

**TOWN AND COUNTRY PLANNING (SCOTLAND) ACT 1997**  
**TOWN AND COUNTRY PLANNING (NOTIFICATION OF APPLICATIONS) (SCOTLAND)**  
**DIRECTION 2007**

**OUTLINE PLANNING PERMISSION FOR GOLF COURSE AND RESORT  
DEVELOPMENT ON LAND AT MENIE HOUSE, BALMEDIE, ABERDEEN**

**CLOSING SUBMISSION**  
**TRUMP INTERNATIONAL GOLF LINKS SCOTLAND**

**Prepared and Presented by**  
**The Right Honourable Lord Boyd of Duncansby Q.C.**  
**on behalf of**  
**Donald J Trump**

**4 JULY 2008**

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**\*These documents are already before the inquiry and will be appended to the final closing submission to be submitted to DPEA on 11 July 2008.**

**1. Introduction:**

- 1.1 The purpose of this inquiry is to assist the Scottish Ministers in reaching a decision on whether or not to grant outline planning permission for this development. It is an Inquiry which the applicants did not seek and would not have desired. Nevertheless it has resulted, in my submission, in an unprecedented level of scrutiny for an application. Many may think that is right. However you may have been struck by the fact that the facts and issues are not seriously in dispute and have not substantially changed since the application was considered by both the Formartine Area Committee and the Infrastructure Services Committee last year.

## **2. Summary of Case:**

- 2.1 The applicants propose to develop a major golf resort of a scale not seen elsewhere in Britain let alone in Scotland. The investment is in the order of £1bn. It will be centred on an exceptional world class golf course in a links setting in a high quality landscape and environment. The development will bring very significant economic benefits not just to the north east of Scotland but to Scotland as a whole. It will be a major tourist draw increasing the diversity of economic opportunity in this area.
- 2.2 In this closing submission I set out the applicants' vision of building the best golf course in the world. I demonstrate how he has sought to achieve that in the selection of both the site and golf course architect. I show how, in order to achieve that ambition it is necessary to use the land at North Menie within the Foveran SSSI.
- 2.3 I take Ministers through their approach to the decision making process. I suggest that the relevant policy for reaching a decision is that contained in paragraph 25 of NPPG 14. I accept that the development will have significant adverse effects on the qualities for which the area has been designated but I submit that these are clearly outweighed by economic benefits of national importance.
- 2.4 I then go onto deal with environmental issues. I submit that the applicants have employed the best environmental scientists and that they have not sought to hide or massage the impacts of the development. I suggest that overall in assessing the environmental evidence on all material issues where there is a conflict you should prefer the evidence of the applicants' witnesses.
- 2.5 I suggest that in issues of geomorphology there is little between the parties but go on to suggest that of more concern to Ministers may be issues of loss of habitats and potential loss of biodiversity.

- 2.6 I then deal with the direct impact on the habitats. In summary I suggest that the total impact on Annex 1 habitats at Menie Links is approximately 10%. The total impact on the habitats within the SSSI is approximately 8%.
- 2.7 I then turn to issues of mitigation including MEMAG and translocation. I submit that overall the likelihood of success of translocation is considered high for grey dune and dune heath which are priority one habitats. While it is less certain for the lower ranked dune slacks there was confidence that further investigation would improve the confidence levels in the success of translocation. I suggest these confidence levels are based on considerable knowledge and experience.
- 2.8 I also deal with environmental benefits including the opportunity of improving habitats and increasing biodiversity.
- 2.9 I then turn to the economic benefits of the development and suggest that, using conservative estimates, over 1200 FTE jobs could be created in Scotland as a result of the operation of this development. Considerably more would be created during the construction phase. In addition there would be a significant increase in GVA in both Scotland and locally.
- 2.10 I also demonstrate that these figures are underpinned by the support of and confidence shown by the business community in Scotland who understand the opportunities that the development will bring.
- 2.11 The benefits fit in with national and local policies to diversify the economy, provide major tourist destinations and attract global headquarters to the north east of Scotland. I also suggest that the development is consistent with the current Scottish Government's economic policies.
- 2.12 I submit that the housing element, while not consistent with the current development plan, will assist the area achieve the very considerable emerging shortfall in housing land supply, that the housing is required to fund the development and that in these circumstances the housing element of the application is acceptable.

- 2.13 I deal with other issues including public access, transport and conditions.
- 2.14 I conclude with a balancing exercise in which I suggest that it is not a clear cut balance between on the one hand environmental impacts and on the other economic benefits. In my submission the exercise is more subtle taking into account both the proposed mitigation of the impacts and the opportunity that exist for realising environmental benefits promoting biodiversity.

### **3. Description of Application:**

- 3.1 On 27 November 2006, Trump International Golf Links Scotland ("the applicants") submitted an application for outline planning permission for 'a golf course and resort development' on land at Menie House, Balmedie in Aberdeen ("the application"). The application was registered by Aberdeenshire Council ("the Council") on 27 November 2006. On 4 December 2007, the application was called in for determination by the Scottish Ministers who subsequently called this inquiry to consider the application prior to its determination.
- 3.2 The application seeks outline planning permission for the development of a golf resort, the component parts of which are listed in Appendix 1. It should be borne in mind that this is an application in outline only. The applicants are not seeking detailed approval of any part of the development at this stage. All matters of detail will be the subject of applications for approval of reserved matters following upon the masterplanning exercise required by proposed Condition 3.
- 3.3 The applicants have produced Document T2 to the inquiry. This document contains the latest layout for the proposed championship golf course which is as near perfect as we can show at this stage in the process. The applicants are willing to accept the imposition of proposed condition 24 if it is considered appropriate.

#### 4. The Vision – The Best Golf Course in the World:

- 4.1 Mr Trump in his evidence to this Inquiry spoke eloquently of his vision for building the best golf course in the world here at Menie. He spoke of how Scotland is the home of golf and of the special nature of links courses. The course had to look and feel Scottish – and it had to be extraordinary. As he said, creating a golf course from scratch to compete with courses which have already established themselves among the greatest in the world is difficult. The only way to do so is to choose a site with superb topography and hire one of the best links architects to design it.
- 4.2 Mr Trump described how he came to appoint Martin Hawtree as the lead architect and Dr Hawtree described in an impressive but understated manner his design and its underlying philosophy. He told us of his initial belief that he saw at Menie the opportunity to create a golf course of extraordinary power, beauty and interest<sup>1</sup>. He described how he prefers to work with the land and to do the minimum of reshaping. That philosophy can be seen in his productions showing the 13<sup>th</sup> hole<sup>2</sup> and how it might look after the course has been constructed.
- 4.3 Dr Hawtree was challenged on the difference between what he described as his brief and Mr Trump's vision of the best golf course in the world. He was naturally reticent about claiming the accolade in advance of the course being constructed and said that it was for others to judge. But, in cross examination, he was asked about the best golf course in the world and he referred to the course at Royal Birkdale, which his grandfather and father had worked on, as the benchmark. He believes that this course could be better than Royal Birkdale.

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<sup>1</sup> paragraph 2.2 of his precognition

<sup>2</sup> Document T5

- 4.4 Both Mr Trump and Dr Hawtree spoke realistically of the ambition to attract the Open Championship to the golf course at Menie. There is, I suggest, little doubt that Menie, if realised in the full form anticipated in the outline planning application, would have the course, and the infrastructure to support a major championship. At this stage that is perhaps all that can be said given that nobody is likely to sign up until the course has proved itself. However I do suggest that you can report to Scottish Ministers that the golf course would be capable of one day hosting the Open Championship. The decision on whether or not that might happen is one ultimately for the R & A.
- 4.5 There was one criticism made of Dr Hawtree by Mr Cockburn, which was, in my submission, unfair and that is that the alterations Dr Hawtree made to the Fazio design were motivated purely by golfing considerations without regard to environmental issues. In Mr Cockburn's scenario it appears to be a matter of chance or luck that Dr Hawtree's design is less intrusive than that of Fazio. It is unfair for two reasons. First it ignored the fact that Dr Hawtree had met both Prof Ritchie and Dr Dargie on site and was aware in general terms of the environmental issues. Moreover Dr Hawtree has been in practice for 38 years as a golf course designer. You cannot practice that for that length of time and fail to have a deep and practical understanding of golf course environment. Indeed, as Dr Hawtree pointed out, he was intimately involved in the development of the European Institute's principles as well as many of the other publications on golf courses and the environment.
- 4.6 Michael Wood's alternative design was put to Dr Hawtree and he conceded that one could produce a world class golf course such as Cruden Bay, Murcar, Royal Aberdeen, without using the SSSI but there would be no point. They exist already. What Martin Hawtree is creating at Menie will be truly exceptional.
- 4.7 To do that, however, does require the use of the SSSI and that is the central issue in this Inquiry. Dr Hawtree explained in section 3 of his precognition why, in his view it is necessary to go into the SSSI land. He pointed out that the proposed course at Menie would have none of the sporting history, no

legends, no championships. What it would have would be superlative topography, landscape, drama, alternating spaciousness and enclosure, a great many panoramic views along the dunes and out to sea a rich texture of vegetation habitats and a challenging but enjoyable course.

- 4.8 At paragraph 3.5 he said “As nearly as it is possible to do, I would guarantee the world class status of this course. I could not do so for any other arrangement or location. The site is the most exciting piece of links land I have seen in my working life. I believe that it would produce a golf course of exceptional stature and allow many thousands of visitors to enjoy this stretch of course.”
- 4.9 In his conclusion Dr Hawtree says he believes that there are in principle no weak holes. “Menie comes fairly close to an ideal”.
- 4.10 Mr Trump, who has considerable experience as the developer of world class golf courses, endorses the design saying that “what he has created is magnificent and more than lives up to my expectations and hopes for the site. The course appears to grow out of the land. It uses and totally respects the topography. It creates challenging holes in a wonderful and beautiful setting.”

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<sup>3</sup> paragraph 14 of Mr Trump's precognition

## 5. The Need to Use the SSSI:

- 5.1 Against that background of Mr Trump's vision, the applicants' position has been clear from the beginning. If the applicants are to realise the vision of an exceptional world class course underpinning £1bn of investment then the championship course needs to use the SSSI. To say that is not to refuse to compromise; it is a statement of principle and fact. The Council officers understood this when they decided to put the application before councillors. They had asked the applicants several times to consider moving the course off the SSSI but the applicants told them that they could not do so.
- 5.2 Mr Trump made his position clear in his precognition when he said that the bottom line was that if he was refused permission to develop on the southern end of the SSSI he would withdraw from the development because it would not and could not fulfil his ambition of doing something outstanding.<sup>4</sup>
- 5.3 I have already made the applicants' position clear but for the record repeat it here. If Ministers were persuaded that development at Menie was desirable but that there should be a condition, as proposed by others, to the effect that no development should take place on the SSSI, the applicants would wish Ministers to refuse the application rather than to grant consent subject to such a condition.
- 5.4 They make that submission because the SSSI is critical to the development. And it is critical to the development because of the scale of investment involved. They have no interest in developing a golf course at Menie which does not live up to these ambitions.
- 5.5 This position was criticised by Mr Tyldesley who went on the final paragraph of his closing submission to make a comment which was singularly inappropriate. He said that the decision on whether to proceed with the development and on what basis is that of the Scottish Ministers. That is completely wrong. The decision on whether to grant planning permission is

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<sup>4</sup> paragraph 19 of Mr Trump's precognition

for Scottish Ministers. That has always been accepted by the applicants. But it is for Mr Trump to determine whether to proceed with the development. That is why he has made his position clear, not just to this inquiry, but from the time of lodging the planning application.

## 6. Approaching the Decision:

- 6.1 The purpose of this inquiry is to assist the Scottish Ministers in reaching a decision on whether or not to grant outline planning permission for this development. That decision will be taken in the context of Section 25 of the Act.<sup>5</sup> This means that the Minister's decision will be in accordance with the relevant policies of the development plan<sup>6</sup> unless material considerations indicate otherwise.
- 6.2 Although the proposal draws some support from relevant policies within the structure plan, the applicants accept that the application does not accord with the Statutory Development Plan<sup>7</sup>. The applicants adopt the submission made by the Council in relation to the development plan and concede that the proposed development would be a significant departure from the plan.
- 6.3 Aberdeenshire Council's written submission in respect of Planning Policy dated 21 May 2008<sup>8</sup> sets out the policy framework within which this application requires to be considered. Indeed, within that submission the Council addresses and analyses the development and local plan policies applicable to the proposed development together with other relevant supporting documentation and government guidance. The applicants agree with and adopt that statement.
- 6.4 The one policy document of particular relevance in my submission is paragraph 25 of NPPG 14: Natural Heritage<sup>9</sup>, which states:

“The presence of a national natural heritage designation is an important material planning consideration. This does not mean that development is

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<sup>5</sup> The Town and Country Planning (Scotland) Act 1997

<sup>6</sup> CD – A1 - Aberdeen and Aberdeenshire Structure Plan 2001 – 2016 (NEST) approved by the Scottish Ministers on 21 December 2001 and CD – A2 - the Aberdeenshire Local Plan adopted by Aberdeenshire Council on 30 June 2006.

<sup>7</sup> See footnote 6 above

<sup>8</sup> Appendix 2

<sup>9</sup> CD – C11

precluded by the presence of such a designation. Proposals require to be assessed for their effects on the interests which the designation is designed to protect. Development which would affect a designated area of national importance should only be permitted where:

- The objectives of designation and the overall integrity of the area will not be compromised; or
- Any significant adverse effects on the qualities for such the area has been designated are clearly outweighed by social or economic benefits of national importance.”

6.5 The applicants accept that the development will have significant adverse effects on the qualities for which the North Menie part of the Foveran SSSI were designated. They argue however those effects are clearly outweighed by social and economic benefits of national importance.

6.6 You asked to be addressed on the criteria that should be applied in assessing the balance and the relative weights to be applied to each criterion as against each other. I have to say that I have found this to be the most difficult task you set for us. There is no national policy or guidance on these issues and with respect I am not entirely clear that the approach of identifying criteria is correct<sup>10</sup>.

6.7 In my submission, the decision maker’s task is to identify all relevant factors, carefully setting aside irrelevant ones, so that he is in a position to apply his judgement to these relevant or determining factors. Section 25 of the 1997 Act directs him first of all to the development plan. Where he will impose a test of relevancy:- if the development plan policy is relevant to the case, then that policy will be a determining factor. The second stage is to consider all of the other considerations, on issues raised in relation to the case. These factors require two-part test. First, is the factor reasonably related to planning

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<sup>10</sup> see paragraph 6.5 above

purpose? If so, he will apply the second part of the test – is it relevant to the case? If so, it will be one of the determining factors.

- 6.8 This approach sets out the fundamental criteria that any decision maker will apply to properly identify the determining factors to which he must apply his judgement in making a decision. If all of these factors are both relevant and reasonably related to a planning purpose, he can safely enjoy the wide discretion invested in him as decision-maker to reach a decision. He can apply significant weight to one factor whilst applying the weight of a snowflake to another. In any judicial review of such decision, the courts are not prepared to impose their judgement in place of another. They are looking at the basis of the decision-making process, not the outcome. There are no wrong answers, only wrong questions.
- 6.9 You also asked who has responsibility for determining the national interest. In my submission, “national” in this context relates to Scottish, though it is possible that in certain circumstances “national” could relate to the U.K. level. For example, where issues of national defence arise. But planning issues are generally devolved and “national” must relate in this instance to Scotland.
- 6.10 In these circumstances, in my submission it is Scottish Ministers accountable to the Scottish Parliament who fall to determine the national interest.
- 6.11 As to what might fulfil the definition of national importance, there is an attempt by Mr Tyldesly under reference to the test in the Habitats Directive, to equiperate “public interest” with “national importance”. In my submission that is the wrong approach. If the test in NPPG 14 was to be “public interest”, it would have said so.
- 6.12 Nor, in my submission, is it right to suggest that a private company or commercial interest cannot undertake a development of national importance. To take an obvious example: there is a national interest in the provision of a secure energy supply. Yet virtually all energy in the United Kingdom is provided by the private sector.

6.13 I will return to the issue national importance later in my submission.

6.14 In response to Mr Tyldesley's submission regarding the SINS we make the following points:

- a) We do not resile from the agreement with RSPB that the area outwith the SSSI but within the Foveran Links Botanical SINS have ecological features which would justify its notification as a SSSI.
- b) That has always been the position and is recorded in the Environmental Statement<sup>11</sup>.
- c) Professor Ritchie's qualification was to the effect that, in his judgement, notification as a SSSI would not be justified on geomorphological grounds.
- d) Dr Dargie has always accepted that for botanical reasons the area is of a quality that would justify its notification.
- e) I note Mr Tyldesley's submissions under reference to the *Basses Cabrieres* case were that Foveran Links SINS should be treated as if it was a SSSI. I do not accept that a case involving a European Directive can be taken as a precedent for SSSIs involving as it does domestic not European legislation.
- f) However, I am not entirely clear that this matters. The assessment undertaken by the Environmental Statement and by Dr Dargie covers Foveran Links SSSI. Here I do depart from Mr Tyldesley in considering whether the full force of NPPG 14 would apply to that part of land outwith the SSSI. However, given the applicants' position that development must include the SSSI, I accept that the application has to be judged against NPPG 14.

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<sup>11</sup> CD – G3, Chapter 7

## 7. The Wider Environmental Issues:

- 7.1 For most of this Inquiry we have been using the term “environment” in a technical and scientific manner. There is an environmental assessment<sup>12</sup>. Impacts of the development on different aspects of the environment are measured and assessed in an objective and hopefully dispassionate manner. Yet for most people issues of geomorphology and SD13 are meaningless. The environment is what they see, hear and breathe.
- 7.2 That is not to say they are not concerned with the wider picture; witness the concern about emissions and climate change. But for most of us the environmental world is one where we make value judgements based on our own perceptions of our surroundings. A fine building may contribute to the built environment yet one may have passionate debate as to the value of modern architecture and whether a particular building is in keeping with its surroundings.
- 7.3 Similarly in the natural environment one may have endless debate as to whether man’s intervention in the landscape improves or detracts from its natural surroundings. This mismatch between the technical world of environmental assessments and the everyday world of most ordinary folk was nowhere more evident in the exchange between Mr Tyldesley and Mr Trump. It was clear that Mr Tyldesley was referring during his questions to the assessed impacts in the environmental assessment. Yet Mr Trump was talking about the best golf course in the world set within the natural beauty of the dunes. And his reference to environmental benefits was clearly a reference to opportunities that he saw within a managed environment that required as their prerequisite the stabilisation of the dunes.
- 7.4 Setting aside for a moment issues of geomorphology and habitat loss, in my submission it is not difficult to imagine a wonderful golf course set within the

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<sup>12</sup> CD – G3

natural beauty of the dunes respecting the topography and promoting high environmental standards. That is an inherent component of Mr Trump's vision for the golf course and its surroundings.

**8. Environmental Statement:**

- 8.1 I submit that the environmental assessment in support of the planning application was a thorough, complete, honest and robust assessment of the environmental impacts of the development. It has not been seriously challenged by any of the parties to the Inquiry; indeed it has more often been used to support the case against the development.
- 8.2.1 The only area where more complete information might have been desirable is in the provision of hydrological data within the SSSI. However, agreeing with Dr Dargie, there is in my submission sufficient information for the determination of an outline planning application. I deal with SEPA and the issues around hydrology below.
- 8.3 Since writing the above I have seen Mr Cockburn's closing submission at section 2. Nothing I have read there alters my position. However, I am reassured that Mr Cockburn is not suggesting that it would be unlawful to grant outline planning permission.

## 9. Scottish Natural Heritage – SNH:

- 9.1 As I indicated in the course of the Inquiry it is no part of the applicants' case that the boundary of the Foveran SSSI should be adjusted to remove the part of the designated land which would form part of the golf course. We accept that the dome will be stabilised and much, though not all, of the geomorphological interest in North Menie part of the Foveran SSSI will no longer exist. However, North Menie is only a part of the SSSI; the coastal dunes and beach which are critical to the wider geomorphological interest in the area will be retained as will the north east corner which was formerly developed as part of the Fazio course design; there will be retained some areas of blown sand; and, importantly, as Stewart Angus conceded to me there will still be a considerable amount of habitat interest in the site even if you made no allowance for mitigation and translocation.
- 9.2 Moreover in management terms the applicants do see the merit of SNH continuing to be involved in an ancillary capacity in the development and assisting in the monitoring of progress of construction and operation of the development.
- 9.3 Against that background the applicants were disappointed at the attitude of SNH, no doubt officially articulated through Stewart Angus, when he was unable to give any commitment in that regard. Of course we recognise their "implacable opposition", as Stewart Angus put it, to development on the SSSI but the prospect of planning permission being granted is not, as Mr Angus claimed, hypothetical; we are involved in an Inquiry and even SNH have considered what conditions should be attached to a grant of planning permission, if the Minister decides to approve the application. Accordingly there is no reason why SNH could not have applied their minds to the questions I put to Mr Angus.

## 10. Assessing the Environmental Evidence:

- 10.1 The applicants have never sought to hide or massage the impacts that the development will have on the environment. As Mr Trump said in his precognition he hired the best environmental consultants, who have been clearly independent and professional in their approach. Dr Dargie was open that he had advised the applicants to stay off the SSSI. Professor Ritchie confined himself to advising on the consequences in scientific terms of stabilising the dome. He said in terms that he was neither for nor against the development. Mr Bell was not as I recollect it asked about advice that he may or may not have given regarding the SSSI. Nevertheless his approach was much along the same lines.
- 10.2 A more unscrupulous developer might have tried to obtain more pliable advice but that has not been the applicants' approach. The result is that, in my submission, the best and most reliable environmental evidence came from the applicants rather than the other parties.
- 10.3 In Professor Ritchie the applicants have one of the very best academics who wrote much of the literature on coastal geomorphology. He is a former University Vice Chancellor who has attained the highest academic honours including honorary doctorates and Fellowship of the Royal Society of Edinburgh.
- 10.4 Dr Hansom is greatly respected as a scientist, particularly by Professor Ritchie. Nevertheless you might consider having made his assessment he was a committed advocate of the course. He used language which was more emotive such as his reference to "biblical proportions" of sand and material requiring to be moved.
- 10.5 Incidentally, Mr Cockburn noted that I had not challenged Dr Hansom on this issue. If I am at fault so be it. But by recollection and my notes show that this emerged during questions put by the Reporters.

- 10.6 Stewart Angus came across as someone who was almost insulted that the judgement of SNH should be open to question whether it was on the central issue of development on the SSSI or the condition of the SSSI at present. You will recall my questions on Macrahanish and he was at pains to tell us that there the developers had done everything that SNH had asked of them in contrast no doubt to the applicants.
- 10.7 Paul Rooney has obvious experience of the Sefton Coast and in other places though it was not clear to me in how many of the other locations he was advising developers or landowners rather than leading field trips, important as these are. He has experience of working with golf clubs – experience which put his evidence at odds with that of Stewart Angus e.g. on coping with championships on golf courses within SSSI's. Otherwise I would submit that his experience and academic record is nowhere near that of Dr Dargie. In addition, while noting that he was only instructed to assist SNH in this Inquiry in March 2008, it is, in my submission, simply unacceptable that he has only spent one day on site, however long that day lasted, given that you yourselves, Sir, Madam, have taken 2 days for the site visit.
- 10.7 Dr Dargie is to be contrasted with both Stewart Angus and Paul Rooney. His academic record is set out in his main precognition and includes 38 peer reviewed articles. As Mr Angus conceded no one has more knowledge of the vegetation of dune habitats in Scotland than Dr Dargie. His experience extends to other habitats. Moreover he has an unparalleled knowledge of the site. You should also have regard to the manner in which he gave his evidence. Here was a genuine expert determined to assist the Inquiry. In my submission on every critical issue where there is a conflict between Dr Dargie on the one hand and Stewart Angus or Paul Rooney on the other you should prefer the evidence of Dr Dargie unless you find compelling evidence from elsewhere which casts a real doubt in your mind on Dr Dargie's testimony.
- 10.8 David Bell was also an important witness for the applicants dealing with the impact on birds and wildlife. And he too is someone of wide experience, including that of an ecological clerk of works. It was significant that his

evidence went unchallenged by SNH and virtually unchallenged by other parties.

10.9 So far as the evidence of RSPB/SWT/BSBI is concerned, in my submission, their evidence is compromised by the position that they took with regard to Mr Wood's alternative golf course design. They set out to prove that it was not necessary to use the SSSI to produce a championship golf course. They trumpeted Mr Wood's design as the answer and sought to persuade people that Mr Trump was wrong not to compromise on this central issue. Yet in their eagerness to demonstrate that there was an alternative to using the SSSI they produced a design which both Dr Dargie and Mr Bell believe may produce greater environmental impacts than the Hawtree design. And their failure to lead Mr Wood in evidence was, in the circumstances unfair on him and disrespectful to the Inquiry.

10.10 While Dr Auld and Mr Hughes's evidence is to be respected, in my submission, it was flawed. In Dr Auld's case you may conclude that the precognition was not written with the care and precision that one might expect; you will recall that he misquoted the applicants response to the consultations to the Environmental Assessment criticising the applicants for saying that SNH's views on the proposed mitigation was a gross exaggeration. As I demonstrated with this witness, that simply was not true. Mr Hughes suggested in his evidence that continued geomorphological processes are necessary to ensure the progression on from SD13 to SD16. In my submission that is wrong. Dr Dargie deals with that issue in paragraph 5.40 of his precognition and in the circumstances you should prefer his evidence on this matter.

## 11. Geomorphology:

- 11.1 There is little difference between the applicants and SNH on the effect that the development will have on the geomorphological processes. Any differences that remain are for the most part within the reasonable limits of academic uncertainty and are of minor significance. The central issue is the stabilisation of the dome and there is general agreement on the fact that much of the dynamic processes associated with this feature will be lost. Nevertheless it is wrong to claim that it will all be lost; the north east corner will be retained as a result of the alteration to the Fazio design. There will be areas of blown sand and the coastal dunes will not be touched.
- 11.2 One area of distinction between Dr Hansom and Professor Ritchie is whether the closure of the gap between the tees and the start of the fairways at the 18th is permanent or merely migrating northwards. This is a minor disagreement of more academic interest than practical importance. Professor Ritchie believes it is permanent though concedes the possibility of destabilisation occurring in this area. There is agreement between Hansom and Ritchie that at one point in the 1940's the gap was about 200m wide. There was a dispute between Ritchie and Hansom on whether military activity might have been responsible for the width of the gap. It is well known that every beach was fortified during the war and the possibility that military activity had contributed to the gap seems self evident. Yet Dr Hansom placed no value on this because it was not documented.
- 11.3 Professor Ritchie has shown in a study of blow outs on beaches throughout Britain<sup>13</sup> that the vast majority were initiated by human or animal pressure though other natural forces such as wind and water can be a factor. The gap has progressively closed and if human activity is less on the coastal dunes then one would predict that it is less rather than more likely that the gap will remain closed and not migrate northwards.

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<sup>13</sup> RSB 55

- 11.4 The dispute has potential implications for the dynamism of the dome. However while Professor Ritchie considers that while there may be some loss of dynamism the amount of loose sand within the dome coupled with sand being fed along the funnel where the gap was before it closed means that the geomorphological processes are still at work and the dome is still moving.
- 11.5 Professor Ritchie accepts the possibility of small areas of instability appearing elsewhere. In those circumstances any response from the developer would be a “soft” response that continued to respect the integrity of the geomorphological processes.
- 11.6 Dr Hansom placed reliance on the fact that North Menie had recently been promoted as a candidate GCR. However, in my submission you should place no weight whatsoever on this contention. According to the GCR submission<sup>14</sup> work on this commenced within one month of Dr Hansom being commissioned to advise SNH in the light of the application for planning permission. North Menie had been considered, but not nominated, in the 1980's. As Dr Hansom conceded to me, as well as the criteria referred to in his precognition<sup>15</sup> there is a minimalist approach to the selection of sites so that only a selection of representative sites go forward for inclusion. In 1998 Fiona McTaggart<sup>16</sup> made a recommendation that the Sands of Forvie GCR boundary be adjusted but that did not involve the application site. Its nomination now is, in my submission, a flawed attempt to bolster the SNH case against the stabilisation of the dome; a case which frankly does not need this kind of assistance as the geomorphological interest in North Menie is conceded.

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<sup>14</sup> SNH 6

<sup>15</sup> Paragraph 17

<sup>16</sup> Document T13

- 11.7 Another area of controversy was whether the line of the 14<sup>th</sup> hole impinged on the coastal dune. In my submission this point is overplayed. In the first place it assumes that the transition zone is a hard edge – it is not. It is a soft boundary between the rough and the natural vegetation. Secondly, and in any event, the exact line of the hole will not be determined until the detailed stage when the contractor goes out on site and pegs it off with the consultants. The applicants have readily agreed that the coastal dunes should not be touched and that remains their position. Dr Hawtree was relaxed about the possibility of some quantities of sand on the tees and greens; that is characteristic of links golf.
- 11.8 SNH also made reference to the Balmedie sand sheet and their concern over the second course. In my submission, given that it is not an SSSI and no one is suggesting that there is the level of scientific interest in this part of the site to justify such a designation, you should not have any concern about development here. That includes the measures that will be required for the championship (Hawtree) course at holes 4 and 5.
- 11.9 The fly through<sup>17</sup> does not assist. In the first place there is better software available to demonstrate the effect on the landscape. Secondly the floating line makes it difficult to appreciate the exact place on the ground where the impacts will be seen. Thirdly the transition zone is seen as a hard edge when it is clearly a soft transition. Finally the video does not show Dr Dargie, Dr Hawtree and the contractor on site marking out the final boundaries of the various holes.
- 11.10 There was some discussion of the future of the dome. Dr Dargie said he believed that much of the present dynamism of the dome will largely disappear by the end of the century as a result of vegetation successional processes and other factors. It may be that he gains some support for this view from the appearance of recent marram grass on the dome. Dr Hansom

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<sup>17</sup> SNH 53

and Professor Ritchie were a lot more cautious about speculating its rate of movement or ultimate final position.

11.11 The applicants accept that there will be a significant loss of dynamism in parts of the dune system though they do not accept suggestions that the dunes will be destroyed or even that all the dynamic process will be destroyed. These are chosen as deliberately emotive terms and are not matched by the facts. It is also accepted that North Menie does have a national significance for geomorphology. However, the term “jewel in the crown” coined by Dr Hansom is not one that finds a resonance with Professor Ritchie. North Menie, though within a SSSI, was not selected as a GCR when these sites were originally put forward, in contrast to the Sands of Forvie, where there are also migrating sheets of bare sand.

## 12. Geomorphology and Habitat Loss:

- 12.1 In advising the Scottish Ministers you may have to place some value on the various components of the SSSI. In what I say now I do not for one moment wish to suggest that there is not a scientific interest in the movement of sand dunes and the geomorphological processes associated with it. Nor do I ignore the interrelationship between these processes and the habitats to be found in North Menie. However I do suggest that one might well place a higher value on the issues of habitats and biodiversity. The reasons I suggest are clear; man has been forming and reshaping the landscape since time immemorial. In the cross examination of Paul Rooney I took him to an article by van der Meulen and Jungerius on The Decision Environment of Dynamic Dune Management<sup>18</sup> which referred to the functions that the dune system has to play for society. In that scenario the dunes are seen as a resource for society which may make choices about how to use them.
- 12.2 More importantly, however, are the commitments made by successive administrations both British and Scottish to the maintenance and promotion of biodiversity and the policies which underpin these commitments. These policies were referred to by several witnesses and are contained in documents before this Inquiry<sup>19</sup>.
- 12.3 Accordingly in my submission of more concern to Ministers is likely to be the effect on issues of habitats, biodiversity and species.

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<sup>18</sup> SNH 47b

<sup>19</sup> E.g. UK Biodiversity Plan – CD – F5 and Scotland's Sustainable Development Strategy – RSB 60

### 13. Habitat Loss:

- 13.1 Dr Dargie's assessment of habitat loss is contained within the environmental statement, his report for this inquiry<sup>20</sup> and the updated hole by hole analysis<sup>21</sup>. You may also have regard to the overlay<sup>22</sup> which was produced following his overnight trip home. It is also summarised within the precognition at section 7.1 onwards. I do not intend to rehearse the whole evidence on impacts but to focus on the key habitats affected by the development.
- 13.2 Paragraph 7.13 of Dr Dargie's precognition gives the impacts on the NVC types which make up the dune habitats listed in Annex 1 of the Habitats Directive. These habitats are 2120 White dunes (mobile dunes), 2130 Grey dunes (Priority), 2140/2150 Decalcified fixed dunes (dune heath), (Priority) and 2190 Humid dune slacks.
- 13.3 The total loss of Annex 1 habitats is given as 35.1 ha, the sum of the figures given in paragraph 7.13. This figure as Dr Dargie explained is a considerable over estimate for the following reasons.
- 13.4 First, the figure covers all key habitats within the T2 footprint and includes all remaining bare sand on the dome included within the figure given for 2120 White dunes. Two points require to be made about this. In the first place Dr Dargie assumed that all such sand would be stabilised. In fact, as Dr Hawtree and Professor Ritchie have indicated areas of bare mobile sand can be maintained. Secondly while appearing under the classification of 2120 White dunes 9.8 ha of this is made of up bare sand with no vegetation (see table 3 in T4). The figure of 9.8 ha includes 3.2 ha of bare sand within the T2 footprint and a further 6.6 ha required for the stabilisation of the dune. For the

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<sup>20</sup> Document T50

<sup>21</sup> Document T4

<sup>22</sup> Document T70

avoidance of doubt the figure of 1.3 ha given against bare mobile sand for the transition rough is not included in this figure but is a component of the 7 ha assigned to transition rough.

- 13.5 Secondly the figure includes 7 ha of transition rough<sup>23</sup>. Most of this ground will be managed as dune habitat which provides a playable lie. It will not be destroyed nor will it be translocated.
- 13.6 Accordingly the accurate figure for direct impact on NVC types making up Annex 1 habitats is 18.3 ha (35.1 ha less the transition rough, 7 ha and bare mobile sand (9.8 ha).
- 13.7 This figure represents approximately 10% of Annex 1 total habitats (extending to 182.78 ha – see table 3).
- 13.8 So far as the impacts within the SSSI are concerned, and following the same methodology, the total area affected by the development is 19.4 ha<sup>24</sup>.
- 13.9 Of that total 3.4ha is transition rough.
- 13.10 Bare mobile sand accounts for 9.6 ha (Table 4, T4 – 10.87 ha less 1.25 ha for the transition rough).
- 13.11 Accordingly the impact on NVC vegetation making up Annex 1 habitats within the SSSI amounts to 6.6 ha<sup>25</sup>, or 8% of 1990 annex 1 dune habitat total for the Foveran Links SSSI (total figure is 85.1 ha – table 4 total of 151.32 ha in column 1 less 48.67 ha bare mobile sand and 17.51 ha of beach sand).

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<sup>23</sup> see Table 3 in Document T4 and paragraph 7.14 in Dr Dargie's precognition

<sup>24</sup> Table 4, Document T4, Dr Dargie's precognition paragraph 8.7

<sup>25</sup> Table 4, Document T4

13.12 In summary then, the total direct impact on vegetation comprising Annex 1 habitats at Menie Links is approximately 10%. The total impact on the habitats within the SSSI is approximately 8%. Put another way, 90% of Annex 1 habitats at Menie Links will be unaffected and 92% of habitats within the SSSI will be unaffected.

## 14. Other Impacts:

14.1 Dr Dargie dealt with indirect effects in paragraphs 7.45 to 7.49 of his precognition under reference to the environmental statement at section 7.4.1. The two featured changes are increased nutrient levels and loss of rabbit grazing. In my submission these are operational issues common on golf courses and can be addressed through proper environmental management informed by MEMAG.

14.2 Mr Angus raised the issue of trampling of crowberry in the transition rough. Yet the text he referred to of a Danish study<sup>26</sup> properly analysed looked at trampling over the same pathway while pressure of golfers will be much more diffuse.

14.3 Mr Angus also raised the issue of championships being played on the course and damaging habitats. I have to observe that it is a bit rich for Mr Angus to raise this issue when he cannot say whether the site would remain an SSSI or that SNH would work with the developer in the operation of the site. Nevertheless his evidence ignores the evidence of Dr Hawtree, Dr Dargie and Mr Rooney as to the successful operation of championship matches on environmentally sensitive sites.

14.4 Finally Mr Cunliffe raised the issue of effects beyond the site with a number of witnesses. Without going through each one individually my impression was for the most part witnesses struggled to find significant impacts though the evidence is a matter for yourselves.

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<sup>26</sup> SNH 29

**15. Mitigation:**

- 15.1 One of the myths of this Inquiry has been that the applicants have not been prepared to compromise or mitigate the effects of the development. Of course on the central issue of use of the SSSI compromise is not possible for the reasons given in this Inquiry. However it would be wrong to say that the applicants are unconcerned about the impacts or do not propose to mitigate and minimise their effects where possible.
- 15.2 In the first place it is important to get the impacts into perspective. As demonstrated above, the direct impacts on habitats within the SSSI is less than 10% of the total. Two thirds of the SSSI is not affected at all.
- 15.3 The Hawtree design does make significant changes halving the amount of cut and fill from that proposed in the Fazio design and drawing back from the top north east corner and elsewhere. Although the design is virtually complete the layout will not be finalised until the course is staked out on site allowing for further alterations.

**16. Mitigation MEMAG:**

- 16.1 The proposals for the Menie Environmental Management Group are set out in detail within the Environmental Impact Assessment at Appendix 6.6. It is an important body which will provide independent environmental advice on such matters as mitigation, best environmental practice and responses to ad hoc operational requirements. It will comprise of a Main Committee with representatives of various organisations (including SNH, should they decide to participate) and a Monitoring committee which will provide the scientific expertise.
- 16.2 As Professor Ritchie indicated in his evidence the proposals for MEMAG come principally from his experience at Sullom Voe in Shetland and St Fergus. The experience is a positive one and nobody suggested that either body did not work well.
- 16.3 Criticisms of the proposals were largely based on the advisory nature of the organisation. However in my submission it would be wrong to give MEMAG the power of veto as some suggested. In the first place the legal responsibility for what happens on site must rest with the developers and those carrying out the work. To dilute that responsibility would I suggest make regulation and enforcement more difficult since in theory the developer could point to the fact that he had not been told to stop the practice by MEMAG and the regulators may wonder whether they are required to proceed against both MEMAG and the developer. Moreover MEMAG cannot take the place of the statutory bodies with enforcement powers including the Council, SEPA and SNH. Christine Gore said in cross examination that a power of veto was not appropriate.
- 16.4 That however does not mean, as was suggested, that such an organisation would be toothless. It will have the legitimacy of the planning permission and the section 75 agreement, it will have a considerable body

of information about the site from the Environmental Assessment and the work for this Inquiry, it will have the task of advising on stringent environmental and ecological conditions which the developer must fulfil and it will on top of this possess a moral authority which anyone would find difficult to ignore. A breakdown in the relationship between MEMAG and the developer would I suggest be the prelude to enforcement action by others.

- 16.5 While we accept that such a body does not in itself constitute mitigation in the strict sense of the word it is an important component. Everyone would accept that neither an Inquiry dealing with the principles of development nor a regulator sitting in an office can micromanage a sensitive environmental site. A body such as MEMAG with access to the full range of environmental scientists and an unparalleled knowledge of site conditions can be a far more effective means of channelling good practice through those with responsibility for construction and operation of the site. It can also provide the necessary technical expertise to undertake appropriate field studies and monitoring.
- 16.6 In addition the applicants are more than happy to accept a condition that there should be an ecological clerk of works during the construction phase.

**17. Mitigation – Translocation:**

- 17.1 It is clear from the figures relating to habitat loss that, even if there was no attempt at translocation of habitats, there would still be considerable Annex 1 habitats both within the Foveran SSSI and on the site post development. Indeed this was accepted by Stewart Angus in cross examination to me. Accordingly it is my submission that, even if the applicant were to propose no measures to save or preserve habitat by translocation, the development would still be acceptable applying the test in paragraph 25 of NPPG 14<sup>27</sup>.
- 17.2 However, and I wish to emphasise this point, that is not the applicants' position. They accept that it would be wrong not to take steps to mitigate the loss of habitat by undertaking translocation. It is accepted that this is not a preferred option – indeed it is one of last resort where it is not possible to avoid the impact on the habitat. But, as Dr Dargie said, it would be unacceptable not to make the attempt.
- 17.3 The applicants have not sought to understate either the impacts on habitats or the challenges of translocation. Indeed in my submission they have been forthright in their assessment of both of these issues. For that reason it is my submission that you can have more confidence in their assessment of how it will be achieved and in the prospects for success.
- 14.4 As an aside, while, of course, the identity of the developer is not a material consideration, it is right to observe that the scale of translocation involved is not one which is of concern to this applicant. As you might appreciate, in my experience of my client, the word “cannot” does not appear in his dictionary. And for an organisation used to constructing 90 storey tower blocks translocation on this scale is not logistically daunting.

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<sup>27</sup> CD – C11

- 17.5 There are of course a number of significant steps required to enable successful translocation to proceed.
- 17.6 In the first place suitable receptor sites require to be identified. The final work on identification will be done during the reserved matters stage and the EIA which will accompany that process. Dr Dargie has identified potential sites in figure 6 of Document T50 and no one has sought to challenge his assessment of their potential.
- 17.7 Secondly it is accepted that hydrology is an important element in ensuring the successful translocation of species. Dr Dargie was challenged on this point by Mr Cockburn. However he indicated that he had sufficient information for an outline planning application which I take to mean at this stage of the process. And both Dr Dargie and Dr Hawtree were able to bring their very considerable knowledge of golf courses to inform their professional opinion on these matters. The depth of Dr Dargie's knowledge of ground conditions was demonstrated by his response to questions regarding the Site Investigation Report prepared by W A Fairhurst<sup>28</sup>. You will recall that he took Mr Cockburn to the English Nature Research Report produced to the inquiry by SEPA<sup>29</sup> and he went on to illustrate how he believed that Menie dunes are much easier to understand in terms of hydrology. When asked whether we are dealing with a complex and subtle system replied that in his opinion we were dealing with one ecohydrological model.
- 17.8 Thirdly there is the nature of the soils and related to that the size of the turves to be translocated. It is accepted that where the soil is composed of looser material including stones there is a greater challenge in successfully completing the translocation of vegetation. And the size of the turves is important in minimising the damage to the area being

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<sup>28</sup> Document T64

<sup>29</sup> SEPA 11

translocated. However, while challenging, it is not an insuperable problem since the equipment exists and can be adapted to cope with these problems. Dr Dargie pointed to the description of the equipment in the Penny Anderson handbook on Translocation practice<sup>30</sup>.

17.9 A lot of attention of the Inquiry was focussed on young dune slack SD13. You will recall that the 1990 NVC survey showed only 0.06 ha of young dune slack on the Foveran SSSI<sup>31</sup>. Dr Dargie's survey of the Menie part of the SSSI in 2006/08 showed some 3.59 ha or a twenty fold increase. There was no evidence before the Inquiry to account for this sudden increase. Stewart Angus in his precognition told us that assuming no significant change in other sites Menie contained over 98% of the Scottish resource of SD13 and over 13% of the total for Great Britain. However that figure assumes no significant change, which may be a rash assumption given the changes, unknown before the Environmental Assessment, of the quantities of SD13 at Menie.

17.10 The impact of the first golf course on the young dune slack at Menie totals 1.68 ha<sup>32</sup>. The habitat remaining is 2.11 ha. That does not include the second golf course though most of the young dune slack lies within the SSSI<sup>33</sup>. Only 0.2 ha of SD 13 lies outwith the Foveran Links Botanical SINS and SSSI<sup>34</sup>. Accordingly it is safe to say that 2.11 ha of young dune slack will remain after development of both golf course and before any translocation. That compares to the 1990 survey of 0.06 ha.

17.11 The effect of translocation was also the subject of debate. Young dune slack will remain young dune slack unless and until it matures to an older

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<sup>30</sup> Document T53 at section 6.3 and the box 6.1

<sup>31</sup> Table 4, Document T4

<sup>32</sup> Table 3

<sup>33</sup> Figure 4, Document T50. See also Tables 4, 5 and 6 of Document T40

<sup>34</sup> Table 6

form SD16. This is a natural progression. It does not require continued dynamism. While Dr Dargie acknowledges that the loss of geomorphological dynamism will mean that there is less new creation of SD13 there were still sufficient areas of dynamism to ensure the continued presence of SD13 at Menie.

- 17.12 While I do not under estimate the value of young dune slack there are two other points to be made. In the first place young dune slack represents only about 20% of the total material to be translocated. Secondly while it is an Annex 1 habitat unlike grey dunes and dune heath it is not a priority habitat.
- 17.13 So far as confidence in success is concerned this is dealt with in paragraph 8.31 of Dr Dargie's precognition when he suggested that there would be at least 66% success for habitats established in receptor areas in the short term (1 – 5 years). Following remedial measures he estimated that near 100% would be possible in the medium to long term.
- 17.14 Challenged on these assessments he indicated that this was an overall assessment but that there were varying levels of confidence depending on the type of material involved. For the grey dune and dune heath, constituted in drier material the confidence level was high. It is less so for the young dune slack and he conceded that it would depend on being able to overcome any difficulty there was in the underlying soil conditions. It would depend on the balance of young dune slack on stony soil and his confidence of 100% success would depend on being able to overcome these difficulties.
- 17.15 Overall the likelihood of translocation success is considered high for grey dune and dune heath. It is less certain for dune slacks including SD13, though Dr Dargie remains confident that further investigation of soils will improve the confidence level.

- 17.16 These confidence levels are based on knowledge and experience. While Mr Cockburn was able to point Mr Rooney in the direction of passages in the Penny Anderson handbook<sup>35</sup> which undoubtedly show the difficulties associated with translocation Dr Dargie's assessment is based on work in the field by him, and by David Bell and the success of St Fergus led by Professor Ritchie.
- 17.17 In the first place Dr Dargie referred in his rebuttal precognition to his experience with blanket bog. Personal experience of 50ha of blanket bog turf relocation showed the development of stand with species composition, patterning and structure which is within the range of undisturbed bog uninfluenced by development. This required 10 years, medium term, to be achieved when starting with a surface with a low live vegetation cover. He went on to say that judged by the speed of young dune slack succession at Menie, dune slack habitat will respond much more quickly than blanket bog and young dune slack conditions should be achievable in the short term, up to 5 years.
- 17.18 When challenged on whether it was appropriate to compare blanket bog with young dune slack he pointed out that both were wet habitats but he considered that blanket bog was a more difficult material to work with.
- 17.19 Secondly Dr Dargie referred to work at Barry Links in Tayside where there was considerable disturbance to habitat following the installation of a pipeline through the dune habitats. David Bell had been the ecological clerk of works. When Dr Dargie and Mr Bell had visited there recently and assessed vegetation recovery there after 7 – 8 years they found that the grey dune habitat disturbed in 2000 was in better condition than the very uniform, rank and species poor adjacent ground. It has a wider range of

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<sup>35</sup> Document T53

NVC types usually with more species and a better vegetation structure including small patches of bare sand<sup>36</sup>.

17.20 More generally Dr Dargie's assessment is based on his wide experience of dune habitats, his knowledge of the ways in which dune habitats cope with dynamism as well as observation of dune restoration schemes in Britain, France, Spain and the Netherlands<sup>37</sup>. There is also a major issue between Dr Dargie and Mr Rooney on the extent of available literature on dune soils. For the record we append a list of documents<sup>38</sup> which have been presented to this Inquiry which relate to the issue of dune soils<sup>39</sup>.

17.21 In conclusion on this subject I submit that you can report to the Scottish Ministers that in mitigation of the impacts on habitats shown within the Environmental Assessment the applicants are prepared to effect translocation of key habitats. You can also advise Ministers that while the extent of translocation of this material has not been attempted before there are nevertheless good reasons to expect a successful translocation of priority one habitats. While the prospects for the translocation of the lower ranked young dune slacks is less certain there are nevertheless sound reasons to expect that it could be done with a reasonable confidence in its success. Dr Dargie's bottom line was that there would be no net loss. I go on below to explain the environmental gains.

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<sup>36</sup> See Dr Dargie's Rebuttal Precognition

<sup>37</sup> Dr Dargie's Rebuttal Precognition

<sup>38</sup> Appendix 6

<sup>39</sup> See also Dr Dargie's Rebuttal Precognition

**18. Special Protection Area:**

18.1 In this regard, the applicants refer to Appendix 12 of this submission.

**19. Other effects on flora and fauna:**

19.1 The impacts of the development on a range of birds, protected mammal species and other species are dealt with in the Environmental Assessment and David Bell's precognition. I do not intend to deal with them in detail since they were not challenged by SNH nor seriously challenged by RSPB and others. I simply refer you to precognition of David Bell and his answers in cross examination.

**20. Ranking of Designations:**

20.1 The Reporters have requested the parties to the Inquiry to rank the environmental designations that apply to the land within the proposed development site in terms of law and policy and to note any distinction arising between the two so far as applicable. In this regard the Applicants refer to Appendix 10.

20.2 It accords generally with the ranking given in the closing submission of Mr Cockburn at paragraph 9.1 though he has slipped in a distinction between habitats depending on whether they are within the SINS or not.

20.3 We do not accept Mr Tyldesley's submission that SSSI should have the same ranking as an SPA.

## **21. Environmental Benefits:**

- 21.1 While it is not suggested that the condition of the SSSI is sufficient ground in itself to justify the development, nevertheless, it is our submission that the condition of the SSSI is not good. Mr Angus appears to accept this to some extent in his precognition though he was defensive when challenged over the formal assessment of the SSSI as being favourable. Dr Dargie, who you may think is best placed to comment on this issue, was surprised at SNH's assessment and details in his precognition the reasons why he finds the site to be in an unfavourable state.
- 21.2 That unfavourable condition will be addressed incidentally as a result of the development. But it will go much further in protecting the environment and increasing biodiversity, albeit within a changed landscape.
- 21.3 It is important to recognise, as has been demonstrated at this Inquiry, that very many golf courses including some of the most famous are either wholly or partly on land designated as SSSI's. While many if not most predate the introduction of SSSI's the existence of a SSSI is not deemed to be a barrier to the development of a golf course as we have seen with the approval given for Macrahanish golf course. There is wealth of knowledge and experience concerning environmental management on these sensitive sites some of which was referred to in the course of the Inquiry. That such management can produce environmental benefits is widely accepted.
- 21.4 Through such management at Menie the opportunity arises to ensure not just "no net loss" but as Dr Dargie put it "If development gets permission to go ahead and we are allowed to do mitigation we will have habitat conditions that are better overall than we have at the current time."

- 21.5 That assessment is repeated by David Bell<sup>40</sup> where he said that the Course Environment Management Plan (CEMP) would seek to create new opportunities for wildlife and to underpin national and local biodiversity priorities. He listed key species which might benefit including aquatic beetles, bats, barn owl, sky lark, reed bunting, tree sparrow, otter and grayling butterfly. The CEMP should see targeted action for boundary habitats, wetlands and watercourses, grassland and planting of new broadleaved native woodland. Specialist monitoring would endeavour to protect, improve and create lower plant habitats in relevant dune areas. He concluded that the possibility of re-introducing water vole at Menie could be one of the more exciting projects.
- 21.6 You may well have detected a real enthusiasm from Tom Dargie and David Bell in the way they gave their evidence. And you may have wondered why that was given their initial reservations about intruding into the SSSI. The reason for that enthusiasm I suggest is clear; it is the prospect of improving habitats and increasing biodiversity on the site.
- 21.7 This is an enthusiasm shared with the golf course designer Martin Hawtree but also crucially with Donald J Trump. He said in his precognition that he believed that there was the opportunity of creating additional habitats that will produce environmental benefits. That environmental vision is underpinned by sound commercial sense since, as he said, he has found that people will not play on a course that is environmentally harmful.
- 21.8 In conclusion on the environment I submit you may report to Ministers as follows
- The stabilisation of the dome will result in the loss of dynamism within the North Menie section of the Foveran SSSI and adversely impact on the integrity of the geomorphological processes

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<sup>40</sup> see paragraph 6.2 of Mr Bell's precognition

- That there will be impacts on the habitats extending to a loss before mitigation of some 8% of habitats within the SSSI
- That with mitigation there are reasonable prospects of ensuring no net loss
- That the opportunity exists to increase the habitats and the biodiversity on site bringing environmental benefits

**22. Consents:**

- 22.1 The Reporters requested a note of the various consents that may be required if planning permission is granted to allow development to proceed on the SSSI. In this regard reference is made to table 1 of Appendix 11. Table 2 of Appendix 11 outlines those additional consents that may be required to enable the development to proceed and identifies the relevant statutory authority (excluding RCC and Scottish Water).

### **23. The Economic Benefits:**

- 23.1 Evidence on these issues came from Stewart Dunlop of the Fraser of Allander Institute and Ms Donaghy of EKOS, both of whom had produced reports to accompany their evidence.<sup>41</sup>
- 23.2 The figures used by Stewart Dunlop in his report came from three sources (1) published Government sources, (2) from Hardies, for construction costs and (3) from Johnston Carmichael. There was no serious challenge to Mr Dunlop's use of these figures.
- 23.3 Similarly there was no serious challenge to the methodology adopted by him in reaching conclusions on the economic impact using two well known indicators – the number of full time equivalent jobs (FTE) and gross value added (GVA). In reaching his conclusions he took account of a number of factors.
- 23.4 The first was multipliers where the creation of a job at Menie would support the creation of another elsewhere in Scotland.
- 23.5 The second was additionality. Stewart Dunlop used the generally accepted concept of additionality which attempts to measure the net impact of Government intervention. It was suggested that one should not consider the construction jobs for the housing element as additional since, if the houses were not constructed at Menie, they would be built elsewhere. Whether this is the correct approach or not, the net effect, as Ms Donaghy pointed out, is miniscule.
- 23.6 Thirdly, there is the issue of leakage where employment may be taken up by people outwith Aberdeenshire. This issue was the subject of some

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<sup>41</sup> Document T6 and ACC9 and 19

misconception. Councillor Ross's view appeared to be that, where people move into the area to work, that was leakage since the jobs would not be going to locals. That is not the case. Leakage is where money is exported out of the area, usually by people travelling from outside the area to work in the development. Mr Dunlop made allowances for this.

- 23.7 Fourthly Mr Dunlop also made allowances for displacement where economic activity takes market share from local firms producing the same goods and services.
- 23.8 Using the figures described in the report, and factoring in the issues above, Mr Dunlop concluded that the number of construction jobs created in Scotland would be 7042 FTE using a 25% displacement assumption and 4694 FTE using a 50% displacement. Displacement would occur if construction elsewhere in Scotland fell by 25% and 50% respectively. As he said 50% may seem high but he preferred to be conservative in his approach. In table 5 of his report he gives equivalent estimates for the number of local FTE jobs created.
- 23.9 Councillor Ross challenged the materiality of construction jobs on the basis, as I understood it, that planning was about land use not job creation. In my submission such a view is wrong and misconceived. Of course one would not wish to grant planning permission merely because the construction which would ensue would provide jobs. That approach would produce the follies of the 19<sup>th</sup> century. However where a development is acceptable for other reasons it would be quite wrong in my submission to leave out of account the job creation that would accompany the construction phase.
- 23.10 Whether it would be right to include all the jobs created by the construction of the houses depends on whether you consider the houses to be a windfall as Dr Gore suggested or whether they would be built elsewhere.
- 23.11 Gross Value added figures for construction at national and local level are given in tables 4 and 6 of Document T6 respectively.

23.12 Turning to the impact of operations at Menie, Mr Dunlop analyses the effects for each of the various elements. Table 19 of Document T6 summarises these effects and shows in Scotland 1856 FTE jobs created by the development using a 25% displacement factor and 1237 FTE using a 50% displacement. The equivalent figures for local effects are 1418 FTE and 945 FTE respectively.

23.13 The GVA figures show an impact of £49.2m in Scotland using 25% displacement and £32.8m using 50% displacement. At local level the figures are £33.5m and £22.3m.

23.14 These figures fit in with those produced by Ms Donaghy for Aberdeenshire Council. I do not intend to repeat these but differences of opinion are based partly on access to figures and partly on slight differences in methodology. In any event, in my submission, they are not significant. It is not necessary for you to plump for one set of figures or another. In my submission, if you are satisfied that the figures are approximately correct then, on any view, your advice to the Minister should be that the potential economic benefits of the development are meaningful and significant. They were not challenged.

**24. Support from the Business Community:**

- 24.1 While the raw figures may be important in advising the Minister of the exact scale of the economic benefits, of equal importance in my submission, is the voice, or indeed voices, of the business community. They are the people who take decisions about investment. It is to them whom we look for our prosperity. They do not require an economic analysis to appreciate the huge economic impact and opportunities that this development can bring to the north east of Scotland and, indeed, Scotland as a whole.
- 24.2 I may stand to be corrected but I cannot recall an occasion when a Chamber of Commerce elected to appear at an Inquiry as a relevant party. Nor do I recall any planning application that has aroused so much passion among business leaders. I will not repeat the submissions of the Chamber of Commerce but I do draw attention to the Press Release issued by six business organisations, including the CBI in Scotland, the Institute of Directors and the Scottish Council, Development and Industry on 14<sup>th</sup> March 2008, (reproduced as T67).
- 24.3 These views, together with the large number of representations which you will have from various businesses, not only in the north east of Scotland, demonstrate that the economic benefits which will flow from this development are real and tangible. They are not merely figures produced by academics no matter how distinguished. Businesses relish the opportunities presented by this proposal.

**25. Significance of the Development for the North East of Scotland:**

- 25.1 The benefits which will accrue to north east Scotland in my submission accord with the objectives of the Council. The Council Leader, Councillor Anne Robertson, spoke of the need for the Council to have a wider vision. That vision encompasses the promotion of Aberdeenshire on the wider national and international stage and promoting diversification of the economy. The Council and its Leader are to be commended for their clear strategy planning ahead to ensure that the widely forecast decline in the oil industry does not lead to a decline in the fortunes of Aberdeen City and Shire.
- 25.2 It is acknowledged that unemployment in the north east is low. However as Mr Dunlop pointed out there are a significant number of people classed as economically inactive many of whom would wish a job.
- 25.3 Moreover the need to diversify the economy has been recognised at both a local and national level and the City and Shire have adopted policies and strategies to maximise the potential for growth. Mr Runcie spoke of the role of Aberdeen City and Shire Economic Forum in promoting the diversification of the economy and the desire to promote tourism, in particular golf tourism as part of that strategy.
- 25.4 He also spoke of the need for both high quality 5 or 6 star hotel accommodation noting that the lack of such accommodation was a problem in attracting major conferences to Aberdeen.
- 25.5 The conference facilities too will be a major boost to the economy helping to attract high quality business tourism.
- 25.6 Councillor Robertson spoke of her desire to see more company headquarters perhaps even global headquarters locating in Aberdeen. High quality recreational facilities not only help act as a flagship for the area but as a draw for business relocation.

## 26. National Importance:

- 26.1 In my submission this development is clearly of national importance.
- 26.2 In the first place the figures for job creation are very significant indeed. Ms Donaghy spoke to the their scale in her evidence pointing out that the figures for job creation were above the threshold for RSA grant were the development to be eligible for such support. She pointed out too that the fact that 900 jobs in a call centre had been saved, not created, was worthy of the First Minister attending the announcement. Stewart Dunlop was not aware of any similar development. Ian Webster in his report<sup>42</sup> noted “The resort elements of the Menie Estate are of a scale not previously seen in the United Kingdom.”
- 26.3 Moreover this importance is acknowledged and underwritten by national policies. I refer first to the National Planning Framework published in 2004<sup>43</sup>. Under reference to the review of Scotland’s cities at paragraph 31, the NPF draws attention to the distinctive characteristics of cities and the important strategic role as drivers of economic activity. Paragraph 34 recognises Aberdeen as having a GDP 30% higher than the Scottish average but recognises too that there is a danger that today’s success may inhibit future performance. Paragraph 59 indicates that a significant decline is predicted in Aberdeen as a result of the decline in the oil industry.
- 26.4 Paragraph 86 sets out the key aims of the strategy and emphasises the importance of a high quality environment noting that if the rich diversity of Scotland’s landscapes are a national treasure, “The aim should be to build environmental capital and pass well managed, high quality landscapes on to future generations”.
- 26.5 At paragraph 98 in the key elements of the spatial strategy to 2025 the following are to be noted:
- To support the development of Scotland’s cities as the main drivers of the economy; and
  - To promote economic diversification and environmental stewardship.

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<sup>42</sup> Document T7, page 8, paragraph 3.1

<sup>43</sup> CD – B1

- 26.6 At paragraph 99 of the NPF it is noted that Aberdeen has potential as a major tourism gateway.
- 26.7 At paragraph 161 the NPF notes that North Sea oil has been a key driver of the Scottish economy over the last 30 years and will continue to make a contribution well into this century. However with the emphasis having shifted from development to production, the NPF predicts a decline of 9,000 oil related jobs in north east Scotland by 2016. It goes on to say that Aberdeen must build on its strengths as an energy centre and Scotland's northern gateway and broaden its city base.
- 26.8 The City and Shire's determination to diversify the economy is entirely in line with this national policy.
- 26.9 Last year the draft National Planning Framework number 2 was published<sup>44</sup>. Given that it still has significant processes to go through before it can be adopted, it should be treated, in my submission, with a great deal of caution. Nevertheless, there are references to Aberdeen within the document including the need to diversify the economy and enhance its reputation as a competitive business location as well as pursuing other opportunities in leisure and recreation. It also notes Aberdeen beginning to develop the role of a major tourism destination. In general terms, tourism is one of the key industries on which government action is focused.
- 26.10 So far as tourism is concerned, the Scottish Executive in 2006 published its document, *Scottish Tourism: The Next Decade*<sup>45</sup>. The key target within that document is to achieve a 50% increase in revenue growth from tourism by 2015. The document places an emphasis on quality, on short breaks, on business tourism and on special interest and special experience trips, including active holidays of which golf is perhaps the most important.
- 26.11 The application by Trump International Golf Links Scotland (TIGLS) will go a long way to meet these aspirations.

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<sup>44</sup> CD – B2

<sup>45</sup> AC 17

26.12 Councillor Robertson was asked under reference to Local Plan Policy ENV2 what were the benefits in national importance. She replied that it was tourism that was of major importance. This development will have the potential to be a global destination for tourism. Under reference to ACSEF she said that it was important in attracting companies to locate perhaps even global headquarters in the Aberdeen area and she went on to mention the scale of the development and the employment opportunities. On social benefits she was asked about those and she mentioned the development of community prosperity and quality of life as well as the planning gain.

**27. The Scottish Government's Economic Strategy:**

- 27.1 The strategy, published in 2007 sets out the Government's priorities for economic growth. It identifies the challenge of what it says is decades of relatively poor economic performance against small independent EU countries. The key is the delivery of sustainable economic growth through a number of strategic objectives and priorities. These include the promotion of economic growth and environmental quality and responsibility as mutually advancing.
- 27.2 In cross examination of Mr Hughes I put it to him that a development on a high quality landscape which also promoted new habitats and biodiversity could meet the objectives in the strategy. As I understand his reply he thought it could do if it did not go into the SSSI. That is the point of departure between us.
- 27.3 It was suggested by, among others, Councillor Ford, that the proposed development did not meet the objective of sustainability. In my submission that is a matter of judgement. Sustainability is not just about the environment but includes economic and social elements. Each factor has to be balanced and a judgement reached on the basis of the evidence.
- 27.4 In my submission the development is wholly in line with the strategy and that priority. The development will help promote and sustain economic growth. It will be of a high environmental quality promoting biodiversity and responsibility.

## 28. Housing:

28.1 It is accepted that the housing element is contrary to the established housing policies in the current development plan. The Council were prepared to accept the case for housing as part of the development package to make it viable. One might however have gained the impression from Dr Gore that the Council was relatively relaxed about the housing element. It is not as if they are having to accept the housing through gritted teeth because they want the other elements of the development. That, in my submission, is not surprising. I refer the Reporters to the written statement on housing land supply submitted by the Council. In evidence Dr Gore said that they had a traditionally tight land supply in Aberdeenshire and that was reflected in the Housing Land Audit<sup>46</sup> of 2007. It is clear, again under reference to figures 14, 15, 16 and 17, that there is not a generous housing land supply and it shows at best just over a five year land supply. It is debatable indeed whether or not the land supply is consistent with the aims and objectives of PAN38<sup>47</sup>.

28.2 Dr Gore told us in her evidence that firstly, it was the ambition of the Shire and City to have a more flexible and generous land supply of perhaps seven to eight years. Secondly, she said that 72,000 new homes would be required for the City and Shire between 2009 and 2030. Against that background the applicants' proposal for 500 new houses is not just a drop in a bucket but almost a crucial element in achieving that objective. As Dr Gore said in paragraph 6.3.7 of her precognition, "There is the possibility of this being one of the chosen locations for strategic housing land supply. It is extremely likely that the A90 corridor from Aberdeen to Peterhead will be the focus for new development including housing." She also indicated that there was still buoyancy within the local housing market.

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<sup>46</sup> AC 5

<sup>47</sup> CD – D1

- 28.3 Iain Webster in his evidence was very clear about the need for housing to help fund the whole development package. In the work that he did, he showed that there was a negative net present value of the development amounting to some £20m or thereby, if the development proceeded without the housing element. Mr Trump too, in his evidence, indicated that the housing was required to fund the development and went on to say that apart from his golf course in Florida, which was set in an area of high income residences, all his courses had required some other funding element. This evidence from both Mr Webster and Mr Trump was not seriously challenged and accordingly, it is my submission that the housing element is not only an important but an essential part of the whole application.
- 28.4 Mr Walton in his precognition raised the issue of whether the requirement to cross fund a development could be a material consideration and suggested that the housing element could be severed from the rest of the application. However in my submission the concept of cross funding is well established in both the private and public sector. It would be decidedly odd to close ones eyes to that reality especially where it might well mean that a development, which provided the opportunity for substantial economic gains of national importance, might not be able to proceed. Of course if the element required for cross funding was unacceptable for other reasons then one might have to consider whether as a whole the application should be approved. That is not the case here.

**29. Landscape and Design:**

- 29.1 This is an application for outline planning permission and the applicants have agreed with the proposed conditions in relation to landscape and design, as set out in the attached schedule. Those conditions are onerous and reflect the landscape sensitivity of the application site.
- 29.2 The applicants welcome the requirement to achieve a high quality of design and landscape including the involvement of Architecture and Design Scotland in terms of proposed condition 8.
- 29.3 In his evidence to the inquiry, Mr Trump emphasised his commitment to build something spectacular in architectural terms but in keeping with the natural environment.
- 29.4 We adopt the approach of the Council in their proposed conditions to ensure that there is sufficient flexibility to encourage an outstanding design solution that is in keeping with its natural surroundings, as outlined in evidence by Dr Gore.

### 30. Public Access:

- 30.1 The Land Reform (Scotland) Act 2003 formally recognises public access rights in Scotland and provides the framework within which these rights are governed and exercised. Access rights, which include the right to be on or to cross land<sup>48</sup>, are applicable to all land subject to certain statutory exemptions<sup>49</sup> and are exercisable by anyone for recreational or educational purposes<sup>50</sup>.
- 30.2 The extent of access rights is dependent upon the manner in which they are exercised – indeed “a person only has access rights if they are exercised responsibly”<sup>51</sup> that is, exercised so as not to cause unreasonable interference with the rights of others.
- 30.3 The responsible exercise of public access rights, however, falls not only on those seeking to exercise their right to be on or to cross land, but also on landowners themselves. Section 3(1) of the 2003 Act imposes a duty on every owner of land in respect of which access rights are exercisable to use and manage the land and conduct the ownership of it in a responsible manner which is respectful of those rights. Thus, the responsible exercise of public access rights is a two-way requirement of the legislation.
- 30.4 Access rights so far as embodied in the 2003 Act co-exist with those already established<sup>52</sup>.
- 30.5 What constitutes the responsible exercise of access rights is clearly subjective. Although the Scottish Outdoor Access Code<sup>53</sup> has no formal legal

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<sup>48</sup> s2, 2003 Act

<sup>49</sup> see s1(7) and s6, 2003 Act respectively

<sup>50</sup> s3, 2003 Act

<sup>51</sup> s2(1), 2003 Act

<sup>52</sup> s5(3), s5(4), 2003 Act

status, it does provide supplementary explanation and guidance on the extent and exercise of public access rights in Scotland under the 2003 Act.

- 30.6 Section 6 of the 2003 Act outlines a number of categories of land in respect of which rights of access do not apply including land that has been developed or set out for a particular recreational purpose. Golf courses clearly fall within this exempted category of “land for a particular recreational purpose”. The Scottish Outdoor Access Code explains at page 96 how access rights may be upheld and exercised over golf courses. In summary, rights of access only exist over golf courses for the purpose of crossing them. No access can be taken across greens or fairways and there is no right of access if it would interfere with the playing of any games of golf. In his evidence Mr Trump stated that he would abide by legal requirements in relation to public access and the legal position is understood by the applicants.
- 30.7 To this extent, Mr MacKay’s analysis of the law applicable to public access rights in Scotland is accepted by the applicants.
- 30.8 Persons exercising rights of access are owed a duty of care by the landowner whose obligations towards occupiers of their land are not affected by any part of the 2003 Act<sup>54</sup>. However, if the path is delineated as such by virtue of a path order made under section 22 of the 2003 Act, the duty of care potentially transfers from the landowner to the local authority.
- 30.9 Just as the responsible exercise of public access rights is reciprocal between members of the public and landowners, so to is the responsibility for safeguarding and enforcing those rights.
- 30.10 As previously stated, landowners must respect access rights and must not unreasonably obstruct the exercise of such rights in the management of their land. Failure to adhere to this duty may result in civil and or criminal sanctions. This is accepted by the applicants.

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<sup>53</sup> Ramblers 2

<sup>54</sup> s5(2), 2003 Act

- 30.11 The applicants have outlined their proposals for public access in Chapter 13 of the Environmental Statement<sup>55</sup> and in Chapter 10 and Appendix 1 of the Response to Aberdeenshire Council and Statutory Consultees (July 2007)<sup>56</sup>. The applicants have also produced to the Inquiry a written statement entitled Access Strategy, which encapsulates and summarises the provisions of the abovementioned documents in relation to access rights. The applicants rely on that statement a copy of which is attached as Appendix 9.
- 30.12 As outlined in the Access Strategy, two primary public access routes have been identified on the development site. The first is an equestrian route running through the dunes along the length of the estate, linking Balmedie Country Park with Newburgh. The second is a shorter route, extending northwards from the car park within Balmedie Country Park approximately 1.3km, to the site identified for future golf. The applicants propose to retain the existing equestrian route extending through the dunes.
- 30.13 To promote public access to the site, the applicants propose three public routes. These proposed routes take account of existing access routes on the site, the features of interest in the surrounding area and the relevant environmental designations. Bearing in mind that this is an application for outline planning permission, details of the proposed routes, so far as they are available, are set out in paragraphs 4.6.1 to 4.6.3 of the Access Strategy. It is submitted that the proposed routes build on existing popular usage in the area as well as improving and facilitating accessibility within the development site.
- 30.14 Furthermore, the applicants accept the imposition of planning conditions 53 and 54 requiring the preparation of a detailed access strategy, in consultation with relevant special interest groups including the Ramblers Association, for approval by Aberdeenshire Council.

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<sup>55</sup> Core Document G

<sup>56</sup> Core Document G 10

- 30.15 Although the 2003 Act does not provide a remedy for landowners faced with irresponsible public access, there are civil and criminal legal mechanisms to deal with such cases, as appropriate.
- 30.16 Members of the public may refer cases in which landowners fail in their duty to facilitate access to the Local Authority.
- 30.17 Policy 17 of the Aberdeen and Aberdeenshire Structure Plan<sup>57</sup> together with Policy Env 22 of the Aberdeenshire Local Plan<sup>58</sup> provides for the maintenance and promotion of public access routes in the area and require that where public access routes are interrupted alternative provision is to be made. Interruption of / to access routes over the development site is most likely to arise during construction phase of the development. The applicants have acknowledged this and accept proposed Condition 82 which requires the Construction Method Statement to include public access arrangements.
- 30.18 As outlined in paragraph 6.10 of the Scottish Outdoor Access Code local authorities have a wide range of powers for the purpose of managing access and recreation in their area, including the power (1) to enter into agreements with landowners to establish and maintain core paths; (2) to enter onto land to remove physical obstructions, and (3), to acquire compulsorily land for the purpose of providing access routes.
- 30.19 In his precognition, Mr Mackay sets out the operation of public access rights in Scotland generally and how they will require to operate at Menie should the proposed development proceed. We do not dispute Mr MacKay's analysis of the legal operation of public access rights in Scotland. Nor do we see those rights as being inconsistent with the propose development. Indeed we acknowledge and accept the responsibility to facilitate and promote public access to and from the development site. This commitment was demonstrated through the evidence of Mr Trump and in the Access Strategy submitted to the inquiry and proposed planning conditions 53 and 54.

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<sup>57</sup> Core Document A1

<sup>58</sup> Core Document A2

### 31. Transport:

31.1 A Transport Assessment<sup>59</sup> was prepared in support of the application and submitted to the local roads authority and to Transport Scotland for their consideration. Neither authority has objected to the grant of outline planning permission subject to the imposition of conditions. Those conditions are set out under the heading 'Transport and Roads' in the schedule of proposed conditions circulated by the Council during the inquiry and attached hereto as Appendix 3.

31.2 It is understood that the reasons for the Transport and Roads' conditions are as follows:

Conditions 58, 59, 63, 64, 66, 67, 68, 69, 70, 71, 72, 73: To minimise interference with the safety and flow of traffic on the trunk road network.

Conditions 60, 61, 62: To be consistent with the requirements of SPP 17 – Planning for Transport;

Condition 65: In the interests of the satisfactory operation of the trunk road.

31.3 We are aware that proposed Condition 73 creates an obligation to construct a grade separated junction on the trunk road network; an obligation proposed by the local roads authority rather than Transport Scotland. Condition 73 provides:

"No additional development shall be occupied in excess of that identified in Conditions 12 and 13 until after the opening of the new A90(T) Balmedie to Tippetty dual carriageway upgrade to include an additional grade separated junction in the vicinity of Orrock House, north of Balmedie Village, to serve the development directly from the new dual carriageway."

Although the local roads authority want the proposed grade separated junction, it should be noted that Transport Scotland has not yet assessed its

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<sup>59</sup> Document T58 – Consolidated Transport Assessment April 2008

feasibility and they have confirmed that they would only do so if and when planning permission is granted<sup>60</sup>. The applicants are prepared to accept this condition on the basis that, should Transport Scotland refuse consent for the construction of the proposed junction, further discussions will be held with the local roads authority to explore alternative traffic management measures for the local road network.

- 31.4 The remaining Transport conditions are considered to be appropriate by the applicants.
- 31.5 Regarding Mr Harrison's evidence on the likely use of helicopters from Aberdeen airport to the development, it is submitted that he has overestimated the likely use by a significant margin. He predicted a possible 150 flights per day when, at other leisure resorts operated by the Trump Organisation, one helicopter trip per week is considered to be high. Therefore, whilst we respect Mr Harrison's views, his concerns are extremely unlikely to be realised and certainly should not form a reason for refusal.

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<sup>60</sup> See Additional Submission on behalf of Transport Scotland

## **32. Planning Gain and proposed Section 75 Agreement:**

32.1 Aberdeenshire Council is one of the leading Scottish planning authorities in carrying out negotiations with the applicants to secure planning gain packages that are in accordance with the Council's local plan policy. This approach also has the merit of ensuring consistency in the application of policy.

32.2 In this case, the applicants have reached agreement with the Council on 'heads of terms' for a Section 75 agreement. A paper setting out draft heads of terms was circulated to parties during the inquiry and is attached as Appendix 5. The intention is to prepare a draft Section 75 agreement based on those heads of terms so that it is ready for signature in the event of the Scottish Ministers' deciding to grant outline planning permission.

32.3 The planning gain package comprises:

1. The provision of 98 affordable housing units on land to be provided by the Council;
2. The provision of 52 open market entry level housing units, in accordance with PAN 74<sup>61</sup>, on land to be provided by the Council;
3. The provision of a primary school to accommodate 225 pupils;
4. A financial contribution of £500,000 to fund community facilities.

32.4 The Section 75 will also include other measures such as:

1. Off site road works to the A90 trunk road;
2. The establishment and operation of MEMAG; and
3. A Local Training and Staff Recruitment Programme

32.5 Councillor Johnston has raised the validity of the proposed affordable housing provisions in his letter to Mr McKinnon dated 2 July 2008. The applicants will

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<sup>61</sup> CD – D15

respond in detail to the allegations but there is no legal or policy constraint with the proposed provisions. At this stage, the Council has not yet confirmed their preferred mechanism for making the land available for the construction of the affordable housing or the starter homes. However, I wish to put it on public record that, if the Council decides to transfer any public land to the Trump Organisation or any other party or Housing Association for a consideration that is less than the best consideration reasonably obtainable, it requires the consent of the Scottish Ministers in terms of Section 74 of the Local Government (Scotland) Act 1973.

### 33. Conditions

33.1 On 25 June 2008, the Council produced a consolidated list of proposed conditions following input and discussions with Relevant Parties on their content. This list is attached as Appendix 3. In response to points of clarification raised by Ms Heywood, the Council clarified 7 issues in their e-mail dated 1 July 2008. In addition, Transport Scotland provided reasons for their proposed conditions. We have read all of this information and confirm the applicants' agreement with the conditions<sup>62</sup> proposed by the Council.

33.2 However, the Reporters' asked for all Relevant Parties to address the following issues in their submissions:

1. The appropriateness of conditions that seek to replicate legal requirements;
2. The appropriateness of suggested condition 24 when dealing with an application for outline planning permission and the extent to which it is consistent with the terms of suggested condition 3 dealing with reserved matters;
3. Whether there was a legal impediment to the grant of outline conditional planning permission. (This was a general point raised by the Reporters but we have taken it to apply to the issue raised by SEPA in their written statement.) Allied to that point is the appropriateness of dealing with the issue raised by SEPA in relation to Environmental Assessment by means of a suspensive condition;
4. The appropriateness of the conditions proposed by Transport Scotland;
5. Would a personal condition for Trump International Golf Links Scotland be appropriate in this case?

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<sup>62</sup> Note that proposed conditions 58 and 59 are the same.

To address each of these issues in turn:

*The appropriateness of conditions that seek to replicate legal requirements:*

- 33.3 The Scottish Government Circular 4/ 1998<sup>63</sup> sets out government policy on the imposition of planning conditions. This policy clearly states that that planning conditions should only be imposed where they are necessary and it appears to be reasonable to conclude that it is not necessary to restate legal requirements in a planning condition. However, the application of a legal requirement to a particular set of circumstances might not always be unambiguous. A clear requirement in a planning condition could address any future ambiguity or change in the legal requirements, either by statute or judicial interpretation. Moreover, the applicants have reached agreement with the Council on their proposed conditions and therefore wishes to adhere to that agreement.

*The appropriateness of suggested condition 24 when dealing with an application for outline planning permission and the extent to which it is consistent with the terms of suggested condition 3 dealing with reserved matters:*

- 33.4 In his evidence to the inquiry, Dr Hawtree confirmed that the layout of the championship golf course shown in Document T2 represents the latest design for that course. On the basis of Dr Hawtree's evidence, the applicants are prepared to accept Condition 24 if it is considered to be appropriate for an outline planning permission and consistent with condition 3.

*Whether there is a legal impediment to the grant of outline conditional planning permission and the appropriateness of dealing with the issue raised by SEPA in relation to Environmental Assessment by means of a suspensive condition:*

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<sup>63</sup> CD – E2 - The Use of Conditions in Planning Permissions

- 33.5 SEPA addresses two issues on the legality of granting outline planning permission . First, conflict with the Water Framework Directive (“WFD”)<sup>64</sup> and the Water Environment and Water Services (Scotland) Act 2003 (“WEWSA”)<sup>65</sup> (section 3 of the SEPA Written Statement) and secondly the EIA Directive (85/337/EEC) and the Environmental Impact Assessment (Scotland) Regulations 1999.
- 33.6 The background to this issue is that in order to carry out a full assessment of the groundwater conditions on site it would be necessary to undertake a series of boreholes and trial pits. This was done by W A Fairhurst and Partners for the area outwith the SSSI<sup>66</sup>. The area within the SSSI posed a problem. Operations such as boreholes and trial pits are operations requiring the consent of SNH and also planning permission since permitted development rights do not apply to such operations within a SSSI. A proposal was submitted to SNH seeking such consent but was not progressed. The applicants believed that SNH would not be sympathetic to the application since it was an invasive procedure within the SSSI. No application for planning permission was made. Whether the applicants were correct in their assumption regarding SNH in my submission their hesitation about this matter was well founded and should form the backdrop for Scottish Ministers consideration of these issues.
- 33.7 In order to investigate ground water conditions on this part of the site it would, as I said, be necessary to take onto the SSSI the necessary machinery and equipment to conduct the investigations. Then one has to conduct the test bores and dig the necessary trial pits. This is not passive observation of the sort that is required for other parts of the Environmental Impact Assessment. This is not just observing species or surveying habitats; it is an invasive procedure in an environmentally sensitive area.

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<sup>64</sup> SEPA 1

<sup>65</sup> SEPA 2

<sup>66</sup> Document T64

- 33.8 It is therefore logical, in my submission, and wholly in accordance with the both the letter and spirit of the regulations, that such investigations should not be undertaken until the principle of development in the site has been established through the grant of outline planning permission. I reiterate that such issues do not affect the area outwith the SSSI since it does not have the protection of that designation and a full survey has been carried out. That gives certain confidence levels in the nature of the groundwater conditions generally at Menie and it is to be noted that SEPA have not challenged these findings.
- 33.9 It should also be noted that SEPA, while admittedly stating that they did not have sufficient information did not suggest there was a legal impediment until the Written Statement was lodged by them. Indeed they participated in the Pre-Inquiry meeting and at no point suggested that even if the Inquiry was held by Scottish Ministers they could not in the end grant outline planning permission because of a lack of information. Nor have they seen fit to participate in the Inquiry.
- 33.10 Turning to the first issue regarding the WFD, the interpretation that, the duty to ensure compliance with the requirements of the WFD is an absolute one with a duty to have regard to social and economic effects bolted on to it, is inaccurate in my submission.
- 33.11 The basic duty to ensure compliance is contained in s.2(1) of WEWSA. S.2(4) provides that the Scottish Ministers and planning authorities must have regard to the social and economic impacts of *such exercise* of their functions. Therefore Section 2(4) qualifies s.2(1): if having regard to the social and economic impacts of the exercise of their functions to ensure compliance with the requirements of the WFD could never result in those requirements being tempered, there would be no purpose to s.2(4).
- 33.12 This is backed up by the policy document on the obligations of responsible authorities – “Implementing the Water Environment and Water Services (Scotland) Act 2003: The Designation of Responsible Authorities (March 2006 Paper 2006/5)” at section 2.2: “No duty or requirement takes precedence over

another and the aim is to consider all of the objectives and intentions of potentially conflicting duties to find an appropriate balance between them.”

- 33.13 As an aside, although it is clear that the duties regarding the WFD set out in SEPA's response apply to the Council, it seems that the same does not explicitly apply to the Scottish Ministers, as the planning legislation has not been designated by order as a relevant enactment for Scottish Ministers under the Water Environment (Relevant Enactments) Order 2006/554. However the net effect is likely to be the same, given the Ministers' obligations to implement European law and the fact that the relevant legislation will require to be interpreted in light of the requirements of the WFD.
- 33.14 Even if the duty to ensure compliance with the WFD did apply, the WFD allows for derogations from the duties contained in it. These are complicated but include derogations based on social and economic justification. See Articles 4(4) – (9) of the WFD (2000/60/EC). SEPA refer to these derogations but do not explain why they do not apply.
- 33.15 In any case, the requirements of the WFD should be delivered by SEPA consenting under the Water Environment (Controlled Activities) (Scotland) Regulations 2005 (the "CARs")<sup>67</sup>. The CARs regulate any activity liable to cause pollution of water, abstraction and impoundment of water and building and engineering works in and in the vicinity of water. See s.20 of WEWSA 2003 and Regulation 5 of the CARs.
- 33.16 Again, if the duty to ensure compliance with the WFD was held to be absolute, Scottish Ministers could be said to ensure compliance with the WFD by relying on the fact that the pollution or abstraction of water will require to be consented under CARs by SEPA. Compliance with the WFD can therefore be left to that regime.
- 33.17 Before turning to the requirements of the EIA Regulations it is important to note that no decisions have been made as to how the site is to be irrigated whether it is to be by means of water abstraction or other methods or even a combination of measures. That in part is because the necessary investigations have not, at this stage been possible.

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<sup>67</sup> SEPA 4

- 33.18 The impacts on groundwater and wetlands cannot be assessed until it is decided whether the development will abstract from groundwater. Other impacts by SEPA cannot be meaningfully assessed until the detailed design stage.
- 33.19 The EIA Directive and Regulations require that an EIA is necessary only to assess the likely significant effects and the likely main effects of the development (Schedule 4 of the EIA Regulations). If it has not yet been decided whether there will be any groundwater abstraction and the detailed design has yet to be settled, there can be no *likely* effects of these matters to be assessed. Where environmental effects cannot be identified until the reserved matters stage, the EIA of those matters can be left until that stage. See also *R v Rochdale MBC ex p Milne* [2001] Env LR 22 at paras 104 and 127.
- 33.20 In any event the details of the impact of the groundwater will require to be assessed in full by a further EIA at reserved matters stage. This is now specifically catered for in the EIA Regulations, and so there is no question of the development going ahead without proper EIA and the publicity and public consultation of the impact that goes with it. The publicity and consultation requirements were a major concern in the case law concerning inadequate EIA: e.g. *R v Rochdale MBC ex p Tew* [2000] Env LR 1, *Ex p Milne* (above) and *R v Cornwall County Council* [2001] Env LR 25).
- 33.21 Turning to the question of the appropriateness of dealing with these matters by condition the applicants addressed this question in their rebuttal statement dated 2 June 2008 which is attached as Appendix 8.

*The appropriateness of the conditions proposed by Transport Scotland:*

- 33.22 The Statement by Transport Scotland dated 1 May 2008 contained a schedule of proposed conditions. We provided comments on those conditions in our written statement dated 21 May 2008 Transport Scotland accepted our comments and then revised their schedule of conditions as outlined in their Additional Statement dated 21 May 2008. The applicants wish to adhere to the agreement reached with Transport Scotland and therefore accept their proposed conditions. We have addressed the position regarding Condition 73 in the section on Transport above.

*Would a personal condition for Trump International Golf Links Scotland be appropriate in this case?*

33.23 In my submission, the imposition of personal condition in this case would be contrary to policy, unreasonable and unnecessary. National policy is set out in Circular 4/1998 which states that 'planning permission runs with the land and it is seldom desirable to provide otherwise.'<sup>68</sup> The policy goes on to state:

"There are occasions relating, for example, to strong compassionate or other personal grounds, where the planning authority is minded to grant planning permission for the **use** (emphasis added) of a building or land for some purpose which would not normally be allowed. In such a case the permission may be made subject to a condition that it will enure only for the benefit of a named person – usually the applicant. A permission personal to a company is generally inappropriate. Conditions of this type will scarcely ever be justified in the case of a permission for the erection of a permanent building."

33.24 It is beyond doubt that a personal condition for the construction of a golf resort with residential development by a company would be contrary to this policy. It should also be borne in mind that this planning permission, if granted, will cover 500 private houses, which obviously will not be occupied by Mr Trump. Those houses will have to be sold with the benefit of planning permission. Moreover, we are of the view that it would not be valid to try to divide the planning permission to make some parts of the planning unit personal to the company but not other parts.

33.25 Finally, the applicants accept appropriate conditions in respect of the SPA. They note the concession made by Mr Tyldesly at paragraph 135 of the closing submission. For completeness the applicants rebuttal of the position adopted by RSPB in their written statement is enclosed as Appendix 12.

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<sup>68</sup> Paragraph 92



**34. Objectors:**

- 34.1 I have already dealt with the evidence of RSPB/SWT/BSBI in the environmental evidence.
- 34.2 So far as the Ramblers and associated organisations are concerned we have covered their specific concerns on access separately. As Mr Trump said in his evidence the applicants will abide by the law and that remains the bottom line. Mr Morris argued for an “exclusion zone” of 100m from the coast within which there would be a presumption against development. In my submission this is the wrong forum for that debate since it would require a change of government policy. Without that there is, in my submission, no justification for pulling the development further back from the coast. It is after all a links golf course.
- 34.3 Turning to the dissident councillors group, Mr Ford attempted to wrap himself in the mantle of the planning authority and argue that great weight should be accorded to their views. But, in my submission, Councillor Ford ignores what preceded the Infrastructure Services Committee meeting at the Formartine Area Committee and what happened afterwards in the full Council. As I understand it the Formartine Area Committee had access to the same set of papers as the ISC. They voted 7 -4 in favour of the development. Following the ISC vote the full Council agreed to support the application. Not only that they voted to remove Councillor Ford as Chair of the ISC so that the Council could reach decisions “not constrained or influenced by Councillor Ford’s approach to developments which do not meet his own personal objectives.” Subsequently the Council re-affirmed its decision to support the development by 56 votes to 5. The facts are that more councillors voted in favour of the development if you take both the Area Committee and the ISC together, the decision of the Infrastructure Services Committee nowhere near accorded with the prevailing sentiment on the Council and Councillor Ford clearly lost the confidence of his fellow councillors as Chair of the Committee. In these circumstances whatever the formal or legal status of the Committee no more weight should be given to their views either individually or collectively than is given to any other individual councillors, such as, for example Councillor Gifford. In the event their evidence in my submission added little of substance to the evidence before the Inquiry.
- 34.4 Mr Agnew’s group led two witnesses, Mr Banks and Mr Walton. Of course the applicants understand the concerns of those who will be affected by the development. In my submission however the points they made in so far as relevant to

your determination have been dealt with separately and I do not intend to rehearse them here.

## **35. Conclusions:**

- 35.1 In approaching the balancing exercise in NPPG 14 I suggest that the following approach may be of assistance.
- 35.2 It is accepted that the development will have significant adverse effects on the qualities for which the area has been designated as a SSSI. These adverse effects come about as a result of the necessity of stabilising the dome in the SSSI which will result in the loss of much, though not all of the geomorphological processes. It was for these processes that the Foveran SSSI was designated. It is also accepted that there will be an impact on the habitats both within the SSSI and within the wider Foveran Links SINS.
- 35.3 Against that effect on the SSSI, the development will bring mainly economic but also some social benefits of national importance. These benefits centre on the creation of a significant number of jobs in an area where there is a desire at both national and local level to diversify the economy. The development is in line with national policy and will help deliver on the Government's wider economic policies as well as their tourism objectives. It is these elements that render this development of national importance since it fulfils objectives set nationally and will have national effects.
- 35.4 The impact on the habitats within the SSSI has been shown to be around 8% of the total Annex 1 habitats. There will still be significant levels of habitat within the development even before any mitigation.
- 35.5 The Applicants have taken steps to minimise the impacts both on the geomorphological processes and on the habitats. They propose further mitigation measures involving the translocation of habitats, which, on the priority one habitats, have good prospects of being successful. On the Annex 1 habitats the confidence levels are less clear but still significant. Overall there are good prospects of ensuring no net loss of habitats.

- 35.6 The mitigation efforts as well as the operation of the golf course will be underpinned by a management body ensuring best practice in the delivery of environmental monitoring.
- 35.7 There are very real prospects of ensuring an increase in both habitats and biodiversity bringing real environmental benefits and in line with Government policy in securing and promoting biodiversity.
- 35.8 The achievement of these benefits is however dependent on the development proceeding.
- 35.9 Finally, I want to make two brief points.
- 35.10 The point arises out of the closing submissions of Mr Tyldesley (at paragraph 153) and Mr Cockburn (at Section 11). Mr Tyldesley asserts that a grant of planning permission would send out negative signals about the ability of the planning system to protect the best of Scotland's natural heritage. Mr Cockburn suggests that Scottish Ministers should be slow to grant a consent not only in the specific circumstances of the case "but having regard to the resultant vulnerability visited on other nationally designated sites from large scale commercial development."
- 35.11 In my submission these comments should be disregarded. Every case has to be considered on its merits and precedence is not a material consideration. Moreover, Ministers are obliged to go through the assessment in NPPG 14. They cannot simply ignore its provisions on the basis that a consent might "send out the wrong signals" or act as a precedent.
- 35.12 In the well ordered world of development planning we try and anticipate the future. We set out our hopes and aspirations and attempt to direct development to our preferred locations.

- 35.13 Sometimes however an opportunity arises that we have not anticipated, that exceeds our expectations and challenges the cosy assumptions we have made.
- 35.14 Seldom however are we presented with such an audacious proposal. You only have to be in the presence of Donald Trump to understand its ambition; or to walk the site to understand its scale; or to stand where the 13th tee will be to appreciate its grandeur; or listen to Iain Webster to have any idea of the huge sums of money that will be invested and the degree of risk to the developer.
- 35.15 As to the benefits there are plenty of voices to show that this is well understood - from the public outcry following the ISC vote to the near unanimous support of the business community, from the overwhelming support of the Council to the thousands of ordinary people who have made representations.
- 35.16 But the question is- what is Scotland prepared to invest? What risks do we take? Or are we merely passive players happy to take the benefits provided they come cost free with no risk?
- 35.17 In my submission this truly is a once in a lifetime opportunity. We will not see its likes again. It would be a tragedy for Scotland if we let it pass by.

## SCHEDULE OF THE PROPOSED DEVELOPMENT

The application seeks outline planning permission for the development of a golf resort comprising:

- a. 2 x 18 hole links golf courses on Menie Links, Pettens Links and Blairton Links;
- b. a golf clubhouse;
- c. a golf academy;
- d. a golf maintenance building and caddy shack;
- e. a short game area and driving range;
- f. a 450 unit resort hotel;
- g. a conference centre and spa;
- h. 36 gold villas;
- i. 950 holiday homes in four blocks;
- j. accommodation for 400 staff;
- k. parking areas and access roads; and
- l. 500 private residential houses