

TOWN AND COUNTRY PLANNING SCOTLAND ACT 1997

CLOSING SUBMISSION

for

DONALD BANKS AND OTHERS

OBJECTORS

against

CALLED-IN APPLICATION FOR OUTLINE PLANNING  
PERMISSION FOR GOLF COURSE AND RESORT: LAND  
AT MENIE HOUSE, BALMEDIE, ABERDEEN

by

TRUMP INTERNATIONAL GOLF LINKS SCOTLAND

APPLICANT

CALLED-IN BY SCOTTISH MINISTERS  
REFERENCE: DPEA : CIN/ABS/OO 1

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KINNEAR HOUSE  
33 EVAN STREET  
STONEHAVEN  
AB39 2ET.

JULY 2008

SIR:

1. My clients are Mr. and Mrs. Donald Banks, West Lodge Menie, Balmedie, Mr. David Milne, Hermitpoint, Menie Links Balmedie, Mr. Michael Foote, Hatterseat Farmhouse, Hatterseat, Balmedie, and Mr. Raymond Davidson, Mains of Foveran, Newburgh, Ellon. All are members of Sustainable Aberdeenshire, an informal pressure group of local and other persons who were and remain objectors to the development proposals as outlined in the called-in application lodged on behalf of the Trump International Golf Links Scotland (TIGLS).

2. The application site comprises some 452 hectares and is located some 8 miles north of Aberdeen City and east of the A90 between the settlements of Balmedie and Newburgh. The application site and surrounding land use is agricultural. There are a number of occupied single and grouped dwellings on and around the application site.

2.1 The application site lies on part of the land designated in the statutory Development Plan as Undeveloped Coast and as an Area of Landscape Significance. The application proposes to construct part of a golf course on the Foveran Links Site of Special Scientific Interest (SSSI). The whole of the dune system within the site is also designated as a Site of Interest to Natural Science (SINS).

2.2 The development proposals are described in the application, plans, drawings and other accompanying documents lodged. An indicative master-plan comprises two 18 hole golf courses, a golf clubhouse, a golf academy, a golf maintenance building and caddy shack, a short game area and driving range, a 450 unit resort hotel, conference centre and spa, 36 golf villas, 950 holiday homes in four blocks, accommodation for 400 staff, parking areas, access roads and future housing proposals for 500 private houses indicatively split between two areas, one to the north west and one to the south west of the application site.

3. Under Aberdeenshire Council's Scheme of Delegation, the application was brought before the Formartine Area Committee for determination. The Officer's recommendation was for a delegated grant. The application was considered to be a departure from the Development Plan and could not be granted without being referred to the Infrastructure Services Committee (ISC). The Area Committee was minded to grant consent. The application was referred to the ISC. The application was considered to be a significant departure from the Development Plan and could not be granted without being referred to Scottish Ministers. The ISC met on 29th November, 2007 and resolved to refuse the application for the Reasons stated in the motion to refuse and recorded in the relevant minute, Core Document (CD) Section G9(g).

3.1 The application was called-in by Scottish Ministers by Notice served under section 46(1) of the Town and Country Planning (Scotland) Act 1997. The Notices stated, inter alia, "This direction is given in view (of) the proposal raising issues of importance requiring scrutiny at a national level."

4. Section 37(2) of the Town and Country Planning (Scotland) Act 1997 provides that in determining an application regard shall be had to the development plan so far as material to the application and to any material considerations. Section 25(1) provides that the determination shall be made in accordance with the development plan unless material considerations indicate otherwise.

5. The relevant statutory Development Plan comprises the approved Aberdeen and Aberdeenshire Structure Plan, North East Scotland Together (NEST) (2001—2016) (CD Sect.B, (A)1) and the adopted Aberdeenshire Local Plan (ALP) (2006) (CD Sec.B, (A) 2).

5.1 The statutory Development Plan is of primary material importance to the determination of the development proposals as applied for in this case. First, because it is relatively recent, up to date and the recently adopted Local Plan was produced to conform to the Structure Plan (NEST). Second, there is a raft of Development Plan Policies which apply to consideration of the development proposals and the position as set out in the Statement of Case for Donald Banks and others is relied upon in this respect and in respect of the fact and, importantly, the degree of the departure concerning the proposed development as applied for.

5.2 It is not disputed at this Inquiry that the proposed development represents a major departure from the statutory Development Plan and no substantive contradictory Policy evidence was led on behalf of the applicants. Inasmuch as a decision maker must consider whether or not a consent in departure would be justified having regard to all the circumstances, any other material consideration must be taken account of and it is acknowledged that the weight to be afforded to any material consideration lies with the decision maker. That said, in my submission it is important in this case that weight to be given to any other material consideration requires to be considered and assessed against not just the bald fact of departure from the Development Plan but also the degree to which the proposals are in conflict with development plan Policies and the likely and, or, factual consequences of a grant of outline planning permission in this case. It is my submission also, that it is a fallacy to suppose that because some argument of principle can always be found to substitute for an argument of Policy, it will be as cogent or as powerful as the appropriate argument of Policy would have been; quite simply because principles, aims and objectives, both positive and negative, are given effect to through the statutory Development Plan Policies.

5.3 In representations lodged on behalf of my clients (DB/ 01 and DB/02) I stated, inter alia, that the development proposals as applied for were contrary to the statutory Development Plan in fact and to a degree plus quam tolerabile, that is to say, beyond what is tolerable or acceptable. These terms are more usually applied in cases of nuisance. However, I used these terms and I use them now to describe and emphasise my submission that in the absence of a very special circumstance or circumstances and, or, a clear and accepted circumstance of national importance or need, then setting aside the Development Plan Policies in this case cannot be justified. Standing that, it is plain that any justification for approval of the proposals as applied for, in this case, requires to be founded upon other material considerations which justify being afforded a threshold weight which in this case requires to be of considerable proportion.

6. It is accepted that development proposals of the scale and nature outlined in this case will bring some economic benefits. However, this in itself is not the test and if it was the test then the proposals would fail the test in the same way that some other business, commercial and industrial proposals fail, notwithstanding investment and job opportunities. In some cases these benefits are material considerations which lack a threshold weight to set aside development plan Policies and in some cases these benefits are an additional Policy justification to what is otherwise acceptable development having regard to all relevant development plan Policies; in this regard and in the Development Plan relevant to this case, it is material that when a Policy states that a proposed development will be acceptable 'in principle' if it complies with the Policy criteria, 'in principle' means 'subject to compliance with all other relevant policies in the plan' (ALP Glossary p.343)(CD Sec.B, (A) 2).

6.1 The application, in this case, was originally supported by an Economic Assessment and Financial Review prepared by Deloitte MSC Limited. This Report was treated as Private and Confidential and was not available in the public domain. The Executive Summary, 18th July, 2007 (DB/04) was and is in the public domain and it demonstrates, inter alia, that using a discount rate of 10% the proposed development would achieve a Net Present Value (NPV) of £112m with the proposed 500 houses and a NPV of £21m without the proposed residential development (DB/04 p.7). On the same page the Summary Report states, “For the project to be considered worthwhile in financial terms the NPV must be positive.” It is therefore plain that the project is, as assessed, demonstrably worthwhile in financial terms without the 500 houses, it is only that, “Better returns may be available at same cost of capital on £751m investment” (DB/04 p.7); in my submission, this is a commercial consideration for developers, it is not and cannot be held to be a material planning consideration. The Summary Report, on page 8, concludes, inter alia, that with the residential development it is forecast to generate a total net cash flow of £604m resulting in a NPV of £112m. Without residential development the forecast total net cash flow is £437m resulting in a NPV of £21m. Standing this, it is plain that the 500 houses are not required for other elements of the application to proceed, and, the 500 houses are added for the sole purpose of increasing income and the capital return generated by the open market houses.

6.2 It is accepted that other reports are now lodged as Documents to the Inquiry on behalf of the applicants. Part of the relevance of the Deloitte Summary Report is that it was the basis upon which Council Officers recommended approval of the outline application including the 500 open market houses inasmuch as “The Planning Service is, in this case, willing to accept a business case for the proposed housing given the size of the development as a whole and the scale of funding required to make it a serious proposition”. (Formartine Area Committee Report- 18 September 2007, para. 6. 30) (CD Sec.G9(a)).

6.3 In cross-examination of Dr. Gore, Aberdeenshire Council's Director of Planning, I asked why she had recommended approval of the 500 houses when it was plain, at the time, they were not required in respect of financial viability of the golf course and resort elements of the application, Dr. Gore said she was guided towards the recommendation because the applicants might not proceed if the 500 houses were not approved. In my submission the Council's position as taken by Dr. Gore constituted the material fallacy non causa pro causa inasmuch as it sought to assume that financial requirement was the cause of the recommendation of consent for 500 houses, without sufficient grounds.

6.4 It is a matter of fact that a subsequent report has been produced by Johnston Carmichael Corporate Finance and lodged with the Inquiry which contains computations concluding that without the 500 houses there would be a negative NPV. In my submission this is of no assistance to the credibility of the position of Council Officers at this Inquiry, quite simply because they assumed their position in support for the 500 houses in the absence of any financial evidence to support their position. In my submission this amounted to bias arising from a fear that the development may not proceed without consent for the houses.

6.5 It was said at this Inquiry that the applicants had 'demanded the surrender' of the planning system by suggesting they would not proceed without the houses. I have to say that applicants have a right to ask that an application be determined as it stands. It is the position of my clients and my submission that it is Council Officers who were, and remain, prepared to surrender proper and prudent development control in this case almost to the extent of any cost, having regard to the consequences of what is arguably a housing element of strategic numbers and having regard also to the factual and potential adverse impacts concerning other issues.

6.6 The Johnston Carmichael Financial Report and Analysis May 2008 (Applicants' Doc. Vol. 2:T7) was spoken to in evidence by Mr. Iain Webster. The Report uses the same discount rate of 10% used by Deloitte. It is accepted that a positive NPV suggests that an investment will be worth entering into and conversely if there is a negative NPV the inference is that it may prove an unacceptable investment. That said, if there is a neutral NPV the investment will earn money at the same rate as used in the calculation. This was accepted by Mr. Webster. It is true to say also, that a positive NPV indicates that the investment can earn money at a higher rate than that used in the calculation, in this case 11.75% arising from the forecast NPV of £35.5m with the residential development (T7 at 1.2). Conversely the Report calculates the resort development excluding the residential element generates a forecast negative NPV of £20.7m indicating a rate of return of 6.15% (T7 at 1.3).

6.7 In giving consideration to the computations and their conclusions, in my submission it is important to bear in mind that;

- construction costs are forecast;
- sales revenue is forecast;
- net operating income is forecast;
- residual values are forecast from a chosen period 1 April 2008 to 31 March 2022;
- the Report states (1.3) It should be noted that a key driver of the NPV is the impact of the assumed Nominal values of £373.9m for the deemed residual value of resort facilities which have an overall impact of £108.3m in NPV terms;

and;

- the Report (at 1.3) properly states that it should be noted that the NPV is sensitive to small changes in the discount rate used. This is illustrated in Figure 7.3.1. In addition, in my submission it is reasonable to suggest that phasing can affect the timing of income flow.

6.8 It is accepted that sensitivity may be either positive or negative in effect. However, it is clear from the “Limitations” cited on the second page of the letter dated 11 May, 2008 (T7) from Johnston Carmichael to the applicants that responsibility for the assumptions used in the Report remain solely with the Directors and officers of the applicants. Attention is drawn to the fact that the assumptions used are necessarily based on statements, estimates and projections concerning anticipated future events and are therefore subject to significant business, economic, political and competitive uncertainties and contingencies, many of which may be beyond the control of the applicants. In my submission the “Limitations” referred to should be read, understood and noted. In the same way the Disclaimer of the Deloitte Summary Report should be read (DB/04 p.9). This is not a criticism of those who prepared the Reports, but there is, in my submission, a material degree of uncertainty arising, and as I understand matters there is no audit of the base assumptions and comparables.

6.9 The evidence of Mr. Webster at 2.4 of his precognition is that the output of the financial model distinguished the NPV for the golf related elements of the development and the residential housing elements in order “to establish whether the golf resort on its own would provide an acceptable rate of return for all investors (being Trump Scotland and those banks and other financial institutions who may lend money to build and operate the development).”

6.10 It is common to business and private finance that the more that is required to be borrowed the higher the income required to finance the loan or multiple loans and leave an acceptable surplus. What is prudent or what is not prudent is a matter of business or private judgment, and in my submission it is not, and cannot be held to be, a material planning consideration in this case.

6.11 The only Policy support for 'enabling' development in the Development Plan is to be found in ALP Policy Env/18 and relates to listed buildings only, concerning their preservation and renovation. Thus it is that there is no Policy support for the housing element of the applicants' proposed development.

6.12 It is difficult to accept that the housing element of the proposed development is required to make the golf course or courses and resort development profitable. The hotel is predicted to move to a steady rate of occupancy level in year 4 onward (T7 p.20). Figures are shown in T7 for the other elements of the resort. If the courses and golf resort cannot be profitable without the housing then it would eventually fail quite simply because once the houses are sold the capital realised is not tied to the other elements of the development, and even if it were, it is my submission that a business that requires capital realised to make up for inadequate income flow may not be financially sound, in which case the development may not go ahead and if it did it may fail despite the housing element. As I understand it Mr. Trump, in answer to a question from one of the Reporters, stated that if he did not get consent for the houses at this time he would build the golf course anyway, which I took to mean the golf resort also, if granted consent.

6.13 I adopt the evidence of Mr. Walton MRTPI concerning the housing element of the application proposals.

6.14 In my submission;

a) the housing element is not golf or tourist related;

b) the housing element is divisible and severable from the other elements of the proposed development (Kent County Council v Sec. of State for the Environment and Burmah Total Refineries Trust(1976)75 L.G.R.452);

c) there is no significant identified shortfall in housing land supply;

d) there is no Development Plan Policy justification for the housing element;

e) demonstrably, the housing element is included to make the proposals more attractive to potential investors and to increase the capital return, which are not material planning considerations;

f) the housing element has no planning nexus with the other elements sufficient to allow the housing element which would not otherwise be granted consent

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6.15 In addition, standing what is set out in 6.14 above, it is plain that the housing element requires to be considered on its own merits. This means on its merits as an application for housing on an unallocated site in the countryside, to the exclusion of any other consideration. This is admitted in the last sentence of paragraph 6.23 of the Officer's Formartine Area Committee Report 18 September 2007 (CD Sec.G9(a)) before coming to the erroneous conclusion in the last sentence of paragraph 6.30 that the Planning Service is willing to accept a business case for the houses, following all that is stated in paragraphs 6.23 to 6.30. In this regard I adopt what is stated in Production DB/02 from the foot of page 6, the whole of page 7 and the first three paragraphs of page 8.

6.16 Notwithstanding what I have already submitted concerning the housing element of the proposals, if the housing is considered to be a material consideration then for the reasons already submitted my submission is that little if any weight can be given to it and in addition also because any economic activity created by the construction, sale and occupancy of the houses will occur through the development plan process. Even if the Council takes the position that the housing element would be in addition to housing allocations through the development plan process, I cite the Council's own figure of just 1% of the likely numbers required as hardly likely to bring an economic benefit of national significance. What the other elements may contribute in economic benefit requires to be assessed against the value of the ecological and geomorphological values of the designated sites likely to be adversely affected and this was addressed at the Inquiry by other parties who called expert evidence to address the issues.

6.17 In consideration of the employment opportunities that would be created by the proposed development it is my submission that this should be considered excluding the construction phase because construction employment opportunities are available to a greater or lesser extent by all development construction which is on-going in Aberdeenshire and throughout Scotland. To focus on long term estimated job opportunities is, in my submission, of greater materiality. I adopt Mr. Walton's evidence in cross-examination by Mr. Shaw that the 'construction' multiplier is not appropriate because these jobs do and will arise.

6.18 The Deloitte Summary Report (DB/04) on page 5 states that the ongoing operation could support a total of 1,250 and 1,440 long term jobs in Aberdeenshire and the whole of Scotland respectively. This means around 190 additional jobs in the rest of Scotland. In my submission this demonstrates that the development has more local significance than national significance.

6.19 An Economic Impact on the Scottish and Local Economy dated May 2008, concerning the impact of the proposed development, was prepared by the Fraser of Allander Institute for the applicants (T6).

6.20 In evidence, Mr. Dunlop from the Fraser of Allander Institute, stated that under a 25% displacement assumption he estimated that the ongoing golf and holiday resort operations will create a total of 1,856 net Full Time Equivalent jobs in Scotland and a total of 1,418 net Full Time Equivalent jobs in the local economy. This appears, by simple subtraction, to compute to 438 jobs created in the rest of Scotland. Under a 50% displacement assumption Mr. Dunlop estimated that the same ongoing operations will create a total of 1,237 net Full Time Equivalent jobs in Scotland and a total of 945 net Full Time Equivalent jobs in the local economy, and using the same deduction as used above, this computes to 292 jobs for the rest of Scotland.

6.21 Whilst the job estimates by the Fraser of Allander Institute appear to be higher than those of Deloitte, the GVA figures cited are lower than those cited in the Deloitte Summary Report.

6.22 When asked by the Reporters whether the 25% displacement figure or the 50% displacement figure was closer to what might be expected, Mr. Dunlop stated he could not estimate without other figures, nor could he estimate the relevant proportion of jobs split between the City and Aberdeenshire.

6.23 Mr. Dunlop did say, however, that Trump is effectively a brand. If the Trump brand is not there it would be different. Mr. Dunlop was not the only witness to refer to the 'Trump brand'. In my submission the identity of the applicant(s) is not a material planning consideration and not least because planning permission normally runs with the land and not the applicant(s).

6.24 A report on the economic effects of the development was prepared by EKOS for the Council (AC9). I do not consider that this Report adds anything of specific materiality to what emerges from the other Reports referred to, not least because EKOS did not have all the information which was available for the other Reports and the EKOS witness did not appear to accept that jobs created locally could be separated from jobs created in the rest of Scotland. That the other Reports did this is indicative of its materiality.

6.25 Apart from anything else said, the estimated job creation arising from this case requires to be seen against the background of Aberdeenshire having the lowest unemployment rate (2005) of all the Scottish local authorities at 1.2% Aberdeen City at 1.7% and Scotland 2.8% and the UK at 2.4% (AC2 p.5). Also, I adopt Mr. Walton's evidence that it is difficult to accept that all or most of the Hotel jobs will be taken up by local residents (T6 p.13) and I adopt this not least because of the provision of a staff accommodation unit for 400 persons.

6.26 Notwithstanding my position on behalf of my clients that the estimated economic benefits are not of national significance, I accept that the decision as to what is or is not of national significance ultimately lies with Government.

7. I adopt section 5 of Mr. Walton's evidence on behalf of my clients concerning the holiday blocks and staff block in respect of, inter alia, impacts upon the landscape arising from scale, height and design, notwithstanding that it is an outline application.

7.1 Mr. Donald Banks, a local resident, gave evidence on behalf of himself and other residents who comprise my clients and I adopt his evidence as being a reasoned and credible position of local residents who would be most directly affected by the proposed development. His position that MEMAG cannot be regarded as mitigation was supported by others who gave evidence against the proposed development. Mr. Banks cited a letter from Kenneth J. Thomson, Emeritus Professor of Agricultural Economics, University of Aberdeen. This letter dated 5th June 2007 is before the Inquiry for its own terms. Speaking on behalf of himself and Mr. Milne, Mr. Davidson and Mr. Foote, Mr. Banks made clear that he is not, in principle, against a golf course and development on land owned by the applicants, but feels that the development should not go ahead in its current form.

7.2 Adverse impacts upon the local amenity are material considerations. Amenity can be described as ‘that element in appearance and layout of town and country which makes for a comfortable and pleasant life’ (Ministry of Town and Country Planning, Town and Country Planning Progress Report 1943-1951 Cmd.8204 (1951)) (Scottish Planning Law & Procedure p.290 - Jeremy Rowan Robinson et al.(2001)). Having regard to the ‘locational principle’ it is plain that what constitutes a desirable amenity which one would want to preserve will differ between town, city, housing estate and countryside. The amenity currently enjoyed in and around the application site is described in the evidence of Mr. Banks.

7.3 I paraphrase and invoke what was once said by Lord Widgery in a case concerning compatibility with other uses when he said, ‘Planning deals with localities and not individual sites. In all cases it must be of the greatest importance when considering a single planning application to ask oneself what the consequences in the locality will be.’ (Collis Radio Ltd v Secretary of State for the Environment (1975) P & CR 390).

7.4 Given the scale, nature, height and indicative layout of the proposed development and attendant activity, in my submission it is plain that the current appearance and layout which makes for a comfortable and pleasant life for local residents, that is to say their amenity, will be lost, completely converted to an urban appearance and to a degree potentially plus quam tolerabile, having regard to the 'locational principle'. In consideration of the likely adverse impact upon the character and appearance of the landscape itself I simply repeat the words put to me by one of my clients, "the value of the landscape speaks for itself".

8. Mr. Banks confirmed in his evidence that my clients support Scottish Natural Heritage, the Royal Society for the Protection of Birds, Scottish Wildlife Trust, The Ramblers Association and others in their opposition to the proposed development as applied for. I adopt the evidence of SNH, RSPB, SWT and The Ramblers Association and I accept the position of the Ramblers in respect of the law of access in Scotland. I defer to others who led expert evidence concerning the ranking of environmental designations and consents required in respect of the SSSI if outline planning permission is granted and appropriate conditions thereanent.

8.1 It is plain however that the application proposals face a severe test in ALP Policy Env/2 — National Conservation Sites, which Policy is engaged concerning the SSSI. The severity of the test lies in the Policy requirement that the developer "proves" compliance with the criteria set out in the Policy. This is not common to many Development Plan Policies, but it is required also in respect of ALP Policy Env/3 which is engaged concerning the SINS.

8.2 NPPG 14 — Natural Heritage was published in 1999 and was current prior to preparation of the statutory Development Plan relevant to this Inquiry. It is my submission that the Government guidance in that document is incorporated into the relevant Policies of the Development Plan. Thus, for example, in my submission, the test set in ALP Policy Env/2 is the test that must be met concerning the SSSI in this case, as opposed to the test set out in paragraph 25 of NPPG 14. The reason for the test set in Policy Env/2 is laid out in the second paragraph of the Policy narrative.

8.3 In consideration of the criteria to be applied in balancing the economic and environmental effects of the proposed development and the weight to be given to either, I confirm my clients position that there would be some economic benefits primarily of local significance as opposed to national significance. Whilst deferring the detail to others who led expert evidence against the development in respect of the SSSI, my clients' position and my submission, is that the SSSI is a National Nature Conservation Site as referred to in ALP Policy Env/2 and it follows that adverse impacts on the SSSI are potentially of national significance. The same applies to habitats and species referred to in ALP Policy Env/4 - Biodiversity.

8.4 In consideration of who has responsibility in determining the national interest in balancing the economic and environmental effects of the development proposals in this case, the responsibility ultimately lies with Government whilst having regard, in particular, to the advice of national agencies whose own responsibilities include specialised interests in matters relevant to the question.

8.5 For more than two hundred years before there was a planning system, there has existed the legal maxim in dubio sequendum quod tutius est, which simply means, in a doubtful case that course is to be followed which is the safer. By accident or design, the planning equivalent now exists in the planning system in the name of the “Precautionary Principle” which is defined in ALP Glossary page 343 as, “Taking action now to avoid possible environmental damage, when the scientific evidence is inconclusive but potential damage could be great.” I am not in a position to judge the scientific evidence in this case, I simply and respectfully submit that if it is inconclusive then refusal is indicated.

9. For the avoidance of any doubt I adopt the evidence of the Councillors who gave evidence in support of the reasons for refusal in the decision properly taken for and on behalf of the Planning Authority, insofar as that evidence is relevant to the reasons for refusal.

Sir, I respectfully invite you to recommend to Scottish Ministers that the development proposals, as applied for, be refused outline planning permission.

If you are minded to recommend approval, I respectfully invite you to consider recommending refusal for the 500 houses for the reasons I have expressed hereinbefore and inasmuch as, in my submission, there is no legal bar to such a recommendation (Kent County Council v Sec. of State for the Environment & Burmah Total Refineries Trust(1976)75 L.G.R 452) (Bernard Wheatcroft Ltd v Sec. of State for the Environment (1980) 43 P. & C.R.233) (Care Link v Sec. of State for the Environment (1989)2 P.L.R.47) (Scottish Planning Law and Procedure pp. 389 & 390).

  
John A.A. Agnew

Agent for Donald Banks and Others.

3<sup>rd</sup> July 2008.