the planning applications relating to the above two applications have lapsed, with the applications for Matters Specified in Conditions not having been all submitted within the required timescale. We trust the Highland Council will take appropriate legal advice on this matter.

The reasons for each of the conditions the applicant is seeking to vary are clearly explained in the permission documents and we do not consider that there has been any change in circumstances that would justify varying these considered conditions.


We remain deeply concerned that important natural heritage interests, that are special features of the National Park, have not been adequately taken account of. These include the realistic protection of the range of habitats for the Small Scabious Mining-bee *Andrena marginata* that has been recorded from the site. This bee is a conservation priority species known from only a very few locations in the National Park where it is under acute threat. It is on the Cairngorms Nature Action Plan 2013 shortlist, and for purposes of the Nature Conservation (Scotland) Act 2004 is on the Scottish Biodiversity List. It is the bee considered most likely to go extinct in Scotland and it has declined substantially over most of its former range.

The planning surrounding these two sites is already complex (referred to by the CNPA's Head of Planning as "unduly complex" in his Planning Paper of 1 August 2014). These variations to conditions would add another layer of complexity, increasing the difficulties for the public in engaging effectively in the planning process and making enforcement of planning conditions liable to be more problematic.

There have been problems for the public in accessing and submitting information electronically due to the Council's eplanning website having been down.

BSCG requests the opportunity to address the planning committee when these applications are considered.

Yours sincerely


Gus Jones
Convener

38 Callart Road,
Aviemore

10 January 2015

Dear Mr McCracken,

Re Planning Applications: 14/03676/S42 and 14/03675/S42

I wish to record my objection to both of these applications.

These applications are seeking to vary the Reporter's decisions and conditions. The Reporter has presented reasoned and careful conditions, which are clear and not ambiguous as alleged by the applicants.

Re Variations to Conditions 1 and 12 - Timing

The applicant informs/accepts the Reporter has stated there may be a plot-by-plot approach. The applicant states that their variation "changes very little". They accept they are essentially needlessly wishing to change this variation except to make what is clear in the Reporter's decisions clearer

Because the Reporter's decisions are clear, and this accepted by the applicant, then there is absolutely no need to make a variation. To change the Reporter's Condition is likely to lead to a fragmented approach to construction.

Re. Variation to Condition 11 - Phasing

The applicant states it is "not impossible (to build in a north to south direction) thiswould raise issues ..."

Planning permission is about protecting an area and for a community, in terms of disturbance, health and safety. It is not about easing the burden for developers.

By making it a condition for the developer to build in a north to south direction the Reporter sought to protect the community, and community use of this last wooded land in the north-east of Aviemore. By laying all the infrastructure into the whole site first of all the Reporter is ensuring there will not be constant construction as a plot-by-plot approach is undertaken.

Building in a north to south direction will minimise the issues raised by the applicant. An orderly approach like this will mean that the residents of completed Phase1 will experience limited disturbance, and so on for Phase 2 and 3 as each phase is completed, moving southward. As residents on already completed phases pass through they will be using previously completed public roads

Therefore, health and safety issues for the general public are kept to an absolute minimum by following the Reporter's Condition. He has obviously thought through the implications of direction very carefully.

To alter the order of the phasing, as suggested by the letter from Messrs Halliday, ie. in another direction, will result in a prolongation of disturbance, disruption and safety issues for many more people.

Health and Safety issues abound if the direction of build is changed.

This area has many paths used by the general public. A survey of people using this area for walking some-time ago showed that the number of people using this area amounted into hundreds. One important path borders the Spey Valley Golf Course, and proceeds northwards to the junction with a path going across the woods from the junction of Corroun and Callart Road. These paths then meet at the gateway leading onto the Spey Valley Golf Course, and here the public can cross to reach the Speyside Way, a very popular route for members of the public, and very much used by tourists.

By following the Reporter's decision the building of the northern-most properties will be completed first, and the development continuing south of the path and the important gateway. Thus, by building Phase 1 first and then moving on any health and safety issues for the general public walking here will be removed.

Any other approach is likely to increase and prolong health and safety issues regarding walkers in this area.

The developer says they can build in a north /south direction in accordance with the Conditions placed on the application. Therefore the Reporter's decision should not be varied.

Re Variation of calculation for provision of Affordable Housing

At the time of the Appeal the Reporter stated "the appeal papers include a figure (for affordable housing) apparently acceptable to both parties". The number of properties to be built has not altered since the time of the appeal in 2010. Therefore, the method of calculation does not require to be altered; variation would be pointless. Thus, the Reporter's Condition should not be varied.

These applications to vary the Reporter's Conditions should be rejected - notwithstanding the fact that that we are dealing with applications almost 2 years past the 3 year limit as specified in the Town and Country Act (Scotland) 1997 and as revised, and are therefore beyond the limits for consideration.

Yours sincerely

John Nethercott