OUTER HOUSE, COURT OF SESSION

[2007] CSOH 180

OPINION OF LORD TURNBULL

in the cause

DALFABER ACTION GROUP

First Appellants;

MOYRA GRAY

Second Appellant;

against

THE SCOTTISH MINISTERS

First Respondents;

REDHAVEN ESTATES

Second Respondents:

First and Second Appellants: Connal, QC; McGrigors
First Respondents: Springham; M Sinclair, Solicitor to the Scottish Executive
Second Respondents: O'Carroll; Brodies, W.S.

15 November 2007

Introduction

[1] This is an appeal brought in terms of section 239 of the Town and Country Planning (Scotland) Act 1997 ("the 1997 Act") by, firstly, the Dalfaber Action Group and the office bearers thereof and secondly Moira C Gray. The appeal seeks to challenge a decision of the Scottish Ministers by their reporter dated 16 November

2006 concerning an area of ground at North Dalfaber, Aviemore. The respondents are, firstly the Scottish Ministers and secondly Reidhaven Estates Limited.

History

[2] By application dated 17 February 2005 the second respondents sought outline planning consent for a residential development comprising 101 (subsequently amended to 104) serviced housing plots, all associated roads and access points and all associated engineering and landscape works at the site which they owned at North Dalfaber, Aviemore ("the site"). Although an application for outline planning permission, the application was accompanied by detailed plans and drawings, showing the position of access roads and house plots. The planning authority to whom application was made was the Cairngorm National Park Authority. By letter dated 6 March 2006 the planning authority intimated its refusal to grant outline planning permission specifying three separate reasons. The second respondents sought to appeal the planning authority's decision in terms of section 47 of the 1997 Act and the reporter was appointed to determine the matter. The appeal to the reporter was determined on the basis of written submissions and a site visit. In a reasoned decision dated 16 November 2006 the reporter allowed the second respondents' appeal and granted outline planning permission subject to the conditions as set out in Annex A of his letter. Condition 1 explained that approval was for a development of up to 104 residential units, of which 25 were to be affordable units. Condition 2 explained that the layout plan submitted with the application was not approved and that a revised layout was to be agreed with the Cairngorm National Park Authority as part of a reserved matters approval application. The first and second

appellants now seek to challenge the reporter's decision on ten grounds as set out in the Record prepared for the hearing before me.

Appellants' Submissions

[3] Mr Connal, QC who appeared for both appellants presented the case on their behalf without distinguishing on any point between either appellant. He sought to argue that the reporter had erred in law in his treatment of various issues before him and had failed in his duty to give adequate reasons for the decision taken.

[4] In his principal argument Mr Connal sought to define what he submitted was the central issue before the reporter for determination. Mr Connal drew my attention to the terms of the Badenoch and Strathspey Local Plan as adopted by the Highland Council in September of 1997 (number 6/2 of process). The site was located within one of the areas which the local plan had identified as being allocated for a mix of housing and related community facilities. As could be seen from paragraph 6.1.2(c) this area had been identified as suitable for housing development:

> "with residential enclaves being absorbed within compartments of woodland and modulated according to localised physical characteristics, landform and other site planning factors".

However, the local plan also adopted a strategy of protecting amenity woodland and its settlement diagram showed woodland at North Dalfaber as enclosing "pockets" for development marked as new or long term. The proposed development was within these so called pockets but also encroached beyond these and into the surrounding amenity woodland. This encroachment formed a significant aspect of the appellants' opposition to the proposed development, as argued before the reporter. Accordingly Mr Connal said that it was not the principal of residential development which was

truly at issue before the reporter, but rather the detail of the particular development proposed.

[5] Mr Conal referred to the fact that the second respondents had submitted a detailed plan of the proposed development to the reporter which was not said to be indicative only. It set out the locations and sizes of each of the proposed 104 plots. It was the question of this particular development which he said the parties had joined issue over. Accordingly, when one saw that the reporter had both refused to approve of the layout plan submitted and granted planning permission for a development of "up to 104 residential units", as found in condition 1 and 2 of Annex A, it could be seen that he had failed to address the principal issue in the appeal before him and had arrived at a decision which did not reflect the requests made of him by any party. As Mr Connal put it, the reporter was faced with a stark choice, either to allow the development proposed or to refuse to allow it.

[6] Further, it was said that once the reporter had decided not to approve of the detailed layout proposed by the developers there was no material before him to justify a decision to grant outline planning permission for "up to 104 residential units". Once his decision in principle had been taken it was said that there ceased to be any relevance at all to the figure of 104. Before he was entitled to come to the decision he did the reporter would have needed to see evidence that it remained possible to locate up to this number of houses within the site without encroaching on the amenity woodland. In any event, it was argued that the decision letter was silent as to the reporter's reasoning on his approach to this aspect of his decision

[7] As a further limb to this argument Mr Connal submitted that the reporter had failed to comply with his duty in terms of section 25 of the 1997 Act to determine the appeal before him in accordance with the local development plan unless material

considerations dictated otherwise. He drew my attention to the fact that at paragraph 38 of his decision letter the reporter had noted that the extent of the amenity woodland provided for by the local plan was not fully reflected in the proposals being advanced and that the entire affordable housing provision was located within the amenity woodland. He went on to point out that in paragraph 39 of his letter, when drawing together the issue of compliance or otherwise with the local plan, the reporter said:

> "Even allowing for some latitude, the proposals go further that the plan clearly intended, and to that extent they are not fully in accordance with the local plan. Taking the development plan as a whole, the proposals meet the principles regarding housing development, whilst falling short of the specific aspects regarding amenity woodland in the local plan."

It could be seen, said Mr Connal, that in his decision letter the reporter then went on to address the question of material considerations. Accordingly he did so without first deciding the crucial issue of whether the proposals accorded with the local plan or did not. It was, he said, as if a sentence was missing from the end of the passage quoted.

Subsidiary Arguments

[8] In addition to his main attack on the reporter's decision Mr Connal advanced a number of other arguments to the effect that the reporter had failed to give consideration to and determine significant matters placed before him. These arguments took in five propositions:

1. The reporter had failure to determine the natural heritage issues advanced by the Cairngorm National Park Authority as founded upon the information produced by their Natural Heritage Group.

2. The reporter had failed to deal with the issue of maintenance and management of the woodland in the context of the insertion of private housing within the amenity.

3. The reporter had failed to deal with the national planning policy on integration of affordable housing.

4. The reporter had failed to require an agreement under section 75 of the 1997 Act in relation to the affordable housing issue before him.

5. The reporter had failed to deal with the issue of flood risk which it was said was before him.

It was also said that he had failed to explain his reasoning in respect of each of these matters in his decision letter.

[9] Finally, Mr Connal also argued that the reporter had erred in law in his treatment of the aims of the National Park. It was not disputed that the site fell within the Cairngorm National Park. The Cairngorm National Park Authority had been established in terms of the National Parks (Scotland) Act 2000 ("the 2000 Act") to exercise functions in relation to the Park. Section 10 of the 2000 Act provides for a National Park authority being designated as the planning authority for the Park for the purposes of the planning Acts. It was accepted that such designation had occurred in the present case. Section 1 of the 2000 Act provides as follows:

> **"The National Park aims**
>
> In this Act, references to the National Park aims are to the following aims in relation to an area –
>
> (a) to conserve and enhance the natural and cultural heritage of the area,
>
> (b) to promote sustainable use of the natural resources of the area,

(c) to promote understanding and enjoyment (including enjoyment in the form of recreation) of the special qualities of the area by the public, and

(d) to promote sustainable economic and social development of the area's communities."

Section 9 of the 2000 Act provides, so far as relevant, as follows:

"**General purpose and functions**

(1) The general purpose of a National Park authority is to ensure that the National Park aims are collectively achieved in relation to the National Park in a co-ordinated way.

(2) A National Park authority has, in relation to the National Park –

(c) such planning functions as may be conferred under section 10,

(6) In exercising its functions a National Park authority must act with a view to accomplishing the purpose set out in subsection (1); but if, in relation to any matter, it appears to the authority that there is a conflict between the National Park aim set out in section 1(a) and any other National Park aims, the authority must give greater weight to the aim set out in subsection 1(a)."

[10] Mr Connal's submission was that there was now an element of interplay between the reporter's duty in terms of section 25 of the 1997 Act and the aims of the National Park authority as found in the 2000 Act. It was said that he, like the National Park authority, was bound by section 9(6) of the 2000 Act to prioritise the aims of the National Park. It could be seen, said Mr Connal, that the reporter had failed to appreciate and give effect to this legal requirement.

Respondents' Arguments

[11] For the first respondents Miss Springham commenced by seeking to identify the approach which the Court ought to take to an appeal brought in terms of section 239 of the 1997 Act. She reminded me that in terms of that section the validity of the reporter's decision could only be challenged on the basis that it was a decision which was not within the powers of the Act or that any of the relevant requirements had not been complied with in relation to that order. She referred me to the speech of Lord Clyde in *City of Edinburgh Council* v *Secretary of State for Scotland* 1998 SC (HL) 33 at pages 43 to 45 in order to vouch her submissions as to the relevance of the local development plan to the reporter's decision and to the primacy which must be given to his assessment of the weighting to be given to the various relevant considerations. In her submission the reporter had said all that was necessary in his decision letter to permit the parties, who were well aware of the issues, to properly understand the basis for his decision. In any event she submitted that the appellants could not point to any prejudice which they had suffered as a consequence of the way in which the reasons had been articulated.

[12] As further context to her submissions Miss Springham also took me to the definition of "outline planning permission" as found in section 59 of the 1997 Act and the definition of "reserved matters" as found in regulation 2(1) of the Town and Country Planning (General Development Procedure) (Scotland) Order 1992.

[13] Miss Springham then went on to submit that the principal argument advanced by the appellants ought not to be given effect to. She submitted that in light of the wide powers available to the reporter in deciding an appeal in relation to an application for outline planning permission it was perfectly competent for him to allow the appeal in part and to grant planning permission on an outline basis subject

to conditions. She drew my attention to the fact that in their written submissions to the reporter (number 6/11 of process), as an alternative to their principle argument, the developers had sought the approval of such elements of the application as the reporter thought justified, including outline consent for 104 residential units at the site. The reporter had acknowledged this, as could be seen from paragraph 22 of his decision letter. Miss Springham pointed out that although both the Dalfaber Action Group and the Cairngorm National Park Authority had been aware of the content of the developer's written submissions to the reporter and had each tendered their own (6/14 and 6/12 of process respectively), neither had commented on the developer's alternative request. Accordingly, she submitted that all concerned were aware of what the reporter had been asked to do. It was incorrect to say that the only question before him was whether to grant the application in keeping with its detailed layout or to refuse it. It was equally incorrect to say that he had decided a question which had not been asked of him.

[14] Miss Springham also submitted that the reporter had ample material before him to entitle him to conclude that the site could accommodate up to 104 residential units. She submitted that this arose from the fact that he had before him a request that outline permission for this number be granted and the fact that the local plan included an assessment that the designated area had a capacity for two hundred and fifty houses, within which one hundred had already been built. Since the reporter had only granted outline planning permission the detail of the layout for individual plots was to be determined by application for approval of reserved matters. This process would in turn determine the total number of units to be permitted within the site under the umbrella of the outline permission granted.

[15] Miss Springham also pointed out that the appellants had focussed their argument to the reporter around the issue of encroachment into the amenity woodland. They had accepted that the local development plan acknowledged the appropriateness of residential development in principle. Accordingly they had in fact been successful in this argument before the reporter and it was difficult now to understand why they were taking the point they were. In any event she submitted that it could be seen from a reading of paragraphs 36 to 38 and 47 of the reporter's decision letter that he had properly identified what the local development plan was and had decided that the proposal was in keeping with this plan, subject to the extension beyond the pockets identified for housing. It was, she said, entirely within his powers to permit the application but to decline for this reason to give approval to the specific layout.

[16] Miss Springham went on to submit that it was perfectly clear that the reporter had been aware of the Natural Heritage issues put before him and those relating to the maintenance of the woodland, as could be seen both from the content of his decision letter and from the conditions which he had attached. She submitted that in his reasons on these matter, as with the others under challenge, the reporter had said all that he needed to and left the informed reader in no substantial doubt as to his conclusions on the determining issues. She also said it was difficult to understand in what way the appellants were claiming to have been prejudiced on account of a deficiency in reasons. She submitted that nowhere within the Record did one find any averment as to the prejudice which they had suffered and that none had been identified on their behalf in submissions. On the matter of flood risk it was submitted that this had not been an issue before the reporter, as it had not been referred to in the written submissions presented on behalf of the planning authority or the present appellants. Nor had it featured as a ground of refusal of the application by the

planning authority. In any event it was argued that conditions 6(c) – (f) adequately dealt with any concern and reflected the conditions asked for by the planning authority in the event of the reporter granting the application.

[17] In response to the appellants' submissions relating to the issue of affordable housing Miss Springham submitted that one had to remember that the reporter had declined to approve of the detailed layout suggested. Although he had stipulated in condition 1 that there had to be 25 affordable housing units the location of these was a matter, like all other details, which would have to be resolved by further application to the planning authority. It followed that he could not be criticised in the way the appellants had sought to do for declining to say anything about how these units were to be integrated. Miss Springham also submitted that whether the matter of affordable housing was to be dealt with by requiring an agreement in terms of section 75 of the 1997 Act, or by imposing conditions, was a matter for the planning judgement of the reporter.

[18] When it came to the challenge arising out of the provisions of the 2000 Act Miss Springham said that it was clear from paragraphs 43 and 44 of his decision letter that the reporter had given consideration to the aims of the National Park authority. She argued that the weight to be given to these aims was a matter for planning judgement and could not be attacked in the absence of an argument that the reporter had acted perversely or irrationally, which had not been advanced. Again, on the matter of reasons, it was said that the reporter had said as much as was necessary.

Second Respondents

[19] Mr O'Carroll, who appeared on behalf of the second respondents, adopted the submissions presented by Miss Springham and since much of what he wished to say

overlapped with what had already been submitted took me through his own submissions expeditiously. He also provided me with a written note of submissions for ease of following. In revisiting the various arguments presented by the appellants he submitted that the points advanced failed to acknowledge both the powers available to a reporter and the correct nature of outline planning permission. He also submitted that the terms of the 2000 Act had not altered or modified the reporter's obligation to give effect to section 25 of the 1997 Act.

Discussion

[20] The reporter is required to make a decision by reference to the provisions of the local development plan and to other material considerations (1997 Act, sec 37(2); sec 48(5)(a)). Unless material considerations indicate otherwise he has to make his determination in accordance with the development plan (1997 Act, sec 25). What weight he gives to the various matters brought to his consideration is for the planning judgement of the reporter and is not open for review before the court, (*City of Edinburgh Council* v *Secretary of State for Scotland)*. The court can only quash the decision of a reporter on the limited grounds set out in section 239 of the 1997 Act.

[21] The starting point is to define the nature of the application being considered by the reporter and to identify his powers in that regard. As can be seen from their brochure (number 7/27 of process) the second respondents had reached the stage of setting out their aspirations in detailed form to the planning authority. They did not intend to build a residential development in the regularly encountered sense. They had in mind that the available plots would be sold on to purchasers who would instruct the construction of individualised homes to their own personalised design choices, within the framework of a design guide which sought to reflect the aims of

the National Park. The developers had hoped that if outline planning consent which included approval for the layout and plots sizes they suggested could be obtained, then the benefit would be a reduced burden on the purchasers when it came to seeking approval for the individual homes to be built. However, it is clear that throughout the history of the application it was understood to be an application for outline planning permission. This is how it is described in the original planning application document (number 7/1 of process) in box 1 under the heading "Type of application". This is how it was understood in the report on called-in planning application prepared for the Cairngorm National Park Authority (number 7/3 of process). In this document at paragraph 9 it is explained that:

> "Outline planning permission is sought in this application for 104 serviced house plots, all associated roads and access points and all associated service engineering and landscape works. The standard information required in an outline planning application has been supplemented by a series of indicative drawings, showing details of the position of access roads and house plots."

As the reporter explains it in paragraph 3 of his decision letter:

> "Although an outline application, the submitted plans include a detailed layout, not marked indicative, for the plot layouts, roads and access points, service engineering works and landscaping, for which approval is sought as part of the outline permission."

Outline planning permission is defined (for the purposes of this appeal) by section 59 of the 1997 Act which provides:

> "(1) In this section "outline planning permission" means planning permission granted, in accordance with the provision of regulations or a development order, with the reservation for subsequent approval by the

planning authority or the Secretary of State of matters not particularised in the application ("reserved matters")."

The definition of reserved matters found in the Town and Country Planning (General Development Procedure) (Scotland) Order 1992 at article 2(1) is as follows:

"reserved matters in relation to an outline planning permission or an application for such permission, means any matters in respect of which details have not been given in the application and which concern the siting, design or external appearance of any building to which the planning permission or application relates, or the means of access to such building, or the landscaping of the site in respect of which the application was made;"

[22] The powers of the reporter in dealing with an appeal are, as set out in section 48(1) of the 1997 Act, to:

"(a) allow or dismiss the appeal, or

(b) reverse or vary any part of the decision of the planning authority (whether the appeal relates to that part of it or not)"

The reporter is also empowered to deal with the application as if it had been made to him in the first instance. It is beyond question that the second respondents put before the reporter a request that he grant outline planning permission for 104 houses in the event that he was not prepared to approve of the detailed layout submitted. This can be seen from the written submissions presented on their behalf (number 6/11 of process paragraph 2.2). It is acknowledged by the reporter at paragraph 22 of his decision letter. Standing the nature of the application before him and the wide powers available to him it is incorrect to argue that the reporter's obligation was either to grant the detailed application as it stood or to refuse it. Nor, standing the second respondents' submission to him, is it correct to say that he decided a matter which was

not asked of him. It should also be noted in this connection that the planning authority put before the reporter a list of conditions which they wished him to consider imposing in the event of the application being granted.

[23] What the reporter decided to do was to grant outline planning permission subject to detailed conditions in the understanding that all issues relating to location, design and impact on the surrounding amenity could be dealt with by the planning authority in applications for approval of reserved matters. Article 6 of the Town and Country Planning (General Development Procedure) (Scotland) Order 1992 provides that such applications require to be accompanied by such particulars and such plans and drawings "*as the authority may require as necessary to enable them to deal with the applications*". In doing so the reporter placed a ceiling of 104 units on the development. I was satisfied on the basis of the submissions presented on behalf of the respondents that there was material before the reporter to underpin this decision. The local plan had envisaged up to 250 houses within the area at North Dalfaber. One hundred had already been built. The reporter has accepted the developer's submission (noted at paragraph 12 of his letter) that the figure suggested by them is well within the remaining estimated capacity for the designated area. In addition it is obvious that he cannot select a particular number since he has deferred all questions as to layout and plot size to reserved matters applications. As Miss Springham said, it is the detail of the still to be approved layout plan which will determine the number of properties within the development. Putting aside the question of whether the reporter's decision is otherwise open to challenge, I am satisfied that he has adopted a competent course of action.

The Reporter's Approach

[24] As was accepted by Mr Connal, the local plan had allocated the area within which the development was proposed for residential development, at least within the pockets shown on the settlement diagram. The reporter refers to the local plan correctly by name in paragraph 12 of his decision letter and refers to its content at paragraph 13, when summarising the developer's submissions to him, paragraphs 24, 25 and 26, when summarising the planning authority's submissions and in paragraphs 36, 37, 38, 39 and 47, when explaining his decision. In their written pleadings in the present case the appellants quote two of three sentences in paragraph 39 of his decision letter and seek to argue that he failed to address himself to the question of whether the application accorded with the development plan. The whole paragraph reads as follows:

> "39. Drawing all these points together, I find the appeal site as a whole to be located in an area which in principle is designated in the local plan for development, subject to the retention of substantial areas of amenity woodland. Even allowing for some latitude, the proposals go further than the plan clearly intended, and to that extent they are not fully in accordance with the local plan. Taking the development plan as a whole, the proposals meet the principles regarding housing development, whilst falling short of the specific aspects regarding amenity woodland in the local plan."

Paragraph 47 of his decision letter reads as follows:

> "47. Taking the material considerations together, as the issues relating to the extent of the amenity woodland and informal recreation areas can be addressed at the detailed planning stage, in line with NPPG 14 guidance, I find

nothing to justify the refusal of planning permission for a development that accords with the principle, if not the letter of the development plan."

Condition 2 of Annex A to the decision letter reads:

"2. For the avoidance of doubt the layout plan submitted with the application is not approved. A revised layout shall be agreed with the Cairngorm National Park Authority (CNPA) as part of the reserved matters approvals referred to below. *Reason:* because the application is in outline, and the submitted plan does not adequately reflect the local plan intentions for the application site with regard to the retention of amenity woodland."

From these references it is, in my opinion, quite clear that the reporter's understanding of the local development plan cannot be faulted and that he has accurately held that, subject to the proposed encroachment into the amenity woodland, the proposals were in accordance with it.

Failure To Determine Significant Issues Put before Him

[25] It is clear from what the reporter said in paragraphs 19 and 28 of his decision letter that he understood the natural heritage issues which were advanced before him. A reading of paragraphs 38, 39, 43 and 46 demonstrates that he was well aware of the importance of preserving the amenity woodland and that this consideration drove him to rejecting the particular layout proposed by the second respondents. However, all of these issues were addressed by him in the context of a site which was intended for housing development. As he states in paragraph 43 of his decision letter:

"Regarding the first aims of the National Park, with regard to the natural heritage there are no specific designations covering the appeal site, and whilst the woodland has obvious important local value the site is intended for

> housing development in the local plan. I have already found that whilst the detail of the proposal as it stands is not acceptable this can be addressed through conditions, allowing the most important elements of the woodland to be protected."

These issues were before the reporter as matters of planning judgement. In the exercise of that judgement he has weighed them and arrived at a decision. His decision included the imposition of conditions 2, 12 and 14 which were designed to afford the appropriate protection to the natural heritage in light of the introduction of a housing development.

[26] The appellants' submissions under reference to the subject of affordable housing were in my view misconceived. The reporter has imposed a condition that the development requires to include a total of 25 affordable housing units. This number is fixed regardless of how many other houses are eventually given approval for. His decision is in keeping with national planning policy as can be seen from paragraph 35 of his decision letter. The complaint as to there being no detail as to the way in which these units are to be integrated into the remainder of the development fails to acknowledge that the entirety of the layout for the development has been left by the reporter to the planning authority as part of the reserved matters application process. Since the eventual layout has not yet been suggested it is illogical to argue that the reporter ought to have determined the way in which adequate integration was to be achieved. Equally, there was no need for the reporter to require an agreement in terms of section 75 of the 1997 Act. The way in which affordable housing is to be provided or managed is not a matter for outline planning permission. It is for the planning authority and other interested parties at the stage of a reserved matters application. The reporter's decision to deal with the matter by condition rather than

require a section 75 agreement, as expressed at paragraph 48 of his decision letter, is in line with national planning policy, as can be seen from the Scottish Executive's Planning Advice Note 74 on affordable housing at paragraph 41 (number 7/24 of process).

[27] The appellants' written pleadings contain the proposition that that the reporter erred in his treatment of flood risk. In advancing his submissions Mr Connal took me to the Scottish Executive's Planning Policy Number 7 "Planning and Flooding" (number 6/4 of process). He also took me to the report of the Scottish Environment Protection Agency who were consultees in the planning process (number 6/16 of process). The argument appeared to be that as a consequence of the content of number 6/16 of process there was an issue as to flood risk before the reporter. That issue ought then to have been dealt with in line with national policy as found in number 6/4 of process and as a consequence the reporter ought to have obtained a flood assessment report before granting outline planning permission. It was then submitted that since he had not followed national policy and had failed to give a reason for this his decision was open to challenge. When it came to an examination of this issue it became clear that if flood risk was truly before the reporter then it was only so in a very limited sense. It was not given as a ground of refusal by the planning authority. It was not advanced by the planning authority or the appellants in their written submission to the reporter. No objection was advanced to the grant of outline planning permission by the Scottish Environment Protection Agency, they being content that relevant conditions would be imposed. The report which Mr Connal founded upon at 6/16 of process contained a request by the agency that three specific conditions be imposed in order to prevent water pollution. By way of distinction the report also contained a suggestion that a flood risk assessment should

be carried out for the site. Mr O'Carroll in his submissions also drew my attention to number 7/16 of process which was a drainage impact assessment for the site prepared by a firm of consulting structural and civil engineers. Paragraph 11 of that document stated that:

> "There is no known flooding history for this site. We enclose a response from SEPA relating to the flood history of the site"

In the result the reporter, as suggested by the planning authority, imposed a number of conditions to the grant of outline planning permission which addressed this issue. These can be seen in conditions 6(c) to 6(f), 8 and 9. These requirements were all imposed as conditions precedent to the commencement of work starting in connection with the development of individual plots.

[28] When it came to advancing his argument regarding the impact of the 2000 Act Mr Connal submitted that the reporter had not said very much about the relevance of the aims of the National Park policy in the decision which he had to make and that he had not given the aims of the National Park their due importance. As I understood him his argument was that in light of the interplay between the two statutory provisions outlined the reporter had made an error of law.

[29] Beyond providing that the National Park authority may be designated by order as the planning authority for the purposes of the planning acts, the 2000 Act makes no reference to how the authority ought to perform such functions. In particular it makes no reference to the general duty set out in section 25 of the 1997 Act to make a determination in accordance with the development plan unless material consideration indicate otherwise. I agree with the submissions made on behalf of each of the respondents that this duty is not displaced by the terms of either section 1 or section 9 of the 2000 Act. In my opinion, the effect of the 2007 Act is that the aims of the

National Park are material considerations to which the reporter may give whatever weight he deems appropriate in the exercise of his planning judgement. It is clear that the reporter was aware of the National Park aims. He notes that they featured in the decision made by the Cairngorm National Park Authority. It was because of the fact that the second respondents' original proposals affected the natural heritage of the area in a way which he deemed to be unacceptable that he declined to give them the permission they sought. In paragraphs 43, 44 and 46 of his decision letter the reporter makes reference to the various aims of the National Park and explains how in his view these can be adequately accommodated. These views are then underpinned by conditions 11, 12 and 18(c). The effect of the reporter's decision is in fact to give priority to the first of the National Park Aims over the fourth.

[30] For the reasons outlined above I am satisfied that the reporter did give consideration to all of the material issues which were placed before him. I am satisfied that he identified what the determining issues were and that he applied his planning judgement to the question of how these were to be resolved. No argument was advanced before me to the effect that in the assessment of any relevant consideration the reporter had acted irrationally or in a perverse manner.

Adequacy of Reasons Given

[31] On the matter of the responsibility imposed on the reporter to give adequate reasons for his determination of the issues before him I was referred to *Wordie Property Co, Ltd.* v *Secretary of State for Scotland* 1984 SLT 345, *Moray Council* v *The Scottish Ministers* 2006 SC 691, *Perth and Kinross Council* v *Secretary of State for Scotland* 1999 SC 144, *Save Britain's Heritage* v *Number 1 Poultry Ltd* [1991] 1WLR 153, *South Bucks District Council and Another* v *Porter* (No 2) [2004]

1WLR 1953 and *Edwin Bradley & Sons* v *Secretary of State for the Environment and Others* (1984) 47 P&CR 374. The import of this line of authority was most recently considered and drawn together in the opinion of the Lord Justice Clerk in the *Moray Council* case. At paragraphs 30 and 31 of his opinion he explained the duty in this way:

> "[30] The reporter must then decide in the light of his findings how he resolves the determining issues. This involves the exercise of his planning expertise and judgement. In his decision letter he must set out the process of reasoning by which he reaches his decision; but that does not require an elaborate philosophical exercise. Nor does it require a consideration of every issue raised by the parties. The reporter is entitled to confine himself to the determining issues. So long as his reasons are intelligible and adequate, he is entitled to express them concisely. The guiding principle is that the decision letter should leave the informed reader in no substantial doubt as to the reporter's findings in fact and conclusions on the determining issues, and as to the way in which he has applied section 25 of the 1997 Act in reaching his decision (*Perth & Kinross Council* v *Secretary of State for Scotland*).
>
> [31] Lord Brown of Eaton-under-Heywood has observed that 'Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision' (*South Bucks District Council* v *Porter (No 2)*, para 36)."

[32] Applying this approach to my examination of the reporter's decision letter I find that the determining issues in this case were clear cut and that it was obvious to the parties what they were. In my opinion a fair and reasonable reading of the reporter's letter makes it obvious not only what he considered the principal controversial issues to be but also discloses the other matters which he took account of. His reasoning in the resolution of these issues is clear from the particular paragraphs and conditions to which I have referred in analysing the submissions advanced. Adopting the words of Lord Brown of Eaton-under-Heywood in the *South Bucks* case, there is no mystery as to what moved the reporter. Nor was there in any event any averment or meaningful submission as to the nature of the prejudice which it was said the appellants had suffered. Mr Connal sought to rely on one of the examples given by Lord Bridge of Harwich in the *Save Britain's Heritage* case as to where prejudice might arise. At page 167 letter G-H his Lordship had explained that:

> "... an opponent of development, whether the local planning authority or some unofficial body like Save, may be substantially prejudiced by a decision to grant permission in which the planning considerations on which the decision is based, particularly if they relate to planning policy, are not explained sufficiently clearly to indicate what, if any, impact they may have in relation to the decision of future applications."

[33] No such difficulty arose for the present appellants. It is perfectly obvious what policy influenced the reporter and how that impacted on his decision. As he explained, he left all issues concerning the layout of the development and issues as to impact on and management of the amenity woodland to reserved matters applications. These will be decided within the framework of his decision to grant outline planning

permission and the provisions of the local development plan which identifies the need to protect the areas identified as amenity woodland.

Decision

[34] For the reasons given above I will refuse to give effect to the appellants' motion to quash the decision of the reporter dated 16 November 2006. I will grant an award of expenses against the appellants in favour of each of the first and second respondents.