



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

PUBLIC LOCAL INQUIRY: Ref CIN/ABS/001

CLOSING SUBMISSIONS

**ON BEHALF OF
RSPB Scotland
Scottish Wildlife Trust
Botanical Society of the British Isles**

DAVID TYLDESLEY MIEEM FRTPI FRSA

Abbreviations used in references

CB	Colin Boyd QC	E =	Evidence in chief
CG	Dr Christine Gore	P =	Precognition
DB	David Bell	Pr =	Paragraph
DT	Donald Trump	R =	Re-examination
DTy	David Tyldesley	RP =	Rebuttal precognition
JH	Jonathan Hughes	RQ =	Reporters' questions
JHm	Dr Jim Hansom	SC =	Statement of Case
LC	Louise Cockburn	X =	Cross examination
MA	Dr Martin Auld		
MH	Dr Martin Hawtree		
MW	Michael Wood		
PR	Paul Rooney		
SA	Stewart Angus		
TD	Dr Tom Dargie		
WR	Professor William Ritchie		

The line spacing on pages 2, 8, 9 and 18 has been adjusted to accommodate additional submissions, made orally on the day, whilst maintaining the original page numbers

INTRODUCTION

Structure of the submissions

1. I think it will be helpful if I set out the structure of these submissions in order to enable everyone to follow the order and chronology of what I say. This is an immensely important decision to be taken by the Scottish Ministers. I make no apology for the length of these submissions. I am satisfied that they are reasonably succinct, whilst being comprehensive of the submissions I wish to make.
2. These submissions are made on behalf of the Botanical Society of the British Isles, the Royal Society for the Protection of Birds Scotland and the Scottish Wildlife Trust collectively referred to as 'RSB'.
3. I shall start by addressing the general planning issues of sustainable development and biodiversity planning processes given in evidence by Mr Hughes and Dr Auld.
4. I shall then identify the appropriate planning policies to be applied in the development plan and in national planning policy guidance.
5. I will then apply those policy tests firstly by examining the impacts on the SSSI, including the effects of offsetting measures, then by considering the social and economic benefits of the development.
6. In this respect I note that Mr Shaw questioned Mr Hughes because RSB did not present evidence about socio-economic benefits. That is because we do not take significant issue with the various figures presented by the applicants and the Council, which is why we did not cross examine those witnesses. But that should not be taken to assume that either we have not given due consideration to those matters, or that we are disenfranchised from commenting upon them. The Council did not call any scientific evidence, but I take no point about that against Mr Shaw, because it appears that the Council does not dispute the objectors' geomorphological and ecological evidence. I have no doubt Mr Shaw's submissions, like mine, will deal with the balance of the economic and scientific issues.
7. I will draw conclusions about the consistency of the development with the essential policy tests that must be applied by the Scottish Ministers in respect of the SSSI.
8. I will make submissions in respect of the question of alternatives.

9. I will then address other material considerations focusing, on the internationally designated sites, the SINS, Annex 1 habitats, protected species, proposed biodiversity benefits and some other matters which we were invited to address in closing by the Reporters.
10. Finally, I will comment on the proposed conditions and the S75 planning agreement, before drawing conclusions as to the recommendation I shall urge the Reporters to make.
11. As I progress through these submissions I will deal with a number of the matters that the Reporters invited the parties to address in closing submissions, if they wished to do so. However, I will not deal with matters 1 and 2 about access law and liabilities; matter 6 other consents required, apart from any that may relate to the SSSI; and matter 10 the Transport Scotland conditions. In respect of these matters RSB has no expertise or useful comment to make.
12. In respect of matter nine, the SEPA comment in its written statement at 3.12, it is difficult to comment without clarification of the case law it has in mind and the particular areas that SEPA is saying are deficient in terms of identifying mitigation measures. Consequently, I will not comment on SEPA's view, either for or against it, unless further clarification is forthcoming. It was open to SEPA to attend the Inquiry and express its concerns in evidence and submissions.

Addition oral submission based on notes

Ms McCall had recently requested clarification from the Reporters via Mr Bell of the 12th issue of the matters you asked to be covered – about who is responsible for the decision making, but has had no reply, I think because of the shortage of time, so I may or may not cover that adequately in the prepared closings.

13. In order to make the text more manageable, I have used the abbreviations on the cover of this document to reference the source of my submissions, where this is necessary. I will not read these out but hope that the references will assist the Reporters in their unenviable task of assimilating a considerable amount of evidence and submissions from a diverse range of parties to the Inquiry.
14. As you are well aware my clients joined together for this Inquiry at your invitation. It saves Inquiry time and, indeed, participants' resources. I approached the task of representing three highly respected, but nevertheless very different, scientifically-based nature conservation bodies, with some trepidation. However, any concern I may have had about trying to wear three different hats was very quickly dispelled. Not only were their cases totally consistent and compatible, they were also consistent and compatible with that of SNH. Indeed, to be fair to the applicants' witnesses, it was consistent with much of what they had to say as well.

15. There is much common ground between the parties on the impacts on nature conservation (I will use this term to cover flora, fauna, geological and geomorphological interests). RSB appears to be the only objector that concluded a substantive statement of agreed matters with the applicants, about which I will comment further in due course.
16. Finally in this introduction, we are all aware that the starting point in the decision making process is S25 TCPA. It is common ground that the development is not in accordance with the development plan. (RSB WS/5 and several references in precognitions, statements of case and oral evidence). So do material considerations indicate that the development should be permitted?
17. I submit that in addition to the development plan policies, the determining considerations are likely to be:
- a) consistency of the proposed development with the principles of sustainable development;
 - b) the impacts on the natural environment, particularly, but not limited to, the SSSI interest features, and
 - c) the economic benefits that could flow from the proposed development.
18. From the evidence before the Inquiry, adverse impacts on the coastal landscape and its enjoyment and social benefits would also appear to me to be important considerations, but I doubt that they will be the determining issues in their own right and, in any event, for obvious reasons, I shall concentrate on the matters I first listed.

GENERAL PLANNING ISSUES

Sustainability

19. The fact that the Reporters and the Scottish Ministers are forced to decide such an intransigent conflict between severe harm to a nationally important natural environment and a widely welcomed major economic development, in itself indicates that the proposal is inconsistent with sustainable development principles.
20. Unsustainable development is an increasing global problem for both the natural environment and for the health and well being of the human population who depend on this environment for their survival. As Scotland's Sustainable Development Strategy (RSB 60) states "unsustainable development across the world is changing habitats and climates, overexploiting resources and creating pollution. If current patterns continue, damage to the natural world will accelerate, not diminish." (JH P pr 22).
21. It is incumbent upon decision makers to ensure current and future decisions are consistent with the five principles of sustainable development set out in the Strategy. An approach which positively seeks to destroy naturally sustaining environmental capital and replace it with managed non-sustaining urban and leisure capital manifestly fails the test of sustainability. The concept that our environment can always be managed, whenever and wherever we choose to manipulate it, lacks an understanding of such natural processes and of the extremely modest extent of our knowledge of natural systems. (MA P pr 4.4.1)
22. The Government's central purpose is clearly stated in its Economic Strategy (RSB 36) as increasing "sustainable economic growth". The word 'sustainable' is equally, if not more important, than the word 'growth'. This development as proposed demonstrates very tangibly the tensions that can, but RSB believe do not need to, arise between environmental sustainability on the one hand and the need for economic growth on the other. (JH P pr 27)
23. In response to Mr Boyd's questions, Dr Auld further emphasised how the planning system needs a new mind set to protect critical natural assets, now and for the future, as part of the sustainable development process. He argued that under the requirements of sustainable development we should provide win-win-win solutions for environmental, social and economic sustainability. I submit that this leisure development, of enormous scale, on a greenfield location, detached from an urban area, relying heavily on high-end tourism and increases in international flights, and which is severely damaging to nationally important natural features, habitats and species, is the epitome of unsustainable

development. It cannot therefore be seen to be consistent with, and cannot contribute to, the Government's central purpose of sustainable economic growth. (JH P pr 27 - 28)

Biodiversity planning

24. Only a third of UK Biodiversity Action Plan (CD F5) habitats are in an improving or in a stable condition, despite conservation and monitoring effort being focussed towards such habitats. (JH P pr 23)
25. The UK Biodiversity Action Plan and the associated local Biodiversity Action Plan for North-East Scotland (CD F8) are Scotland's response to its commitment to the Convention on Biological Diversity. In 2004 these plans were given legal underpinning by Section 1(2)(b) of the Nature Conservation (Scotland) Act (RSB 19). The Coastal Sand Dunes Habitat Action Plan (RSB 47) commits to protecting the existing UK sand dune resource of around 54,000 hectares from "further losses to anthropogenic factors". Allowing this development to proceed as proposed would not only undermine SSSI legislation, but also undermine the whole biodiversity planning and policy process, including efforts of this and previous administrations to "halt the loss of biodiversity". This is a target that Scotland has committed to achieving by 2010 (RSB 65) (JH P pr 24 – 25).
26. What would these commitments amount to if, at the first major test they face, they were set aside to accommodate a leisure based development that is not in accordance with planning policy? As Mr Hughes said in his precognition (pr 31) quite apart from the planning policy contraventions, the loss of these dunes would send a dangerous message that Scotland wantonly disregards its most precious environmental assets, and will happily set aside democratically agreed policy so long as the development comes with a big enough economic carrot. Sending this message would, he contended, be bad for Scotland's global reputation and credibility regarding its commitment to sustainability. It could also be potentially disastrous for the future of Scotland's natural environment and ultimately its economy, which it is widely acknowledged, heavily depends on a healthy and well cared for environment.
27. A key role of the planning system is to ensure that society's land requirements in terms of housing, economic activity, transport infrastructure and recreation are met in ways which do not erode environmental capital. (NPPG 14 pr 9)

PLANNING POLICY TESTS

Introduction

28. The conflict between the impacts on the SSSI interest features and the economic benefits that could flow from the proposed development should not be weighed in an unstructured or ad hoc way. They must be considered in the way that is required by the development plan policies and NPPG 14. I would add at the outset that these two important interests are only in competition because of the applicants' refusal to consider any form of compromise that would relocate the golf course off the most sensitive areas of the dunes, including the SSSI. I shall return to that later.
29. RSB set out its views on the planning policies in RSB WS/5, indicating close agreement with the Head of Planning Policy in the consultation response from the Council's Planning Policy and Environment Service (RSB 68), subject to important caveats set out in the written submission. That remains our position.

The ranking of nature conservation interests

30. Number three of the matters that the Reporters invited the parties to address in closing submissions, if they wished to do so, was about how the law and policy ranked the relevant designations. Mr Hughes gave the most comprehensive response to this matter in oral evidence (JH E), endorsed by Dr Auld (MA E), who had the advantage of going second! I propose to build on the answer that they gave, drawing on the documentation before the Inquiry. I submit that there is a difference between the ranking or hierarchy of a nature conservation site or feature and the weight to be attached to adverse and beneficial effects on it, in any particular case, as I shall endeavour to explain. I will deal firstly with the hierarchy.
31. In respect of nature conservation designations, there is an established hierarchy which we can see consistently expressed in NPPG 14 paragraphs 23, 60, 69, 71 and 81. The highest level of protection should be attached to the internationally and nationally designated sites, equally. In this case they are the Ythan Estuary, Sands of Forvie and Meikle Loch SPA (RSB 42) and Ramsar sites (RSB 24), The Sands of Forvie SAC (RSB 43), the Forvie National Nature Reserve and the Sands of Forvie and Ythan Estuary SSSI and the Foveran Links SSSI (T41). The second step in the ranking is represented by the locally designated sites, in this case the Foveran Links SINS. After that protection should be afforded to other important habitats and features in urban and rural areas referred to in NPPG 14 (prs 49 and 50 – 57), namely trees, woodlands, lochs, ponds, watercourses and

wetlands, field boundaries, unimproved grasslands, herb-rich meadows, heaths, peatlands and coastal habitats; often explicitly referred to in development plan policies (for example, policies ENV 3, 4, 6 and 8 of the Aberdeenshire Local Plan). This hierarchy accurately reflects the legal protection provided for:

- a) internationally designated sites (European sites) and European Protected Species through the Habitats and Birds Directives and the Habitats Regulations – it should be noted also that it is Government policy to treat Ramsar sites as if they are fully designated European sites for the purposes of land use planning see NPPG 14 pr 39); and
- b) nationally designated sites and other species especially protected by law through the Nature Conservation (Scotland) Act 2004

32. This policy hierarchy does not include explicit reference to EC Annex 1 habitats or species that occur outwith designated areas. However, these are clearly established as material considerations. They should be placed high in the ranking in light of the UK's general obligations under the Habitats Directive. It is logical that of these the higher rank should be accorded to EC Annex 1 priority habitats. Further, the ranking should include species especially protected by law, with a higher ranking again being attached to those recognised internationally as needing 'special protection, which are known as 'European protected species' (here the otter and bats are relevant). It is clear that if the commitments in the UK and Scottish biodiversity action plans are to be achieved UK and Scottish BAP priority species and habitats, not otherwise in the ranking should also be included. (NPPG 14 pr 20)

33. This ranking can be seen by nature conservationists as a dangerous approach which overlooks the crucial interdependence of features, habitats and species in natural ecosystems. For instance, to take a very simple example, it is well understood that the bats for which a SAC or SSSI may be designated, require extensive areas for foraging in the areas around and often several kilometres away from the designated area that may only relate to their roost. They also may rely on linking habitats and features along which they need to travel to reach the foraging areas. In practice therefore the non-designated field boundaries and woodland edges are as critical to the bats' survival as the designated roost site. However, with this word of caution, and the words of Mr Hughes ringing in my ears emphasising the need to see the whole dune ecosystem and not to look at it as a series of patches, I will continue to consider the ranking.

34. We must also recognise that there are areas outwith designations that appear to qualify for designation, but have not been designated. Paragraph 12 of the agreed statement between RSB and the applicants clearly states:
35. *“As noted in the Environmental Statement accompanying the TIGLS application, the area of the proposed development outwith the SSSI (i.e. the remainder of the SINS and area to the south at Balmedie) is of sufficient quality to meet the criteria for selection as a SSSI on geomorphological and ecological grounds. Notification is a matter for Scottish Natural Heritage”*
36. The reasons for this are set out in the Environmental Statement at paragraph 7.3.10, in Dr Hansom’s precognition and in RSB WS/2 at paragraph 4.7. I was therefore concerned to hear that Mr Boyd had actually questioned this point with Professor Ritchie, and sought and obtained from him an answer that contradicted what had been agreed. This does nothing to encourage parties to reach agreement prior to an Inquiry to save Inquiry time, nor does it encourage us to make the effort to narrow the areas of disagreement if we find that during the Inquiry what was agreed appears to be denied. I ask that you should give greater weight to what is plainly stated in paragraph 12 of the Agreed Statement, than to the answer of Professor Ritchie which is not in accordance with the applicant’s stated position. In any event, the Agreed Statement clearly says the site meets ecological selection criteria as well as geomorphological criteria and Professor Ritchie’s answer was confined to the latter interest.
37. In my view, where it is agreed that areas qualify for designation, but for whatever reason have not yet been designated, such areas should be accorded the same rank in the hierarchy as a designated area. As intimated by Mr Hughes, that is how the European Court of Justice treats non-designated but qualifying areas, e.g. under the Birds Directive.
38. There is established case law in the European Courts to this effect. The cases are: Case C – 374/98 EC v French Republic **Basses Corbieres** 7/12/2000 and Case C-117/03 13/1/2005, ruling for the Italian Courts in the case of **Dragaggi** and others v Italian Ministry of Infrastructure and Transport et al Port of Monfalcone. I produce these cases having given prior notice to Mr Boyd, Mr Shaw and Mr Cockburn. They are well known and can be found on the European Court of Justice case law search form at:
<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en>;

Oral addition, based on notes

These are the cases that I think Cllr Ford was referring to.

In Basses Corbieres, the key paragraphs are 47 and 56. Essentially, Spain was penalised by the ECJ for not classifying the Basses Corbieres as a SPA, when it should have been so classified. In order to gain no advantage from non-classification, the Court ruled that the stricter regime of the Birds Directive should apply rather than the Habitats Directive. In Dragaggi et al paragraphs 26 and 29 are key. The court held that for sites eligible for identification as Sites of Community Importance (a designation step pre designation as a SAC), Member States are required to take protective measures appropriate for the purpose of safeguarding the ecological interest.

39. The approach of the European Court seems to me to be entirely logical. I submit it should be adopted where relevant in dealing with areas that would qualify for designation at national level as well as international level.

40. In scientific / nature conservation terms we tend to place the highest rank, on species or habitats or features that are unique, very rare or irreplaceable, (we refer to these, as did Dr Auld, as “critical natural capital”, it is irreplaceable and not translocatable, once lost it is lost forever and the environment and society are the poorer for the loss. Society surely has a moral duty to protect such natural features, irrespective of any requirements of the law or policy.
41. However, in this case, all of those natural features, habitats and species are already cited as interest features in the SSSI or the part of the SINS to which paragraph 12 of the Agreed Statement applies so nothing further need be added.
42. Finally I refer to Dr Auld’s reference (MA P pr 5.8.2) to the “immense national value” of the Foveran Links SSSI. As he explained (MA RQ and MA R) there is not a hierarchy of SSSI, but the interest features of some SSSI are representative of important features relatively widespread, whereas other SSSI may have features that are unique, exceptionally rare or irreplaceable. So the protection of all SSSI should be applied with equal force as a matter of policy but when considering the effects on specific interest features it is clear that some are more important than others. The Foveran Links SSSI has exceptional and irreplaceable features.
43. In summary therefore, in law and policy, I submit that the interest features of the SAC, the SPA and Ramsar site, the NNR and the two SSSIs I have previously cited should be given the highest level of protection in the planning system. The requirements of the Habitats Regulations apply as a matter of law to the international sites. The features of the SINS that are agreed to qualify for SSSI notification should be accorded the same ranking, as I have referred to earlier (Agreed Statement, RSB WS/2).
44. In the absence of explicit guidance to the contrary, it is also logical in my view to accord the same rank in planning decisions at least to EC Annex 1 priority habitats and species outwith internationally designated sites and to European protected species. Whilst not directly equivalent, it is the European protected species which are subject to special measures within the planning system.

The following text was deleted because the reference is not before the Inquiry, as emphasised by guidance issued by the Scottish Government to planning authorities at <http://www.Scotland.gov.uk/Resource/Doc/212607/0060058.PDF>

45. It follows that, whilst very important, the same weight cannot be attached to EC Annex 1 non-priority habitats and species, other features habitats or species in the SINS, to important habitats in the wider natural heritage, or to protected species other than

European protected species. However, that does not mean that they are not important, and critically linked to the higher ranking interests, as I have previously indicated.

46. The **weight** attached to **impacts on** any of the above features, habitats or species, in any particular case, is a matter for the decision maker. This will depend on the circumstances of a case and, I submit, factors such as the degree of harm, the risk of harm occurring, whether the harm is reversible, long or short term, temporary or permanent, etc will all influence the weight to be attached. It follows that greatest weight should be attached where the certain or near-certain effects of a proposed development would be to destroy, permanently and irreversibly all or a substantial part of a nature conservation interest of national or international importance, whether designated or not. RSB argues that that is what would apply to the interest features of the Foveran Links SSSI and SINS if this development were to proceed.

Development plan policies

47. I shall concentrate on the tests in the policies intended to safeguard the SSSI and other nature conservation policies. With regard to the SSSI, policy 19 of **NEST** directly reflects the test in NPPG 14, paragraph 25. Policy ENV 2 of the **Aberdeenshire Local Plan** also reflects the test in NPPG 14. However, importantly, ENV 2 has additional tests. It adds that there should be no alternative site for the development and, where development is allowed, the developer must demonstrate that adequate measures will be taken to conserve the site's ecological, geological and geomorphological interest.

48. I will come back to the additions in due course but first concentrate on the policies in **NPPG 14** paras 24 – 28.

49. SSSI is a designation of national importance (NPPG 14 para 24). It is Government policy to safeguard such sites and ensure that their important natural heritage features are conserved and, where appropriate, enhanced by positive management (NPPG 14 para 24). The presence of a national natural heritage designation is an important (my emphasis) material planning consideration. This does not mean that development is precluded but proposals require to be assessed for their effects on the interests which the designation is designed to protect (NPPG 14 para 25). SSSI are at the core of national and international arrangements for the protection of species, habitats and geological or geomorphological features (NPPG 14 para 28). The protection and better management of SSSI has only recently been reinforced by the Nature Conservation (Scotland) Act 2004 (RSB 19).

50. NPPG 14 para 25 clearly says that development which would affect a SSSI should only be permitted (my emphasis) where either:

A] the objectives of designation and the overall integrity of the area will not be compromised; or

B] any significant adverse effects on the qualities for which the area has been designated are clearly outweighed by social or economic benefits of national importance.

51. This is a strong and clear policy statement from which the Scottish Ministers cannot rationally depart, because the policy sets the test in recognition that a SSSI is not sacrosanct. It recognises that it is possible that a development may come along that would harm a SSSI, but may nevertheless be required in the national interest. If this development is to be permitted it is necessary for the Scottish Ministers to show that the overall integrity of the SSSI will not be compromised; or there are social or economic benefits of national importance; and those benefits clearly outweigh the significant adverse effects. It is not enough for the social or economic benefits to marginally tip the balance, and they must be of national importance.

52. Referring to matter 11 about which the Reporters invited parties to offer their submissions, I submit that in order to apply this test (and thereby embrace the requirements of NPPG 14, NEST and ALP) in respect of this development and the Foveran Links SSSI, it is necessary to apply the following criteria and procedure:

- a) Define what is meant by the overall integrity of the SSSI;
- b) Decide whether that integrity would be compromised, taking account of the effects and effectiveness of any mitigation measures;
- c) If the integrity would be compromised, assess the significance of the adverse effects on the SSSI interest features;
- d) Consider whether, and if so to what extent, the adverse effects are offset by beneficial effects on the SSSI interest features, but not, at this stage, general biodiversity benefits;
- e) Decide what may constitute social or economic benefits of national importance;
- f) Determine whether such benefits c/would flow from the proposed development;

- g) If they would not, and the overall integrity of the SSSI would be compromised, the development should be refused; but
- h) If social or economic benefits of national importance c/would flow from the development, assess the degree of certainty / confidence they would occur against the certainty / confidence that harm would occur;
- i) Assess the degree / scale of harm and the degree / scale of benefit;
- j) Consider whether the scale and likelihood of the benefits clearly outweigh the scale and likelihood of the harm to the SSSI.

53. I further submit that a crucial test in the consideration as to whether the harm to the SSSI is clearly outweighed by the social or economic benefits of the development is whether there are alternatives to the proposal that would have a lesser effect on the SSSI. This is explicitly set out in ALP ENV 2. It is also worth noting that this test of alternatives is in an adopted local plan, which post-dates NPPG 14 and which was subject to the rigours of the local plan process. Even if it were not regarded to be an essential criterion in the weighing of the conflicting interests in NPPG 14, at the very least it is a perfectly logical addition to the test because if there is a reasonable alternative for a development to avoid harming a SSSI, it would be obvious that such an alternative would be preferable. This is entirely consistent with the approach in paragraph 74 of NPPG 14.

54. I shall now proceed to submit how RSB consider the tests should be applied and decided in this case.

EFFECTS ON THE SSSI

Overall integrity of the SSSI

55. The expression “overall integrity” is used in the NPPG 14 test. It is not defined in Scottish Government guidance in the context of SSSI. However, as pointed out by Mr Hughes in his precognition (JH P pr 39), there is a definition of “integrity” in the Habitats Directive Circular June 2000 *Revised Guidance updating Scottish Office Circular 6/1995* (RSB 57), in the context of assessing the effects of projects on European sites (SPAs, SACs and Ramsar sites). It states that *"The integrity of a site is the coherence of its ecological structure and function, across its whole area, that enables it to sustain the habitat, complex of habitats and/or the levels of populations of the species for which it was classified."*
56. This definition was adopted by Lord Nimmo-Smith in the Court of Session judgment on the Cairngorm Funicular Railway case (RSB 53) and is also adopted (though with transposition inaccuracies) by the EC in its 2000 guidance (RSB 69 section 4.6.3)
57. In oral evidence (JH E) Mr Hughes enlarged on the definition of integrity by referring to the dictionary definition which refers to being whole, or undivided, unified, unimpaired or sound. He also drew attention to other parts of section 4.6.3 of the EC guidance on Managing Natura 2000 sites, which, amongst other things, says:
58. *"In a dynamic ecological context, it [integrity] can also be considered as having the sense of resilience and ability to evolve in ways that are favourable to conservation."* And further *"A site can be described as having a high degree of integrity where the inherent potential for meeting site conservation objectives is realised, the capacity for self repair and self renewal under dynamic conditions is maintained, and a minimum of external management support is required."*
59. In the absence of any other guidance as to the meaning of “integrity” in the context of assessing impacts on nature conservation interests, I submit that the foregoing definition and EC guidance should be adopted in respect of “overall integrity” in the NPPG 14 test for SSSI.

Would integrity be compromised

60. I submit that it is irrefutable that the overall integrity of the SSSI would be compromised by the development as proposed. Scientific witnesses explicitly say so (JHm, PR, JH, MA) in the context of nature conservation. Dr Gore agreed (CG X LC) in her capacity as an interpreter of planning policy, based on the scientific evidence.

61. We must not be distracted by the detailed attention directed by the applicants to the effects of the development on specific NVC habitats or particular species, and the extent to which they may be mitigated or compensated. It would be easy to lose sight of the far more important 'bigger picture' of the overall integrity of the whole dune ecosystem, of which the part of the SSSI that would be affected makes an irreplaceable and integral contribution.
62. The geomorphology and ecology of the whole system are inextricably linked. The fixing of the dunes and the other works to create the golf course, and manage it thereafter, would have severe effects, both spatially and temporally (JH R DTy) that would destroy both the geomorphological and the ecological interests of the SSSI. I use the word "destroy" intentionally and unequivocally in light of Dr Auld's definition (MA E) of completely ruining or spoiling something, stopping it functioning, like a room after a fire has destroyed it. Professor Ritchie said the function of the dunes' dynamic systems would cease. As Mr Hughes said (JH X CB) termination, loss, destruction are much the same thing in this context.
63. Mr Trump's assertion that many golf courses have been built on SSSI is plainly wrong (JH E). There are 13 SSSI in Scotland located wholly or partly on golf courses, but except in two cases, the courses pre-dated the notification, usually by several decades, they are not on mobile dunes and most of the sand dune interest features on these SSSI golf courses are not in favourable condition. Only two golf courses have actually been built on SSSI. The first was a nine hole course in 1988 at Durness which was at the time unauthorised and needed retrospective permission. The other was Machrihanish which is very recent and about which there is evidence before this Inquiry, including that it is on fixed, not mobile, dunes and it being 'future-proofed' against changes in coastal systems (JH E).

The effects of offsetting measures

64. RSB and SNH argue strongly, in line with paragraph 74 of NPPG 14, that the first principle of conservation is to avoid harm by sensitively locating development in the first place – avoidance measures. However, having rejected avoidance measures, essentially, the applicants propose four other types of offsetting measures:
- a) Very minor changes to layout – which on the evidence I would characterise as mitigation (the reduction of harm);
 - b) Habitat management in situ – which again I would characterise as mitigation;

- c) Habitat creation elsewhere – which on the evidence I would characterise as compensation (for residual harm);
- d) Habitat and species translocation – which can only be characterised as a last resort, rescue operation.

65. It is clear from the evidence before the Inquiry that the offsetting measures proposed by the applicants' team, and relied heavily upon by them to persuade you that the development is acceptable, are not consistent with an early start to golf course construction. We are under no illusions that Mr Trump wants to start "straight away". This is also clear from the amendments to conditions sought by the applicants, which would have the effect of allowing commencement of the championship course before certain reserved and other detailed matters are submitted and approved.

66. However, if the proposed offsetting measures are to be as effective as possible, translocation in particular will take time to develop and implement. For example, there is no pre-existing scientific literature to guide the translocation of dune slacks (TD X DC, PR E). Translocation operators will need to develop techniques, enter into consultations, seek and obtain approvals, test operations through trials, adapt operations as a result of trials and then it will take a long time to actually complete the works that will be needed before the course can be laid out and used.

67. Mr Rooney described it as a lengthy process (PR E). Dr Auld (MA E) suggested possibly 2.5 years to translocate the SSSI habitats. The scale and scientific and technical complexity of the offsetting measures is enormous, they will require not a single, but a whole team of, ecological clerks of works. 35ha of sensitive material from dune habitat have never been translocated before (MA E). In my submission if an immediate start and early completion of the course is actually achieved it would be at the expense of the offsetting measures on which the application relies.

68. **Minor changes to layout:** It is quite clear that Dr Hawtree's design of T2 is a design primarily influenced by the demands of golf and Mr Trump's aspirations for a dramatic course, he said that the first objective was to meet Mr Trump's objectives, there was no point producing a layout Mr Trump was not happy with (MH X DC), it was Mr Trump's idea not Dr Hawtree's to move the main course into the Blairton dunes (MH X DTy).

69. I readily acknowledge that Dr Hawtree has some understanding of the relevant environmental issues, having learned them on the hoof (MH X DTy), but his knowledge cannot match that of Professor Ritchie or Dr Dargie. They were specifically appointed to

provide their advice and influence, but their advice has sometimes been rejected and their influence seems to have been minimal and late in the design stage. T2 is not an environmentally sensitive design and it never will be. One gets the impression that this team of designers and scientific advisers want to make the course more environmentally sustainable, but their hands are tied by an intransigent client.

70. The applicants regard the course design in T2 as: close to perfection (DT P 13); and needing only very minor changes, small tweaks (DT X DTy). In this respect it is also enlightening to note what the applicants intend to do about further iterative mitigation, in detailed course design, as set out in paragraph 10 of the Technical Response to SEPA's Written Statement. There we see again how little the T2 course is expected to be changed. I will refer to condition 24 relating to the T2 layout when I address conditions.
71. Neither is it a course that, as asserted by Mr Trump, totally respects the topography. I submit if it were to do that it would not fix the dynamic nature of the dunes, but in any event, major changes to the topography of the dunes are already incorporated into T2. This is not a course design that only slightly adjusts and smooths the natural topography. It was apparent from the oral evidence (WR X DC) that tee 14 could be raised by 7.5m and others excavated by 2m. You will have seen for yourselves the location of tees and greens in the course. You will come to your own conclusions about the extent of changes to the subtle, infinitely varied, natural and dramatic topography of the dunes necessary to accommodate the site works to create a playable golf course, let alone the best in the world. I submit all the evidence points to further significant change likely to be necessary in order to initially fit, then subsequently manage a golf course in the natural systems of the dunes at Menie.
72. Neither will **MEMAG** have any influence on the design of the course. MEMAG is not mitigation. This is absolutely clear from evidence (DT, MH, TD, WR, Heads of terms) MEMAG will be advisory only. It will be a toothless monitoring body even though, ironically, Mr Bell thinks it should prepare the Environmental Management Plan (DB P pr 6.1).
73. As Mr Trump put it in answer to my questions, if their advice is good it will be followed. The corollary is that if the golf course managers do not like the advice, from a golfing point of view, the advice will not be followed. Given that there may well be many times when the interests of golf will not match the interests of the natural environment it is obvious which will prevail. The MEMAG will be toothless and ineffective in the situations it would be most needed.

Habitat management in situ

74. Much was made by the applicant's witnesses about the effects of poor management on the SSSI interest features now, for example, the effects of grazing cattle. I submit that these are localised, reversible effects that would be easily remedied (see rebuttal of Mr Angus for SNH in respect of the precognition of Dr Dargie). Building a golf course on the dunes will certainly not improve the management of its scientific interest, it is not needed in order to remedy any adverse effects of grazing.
75. The proposed habitat management will have some locally beneficial effects on the areas of the SSSI that would not be affected by development, but these would be small and indirect effects and are still uncertain. Importantly, as Dr Auld pointed out (MA E) it would be about trying to maintain a dynamic dune habitat system on a static dune system, with the added complication of the effects of aggressive alien species introduced as part of the golf course construction and management (MA E).
76. Dr Auld also described how habitat restoration was about encouraging the habitat that was left to do better, but in its fragmented and reduced state it would be less resilient to change, the micro-interactions that are there now would be diminished (MA E).
77. These measures would not significantly reduce the effects of the dune stabilisation and golf course construction and operation. Without the golf course, they could be achieved anyway and more successfully through normal SSSI management regimes.

Habitat creation elsewhere

78. Habitat creation elsewhere would require the same conditions as currently found at Menie. Where such conditions exist they are likely to be in an already functioning dynamic sand dune system. Habitat creation will be a poor substitute for the in situ conservation of an outstanding dynamic, dune ecosystem with its historic and natural context.

Habitat and species translocation

79. As indicated above, translocation of habitats and species can only be characterised as a last resort, rescue operation (TD X DC; PR E; JH E; MA E). I submit it is neither mitigation nor compensation for the harmful effects of the development. It does nothing to reduce or compensate for the harm that would occur. It is, in effect, an emergency rescue operation to save doomed habitat and species and tantamount to eco-gardening.

80. T53 was submitted by the applicants. It is in fact a devastating indictment of what they propose. I refer to Mr Rooney's oral evidence (PR E) and how Mr Cockburn took him through that very authoritative guidance: the health warning, the potential to go wrong, the risk of failure, the need to explore all other options first, the reduction in conservation value, the loss of historic and ecological context, the difficulty of translocating critical natural capital that is not tradeable, the need to avoid having to translocate the near natural habitats of high nature conservation value. Mr Rooney and Mr Hughes both refer to the need to match donor and receptor site conditions, not to nearly match them as Dr Dargie considered would be sufficient. Again, T53 shows the need to match hydrological conditions, not nearly match them.

In response to a question from the Chief Reporter I clarified that here we were dealing with natural habitats in this context rather than near-natural habitats

81. Again I say that T53 is an authoritative, if expensive, publication. It clearly states (page 24, 3.2.2)

82. *"In assessing the impact of habitat loss in an EIA, **translocation should not be considered as reducing the damage to a site sufficiently for the category of impact (major to intermediate for example) to be reduced**"*

83. However, this is precisely what Dr Dargie has done in order to reduce his assessment of the effects from severe adverse without mitigation. This was an illogical step, even without his subsequent acquisition of T53, because he accepted that translocation was not mitigation.(TD RQ)

84. So I further submit that, in light of the above, the fact that translocation would be attempted should not even be taken into account by the Scottish Ministers in their decision as to whether to grant planning permission. It should be a post-decision determination as to whether translocation is desirable, to move otherwise doomed habitats and species out of the way of the site works. The witnesses all agreed that if the development goes ahead it would be desirable, better to try than not to try.

85. If I do not succeed on this point, and the Ministers decide that translocation is a form of mitigation or compensation that reduces harm, then they should be very confident that translocation would be so successful that it would genuinely amount to a mitigation or compensation measure.

86. It is not easy to define what would be regarded as successful translocation. In answer to questions from Ms Cockburn, Dr Dargie indicated that he would measure success of translocation, say of dune slack habitat, as the habitat remaining in the same NVC vegetation type or undergoing succession in an expected way, say SD13 to SD16. It is

clear to me (PR E; JH E; MA E) that Dr Dargie's single measure of success whilst one of an important range of such measures (PR X CB) is not enough. Indeed, Mr Hughes regarded succession to SD16 as a failure, not a success (JH X CB). If it succeeded to SD16, in the artificial fixed dune system, SD13 habitat would not be replaced by naturally evolving processes in a dynamic system. About 98% of Scotland's resource of this rare and fragile habitat would be lost, not rescued.

87. When we come to the analysis of how successful translocation might be there is an obvious difference between the high levels of optimism of Dr Dargie and to some extent Professor Ritchie, and the deep pessimism of Mr Rooney, Mr Hughes and Dr Auld. I submit that despite the acknowledged expertise of Dr Dargie, if you impartially consider the scientific literature, the guidance (especially T53) and the experience of translocation in practice, one cannot fail to come to the conclusion that the likelihood of success is much more likely to be at the lower than the higher end of the scale.

88. Dr Auld's considerable experience of habitat management, manipulation, creation and translocation (50,000 ha over decades) should be no more underestimated than Dr Dargie's, particularly when Dr Dargie accepted (TD R CB) that he did not have experience of habitat translocation, only habitat rehabilitation. Dr Auld put it very fairly (MA X CB), there was a lot of very detailed work carried out by these two eminent gentlemen (TD and WR), with which he agreed, but where he disagreed with them was the way that they regarded mitigation and translocation as enabling the development, because his view was that they would not function at the levels suggested. I submit that all the evidence points to Dr Auld (and Mr Rooney and Mr Hughes) being more likely to be right than Dr Dargie.

Significance of the adverse effects on the SSSI interest features

89. I submit that in this case the very highest level of significance should be given to the effects of the development on the SSSI. As I have explained above, and as the evidence to the Inquiry has shown, RSB considers that the proposed golf course would destroy a unique, dynamic, coastal, geomorphological and ecological system of the highest scientific and nature conservation value.

90. In further supporting this submission I refer you to, but do not reiterate, the written submissions in RSB WS/1, WS/2 and WS/4.

Are adverse effects offset by beneficial effects

91. If beneficial effects of the development are to be taken into account at this stage, in terms of the SSSI, they must clearly be net beneficial effects on the SSSI interest features, namely coastal geomorphology and sand dune habitat. Mr Bell is keen to tell us about the benefits he envisages, but I submit that there is no evidence that there would be net benefits for the interest features of the Foveran Links SSSI. Rather, he is extolling the virtues of species richness, generally, he would not be improving the biodiversity and integrity of the existing, fully functioning critical natural capital of the dune system.

SOCIAL AND ECONOMIC BENEFITS

Defining nationally important social or economic benefits

92. Although nationally important natural heritage assets are well defined, there is no clear definition, or even any guidance as to what may constitute a nationally important social or economic benefit in this context (CG X LC). Certainly, they cannot merely be something that would contribute to the regional or national economy; almost any new inward investment would do that to some degree. Dr Gore said it was a matter of judgement. So it is, but there has to be a rational and transparent basis for such a judgement, for example with a logical approach or a criterion or set of criteria. But none have so far been proposed.
93. In my submission it is perfectly feasible to have a development capable of generating a nationally significant number of jobs that is not of sufficient importance to clearly outweigh a high level of harm to the overall integrity of a SSSI.
94. The question of national importance must surely involve a consideration of the primary interest of the proposed development. A development that is to be delivered wholly or primarily in the public interest of the people of Scotland would seem to me to be much more likely to qualify for the status of national importance, in this context, than a development brought forward wholly or primarily by a private interest. That is not to diminish the economic significance of private developments, but to consider what may be of national importance, that is of importance to the nation. It is notable that in the tests of Regulation 49, of the Habitats Regulations, the test is an "*imperative reason of overriding public interest*". In judging whether an interest is overriding of the harm to the integrity of a European site, the public interest is essential.
95. The test in the Habitats Regulations also invites consideration of another aspect of the concept of how a development project may override the otherwise strict protection of nature conservation sites. It is the question of need. The regulation 49 test refers to "*imperative reasons*" which I would submit reflect an urgent necessity. Merely a desirable objective would not be enough. I submit that if we are to sacrifice the special scientific interest of a nationally important site, such as the Foveran Links SSSI, it should not be for some general economic benefit, which however desirable, could be delivered in a different way or a different place in Scotland, including at Menie but outwith the SSSI. Rather, it should be for a benefit that meets an identifiable national need and cannot be delivered by some other means or in some other location.

96. I am not asserting that the tests of imperative public interest apply here as a matter of law, they do not, but internationally and nationally important sites are protected by Government policy with the same force and these tests do help to inform our thinking about what the tests of 'national importance' may be.

Social and economic benefits of the proposed development

97. Social benefits may be locally significant, trickling down from economic benefits, we do not diminish their potential value but no one has suggested they amount to an interest of national importance.

98. Turning to the economic benefits, we must bear in mind that much will happen anyway, housing is not to be regarded as an addition, or a kind of bonus, it is almost certain they will be built anyway, elsewhere if not here (CG RQ and Dunlop X Agnew and RQ). It would be unwise to count them as an additional benefit because they would be built earlier (MD RQ) in light of Mr Trump's evidence (DT RQ) that he may delay building the houses to suit market conditions.

99. There may well be demand for a large 5 star hotel, conference centre and spa. If there is, now or in the future, then the market will deliver and they would come forward in due course, elsewhere if not here (Dunlop X Agnew). In the meantime, there are, apparently some 2,500 hotel rooms under construction, with permission or in the planning system in the shire and city of Aberdeen. (Mr Skene RQ)

100. The elements which would happen anyway and elsewhere cannot be used to justify the environmental damage, because the damage would not be allowed to occur at this scale, simply to achieve a housing or hotel development elsewhere. Damage therefore need not occur if these elements were built elsewhere.

101. I submit that on the evidence before the Inquiry the scale of development could be excessive, even for a world class championship golf course. The housing, hotel, holiday homes and golf villas developments are of a scale never seen before in Scotland by a substantial margin. There is an obvious mismatch between the number of people potentially staying at the hotel and in the holiday apartments and golf villas and the capacity of the two golf courses. Quite why so many other people would be coming to stay in the high quality, but undoubtedly expensive, facilities at Menie, if there was no conference taking place, has never been justified.

102. The economic benefits of the whole development could be significant at a local, regional and national level (MH X). If the development generated the 1200 new jobs referred to in the Inquiry and the subsequent written clarification from EKOS, that would be significant. However, that cannot automatically and in every case equate to an economic benefit of national importance in the context of NPPG 14. As I have already submitted, an economic development that is significant at a national level is not necessarily the same as a development that is of national importance. (JH X MS)
103. Some developments plainly would be of national importance, for example, major infrastructure projects of the kind referred to in the emerging National Planning Framework. But I would argue that, in the absence of guidance, case law, authoritative decisions and any clear criteria previously put to the Inquiry, it would be inappropriate to report to the Scottish Ministers that this development would be of national importance in this context.

Weighing benefits and harm

104. Because Mr Trump has refused to submit any kind of alternative we simply do not have the information that would enable us to see whether a modified course design avoiding the SSSI would bring about the same or similar economic benefits; and if it would not, just how much less may the benefits be, so that we can compare the additional benefits of developing the SSSI with the additional harm it would cause.
105. Instead of a carefully presented analysis of costs and benefits with and without the SSSI, all we have is the applicant's stubborn refusal to consider anything other than a golf course construction partly on the SSSI.
106. There is a grave danger that we might mistakenly try to assess (as Mr Trump would like you to do) the harm caused to the SSSI against the entire economic benefits of the whole scheme. He manoeuvres you into this position by insisting it is all or nothing. It might be all or nothing to Mr Trump, we may never know, but that is not an appropriate way to determine whether a major golf resort development and all that it may bring to Aberdeenshire could be appropriately developed at Menie. Mr Trump is trying to force the Scottish Ministers to consider only this proposal, not one that is conditioned to avoid the SSSI.
107. I accept that the application comes as a complete package, but that does not mean that its different elements should all be tested on the same basis. That cannot be right. The Council tests the housing element on the basis of housing policies and the market area. I

argue that it has become increasingly apparent during the Inquiry, that it is appropriate to consider not the impact on the SSSI against the whole economic benefit of the development but against any additional benefit that using the SSSI might bring. This is an approach that I know will be resisted by the applicants and the Council, but I say it has a compelling logic.

108. Of course the applicants want you to weigh the whole of the development's economic benefits against the harm to the SSSI, because to disaggregate the elements that would be likely to happen anyway, or which would not be located on the SSSI, severely diminishes the economic arguments.
109. There has been some evidence to suggest that the Trump brand is critical to the delivery of the estimated economic outputs from the development. It has also been suggested that the consent should be specific to the applicant. However, a condition making any permission personal to TIGLS would not only be exceptional but unreasonable in terms of the necessary tests. It has never even been proposed in any round of draft conditions circulated for comment by the parties.
110. As indicated earlier I submit that the question of alternatives is also an integral criterion to the task of weighing the conflicting interests to see if one clearly outweighs the other.

ALTERNATIVES

111. The further test in policy ENV2 of ALP is an important one. It is in an adopted local plan, which was subject to the rigours of the local plan process. Dr Gore acknowledged the test in ALP ENV 2 was stricter than para 25 of NPPG 14, and also that the development as proposed failed the test (CG RQ). It is also a perfectly logical addition to the test in NPPG 14 because if there is a reasonable alternative for a development to avoid harming a SSSI it would be obvious that such an alternative would be preferable.
112. The policy does not, of course, say that the alternative must be acceptable to the applicant. It imposes a duty on the decision maker to explore alternatives. Just because the applicant chooses to reject all (not merely some) alternatives on the grounds of a personal aspiration, does not mean that there are no alternatives. Indeed, it does not mean that more sustainable alternatives do not exist (JH P pr 28). As Dr Gore fairly indicated there are alternative locations for the golf course within this site but the developer chooses not to use them (CG X Cllr Storr).
113. It was because the applicant refused to consider submitting such an alternative that the RSPB commissioned the Mike Wood scheme (RSB 17), to test whether such an alternative was possible, and if so, to show that such an alternative was perfectly feasible and would justify a condition on any outline planning permission that may be granted (MA E). It became clear during the course of the Inquiry that alternative layouts had been drawn up, at some earlier stages, by the applicants. Whilst there is no duty on an applicant to look at alternatives, the 1999 EIA regulations are clear. Regulation 2(1) and Schedule 4 require the Environmental Statement to include: "*An outline of the main alternatives studied by the applicant ... and an indication of the main reasons for his choice, taking into account the environmental effects.*" The submitted EIS was therefore deficient in this respect.
114. The RSPB does not promote the scheme in RSB 17B as a proposal it wants to see go ahead. It is plainly damaging to the nature conservation of the dune system, especially within the SINS. Dr Auld made it clear (MA X CB) that he would prefer to see no impacts on Annex 1 habitats, or only limited impacts on habitats of that quality. To point out only that it may be damaging or more damaging to some interests (DB and CB) misses the obvious points that, firstly, it avoids the SSSI and the Blairton dunes (MA RX DTy), the most important geomorphological features and the nationally important habitats they support; and secondly it meets an important policy test that the applicants have refused to seriously address.

115. In any event, Dr Auld clearly said (MA X CB) that he disagreed with the view that the course layout on RSB 17B was more damaging of non-SSSI interests than the T2 layout.

Best golf course in the world

116. Let us now consider why the applicant has refused to seriously consider an alternative that avoids the SSSI and the mobile dunes. It is for one reason and one reason only. The applicant himself has told the Inquiry that he wants to build the best golf course in the world. That is his personal aspiration. The aspiration came out of the blue in Mr Trump's precognition (DT P 9). The Environmental Impact Statement (EIS) does not say that was the objective of the development proposal (EIS NTS). None of the material submitted with or after the planning application says that that was the proposal. Not even in the applicant's Statement of Case does it say that that was the intention.

117. Dr Hawtree said he was told at the beginning by Mr Trump, and yet Dr Hawtree's precognition does not say so. Rather Dr Hawtree's brief is described in his precognition (MH P pr 2.1) more realistically: *"to produce a world-class 18 hole championship links course, in traditional Scottish style, capable one day of hosting a major championship"*.

118. Dr Hawtree says it could be a championship course without the SSSI, just weaker and less visually striking than with the SSSI (MH P pr 4.2). He can guarantee a world class golf course even without the SSSI (MH P 4.3). Dr Hawtree could only say that it would be his ambition that Menie would be better than Royal Birkdale (MH X DTy). Modesty was not limiting his assurance as he has been involved in the design of both.

119. It is understandable if objectors felt that Mr Trump's recent announcement that he was seeking to build the best golf course in the world at Menie was an afterthought, to help to justify the use of the SSSI. We need to bear in mind the site was bought before Mr Trump personally had seen it and before he at least was made aware of the SSSI (DT X DTy)

120. Is such an aspiration achievable? Mr Trump's sole criterion for achieving the best golf course in the world appears to be to use very large scale dunes. When asked which he thought was the best in the world Mr Trump, surprisingly, did not even cite a Scottish links course, so why is it essential that Scottish links must be the venue of the course that would out compete Pine Valley.

121. When asked by Councillor Ford what the criteria for the best course in the world would be, Mr Trump said "I just think it will be". These dunes are much larger majestic dunes, this is a larger property not cramped like Carnoustie. Other courses have age and legacy but they were new once.
122. The problem is that when they were new, lots of other fine golf courses over a hundred years old did not exist.
123. Dr Hawtree does not say he can guarantee the world's best golf course. Such a claim would be unrealistic against the criteria he defines as necessary to create even a world-class course. I refer to the six criteria in Dr Hawtree's precognition (pr 3.3). In my submission none actually require the SSSI. Dr Hawtree does not convincingly demonstrate that the SSSI is necessary to create even a world-class golf course, against the criteria that he sets himself. Criteria 4 and 5 are key, but these are found elsewhere on the site, they are just more pronounced on the SSSI. Criteria 2 and 3 cannot be achieved at Menie, at least for decades, if ever.
124. I submit that on the basis of the criteria set by Dr Hawtree, Menie could not yet meet the criteria for a world-class golf course, let alone the best in the world.
125. Mr Trump and Dr Hawtree in oral evidence indicated that there was no point merely building a world class golf course, because they already exist. That seems at odds with other new courses recently built that aspire to or are regarded as fulfilling that definition (Kingsbarns). In any event, given that even if Menie eventually became the best course in the world, it will not be so for many years and in the meantime the applicants must be confident that it would support the whole development (the hotel, spa, conference centre, holiday flats, golf villas etc). They are not proposing to delay construction of them for many years, the phasing appears to be over a matter of a few years, not decades so that they would be built as the course and its reputation mature. There must therefore be little merit in the argument that there is no point building a world class golf course (MH X DTy), because at best that is all Menie could be for a very long time.
126. Mr Trump's claims are overstated and his aspirations over-ambitious. His answers to my questions indicated to me that he may be in danger of being carried away by his dream, losing sight of the possibility that his scheme may not fulfil its ambitions. He appears to disregard (or deny) the prospect of disappointment, or failure, in much the same way as he disregarded or denied the harm to the natural environment that the project would cause.

127. Mr Trump was not originally driven by a compelling urge to build a golf course at the Menie Estate, or even in Aberdeenshire, or even in Scotland, his search was across Europe, and at one time even in Asia. He says that what attracted him to Menie was the drama of the dunes, but it is hard to appreciate his enthusiasm for this now, when he agreed with me that you had to be amongst the dunes to fully appreciate them. He bought the site without actually seeing it.
128. I can understand that Mr Trump does not do detail, but it was worrying to see his lack of appreciation (or to put it another way, his denial) of the harm that his development would cause, even as set out in his own EIS and by his own witnesses (DT X DTy). He may have flown the Atlantic to be here, but remarkably, he had not taken the trouble to inform himself about one of the key issues – the adverse impacts on nationally important geomorphological interests, before emphatically telling the Inquiry the effects would be beneficial. Mr Trump's concept of needing to fix the dunes to stop them blowing away is frankly ludicrous.
129. It was made abundantly clear in Mr Boyd's interjection during Dr Gore's evidence that the applicants would sooner have a refusal than a permission with a condition requiring them to avoid the SSSI. That highlights the conflict. It is Mr Trump's personal aspiration to build the best golf course in the world and his personal conviction that the SSSI dunes are essential to do that. I submit that cannot be a matter of national importance sufficient to clearly outweigh the extensive, certain and permanent harm to the SSSI interest features.
130. For the purposes of the next submissions, I will however proceed on the assumption that it is considered that the development c/would generate economic benefits of national importance. If so it would be necessary to assess the degree of certainty / confidence the decision maker would have in them occurring against the certainty / confidence that harm would occur if the development went ahead. Further, it must follow that the decision maker must assess the degree / scale of harm (taking account of the importance of the interest features affected – 'critical natural capital') and the degree / scale of benefit (taking account of the importance of the economic benefits, jobs etc.)
131. I submit that there are significant disparities here. The harm to the SSSI would be certain, of the highest level of significance and permanent. The economic benefits are far from certain, the project has been described as risky in some respects. At national level, the economic benefits, whatever they may be, cannot be described as of the highest level of significance and no one could possibly predict whether they would be permanent.

132. In light of these conclusions, I submit that the economic benefits of the applicant's proposals cannot possibly "clearly outweigh" the harm to the SSSI.

OTHER MATERIAL CONSIDERATIONS

133. It is also necessary to take account of other material considerations, to see whether they would indicate that the development should be permitted. These include, but are not limited to the following matters:

The SAC

134. The effects on the SAC should be assessed in respect of the Habitats Regulations, there would be no significant effect on the Sands of Forvie SAC.

The SPA / Ramsar site

135. Again these should be assessed in respect of the Habitats Regulations and the effects are covered in the Agreed Statement and RSB WS/3. It is common ground that there would be a significant effect on the SPA / Ramsar site. However, with the imposition of the condition which RSB has proposed, and now included in the list of conditions, relating to goose management, the Scottish Ministers are likely to be able to conclude, following an appropriate assessment, that there would be no adverse effect on the integrity of the SPA / Ramsar site.

The SINS

136. The severe impact on the Foveran Links SINS is an important material consideration. I emphasise again the high nature conservation value of the SINS, which meets the qualifying criteria for notification as a SSSI. Habitats of high nature conservation value are found all along the coastal belt of the application site (Figure 5 T50). The SINS includes habitats and species listed in the Scottish Biodiversity List published under Section 2(4) of the Nature Conservation (Scotland) Act 2004 and subject to the UK Biodiversity Action Plan, the UK Biodiversity Habitat Action Plan for Coastal Habitat and the objectives of the Scottish Biodiversity Strategy.

137. The Agreed Statement with the applicants refers to adverse impacts on nationally important lichen and fungal flora and on higher plants, including species recognised as scarce in a British context. The effect of mitigation on these interests is not agreed. The invertebrate interest of the SINS (and the SSSI) is substantial and in this respect I refer you to RSB WS/2 paragraphs 6.8 to 6.14 and especially the conclusions on the effects on invertebrates set out in paragraph 6.15. RSB believes that the indirect effects on

biodiversity arising from the management of the golf course have been inadequately assessed or understated throughout the assessment process (RSB WS/2 prs 9.1 – 9.9)

138. The SINS is protected by Policy ENV3 of the Local Plan. The impacts on the SINS will be similar in nature and scale to those of the SSSI, but it must be remembered that the impacts summarised first in Table A7-1.2 of the EIS and then Table 4 of T50 do not include habitat losses in the SINS that would inevitably result from the second golf course.
139. The unresolved environmental effects of the second golf course is relevant to issue eight of the matters which the Reporters asked parties to address in their closing submissions, if they wished to do so. I do.
140. The effects of the second course remain a serious gap in the information available to thoroughly assess the effects on the natural environment. It may well be an impediment to the grant of planning permission. It will be for the Scottish Ministers to satisfy themselves that it would be lawful to grant a planning permission subject to a condition requiring EIA for an element of the project that is being permitted, knowing full well that the effects of that element would be significant and have not be addressed. I believe that it would be unsafe to do so.
141. In my submission recent case law, described in the Scottish Government's Circular letter of 8/2007 (Core document E.1) indicates that EIA is necessary and appropriate at approval of reserved matters stage only in specific circumstances. For example, if it has been erroneously or inadvertently overlooked at outline stage; or if some new or unforeseen environmental effect comes to light after outline planning permission is granted; or the effects of the development as designed at detailed stage, are potentially greater than the effects assessed at outline stage. I am sure it is not a signal to deliberately use the later approval stages as an excuse to avoid or delay proper assessment of the significant effects of an EIA development, that could and should have been assessed at outline stage.

EC Annex 1 habitats

142. I believe these should be considered in light of the Scottish Ministers' general duty under regulation 3(4) of the Habitats Regulations 1994, to have regard to the requirements of the Habitats Directive in the exercise of their planning functions. Close scrutiny of Table 4 in T50 indicates that nearly all of the key dune habitats to be lost to the first golf course are EC Annex 1 habitats, with 16.53ha of that loss to priority habitats (13.18 ha 2130 grey dunes; 3.35ha 2140/2150 decalcified fixed dunes) (RSB WS/2 pr 5.10).

Protected species

143. The potential impact on protected species is a material consideration (NPPG pr 20). The Agreed Statement indicates that there could be adverse effects on otters, despite the Otter Mitigation Strategy. There will be minor disturbance to the local distribution and abundance of three bat species, based on the information available. Bats and otters are European protected species. The effects of mitigation, on potential damage to areas used by badgers, is not agreed and will need to be included in a Badger Protection Plan submitted to SNH (Agreed Statement).

Proposed beneficial effects on biodiversity generally,

144. Mr Bell has emphasised his view that the development is the opportunity to bring about benefits for the nature conservation value of the development site and its surroundings. I note what Mr Bell has to say on these matters. I also note that Mr Hughes disagreed with much of what he had to say (JH X CB). As I have previously indicated, Mr Bell's proposals are considered by RSB to be more related to species richness, generally, than improving the biodiversity and integrity of the existing, fully functioning dune system. They should be required if permission is to be granted, but they come nowhere near compensating for, or in any other way significantly offsetting, the severe harm that would stem from the proposed development to the SSSI and the SINS.

Consents in respect of the SSSI

145. Mr Cockburn will no doubt address this issue for SNH but it is my understanding that if the Scottish Ministers grant outline planning permission for this development, no additional consents would be required in order to carry out the development on the SSSI, so long as it is strictly in accordance with the terms and conditions of the outline planning permission and subsequent approvals. This is the fifth matter which the Reporters asked parties to address in their closing submissions, if they wished to do so.

CONDITIONS

146. The final matter which the Reporters asked parties to address in their closing submissions, if they wished to do so, related to conditions, generally.
147. Frankly, the state of the proposed conditions, in the version available to me at the time of writing (circulated in the third week of the Inquiry), is a mess. Many are poorly drafted, muddled or contradictory, some are imprecise and unenforceable. However, many of these are not of concern to RSB. There are some conditions that appear to replicate the legal agreement, which is contrary to Government guidance and good practice (matter four of those that the Reporters asked to be addressed in closing). Where there is overlap the provision should be in a condition, particularly because we have not seen a completed version of the Agreement, which we would have expected to have been submitted to the Reporters before the close of the Inquiry, tomorrow.
148. At an early stage, we set out as clearly as possible, our comments on the proposed conditions and section 75 Agreement heads of terms (RSB WS/6). We continue to support the intent of conditions aimed at reducing the adverse effects of the development on nature conservation. Many of our comments in the written submission still stand.
149. I submit that despite Mr Boyd's urging the Scottish Ministers to refuse planning permission rather than grant with a condition prohibiting development on the SSSI, it is still open to the Ministers to do precisely that, and it would be consistent with the policy set out in NPPG 14, paragraphs 74 – 76, to which the Ministers will have regard, if they are minded to grant permission.
150. The seventh matter which the Reporters asked parties to address in their closing submissions, specifically related to the relationship between condition 3 and condition 24. RSB support SNH's intention in asking for condition 24 to be imposed, but we have grave concerns about its validity in its present form. It contradicts and overlaps condition 3 and it manifestly fails the tests of precision and enforceability. It should be re-written to ensure that a more damaging (and therefore not assessed) departure from T2 is not submitted for approval, whilst facilitating further design iterations to reduce the harm to important nature conservation interests, which the applicant's witnesses have been at pains to emphasise is so important.

CONCLUSION

151. The summary of the RSB objection, expressed in their joint Statement of Case and the precognitions of Mr Hughes and Dr Auld have not changed as a result of hearing the evidence at the Inquiry. RSB consider that the adverse environmental impacts of this development are unacceptable, irreversible and not outweighed by any over-riding strategic need or national interest. The damage to the integrity of the Foveran Links SSSI and SINS and to biodiversity, over the whole site, is so severe that they believe strongly the application should not be permitted. The main purpose of the SSSI network - to defend nationally important sites against damaging developments and operations - would be severely compromised if these proposals were to be consented, because RSB do not believe it meets the tests of NPPG 14 and the development plan. The policy provides for an exceptional case where some degree of harm is clearly outweighed by some major social or economic benefit of national importance. This is not such a case.
152. A grant of outline planning permission may be unsafe in respect of the EIA Regulations / Directive, because the EIS failed to report on the assessment of alternatives studied and fails to include any assessment of the second golf course. The Scottish Ministers will need to satisfy themselves that it is legally admissible to impose a condition requiring an EIS to be submitted with reserved matter applications, when granting an outline planning permission, knowing that an element of the project permitted has not been, but could and should have been assessed at outline stage.
153. A grant of outline planning permission would also send negative signals about the ability of the planning system to protect the best of Scotland's natural heritage and the efficacy of national and local planning policy to safeguard nationally designated sites from damaging developments.
154. Such a conflict with such a potentially important golf resort complex is unnecessary and avoidable. RSB believes that sustainable economic development to which the Government is firmly committed requires that environmental and economic objectives are met together, not at one another's expense. The decision on this application will be one of the greatest tests of that plank of Government policy.
155. The development could be amended to avoid the SSSI. Indeed, I submit it is still within the Scottish Ministers' power to permit the development with a condition avoiding development on the SSSI. That would send a clear signal that Scotland is open for business, but not open to the destruction of its most important environmental assets.

156. If that decision would not suit Mr Trump's personal aspirations, so be it. The decision as to whether to proceed with this development, and on what basis, is that of Scottish Ministers, advised by you, not Mr Trump. On behalf of the RSB I urge you to recommend to the Scottish Ministers that whatever the benefits of this proposed development may be, the development as proposed does not meet the necessary policy tests and is unacceptable. It should be refused.

'Off script'

I thanked the Reporters for the courtesy, fairness and patience with which they had heard our evidence and submissions, I thanked all parties for helping to accommodate my personal difficulties during the course of the Inquiry and wished Mr Cunliffe a speedy recovery.

David Tyldesley MIEEM FRTPI FRSA

Aberdeen, 3rd July 2008