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DATE: 7 April 2011

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YOUR REF:

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Dear Jamie,

**CAIRNGORMS NATIONAL PARK AUTHORITY – APPEAL
XA158/10**

I can confirm that service of the Appeal As Amended has now been effected and I attach copy of the amended version for your file.

Yours sincerely



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IN THE COURT OF SESSION

**APPEAL
AS AMENDED**

**to
THE COURT OF SESSION
under**

**SECTION 238 OF THE TOWN AND COUNTRY PLANNING
(SCOTLAND) ACT 1997**

by

(1) THE CAIRNGORMS CAMPAIGN, a company limited by guarantee registered in Scotland under the Companies Acts (number SC179159) and a registered Scottish charity (number SC005523) having their Registered Offices at Brig o Lead, Forbes, Alford, Aberdeen-shire, AB33 8PD; **(2) BADENOCH & STRATHSPEY CONSERVATION GROUP**, an unincorporated association and registered Scottish charity (number SC003846) having their Registered Office at Fiodhag, Nethybridge, Inverness-shire PH25 3DJ; and **(3) SCOTTISH CAMPAIGN FOR NATIONAL PARKS**, an unincorporated association and registered Scottish charity (number SC031008) having their Registered Office at An Tearnann, East Lewiston, Drumnadrochit, Inverness-shire, IV63 6UJ.

APPELLANTS

against

The decision of the CAIRNGORMS NATIONAL PARK AUTHORITY, to adopt the CAIRNGORMS NATIONAL PARK LOCAL PLAN 2010 made on 29th October 2010 and advertised in the Edinburgh Gazette on 8th November 2010

The Cairngorms National Park Authority (CNPA) established under the National Parks (Scotland) Act 2000 by resolution dated 29 October 2010 adopted the Cairngorms National Park Local Plan 2010, as modified by the Authority. A copy of the said Local Plan (as modified) is appended to this appeal.

In this appeal the Appellants seek reduction of the following policies in the said Local Plan:

- Nethy Bridge NB/H2 – allocation for 40 houses; and
- NB/ED1 – allocation for business unit.

Carrbridge

- C/H1 – allocation for up to 117 dwelling houses.

An Camas Mor

- 1,500 dwelling houses developed over time.

Kingussie

- KG/H1 - 300 dwelling houses (with 75 provided during the life of the Local Plan).

PROTECTIVE COSTS ORDER

The Appellants crave the Court to grant the Appellants, being (in the case of The Cairngorms Campaign) a company limited by guarantee and (in the case of Badendoch & Strathspey Conservation Group and the Scottish Campaign for National Parks) unincorporated associations as well as all being registered Scottish charities, raising this appeal in the public interest, a Protective Costs Order (PCO). Details of the Appellants' grounds for seeking a PCO will be lodged hereafter.

GROUND OF APPEAL

The Appellants appeal against the adoption of the foresaid policies in Local Plan on the following grounds:

1. The Appellants challenge, in particular, the adoption of the following housing policies in the Local Plan. The Appellants contend that the CNPA acted irrationally and/or unreasonably in not following the recommendations of the Reporter, following upon a local inquiry, as set out hereafter. There was no good reason for the CNPA not to follow the recommendations of the Reporter, also having regard to the Grounds of Appeal set out hereafter.

a. Nethy Bridge

- NB/H2 – allocation for 40 houses; and
- NB/ED1 – allocation for business unit.

The Reporter recommended a suspension, extending for the lifetime of the Local Plan, on all housing and economic developments in Nethy Bridge, other than on windfall sites that already have detailed planning permission. Reference is made to Report paragraphs 66.20 to 66.24.

b. Carrbridge

- C/H1 – allocation for up to 117 dwelling houses.

The Reporter recommended that C/H1 should be deleted from the Carrbridge proposals map in the Local Plan, with the exception of the Boys Brigade Field. Reference is made to Report at paragraphs 60.20 to 60.25.

c. An Camas Mor

- Up to 1,500 dwelling houses and commercial and community uses developed over time.

The Reporter could not endorse the proposal for a new settlement at An Camas Mor due to landscape and natural heritage impacts and the

uncertainty over the housing land position. Reference is made to the Report at paragraphs 42.37 to 42.44.

d. Kingussie

- KG/H1 - 300 dwelling houses (with 75 provided during the life of the Local Plan).

The Reporter recommended KG/H1, as set out in the Deposit Local Plan Modifications (1st and 2nd) October 2008, to be amended to a size which could deliver 55 houses within the life of the adopted local plan; and for continuing consideration to be given to the subsequent phased release of the remainder of the site. Reference is made to the Report at paragraphs 54.15 to 54.17.

2. The Appellants contend that CNPA erred in law and/or acted unreasonably in adopting the housing policies of the Local Plan referred to in Ground of Appeal 1 above when the adoption of the said policies were contrary to the requirements of section 9(6) of the National Parks (Scotland) Act 2000. Section 9(6) of the 2000 Act requires CNPA to exercise its functions with a view to ensuring that the National Park aims are collectively achieved in a coordinated way. Where there is conflict between National Park aims, CNPA must give greater weight to the aim set out in section 1(a) of the 2000 Act being “to conserve and enhance the natural and cultural heritage of the area” and which CNPA has failed to do in the Local Plan. Having regard to the nature conservation issues set out hereafter, the housing allocations are detrimental to the obligation in section 1(a) of the 2000 Act “to conserve and enhance the natural ... heritage of the area” and the CNPA has failed to give greater weight to this requirement. Further the CNPA has failed to have proper regard to the findings of the Strategic Environmental Assessment undertaken for the Local Plan. Had they done so then, in implement of their obligation to

conserve and enhance the natural heritage of the area, no authority acting reasonably would have adopted the following housing policies.

- **Nethy Bridge** – the allocations for houses and business units at NB/H2 and NB/ED1 are on School Wood site which is an area of some 50 hectares of native Scots pine woodland with some birch, willow, aspen and juniper, both aspen and juniper being UK priority species and which are mentioned in the Cairngorms Local Biodiversity Action Plan. Lying between Abernethy Forest and Craigmore Wood, both of which are designated as capercaillie Special Protection Areas, the allocations are on the Ancient Woodland Inventory (as Ancient Woodland of semi-natural origin), and Caledonian pinewood is a priority habitat with its stronghold in Strathspey recognised under the European Habitats Directive 92/43/EEC. The wood supports high numbers of red squirrel (UK Priority species) dreys and a characteristic pinewood flora including dwarf shrubs and various wintergreens (*Pyrola*, *Orthilia*, and *Trientalis*) as well as the orchids Creeping lady's tresses (*Goodyera*) and lesser twayblade (*Listera cordata*). Crested tits are a species listed in the Cairngorms Local Biodiversity Action Plan that has a limited distribution in the UK and are present. Otters (*Lutra lutra*) are a European Protected Species and a qualifying feature of the River Spey SAC. There are habitat connectivity issues for some species. UK Priority species of invertebrates present include the blaeberry bee *Bombus monticola* and the Cousin German moth *Protolampra sobrina*. There are wood ants present listed on the Scottish Biodiversity List. The Mason Bee *Osmia uncinata*, a Biodiversity Action Plan species, is among notable invertebrates recorded. The beetle *Anastranglia sanguinolenta* (Red Data Book listed) is present. The rare *Laphria flava* fly (Red Book Listed) has also been recorded. The SEA notes (page 137) that (i) (H2) housing sites in Nethy Bridge will lead to the loss of Scots Pine plantation woodland and disturbance to the species that use it.

The development will lead to fragmentation of the local woodland habitat, (ii) that the cumulative effect on the Spey SAC is uncertain and that “Under the Habitats Directive, the Local Plan must be subject to an appropriate assessment to identify the implications for the conservation interests of the SAC.” No adequate assessment has been carried out. In summary the SEA concludes “The consented development proposals for the School Wood site in Nethy Bridge will (sic) have significant negative environmental effects in terms of loss of woodland habitat, fragmentation of habitat, and changes to the setting and character of Nethy Bridge.”

- **Carrbridge** – the woodland parts of C/H1 are a significant woodland habitat, which includes bog woodland a priority habitat under the Habitats Directive that is rare in the UK and Caledonian pinewood, which is also a priority habitat in terms of the Habitats Directive with its stronghold in the Strathspey. The woodland and associated habitats have national importance for the Scottish Biodiversity List and UK priority (Red Data Book 1) species the narrow headed ant *Formica exsecta*, and supports other Scottish Biodiversity List species including the hairy wood ant *Formica lugubris* and the Scottish wood ant *Formica aquilonia*. Moths including the Cousin German moth *Protolampra sobrina* and Haworth's Minor moth *Celaena haworthii* are present. It is a site for the (Red Data Book 2 listed) spider *Dipoena torva* that is on the Scottish Biodiversity List and has a restricted distribution. There are numerous red squirrel (*Sciurus vulgaris*) dreys along with activity by a diversity of invertebrates including the blaeberry bee *Bombus monticola* and such other UK priority species including the small pearl bordered fritillary butterfly *Boloria selene*, small heath butterfly *Coenonympha pamphilus* and the rare (Red Data Book listed) 5-spot ladybird (*Coccinella 5-punctata*). Significant fungi present include several species of toothed fungi that are UK priority species and for which the UK importance of the Cairngorms area is listed as high in the Cairngorms Local Biodiversity Action Plan and

the pine milkcap (*Lactarius musteus*) that has a limited distribution with a stronghold in pinewoods in the Cairngorms. Plants include the vulnerable UK Priority Action Plan species field gentian *Gentianella campestris*, the nationally scarce heath cudweed *Gnaphalium sylvaticum* that is now widely regarded as endangered not only in Britain and Ireland but also in North America and the nationally scarce heath dog violet (*Viola canina*), and juniper which is a UK Priority Species. Reptiles recently recorded on the site include adder *Vipera berus* and amphibians include newts and frogs. There is evidence that badgers use the area. It is understood that capercaillie use the site occasionally and are present in the wider area. Red squirrels, badger, adder and capercaillie are protected under the Wildlife and Countryside Act 1981. The SEA (page 104) notes that the allocation of the site does not avoid harm to the bog woodland habitat and risks harm to a range of rare ant species in or close to the site. The SEA concludes (page 106) that the proposal for site H1 is considered likely to have significant environmental effects. Dry heathland habitat is a European Priority Habitat and is also present on the site. Species rich grassland is also present on the site and supports a significant assemblage of fungi including the blushing waxcap (*Hygrocybe ovina*) and the Provisional European Red Listed fungus violet coral (*Clavaria zollingeri*).

- **An Camas Mor** – the Reporter’s recommendation that the proposed development should not be endorsed was based, in part, on the considerable uncertainty, especially about environmental issues. The Local Plan [page 82 – VI] notes that the development has the potential to have significant effects on the river Spey SAC.. The site is in close proximity to the Cairngorms SPA for which the qualifying features include capercaillie, osprey, merlin, Scottish crossbill and peregrine. The site is in close proximity to the Cairngorms SAC for which otter (*Lutra lutra*) is a qualifying

feature. The site has long been recognised by Scottish Natural Heritage to include an extensive area of the Biodiversity Action Plan habitat lowland heath of the bearberry heath (H16) community considered characteristic of moderate altitudes of the east-central Highlands and included in the European Priority Habitat dry heath. The site is situated in an area of high invertebrate biodiversity where in 2008 a Red Data Book 2 nationally vulnerable damselfly, a Red Data Book 3 (nationally rare) fly, 21 nationally scarce invertebrates and 61 nationally local invertebrates were recorded. It includes woodland on the Ancient Woodland Inventory. Naturally regenerating Caledonian pinewood (a European Priority Habitat) is well represented on site. It includes land used by a regionally important population of badger, and habitat suitable for wildcat and woodland grouse including black grouse. Other Birds on the UK Red List of high conservation concern breeding in the area include skylark, yellowhammer and cuckoo. The spotted flycatcher (UK Priority species) has been recorded. The Small Heath butterfly *Coenonympha pamphilus* is a Biodiversity Action Plan species and the Pearl-bordered fritillary (UK Priority species) are present, seven nationally scarce notable B species of *lepidoptera* were recorded in 2008. The Notable A weevil *Magdalis* is also present. There is record of the bearberry marble moth *Olethreutes arbutella* that is closely associated with bearberry in the Highlands. The site supports a notable population of the Small Mesh-weaver *Dictyna pusilla* that is a Biodiversity Action Plan species of spider. The spider *Maro minutus* that has proposed vulnerable status was one of 36 species of spiders newly recorded from the site in 2010. It appears to be the main stronghold in Scotland for the slender ground-hopper *Tetrix subulata*, a species also first found at this site in 2010 and possibly only once before in Scotland. Plants at the site include the nationally scarce gentian *Gentianella campestris* as well as the UK Priority species juniper and aspen mentioned in the Cairngorms Local Biodiversity Action Plan. The Local Plan fails to note that the SEA records that the development is likely to have

significant effects on priority species and habitats and will result in the loss of some habitats (page 78 & 79). The Local Plan states that development of the An Camas Mor site has potential to have significant effects on the river Spey SAC (p82 VI). The soils include iron humus podsol which is of limited distribution and only develops on undisturbed sites with appropriate climatic conditions. At page 80 the SEA notes that the new settlement proposal has potential to have a range of positive and negative environmental effects that cannot be accurately predicted without further detailed information about the proposals and the site. Applying the precautionary principle the site, which is in close proximity to European sites, should not have been allocated for this development until the negative environmental effects had been properly investigated.

- **Kingussie** – A significant interest in the area is the wildcat (*Felis silvestris*) which is a European Protected Species for which the UK importance of the Cairngorms area population is listed as high in the Cairngorms Local Biodiversity Action Plan. The effect on this species ought to have been evaluated in a SEA. Red squirrels are also present with dreys in a wooded part and are a UK Priority Species for which the Cairngorms Biodiversity Action Plan identifies the UK importance of the population in the Cairngorms area as very high. The open area is visited by some birds on the UK red list of birds of high conservation concern such as song thrush and lapwing and may still be used by brown hare, a UK priority species, and badger, a protected species. The small Pearl-bordered fritillary butterfly (a UK Priority species) is also present.

3. The Appellants contend that CNPA acted unlawfully and/or unreasonably by failing to follow the provisions of section 14 of the 2000 Act whereby a National Park authority in exercising functions so far as affecting a National

Park, must have regard to the National Park Plan as adopted under section 12 (7) (a) of the 2000 Act. The CNPA ought to have had proper regard to:

- Section 5 “Strategic Objectives”
 - 5.1
 - “Strategic Objectives for Landscape, Built and Historic Environment” at b) and d);
 - “Strategic Objectives for Biodiversity” at a), b), c) and e);
 - “Strategic Objectives for Forest and Woodland Management” at e) and g);
 - 5.2
 - “Living and Working in the Park”,
 - “Strategic Objectives for Sustainable Communities” at a), b) and c);
 - “Strategic Objectives for Housing at a) and d);
 - 5.3
 - “Strategic Objectives for Sustainable Tourism” at c) and f)
- Section 6 “Conserving and Enhancing Biodiversity and Landscapes”
 - Introduction
 - Outcomes for 2012
 - 3d.

Further, section 264A of the Town and Country Planning (Scotland) Act 1997 provides that:

“In the exercise, with respect to any land in a National Park, of any power under the planning Acts, special attention shall be paid to the desirability of exercising the power consistently with the National Park Plan as adopted under section 12(7)(a) of the National Parks (Scotland) Act 2000 (asp 10).”

If the CNPA had had proper regard to said Objectives of the National Park Plan, and if it had exercised its powers consistently with the National Park Plan, it would not have approved the foresaid housing proposals.

4. The Appellants contend that CNPA acted unlawfully by not observing section 11(3)(a) of the 1997 Act in preparing the Local Plan. No reasonable authority would consider measures contained at policies NB/ED1, NB/H2 (both Nethy Bridge), C/H1 (Carr-bridge), KG/H1 (Kingussie), and those supporting An Camas Mor of the Local Plan as being fit for the conservation of the natural beauty and amenity of that land and the improvement of the physical environment.
5. The Appellants contend that CNPA acted unlawfully and/or unreasonably in failing to further the conservation of biodiversity as required under section 1 of the Nature Conservation (Scotland) Act 2004 by approving housing densities at Kingussie, , An Camas Mor, Nethy Bridge and Carrbridge set out in the Local Plan, which conflict with this obligation. Reference is made to the biodiversity issues referred to in Ground of Appeal 2 above.
6. The Appellants contend that CNPA acted unlawfully in adopting the Local Plan without an adequate appropriate assessment in terms of Regulation 48 of The Conservation (Natural Habitats etc.) Regulations 1994 having been carried out in respect of the potential cumulative effects of the settlements on the Spey SAC and the other European Sites in the area. For example, the SEA (page 128 and 135) commented on the Kingussie and Nethy Bridge housing proposals and their potential effect on the Spey SAC and said “Under the Habitats Directive, the Local Plan must be subject to an appropriate assessment to identify the implications for the conservation interests of the SAC.” The potential cumulative effects of the other house proposals on the Spey SAC were also noted in the SEA.. The purported “Appropriate Assessment” was not an adequate Assessment that complies with the requirements of Regulation 48 and the Habitats Directive [92/43/EEC]. In any event, so far as the appellants can ascertain the “Appropriate Assessment” was not available to the Reporters, and therefore to the public, during the inquiry. In the whole circumstances it would have been appropriate to have obtained

the opinion of the public – article 6.3 of the Habitats Directive – and this was not done.

7. The Appellants contend that CNPA acted unreasonably and/or contrary to natural justice in failing to act upon the fundamental concerns of the Reporter (paragraphs 24.18 – 24.19 and 24.48 – 24.50 of the Local Plan Inquiry Report – December 2009) in terms of its “blunt policy” on affordable housing. CNPA have failed to adopt alternative methods for achieving affordable housing in the National Park to reduce what the Reporter considered “an over provision in the general land supply” other than via planning gain through large housing allocations on greenfield land including those listed in Ground of Appeal 1 above, and which large housing allocations (as stated in Grounds of Appeal 2 above) necessarily conflict with the first aim of the National Park at section 1(a) of the 2000 Act and the obligation under section 14 of the 2000 Act to have regard to the National Park Plan (as per Ground of Appeal 3 above).

8. The Appellants, who are NGO charities having a particular interest in conservation issues in area subject to the Local Plan, have title and interest to make this appeal, in that one or more of their number made representations in respect of the policies which are subject to this appeal. In respect that a substantial part of the appeal relates to the CNPA’s failures in relation their obligations under section 9(6) of the National Parks (Scotland) Act 2000 and to their obligations under the Birds and Habitats Directives, the appellants have title and interest to raise issues arising out of the CNPA’s failures to take proper account of these Directives. They are parties aggrieved by these failures, the failure to give adequate reasons for not following the Reporter’s recommendations and the failure to have proper regard to their objections, in that any failure to protect or enhance the natural environment is a matter that affects the appellants in promoting their objectives.

IN RESPECT WHEREOF

Appendix: Cairngorms National Park Local Plan 2010-12-16

Service:

Service in common form, upon an induciae of 21 days, is sought upon:

The Cairngorms National Park Authority, having their principal offices at 14 The Square, Grantown on Spey, PH26 3HG

Service in common form, upon an induciae of 21 days, is sought upon the following interested parties:

- (i) Davall Developments, Myrtlefield House, Grampian Road, Aviemore PH22 1RH;
- (ii) An Camas Mor LLP, Rothiemurcus Estate, Aviemore, Inverness-shire PH22 1QH;
- (iii) Tulloch Homes Limited, Stoneyfield House, Stoneyfield Business Park, Inverness IV2 7PA;
- (iv) Highlands and Islands Enterprise, Cowan House, Inverness Retail & Business Park, Inverness IV2 7GF;
- (v) Aviemore and Vicinity Community Council, c/o The Secretary, 12 Craig Na Gower Avenue, Aviemore PH22 1RW