

Appeal Decision Notice

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Decision by Philip G Hutchinson, a Reporter appointed by the Scottish Ministers

- Planning appeal reference: P/PPA/300/2003
- Site address: Bogside near Elgin, IV30 8TN
- Appeal by Lovie Ltd against the decision by The Moray Council
- Planning application 06/00182 dated 24 January 2006, refused by notice dated 28 April 2009
- The development proposed: Extract and process sand and gravel, and erect and use a concrete batching plant
- Date of site visit by Reporter: 18 February 2010

Date of appeal decision: 17 March 2010

Decision

I dismiss the appeal and refuse to grant planning permission for the above development.

Reasoning

1. The key issues are (1) whether the proposal is consistent with the development plan and (2) if not, whether other material considerations justify a development plan departure or justify refusal on some other basis.
2. Although others have also been mentioned the most relevant parts of the development plan are policy 2 in The Moray Structure Plan 2007 and policies ER5, ER6, ED8, T2, T6, EP5, and EP7 in The Moray Local Plan 2008. I must take the development plan as it stands today. This is despite the long life of the proposal and the fact that the submitted Environmental Statement analyses a former version of the development plan. This reached its current state long before the application was refused.
3. In summary the said structure plan policy protects areas with natural heritage designations from inappropriate development. Among its 12 other aims it safeguards mineral resources and protects the countryside around Moray's main towns. Local plan policy ER5 sets out a 4-tier approach for the assessment of such proposals. Policy ER6 presumes against irreversible development on agricultural land of Class 3.1 or higher. Policy ED8 supports rural business development subject to 5 criteria dealing with various types of impact and locational justifications. Policy T2 requires new development to be satisfactorily accessed, presuming against access proposals which would significantly and adversely impact upon the surrounding landscape and environment. Policy T6 indicates that the road hierarchy will have a bearing on traffic management options. Policy EP5 requires surface water to be properly managed and that water courses are spared pollution.



Finally, EP7 presumes against development in flood risk areas which would increase the flood risk elsewhere.

4. The other material considerations are (i) the balance of the policy background which has been drawn to my attention (ii) likely visual and other local environmental impacts (iii) the likely traffic generation, its environmental impact, and whether it can be satisfactorily regulated (iv) any overriding need for the development and (v) local public opinion so far as it is based on valid planning matters. Many of the matters identified in this and the previous paragraph overlap and can be addressed simultaneously.

5. This 16.6 ha site was in cereals on my visit but it is unnecessary for me to dwell at length on the narrow question of its agricultural potential. I see reasonable differences of opinion on this given that there are pockets of Class 3.1 land on the perimeter of a larger area in Class 3.2. Minerals can only be exploited where they naturally occur. I cannot split hairs in this decision notice. The proposal strictly conflicts with the ER6 presumption against irreversible development on those parts of the site within Class 3.1. However it would be reasonable to take a view of the site as a whole. Despite its permanent loss to agriculture (with a water feature resulting) this provides no compelling basis for refusal. There is only limited conflict with local plan policies ER5 and ER6. The precise extent of this conflict is in dispute. I can move on to other matters since this is perhaps the least of the difficulties.

6. The Scottish Environment Protection Agency [SEPA] was involved from the outset. The agency requires further details which could be secured by condition. It is said to be content over the possible flood risk. Some objectors query this position. An indicative flood risk map shows part of the site within the Lossie flood plain. Recent floods have been much in the news. However, mineral extraction can only enhance, very modestly I agree, the storage capacity of the flood plain. While acknowledging previous flooding, I cannot see why it would be exacerbated or become more frequent as a result. There is obviously a risk that the actual workings could flood - an experience only for the operator and which would be equally shared with workings nearby. I cannot see the risk elsewhere being increased. I see no conflict with former Scottish Planning Policy 7 [SPP7] on which objectors have founded. Those aims survive in the consolidated SPP published very recently. The (non-continuous) earth bunds would not exclude floodwater from the site and redistribute it to other locations. The Moray flood alleviation team has apparently raised no concerns. The appeal turns on matters other than potential conflict with policies EP5 and EP7.

7. Some support, in principle, can be drawn from policy ED8 since a rural location is imperative. The creation of 3 jobs on site (and others indirectly) would be of undeniable benefit especially at this point in the general economic cycle. However, this policy requires care to be taken over siting, design, landscape, visual impact and emissions. In common with structure plan policy 2, it also requires attention to other environmental considerations and care over proximity to populated areas. I return to these remaining matters and to local plan policies T2 and T6 at paragraph 22 below, after dealing with my primary practical concerns in the intervening paragraphs.

8. I have a major concern over the likely visual impact given the almost featureless and relatively treeless nature of the immediate vicinity on the valley floor. The site is open to two treeless, level road frontages. With extraction taking place, with a batching plant, stockpiles and other facilities, even with earth bunds it would command the forward view of

northbound travellers. These would descend towards the site with clear views of the development (not least the batching plant) over a straight length of the B9010 for almost 1.5 km. These would include view from 'Viewpoint F' in the Environmental Statement. The unnatural bunds themselves would draw attention in such a flat agricultural scene. It is never too early for mineral operators to undertake advance tree planting in such a situation. Significantly some of the nearest trees provide effective screening for existing workings.

9. There remains a disturbing lack of detail of any screening and crushing plant (except that it would be mobile), of the concrete batching plant, or of car and plant parking areas, or of any buildings, any wheel wash and fuel store. Indicative details suggest that the batching plant would be 12m high and 40m long, in the south of the site. Having struggled at length, I fail to see how its substantial visual impact, and that of the bunds and workings generally, can be adequately mitigated over such an extensive site in views from the long southern approach. The magnitude of the effects in these prolonged views would be particularly high, not merely for sensitive receptors. I focus on this one important view only in the interests of brevity.

10. The proximity of the first phase to the nearest dwellings at Easter Manbeen is also disturbing. Their residents' anxiety over the likely degradation of their outlook is understandable. However visual impact must be assessed primarily so far as it concerns the wider public (as in the previous paragraph). I am also uneasy about the irritation factor of intermittent and varying noise such as that from extraction plant, HGVs and reversing beepers in this open landscape so close to houses. However, the full noise assessment persuades me that permission could not have been reasonably denied on this count had other factors been more straightforward and had there been convincing evidence of overriding need.

11. Dust impacts have been unreasonably belittled in the Environmental Statement. It claims that this area has above average rainfall and that most extracted material will be damp. I have a very different understanding of the local climate. That comment on rainfall is bizarre. From previous visits I accept local residents' point that soil storms are not uncommon locally after ploughing. Occupiers of the above properties are very sensitive receptors, given the proximity and orientation of those houses. Significant and strict precautions, probably including greater separation, would be needed to deal with dust migration.

12. The matters discussed in the previous two paragraphs could conceivably be addressed. This may involve amendments and strict planning conditions - only provided that there is a pressing and overriding need for more sand and gravel extraction at this location. In view of my findings in paragraph 21 below, this does not arise.

13. A much greater concern arises from the likely use by HGVs of the U112E Miltonduff Road to/from the A96(T) at Newton. There is already an issue about the traffic mix on this generally single track route. The development would exacerbate this. I used this road several times on either side of my visit. I find it most unsuited to HGVs. It bisects the community of Miltonduff where there is a 40 mph speed limit. It lacks pavements east of the distillery access. In some places it lacks street lights. It continues close by the village hall (used by a playgroup) then by the local primary school. Further west near a blind

railway over-bridge it passes in front of a day nursery. At this point I twice noted quite significant roadside parking congestion.

14. Responding directly to the appeal roads officials have tried to address the above problem by suggesting a planning condition requiring 4 new passing places on this minor road. These are sought on "ground over which the appellant has or can obtain control at locations agreed by the Roads Authority" to council specification. Elected members had been asked to apply a condition stating "prior to the commencement of development, details of the provision, location and design of four passing places shall be submitted" for prior approval. Both versions of this proposed condition fail the test of precision which is set out in Circular 4/1998 – *The Use of Conditions in Planning Permissions*. I also seriously question the enforceability and reasonableness of each version (these are additional tests from the Circular). Neither would specifically secure 4 passing places at particular locations within the appellant's control on either side of the U112E Miltonduff Road. Even if they could be guaranteed, these passing places would simply encourage greater use of this road. They would have no great bearing on driver behaviour, or on the safety of pedestrians or other vulnerable road users.

15. This minor road occupies the most obvious desire line for anyone moving between this location and points west of Elgin. Roads officials are presumably content with its additional use because the generated traffic would remain within its strict quantitative capacity. However, the pivotal matter is not mere road capacity. What has been seriously lost sight of is the likely high cost to local residents in terms of amenity, tranquillity, safety and general peace of mind. The last two points apply especially to the welfare of young children and parents escorting them to/from any of the above facilities. Planning officers inserted roads advice into their report without evaluating it against the Circular or from these additional valid planning angles.

16. The appellant company may well, and with the best of intentions, instruct its own drivers to use other routes. However such an 'in-house' rule is unenforceable by the planning authority whatever road markings or directional signs are used. There has been no suggestion that HGVs moving to/from the site would be exclusively driven by the company's own drivers. It is not unusual in these situations for other hauliers to also visit for sand, gravel or concrete. It has been admitted that only 'a majority' of HGVs will be owned and controlled by the appellant company. Moreover the number of HGV movements cannot be guaranteed to remain at their precise predicted levels. The number passing through Miltonduff in either direction could never be controlled by planning conditions.

17. The problems in paragraphs 13-16 above can only be resolved by preventing certain HGVs from using that route. I cannot secure that in this decision notice. The Environmental Statement devotes only a single page to transportation. Its coverage of this topic is rudimentary. It is predicated on an assumption that the market place will be confined to Moray and that 90% of HGVs (roughly 11 departing HGVs per day) will turn left up the B9010 towards Elgin. It does not explore how many HGVs per day would then take a second left turn onto the U112E Miltonduff Road (far less what their return route might be). Local residents focussed upon this matter from the outset. The planning application is now 4 years old. An answer is no closer.

18. I attribute this last point to the complexity of the matter. How additional HGVs can be denied the use of the U112E Miltonduff Road remains a conundrum. The only effective way might be a Traffic Regulation Order. However, I cannot express a view for or against that option in this decision notice. It may well bear upon, or prejudice, the interests of others who are not party to this appeal. There remains agricultural, distillery and other traffic to consider. This would all require considerable further thought.

19. A formal routeing agreement has been volunteered. This would be impossible to enforce. I accept that the appellant company would wish to keep to any such agreement having regard to its reputation. There remain two problems; (1) the drivers of non-company HGVs must also be considered, and; (2) planning permission would run with the land, not with the appellant company. It is not so unusual for other operators to come and go over the life of a sand and gravel quarry. This has apparently been the case locally in the recent past. I remain unable to unravel the above conundrum in this decision notice. It is one of the greatest obstacles in this case.

20. Had questions of visual amenity and access been finely balanced, a further concern would have come into play. The application relates purely to mineral extraction and the production of concrete. The minute dated 17 March 2009 records an explanation on the appellant's behalf that the development would include the sale of "precast concrete products and blocks". This clearly raises the possible scenario of on-site manufacturing and/or stockpiling of building products in addition to the production of wet concrete. The planning conditions recommended to elected members do not deal with these extra potential strands of business activity. Even if they were to coexist on some ancillary basis they would draw additional vehicles such as builders' HGVs or pick ups. Whatever its scale this additional type of traffic has not been assessed. Some would be bound to use the U112E Miltonduff Road. Its drivers could not be covered by any routeing agreement, formal or otherwise.

21. Objectors have pointed out that in accordance with national guidance The Moray Structure Plan 2007 records that (at that time) a 10 year supply of sand and gravel had planning permission. It also records that potential extensions to existing workings offer additional significant reserves. This language indicates that the 10 year supply is no 'minimum'. A supply of at least 10 years can be available if needed. I accept that time has moved on. On the other hand demand is likely to have abated on account of the economic climate. I have not been presented with detailed statistical or cartographic evidence about the precise scale or distribution of this supply. Very clear evidence of any shortfall would have been to the appellant's advantage. The local plan has been only recently adopted. There is no record of the forward supply having been questioned when it was placed on deposit. From what is in front of me I cannot safely conclude that there is convincing evidence of overriding need. There is certainly no unmet need of sufficient importance to outweigh the various problems discussed earlier.

22. It seems helpful at this stage to refer back to the key issues in the light of my later reasoning. So far as the development plan is concerned I see no fatal conflict with local plan policies ER5, ER6, EP5 or EP7. Some support can be drawn from local plan policy ED8 except that (i) at the present time there is no convincing locational justification, and (ii) the landscape and visual impacts would be unacceptable. The proposal therefore cannot be sufficiently reconciled with criteria (a) and (b) under this policy. There is also a

certain amount of conflict with criteria (b) and (e) under structure plan policy 2 since these try to protect the natural environment including the countryside around Moray's main towns. However, these areas of tension are secondary. They could have been set aside in the face of overriding need.

23. With reference to paragraphs 2 and 3 above I now turn to local plan policies T2 and T6. I consider there are serious problems in connection with both. It is not possible at this point to secure satisfactory modifications to the local road network (primarily from paragraphs 13-19 above). Moreover the U112E Miltonduff Road occupies the wrong level in the road hierarchy to be accepting additional volumes of HGVs, irrespective of the amenity impacts for adjacent residents and other users. I therefore find the proposal to be at odds with the development plan in multiple respects.

24. I now turn to the other material considerations identified in paragraph 4 above, starting with the first. I have been referred to various national policy documents including some in the former Scottish Planning Policy (1-23) series. These have recently been consolidated and abbreviated in new Scottish Planning Policy [SPP]. I have not referred back to parties on this new document since it is a consolidation and simplification of the earlier series. It contains no major policy shifts, certainly none which would justify setting aside the above difficulties. Although it is a guide to good practice rather than a policy document I have also considered Planning Advice Note 50 – *Controlling the Environmental Effects of Surface Mineral Workings* [PAN50] and its Annexes. Its paragraphs 28-32 reinforce some of the concerns expressed above. Nothing in this PAN outweighs any of my above reasoning.

25. Of those other material considerations mentioned in paragraph 4 I have now also dealt with the second, third and fourth. This leaves the fifth one - local public opinion so far as based on valid planning matters. I cannot endorse every objection. For example some are based on perceived likely reductions in property values; others place what I consider to be slightly disproportionate weight on the agricultural potential of the site. In addition I cannot rule out possible overriding need for all eternity. However, I have already endorsed many of the principal concerns expressed by objectors. It would be pointless to revisit them.

26. I conclude that the proposed development cannot be satisfactorily reconciled with the development plan and that other material considerations, taken together, also justify refusal. Careful account has been taken of all the other matters which have been raised but they do not outweigh those considerations on which this decision is based.



PHILIP G HUTCHINSON
Reporter