

John A. A. Agnew
Town and Country Planning Agent

Kinnear House, 33 Ervan Street, Stonehaven, AB39 2EJ

Principal: JOHN A. A. AGNEW, SDA
 Consultant: WILLIAM WALTON, BA(Hons), MSc, Dip.Env.Law, LL.M., MRTPI

Direct Dial: 01561 361364
 Telephone & Fax: 01569 763462

Mr. Colin Bell,
 Directorate for Planning and
 Environmental Appeals,
 4 The Courtyard,
 Callendar Business Park,
 Falkirk,
 FK1 1XR.

BY FAX AND POST

14th April, 2008.

Dear Sir,

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

Instructed by Mr. Donald Banks and Others, I hereby lodge a submission, as hereinafter expressed, for the consideration of the Reporters appointed to hear evidence concerning the called-in application as referred to above.

1. It is the position of my clients and my submission that it is ultra vires, jointly and severally, of Officers and Councillors of Aberdeenshire Council(The Council)to appear at the Inquiry into the called-in application in any role other than in support of the reasons for refusal of the application as determined by The Council's Infrastructure Services Committee(ISC). This is stated in contradistinction to any Councillor who, for appropriate reasons, may have locus standi to appear as an individual.

2. The Council is the Planning Authority for the purposes of the Town and Country Planning(Scotland)Act 1997(the 1997 Act)arising from the Local Government(Scotland)Act 1973(the 1973 Act)(s.172(1) c.56).

3. Section 56(1)of the 1973 Act provides that subject to any express provisions in this Act or any Act passed after this Act, a local authority may arrange for the discharge by a committee, a sub-committee, an officer of the authority or any other local authority in Scotland.

4. Thus, under The Council's Scheme of Delegation, in place at the time of determination of the(now called-in) application, the relevant Area Committee determined planning applications at first instance and, where provided for and appropriate, the ISC determined applications referred to them at second and final instance for and on behalf of The Council.

2.

5. It is important to observe that delegated 'jurisdiction' is not held to be the (proper) jurisdiction of the substitute (ISC) but the proper jurisdiction of the principal (The (full) Council) who delegated jurisdiction to ISC; thus, delegatus non potest delegare, the ISC cannot delegate its duties to any other; thus it is that the decision taken by the ISC on 29th November, 2007, to refuse the application referred to was, and remains, de facto et de jure, the decision of The Council.

6. The Council, as the principal, can revoke or otherwise amend any delegated powers or duties and The Council decided at the (Special) Meeting on 12th December, 2007, to initiate the process of amending delegated authority concerning planning applications and it is believed to have completed that process at a meeting in January, 2008. That said, this was after the fact of determination of the application referred to, and it was after the fact also, of the application being called-in by Scottish Ministers; et seperatim, the application was not in front of The Council for determination, whether or not it had been called-in, and it could not lawfully be re-visited, with the exception only where the process of determination was unlawful or otherwise flawed or a new matter having a threshold weight in materiality had appeared, prior to issue of Notice of Determination; no such issue(s) apply in this case and in any case where such issues did apply the application would require to have been (lawfully) re-visited prior to it being called-in by Ministers.

7. Inasmuch as the act of refusal by the ISC is an act in the name of The Council and having regard to the rule nemo contra factum suum venire, The Council cannot go against its own act; that is to say, The Council cannot at will depart from that act or lawfully do anything contrary to it. Standing that, any act or undertaking arising from the (special) Meeting of The Council on 12th December, 2007, and, or, any other meeting, which is, or is intended to be, contrary to the decision taken by the ISC and the reasons for said decision, is void ab initio, a nullity, having no legal force, and cannot be represented as the position of The Council concerning the called-in application.

8. Council Officers are the servants of decisions lawfully reached by elected Councillors acting as the Planning Authority and should therefore appear at the Public Local Inquiry in support of the reasons for refusal. This is stated in the knowledge that planning Officers do not normally give evidence against their recommendation expressed in their Report to Committee. However, The Council's Legal Service would normally, and should, appear in support of the reasons for refusal, leading evidence from inter alios, a Councillor and any other independent expert witness considered appropriate in support of the reasons for refusal. This facility, support and opportunity is being unlawfully, certainly improperly, denied to a Councillor or Councillors who wish to, and would normally and properly, appear as a witness for The Council; in my submission such Councillors are the only Councillors who can be heard by the Inquiry as representing The Council.

3.

9. In my submission, any Councillor who wishes to appear other than in support of the reasons for refusal of the called-in application can do so only if; first, they can demonstrate a locus standi to appear as an individual Councillor or otherwise as an individual; and, second, the Reporters sitting as the Tribunal of Fact consider the evidence to be relevant and of assistance to consideration of the called-in application.

10. Vires, in this case is conferred by legal authority from Parliament and in this case the ISC exercised its vires lawfully on behalf of The Council.

11. Where procedural requirements are laid down, the Courts are bound to assume that they must be observed. In the House of Lords, in causa, London and Clydeside Estates Limited v Aberdeen District Council(1980 S.C.(H.L.)1;1980 S.L.T.81) Lord Hailsham stated;

"When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the last detail what the courts have to decide in a particular case is the legal consequence of non-compliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events."(Scottish Planning Law & Procedure(2001)Jeremy Rowan Robinson et al.at 21.112).

12. In consideration of my submission on behalf of my clients, the outcome in determination of the now called-in application by the ISC is not the issue. Standing that the ISC acted lawfully on behalf of The Council, upon the grounds, and for the reasons, stated hereinbefore, the issue is that, in my submission, the subsequent acts and omissions of The Council are unlawful and, culpa lata dolo aequiparatur, to a degree equivalent to(civil)bad faith or intention, inasmuch as elected Members of the ISC are effectively 'caste adrift without provision' and The Council seeks to represent an unlawful position at the Public Local Inquiry.

13 It is perhaps important to observe that grounds for judicial review are classified under the heads of illegality irrationality and procedural impropriety(per Lord Diplock in the GCHQ case - CCSU v Minister for the Civil Service(1985) A.C.374 at pp.410-411)(Neil Collar,Planning(Law)2nd Edition at 8.54).

14. Upon the grounds, and for the reasons, expressed hereinbefore, it is my submission that the intended position of Officers and Councillors of The Council is, jointly and severally, ultra vires and therefore unlawful, and unlawful also having regard to the definition of irrationality, as per Lord Diplock(in CCSU supra), viz:

" a decision/

4.

"a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who applied his mind to the question to be decided could have arrived at it."

It is unlawful also in consideration of fairness arising from, in my submission, the procedural impropriety of The Council. This is submitted concerning the position of Members of the ISC are currently in, having regard also to the alleged importance of the called-in application and complexity of the issues arising from it. That is to say, whilst ISC Members intend to be, and will be, heard in support of the reasons for refusal in my submission it is unlawful, irrational and unfair, to a degree of absurdity, that said ISC Members who acted lawfully on behalf of The Council, are without the professional representation and without professional support in evidence, both of which is their lawful right. For the sake of completeness, if the status quo remains, the absurdity arises from ISC Members who acted on behalf of The Council, will be unlawfully, irrationally and improperly opposed by The Council.

PERORATION

Having regard to the rule non exemplis sed legibus iudicandum, the issues raised in my submission for my clients require to be determined by the Law; that is to say in accordance with the principles of Law which are applicable.

The ISC acted lawfully for and on behalf of The Council, therefore The Council's position at the Public Local Inquiry into the called-in application is, de facto et de jure, to be heard in support of the reasons for refusal of the application referred to. The Council's apparent intended position to appear against the act lawfully done in the name of The Council, is unlawful, irrational and amounts to a procedural impropriety.

It is unlawful, irrational, a procedural impropriety and an absurdity that the the ISC Members have been put in the position of appearing at the Inquiry, in support of the reasons for refusal, without professional representation and professional support in evidence heard which is their right in expectation and their lawful right inasmuch as the Officers of The Council are the servants of decisions lawfully taken by and on behalf of The Council.

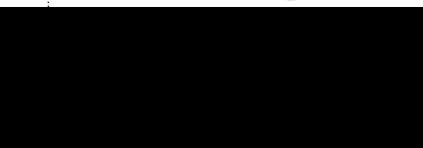
A. If the status quo, as evident at the pre-inquiry meeting, is maintained, the absurdity arises from the fact that ISC Members supporting a decision taken on behalf of The Council will be opposed by The Council acting unlawfully by contradicting its own decision and by abandoning those who were delegated to act on behalf of The Council.

5.

Please pass this letter to the Reporters for their consideration and determination.

Please note that I have copied this letter to all the "relevant persons" as recorded in the Note of the pre-inquiry meeting.

Yours faithfully,

A large black rectangular redaction box covers the signature area. To the left of the box, there are several handwritten scribbles in black ink.

John A.A. Agnew
Agent for Donald Banks & Others.

cc. all "RELEVANT PERSONS" (BY POST)