

**THE HIGHLAND COUNCIL
TOWN AND COUNTRY PLANNING (SCOTLAND) ACT 1997
PLANNING APPEAL BY AVIEMORE & HIGHLAND DEVELOPMENTS LTD**

**PROPOSED HOUSING AND [COMMERCIAL DEVELOPMENT, REPLACEMENT
LORRY PARK*], PRIMARY SCHOOL SITE AND AMENITY GROUND ETC:
LAND SOUTH OF CRAIGIE AVENUE, BOAT OF GARTEN.**

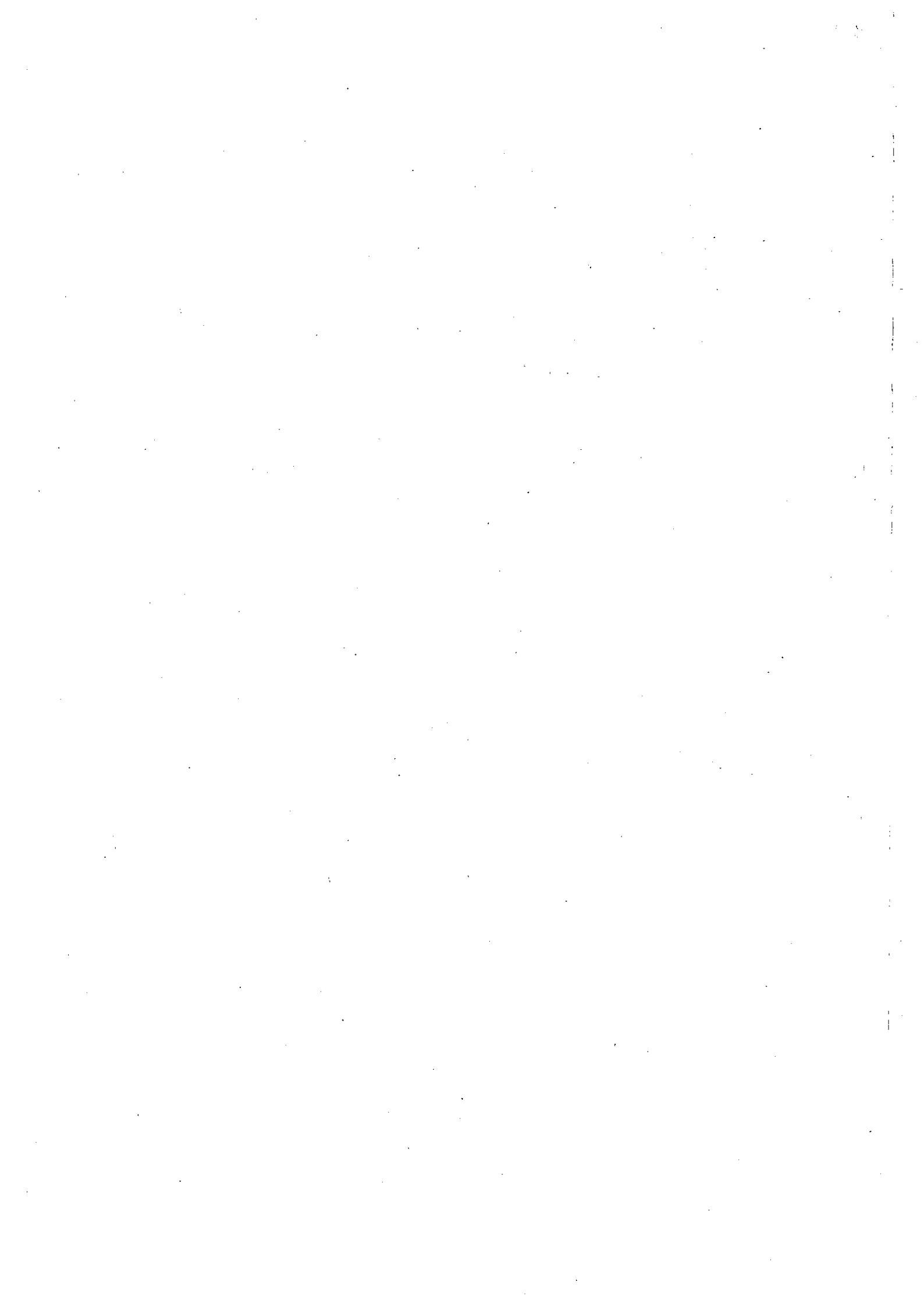
REPORT OF AN ACCOMPANIED SITE INSPECTION

* Items in brackets deleted from amended scheme

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Inspection date: 10 April 2006

File Ref: PPA/270/380



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File Reference; PPA/270/380

07 June 2006

The Scottish Ministers
Edinburgh

**REPORT OF AN ACCOMPANIED SITE INSPECTION ON 10 APRIL 2006:
PLANNING APPEAL (AGAINST NON-DETERMINATION) BY AVIEMORE AND
HIGHLAND DEVELOPMENTS LTD: HOUSING AND [COMMERCIAL
DEVELOPMENT, REPLACEMENT LORRY PARK*] PRIMARY SCHOOL SITE
AND AMENITY GROUND ETC: LAND SOUTH OF CRAIGIE AVENUE, BOAT OF
GARTEN.**

* The elements in brackets have been deleted from the current version of the application.

The persons present:

Mr D Cameron)
Mr M Gillespie) Aviemore & Highland Developments Ltd
Mr A Munro)
Mr B Muir, Muir Smith Evans (Agent)
Mr A Rennie, Bracewell Stirling Architects

Mr A McCracken, Highland Council [HC]
Mr A Tait, The Cairngorms National Park Authority [CNPA]
Ms A Elliott, Scottish Natural Heritage [SNH]

Mr A Norval) Seafield Estates
Mr R Furniss)

Mr J Roberts) Royal Society for the Protection of Birds [RSPB]
Mr K Kortland)
Dr A M Jones) Badenoch & Strathspey Conservation Group [BSCG]
Mrs T Jones)
Mrs B Davison Boat of Garten & Vicinity Com Council [B of G CC]
Mr I Murray Boat of Garten Community Hall Company

Mr A Bateman
Mr J Davison
Mr J Dunbar
Mr I Gow
Mr A Nisbet
Mrs G Nisbet
Ms Anne S Ross
Mr R Turnbull

Description of the site and surroundings

1. The application site extends to 23.66 ha of forest, of plantation origin, south west of the nucleus of Boat of Garten (although the area currently proposed for development is roughly half this extent). This is due south of a football pitch and a car park at the west end of the village. It is of irregular shape and generally level with undulations, including localised crests in the eastern part of the site. A handful of paths cross the site, and National Cycle Route 7 passes close to the west of the site.

2. Woodland continues east of the site to the backs of residential properties in Kinchurdy Road. There is no vehicular access to the site - other than a track from the south west corner of the football pitch and which is used almost entirely as a footpath. The site presents a 150m (approx) frontage to Deshar Road west of the built up area. This wooded frontage carries a cycle route and is very visible on the approach to the village, even from the A95 at a range of almost 1 km to the north.

The proposal

3. The outline planning application (as amended) proposes residential development plus sites for a new primary school and a community bowling green etc to the east of the southern most houses. Indicative plans (as amended) show a layout of 41 affordable houses at the entrance from Deshar Road and 62 private houses on the remainder of the site.

4. Highland Council [HC] accepted the reduction of the area for development - but without variation of the original site boundary - plus the deletion of business and other uses, and the inclusion of affordable housing, all as competent amendments to the original planning application submitted on 26 July 2002. The amended proposal was subject to public re-advertisement with a response deadline of 14 September 2005.

Public and consultation responses

5. The original advertisement (response deadline; 5 September 2002) drew 44 representations or objections mainly from local residents, but also from bodies including the RSBP, the Scottish Wildlife Trust [SWT] and the Badenoch and Strathspey Conservation Group [BSCG]. In addition HC received a 90-signature petition objecting to the application.

6. The sum of the main concerns raised at this stage can be summarised as; (1) likely adverse effects of the character of the village, on high-value forest habitats including that of the Capercaillie, with associated policy tensions, impacts on recreational interests, tourism and therefore the local economy; (2) the apparently sudden growth involved, without thought for phasing; (3) the age and reduced relevance of the adopted local plan which survived SNH and RSPB objections, and its reduced relevance since the establishment of CNPA; (4) likely stresses on infrastructure, notably schooling and drainage; (5) the case for affordable housing rather than holiday/second homes; (6) disturbance and conflicts during development, and; (7) the lack of demand for more employment land in a village where businesses have closed.

7. The re-advertisement of the application (response deadline; 14 September 2005) drew 24 representations or objections. Again these came predominantly from local residents, but also from bodies including the RSPB and the Scottish Council for National Parks [SCNP].

8. In this second group of responses many welcomed the reduction in scale and the new emphasis on affordable housing; but many original concerns were restated. In brief summary, additional concerns related to impacts on existing water supplies, and to the density and layout. Attention was also drawn to the Consultative Draft National Park Plan which was said to better represent the interests of the area, and again to the natural heritage implications (including cumulative effects) – especially for Capercaillie and on its range across several SPAs. Attention was drawn to the high level of policy protection that this species enjoys, and to perceived inaccuracies in the appellant's Capercaillie Report.

9. Consultation responses (to the proposal as it stands) can be summarised as follows: -

- CNPA suggested that the revised proposal merits a new application, and objects both to the revised proposal and to the principle bearing in mind that the adopted local plan is out of date and the significant public opposition. It maintains that as amended the development would have still an adverse effect on the woodland which is a valuable natural resource and habitat, and an integral part of the landscape setting of the village. CNPA considers the amended proposal to be at odds with the first and second aims of the National Park (the conservation/enhancement of natural heritage and the promotion of the sustainable use of natural resources). CNPA is critical of the scale, density, character and suburban pattern of the proposed development which is said to be at odds with the character and pattern of development in Boat of Garten, and which would therefore be a negative influence of the area's cultural and built heritage. The development is also considered premature in relation to the emerging CNPA Local Plan. It lacks any provision for employment uses, and is therefore at odds with the fourth aim of the National Park (the promotion of economic development). The development is considered likely to diminish the informal recreational use of the area. It would therefore be at odds with the third aim of the National Park. Water and drainage constraints in any case stand in the way of the development.
- SNH objects on account of the loss of Capercaillie habitat and the additional disturbance for this species. The investigations undertaken on the appellant's behalf do not enable the agency to withdraw its original objection. The affected woodland is important for Capercaillie and holds a nationally significant number of birds. In addition any effects on this particular woodland could affect the integrity of populations in nearby SPAs at Kinveachy Forest, Abernethy and Craigmore Wood.
- Scottish Water objects to the application due to the lack of spare capacity in the local wastewater treatment plant. This objection may be considered withdrawn if conditions prohibit development pending agreement on the means of providing a drainage and water supply scheme, including the formal agreement of other affected landowners to off-site infrastructure. Satisfactory arrangements are likely to involve a separate drainage system with surface water disposal observing SUDS principles. In addition Scottish Water objects on account of the likely effect on the catchment of the Blackpark Water Treatment Works, but this part of the objection may be surmounted if it can be shown that the development would not have any such effects or preventative measures can be put in place.
- The Scottish Environment Protection Agency [SEPA] seeks a drainage strategy [observing SUDS principles] to accompany this application. This may involve a totally new WWTP or alternatively pumping to Aviemore. The agency stopped short of objecting in relation to foul drainage provided that details are acceptable to Scottish

Water. Concern is expressed over the creation of hard surfaces in place of woodland and over the increase in surface water run-off, which may justify an attenuation pond. The agency objects until such time as satisfactory surface water drainage proposals are available.

- The B of G CC reserves its position pending the production of a second amended plan containing assurances given at a public meeting on 13 September 2005. The points needing to be covered are; (1) the donation of the indicative primary school site to the community, and revisions to show vehicular access to the school and the proposed community hall; (2) the provision of foul drainage infrastructure between the site and any new or upgraded WWTP in advance of development. In addition an assurance is sought that the annual build-rate would be no more than 15 houses to ensure assimilation with the community, and to guard firmly against development on the rest of the application site.
- The Area Roads and Community Works Manager raises no objection in principle subject to all roads being to an adoptable standard. The basis of possible planning conditions dealing with a number of detailed requirements is set out in the consultation response dated 19 November 2002.
- The Area Education Manager reports that the roll of Deshar Primary School was expected to fall from 59 in August 2005 to 36 in 2011-12. The reply indicates that if 103 new houses are phased over several years, this roll would rise to 55 which is well within the capacity of 71 pupils.

The Development Plan

10. The Highland Structure Plan (the submitted extract) contains the following policies which are relevant in varying degrees:

Policy G1 – Conformity with Strategy: This indicates support for developments which, having regard to the plan's sustainability objectives, promote and enhance the social, economic and environmental wellbeing of the people of Highland.

Policy G2 – Design for Sustainability: This lists 13 criteria against which proposed developments will be assessed. In summary these are; (1) adequacy of infrastructure, (2) multi-mode accessibility, (3) energy efficiency, (4) freedom from natural hazards, (5) clear of safeguarding zones, (6) preferably using brownfield sites, (7) avoiding adverse impacts on amenity, (8) acceptable impacts on non-renewable resources; (9) acceptability of impacts in respect of habitats, species, landscape, scenery, freshwater and marine systems, cultural heritage and air quality, (10) sensitive siting design etc, (11) promotion of crime-free environments, (12) accommodating the needs of all sections of the community, and (13) contributing to the economic and social development of the community.

Policy G4 – Community Benefit and Commitment: This asserts an expectation that development will benefit the local economy and contribute to the wellbeing of the Highlands while recognising national interests (it also discusses community funds, developer contributions and financial bonds as possible means to the above ends).

Policy H2 – New Settlements: Despite the title of this policy, under its reference to the housing land supply is a statement that in Badenoch and Strathspey the housing land supply beyond 5 years can only be maintained if infrastructure investment is made to bring forward the Cambusmore site at Aviemore. It indicates that a local plan review will address requirements in later years.

Policy H3 – Housing in the Countryside: This prefers new housing development to take place within existing or planned new settlements and lays down the limited scope for permissible exceptions.

Policies H4 and H5 – Affordable Housing: These support the provision of affordable housing, the former seeking additional resources to this end, the latter looking to local plans to identify areas where there is an identifiable need. H5 also seeks to use Section 75 Agreements and other mechanisms to secure developer contributions where justified, while expecting affordable housing within a larger scheme to be of generally similar density and quality.

11. The Badenoch and Strathspey Local Plan (1997) allocates the site for housing development, and for business uses and community facilities in accordance with expectations set out in policies 5.6.2, 5.7.5, 5.7.6, 5.8.2 and 5.8.4. In addition surrounding woodland is covered by policies 5.10.1 (landscape corridor) and 5.10.6 (commercial forestry). Since these policies extend to 1½ pages, reference should be made to the texts found among the documents accompanying the appeal questionnaire. Nevertheless, in summary, the first 5 identify the site as having capacity for about 120 houses plus the other uses above, with an emphasis on (1) respect for existing village character, and (2) minimising natural heritage impacts. These intentions were to be delivered with the aid of a development brief prepared by HC and by Section 75 Agreements.

Main events giving rise to the appeal

12. In its original, more extensive, form the outline planning application was submitted to the HC on 26 July 2002. The latest drawings are dated March, June and September 2005. These, along with the second round of publicity and consultation responses, are addressed in the report by HC planners to the Badenoch and Strathspey Area Committee on 18 November 2005.

13. This report recommends the grant of outline planning permission (subject to 3 extensive conditions) upon conclusion of a Section 75 Agreement. The latter was envisaged as covering the following matters:

- The transfer at no cost to the Education Authority and any appropriately constituted community body of sites for the new school and bowling green.
- The transfer to “an appropriate mix of registered social landlords and/or Community Trust, the precise mix to be by negotiation, of land sufficient to accommodate 41 dwellings; in the case of conveyance to Community Housing Trusts, the price for the land to be an equitable pro-rata share of serving costs only and nil land value”.
- The transfer of undeveloped areas within the application site to community use and ownership “subject to a suitable partner being found”.

- And in any event, some form of assurance that there will be no further development beyond that shown in the indicative (layout) plan into the (southern) balance of the site area.

14. The minute of the above meeting is found on the case file. A motion to continue the application 'until after the new draft local plan [is] finalised' defeated by 3 votes to 2 an amendment that the above recommendation be accepted. The application was accordingly continued, and the appeal against non-determination was received on 24 January 2006.

Summaries of parties' cases

15. **On behalf of the appellant** it is submitted that the application is over 3½ years old, and the company's very similar experience in an appeal at Carrbridge (PPA/270/312) turned out in its favour. In the present case HC deferred a decision until some undetermined point in the future, the timing to hinge upon the progress of the draft local plan for the National Park. This is being prepared by another authority – CNPA of which some members participated in the committee meeting of 18 November 2005. HC has not however asked Scottish Ministers to delay a decision on the appeal, or argued why it should be dismissed. The only substantive document relied upon by HC is the favourable committee report. The minute of the relevant committee meeting is in any case inaccurate, failing to reflect the true reasons why councillors would not determine the application. If they were opposed to it they could have refused permission.

16. The proposal is consistent with the adopted local plan which has been exposed to full publicity and consultation, as well as surviving a local plan inquiry. Full account has been taken of all environmental issues, especially natural heritage issues, and the extent of development has been trimmed back. The amended scheme is a direct result of discussion of the natural heritage issues raised long after the local plan was adopted. Although the local plan was adopted in 1997 that is relatively recent for a rural area. The application was submitted when the local plan had been adopted for less than 5 years. The land use allocation is a major part of that plan. The indicative layout tries to maintain a traditional street pattern, reflecting the established 'grain' while maintaining a landscape corridor on the ridge. Phasing can be agreed separately.

17. The various points raised by consultees are thoroughly addressed. In response to the SNH objection the appellant commissioned Bidwells to undertake an independent survey of the Capercaillie population (Oct 2003 - May 2004). The proposal has accordingly been restricted in extent, and would be accompanied by physical barriers, footpath management and signage to limit movement into the rest of the forest. SNH responded to the above survey without substantive criticisms sufficient to undermine the acceptability of the development in relation to Capercaillie. This survey has had a major influence on the scheme. There have been no sightings of Capercaillie within the proposed development area for over 11 years. This situation has not therefore changed since the local plan inquiry. SNH has not objected on grounds of loss of habitat. The agency has made no submissions in direct response to the appeal. Seafield Estates would undertake off-site measures to mitigate impacts on Capercaillie, e.g. through the erection of signage, fence alterations etc.

18. The comments by Scottish Water prompted a separate series of discussions, and there is now general agreement that existing treatment facilities should be upgraded, although the option of pumping to Aviemore is not ruled out. Although the water supply is inadequate,

improved leakage control could increase delivery and this approach could be financially supported by the appellant, running hand in hand with careful phasing. Technical solutions are within reach. Planning officials saw these matters in the same way. Their advice has not been overpowered by any council submissions,

19. The emerging local plan for the National Park is merely a 'consultative draft' which is still to receive considerable scrutiny, and there can be no certainty as to its later provisions. Although the forest at this location is classed as an ancient woodland in the 'Ancient Woodlands Inventory' – based on the situation in 1860 – the site does not support a high quality or diverse woodland of high ecological significance.

20. Landowners and developers are entitled to place faith in the development plan; this should provide a degree of certainty, enabling informed commercial decisions to be made. The appellant has secured the site with a non-returnable deposit of £300,000 and professional fees could be one third as much again. This was reasonable expenditure following the site's survival after the local plan inquiry.

21. Satisfaction is taken from the recognition of CNPA that the consultative draft local plan 'carries no material weight in terms of planning policy context' and from associated reservations about delaying a determination until this emerging plan has acquired a higher status. This is a pragmatic response to the uncertainties lying in the path of the local plan.

22. To help demonstrate the above uncertainties, there are submitted 3 sets of representations on the consultative draft local plan (AHD 3, 4 & 5). It is claimed that there is no justification for deleting this housing site in favour of smaller and still questionable ones in different parts of the village. Nowhere in the consultative draft or in the SEA is there any appraisal of the pressing infrastructure needs of the village. These matters are more easily addressed by a single, properly-phased development. This approach can deliver more affordable housing and would not rely on piecemeal improvements to services. AHD4 sets out the HC view that the settlement strategy, which is missing from the consultative draft local plan, should be more visionary yet fundamentally a continuum based on the principles of the adopted local plan. The site is seen as 'a development option' (another one being linear expansion to the west) and consequences are considered likely for other allocations if this is deleted. Any diminution in the land supply would need a credible strategic alternative.

23. The Nethy Bridge appeal (PPA/001/004) which has been referred to by CNPA is of questionable relevance. That site had not been allocated for development in a local plan which survived an inquiry into objections. It is closer to the nearest SPAs and was under threat from potentially intrusive trekking activity. The currently proposed development has been limited in accordance with the precautionary principle and will be complemented by sensitive estate management measures.

24. A supporter has responded to the appeal claiming to represent several local residents of similar mind. She states that it has become impossible for anyone to start on the property ladder, and that this alternative view must be heard. The roll of the local primary school will continue to contract unless new affordable housing is brought on stream soon. HC cannot be expected to keep its 100-year old school building indefinitely with a falling roll. The impact of even one family leaving the village has to be understood. For the last 3 years there has been no viable play group as there have been only two mothers with eligible children.

25. No enthusiasm can be attached to the provisional housing sites in the consultative draft local plan (H1, H2 and H3) which would offer a notionally similar number of houses, but fewer affordable units. Their productivity cannot be relied upon and they do not offer a reversal of the decline in the school roll. CNPA should take a wider view and thoroughly investigate the effectiveness of housing sites in the new local plan. Fragmented releases would be harder to service with water and drainage. Site H1 (northeast of the caravan site) is boggy, difficult to access and would only yield 30 houses. Site H2 (west of the caravan site) involves as many environmental issues as the appeal site, if not more. Site H3 can also only take 30 houses. None is big enough to offer a realistic supply of affordable units. The appeal proposal offers more affordable housing than HC guidelines demand.

26. The site is well-used for informal recreation. The revised proposal would ensure this situation changes little (as opposed to the vision in the adopted local plan). Many natural heritage objectors are not resident in the village yet had disproportionate influence on elected members. The trees were planted in living memory. Some locally resident objectors are naturally defensive of their retirement environments. Indigenous people tend not to speak up. If 'NIMBY' views prevail the village could be reduced to a retirement community with one generation resenting another. Given the opportunity for locals to engage with the developer, the scheme could serve as an example for other villages in the National Park. It is important that the affordable units are targeted at local needs. The success of the appeal would bring an end to years of uncertainty, helping ensure a balanced community into the future.

27. **The Highland Council** rests on the questionnaire and accompanying documents. These include (1) publicity responses summarised at paragraphs 5 -8 above, (2) consultation responses summarised at paragraph 9 above and (3) the favourable report by the planning service summarised briefly at 13 above.

28. **The Cairngorms National Park Authority** states that it is important to recognise the change in planning context since the site was allocated - i.e. the designation of the National Park, and the issuing of National Planning Policy Guideline 14 - 'Natural Heritage' [NPPG14].

29. It may not be appropriate to delay determination until the new local plan has been adopted or gained material status. However, the approval of such a large development at this stage would be premature bearing in mind that up to date demographic data will inform eventual housing allocations. A more cautious approach would be consistent with paragraph 38 in Scottish Planning Policy 3 - 'Planning for Housing' [SPP3] and paragraph 29 in Scottish Planning Policy 15 - 'Planning for Rural Development' [SPP15].

30. The site is not allocated in the consultative draft local plan because of the loss of habitat, and community concern emerging from consultations. This concern questions the appropriateness of such a scale of housing site adjacent to a Highland village.

31. Attention is drawn to the failure of SNH to withdraw its objection to the revised proposal in the light of the appellant's Capercaillie survey; this is on account of the likely effects on the integrity of populations in the SPAs at Kinveachy Forest, Abernethy Forest or Craigmore Wood from disturbance and loss of habitat in Boat of Garten Wood. This is itself recorded in the Ancient Woodlands Inventory (although only one quarter of the area to be developed is within the area so recorded). Although these trees are of plantation origin they have maintained the characteristics of the area's soils and flora. The woodland is valuable Capercaillie habitat of typical Scots Pine plantation and heather ground cover. Accordingly

the proposal is at odds with the first and second aims of the National Park. Similarities are drawn with an unsuccessful appeal concerning land opposite Balliemore, Nethy Bridge (PPA/001/004) in which the potential threat to Capercaillie was fatal.

32. The revised proposal lacks the linearity of the earlier one and in this sense is less consistent with village form, in contrast to the fragmented pattern of sites in the emerging local plan. This has been informed by landscape capacity studies recognising the importance of the backdrop of woodland, especially in long views from the A95. In any case the infrastructural challenges have not been surmounted. The site lacks any physical relationship with the village and the proposal would not conserve or enhance cultural heritage. The woodland is also a valuable recreational resource which should be spared new demands. The revised proposal would displace an employment land allocation in the consultative draft local plan. Access to, and delivery of, the new primary school and community facilities may have to be reconsidered. If the proposed housing is rejected, these facilities may need re-siting.

33. **Scottish Natural Heritage** maintains its objection, referring to earlier correspondence summarised briefly at paragraph 8 above (second bullet).

34. **The Scottish Council for National Parks** has pointed to over a dozen significant inconsistencies between the amended proposal and the consultative draft local plan including its General Policies 1-5, and its policies on biodiversity/habitats and landscape. It views the site as lying outside the village, and therefore the scheme should be assessed against the provisions on housing in the countryside. These require a special justification. The site is unlikely to be zoned for housing in later versions of the new local plan.

35. **Opposing residents and the B of G CC** have responded directly to the appeal by founding on the designation of the National Park and on the prospect of a stricter long-term control regime following the adoption of the new local plan. Without a firm policy background in place the attractions of the National Park as a place in which to live or to visit could seriously diminish. There remain challenges of providing satisfactory water supplies and drainage. Both services malfunction at present.

36. Although the shortage of homes for young local people is recognised, and Boat of Garten needs additional housing, this should be in smaller low-cost groups which can be readily assimilated. Elected members relied on exaggerated impressions of the demand for affordable housing, especially of unmet demand from within the village. These impressions were based on anecdotal and inaccurate evidence. The case for caution is supported by the majority of village residents, especially those engaged in the tourist industry. Two years of consultation on the new local plan would count for little if the appeal succeeds. In any case it is not unusual for people to respond more readily to planning applications than to opportunities in the local plan preparation process.

37. Some consider that the inclusion of a new primary school site is misleading since HC admits that it has no funds to provide one, and this is clearly not on offer. A 'market-led' development could see an increase in the village's housing stock by almost 50% in an unreasonably short time. The appellant seems bent on building at a rate which would 'catch up' on the delay incurred in obtaining planning permission.

38. The new pressures on footpath networks would steadily push wildlife further out. There has been a dramatic decline in the Capercaillie population since the site was allocated. The interests of this species and local people coincide very significantly. It is questioned

whether there have been no sightings in the last 11 years – certainly droppings have been observed even within 2006. Despite being adopted in 1997 the extant local plan went through its formative stages in the early 1990s. There is now generally greater appreciation of the vulnerability of Capercaillie and of the value of ancient woodlands as part of its habitat. One must guard firmly against fragmenting these habitats. The villages of Strathspey are steadily taking on the characteristics of housing schemes where second homes are the rule rather than the exception.

39. BSCG emphasises that the Capercaillie is an Annex 1, UK Priority and UK 'red-listed' species for which the UK government has international responsibilities. In addition this Caledonian Forest is a European Priority Habitat (listed in the Habitats Directive) which is recognised as being 'in danger of disappearing in the EC and (requiring) special and urgent protection measures to ensure its survival and subsequent enhancement'. Part of the development area is on the Ancient Woodland Inventory. When the current local plan was adopted there was less awareness of these points. The Scottish Forestry Strategy supports the need (identified in the UK Biodiversity Action Plan) to protect, improve and restore ancient semi-natural woodlands and encourage the extension and creation of new native woodlands. It too recognises the current threat to the Capercaillie, but had not been published when the local plan was adopted. Since that point numbers have continued to decline dramatically. It was declared the fastest-disappearing bird in 2003 (see also BSCG document 11).

40. It has not been shown that the development would not adversely affect the integrity of SPAs for Capercaillie in Strathspey. The site lies centrally in a 'core zone' for this species which contains 5 out of 9 SPAs recognised for their importance to Capercaillie. One of the main threats is fragmentation of forest habitats not merely within or immediately adjacent to SPAs - but any such habitat which has a linking function between these areas.

41. BSGC has submitted a copy of the 'formal notice' (dated 22 December 2004) to the UK government about Infringement No 2000/4303 from the Commission of the European Communities. This concerned failure to ensure the adequate protection of the Capercaillie, and stated "with regard to relevant habitat adjacent to SPAs in Strathspey, there is concern that (the government) is failing to ensure that sufficient account is being taken of the Capercaillie with regard to planning proposals in the new Cairngorms National Park. It appears that a large number of development proposals are in the pipeline and are being zoned for woodland areas important to the Capercaillie. The issue of the adequacy of guidance to planning authorities and their need to take into account the interests of Capercaillie in their planning decisions was already highlighted in the additional letter of formal notice of 17 December 2002."

42. Such far-reaching concern had not been expressed when the local plan was prepared and adopted. Nevertheless both SNH and BSCG opposed the allocation of the site at the local plan inquiry in 1994. Although this concern has become wider-reaching, it is of very long standing. It cannot have come as a surprise to the appellant. It was made clear to the landowners in a 1994 report they commissioned from the Game Conservancy Trust. This refers to the appeal site as being 'locally significant for breeding Capercaillie'. Observations in 2004 and 2005 provide incontrovertible evidence of Capercaillie using the site. BSCG document 10 reveals that signs of Capercaillie were observed at 51 locations in the eastern part of Boat of Garten Wood at a frequency of about 15 per km walked. (N.B.- One of the transects lay within the appeal site and its north-most recorded sign of the species lies well within the development area, and another nearer the edge). Planning decisions should respond to the best available evidence.

43. Compatibility with National Park aims was a major factor in an appeal at Ballater (PPA/001/005). At Nethy Bridge (PPA/001/004) it was held that 'absolutely no increased risk to Capercaillie can be tolerated' and that it was "impossible" to condone an additional source of potential disturbance – however tentative and long term it may be". These remarks related to a much smaller proposal on a non-woodland site within the same core zone. The significance of cumulative impacts on 'metapopulations' (i.e. scattered, movement-dependent populations) was not considered by HC planners. Understandings of the behaviour of Capercaillie over large areas of farmland, moor-land and forest, were much less developed at the time the adopted local plan emerged.

44. Other matters, including concerns about water supplies and claims that the landowners can provide compensatory habitat improvements on adjacent land, have not been transparently explored. No safe findings can be made on them. There is reason to doubt (from observations of a Lek near Dulnain Bridge, and from earlier tree felling elsewhere) that the landowners' understanding of the area's Capercaillie population is less comprehensive than claimed despite their recorded recognition that the population is decreasing.

Reasoned conclusions

45. Section 25 of the Act requires the appeal to be determined in accordance with the development plan unless material considerations indicate otherwise. The relevant provisions of the development plan that have been drawn to my attention are summarised at paragraphs 10 and 11 above. In this light from my accompanied site inspection and the written submissions I consider the determining issues to be:

1. Whether the proposal is consistent with the above development plan provisions:

2. In the event of serious difficulty arising in the above connection, whether material considerations justify exceptional approval. [The material considerations inviting attention are; (i) the balance of the available policy background; (ii) whether the environmental effects - including heritage impacts - of development would be acceptable, and; (iii) whether planning conditions or other controls can satisfactorily address any problems or areas of uncertainty.]

46. On the first issue, I can make no safe findings in relation to compliance with structure plan policy G1 and the written submissions do not address this matter directly. Policy G2 presents the proposal with various degrees of friction rather than difficulty across the board, since its language does not demand that each and every criterion is completely met. For example I have a little difficulty visualising how a satisfactory water supply can be made available in the short term for an almost 50% increase in the village's housing stock. It is nevertheless possible that this, along with a drainage solution, could be addressed by suspensive condition. Scottish Water considers that its objection can be disposed of in this way. The site is accessible, although not particularly well-integrated with the village. Some G2 criteria do not apply and others can be revisited at the detailed stage. Compatibility or otherwise with the G2 natural heritage criteria will become clear below.

47. Policies G4, H4 and H5 in the structure plan are satisfied by the inclusion of affordable housing. There is much agreement that Boat of Garten needs some (precisely how much is another matter) as well as mainstream housing which is after all contemplated in the emerging local plan. Although the level residential expansion cannot be guided by up to date evidence in this appeal, I find no clear difficulty in relation to any of these policies. (I return

later to mechanisms for community benefits envisaged in G4.) Policy H2 is not decisive either way. No evidence has been presented of progress or otherwise at Cambusmore. I cannot make safe findings on the relevance (or otherwise) of the appeal site to the current land supply equation in Badenoch and Strathspey. I do not accept that H3 strictly applies, although I see a limited argument why it might have. The site was zoned before the structure plan was approved. The authors of the structure plan would not have had already-zoned sites in mind when drafting this policy on housing in the countryside.

48. I return below to natural heritage impacts to clarify the true extent of friction with structure plan policy G2. This important matter apart, I see no difficulties in relation to those policies of the approved Highland Structure Plan that have been brought to my attention.

49. It is widely accepted that the proposal is broadly compatible with the Badenoch and Strathspey Local Plan (1997) despite the omission of business space. Criticisms about incompatibility with village character can be addressed at the detailed stage. I have seen no development brief, but a suitably worded outline planning permission could serve that purpose. The appellant has tried to minimise natural heritage impacts – at least so far as within the control of any developer, and this aspect could also be pursued by conditions. The words used in policy 5.6.2 expect such impacts on surrounding land to be minimised, rather than eliminated. The proposal is generally consistent with the adopted local plan therefore.

50. Strictly subject to later review of natural heritage impacts (relative to structure plan policy G2) it follows from 46 - 49 above that the proposal is consistent with most provisions of the development plan as it presently stands. For the avoidance of doubt, this is merely an interim finding.

51. On the second determining issue I take the balance of the policy background to include NPPG14, relevant sections of SPPs 3 and 15, the (June 2000) update of Circular 6/1995 which deals with the EC Habitats and Birds Directives, the 'formal notice' introduced at paragraph 41 above, the statutory aims of the National Park, and the Consultative Draft Cairngorms National Park Local Plan. It is logical for me to first review likely natural heritage impacts before making findings in relation to these parts of the wider policy background, and I return to these at paragraph 58 below.

52. Although I am reasonably satisfied that no Capercaillie have been seen on the appeal site since the local plan was adopted, there is clear evidence that they have nevertheless frequented it in the interim, certainly within the last two years (see unchallenged observations at paragraph 42 above). The north eastern part of Boat of Garten Wood appears to be used by this species infrequently due to disturbance levels rather than habitat differences. Despite the best efforts of the landowners, at the end of the day one can only speculate on the likely effectiveness of mitigation and habitat improvements in the balance of the wood. The development would probably have a marginal direct impact on the movement of Capercaillie. However, the general interface between development and the species would be displaced south and west. A Lek was observed in April 1994 - see section 6.2 and Map 2 in the appellant's Capercaillie Report. The said map carries no scale, but by comparison with others including appellant's drawing No 2532-010 Rev D I assess its distance from the edge of the proposed development as 950m. It lies in a key location between Kinveachy and Abernethy SPAs.

53. There would be indirect but inevitable consequences for the movement of Capercaillie within Boat of Garten Wood. The frequency of occupation (in woodland beyond the

development area) is likely to diminish. It is impossible to make safe findings either way on corresponding impacts across the balance of this 'core zone' and its SPAs. Knock on effects cannot be ruled out. These overlapping areas of uncertainty in this and the previous paragraph are disturbing.

54. Boat of Garten Wood has a nationally significant population of Capercaillie (the appellant's evidence puts this at 1.2% of the national total). Although the extension of the Capercaillie habit is in hand in various parts of Strathspey the total extent, now and in the future, appears to be unquantified. The Strathspey Capercaillie population has declined since the local plan inquiry of 1994. Boat of Garten Wood is also frequented by siskin, crested tit, crossbill, and woodpeckers. SNH has followed the site's planning history for many years and the agency's objection remains unshaken.

55. Drawing together the previous 3 paragraphs, I consider that the wildlife impacts cannot be predicted with confidence but the probability remains of displacement of Capercaillie from the site itself and from the surrounding woodland to the south and west. Capercaillie are sensitive to disturbance. By moving the limit of development further into Boat of Garten Wood, recreational disturbance seems likely to become a greater threat than at present. This issue should carry significantly greater weight than it did at the local plan inquiry 12 years ago, and when the local plan was adopted in 1997. The other wildlife impacts (and habitat impacts) are subordinate negative factors which would not have appeared decisive on their own.

56. Turning briefly to landscape and scenic impacts (which are also relevant to structure plan policy G2) I consider that the worst fears of CNPA could be addressed by planning conditions reserving a belt of woodland at the site entrance (penetrated only by the access road itself). This could avert a visual lengthening of the frontage to Deshar Road, and prevent the development drawing the eye in views from the A95. Such an approach could for example ensure that the development is less conspicuous than at least one of the sites provisionally identified in the consultative draft plan.

57. Returning to structure plan policy G2 in respect of which I deferred definite findings at paragraphs 48 and 50 above I find that this policy is after all significantly offended, because of the likely disturbance to Capercaillie above all other considerations. Accordingly, the appeal proposal is not - after all - consistent with both components of the development plan.

58. The balance of the policy background can now be addressed more concisely. Paragraphs 33 and 51 of NPPG14 indicate that conservation of natural heritage will be a key objective in any National Park and that woodlands of natural heritage value should be retained. Paragraph 38 in SPP3 and paragraph 29 in SPP15, in summary, expect outstanding natural resources in National Parks to be safeguarded. As indicated in the update of Circular 6/1995 the Birds Directive requires (at Article 4) that Member States ensure the survival and reproduction of Annex 1 birds in their area of distribution (and these include Capercaillie). The 'formal notice' referred to by BSCG seriously questions the adequacy of measures to achieve these objectives, with specific reference to development pressures in Strathspey which is elsewhere said to account for about 67% of the UK Capercaillie population. To put it mildly, there is very serious friction between the proposal and these different sources of policy. This extends also to the first 3 aims of the National Park and arguably, in a less obvious way, to the fourth. In contrast, the emerging local plan carries negligible weight. Its allocations are likely to be reviewed since housing need will better inform the next draft. Th

consultative draft plan does not (by definition) represent the final (pre-inquiry) position of CNPA.

59. Having dealt with the third material consideration in passing, I move straight to the fourth – i.e. whether planning conditions or other controls can satisfactorily address any of the above problems or areas of uncertainty. Some of the more serious natural heritage impacts would be off-site (as in the unsuccessful Nethy Bridge appeal which has been mentioned). Accordingly, they do not lend themselves to precise, enforceable or reasonable planning conditions which would be consistent with Circular 4/1998. The revised proposal includes affordable housing, and sites for a school and community uses in respect of which HC planners expect a Section 75 Agreement to first be concluded. The written submissions contain no draft agreement, although this could be addressed by an 'intentions letter' pending conclusion of one. The latter loose ends are not necessarily fatal therefore, but I envisage no way in which the various natural heritage impacts can be satisfactorily controlled by conditions. These are of a different order to those arising in the Carrbridge case.

60. Returning to the determining issues in the light of my later reasoning, I conclude that the amended proposal is not after all consistent with the development plan, despite its general compatibility with the Badenoch and Strathspey Local Plan 1997. Material considerations do not justify exceptional approval, and are in fact predominantly unfavourable to the appeal.

61. I recognise, with some unease, that the appellant would have felt reasonably entitled to make commercial arrangements with a view to taking forward the 1997 local plan allocation. However, the application was submitted in July 2002 - almost 5 years after the local plan was adopted (and longer after its final content would have become clear). The natural heritage issues which I consider fatal would have been understood in the late 1990s, at a time when the Capercaillie was coming ever closer to extinction. The 1997 local plan cannot provide indefinite immunity from this increasingly challenging situation. With similar unease I appreciate that my recommendation will be unenthusiastically received by young adults looking to raise families in Boat of Garten. However, the submissions leave one to speculate over the level of local housing need. Unchallenged reports of the appellant revealing that the scheme would be market-led over a number of years imply that it would serve considerable mobile demand as well as local demand. This unease does not therefore undermine my conclusion in paragraph 60.

62. Careful account has been taken of all the other matters raised but they do not outweigh the considerations on which my conclusions are based.

Recommendation

63. I recommend that the appeal is dismissed, and that planning permission is not granted for the development described in the planning application (as amended) dated 26 July 2002 (Ref; 02/230/OUTBS).

Yours faithfully



PHILIP G HUTCHINSON
Reporter