TOWN AND COUNTRY PLANNING (SCOTLAND) ACT 1997

PROPOSED CNOC AN EAS WIND FARM

RESPONSE OF THE APPELLANTS TO THE CLOSING SUBMISSIONS OF OTHER PARTIES

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Response of the Appellants to the Submissions of Other Parties

Introduction

1. This document is the response of the Appellants to the Closing Submissions of Historic Environment Scotland (HES) and The Highland Council (THC). It follows the pattern of a commentary on individual paragraphs in those submissions.

2. I refer to the Glossary within the Closing Submissions submitted on behalf of the Appellants. The same abbreviations apply to this document.

Closing Submissions of Historic Environment Scotland

3. Paragraph 16. If HES is arguing that SPP advice should be the sole arbiter of policy compliance then that is of course wrong. s25 is engaged, and even if it were not the development plan cannot be displaced as a material consideration.

4. Paragraphs 21 and 108. This is not common ground. VC was cross-examined on this point to the effect that such a distinction could be drawn within paragraph 145 of SPP, noting the absence of a definition of "integrity".

5. Paragraph 28. CD5.2 is not SG policy, but rather HES guidance.

6. Paragraph 38. SC did agree that CD5.2 does not prioritise the factors which contribute to significance. However, he made it clear that in any case it was nonetheless important to understand which factors did contribute to significance, and which contributed more than others, in order to underpin a valid stage 3 assessment.

7. Paragraph 41. In what document did HES so advise THC? There was no such advice produced to the inquiry. This is, regrettably, new evidence.

8. Paragraph 44. In its objections to the application HES made not one mention of integrity. This term only appeared in inquiry evidence.

9. Paragraph 53. As just recorded, HES did not even mention integrity in its consultation responses.

10. Paragraph 53. The process of putting together the HES objection is here recorded in terms that were not given in oral or written evidence to the inquiry. There was a lack of clarity, but VC did not refer to any document drafted by her and NH did not mention in XX the text now recorded.

11. Paragraph 54. No such evidence was given or brought before the inquiry. Indeed HES made the point that its role was simply to comment on the ES and not to carry out a full assessment. This point continues in paragraph 55; did NH provide advice and a summary of that advice.

12. Paragraph 56. Following e-mail exchanges with Harper Macleod and the Case Officer at the DPEA it is necessary to address this paragraph. In my view you should ignore the new evidence given on NH's site visits. In XX NH said that she could not recall if she had made a site visit for the purpose of informing the HES consultation response to THC on the application. I did indeed offer NH the chance to think again about this, but any further reply to my question would have had to be delivered before the close of evidence so as to give the opportunity for further XX if I thought that necessary. Once evidence has closed, as it did on the final day of the inquiry, it is as Jennifer Jack knows perfectly well not permissible to allow new evidence to be given to you. This is for good reasons of fairness which I hope needs no general explanation. In particular, I do not know what importance you may attribute to the new evidence, having regard to the points I have made in Closing Submissions about the credibility of the HES approach to consultation and its evidence at the inquiry. That HES attaches importance to the point is clear from the commentary at the end of paragraph 56. To allow new evidence would set a most unfortunate precedent which others would not unnaturally seek to exploit on future occasions. I am therefore entitled to require that you should, to the extent possible since the new material is unfortunately before you, ignore paragraph 56.

13. Paragraph 64. Firstly, the magnitude criteria are only found in Table 11.3. Secondly, SC did not change the magnitude of effect from that found in the ES. Thirdly, the assessment process for Scheduled Monuments was indeed halted at the magnitude stage for paragraph 145 of SPP since high sensitivity is already built into paragraph 145 of SPP.

To use significance rather than magnitude for the purposes of paragraph 145 of SPP would be to double count sensitivity.

14. Paragraph 65. We refer to what has been said about paragraph 38 concerning the "ranking" of characteristics. And turning to paragraph 87 the only characteristics that need to be considered are those which are present and which could be impacted by the development.

15. Paragraph 71. SC did not agree to the point recorded in the last sentence.

16. Paragraph 76. HES fails to correctly record the evidence. As SC made clear there is a need to distinguish between the general alignment of Clava passage graves to the southwest quadrant (a 90 degree spread) and more precise alignments to lunar or solar events within that quadrant.

17. Paragraphs 77 and 80. The HES submissions ignore its own guidance "Managing Change" (stage 2 page 9 – "our present understanding") and disregard an answer given in re-examination by SC to the effect that in assessing impacts on heritage assets regard must be had to current circumstances. No mention is made of guessing into the future in terms of understanding assets, and this should not be done.

18. Paragraph 93. We are not aware that any evidence was produced, or could be produced, of whether or not a relatively undeveloped rural landscape (if such it was) was important to those who constructed the monument.

19. Paragraph 115. The evidence of AM could not correlate with the RFR since she gave no impact evidence.

Closing Submissions of The Highland Council

Paragraphs 3 and 4

20. I do not recall that THC played a part in the hearing session which extended to the comments now made. Indeed the hearing session did not engage with heritage policy, since all heritage issues were dealt with in the inquiry session. Thus I believe that this section of the THC submissions should be struck out as an attempt to give new evidence.

21. However, addressing them now, in any event THC is wrong. Policy 57 cannot be read so easily with paragraph 145 of SPP. It uses the terms "compromise" and "significant adverse effects", neither of which necessarily equates to the concept of integrity. Compromise may simply mean any harm, but that is guesswork. And a significant adverse impact may or may not breach integrity. The use of the word integrity in Appendix 2 of the LDP is simply a reference to national policy.

22. Again, Policy 57 advises in terms of the heritage resource, to setting. By the resource it is likely that the LDP means the heritage significance of an asset, but that is not explicit. At all events it seems clear that the scope of paragraph 145 of SPP is demonstrably narrower than that of Policy 57.

23. In this context I do not understand what is meant in paragraph 3(e). Paragraph 4 is clearly wrong given the difference in scope between Policy 57 and paragraph 145 of SPP.

24. Finally, THC cannot just bypass Policy 57 and invite you to determine by reference to SPP. I refer to s25 of the 1997 Act.

Paragraph 5

25. This paragraph is extraordinary, and again this is new evidence, not being a point made in the policy hearing session. I invite you to disregard this paragraph for the same reasons as paragraphs 3(a) and (b).

26. To the extent that you engage with what is said, is Mr Findlay really saying that, even in the absence of actual impact being determined by a decision maker, a project should be condemned under paragraph 145 of SPP if there is the potential for a breach of integrity? That would be a surprising proposition. Again the precautionary principle, however that is defined, is only engaged where a decision maker is unable for reasons of uncertainty to determine likely impacts, and that is not the case here.

Paragraph 6

27. THC gave no evidence in the inquiry session and should not engage on the evidence now. This passage should be struck out, or at least not be taken into account by you.

Paragraph 8

28. I first address paragraph 8(e). Indeed the Appellants do distrust the THC approach. In one sentence THC acknowledges that the SG is parasitic on Policy 67 of the LDP and cannot create new policy. In the next it uses clever and careful words to in effect suggest the opposite. This is double speak. The game is given away in section 8 of the THC policy HS – see my Closing Submissions – and it is given away again in paragraph 8(b) of the Closing Submissions of THC. How can there be a requirement for mitigation in the SG (Mr Findlay says there is not in paragraph 8(d)) which if not observed may "point to a conflict" when there is no such requirement in Policy 67? This comment is not a challenge to the SG (see THC closing at paragraph 8(e)). Rather it is the Appellants who are rightly insisting on treating the SG as SG rather than infer some new policy elements from it.

29. My last point on the SG addresses the extraordinary convolutions regarding Chapter 5. There was no agreement that Chapter 5 of the SG was material. I said in the hearing session, and have repeated in my closing submissions, that Chapter 5 can have no application to the appeal. However, the landscape character discussions in Chapter 5 are material insofar as such character crosses the Chapter 5 boundary into the area covered by Cnoc an Eas. The THC effort in its HS and in closing to make Chapter 5 apply whatever a clear development plan boundary may say is very concerning in terms of its general approach to policy.

30. From paragraph 8(c) it would appear that THC has misunderstood evidence on the design rationale in suggesting that turbines on the highest ground were increased in height as a mitigation measure. By looking only at one variable, the statement shows a lack of understanding of a complex process. As explained by SO, the height of each turbine was considered on a case by case basis from each of the key design viewpoints, including Corrimony and Loch Ness. Both heights and ground positions were adjusted to optimise the design – to only compare heights is to compare apples with pears, following the guidance set out by SNH. The combined effect is that a relatively even tip height will be apparent from Corrimony, and that the array will be minimised and relatively even as seen from Viewpoints 10, 14 and 15 in the SLA.

31. In relation to paragraph 8(d), THC agreed in the Report of Handling (paragraph 8.46) that the design is to be commended and the suggestion that the Appellants have not demonstrated appropriate mitigation is therefore wholly inappropriate. Given that the appeal is to consider the proposal currently before the Reporter it is unsurprising that the evidence of SO concentrates upon this scheme and not upon earlier iterations which were rejected and developed in favour of the optimised scheme.

Paragraph 10

32. My point in the hearing session, elaborated on in my Closing Submissions, was that the LDP will soon be more than 5 years old, so that for the purposes of your decision, paragraph 33 of SPP is engaged. That is the case. What Mr Findlay says in paragraph 10 is irrelevant to the point, and I refer to my submissions.

Paragraph 13

33. With regard to paragraph 13(e), Mr Findlay's conclusion that the overall impact of forest management in Glen Urquhart will be to open up views remains unsubstantiated by the evidence. Only in an unreal world would one only consider the felling plans and not also the restocking plans and the long term objectives for native woodland restoration in the glen..

Paragraph 22

34. With regard to Druim Ba, at this point it is important to remember that it too is at appeal. Both the Druim Ba evidence and the Cnoc an Eas evidence include visualisations showing both of these wind farms and any Reporter seeking to understand this relationship has all the information required.

Paragraph 23

35. Mr Findlay is wrong to suggest that only the additional impacts have been considered, and not the overall impact. Both have been fully considered and were updated and set out in CD1.3 at paragraph 6.207, included throughout CLVIA, and summarised in paragraphs 6.325 – 6.326, as well as being revisited in the Supplementary Environmental Information dated February 2016 – Main Text, Figures and Appendices (CD1.21).

Paragraphs 28 – 30

36. Paragraph 29(a). The Appellants did not accept that such a condition has been imposed elsewhere. Mr Nesbit specifically stated that had this been imposed elsewhere by the Energy Consents Unit, as suggested by SH, he could not comment on that. The example of Millennium South was not given during the hearing session and the particulars of that scheme and case were not explored within evidence or indeed as part of the hearing session. However it can be noted that this was a scheme being pursued under s36 Electricity Act 1989 for an extension, comprising 36 wind turbines in total. It has no direct comparison to Cnoc an Eas but in any event it remains the Appellants' position that this is a statutory function of the Planning Authority and as such it is not appropriate to place an obligation on the developer to pay for what should be paid for by the Planning Authority. On this basis, the condition does not meet the Circular tests and is unreasonable, onerous and unenforceable.

37. Paragraph 29(b). There is a difference between Conditions 14 and 16 and this condition, in that this is a statutory function of the Planning Authority so it is not a function that the developer should be required to fund.

38. Paragraph 29(c) and (d). There is no dispute in relation to the relevance or reasonableness of such a role, but rather in relation to whose responsibility it is.

39. Paragraph 30. There is potential conflict between items i. and ii. If the turbines and infrastructure cannot be micro-sited within 50m of the top of the bank of any watercourse, this would effectively limit micrositing available downhill. If the turbines cannot be positioned higher when measured in metres AOD than the listed co-ordinates, this would prevent uphill micrositing. Together this will severely restrict micrositing, which by its very nature is designed to provide flexibility within the parameters of assessment. This element of the condition as drafted is therefore too restrictive and does not accord with what has been fully assessed within the ES. At the hearing session Mr Nesbit advised that micrositing is in place for a reason so as not to be overly restrictive but there was an acceptance that the micrositing provision could be reduced from 50m to 25m and the Appellants maintain this suggestion to offer a compromise. As such the Appellants request that, in the event of planning permission being granted, the

Appellants' condition be imposed with either a 50m or 25m restriction on micrositing but no restriction on the direction of such micrositing provision.

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