

# SCOTTISH EXECUTIVE

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**Your ref. TT/ELPEOOO I**  
**Our ref PPA/290/63**

12 June 2002

Dear Sirs

## **TOWN AND COUNTRY PLANNING (SCOTLAND) ACT 1997: SECTION 47 AND SCHEDULE 4**

### **PLANNING APPEAL BY HALLHILL DEVELOPMENTS LIMITED: OUTLINE PLANNING PERMISSION FOR THE CREATION OF WILDLIFE HABITAT WITH WOODLAND TRAIL AND RIVERSIDE WALKWAY, REMEDIATION OF CONTAMINATED LAND, AND THE DEVELOPMENT OF 25 RESIDENTIAL UNITS AT SPRINGFIELD MILL, POLTON, MIDLOTHIAN**

1. I refer to your client's appeal, which I have been appointed to determine, against the deemed refusal of outline planning permission by Midlothian Council for the above development. I held a public local inquiry into the appeal at Polton Bowling Club on 18, 19, 20, 21, 25 and 28 March 2002 and made an accompanied inspection of the appeal site and the surrounding area on 28 March 2002. The submissions were completed by the letter of 23 April from your client's solicitors, forwarding the closing submission for the appellant. I have now considered the evidence at the inquiry and the written submissions.

2. The appeal site, which extends to 6.29 ha, lies in a steep narrow gorge on the south bank of the river North Esk, to the south of Loanhead and adjacent to the small village of Polton. There is a right-angled bend in the river at the north west corner of the site, with the river forming the north and west boundaries of the site. It is the site of a former paper mill and all buildings, apart from a large 4 storey brick built building, have been demolished. It is an area of derelict land, with much demolition material remaining on the site. The site is understood to be contaminated from its past industrial uses. Woodlands have generated in the southern portion of the site, which lies at a higher level than the northern portion and contains a waste mound. In the centre of the site, lies a former pond area.

3 The application for planning permission, which is in outline, proposes the erection of 25 houses, broadly in the centre of the site, accessed from Polton Road at a point just south of the road bridge over the river. The houses would be set back 30m from the river bank, on raised ground, to enable a riverside walkway, woodland trail, and wildlife habitat to be created around the housing.

4. In response to consultation, Scottish Natural Heritage (SNH) referred to their preference for the scheme being promoted by the Springfield Mill Action Group (SMAG) for the decontamination of the site and the provision of a wildlife habitat. The Scottish Environment Protection Agency (SEPA) required more investigation of the flood risk and the extent of contamination. The Public Analyst was also unable to be definitive in the absence of more detailed information in regard to the nature and extent of contamination.

5. In response to notification, there were 82 objections from local residents and interested parties. These objections were based on issues including flooding, unsuitable access roads, the impact on the landscape in an Area of Great Landscape Value (AGLV), proximity to a SSSI at Hewan Bank across the river, lack of capacity at the local primary school, the doubling of the size of the hamlet, and decontamination of the site being achievable by way of a proposal which would see the entire site developed as a wildlife habitat.

6. The development plan comprises the Lothian Structure Plan, approved in 1997, and the Bonnyrigg and Loanhead Local Plan, adopted in 1992. The Finalised Draft Midlothian Local Plan (FDMLP) is the subject of an ongoing local plan inquiry which has heard objections from both your client and SMAG into the future allocation of the site.

7 The application for permission was dated 26 February 2001 and your client's appeal, based on the council's failure to determine the application, was lodged on 29 August 2001, in advance of the start of the local plan inquiry in September of that year.

## **BACKGROUND**

8. The appellant owns a relatively small portion of the appeal site (0.63ha), the balance belonging to the council. In 1988, the former Lothian Regional Council promoted a compulsory purchase order to acquire the appellant's portion of the site. The appellant successfully opposed the order at a public inquiry and the order was not confirmed by the Secretary of State. It is understood that in the course of the inquiry, the appellant claimed that he could re-develop and decontaminate the entire site in a relatively short period of time.

9. The current local plan appears to have been adopted on the basis of the outcome of the compulsory purchase order inquiry. Despite the site being allocated for housing in 1992, no application for planning permission was made until February 2001. In the interim, there had been discussions between the council and the appellant on a range of layouts. In 1992, planning permission was granted for the creation of a bund to prevent flooding but the permission was never implemented and has now lapsed.

10. In 1998/9, the Springfield Mill Action Group (SMAG) was formed, with a view to converting the entire site to a wildlife habitat, with public access. Funding was obtained to carry out a site survey under the auspices of the Scottish Wildlife Trust (SWT). A feasibility report, covering issues of contamination, flooding risk, detailed proposals, and costings was prepared by a firm of landscape architects, the Turnbull Jeffrey Partnership, (the TJP report). Based on this research, SMAG proceeded to work up a detailed proposal.

11. Towards the end of the 1990s, the council began a review of the local plan and was faced with the 1992 allocation and the competing SMAG proposal. In these circumstances, the council initially retained the 1992 allocation in the consultative draft but indicated that, if SMAG could demonstrate within six months that its proposal could be funded, then the site would be reallocated for use as a wildlife habitat. SMAG apparently was able to satisfy the council in regard to funding. Shortly thereafter, the application to which this appeal relates was lodged along with objections to the FDMLP. It should be noted that SMAG also objected to the FDMLP.

12. Subsequent to the adoption of the current local plan in 1992, the Lothian Structure Plan was reviewed and approved in 1997. A further review of the structure plan is in the early stages of preparation.

13. In February 2002, a revised illustrative site layout, showing the proposed housing set back a minimum of 30m from the river to provide a larger flood plain, and studies of flood risk assessment and the stability of the Hewan Bank, were the subject of discussions involving SEPA, SNR and the council. It is understood that, on the basis of the information supplied, both SEPA and SNH withdrew their earlier objections.

## **RELEVANT POLICIES**

14. The structure plan policies of relevance are policies ENV1, 16, 20, 21, 24, 30, 40, 55, ED4 and HI. Policy HI supports development of the established housing land supply in accordance with a housing land audit. Policy ED4 supports the continuing use of brownfield former industrial business sites, except where unsuitable for or surplus to requirements or incompatible with local planning policies. In the case of these exceptions, other compatible uses (particularly housing) will be supported.

15. The environment policies cover a range of issues. These include encouraging the development of infill and brownfield sites and conversion of existing buildings, a presumption against isolated new development in the countryside, except for countryside related activity and local plans being required to safeguard Areas of Great Landscape Value (AGLVS) and conserve and enhance other valuable landscapes. In addition, there is a presumption against development affecting regional or local areas of nature conservation, except in certain defined circumstances. Local plans should contain policies to protect the ecological and landscape value of rivers including the Esk and to rehabilitate the remaining areas of derelict and contaminated land. Finally, councils are required to review flood risks and adopt local plan policies to reduce risk, in defining land use allocations.

16. The relevant policies of the adopted local plan are those set out at the end of paragraphs 15.17, 15.22, 15.26, and 15.30. These relate, respectively, to control of development in the countryside, rehabilitation of derelict sites, control over development in AGLVS, and woodland management plans for river valleys. Table 2 in paragraph 8.3 on page 12 identifies 3ha. of the appeal site for a maximum of 25 houses.

17. In the FDMLP, the relevant policies are RPI, 5, 6, 7, 8, 10 and 12, policy TRAN2 and DERL1. Policy RPI contains a presumption against development in the countryside. Policies RP5 - 8 and 10 restrict development where it might (1) lead to loss of or damage to woodlands and hedges which contribute to the amenity, nature conservation and landscape character: (2) adversely affect an AGLV: (3) not respect the quality of the landscape character: (4) adversely affect the water environment: and (5) adversely affect the integrity of a conservation site of national importance. Policy RP 12 relates to the development of the Springfield Mill site as a local wildlife site. Policy TRAN2 provides that major new traffic generating uses will only be permitted where they are well located for public transport and make adequate provision for links to cycling and walking networks. Policy DERL1 relates to the treatment of vacant and derelict sites, the after-use not being in conflict with other plan policies. The intention to redevelop the Springfield Mill site as a wildlife site is specifically mentioned.

#### **MATTERS AGREED BETWEEN THE APPELLANT AND COUNCIL**

18. At the start of the inquiry, the council conceded that it no longer wished to maintain its opposition to the proposal based on issues of flooding, the stability of Hewan Bank, and the capacity of the local primary school.

#### **THE CASE FOR THE APPELLANT**

19. In support of your client's appeal, it is submitted that the adopted local plan specifically allocates the appeal site for an estimated 25 houses and seeks the rehabilitation of the Springfield Mill site. While the plan also shows the site within the countryside, the housing and rehabilitation policies must take precedence over the countryside policy in that the council, in allocating the site for housing, must have regarded the impact on the countryside and the AGLV as acceptable.

20. As regards the structure plan, the only policy of relevance is policy ENVI6 concerning isolated new development in the countryside. Mr Mather, in cross-examination, accepted that the appeal proposals, lying adjacent to the existing settlement at Polton, did not constitute isolated new development in the countryside. Ms Learmonth, the council's development control witness, did not share this view but was unable to provide a plausible explanation for her opinion. Other development plan policies referred to by the council either do not apply or are dependent on the specific impact of the proposals.

21. The proposal therefore accords with the development plan and planning permission should be granted, unless there are other material considerations to justify refusal. As regards material considerations, these are identified as flooding, contamination, stability of the Hewan Bank, transportation, ecology, landscape, illustrative layout, the FDNLP, and the interim report of the local plan Reporter.

22. On the issue of flooding, the proposal, as adjusted, no longer involves building on the flood plain, the housing being set, back a minimum of 30m from the river. In addition, there would be no adverse impact or increase in flood risk downstream. Your technical expert on flooding issues also concluded that the same position would be maintained, even if a slippage of the Hewan Bank, such as took place in 1979, were to recur.

23. The expert refuted the SMAG suggestion that the proposal would prevent the site being used to increase the flood plain, on the grounds that there was insufficient volume available within the site to make any marked difference. Flooding from the Bilston Burn downstream at the bridge over the river would be unaffected by the proposed development.

24. While SMAG suggested that experts could be wrong, the methodology and conclusions remained solid under cross-examination. Support for the methodology and conclusions is evidenced by the acceptance by both SEPA and SNH and the concession by the council on the issue.

25. As regards contamination, paragraphs 24-26 of PAN 33 indicate that this is a material consideration and that development of contaminated sites can be a method of securing rehabilitation. This is the approach taken by both the council and your client since the late 1980s. While there is agreement all round that the site is contaminated, the extent of the contamination is disputed. The council has recently appointed consultants to investigate contaminated sites and Springfield Mill is understood to be the first site to be investigated.

26. Your technical witness on the contamination issues stated that the site falls within the definition of contaminated land set out in the Environment Protection Act 1990 (EPA). The fact of the matter is that pollution of controlled waters is being caused and that the statutory definition applies. The site causes or is likely to cause significant harm. While SMAG suggested that guidance on the EPA indicated that a pragmatic rather than literal approach was taken to its interpretation of "contaminated land", your witness testified that even the process of site investigation to establish the extent of contamination constituted remediation. Until such time as a full investigation has been undertaken, there would be insufficient information to determine what a "pragmatic approach" might entail.

27. The evidence of your witness is that the SNUG estimates for remediation are over optimistic and that his estimate of £287k was nearer the mark. This was £105k higher than the SMAG estimate and did not include provision for treating surface and ground water. In evidence, SMAG acknowledged some concern at the difference in costings. While your client accepts that the SMACR proposal does not involve remediation to the standards required for a housing use on the site, nevertheless the SMAG costings could be much higher than indicated. In contrast, the costings for your client's proposal have been based on a cautious approach and can be accommodated within a scheme that would attract developers. The costs per housing unit were not out of the ordinary, when compared to other schemes.

28. The SMAG proposal relies heavily on external funding sources. Even the council's indication of support is threatened by the decision of national government that 65% of landfill tax credits should be allocated to sustainable waste management. If that target were applied, SMAG would require the council's entire annual budget. In reality, it might take some years for

the total funding package to appear. Given the ecological evidence presented at the inquiry, there is no case to suggest that the SMAG proposal is preferable to the appeal proposal. Furthermore, the SMAG proposal is unlikely to secure the decontamination of the site within a reasonable time scale. The SMAG suggestion that its project could be phased causes more problems than solutions. There is no information on the amount of basic remediation works required and costs involved. The danger is that either the works will not proceed for lack of funding or, if commenced, will run out of funding prior to completion. In contrast, the appeal proposal would secure the rehabilitation of the site.

29. As regards the stability of the Hewan Bank, your technical witness confirmed that there would be no material risk of damage to the proposed residential development or of flooding, as a result of slippage of the Hewan Bank. A recurrence of the 1979 event is considered unlikely and, even if it did recur, the risk of flooding the proposed housing development would be insignificant. While third parties drew attention to the speed of the 1979 event, it is evident that the SMAG proposal would be under similar threat.

30. On transportation, the council was still prepared in June 2000 to support a housing use of the site, despite the publication of NPPG 17 a year earlier. The council's position at the inquiry now relies heavily on the NPPG. Your transportation witness testified that, even if the development is heavily car dependent, the result would not be a material impact on future traffic flows, being within the range currently observed. Your client and the council agree that current traffic levels are low. In these circumstances, the proposed development cannot be considered a "major traffic generating use".

31. Your client and the council are in broad agreement in regard to the deficiencies of the existing road network, the accident records, public transport availability, traffic counts, and the level of traffic likely to be generated from the development. The number of new trips generated by the development would be relatively small in relation to overall traffic flows and, because of daily variability, would be imperceptible in traffic terms.

32. The physical characteristics of the road network are such as to require drivers to take particular care and to prevent speeding. These characteristics combine to provide natural traffic calming measures. While the council submits that the development may exacerbate the existing situation, this is insufficient in itself to justify refusal of planning permission. Paragraph 77 of NPPG 17 advises that planning permission should not be granted for major traffic generating uses where links to walking, cycling and public transport are inadequate. Given that your witness and the council's transportation witness agreed that the proposed development was not a major traffic generating use, then the proposal does accord with NPPG 17. The residential element of the proposal might assist in preserving the existing one bus per day service to and from Edinburgh.

33. The, transportation issue should not be viewed in isolation from other issues affecting sustainable development. In this regard, paragraph 6 of NPPG 1 identifies better access by non-private car modes of transport as one of 8 sustainable development objectives. The proposal meets at least 2 other of the objectives cited, namely, promoting regeneration and the use of previously developed land. Detailed design issues might possibly meet other objectives. While

access to non- private car modes of transport is not good, the proposal should be assessed in the round. The transportation issue, on its own, is insufficient as a ground for refusal of the appeal.

34. In terms of ecology, your client provided the only expert evidence on this subject and his evidence withstood the test of cross-examination. The other parties simply relied on the survey undertaken by SWT. The expert evidence confirmed that the site has no special nature conservation value and that the diversity of species is only one of 9 primary factors in determining ecological value. Even if the diversity of species were significant, remediation measures would disturb the areas with the greatest diversity. The appeal proposal and the SMAG scheme are similar in that both involve the creation of new habitats, with public access. There is no ecological reason to justify refusal of planning permission.

35. Your expert also exposed the weaknesses of the SMAG scheme and the failure of the council to assess its value. The site is not unique in terms of wildlife interest. It is an open space, which SMAG proposes to convert into a wildlife habitat. This would involve considerable disruption to the site as it currently exists. The proposal is similar in concept to establishing a garden, with public access for educational and recreational use. Public access would reduce the extent to which fauna would occupy the site. The SMAG proposal does not represent a regionally important wildlife reserve but something altogether less significant.

36. The difference between the SMAG scheme and the proposal is simply that the latter involves the erection of 25 houses, entailing a smaller area for the, wildlife habitat. Your expert testified that the residential occupation and its consequences would not adversely affect the ecological interest of the site. In these circumstances, it was unfortunate that SMAG had felt unable to discuss proposals with your client, which might have culminated in a mutually acceptable solution. In this regard, the true motivation of SMAG is questioned.

37. On landscape issues, the council relied on its landscape architect to give evidence. Unfortunately, his evidence on landscape value amounted to no more than one sentence in his precognition, with no discussion or analysis to support his conclusion. In contrast, your client's witness gave independent expert evidence to the effect that landform and topography would visually contain the site, with little impact on the surrounding area. This appeared to be accepted by all parties, in the sense that discussion on this subject centred on the view from the path along the Hewan Bank. From that vantage point, there would be limited change, in that the development would be in keeping with what one would expect to see at the edge of a settlement, with buildings on the site, Polton village, and Bonnyrigg all being in view. A further factor is that the footpath along the Hewan Bank is both steep and narrow and not frequently used. In contrast, the view from the road would be significant but the houses would be largely screened from view.

38. Evidence was led from your client's architect on an illustrative layout which established that the site can accommodate 25 houses, while at the same time meeting the requirements of the flood assessment, the Hewan Bank study and the council's design guidelines. The layout presented to the inquiry' also showed the retention of the bulk of the existing tree cover. The reason for producing the layout was to counter any possible suggestion from other parties that a satisfactory layout meeting the various requirements could not be achieved.

39. As regards the FDMLP, it is submitted that little weight should be attached to this document in this appeal. In reallocating the appeal site from housing to a wildlife site, the council was misinformed on a number of matters. Councillors were given to believe that your client had been responsible for the minimal progress made on the site since the 1989 CPO inquiry, that attempts had been made to increase the number of houses to 75, that the SMAG scheme would avoid disruption of contaminated areas unlike the appeal proposal, and that the site had some ecological value. Your client's evidence at the inquiry categorically refutes these claims. The council did not have the benefit of your client's appraisal of the SMAG costings, which indicates that these costs are grossly underestimated. For these reasons, the FDMLP should carry little weight and more reliance should be placed on the evidence at the inquiry.

40. The interim draft report on the FDMLP is unprecedented and is the subject of separate representations at the highest level. The SEIRU covering letter correctly indicates that the draft can be no more than a material consideration and is in no way binding upon me in this appeal. Likewise, the draft is not binding on the council, which might pursue a further modification in the light of having been misinformed at an earlier stage as outlined in paragraph 39 above and in the light of the local plan Reporter having also been misinformed on a number of these issues. Again, the use of the terminology "interim draft" would indicate that the local plan Reporter might not have reached a final view.

41. Little weight should attach to the interim draft. The approach and duties of a local plan Reporter are different from an appeal Reporter who must follow section 25 of the Act. The local plan Reporter has to consider the draft local plan against a raft of national planning policy guidelines. Such guidelines generally contain separate guidance for development plan and development control purposes. The local plan Reporter is concerned largely with the former, the appeal Reporter with the latter. The local plan Reporter can consider the merits of alternative schemes, while the appeal Reporter can only consider the appeal proposal. In addition, new information is at hand on a number of issues and the draft report is flawed because the local plan Reporter was misinformed on a number of scientific and technical issues.

42. The new information available comprises the Flood Risk Assessment of February 2002, the Hewan Bank Study, and the assessment of species diversity within each of the compartments on site.

43. The local plan Reporter was either misinformed on or misunderstood the following matters: -

- (a) the ecological value of the site and species diversity
- (b) the site's significance as part of a wider countryside corridor
- (c) incursion into the woodland
- (d) the definition of "contaminated land"
- (e) the risks involved in SMAGs remediation measures

44. As regards the council's submission that this appeal is premature pending the outcome of the local plan inquiry, there was no evidence at the inquiry to support such a finding. The appeal relates to localised issues and the outcomes would not affect other parts of the FDMLP. At least another 3 appeals associated with local plan objections have been determined with the council failing to raise prematurity as a ground for refusal.

45. The proposal accords with the development plan. There are no material considerations to justify refusal. On the contrary, the material considerations support the appeal and planning permission should be granted.

### **THE CASE FOR THE COUNCIL**

46. The council submits that the adopted local plan is 10 years old and is in the process of being replaced. While the plan allocated 3ha. of land at the appeal site for 25 houses, this was not done for reasons of strategic housing land supply. The strategic housing policies in the plan are policies IHPI, 3, and 4 and Springfield Mill does not come under these policies as read with Table 2 in the plan. Paragraph 15.26 confirms the importance of the river valley and indicates that AGI-V status would provide more control over inappropriate development, specifically housing,

47. The Springfield Mill allocation was identified as a means of cross funding the rehabilitation of the site and this view is supported by the text at paragraphs 15.18, 15.21 and the policy, which follows paragraph 15.22. Apart from the plan, a committee report of 14 April 1988 (MC24), indicates that the principal reason for allocating the site in the 1992 plan was to secure the rehabilitation of the derelict area.

48. Since adoption of the 1992 plan, circumstances have changed considerably. In particular, all NPPGS, referred to at the inquiry, have been published. The 1992 plan was prepared to conform to a structure plan dating from the mid 1980s, which was itself replaced in 1994. A further structure plan revision is currently under way. The most significant change, however, is the possibility of achieving the rehabilitation of the site by a means other than housing. Little weight should therefore be accorded to the adopted local plan.

49. As regards the approved structure plan, its relevance to the appeal is limited by the fact that it sets policies to which the local plan must conform, and it is on that basis that the FDMLP has been prepared.

50. The FDMLP is a significant material consideration in this appeal. It conforms to structure plan policies and current national planning policy on issues such as housing, transportation, and natural heritage. The plan specifically acknowledges the former allocation of the site for housing in re-allocating the site as a wildlife site with public access.

51. The appellant's suggestion that the council was misled or misinformed in coming to a decision to reallocate the site is entirely unfounded. The report to the Policy and Resources committee of the council on 28 November 1999 (MC7) contained a wealth of information on the subject, weighing up the arguments for and against a housing use of the site. Likewise, the

suggestion that the SMAG scheme, which the council supports, is not financially viable is unfounded.

52. On the contamination issue, there is no evidence that remediation would be necessary. While much play was made of a strict interpretation of the definition of contaminated land in terms of the EPA, there is also a significant body of subordinate legislation and guidance on the contaminated land regime under the EPA. Under this guidance, enforcing authorities are urged to weigh up the costs and benefits of carrying out remediation and there was no evidence before the inquiry on which to conclude that positive remediation action would be required by an enforcing authority. The evidence indicates that river quality in the vicinity of the site is good and there is no evidence of any leachate causing harm to flora and fauna. "The further site investigation is clearly essential, there is no evidence on which to conclude that the SMAG proposal is not financially viable.

53. SMAG has already obtained financial support, as evidenced by a committee report of 3 April 2001 (MC8). While the appellant sought to cast doubt on the availability of landfill tax credit funding being available, the council has an annual budget of approximately £200k from this source and has already committed itself to grant an award to SMAG, dependent on the outcome of the local plan inquiry. A further factor is that the council is not the only body capable of distributing landfill tax credits.

54. The appellant suggested that there had been a recent change in the law to the effect that 65% of all landfill tax credits required to be applied to sustainable waste management projects. While central government has mooted such a proposal, the fact of the matter is that there has been no legislative change to this effect. The reason for the suggestion appears to be that landfill tax is not reducing the amount of landfill waste disposal that had been anticipated and a further suggestion of central government is to raise landfill tax from £12 per tonne to £45 per tonne. Accordingly, if the 65%/35% proposal were to be enacted, there would, in all probability, be an increase in landfill tax, giving the council a substantially greater landfill tax budget to distribute.

55. Many criticisms have been levelled by the appellant against the interim draft report on the FDMLP. It would have been more helpful had the appellant taken part in that inquiry, rather than resting on written submissions. In effect, this appeal has the effect of prejudging the outcome of the local plan process. Allowing the appeal would limit the ability of the local plan Reporter in his recommendations to the council. As one of the appellant's Witnesses conceded, the timing of the local plan inquiry influenced the appeal against non-determination. Allowing this appeal would send out the wrong message to the development industry that planning by appeal is acceptable and would discourage proper participation in a development plan led approach. The appeal should be dismissed on grounds of prematurity.

56. Paragraphs 15 and 26 of NPPG 3 Land for Housing published in 1996 encourage the reuse of brownfield sites in urban areas. The appeal site is not in an urban area but in an AGLV. It lies in the countryside, remote from community facilities, and is poorly served by public transport. The scale of the appeal proposal is out of keeping with the scale and character of Polton village and could not be successfully integrated. It would entail the loss of green space of importance to the area and valued by the community. The proposal lacks the support of both the council and the local community.

57. A draft revision of NPPG 3 has been issued for consultation and indicates the trends in national policy. While redevelopment of brownfield sites retains a high priority, reduction in travel and reliance on the private car are underlined. Paragraph 40 of the draft goes as far as allowing planning authorities to prefer greenfield to brownfield sites, if a more sustainable pattern of development would result.

58. The transportation issues of the proposal are a significant material consideration. Since the 1992 adoption of the local plan, transportation has emerged as a critical issue in national planning policy guidance, culminating in NPPG 17.

59. The appeal site lies at the foot of a valley served by 2 extremely steep and winding roads. The site is remote from shops, schools and other facilities. Only one of the roads has a footpath, which in places allows only one person to pass. There is one bus to and from Edinburgh per day. The proposed housing development would inevitably be car dependent. While the council's transport witness conceded that 25 houses would not normally be considered a "major traffic generating use", that answer was given in general as opposed to site specific terms. There is no definition of what constitutes a "major traffic generating use".

60. It was suggested on the part of the appellant that the third bullet point of paragraph 77 of NPPG 17 - which broadly presumes against the grant of planning permission for major traffic generating uses in locations where links to walking, cycling and public transport networks are inadequate and which encourage reliance on the private car - supported the appeal. The council refutes this suggestion and considers the second bullet point - which advises that development proposals should be assessed against the policies in the NPPG and in due course embodied in the development plan - to be equally relevant. This clearly requires the NPPG to be read as a whole. Paragraph 19 indicates a key task for planning authorities in reviewing development plans is to identify development sites in unsuitable locations for which planning permission has not been granted. This is what the council has done in the FDMLP.

61. In terms of the impact of the proposal on the landscape, while views will be limited in number, nonetheless those that exist are significant. In particular, the view from the walkway along the Hewan Bank would be affected by the intrusion of a view of the proposed housing development. Measures to mitigate the impact would be difficult, given the height difference between the walkway and the valley floor. The layout submitted to the inquiry, while admittedly illustrative only, showed a typical suburban development.

62. On the ecological value of the site, the appellant's assessment of a low value is not shared by SMAG or SWT. The SWT Management Plan (SMAG 11) scores the site higher in a number of categories than would normally be expected of a site of this size. It describes the site as having quite a unique combination of attributes, which are not present on other sites. While the appellant suggested that the houses could provide habitats for a diverse number of species, the houses would also bring cars, domestic pets, and other disruptive factors. While the appellant submitted that the proposal and the SMAG scheme would both result in significant disruption during the remediation process, the council submits that the SMAG scheme offers more opportunity to enhance the ecological value of the site through management as a wildlife site, rather than as part of a housing development.

63. The proposal would result in the loss of the wetland habitat in the former pond area. The SWT indicates that this area supports rare species such as pendulous sage and palmate newts. It would disrupt compartments A, B, C, D, E, F, G, J, L and M identified in the SWT Site Survey.

64. In summary, while the proposal conforms to an out of date development plan, the weight to be attached to that plan is diminished significantly by the emerging development plan and the changes which have taken place in national planning policy guidance. The appeal is premature. Allowing the appeal would destroy confidence in a plan led system and would give the green light to planning by appeal. The appeal should be dismissed.

## **THE CASE FOR SMAG**

65. SMAG broadly supports the council's position, taking the view that its scheme would rehabilitate the site without the need for residential development, which would contravene traffic and countryside policies. It was not party to the agreement between the appellant and the council on the flood risks, the stability of the Hewan Bank and the adequacy of educational provision.

66. On the planning position, it is submitted that, while the map attached to the adopted local plan shows the appeal site as H13 for housing, housing on the site conflicts with other policies of the same plan, where the site is identified as being in the countryside and an AGLV, where strict controls are to be exercised. A further policy provides that the council will seek the rehabilitation of major derelict sites and identifies Springfield Mill as one such site. In 1992, housing was seen as the only viable means of funding the remediation. Proposal H13 was part of a 5-year programme, which expired in 1997 before any planning application had been lodged. The appeal application was only made in 2001, long after the emergence of the SMAG scheme and the FDMLP.

67. The local plan Reporter, in his interim report, has backed the reallocation of the entire site as a wildlife site, giving the prospect of an appropriate, cost effective, and practical form of treatment for the site. The Reporter conducted a site inspection, which included all compartments noted in the SWT Management Plan, and had access to all of the appellant's submissions and productions.

68. The appeal site is rural in character and is isolated from both Loanhead and Bonnyrigg. The proposal is significant in the context of Polton village as it exists. It would double the population and the number of vehicles in the village, where there are no shops and other facilities. The proposal is contrary to the guidance in NPPG 3.

69. The inadequacy of the road network was confirmed by several witnesses, who spoke to a number of incidents on the access roads. Prior to 1992, it is understood that the Roads Department was opposed to any additional housing on the site, reluctantly conceding 20 houses, if there had to be housing. The evidence of the appellant (RTA3) in regard to activity from Polton village indicates that a proportion of the peak time flow from the proposed development would be against the main traffic flow, giving a disproportionate impact in terms of vehicle conflict. The access roads are used by motorists, cyclists, and pedestrians and for accessing adjacent bridle paths. Any increase in traffic will increase the risk to safety.

70. Workplaces, shops, schools, and places of entertainment are beyond walking distance for most villagers. There is one bus per day to Edinburgh in the morning and one from Edinburgh in the early evening. The proposed housing development would run counter to the advice in NPPG 17 in respect of access to public transport.

71. The wildlife site proposed by SNIAG on the other hand would give rise to a different traffic flow. This would essentially be at off-peak hours and would involve visitors on foot to the site and the surrounding and developing footpath network.

72. On the decontamination issue, remediation to the standards required for a residential after use are much higher than for a wildlife site with public access. A housing development would create greater disturbance, increasing the risks to the environment and construction workers. Residents of the houses would have increased long term exposure to residual contaminants. Housing is not essential to decontaminate the site.

73. Decontamination works associated with the SMAG scheme are described in the TJP report and based on professional input from EAG Environ. The core data is substantially the same as that used by the appellant, including a decontamination survey paid for by the local enterprise company.

74. As regards the literal definition of "contaminated land", SMAG shares the council's view that a pragmatic approach is required and indeed advocated in national guidance on the subject. The purist interpretation taken by the appellant is at odds with the materials which the appellant would import on to the site (RTA5 - Appendix C) and oil spillage from vehicles on the site. In recent years, there has been a realisation that taking material off site can be more expensive and a "leave well alone" philosophy has emerged.

75. ReferenceismadetoPartIIAoftheEPAandanabridgeddefinitionofcontaminatedland which relates to land which appears to a local authority to be in such a condition that (a) significant harm is being caused or there is a significant possibility of such harm being caused or (b) pollution of controlled waters is being or is likely to be caused. Harm is defined as harm to the health of living organisms or interference with other ecological systems of which they form part and, in the case of man, includes harm to his property.

76. The appellant's expert witness on contamination referred to the "potential" for harm, which is of limited use, without some quantification of risk. Neither that expert nor the appellant's ecological expert was able to identify any harm being caused to the flora and fauna on the site or the river. Water quality is better downstream than upstream of the site and has shown continuous improvement over the last 30 years. The site appears to be having an insignificant impact on the river.

77. While the council is about to undertake further site investigations, it is submitted that the SMAG scheme represents an appropriate treatment of the site.

78. In terms of community costs and benefits, the housing element of the proposal would lead to a loss of amenity and an increase in traffic. There would be no apparent benefits, whereas the SMAG scheme would rehabilitate the site, while at the same time providing a valuable local facility and visitor attraction.

79. The site is used at present for informal recreational purposes. The proposed housing would occupy the centre of the site, taking up 40% of the available area. The illustrative layout shows an "out and back" footpath. Observed from the footpaths overlooking the site, this footpath arrangement would not commend itself to visitors, as it would appear to be an extension of the housing area, "belonging" to the residents. The sense of tranquility would be lost.

80. The 40% of the area devoted to housing represents a significant reduction in the area available for a wildlife habitat. A housing use would result in permanent disturbance to the remainder of the habitat simply from normal domestic activity. This would include noise and light pollution, domestic pets, and the activities of residents, their children, and friends.

81. There is a clear difference of opinion between the appellant's ecological expert and the 2 witnesses who spoke for SMAG. These witnesses have sound credentials and specialist knowledge, as made clear in their precognitions. Whatever the arguments of the short-term impact of remediation works, a housing development would result in a significant and permanent reduction in the variety of natural habitats available.

82. In response to the earlier concerns of SMAG and others, the appellant has moved the housing development further back from the river, with a consequent greater impact on the balance of the site. If other problems emerge, the options are further reduced. The absence of water level models to replicate the flooding incidents, which have occurred in the last 2 years, is a further concern. SMAG is also concerned that it was not permitted representation at the site meeting last February involving your client, the council, SNH and SEPA. SMAG maintains that there are severe doubts in regard to the flood risk to downstream properties.

83. Questions regarding the predictability and impact of slippages of the adjacent banks opposite the north west corner of the site remain unanswered. Trees are thought to have played a major role in the 1979 slippage. The fear is that trees may re-establish themselves on the actively slipping north west bank. Difficulties in producing an accurate model are acknowledged. Residents in the proposed houses might be at risk from an unpredictable sequence of events. Your client's expert witness on the Hewan Bank indicated that any slippage would travel at no more than a few mph. This contrasted starkly with Mr Carmichael's account of the 1979 slippage, where the movement was like an express train. He also had to shout a warning to adults in the vicinity, who were unaware about what was happening. Your client's expert thought the noise associated with a slippage would be sufficient to warn by-standers. This did not appear to the case in 1979.

84. With the dangers both from flooding and slippage of the bank, residents and visitors to the wildlife site would be at risk. Much reference was made to sustainable urban drainage systems designed to act as soakaways for excess water but this contrasted with lack of detail on such systems.

85. The SMAG scheme is a viable alternative, leading to rehabilitation of the site without any requirement for housing. SMAG has the funding, commitment, and organisation to deliver and has the support of the council, which owns the vast bulk of the site. Your client's witnesses contradicted each other in regard to the integrity of the pond liner, which in fact may not require attention. The project costs of the SMAG scheme will be re-assessed and a phased approach to the scheme is likely to be adopted. The site can be rehabilitated without the policy conflicts housing would entail. The appeal should be dismissed.

### **THE CASE FOR ESK VALLEY TRUST AND LASSWADE DISTRICT CIVIC SOCIETY**

86 Both the Trust and the Civic Society fully endorse the council's case against the appeal proposal and support for the SMAG scheme. The Trust has recently purchased the Hewan Bank and Hewan Wood and is playing an active role with the council and other organisations in developing the Esk Valley Way, which includes the footpath over the Hewan Bank.

87. The creation of a wildlife site on the entire appeal site would provide a wider woodland corridor, retaining a greater variety of species. This would provide a safe link for wild animals between the Hawthornden and Roslin Woods upstream and Polton Mill downstream. In addition, the site would be a valuable facility for the local community and visitors alike, enhancing the beauty of this wooded river valley.

88. The appellant has avoided precision on any issue related to the housing layout. On the other hand, considerable detail has been supplied in regard to traffic flows, species diversity, and contamination. In the absence of any fixed references on layout, it is difficult to assess, in full, the visual and physical impact of the proposal.

89. While the appellant has indicated a desire to consult with the local community on his proposal, the experience of recent years does not augur well. The appellant's plans have changed many times over the years and scant attention has been paid to the needs of the established ecology. The SMAG proposal, which is not commercially driven and has the support of SWT, is preferred to your client's proposal, which would require more in the way of regular maintenance and management to recover the depredations of the on-site population.

90. There is a danger of setting a precedent, leading to creeping erosion of the countryside and amenity. While industrial/commercial development is based on market forces which can change over a relatively short period of time, residential development is driven by demographic change, with land use change less likely to change in the long term.

### **THE CASE FOR MR McGLASSON**

91. Mr McGlasson supports the council's position. As a resident in Polton for more than 22 years, he has walked the appeal site on a regular basis and has noticed an increase in the variety of animals and birds frequenting the site. Putting housing on the site would be a mistake. The preservation of the Esk valley as a wildlife habitat should be a priority.

92. Mr McGlasson showed a video of a flooding event in April 2000, arising from a blockage in the Bilston Burn which flows into the Esk close to the bridge over the river in Polton just downstream of the appeal site. The Hewan Bank is unstable and, in the event of a slippage the appeal site would be in danger of flooding. Surface water from a 4.4ha. housing development at the Hawthorns in Loanhead is to be drained to the Bilston Bum and there is the possibility of further drainage to the burn from development at Dryden Bank. The increased volume of water could result in the Esk itself backing up, posing a threat to the appeal site.

93. The access roads are wholly inadequate for any increase in traffic. They are barely capable of coping with existing traffic at peak times. Accident statistics do not present an accurate picture, as most are minor and not reported. On the Loanhead hill, there are places where 2 vehicles cannot pass without one or the other reversing. There is no footpath. Central heating oil tankers servicing properties on the north bank of the Esk have to use the hill because of a weight restriction of 3.5 tonnes on the bridge over the river. The road has to be closed in order to allow the nearby Harley Weston nursery to receive supplies.

### **THE CASE FOR MR CARMICHAEL**

94. Mr Carmichael testified to the slippage of the Hewan Bank, which he had witnessed in the autumn of 1979, when a narrow section of the bank slipped at speed into the strongly running river, completely blocking it. The slippage took place just upriver of the building, which used to stand at the river's edge, close to the sharp bend in the river. The obstructed river built up rapidly in height and he shouted a warning to a group of 5 adults who were loitering about 20 yards from the river's edge. One of the group, on seeing the river boiling up towards him, ran off followed closely by his companions. Within moments, the river erupted on to the appeal site and spread over it in a broad front to a depth of about one foot. He did not see anyone caught up by the flood but was certain that, had a child been there, it would have been swept off by the current. The floodwater did not reach the public road.

95. In April 2000, on a visit to the village, he found the road on the Loanhead side impassable because of a foot deep torrent of water. This had followed a period of torrential rain. Going on into the appeal site, he witnessed signs of further landslip flooding, flood water having entered the site just upstream of the building now demolished at the river's edge and returned back into the river downstream. It was similar in many respects to the 1979 incident.

96. Hewan Bank is likely to remain unstable for years to come and it would be unwise to allow housing on the appeal site. His experience of the 1979 incident suggests that slippage occurs with no audible warning and children at play near the river would not notice the rising river until it cascaded across the site.

97. A further concern is the inadequate road access. Both roads are narrow, confined, steep, and twisting. The Loanhead hill is unsuitable for heavy vehicles and the weight restriction on the bridge renders Polton Road a virtual cul-de-sac for heavy vehicles.

### **CONCLUSIONS**

98. Section 25 of the Act requires the determination in this case to be made in accordance with the provisions of the development plan, unless material considerations indicate otherwise. The development plan is described in paragraph 6 above. I consider, based on my inspection of

the appeal site, the evidence at the inquiry, and the written submissions that the issues to be determined are whether the proposal is consistent with development plan policy and, if not, whether there are nonetheless other material considerations sufficient to warrant an exceptional grant of planning permission.

99. At the outset, it is important to remember that what is before me is an appeal against non-determination of a valid planning application and not two competing proposals, nor a replay of a part of the Midlothian Local Plan Inquiry. The appeal requires to be determined strictly in accordance with section 25 of the Act. I do not accept the suggestion that the appeal is premature. Applicants are entitled to have valid applications determined in accordance with the planning system.

100. In terms of the adopted local plan, there is no question that the site is identified for a maximum of 25 houses. There is also no doubt that it is identified as being within the countryside and an AGLV, where a range of restrictive policies apply. A fair reading of the plan as a whole would suggest that the housing proposal was an exceptional one, justified by a perceived need to deal with a contaminated site. Nonetheless, the proposal does not strictly accord with the countryside and AGLV designations. In my view, the local plan is seriously flawed in this respect, as evidenced by the appellant's claim that the housing allocation should take precedence over the countryside and AGLV designations.

101. The local plan is 10 years old and pre-dates the advice and guidance in NPPGs relevant to this appeal. It is clear to me that the 1992 housing allocation was an exceptional one, justified by being seen at that time as perhaps the only means of rehabilitating the site. That seems to me to explain the anomalous position of the same plan identifying the site as being in the countryside and an AGLV. A replacement local plan is at an advanced stage of preparation, a revised structure plan was approved in 1997, and a further revision of the structure plan has commenced. In these circumstances, paragraph 46 of NPPG 1 indicates that more recent statements of policy and guidance may outweigh policies in the development plan.

102. While the council appears to concede that the proposal conforms to the local plan and that the structure plan policies are of little relevance, in the sense that the local plan must conform to the structure plan, I take a different view. The proposal is in clear conflict with the countryside and AGLV designations. Furthermore, the thrust and spirit of the structure plan policies set out at paragraphs 14 and 15 above, while not being scrutinised in great depth At the inquiry, nevertheless militate against a residential development on the appeal site. In these circumstances, I conclude that the proposal does not accord with the development plan and now require to consider whether there are material considerations in this appeal to justify an exceptional grant of planning permission. These include the issues listed in paragraph 21 above.

103. The FDMLP and the interim report of the local plan Reporter are material considerations. While it is a matter of regret that the local plan Reporter did not have the benefit of all the submissions and evidence before me, the interim report contains the Reporter's conclusions on the submissions and evidence before him, which fall to be considered along with the "new information" produced at the inquiry. The policies described in paragraph 17 above reflect changes in national guidance in publications such as NPPG 1, 3, and 17. They also conform to the approved structure plan policies. Read as a whole, I conclude that these policies provide no support for the housing element of the proposal, for the reasons set out below.

104. In terms of NPPG 3, the site is not a brownfield site, as it lies outwith the urban area. In fact, it lies in countryside where national guidance presumes against development, except in certain defined circumstances, none of which apply in this case. It also lies in an AGLV, where development is strictly limited, I do not consider the site to be an integrated part of the village. The proposal would double the population of the village and would be out of keeping with the character of this rural settlement, which has poor transport links and little in the way of community facilities. While the draft revision of NPPG 3 removes the urban qualification for brownfield sites, this is a consultative draft at this stage and carries little weight.

105. On the visual impact on the landscape character of the area, there was broad agreement at the inquiry that the housing development would be largely screened from view from most aspects and that very few people use the footpath along the Howan Bank. While I accept that the housing would not be visible from the road and that the Hewan Bank footpath - an arduous route - is not particularly well traversed, these factors do not justify an inappropriately located development. Housing development would forever destroy this part of the river valley. While there was much discussion of the illustrative nature of the drawings produced at the inquiry, it is the principle of housing, rather than details of design, which lies at the heart of this appeal.

106. As regards flooding, the burden of the evidence was that an incident such as the 1979 slippage was unlikely to recur, any flooding would be contained in the expanded flood plain now incorporated in the proposal, and that there would be no flood risk downstream as a result of the development. The 2000 incident shown by " McGlasson in his video presentation related to a blockage of the Bilston Bum downstream from the development and was therefore unrelated to the, appeal site. In these circumstances, the proposal complied with the guidance in NPPG 7.

107. On the issue of the stability of the Hewan Bank, the thrust of the evidence was that, while Hewan Bank would continue to slip, an incident of the scale experienced in 1979 was unlikely. The flooding and the stability of the Hewan Bank issues are closely related. Both SEPA and SNH are satisfied with the risk assessments and the council has withdrawn its objections on these grounds. The evidence, while robustly challenged by SMAG, nonetheless withstood cross-examination. In the circumstances, I conclude that concerns regarding flooding and the stability of the Hewan Bank are insufficient to Justify refusal of planning permission.

108. Considerable discussion took place at the inquiry on the subject of contamination. Much of this was in the context of the SMAG scheme being a less expensive means of rehabilitating the site, which is not a valid or material consideration in this appeal. There was agreement that different standards of remediation are required, dependent on the after-use. It was also clear that

further investigation is required to ascertain the extent of contamination. The council indicated that it was in the process of commissioning an investigation. Until the results of the investigation are known, it seems to me that arguments over the correct interpretation of "contaminated land" are academic. For the same reason, the estimates of remediation costs must be viewed with some caution. Given your client's acceptance of the possible need for remediation works, I conclude that there is no justification for refusal of planning permission based on contamination issues.

109 As regards the ecological value of the site, your client's expert witness, during the course of the inquiry, completed a detailed analysis of species diversity in respect of the various compartments identified in the SWT survey. From this analysis, he concluded that the site had no special ecological value and that remediation measures would disturb those compartments with the greatest species diversity. While the evidence on this subject provides useful background information, its value, however, is limited, in the sense that the application is in outline only and the final layout remains to be determined. In these circumstances, I conclude that, while the appeal site may not be of exceptional or outstanding ecological value, it is nonetheless worthy of conversion for use as a wildlife habitat. No party in the appeal is opposed to the wild life habitat, the dispute focussing on the need, if any, for a housing development to cross fund the proposal.

110. The council and the objectors all highlight the inadequate road network serving Polton. These deficiencies have been highlighted at paragraphs 58-60, 69, 70, 93 and 97 above. In recent years, national policy has emphasised the need for sustainable transport links. Paragraph 19 of NPPG 17 urges planning authorities to re-allocate sites with poor access. which do not have planning permission. This is precisely what the FDNLP seeks to do in respect of the appeal site. In terms of paragraph 77 of the NPPG, I consider that the term "major traffic generating use" requires to be interpreted in the local site-specific context. In this case, a proposal to double the size of the village in my view falls to be regarded as a major traffic generating use. I do not accept that the additional traffic associated with 25 houses would be imperceptible in traffic terms. The suggestion that the access roads are so inherently dangerous as to offer natural traffic calming measures is an indication of the wholly unsatisfactory access. I conclude that planning permission should be refused on the grounds of an inadequate road access posing a threat to road safety.

111. Drawing the various elements in this appeal together, I conclude that the, proposal does not accord with the development plan. The local plan is out of date and, accordingly, little weight should attach to it. That another possible means of rehabilitating the appeal site has been identified forms no part of my conclusions, which relate solely to the merits or otherwise of the appeal proposal. For the avoidance of doubt, I offer no comment on the SMAG proposal beyond the observation that it too would require (1) planning permission and (2) to be judged on merit against relevant policies and material considerations. In this appeal, I conclude that the housing element of the proposal runs counter to the advice in NPPGs 3 and 17 and to the broad range of structure plan policies. The proposal is contrary to the FDMPLP land use allocation in respect of the housing element. The access arrangements are wholly inadequate and run counter to the advice in NPPG 17. I conclude that there are no material considerations in this appeal of sufficient consequence to warrant an exceptional grant of planning permission.

112. Accordingly, and in exercise of the powers delegated to me, I hereby dismiss your client's appeal and refuse to grant outline planning permission in respect of application (ref-. 01/00125/OUT), dated 26 February 2001. I have taken account of all the other matters raised but find none that outweighs the considerations on which my decision is based.

113. This decision is final, subject to the right of any aggrieved person to apply to the Court of Session within 6 weeks of the date of this letter, as conferred by sections 237 and 239 of the Town and Country Planning (Scotland) Act 1997; on any such application the Court may quash the decision if satisfied that it is not within the powers of the Act or that the applicant's interests have been substantially prejudiced by a failure to comply with any requirement of the Act or of the Tribunals and Inquiries Act 1992 or of any orders, regulations or rules made under these Acts.

114. Copies of this letter have been sent to Midlothian Council, SMAG, and Messrs Carmichael, Dobson, and McGlasson. Other objectors have been notified of the decision.

Yours faithfully

DONALD A WATT  
Reporter