

GS/379/IK

**Electricity Act 1989**

**Town and Country Planning (Scotland) Act 1997**

**Town and Country Planning (Appeals) (Scotland) Regulations 2008**

**DOCUMENT SBA/I/4: PLANNING POLICY TOPIC PAPER**

**On behalf of**

**SPEYSIDE BUSINESS ALLIANCE (SBA) and other local objectors**

**For a Public Local Hearing and Inquiry**

into an application for a wind power station at Dorenell, Glenfiddich consisting of 59 turbines, each 126m high and associated facilities and tracks, all known as the Dorenell Wind Farm

DPEA Reference: Dorenell Wind Farm

Submitted 19<sup>th</sup> October 2010

## Background

1. I am Ian Kelly MRTPI, Head of Planning at Graham and Sibbald, and I am a chartered planner with over thirty years experience in the public and private sectors mainly in Scotland but also involving work in Europe, mainly in Scandinavia. I have worked on more than a dozen windfarm cases at various stages in the consent/planning permission process.
2. This paper has been prepared on behalf of the Speyside Business Alliance ('SBA'), a grouping of local and international businesses who together form a local third party objectors group. The SBA consists of Wm Grant & Sons; Diageo; Glenfarclas; Walker's Shortbread; Edrington and a number of smaller local tourism providers.
3. The Reporter, in his Procedure Note in respect of the Inquiry sessions, advised that the Planning Policy evidence should address "*Policy issues (insofar as they relate to the development plan and the Council's strategy for wind farm location)*". This list of matters does not include either the matter of National Climate Change and Energy Policy nor does it include any consideration of the claimed benefits of the Dorenell proposal. However, the Core Document list, at Folder 10, does contain two UK and one Scottish Government references for these issues. Therefore, in this paper Climate Change and Energy are addressed, but only very briefly. Should the applicants lodge significant material on these topics then the SBA would wish the opportunity to respond.
4. The Reporter has also confirmed that Precognitions should be limited to 2,000 words. Therefore, in order to address the full case this Planning Topic Paper has been produced. A similar approach has been taken in relation to Landscape and Visual matters and Tourism.
5. I would stress that, in the preparation of this Paper, in my subsequent expert witness evidence, and in my advice to my clients, I have sought to focus on the key determining issues in respect of a s36 consent application which the Moray Council

(‘TMC’), as consultee decided to object to. In so doing they had regard to all of the information before them, and the benefit of a site visit to the location. Their decision to object was in accordance with the advice from their Officers and having regard to the consultation responses and local objections. The detail of the Council’s consideration of the consultation is considered later in this paper.

6. Having regard to that position this paper seeks to both review the Council’s assessment and to consider other areas such as the policy implications of the evidenced to be given by Mr Steele and Professor Stevens. I accept that all parts of this paper and the whole of my later evidence are areas for valid cross examination.
  
7. The Council’s objection as recorded in the minute of the Special Committee Meeting of 13<sup>th</sup> October 2009 (lodged as part of **CD-G-7**) was as below:  
  

*“the Council lodges an objection .....on the basis that the proposal is located in an area which is in conflict with the Council’s Strategy for wind farm location, and that there is insufficient justification for over-riding that strategy on the basis of the cumulative visual impact created by the 59 turbines and access tracks.”*
  
8. This minute differs in detail from the recommendation made by Officers which referred to the impact of the proposal on its own and also to impact on the local economy with these points being linked to the Conclusions section of the Committee report. It is assumed that the Council will explain the significance, if any, of these differences. This matter is considered briefly in relation to the submitted Statements of Case.
  
9. My involvement with this wind farm proposal stemmed from late August 2008 when I was asked to attend a meeting at Dufftown to consider how to respond to the s.36 application by Infinergy. I subsequently provided planning policy and procedural

advice to the SBA through the stages of lodging an objection with the ECDU and the Council and eventually to the stage of the Council's determination of their position.

10. I was subsequently asked in December 2009 and January 2010 to assist the SBA by providing expert planning advice and case management services for the expected Inquiry.
11. This paper, against that background, focuses on the planning policy and material considerations matters of concern to SBA. The paper and my evidence address the consideration of the proposal in the light of the Development Plan and other material considerations in relation to the evidence on behalf of SBA. There are other SBA expert witnesses for the Inquiry session of this case, including landscape and tourism. There are also two local witnesses for the Inquiry session.
12. I had visited the site in August 2008 and I have undertaken several additional visits to the application site and the surrounding area since then for the objections stage and in preparation for the Inquiry. I have holidayed in the Ladder Hills area and I will have undertaken additional site visits before giving my evidence. I am also in the Cabrach area as part of my work in supporting and advising the Cabrach Community Association (CCA). The CCA are a grouping of local residents who are determined to drive forward the development and regeneration of the Cabrach area.
13. In formulating my evidence I have had regard to discussions with Mr Steele in particular on landscape and visual impact issues. I have also read a draft of Professor Steven's paper. This paper could have been more fully informed by a greater involvement of SNH in particular in the process. It is my view that SNH should be in attendance at the Hearing and Inquiry to address both landscape and ornithology issues. I am not an expert in ornithology but, from the perspective of a lay, intelligent person, I take the view that it would be more helpful for the Reporter to have had all aspects of the ornithological evidence discussed in front of him. I take the view that

SNH's contribution to this important case has been inadequate and insufficient for Government's national policy advisers.

### **The Statutory Tests**

14. The application is one that was considered by TMC as Planning Authority following a consultation in respect of the s36 application under the Electricity Act 1989. That Act was passed in 1989 to re-organise the Electricity industry and to govern the connection of larger thermal power stations to the National Grid. It was not designed to deal with the assessment of on shore wind farms in remote rural areas. Nevertheless it is the instrument that has been used for consents and refusal since windfarms came to the fore.
15. This form of application gives rise to two sets of tests as follows. Should Ministers firstly decide to grant consent under s.36 of the Electricity Act 1989, then section 57(2) of the Town and Country Planning (Scotland) Act 1997 provides that planning permission can be deemed to be granted at the same time for any operation that constitutes development within the meaning of the Planning Act.
16. Paragraph 3 of Schedule 9 of the 1989 Act provides a specific requirement on the Scottish Ministers to have regard to:
  - a. *The desirability of preserving natural beauty, of conserving flora and geological or physiographical features of special interest and of protecting sites, buildings and objects of architectural, historic or archaeology interest:*  
*and*
  - b. *The extent to which the developer has complied with its duty to do what it reasonably can to mitigate any effect which the proposals would have on the natural beauty of the countryside or any such flora, fauna, features, sites buildings or objects.*
17. The full wording is given on pages 3 and 4 of the Planning Statement lodged by the applicant along with the ES.

18. It is almost impossible not to comply with these tests. Indeed there is nothing in them that would actually prohibit or prevent the destruction of key natural assets as a developer could “*have regard to the desirability of preserving*” and then not preserve. These requirements do not give a specific set of criteria or thresholds against which to assess a project, but at their simplest, they do clearly indicate that there is a balance to be struck between the policy, technical and economic justification for any project and the directly associated environmental and other impacts.
19. However, given the deemed planning permission aspect of the process, and given the lack of clear guidance on assessments or thresholds in the Electricity Act tests it is clear, and well established in practice, that a s.25 Planning Act test should also be carried out in order to consider whether the proposed development complies with the Development Plan, and also to consider whether there are any material considerations which change the presumption that flows from a favourable Development Plan assessment. In this case the Reporter has specifically asked for evidence in respect of the Development Plan.
20. Therefore in this paper I focus on the Development Plan and other material considerations assessment having regard primarily to planning and landscape and visual issues. The paper reaches conclusions based primarily on the s.25 assessment process.
21. A s.25 Planning Act test should be carried out in order to consider whether the proposed development complies with the Development Plan, and also to consider whether there are any material considerations which change the presumption that flows from a positive assessment. Those material considerations will include Government renewable energy and climate change policies (to the extent that they have any additional effect beyond the Development Plan in relation to the particular proposal) but these aspects are only material considerations. Nowadays, sustainability, energy and renewables policies run throughout modern local development plans, and are very much part of local government thinking. However, such general policy

making does not, in any way, overrule the Local Plan, or call for the Development Plan to be set aside in the determination of an application such as this one. That is the law, easily stated, but occasionally forgotten in such cases as this.

22. In this case there is an up to date Adopted Local Plan with a specific and detailed Policy in relation to renewable energy projects. That Policy is presumed to be acceptable to Scottish Ministers, as they did not seek to intervene in the Adoption process. In formulating their position on the consultation TMC had full regard to the up to date Development Plan. I consider that that policy should apply. Proper application of the policy, taking all material considerations into account, should result in refusal of this application.

### **National Climate Change and Energy Policy**

23. Clearly it is not appropriate to challenge Government policy in a Public Inquiry although it is clear that there are emerging concerns as to the appropriateness of the extent of current reliance upon on-shore wind, especially in the Scottish Government's overall approach to energy. However, it is certainly appropriate, to consider how such Government Policy translates through to the land use planning system. The correct route, in a Plan led system, is via the Development Plan, and SPG, rather than through decisions on individual projects.
24. As indicated, in this case, there is an up to date Development Plan with a specific and positive policy provision (and associated SPG) for wind farms. Indeed, within the TMC area, there are a number of commercial scale wind farms that comply with that Development Plan provisions.
25. The Scottish Government's renewable policy, which sits within UK National Energy Policy, is set out, under "Renewable Policy", on the Scottish Government web site. Ministers are fully committed to promoting the increased use of renewable energy sources. According to Ministers, this commitment recognises renewables' ability to

tackle the causes of climate change as well as their potential to support economic growth. Scottish Ministers have set clear targets for renewable electricity, announcing an increase in November 2007. Ministers want 50% of the demand for Scottish Electricity to be supplied from renewable sources by 2020, with an interim milestone of 31% by 2010. More recently an 80% of consumption target was announced but this was not accompanied by any Strategic Environmental Assessment and therefore it cannot be a plan or framework for subsequent consents. Rather it is a key consideration for Planning Authorities when updating their Development Plans and SPG.

26. Scottish Ministers want to see targets exceeded rather than merely met, and have made it abundantly clear that they do not wish targets to be viewed as a cap on what renewables can deliver. It is considered important that momentum towards the targets and beyond is maintained. This will require more technologies to start playing a major role – for example, marine energy and biomass energy. It is clear that wind by itself has not, and never can achieve the ambitious targets which have been set.
27. The Planning System has already played its part in ensuring that the 2010 target has been met and there is considerable consented or approved capacity that has not yet been built or commissioned, meaning that there is already significant progress towards the 2020 target. There is therefore no especially pressing or acute need to permit further installed capacity nor to send out any panic signals to society. It is accepted that the policy environment generally favours onshore wind farm developments on appropriate sites, but it does not do so unquestioningly. Indeed policy throughout the UK is clear that onshore wind farms are not to be permitted at any cost. They are only to be permitted where they can be satisfactorily accommodated and where the benefits of any scheme outweigh its adverse impacts. That is clearly the overall thrust of the guidance in the consolidated SPP, and it is also the tone of the caveats which appear throughout energy policy. These caveats are clearly incorporated in the UK Government's latest Renewable Energy Strategy (**CD-S-1**).

28. There is a danger in the approach of being over driven, in planning decision making, solely by targets, in the absence of them being translated into proper spatial planning frameworks at national and regional level (so as to direct development to particular sites and locations, just as we do with other priority types of development such as housing) and in the absence of associated Strategic Environmental Assessments (for both general and spatial policy). The danger is a pressure to approve developments which are not properly acceptable in terms of their impacts and, conversely, despite the targets not being caps, it could also lead to the rejection of otherwise acceptable schemes just because a target has been met by other projects. The “first-come-first-served approach also has implications for cumulative impact assessment that could lead to the rejection of “better” schemes later in the process. Interestingly, a recent consultation by the ECDU, in respect of regional radar solutions in south-west Scotland, fully recognises this danger in the context of schemes that are conditionally consented but not implemented.
29. Therefore, in the light of experience, it is considered that the approach of focussing the priority on fully assessing any wind farm application (or appeal proposal) in terms of the Development Plan and other material considerations is the correct approach. It is only environmentally acceptable (as well as operationally effective) schemes that should be approved. There is nothing in the weight of climate change or energy policy to justify approving projects that are unacceptable in terms of their adverse impacts which are not outweighed by demonstrable and verifiable benefits. There is nothing in any of the submitted Renewable Energy Policy documents (**CD-S-1, 2 and 3**) that changes the operation of the planning system in Scotland.

### **The Planning History of this Proposal**

30. The details of the proposal, a description of the site, and the planning history are addressed in sections 1, 2 and 3 of the Committee Report (**CD-G-7**). Those aspects are not repeated here although the detail of the site and its surroundings are addressed by Mr Steele.

31. However, as will have been addressed by Mr Roy Dennis in the Ornithology Hearings session, it is also important to bear in mind that the proposed wind farm site is located on an Estate with a long history of illegal raptor persecution and where the ecology of the Estate reflects not the real potential of the land but the results of the adopted management practices. Again it is clear, in my view, that SNH should be at the Hearing and Inquiry to advise on these matters.

**The Submitted ES and SEI (and the outline HMP)**

32. The applicants prepared and advertised SEI (**CD-H-7**), mainly dealing with cumulative landscape and visual impact. A formal response has been made on behalf of the SBA in respect of that submitted SEI (**CD-K-23**). That submission is incorporated into this paper but not repeated.

33. However, it is interesting to ask the question “Who is the relevant authority for this SEI material?” There does not seem to be anyone who has provided any screening opinion or approved a proposed scoping, and the assessment of this SEI does not appear to be part of the Reporter’s Minute of Appointment.

34. I have read through the original ES from 2008 (**CD – H – 2 to 5**) and the Planning Statement, also from May 2008 (**CD – H- 6**). I have looked at the 2010 Outline HMP text and figure (**CD-H-10**). The matters of wind farm design and ornithology, which are of relevance to the SBA case, will be addressed in the Hearings sessions. Therefore, these are not addressed further in this Paper.

35. The only additional matters on which I would wish to comment at this stage are the question of alternatives and the emergence and consideration of the HMP.

36. The Electricity Works (EIA)(S) Regulations provide that where alternatives have been considered then the ES should include an outline of the main alternatives and the main reason for the choice of the ES scheme. These requirements are found in Schedule 2,

Part II of the EIA Regulations. This is also good practice and more information on these aspects is generally helpful in the understanding of the project and project rationale.

37. Chapter 6 of the ES is titled “Assessment of Alternatives”. Within that chapter paragraphs 6.7 to 6.12 address site selection. What is described there is a generic process whereby a large number of sites, none of which are identified either by name or location, were the subject of a sieve type assessment leading to 27 sites (unnamed) being selected for more detailed evaluation. The evaluation criteria are then given for Dorenell but, of course, these are meaningless without any other sites to compare them with. There is no requirement to consider alternatives, but where they are considered then the reader should be able to see how the project ended up at the selected site – that is, the main reason for the choice of the ES scheme. That main reason cannot be deduced from this part of the chapter. The applicants will, no doubt, claim that the sieve, as reported, is sufficient to explain their choice of Dorenell, but I doubt, with respect, that Dorenell displays any significant advantages over other windy sites beyond the combination of a willing landlord and reasonable proximity to the grid.
38. The remaining 43 pages of this chapter are about site design and that, perhaps, should have been the proper title of the chapter in the ES.
39. I have had recent experience of Habitat Management Plans for two wind farms – Gordonbush in Sutherland and Griffin in Perthshire. In this case we have an Outline HMP (OHMP) with a 2010 Figure. I have seen the comments of the RSPB on the OHMP and have considerable sympathy with them. In the case of Gordonbush the HMP, worked up in detail after consent and deemed planning permission were issued, involves, inter alia, significant deer culling in an area over the whole Estate and not just the wind farm. As the Estate is not fenced this has a direct impact on deer numbers and hence sporting activities on the adjacent Estates. None of this was assessed in the determination of the s.36 application for Gordonbush. With Griffin,

the detailed development of the HMP resulted in a significant change to the very large amount of tree felling on the site. Rather than the trees being mulched on site, they are to be taken off in lorries. Vehicle numbers for the development were discussed in the ES and at the Inquiry and (since consent was granted) were deemed acceptable on the basis of the numbers given in the ES. The numbers are meant to be controlled. However, no allowance was made for these timber lorries and now no one seems sure as to whether, as a result, the development is operating within the terms of its permission or not. For local people, who have to bear the brunt of this consequence of consent being granted, the very large increase on lorry journeys is of enormous importance.

40. Taking account of this experience to date, of which the above is only a limited summary, it is considered that it would be both prudent and sensible, not to say essential that where this development is being considered for approval, to defer that approval until the HMP had been fully worked up, consulted upon and assessed. If found to be satisfactory then the implementation should be controlled via a section 75 Agreement, as the HMP area might well extend beyond the application site and involve activities by, or burdens upon parties other than the applicants.

### **The Proposed Development and Its Benefits**

41. The proposed development as described in the ES from May 2008 and in the TMC Committee Report and I do not repeat that information in this paper.
42. The claimed environmental benefits of the proposal are set out in table 1 in the ES NTS and there is a section in chapter 2 of the ES as well as a carbon balance assessment in the Appendices. That section in chapter 2 is mainly a generic discussion and the calculation in table 1 is basically an assumption. No precise, attributable or verifiable environmental or climate change benefits are claimed for this proposal. Therefore, the environmental benefits are those assumed by policy and factored into the favourable policy environment. Interestingly the assessments presented do not address the carbon footprint arising from the use of the electricity generated by the

proposed Dorenell wind farm and how that affects the conclusions. For example, if the money to be invested in Dorenell through the system of subsidies for renewable energy was invested in energy use reduction measures would the resultant claimed environmental and climate change benefits actually be higher? A balanced assessment would have attempted such a comparison.

43. The economic benefits of the project are addressed in paragraphs 2.33 to 2.37 in the ES. Again these sections are expressed in general terms which is understandable given the procurement routes that will need to be followed. These economic benefits are not major.
  
44. Socio-economic benefits are further considered in chapter 22 of the ES. This assessment does not account for the effects of the money removed from the local, regional and national economies as a result of the higher costs of electricity arising from the investment in renewable sources of energy. A balanced assessment would address this openly. Otherwise this chapter is an interesting discourse on the potential impacts of an assumed amount and pattern of expenditure alongside thoughts on potential management and mitigation measures. It is worth noting that the eventual full time employment for the wind farm will be 2 people, based locally.
  
45. Given this limited and mainly generic information about the benefits of the proposal, and given that much of the claimed benefit cannot be guaranteed or verifiably checked, it is difficult to make a balanced assessment of the proposal other than on the basis of these generic assumptions about its supposed benefits. Yet it is equally clear that such generic benefits deriving from wind energy generation, especially the assumed environmental benefits, are already inherent in the favourable policy context for such developments. The policy assumption is, quite simply, that renewables deliver environmental and climate change benefits. This is not the place to debate that topic, since the policies are in place. However, in the absence of specific claims for measurable, attributable and verifiable environmental benefits and given the limited

net economic benefits, it is considered that there are no other material benefits of this proposed scheme which should be weighed in its favour in considering the balance between benefits and adverse impacts.

### **The Submitted Statements of Case and Consultation Responses**

46. I assisted in the preparation and lodging of the Statement of Case for the SBA and I have seen the Statements of Case for the other parties. As stated I regret that SNH and SEPA are not in attendance at the Hearing and Inquiry.
47. The Statements of Case are all quite standard but there are two points from the Council's Case that I wish to highlight in this paper.
48. In the Council's Additional Inquiry Statement their position on the application of planning policy is clearly set out. The relevance of the Development Plan, as the starting point for the Council's consideration of any (wind farm) proposal is stated. Finally, it is stated that "*this Inquiry is not considered the platform to debate the procedures associated with the consideration of Section 36 consultations.*" I would agree with those statements. In addition, in the context of the clearly Plan-led nature of the Scottish Planning System, I would also say that this Inquiry should not be seen as a platform to challenge policies in an up to date Local Plan that Ministers have not sought to modify before its adoption.
49. In the Council's Additional Hearing Statement the Council has confirmed that it "*does not have the resources, specialist skills or manpower to proactively monitor a consent for this proposal should it be granted.*" I regard this as a significant material consideration that will be addressed at the Hearing Sessions. Submissions might also be made on this matter.
50. Other than the above I consider that all of the issues raised in the Statements of Case are likely to be addressed in evidence before the Hearing and the Inquiry.

### **Additional Evidence affecting the Planning Policy Assessment**

51. The paper has had full regard to the material being prepared by Mr Mark Steele and Professor Terry Stevens. The paper has also had regard to the SBA material for the Hearings and the evidence to be given by the two local witnesses at the Inquiry.

52. Mr Steele contributed to the SEI response and he has reviewed the landscape and visual sections of the ES. His paper concludes:

- *“The ES viewpoints do not accord with published guidance and are not properly representative of the landscape and visual resource and potential receptors of significant effects.*
- *The ES methodology used in the assessment of landscape and visual sensitivity is flawed.*
- *The ES definitions of magnitude of landscape and visual effect are ill defined and ambiguous.*
- *Whilst the criteria for the assessment of significance are in general accordance with GLVIA guidance the professional judgements are based upon inadequate viewpoints as well as flawed methodology for the assessment of both landscape and visual sensitivity and magnitude of change. This undermines the credibility of the ES assessment of landscape and visual impact significance.”*

53. Professor Stevens has considered the potential adverse effects on brand image and local tourism interests. He concludes:

*“This Report has highlighted a number of important factors relevant to the Dorenell Wind Farm proposals that should be factored into the overall review of the S36 application:*

- (1) *There is widespread and general support for the fact that, from a tourism perspective, wind farms should not be located in primary*

*designated landscape areas or be visible from these primary designated areas.*

- (2) The scale (number of turbines and height) of wind farms is a material factor affecting visitor perceptions with larger developments causing a higher level of negative reaction than smaller developments.*
- (3) There is evidence of a direct connection between visitors' perceptions of a destination's image and branding as a 'wild place' and the erosion of this brand as a result of intrusion by 'industrial' developments, including wind farms and their ancillary facilities / structures.*
- (4) The tourist industry (operators and key players) consistently express strong concerns about the negative impacts of wind farms on their own businesses and, more significantly, on the tourism profile (brand and position) of their destination.*
- (5) In rural areas with limited tourism facilities and services where there is a high dependency upon niche and special-interest markets whose primary reasons for choosing a destination are its wild, peaceful, tranquil and unspoilt characteristics, then the potential negative impact of wind farms is a genuine concern.*

*The majority of research studies involving visitors (or potential visitors) to a destination fail to examine the relationship between market position, branding and perception or market motivations. These and other weaknesses in the existing understanding of tourist responses to wind farms have been discussed.*

*Moray is a destination that has recognised the need for a more aggressive approach to growing its tourism economy. This will be based upon working with a range of internationally renowned businesses whose fashion, food and drink products are the direct result of the environmental, geological, geographical and cultural conditions in the area.*

*The existing promotion and marketing of these products (many of which are iconic Scottish brands) to global audiences evokes the essence of the wild, undeveloped open spaces of the Scottish Highland countryside. These images create and substantiate perceptions of Scotland as a place with great unspoilt scenery and, indeed, for 92% of tourists to Scotland, this is an important reason for them choosing Scotland as a destination of choice.*

*Wind farms, especially large-scale developments in this area, directly contradict these images and erode the foundations upon which the brand values of the Moray area's tourism proposition and the related businesses are based.*

*In addition, the proposed development site is within a landscape that has secondary level designation but is within view of the Cairngorms National Park. The Glenfiddich Estate and the proposed development site is part of the tourist visual and physical approach to the National Park and for many would be regarded as part of that National Park 'experience'.*

*The area of Strathbogie and Cabrach is embarking upon a tourism development strategy based upon increasing the use of local trails for walking, cycling and equestrian activities. These specialist activities are based upon tourists having an intimate involvement with the countryside. One of the strengths of this area is its relative remoteness, wildness and the absence of dominant and intrusive structures in the landscape that would diminish the 'wild' experience for these emerging markets.*

*Overall, therefore, for a number of reasons relating to the way Moray is developing and positioning its tourism offer; the interrelationship between tourism and other consumer brands and the significance of tourism to the future of the area's whole economy, the proposed development at Dorenell will significantly prejudice and erode the area's appeal to tourists."*

**54.** The above two sets of conclusions along with the related evidence that is being prepared, have been taken into account in the policy assessment below.

### Consideration in relation to the Development Plan

55. The relevant Development Plan policies are set out in the October 2009 TMC Committee report. My assessment briefly addresses the key policies set out in the report. In doing so I recognise that for much of the planning case, I will be adopting a position that is the same as the Council's.
56. In this case it is particularly relevant to note that we have a very up to date Local Plan, prepared in the light of all of the relevant National Planning Policy and Advice and that, as a result, there is less need than normal to consider the detail of that National Planning Policy and Advice under material considerations other than in respect of the consolidated SPP
57. Normally, at this point in a paper such as this there would be a lengthy assessment of a full range of planning policies from the relevant Structure Plan and Local Plan. However, in this case there is a very specific policy provision and, following on from the paragraph above, it is possible to go directly to **Local Plan Policy ER1: Renewable Energy Proposals**, adopted as recently as December 2008. That policy has a positive approach – renewable energy proposals will be favourably considered where they meet certain criteria. However, the policy also states:

*“Commercial wind energy developments should be located within a Preferred Search area identified in the Wind Energy Policy Guidance **and** (my emphasis) meet the above criteria.”*

58. Therefore, the **first** test is whether or not this proposal, which is a commercial wind energy proposal, is within a Preferred Search area in the WEPG. As I detail later, under material considerations, it is not. Therefore, the proposal is in clear breach of the subject specific policy in the Adopted Local Plan. In terms of the wording of the

policy there is no need to consider the criteria since the proposal is not in a preferred Search area.

59. Because this Policy is so fundamental to the assessment of this proposal I asked the Council if Infinergy had challenged the policy approach either at the WEPG formulation stage or through the Local Plan objection and Inquiry process. The Council confirmed that whilst there were some objections to the draft WEPG, including trade body objections, Infinergy did *not* object. In terms of the Local Plan only AMEC Wind objected and those objections were not sustained at the Local Plan PLI either as written representations or position statements. As a result the policy ER1 was not even considered at the Local Plan PLI.
60. The first bullet point in paragraph 8 of the consolidated SPP (**CD-B-9**) makes it clear that the planning system should be genuinely plan led with succinct up to date Plans. That is what we have here. Given that fundamental objective, given the precision of this very up to date Local Plan policy and given that Infinergy did not challenge that policy through the Local Plan Inquiry route, it is difficult to understand why we are all taking part in a time consuming and expensive Public Local Inquiry. Both this paper and the Infinergy Planning Statement agree that material considerations do not change the conclusions flowing from a proper Development Plan assessment. Therefore, there can only be one outcome and that is that this application is refused deemed planning permission. That has been the situation since this Local Plan was adopted.
61. It is difficult to see how any other approach can be justified, but if the Reporter were to decide to address the criteria in the policy, which are to be applied to sites in the Preferred Search area for this scale of proposal, then my position and the position of the SBA would, in brief, be as follows (following the numbering of the criteria on the policy):
- a. There is concern that there would continue to be adverse effects on raptors in general and on golden eagles in particular

- b. There would be no permanent loss of or damage to prime agricultural land
- c. There would be a potential adverse effect on brand image and potential direct and indirect adverse effects on local tourism businesses
- d. There would be unacceptable impact in terms of visual appearance and landscape character
- e. There would be unacceptable cumulative impact in terms of landscape and visual impacts

62. The proposal would therefore fail on four out of the five criteria were it within a Preferred Search area, which, I emphasise, it is not.

63. All of the other various topic specific policies in the Structure Plan and Local Plan are secondary to the above renewable energy policy and, thus, it is considered that there is no need to spend time on these as the primary topic specific Local Plan policy, which is fully up to date and to which Infinergy did not object, is so clearly breached.

64. Therefore, in conclusion, and in relation to this current adopted Local Plan, and having regard in particular to the evidence of Mr Mark Steele and Professor Stevens, and the evidence of the local witnesses, I conclude that the proposed development does not accord with the recently Adopted Moray Local Plan on account of its breach of the directly relevant Policy ER1, all as set out above.

### **Development Plan Conclusions**

65. Overall, in terms of the Development Plan, the proposed development is in breach of the specified Local Plan policies based on the contents of this paper and the evidence that will be placed by the SBA before the Hearing and Inquiry sessions. Therefore, the presumption is for deemed refusal of the proposed development.

## Material Considerations

66. The TMC Committee report identifies the relevant statements of national planning policy and advice to be taken into account as material considerations. Most of the considerations are captured in the up to date Local Plan and therefore I do not need to take up time on the detailed aspects of national policy and guidance other than for the Council's SPG and for the consolidated SPP from February 2010.
67. The Local Plan policy ER1 provides the link to the Council's Wind Energy Policy Guidance (WEPG) (CD-F-2) from December 2005 and gives it a linked policy status as at December 2008. The Council has decided that this WEPG will be updated in due course through the new Local Development Plan. Therefore, this guidance remains in force. I consider the WEPG to be a key material consideration.
68. The WEPG defines different scales of wind farm developments. Large wind farms are those over 25 turbines and, therefore, that is the category into which Dorenell falls. Having considered a range of criteria the WEPG concludes with maps showing preferred search areas and unlikely areas for the different scale of wind farms. For Dorenell this site falls into the "unlikely area" category. At that time the SPG guidance, in paragraph 3.2.2, advises that commercial wind farms will only be permitted within these unlikely areas where it can be demonstrated that there will be no unacceptable adverse impact on biodiversity, the natural and built environment and the landscape of the area, comply fully with the policies of the Development Plan or where adverse effects are outweighed by the wider environmental, social and economic benefits of the development.
69. If we did not have the now Adopted Local Plan, which changes the tests, it would have been the case for SBA that there were such adverse impacts and that these could not be outweighed by the benefits since these are only generic benefits that are already built into the favourable policy environment.

70. However, as set out earlier in this paper the Adopted Local Plan provides a different and quite simple test. This scale of wind farm should be within a Preferred Search area, and it is not.
71. **NPF2 (CD-B-1)** sets out high level planning objectives for Scotland and identifies a series of key infrastructure and related projects which have national status. However, there is nothing in the new NPF which changes the normal approach, for wind farm projects, of a balanced assessment of benefits and disbenefits in the light of Development Plan policy.
72. The consolidated **SPP (CD-B-9)** sets out the Scottish Government’s view of the purpose of planning and of the objectives for the planning system. The generality of this advice does not change any of the material in this paper or the evidence that I wish to present to the Inquiry. The system should be clearly Plan led (and we have an up to date Development Plan for this case) and it should operate in the long term public interest. It does not exist to protect the interests of one person or business against the activities of another.
73. The Government’s policy approach to wind farms is addressed in paragraphs 187 to 191. There is no suggestion that the Council has not been following these principles in their approach to renewable energy policies or proposals.
74. National Planning Policy and advice on Natural Heritage is set out **NPPG 14 (CD-B-3)** from January 1999 and in **PAN 60 (CD-C-60)** from August 2000. I consider that the relevant aspects of these are captured in the WEPG and the Development Plan policies. The advice is addressed in the Committee report. Some aspects are addressed in the responses of SNH that are before the Inquiry. I do not consider that a detailed trawl through the text of these documents would add any material new evidence to that which is likely to be before the Inquiry.

75. **PAN 45 (CD-C-1)** provides advice on renewable energy technologies. Revised in January 2002, I consider that most Planners would now consider its advice to be well out of date in many respects especially in relation to its comments on the likely visual impact of wind farms. We only need to look at Drumderg in Perthshire or at Braes of Doune near Stirling to see this for ourselves. The more recent Annex 2 to the PAN **(CD-C-2)** is focussed on the development of new spatial planning guidance and directed to planning authorities. I would strongly support the provision of such up to date guidance through the Local Development Plan process and, although TMC has an up to date framework, it is clear that a review of guidance will be undertaken in line with the Annex.
76. There are no particular additional issues from **PAN 58 (CD – D06)** on Environmental Assessment that I would wish to raise. Mr Steele addresses what are considered to be matters that undermine the reliability of the conclusions in the ES.
77. I consider **SPP 15 (CD – C06)** to be of limited relevance other than its general support for farm diversification.
78. In terms of the **benefits** of the proposal I first consider the potential economic benefits having regard to what I have set out earlier.
79. In the absence of any patented on shore wind turbine technologies being held locally and with the current limited turbine manufacturing, fabrication and assembly capability in Scotland, the local and regional economic benefits of the proposal will not be extensive and will be concentrated, probably, on such fabrication and assembly works (although these are unlikely to be undertaken in Moray) and on the civil engineering works at the construction stage. The developer cannot really be forced to source locally since he is subject to the European Procurement rules but, nonetheless, it would be appropriate to have some form of programme of activities to enhance the

local economic development opportunities arising from the project, if it is approved by Ministers.

80. Additionally, I would expect that any local community benefit fund would be a matter to be addressed by the applicants, the local community (I have explained my work with the CCA earlier and I would confirm that none of that work relates to any wind farm community benefit proposal) and the Council, outwith the Planning process, should the proposal be consented. This is not a material consideration in the determination of the current proposal.
81. Therefore, overall, the economic benefits, beyond the production of electricity, are very limited indeed. The Planning Statement lodged by the applicant basically agrees with this, describing the economic impact as making “*a minor but not insignificant contribution to the Scottish Economy.*” It follows directly that the *local* economic impact will be even more minor.
82. That leaves the environmental benefits to be addressed, again picking up on the earlier review under the ES section of this paper.
83. The potential greenhouse gas savings and the associated climate change impacts are often the principal claimed environmental benefits of wind farm proposals, even although those assumed generic benefits are already built into a favourable policy environment.
84. Therefore, given the limited economic impacts, if this appeal is to be sustained it can only be on the basis that the decision maker takes the view that the claimed environmental benefits from this scheme outweigh the adverse impacts, including the adverse impacts on the local and wider landscape, and thus, despite the clear non compliance with the key Local Plan Policy that the developers did not challenge at the Local Plan Inquiry, the scheme is considered acceptable. In such circumstances it is

only right that the benefits should be specified, verified and guaranteed in some way or else the approval will have been an unbalanced decision with an unbalanced outcome – the community has the adverse effects but no verifiable demonstration of any benefits.

85. In saying this I would point out that I have been reflecting long and hard on this topic over many years and through several wind farm Public Inquiries. As indicated above, it would appear that the almost unspoken land use planning proposition that flows from Government energy and climate change policy, (and indeed that can be seen in the reasoning of decision makers supporting wind farm applications), is that the local residents and the local area must accept some level of locally demonstrable adverse impacts (the nature and significance of which we debate at Inquiry). In return, there is assumed some wider societal benefit in terms of the “environment” or policy compliance, but without any form of direct or indirect compensation for those adversely affected. I do not consider that such a proposition is sound, either in logic or in land use planning terms. In the absence of compensation, or even compensating effects, there should be a clear and unequivocal demonstration of the planning balance that leads to a decision, and it should be on the basis that the reasoned planning assessment can be reviewed, against the *actual* outcomes, at some point in the future.

86. Therefore, I would suggest that, if consent is to be granted, there should be a section 75 agreement (see later in this paper) that should set out a means for the independent verification of the annual output of the site, the related greenhouse gas emissions savings, and any “climate change benefits” (however classified) that the developer may claim for the project. These figures should include a tolerance allowance to reflect annual variations in output from the project. If, at the end of any year, the development should fail to meet these specified benefit levels then, unless agreed otherwise by the Planning Authority, the development should be dismantled and the site restored, because the development would not have been doing what was predicted and it would not be fulfilling the premise on which the permission was based. In those circumstances it should not be allowed to continue impacting upon its receptors. Since

climate is variable this approach would be best adapted to a two or three year cycle. The logic of this approach seems to me to be irrefutable.

87. It has been argued by advocates for wind farm developers, at other Inquiries, that such an approach is “impossible” or that it would “render a project incapable of securing funding” or that “it has never been done before” (a novel response). Based on my own experience of both renewable energy land leases and of PPP/PFI projects, I do not consider these claims to be sustainable. It is not unusual for the rental payment from a wind farm developer/operator to the landowner to be based on the output from the site, and that is something that is monitored by the developer/operator. Those figures will, in turn, provide the starting basis for verifying the claimed benefits. In relation to the funding aspect, what is being sought, in my suggestion, is simply a contract to perform, with sanctions for non performance, and that is not an unusual contractual situation. In any event, the supplier of the turbines will normally warrant the performance of the turbines in his contract with the developer/operator, thus providing the clear back up to the performance guarantee. I cannot see why a funder should balk at providing finance for a project which is guaranteed to work and to yield revenue.

88. Finally, it can hardly be argued that asking a developer to contract for delivery of the claimed benefits associated with the development is a novel situation in Scottish planning practice. It plainly is not.

89. The alternative is there, however, and that is for the promoter of the wind farm scheme to confirm to the decision maker that the claimed benefits are simply those generic ones that are already built into the favourable policy environment and which, as a result, should not be placed on the balance again.

90. This proposition is put forward as a serious contribution to the planning debate on renewable energy. The proposition, as it has evolved, has been roundly derided at

other Inquiries. However, I have not yet seen the industry willing to suggest any other alternative mechanism other than to just ask the local community to believe in the assumed benefits. That approach to such a pervasive and large scale development is not appropriate in this day and age. I would stress that I would very much welcome an initiative from renewable energy developers on how to address this matter.

91. Of course it might be that the proposed installed capacity of a scheme might be seen as a key indicator of the benefit of a wind farm, especially when that proposed installed capacity can be compared with the Government targets. Thus, in short, the more installed MW capacity, the better. Indeed, many Reporters, in Inquiry reports and decision letters on wind farms, have specifically referred to the proposed installed capacity when conducting their planning balancing exercise that leads to their conclusion on the acceptability of the proposal.

92. However, as shown in my email correspondence with the ECDU (**SBA/I/7**), the ECDU is content that, provided the conditions are complied with, there is no material variation if a developer installs a capacity of up to 20% less than that proposed. A small variation in installed capacity to allow for final turbine selection would seem reasonable, but to permit a reduction of up to 20% when the landscape, visual and other impacts remain the same, presents significant challenges to the assessor and/or the decision maker. However, the ECDU does not seem to realise this. In my view this means that the assessor/decision maker should not rely on the proposed installed capacity as a measure of benefit either in absolute terms or in terms of the planning balancing exercise.

93. The appellants have lodged various appeal decision letters and reports for other wind farm Inquiries. I had intended to lodge two, for Calliachar and Logiealmond. As always these are an interesting read, indeed many of them are now extremely familiar as they appear as documents for many wind farm Inquiries. These other decisions demonstrate a number of matters including views on the weight to be given to national energy policy and varying views on the importance of local factors, as well as (in

nearly every case) the general applicability of the section 25 test or its English counterpart. However, the overall conclusion that I take from these various decision letters, is that wind farm proposals fall to be considered in a balanced way, within a clearly defined planning policy framework, of comparing and balancing their claimed benefits with any proven adverse impacts, and reaching a conclusion on the acceptability of the proposals in terms of the Development Plan and then weighing other material considerations. There is nothing in the appeal decisions to indicate that proposals should be approved anywhere, or that they somehow get a “leg up” in the planning process.

94. There are no other material considerations that are relevant to the case that is being presented on behalf of SBA.

95. Having regard to all of the above material considerations there is nothing in them that leads me to change my conclusions based on the Development Plan assessment that this proposal should be rejected and, indeed, that such a conclusion was the only possible outcome in the face of an up to date, topic specific and unchallenged Local Plan policy. This material considerations conclusion is partly consistent with the conclusions in the Planning Statement lodged with the ES as that document, at page 4, states that “*there are no material considerations which outweigh compliance with the Development Plan*”. Therefore, applying the logic in reverse, if the Reporter agrees with my conclusions that there is NOT compliance with the Development Plan, both the applicants and myself agree that material considerations will not outweigh the resultant presumption against the scheme. The logic for refusal therefore becomes irresistible.

### **Section 75 Agreement and Conditions**

96. An updated suggested suite of conditions have been brought forward by the applicants with input from TMC but no input from the SBA. These, along with some comments

on possible Section 75 Agreements will have been addressed at the relevant Hearing session and, therefore, no detailed commentary is provided in this paper.

97. However, in relation to conditions it is considered important to have clear regard to the stated position of TMC that they are not adequately resourced to fully pro-actively monitoring and checking the compliance with conditions and undertaking enforcement. This will be the subject of submissions.

98. As will have been discussed in the earlier Hearing I regard it as essential that the HMP is worked up in detail and then assessed before any consent or deemed planning permission is granted. The implementation should then be controlled by a section 75 Agreement.

99. The need for an Agreement on the verifiable delivery of benefits has been addressed earlier. Overall, in addition to the HMP matter, it is considered that, should the Reporter be minded to recommend that granting of s36 consent and deemed planning permission, there is a need for a section 75 Agreement to address site restoration as well as the securing of the claimed benefits of the project.

## **Conclusions**

100. I have sought to consider both the benefits of the scheme and the likely adverse impacts, or disbenefits of the scheme. For the reasons set out in my precognition, I consider that the benefits of the scheme are only those generic benefits associated with wind energy generation and these generic benefits (real or otherwise) are already factored into the favourable policy environment for this type of development.

101. In relation to the tests in the Electricity Act, I do not consider that these provide any valid basis for the *detailed* assessment of the acceptability of the scheme. However, they must be considered and they do point to the need to balance benefits with adverse effects.

102. In terms of the deemed planning permission aspects, and the application of s.25 of the Planning Act, I have assessed the appealed proposals against the Local Plan part of the Development Plan, having regard to the assessment by Council Officers, and taking into account the matters set out in the ES, the SEI, the Statements of Case and the various documents and written submissions already before the Hearing and Inquiry, and other material considerations aspects, as well as my own professional judgement.
103. In addition to this paper I have had regard to the topic papers and the evidence to be presented by Mark Steele and by Professor Terry Stevens, as well as the local evidence. I have also read the other submissions from SNH and SEPA, as well as the RSPB and the MCS. I am aware of the case that Scotways are to present.
104. Based on the above and having regard to my own evidence that I will present to the Inquiry, I conclude that the proposed development is contrary to the Development Plan on account of its fundamental breach of the key relevant Local Plan policy ER1, all as set out above. That breach arises from the site not being located in a Preferred Search area. Even if that were ignored and the criteria in the policy applied, the development is in breach of four of the five criteria. Finally, even if we only had the WEPG and not policy ER1, then the proposal should be rejected on account of unacceptable significant adverse environmental impacts, primarily landscape and visual impacts, but also ecological impacts, which are not outweighed by the generic benefits of the proposal which are already built into the favourable policy environment.
105. Therefore, my conclusion is that the proposal is not in accord with the Development Plan and that, therefore, the presumption, in law, is in favour of the refusal of deemed planning permission for this application. Indeed, in the circumstances of an unchallenged and up to date Local Plan policy there could, reasonably, be no other possible conclusion.

106. As set out in this paper I have considered a range of material considerations. My conclusions on all of these matters are set out above. However, in summary, I conclude that there are no material considerations that would change the conclusion that arises from the Development Plan assessment.

107. Having regard to the above conclusions I consider that the objection from the Council can be supported and that the objections from the SBA were well founded. I would respectfully request that the Reporter should recommend rejection of this s36 application. I accept that, having decided to recommend that deemed planning permission should be refused, you could still recommend a grant of the s36 permission, but, in practical terms, that would be pointless.

Ian Kelly

October 2010

[END]