

**TOWN AND COUNTRY PLANNING (SCOTLAND) ACT 1997**

**PROPOSED CNOC AN EAS WIND FARM**

---

**CLOSING SUBMISSIONS ON BEHALF OF THE APPELLANTS**

---

**Marcus Trinick QC**

**April 2017**

## **Structure of Closing Submissions**

- A. Identification of Main Issues and Overview**
  - B. The Policy Framework**
  - C. Submissions on Landscape and Visual Effects**
  - D. Submissions on Heritage Issues**
  - E. Conclusions**
- 

## **Glossary**

In these submissions I use the following abbreviations:

IR (Inquiry Report), HS (Hearing Statement), P (Precognition), EC (Evidence in Chief), XX (Cross-examination), AC (Anne Cowling), SH (Simon Hindson), THC (The Highland Council), SO (Sam Oxley), DS (David Stewart), SC (Dr Stephen Carter), AM (Dr Ann MacSween), VC (Victoria Clements), NH (Nicola Hall), HES (Historic Environment Scotland), MS (Mark Steele), STAG (The Action Group), the SLA (Loch Ness and Duntelchaig Special Landscape Area), LCS (Landscape Capacity Study), LCT (Landscape Character Type), LDP (Highland-wide Local Development Plan), Managing Change (Managing Change in the Historic Environment – HES 2016), SG (Highland Onshore Wind Energy Supplementary Guidance), SOA (Statement of Appeal), Corrimony (Corrimony Chambered Cairn), SPP (Scottish Planning Policy) and NPF3 (National Planning Framework 3).

### **A. Identification of Main Issues and Overview**

1. Following the evidence it is my view that the determining issues in terms of local effects are the landscape and visual impacts of the proposed development and impacts on the heritage significance of Corrimony. Other matters have been addressed in evidence through written representations on tourism and through submissions by local parties on access. However, the primary objective of these submissions is to address the main issues.

Tourism and access do not in my view fit into that category, and I will leave you with the submissions you have received on these topics. In addition you will obviously need to consider the application of policy in the planning balance.

## **B. The Policy Framework**

### *Introduction*

2. While the primary focus of the inquiry was the SG it is essential in these submissions to address the overall policy position. Section 25 of the 1997 Act applies to the determination of this appeal and therefore the first focus should be on the LDP.
3. The planning policy framework comprises the LDP (including the SG), SPP and NPF3. Also of relevance is the guidance issued by HES relevant to Corrimony, primarily within 'Managing Change'. With regard to community ownership you have before you 'Good Practice Principles for Shared Ownership of Onshore Renewable Energy Developments' published by the Scottish Government in September 2015. You will also have regard to UK and Scottish Government Renewable Energy Policy.
4. For the purpose of these submissions, I will focus on the LDP and SPP. DS covered NPF3 and renewable energy policies in the July 2016 SOA and in his HS on policy, but I simply ask you to take into account this information in your decision.

### *The LDP – Policies*

5. The LDP was adopted in April 2012. As noted by me at the inquiry, the LDP will be more than five years old by the time your decision is issued, and this is relevant to the policy presumption in favour of sustainable development contained in SPP.
6. I therefore start with the policy presumption. On any analysis the presumption has to be applied in a development management context or it has no meaning, and it can only be a presumption in favour of planning permission for sustainable development.
7. As recognised in the SOA (paragraphs 5.23 – 5.26) not all proposed wind farms will enjoy the benefit of the presumption. I think that the approach of the Lochend appeal Reporter (see SOA paragraph 5.26), who found that the proposal before him benefited from the

presumption on examination of the development against the Outcomes in SPP, had the right approach. I believe that it is correct to investigate the application of the presumption by reference to these Outcomes, while also having regard to the principles set out in paragraph 29 of SPP. And in this case, if you conclude that the presumption applies to the proposed development, then in accordance with paragraph 33 of SPP it will be a significant material consideration in favour of the grant of planning permission.

8. In this case (see SOA paragraphs 5.21 and 5.22) the proposed development will contribute to the achievement of each of the Outcomes except that seeking a "more connected place". I return to the application of the presumption to this proposed development at the end of these submissions.
9. The lead LDP Policy in this appeal is Policy 67. How the policy works is addressed in the SOA (paragraph 5.5) and in the HS of DS (paragraphs 5.5 – 5.10). Taking into account what is said by DS about the contribution of the proposed wind farm to renewable energy generating targets the issues in evidence so far as Policy 67 is concerned relate mainly to heritage impacts, landscape and visual effects (including impacts on residential amenity), tourism and recreation.
10. The development management test in Policy 67 is that the development should not give rise to "significant detriment overall" on relevant receptors.
11. Also relevant is Policy 68 on Community Renewable Energy Developments, having regard to the Memorandum of Understanding between the Appellants and Soirbheas (see SOA paragraphs 5.33 – 5.39 and 5.58). The proposed arrangements for shared ownership benefit from the advice in Policy 68 if the communities that will benefit from shared ownership are those which would be "significantly impacted" by the proposed development. That is so in this case since the charitable organisation Soirbheas represents both Glen Urquhart and Strathglass CC areas which host the proposed development.
12. Policy 57 is also engaged, although it must be read with and not so as to conflict with the lead Policy 67. Policy 57 is relevant here because of the SLA (a Policy 57 feature of local/regional importance as defined in LDP Appendix 2) and because of Corrimony, a

feature of national importance. Policy 57 is addressed in the SOA at paragraph 5.5 and in the HS of DS.

13. For the SLA the development test in Policy 57 is that there should be no “unacceptable impact”; this can be read reasonably satisfactorily with the development management test in Policy 67. For Corrimony the aim is not to compromise the heritage resource. If significant adverse effects are caused then such effects are to be balanced with “social or economic benefits of national importance”. Whether or not this approach accords with the test in Policy 67 is a matter of judgement and I will address this later.

#### *LDP – SG*

14. Section 22 of the 1997 Act enables the adoption of supplementary guidance in connection with an LDP. Regulation 27(2) of the Town and Country Planning (Development Planning) (Scotland) Regulations 2008 describes the allowable content of supplementary guidance, and provides that it should only be adopted if the matters contained in it are expressly identified in a statement contained in the LDP as a matter to be dealt with in supplementary guidance. The same Regulation makes clear that supplementary guidance “may only deal with the provision of further information or detail in respect of the policies of proposals set out in the LDP”.
15. The SG has been adopted and issued under these legal provisions, subject to minor amendments made by the Scottish Ministers which are not in any event relevant to the issues before this Inquiry. As recorded by DS in paragraph 3.2 of his HS on policy, supplementary guidance must not depart from national policy. Since the SG has been adopted and issued with the approval of the Scottish Ministers it must be assumed for all purposes that the SG is consistent with the LDP and SPP.
16. Section 2 of the SG comprises the Spatial Framework for Highland and merely repeats the content of Table 1 within SPP.
17. It is particularly important to note that the SG contains no policy guidance. It is parasitic on Policy 67 (being provided for within that policy). I make this point because elements of the SG (particularly paragraphs 4.10 and 4.17) provide an aim of avoiding significant adverse effects on landscape and visual receptors. Noting the impossibility of such

avoidance for a commercial wind farm, but also the approval of the Scottish Ministers of the SG, it must be assumed for all purposes that the aims set out in these paragraphs (and elsewhere in the SG) are not intended to depart from the "significant detriment overall" test in Policy 67, as made clear by DS in paragraph 3.4 of his HS.

18. Again, the criteria set out following paragraph 4.10 in Chapter 4 of the SG are not to be read as importing any new wind energy policy tests of the acceptability of development. Indeed THC has emphasised such is not the case (6.1 in its HS on policy). Therefore your conclusions on the criteria should be fed into the application of the "no significant detriment overall" test in Policy 67 as inclusive indicators of compliance or otherwise with that policy test.
19. Chapter 5 of the SG addresses strategic capacity for wind energy development in Highland. It applies only to areas covered by landscape studies made for the purposes of the SG, noting that it may apply in the future to areas not currently covered. Five areas are proposed for coverage and a further area (Loch Ness) is currently addressed in the SG. Whilst Cnoc an Eas is close to a boundary of the Loch Ness Study Area (LNSA) no wind turbines are proposed within it and, as agreed with THC, Chapter 5 cannot therefore apply directly to the Cnoc an Eas appeal. However, THC has attempted in section 8 of its policy HS to make what is said in Chapter 5 a material consideration in this appeal on the basis that the LNSA has a "broad brush strategic boundary" and on the basis that judgements formed in respect of the LNSA are considered capable of application to the appeal site. This approach is quite wrong and it should receive no support. The boundary of LNSA is firm and is there for the purposes of determining the area of application of Chapter 5 of the SG. It is a guidance boundary which is part of the development plan that cannot be treated as simply a broad brush indication, any more than the boundaries of a designation such as the SLA can be made porous at the whim of THC.
20. As I said in the hearing session it is acknowledged that the LCT including Cnoc an Eas extends across the boundary of the LNSA, and it is of course right to use the landscape appraisal within the SG for the purposes of informing judgements on the impact of the development on landscape character. But that is quite a different matter from applying guidance where it is not intended to apply.

21. The further element of the SG of relevance is section 3 which advises in paragraphs 3.1 – 3.5 on community renewable energy development. I have already addressed this in the context of Policy 68, and note that in fact the SG says little of assistance beyond that policy.

*SPP*

22. I have already touched on the presumption in favour of sustainable development and return to the application of the presumption at the end of these submissions.
23. Paragraph 161 and Table 1 of SPP set out a spatial framework for wind farms which is repeated in the SG. Cnoc an Eas is in part technically within a Group 2 area due to the occurrence of carbon rich soils within the site. However, SEPA and SNH have raised no concerns on this topic, and it is common ground with THC that the site is effectively within a Group 3 area.
24. Paragraph 169 of SPP lists inclusively factors to be considered in the development management of wind farm proposals. For Cnoc an Eas the first three topics (net economic impact, the contribution that will be made to renewable energy generation targets and effects on greenhouse gas emissions) are engaged, and I note at this point that economic impacts include local and community socio-economic benefits. Such benefits include in this case the community ownership offering as well as direct economic benefits arising from the generation of supply chain opportunities and employment during the construction and operation of the development (see the SOA at paragraphs 5.56 and 5.58).
25. In terms of local environmental effects the factors in paragraph 169 of SPP relevant to the main issues in this appeal are landscape and visual impacts (including impacts on communities) and effects on the historic environment.
26. Paragraph 145 of SPP is in play given the concerns about Corrimony. Noting that paragraph 145 of SPP must be read with LDP Policies 67 and 57, and is a material consideration rather than the sole policy reference, the development management test in paragraph 145 of SPP is that the integrity of the setting of the Scheduled Monument should not be adversely affected.

27. In the inquiry session you asked each witness for a view on the meaning of “integrity” in paragraph 145 of SPP. From that evidence I believe that the words wholeness and coherence are adequate for purpose, and in my view this sets the bar at an appropriately high level. That is to say impacts sufficient to breach integrity will have to be profound. It should be noted that paragraph 145 of SPP only advises on setting which will never be the sole factor in the significance of a heritage asset. As made clear by SC the significance of Corrimony substantially resides in its intrinsic archaeological interest and not its setting. This was not a topic addressed by HES, who solely focussed on setting, but it should be discussed in your decision. It may be said that paragraph 145 of SPP says what it says and should be applied at face value, but it must be material to note that the underlying objective should be to avoid undue harm to the overall significance of a heritage asset, and that any level of impact on setting will only be a story part told. To judge a project purely on the basis of any impacts on the setting of a scheduled monument would be a partial judgement. Evidence concerning the contributions to the significance of Corrimony as a heritage asset has been brought before you by SC.
28. I also note at this stage the definition in Managing Change of setting. As put by me to VC in XX (and she agreed) the definition of setting and this guidance is more helpful than that in SPP, and SC has had the HES definition in mind in assessing the proposed development.
29. I refer back to the exploration of the policy framework set out in this section when drawing conclusions at the end of these submissions.

### **C. Submissions on Landscape and Visual Effects**

#### *Introduction*

30. Contributions in the hearing session came from SO, AC, SH, MS, Dr Gold, Mountaineering Scotland, Glen Urquhart Community Council and ScotWays.
31. The key topics explored were layout and design, impacts on the SLA, impact on residential properties, effects on landscape character and on visual amenity, and cumulative effects.
32. Addressing first the site context, the distance between the boundary of the SLA and any turbine within the proposed development is approximately 10km, although it is



acknowledged that there is nonetheless a potential for material impacts on this local designation. The Central Highlands Wild Land Area (WLA) is at its closest about 7km west of the wind farm site, but no party except ScotWays has claimed any material impact on this WLA. SNH merely noted some significant visual changes to the eastern edges of the WLA, but went no further. And even ScotWays did not attempt to go beyond some very weak representations on wild land, acknowledging the distance of Cnoc an Eas from the WLA boundary. There is no national landscape designation of relevance to the appeal.

### *Methodology*

33. There are differences between the landscape and visual assessment methodologies of MS and SO which were the subject of extensive discussion within the IR of MS. I am not convinced that what we see are much more than differences of professional approach and I certainly see no benefit to you in dwelling upon these differences in my closing submissions. However, I want to make clear that SO's methodology is firmly based in the Guidelines for Landscape and Visual Impact Assessment. SO is broadly perfectly happy with the approach with MS, subject to four points which need to be made:

- MS does not define his criteria. There is no explanation of how he reaches a judgement that susceptibility or value may be high, medium or low, or of how such judgements may contribute to the conclusion on sensitivity.
- Similarly there is no explanation by MS of how size, scale and the geographic extent of effects are defined, and how they combine to inform a view of the magnitude of change.
- You should be cautious in comparing the findings of MS and SO since the former uses a larger number of assessment grades, meaning that findings may not be able to be directly compared. By way of example, an impact of "minor magnitude" may mean something different to SO than it does to MS who also has "Very Minor" and "Very Major" categories for the magnitude of change (see his Table A3 page 54 of his IR).
- MS states perfectly fairly that a "moderate" level of effect may or may not be significant, depending on detailed assessment (see paragraph 3.6.2 of his IR). The

difficulty is that where MS finds a moderate effect to be significant no further detailed assessment is provided.

### *Project Layout and Design*

34. I largely raise this issue in closing submissions because of a curious insistence by James Findlay QC on enquiring about earlier iterations of the project (specifically Layout 3). He wanted to know the heights AOD at which the turbines were proposed at that time. However, it then became clear that whatever point he had in mind might not actually go anywhere because, as he fairly acknowledged, he had confused rotor diameter with radius in calculating turbine height.
35. In fact, THC has been positive about the design of the wind farm. In the Report of Handling at paragraph 8.42 the Planning Officer noted that "From the vast majority of viewpoints the turbines appear well spaced and stacking is avoided. This is to be commended". This point was, indeed, reiterated in oral evidence from THC in the hearing session on landscape and visual effects.
36. However, SH did suggest that the image of the wind farm could be visually confusing from Viewpoint 5 because of the use of two different turbine heights. He appeared to be suggesting that the larger turbines made the image look confusing because they appeared visibly taller. In return SO confirmed that the turbines that looked to be larger in Viewpoint 5 are actually the shorter turbines, and that by using shorter turbines in the "front row" when viewed from Viewpoint 5 a design objective had been achieved in that turbine heights appeared more consistent when looking at the development as a whole. It may be noted that SC was involved from an early stage in considering and advising on layout, including from Viewpoint 5 at Corrimony.
37. It can be concluded on the evidence before you that design has been successfully optimised not just from Viewpoint 5, but from other key design locations including views from Loch Ness and the SLA.

### *The SLA*

38. The assessment viewpoints for visual effects on the SLA are Viewpoints 10, 11, 14 and 15. It is clear from THC's 'Assessment of Highlands Special Landscape Areas' at page 118 that the principal reason for the designation relates to the domination of the area by the "vast linear feature of Loch Ness and its dramatic landform trench". The citation for the SLA also notes that the loch and its environs also "typify the Great Glen as a whole...". The SLA is a designation made after a careful scrutiny of the landscape qualities of the area.
39. Pages 118 and 119 of CD4.12 list the key landscape and visual characteristics and special qualities of the SLA while page 120 discusses sensitivities to change (to development within the designated area, although the Appellants would not argue the point that changes outside the SLA are of course capable of affecting its Special Qualities).
40. Quite simply none of the key characteristics or the Special Qualities mention Glen Urquhart or any of the east-west glens which are west of and outside the SLA boundary. Before turning to look at some individual viewpoints explored in both written and oral evidence it may, therefore, be noted that THC simply cannot claim that any key characteristics or Special Qualities of the SLA set out in CD4.12 are impacted. In my view it thus becomes very difficult from the outset for THC to argue material impacts on the SLA, let alone on the integrity of the SLA. I also note here the paragraph 196 of SPP development management approach to local designations.
41. Turning to relevant viewpoints I start with Viewpoint 11 (Meall Fuar-mhonaidh) which is approximately 11km from the proposed wind farm. The impact of the development at this viewpoint is agreed between THC and the Appellants to be significant, but Cnoc an Eas will not be seen in the direction in which the key SLA feature of the Great Glen Fault is appreciated (to the north east and south). Rather, Cnoc an Eas will be seen to the north-north west. It is, therefore, difficult to see how impact of the development at Viewpoint 11 could be said to impact on the Special Qualities of the SLA.
42. In a cumulative context Cnoc an Eas would be seen from Viewpoint 11 as would the under construction Bhlaraidh wind farm which is approximately 7km from here. The view from Viewpoint 11 will indeed be substantially altered by Bhlaraidh. Other existing wind farms are seen to the east in the Monadhliath. There will be significant combined cumulative effects, but mainly as a result of Bhlaraidh, being closer and having a larger number of

turbines. Cnoc an Eas will add to the baseline position, but not so that it contributes a significant additional effect and not so that there would be a significant impact on the Special Qualities of the SLA.

43. In terms of views from "quiet bays" (a noted key characteristic of the SLA) the views from Urquhart Bay will be screened by mainly deciduous trees (which are within the SAC/SSSI covering Urquhart Bay), especially when approaching the shore. Viewpoint 14 shows the view from the middle of Loch Ness where, across a short stretch of water, limited views of Cnoc an Eas would be obtained. As boats approach the shore, heading west from the middle of Loch Ness, this visibility will reduce and it will be lost before boats reach the jetty near Strone Point which is used to access Urquhart Castle. It cannot be said that views of the wind farm from Viewpoint 14 would be significant.
44. The final viewpoint to which I wish to refer in the context of the SLA is Viewpoint 10 which is on the A82. Viewpoint 10 represents a short stretch of the A82 where pedestrians (on the adjoining footway) and car occupants will see turbine blades when heading west. These views could only be obtained for a few hundred metres when driving down the hill, as you will have noted on your site visit. Along this stretch of road vehicles' speeds are unrestricted except by the national limit, and there is nowhere for drivers to stop safely to observe views. As SO has noted, the view up Glen Urquhart is not particularly distinctive or valued at this point, and therefore I ask you to accept SO's evidence that the sensitivity of receptors travelling on this road (being a combination of susceptibility and value) would not be high. THC claims a high sensitivity for this viewpoint because drivers include tourists, but fails to factor in the lower value of this stretch of road when combining susceptibility and value to come to a conclusion on sensitivity.
45. As highlighted during the hearing session, there are laybys on the A82 further south of Viewpoint 10 where, indeed, tourists may stop to take photographs towards Urquhart Castle, but at these points there would be no views of the proposed wind farm.
46. Noting the distance between the nearest part of the SLA and the proposed wind farm, and also taking into account the very limited visibility of Cnoc an Eas from points within the SLA it can, I believe, be firmly concluded that the proposed development could not conceivably threaten the Special Qualities of the SLA, let alone its integrity.

*View from Residential Properties*

47. In the landscape and visual hearing session you encouraged a discussion of the appropriate test to be applied when considering impacts on individual houses. I referred you to the so called Lavender test and to recent decisions for Corlic Hill (CD6.3), Windy Edge (CD6.4) and Afton (APP22) where both Reporters and the Scottish Ministers have used an approach similar to that of the Lavender test in order to consider impacts on private views.
48. You indicated that the test which has been applied elsewhere would appear to set a very high bar and asked about the approach to be taken to properties which would receive impacts below the level at which that property might become widely regarded as an unattractive place to live. As I said in the hearing session, all impacts on the occupants of houses are a material consideration but whether or not they need to be placed in the planning balance is another matter, and I believe that a cautious approach should be adopted to this topic. Indeed, it must be remembered that almost all wind farms will have some significant effects on the amenities of the occupiers of properties (including both houses and gardens). Projects are not to be rejected simply because of such impacts. No doubt at a certain point a collection of significant impacts may be felt by the decision maker to be moving towards an overall impact which needs to be put into the planning balance, even though there will be no severe impacts of the type envisaged in the Lavender test. However, for the following reasons I believe that we are very far from such a situation in the case of Cnoc an Eas.
49. The factors I draw to your attention are that:
- The closest properties with the potential for views of the turbines are at Cnoc na Raineach (property P15 within the Residential Impact Assessment (CD1.29 CD1.30)) and Fallachan (P16). Both of these properties are at a distance of about 1.6km from the nearest turbine, and views from these properties will, in large part, be filtered by trees.
  - The closest properties tend to be located on the north side of Glen Urquhart with their main views broadly south and therefore away from the turbines.

- The closer groups of properties at lower elevations (community groups A and C within CD1.29 CD1.30) are largely outside the ZTV of the Project.
- Community groups B, C, E and F are more than 2.5/3km away from the nearest proposed turbines.
- There will be some significant effects on groups of properties, as reported in the ES for Viewpoint 1 at just less than 3km. These impacts do not remotely approach the level at which concerns about residential amenity might arise.

50. Therefore I conclude that the visual effects of the development on houses and on the residential community generally would not be such that you should need to put such impacts into the planning balance, let alone start to consider the application of the so called Lavender Test.

*General landscape and visual considerations*

51. I have referred to the criteria following paragraph 4.10 within the SG and I believe the consideration of these criteria will sufficiently inform you of the Appellants' concluding position in relation to landscape and visual considerations apart from the issues already considered, and here I can be brief because the SEI of February 2016 (CD1.21) contains within Table 5.1 the response of SO to each of the criteria. In summary:

- 1: Whilst the proposal will be seen from properties and groups of properties, it would not in any instance cause 'encirclement' or be visible in the 'majority of views'.
- 2: The proposal does not affect and certainly does not 'overwhelm' any 'gateways' as listed (but not defined) in the SG. The gateway which is mentioned on the A831 (paragraph 5.2.3 of the SG) refers to the landform opening out to Loch Ness, describing a view looking east and away from the proposed wind farm, not west towards it.
- 3: This pertains to the 'fabric and setting of monuments' – covered elsewhere.

- 4: In terms of the 'amenity of recreational routes', neither the Great Glen Way or the Affric Kintail Way will be significantly affected when the experience of walking them is considered holistically. There will be some significant visual effects from short sections of the Affric Kintail Way, the closest being some 3km away. The Great Glen Way is over 8-9km away and the potential for views will be very limited indeed.
- 5: In terms of the 'amenity of transport routes', it is clear that the potential for views from roads is very fleeting, as exemplified by Viewpoint 10 on the A82.
- 6: In terms of 'respecting the existing pattern of development', this is not an area where this is a notable pattern. Any concept of pattern as may be appreciated by looking at a map in plan view needs to be treated with caution, as the relevant consideration is how the various developments will be experienced when travelling through the landscape on the ground.
- 7: The development clearly maintains 'separation' from other wind farms, with the closest existing wind farm being Bhlaraidh, some 11-12km away.
- 8: This refers to the 'perception of landscape scale and distance' which relates back to the design of the wind farm in the landscape, to which clearly much attention has been given, including through the use of shorter towers on the higher ground and the ground closest to the 'front' of the view from Corrimony. This helps improve the way the wind farm is perceived.
- 9: This criterion refers to the 'setting of wind farms' but since there are no other existing wind farms nearby, it is not relevant here.
- 10: This refers to the 'distinction between different character types' – which THC consider is met. The development is proposed within the Rocky Moorland Plateau, a LCT where other wind farms have been constructed. Effects upon landscape character were not disputed.

52. To the extent that I need to go beyond the application of the criteria in addressing general landscape and visual considerations I record SO's conclusion on the effect of the proposed

development on landscape character. There would only be local direct and indirect effects on landscape character within parts of the Rocky Moorland Plateau if the development is to be constructed and on parts of the wooded glen LCT through which the site access road passes. The ZTV clearly indicates how the higher ground to the west, north and east of the site will help to confine effects on landscape character to well within 5km of the turbines.

53. Significant visual effects arise at a number of viewpoints (see SO's summary of such effects within Appendix Table 1 within her HS and also in that part of her HS (section 2) which deals with visual impacts generally). None of the views expressed within that part of her HS have altered as a result of evidence. The same can be said for cumulative visual effects (section 3 of her HS).

#### *Concluding Remarks on Landscape and Visual Effects*

54. I have attempted not to simply repeat evidence adequately given in the HS of SO, but have rather concentrated on the areas which were contentious in the hearing session. You may find it helpful to look at paragraph 1.11 of the HS of SO which summarises her overall views on the performance of the proposed wind farm in landscape and visual terms. This I commend to you as a very useful summary. I ask you to accept SO's conclusion that Cnoc an Eas wind farm could be successfully accommodated in the landscape and in terms of views available of it from the surrounding area. I also ask you to accept her conclusions concerning the SLA and impacts on residential properties.

#### **D. Submissions on Heritage Issues**

##### *Introduction*

55. Reason for Refusal (RFR) 4 followed the HES objection by letter dated 19 August 2015. HES repeated its objection following the 2016 SEI (CD2.2e) and again following the submission of the appeal (CD2.3e). However, the later iterations of the HES objection added nothing of substance to that of 19 August 2015 (CD2.1f). The internal THC heritage advisor also objected, but his views do not add to those of HES and he gave no oral evidence. Therefore I will focus on the evidence from SC, DS, AM, NH and VC.



56. The key documents examined in the oral session comprised submitted evidence, SPP, Managing Change and the June 2016 policy statement issued by HES (CD5.2).
57. I have already addressed the relevant policy framework in Section B of these submissions. I ask you to note particularly what I said there about the need to examine the contribution of setting to cultural heritage significance since the heritage significance of any asset is, as recorded on pages 48 and 49 of the June 2016 Policy Statement, founded in a number of characteristics. Specifically there are intrinsic, contextual and associative characteristics which all go to make up a picture of the overall cultural significance or importance of an asset. I record again that in contrast paragraph 145 of SPP only focuses on setting, which may be a very minor contributor to cultural heritage significance.
58. Developing this point further you will remember that I took SC in chief to CD5.2 (although we must be aware that this advice has been drafted to address the potential designation of historic assets rather than the issue of impact on such assets from potential development). SC confirmed the view he gave in paragraph 3.35 of the IS to the effect that the cultural significance of Corrimony resides primarily in its intrinsic characteristics. It is a well-preserved example of a Clava type cairn that provides an informative resource for understanding the construction techniques and funerary and ritual practices in this part of Scotland in the Bronze Age. SC acknowledged that setting, as a contextual characteristic, did contribute to significance, but made clear that he regarded setting as being very far from a principal contributor to overall significance. He also confirmed that associative characteristics are not really present for pre-historic monuments, as opposed to assets where there are documentary records dating from the time of construction and where therefore the associative characteristics described in CD5.2 may be much more clearly understood.
59. As I said earlier in these submissions, the concept of the integrity of the setting of a Scheduled Monument in paragraph 145 of SPP sets a justifiably high bar, and I ask you to accept the evidence of SC that, when evaluating impacts on setting such impacts would have to be such that setting was fundamentally and adversely affected. If the more appropriate approach of evaluating impacts on overall significance were to be followed then

it would be hard to envisage a breach of integrity due to an impact on setting unless setting was a very major contributor to significance.

60. HES may simply say that paragraph 145 of SPP says what it says and should be applied. However, it is one of a number of material considerations, and in my view it would be quite wrong to judge the impact of a proposed development on the significance of a Scheduled Monument by reference to setting alone when it is perfectly clear from advice issued by HES itself that setting is but one contributor to significance.

#### *Evaluation of setting and Some General Points*

61. Section 3 of Managing Change sets out the advice of HES on the stages of assessing impacts of changes to the setting of historic assets by development. Stage 1 requires the identification of the relevant historic assets, and that is an easy task to complete in this appeal because only Corrimony is the subject of concern.
62. Stage 2 requires an examination of how the surroundings of an historic asset contribute to the ways in which the asset is understood, appreciated and experienced. Stage 3 involves an evaluation of the impact of proposed development on the setting of an historic asset, including paying attention to the issue of mitigation.
63. The key to stage 3 is a proper approach to stage 2. If the various factors outlined on page 9 of Managing Change are wrongly or inadequately analysed then the stage 3 evaluation is very likely to be in error and here is the major fault line in the HES case.
64. The HES post-application consultation response (CD2.1f) is, to put it mildly, hopelessly inadequate if it is claimed to be or to summarise a stage 2 assessment. Almost none of the questions set out on page 9 of Managing Change are addressed. There is a record of what Corrimony is and its state of preservation. There is a record of available views and a claim based simply on the southwest–northeast alignment of Corrimony that views of the proposed wind farm to the northeast would mean a significantly adverse impact. There was no attempt to explore and justify the relevance (if any) of this alignment in the way envisaged in Managing Change.

65. HES says (VC P paragraph 21) that the consultation response is simply advice to THC through comments on the Environmental Statement. But VC also says (P paragraph 22) that an assessment was carried out by HES using the advice in Managing Change. Not only is this simply not the case on the written and oral evidence received, but from XX of VC and NH there seems to be some confusion about exactly what was done.
66. We now know (NH IR paragraph 11 and the scoping stage response of HES (HES6)) that HES took a very early view that Cnoc an Eas would impact unacceptably on Corrimony. But that opinion was formed in the absence of a finalised wind farm design, and must be regarded as a severe pre-judgement of the issue.
67. We also know (XX of NH) that she cannot remember if a site visit was made prior to the consultation response following the application. This seems quite extraordinary, but it is perhaps not so surprising. It is my view that HES leapt to a scoping stage conclusion, and subsequently maintained that conclusion following the submission of the application without producing any evidence of a stage 2 assessment which followed the advice in Managing Change. Indeed, there is no evidence that the consultation response was not simply a desk top exercise.
68. Then HES was faced with appearing at an inquiry to justify its position. Work that can only have been retrospective was then carried out by each of the witnesses in an attempt to justify earlier views. The evidence of HES to the inquiry has, it must I am afraid be said, all the hallmarks of a post-hoc exercise in justifying a position already taken.
69. If this appears to be an irritable approach to the evidence of HES that I am afraid is the case. To bring a project such as Cnoc an Eas to the application stage involves huge expenditure. An applicant should be able to expect bodies such as HES to devote time and proper attention to the proposed development, including a site visit where necessary, before raising an objection and potentially driving an applicant to an appeal.
70. My view is also founded on the apparent disconnect between the evidence of at least AM and NH. In XX NH said that she did not find her approach to setting on the evidence of AM. At times during the evidence of HES it seemed that the witnesses had written their respective pieces of evidence in isolation from each other. For example, we find only a

single brief acknowledgement of AM in the IR of NH. Yet AM alone addressed the cultural heritage significance of Corrimony.

71. Does all this matter since you have the evidence you have? It matters very much in two ways. Firstly, the very credibility of the HES evidence is put in doubt by the dislocated and retrospective approach to the justification of an objection made even before the application was submitted. Secondly, the necessary attempts made to justify the objection desk top pre-application views and the post application commentary has in my view led to a very unfortunate retrofit of the available evidence of the cultural heritage significance of Corrimony to the potential impact of the proposed wind farm. The availability of "good outward views to the north east" (CD2.1f) and the fact of a southwest passage entrance to Corrimony has been converted into a case against the development based, as I shall shortly submit, on an evidentially suspect interpretation of the available authorities or, worse, pure supposition.

72. I ask you to approach the evidence of HES with these comments in mind.

### *The Stage 2 Assessment*

73. The IR of AM and the IS of the Appellants (at paragraphs 3.35 – 3.40) give you some good information on the way in which the setting of Corrimony should be appreciated, by reference to the intrinsic characteristics of the Scheduled Monument and based on various authorities. The P of SC indicates where he disagrees with AM (note the useful summary at P paragraph 3.3). I explored these points in XX with AM and make the following submissions based on that XX and on the evidence of SC:

(a) The first point is not contentious and relates to the mound to the north east of Corrimony discussed by AM at IR paragraph 20. It would seem common ground that there is no evidence that this mound is necessarily man-made. You will find it discussed at page 11-88 within chapter 11 of the Environmental Statement, and also within the Appellants' IS at paragraph 3.37.

(b) AM notes at IR paragraph 15 the higher ground which surrounds Corrimony. I only refer to this because of material within NH's IR (e.g. paragraphs 14 and 19) which focus on the

rising land to the northeast. In fact, and as agreed with HES, higher ground rises all around Corrimony.

- (c) The point just made relates in turn to the focus by NH in IR paragraph 14 on the landscape character context of Corrimony. In XX I explored with NH why she focussed on the Rocky Moorland Plateau, the LCT within which Cnoc an Eas sits, as opposed to the Wooded Glen LCT within which Corrimony lies. On the evidence of SC the setting of Corrimony is mainly within the Wooded Glen LCT in terms of the potential for harm (although the setting did extend to the area of Cnoc an Eas), and you will remember that I took NH to Table 6.9 within chapter 6 of the Environmental Statement (pages 6-14). This table and Table 6.10 explore more fully the landscape character of the Rocky Moorland Plateau LCT and the Wooded Glen LCT, and I ask you to note in particular that the key characteristics of the latter include the strong influence of human occupation and the screening provided by trees and landform which restrict visibility within the floor of the glen, creating “an intimate, semi-enclosed landscape”. The same key characteristic notes the stark contrast between the landscape character of the glen and the open hill ground above (being the Rocky Moorland Plateau LCT).
- (d) As further explored with NH this contrast between the two LCTs may ultimately be of little assistance when considering stage 2 of Managing Change since the LCTs are assessed at such a broad scale that they cannot usefully inform a definition of setting. Indeed, NH said as much at P paragraph 24, although she said in re-examination that she had used the LCTs as a starting point in establishing setting which surprised me anew.
- (e) In IR paragraph 21 AM rehearsed Henshall (HES24 at page 22). Henshall noted in her monograph the need to refer to Corrimony, being the Clava type cairn which had then been most thoroughly examined. Henshall was writing in 1963 against the background of Piggott’s excavation in 1956. However, since 1963 Professor Bradley (HES23) has done his work, reporting in 2000 on the basis of extensive work at Balnuaran in the 1990s. Therefore, it is the case that the better information about Clava type cairns now comes from Balnuaran rather than, or as well as, Corrimony. Indeed, it may be noted that in her IR AM focusses closely on Balnuaran rather than Corrimony when discussing the issue of cultural heritage significance.

- (f) In IR paragraph 26 AM records Professor Bradley's note that Clava cairns can be regarded as having a "front and a back" (HES23 page 45). AM draws from this that the cairns were important in the round and not just from one vantage point. However, as I put to AM in XX what she takes from Professor Bradley's work represents an extrapolation by her from what Professor Bradley says about Balnuaran by reference (for example) to coloured kerb stones at the back of the Balnuaran cairns (HES23 at pages 126 and 127) in the context of summer sunrise. Professor Bradley did not discuss Corrimony in the same context and there is no evidence of the same coloured stones at Corrimony. Therefore, Professor Bradley's work at Balnuaran can in this respect not underpin any claim as to the importance of views to the northeast from Corrimony.
- (g) In IR paragraph 29 and again at IR paragraphs 34 – 36 AM explores the relevance of the rising and setting sun and at IR paragraph 38 she claims that all the features of the Clava cairns discussed by reference to Balnuaran in IR paragraphs 32 – 36 can be seen at Corrimony. SC strongly disagrees with this interpretation, and you will remember that I explored the issue with AM in XX. To put the point briefly, Professor Bradley only explored celestial alignments at Balnuaran and only found any relevance of mid-Winter sunset and mid-Summer sunrise in relation to Balnuaran.
- (h) Indeed at page 126 of HES23 Professor Bradley remarked that "What is so unusual about the passage graves at Balnuaran of Clava is that *they were also aligned on the sun*". Therefore, what Professor Bradley had to say about solar alignment at Balnuaran can simply not be extended on the basis of any evidence to Corrimony.
- (i) In contrast, SC acknowledged and explored the relevance of lunar alignment (minor lunar stand-still) in the Appellants' IS at paragraph 3.39. Such lunar alignments are acknowledged by Bradley at page 126 of HES23, but remarkably such alignments were not even discussed by AM in her IR or P. When I put this point to her in XX she said that she found that there could be too much speculation concerning lunar alignment and that it may not have been as important as sunrise in an agricultural community. I found this comment surprising in the light of Professor Bradley's work and the clear physical alignment of the southwest entrance of Corrimony with the position of the moon during the minor lunar stand-still. Again, I found her comment concerning solar alignment very surprising. When

I put to her that there was no evidence that mid-Winter sunset and mid-Summer sunrise were relevant to Corrimony she simply said "I don't see why that shouldn't be the case at Corrimony as well as at Balnuaran". That is hardly a credible professional point of view, and it does not engage with Professor Bradley's remarks about the unusual position at Balnuaran. I ask you to prefer SC's evidence, and indeed that of Professor Bradley, in this respect.

- (j) In summary on this point there is no evidence of a relevant solar alignment for Corrimony as opposed to Balnuaran. However, there is good evidence (so far as evidence has a meaning when discussing prehistoric monuments) in terms of lunar alignment, and this points to the relevance to views to the southwest, not to the northeast.
- (k) At IR paragraph 31 AM discussed the platforms surrounding the cairns of Balnuaran, and indeed there is such a platform at Corrimony. She said that such platforms may have been used to provide an area for ceremonies. In XX I took AM to pages 162 and 163 of HES23 and suggested that Professor Bradley made no claim for a ceremonial function, although I acknowledged that this might be a reasonable inference from the physical evidence. AM did acknowledge that a ceremonial function could not speak to the importance of use towards the northeast from the cairns.
- (l) In IR paragraph 33 AM noted the conclusion of Professor Bradley that all three of the major cairns at Balnuaran appear to have been built to a preordained plan. I suggested to AM in XX that such a finding was peculiar to Balnuaran, and related to the fact of a complex of cairns, as opposed to the single cairn at Corrimony. AM was not prepared to agree with my suggestion and, although this is new evidence, it is fair to say that in hindsight SC agrees with AM that "preordained" refers to a sequential construction process and not a plan. However, I suggest in closing that there is no evidence for Corrimony as opposed to Balnuaran that, apart from the fact of a southwest passage entrance and a possible lunar alignment, there is any evidence for a preordained plan at Corrimony, noting that there was no sequence of construction as there was at Balnuaran.
- (m) In IR paragraph 38 AM referred to the interpretation board provided for visitors at Corrimony which helped them to understand how the cairn was built and how its use is interpreted. NH also referred to the same interpretation board, referring in IR paragraph

30 to the gathering of people outside the entrance to the monument depicted on the panel. To be fair to AM she readily accepted that the interpretation board could not be used to demonstrate any particular use of Corrimony in the past.

74. I believe that everything that came out of the evidence in chief of SC and out of XX of AM and NH shows that HES simply does not have adequate evidence to show that views to the northeast from Corrimony are of any particular importance as a contribution to the way in which this historic asset is understood, appreciated and experienced (the words used on page 8 of Managing Change in the context of stage 2 assessments). SC acknowledges that all views of and from Corrimony may play some part in defining the setting of this asset, but I ask you to accept his evidence that, while views to the southwest do add to the cultural significance of Corrimony, views to the northeast are only of relevance for a very short distance within the valley setting. All distant views towards rising land to the northeast do not materially contribute to the way in which Corrimony is understood, appreciated and experienced. Therefore, the undoubtedly clear views that would be obtained of Cnoc an Eas wind farm from Corrimony may be relevant to the landscape and visual effects of the development insofar as they impact on visitors to Corrimony, but they have more limited relevance to the cultural heritage evidence. The setting of Corrimony, so far as such a concept can be usefully defined on that basis, does not on the evidence of SC extend beyond the valley floor except to the southwest because of the lunar alignment.

#### *Impact on Setting*

75. I can be very brief under this heading because of the conclusions which I believe can be properly drawn from a stage 2 analysis which follows the useful guidance on page 9 of Managing Change. If views to the northeast as far as the area of the wind farm cannot be said to contribute materially to the setting of Corrimony for cultural heritage purposes then the impact of Cnoc an Eas on the heritage significance of Corrimony (noting again what I have said about the contribution of setting to significance) can only, as SC made clear in the Appellants' IS at paragraphs 3.44 and 3.45, be very limited. I ask you to remember SC's explanation of the use of magnitude and not significance when evaluating Cnoc an Eas under paragraph 145 of SPP so as not to double count sensitivity.



76. Based on the evidence of SC I therefore ask you to accept that SC is correct when he finds that there will be an impact of low magnitude on the cultural significance of this Scheduled Monument, and that the contribution that setting makes to the significance of Corrimony would only be slightly reduced. The presence of the wind farm would not significantly affect the ability of visitors to understand and appreciate the monument and how it relates to the surrounding landscape.

### *Conclusions*

77. In her IR VC addressed a number of appeal decisions (see her Table 1 following IR paragraph 14). Ultimately the Appellants and HES agree (see the IR of VC at paragraph 16) that it can be difficult to draw meaningful conclusions by simply comparing two planning decisions. Against this background I make the limited point that the Reporter at the Corlic Hill decision (CD6.3) had it right in his approach in paragraphs 131 – 144 of this decision, when he concluded that development might cause some harm to the understanding, appreciation and experience of the historic asset relevant in that case, but that that harm would not be unacceptable. It cannot be the case that any harm equates to an impact on integrity. Therefore, I believe that NH's approach at IR paragraph 7 is quite incorrect. There NH explored the approach of HES to setting and to the concept of integrity referenced in paragraph 145 of SPP. She said that developments which would harm the integrity of the setting "are changes that would decrease our ability to draw on that relationship in understanding, appreciating and experiencing" a monument. For reasons explored in section B of these submissions and further explored here that test is far too severe and is not that intended by paragraph 145 of SPP. For a development to have an adverse effect on the integrity of a Scheduled Monument this must mean that the impacts are determined above the threshold of a high level of impact which would result in crucial loss of understanding, appreciation and experience. The impacts of Cnoc an Eas wind farm would be so far below that threshold that, in my view, the conclusion can comfortably be reached that what is proposed will comply with paragraph 145 of SPP, and in turn with Policy 57 of the LDP. Therefore, there is no need to look for exceptional circumstances to outweigh a breach of integrity.

78. If you disagree with this conclusion then I ask you to accept the evidence of DS that the climate change benefits of the development, the net economic and social benefits of what is proposed, and the scale of the contribution which would be made by Cnoc an Eas to renewable energy generation targets (all factors listed in paragraph 169 of SPP) would outweigh harm in this case. You will note that I do not canvas previously proposed mitigation through planting around the site. It is acknowledged by the Appellants that such mitigation would not reduce the impacts of the proposed development, and thus it should not count as mitigation. In any event such planting is not now proposed. However, so far as the benefits of the development are concerned I ask you to accept the approach set out in P paragraph 3.3 by DS. Paragraph 145 of SPP does not require that exceptional circumstances should be at a national or any other particular level. Policy 57 of the LDP does require that social or economic benefits should be of national importance, and it is the Appellants' view, based on the evidence of DS (explored orally at the inquiry) that in particular the contribution of Cnoc an Eas to renewable energy targets and the more general climate change benefits can be regarded as of national importance. I refer here also to the letter from the Chief Planner of November 2015 (CD3.20) which also reinforced the need for and benefits of shared ownership.

79. However, I do not believe that you will need to consider "exceptional circumstances". Indeed there is no need to put the impacts on Corrimony into the planning balance at all since the level of impact of the proposed development on the cultural heritage significance of Corrimony, and indeed on its setting when viewed in isolation, would be minor in magnitude and acceptable.

## **E. Conclusions**

80. My conclusions begin by applying relevant policies to the evidence, and the first port of call must be the LDP because of Section 25 of the 1997 Act.

81. I ask you to accept the views expressed in the SOA at paragraphs 5.50 – 5.52 so far as the LDP is concerned. Specifically, recording the policy test in Policy 67 of the LDP ("no significant detriment overall") I believe that the evidence shows that the landscape and visual impacts of the development in the respects addressed earlier in these submissions

satisfy that development test. I also ask you to accept that impacts of the development on Corrimony satisfy the same development test.

82. So far as other policies in the LDP are concerned, I am of the view that Policy 28 is of marginal relevance. One look at the policy will tell you that it is geared to advising on new buildings rather than renewable energy development. To the extent that you find that the policy is of any relevance it adds nothing to the development test in Policy 67. For what it is worth the Appellants see no breach of Policy 28 in respect of the proposed wind farm. Policy 57 is clearly engaged because of the SLA and because of Corrimony. However, if what is proposed satisfies the principal development test of Policy 67 then it must also satisfy the relevant tests in Policy 57, and I ask you to so accept. I should say that in making my submissions in relation to LDP policy I take into account the assistance provided in the SG to an evaluation of the performance of the proposed wind farm under Policy 67, and I have in mind here the criteria which follow paragraph 4.10 in the SG which I believe are complied with by the proposed development, as concluded respectively by SO, SC and DS. I also commend as material and to be given weight the compliance of the proposed development with Policy 68.

83. Turning to SPP this proposed development draws support from paragraph 161 of SPP and Table 1 since, as agreed with THC, the site is effectively in a Group 3 area where "wind farms are likely to be acceptable, subject to detailed consideration against identified criteria".

84. The next point to consider is the policy presumption which follows paragraph 27 of SPP, and which I have already explored in terms of the way it should apply in section B of these submissions. As explored in the evidence of SO, SC and DS it seems to me clear that the Appellants can claim what is proposed contributes to Outcomes 1, 2 and 3 within SPP. Outcome 2 is self-explanatory in the context of this type of proposed development. So far as Outcome 1 is concerned I believe on the evidence that Cnoc an Eas would contribute to the creation of a successful, sustainable place, noting the economic and social benefits which will result and the fact that Cnoc an Eas is a well designed and therefore sustainable wind farm. Turning finally to Outcome 3, I agree with DS that in interpreting what is meant by a "natural, resilient place" regard must be had to a wider meaning of environment and

not simply to landscape and visual concerns or indeed cultural heritage matters. Nevertheless, even if a narrow view is taken of Outcome 3 the proposed development would not harm, and would therefore serve to protect natural and cultural assets. However, I do urge upon you a wider interpretation of Outcome 3 by reference to climate change effects on the physical environment.

85. I therefore submit that in this case there is a highly material starting point of a presumption in favour of granting planning permission. That presumption is clearly rebuttable on the facts of the case, but I do not believe that the presumption has been rebutted in evidence. Therefore (paragraph 33 of SPP) the presumption is a significant material consideration for you to take into account.
86. Turning to paragraph 169 of SPP, regard has been had by the Appellants to the relevant factors in this case (canvassed earlier). Not much more need be said at this stage since paragraph 169 of SPP does not contain any development management tests.
87. My final reference must be to paragraph 145 of SPP on which I have already made submissions in the previous sections. The proposed development would not breach the integrity of the setting of Corrimony (and therefore – although outside the terms of paragraph 145 of SPP – nor the integrity of its cultural heritage significance), and therefore there is no need for the Appellants to demonstrate “exceptional circumstances”.
88. I also ask you to have regard to the significant contribution that Cnoc an Eas wind farm will make to meeting Scottish Government targets for renewable energy development. Whilst there is no cap represented by such targets it is also clear that both the overall UK renewable energy target and that for Scotland remains challenging, noting in this context the still current legal obligation on the UK to source 15% of its energy requirements from renewables by 2020. I refer here to the extensive exploration of such benefits in the SOA at paragraphs 5.10 – 5.15 and 5.41 – 5.43. The economic benefits of the development are addressed in the SOA at paragraphs 5.44 – 5.47 and I commend all this material to you without the need to elaborate upon it.
89. I also refer, if slightly out of context, to Policy 68 in the LDP. The arrangements reached with Soirbheas can in my view draw support from Policy 68 for reasons already given. They

can also draw support from the Scottish Government guidance (including the Chief Planner's letter) on community ownership of wind farms to which I have already referred at paragraph 3.

90. It should be noted that the main issues in play in this appeal are actually quite narrow. This is not a case which required discussion of such issues as operational noise, ecology, hydrology, ornithology or aviation. That makes this case relatively unusual and, in respect of the undoubted main issues, I believe that the conclusions I invite you to make can be comfortably drawn.

91. I therefore ask you to grant planning permission for Cnoc an Eas wind farm.

**Marcus Trinick QC**

**April 2017**