



Report to the Scottish Ministers

TOWN AND COUNTRY PLANNING (SCOTLAND) ACT 1997

Report by Mike Shiel, a reporter appointed by the Scottish Ministers

- Case references: NA-ABS-047 & NA-ABS-048
- Site Address: Land south-west of Eskview Farm, St Cyrus, Montrose DD10 0AQ
- Applications by North Esk Investments Ltd (NA-ABS-047) and Mr J Reid (NA-ABS-048) for planning permission nos. APP/2018/3027 and APP/2018/3018, dated 14 December 2018, and called-in by notices dated 5 September 2019.
- The development proposed:

NA-ABS-047: Change of use of agricultural land to form a nine stance caravan park touring gypsy/traveller site, formation of road and erection of boundary fences, walls, gates, pump station and amenity blocks (part retrospective);
and

NA-ABS-048: Retrospective change of use of agricultural land to form a 10 stance private permanent caravan park, formation of road, erection of boundary fencing, walls, gates and education facility.

- Date of site visits: 30 January and 9 December 2020
- Date of hearing session: 3 November 2020

Date of this report and recommendation: 20 January 2021



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1. Change of use of agricultural land to form a nine stance caravan park touring gypsy/traveller site, formation of road and erection of boundary fences, walls, gates, pump station and amenity blocks (part retrospective); and

2. Retrospective change of use of agricultural land to form a 10 stance private permanent caravan park, formation of road, erection of boundary fencing, walls, gates and education facility at

Land south-west of Eskview Farm, St Cyrus, Montrose DD10 0AQ

• Case references	NA-ABS-047 & NA-ABS-048
• Case type	Applications for planning permission
• Reporter	Mike Shiel
• Applicants	North Esk Investments Ltd (NA-ABS-047) and Mr J Reid (NA-ABS-048)
• Planning authority	Aberdeenshire Council
• Other parties	Scottish Environment Protection Agency
• Date of applications	14 December 2018
• Date case received by DPEA	9 September 2019
• Methods of consideration and dates	Written submissions Accompanied site inspection on 30 January 2020 Unaccompanied site inspection on 9 December 2020 Hearing session on 3 November 2020
• Date of report	20 January 2021
• Reporter's recommendation	That planning permission be granted in each case for a limited period of 15 years.

Site location and description

The sites for these two developments adjoin each other, and are located about 2.5 kilometres south-west of the village of St Cyrus. They are on the western side of the minor road that runs eastwards from the A92 Stonehaven to Montrose road, before passing under the former railway viaduct and turning north-eastwards past the sites and running to the visitor centre and beach access at the St Cyrus National Nature Reserve, some 1.6 kilometres to the north-east. The two sites, formerly used for agriculture, have a total area of approximately 3.3 hectares. They lie on the western edge of the low-lying, flat coastal plain which extends from the River North Esk in the south, which here forms the boundary between the administrative areas of Aberdeenshire and Angus Councils, north-eastwards to the sand dunes and marshland of the nature reserve. The coastal plain is backed by steep slopes, part of which form the north-west boundary of the application sites. The lower part of the steep slope adjoining the sites forms a detached section of the St Cyrus and Kinnaber Links Site of Special Scientific Interest (SSSI).

The applications for planning permission

The two applications are largely for retrospective permission, as much of the development has already been carried out. On the northern site it is proposed to provide nine stances for touring travellers, each with a capacity to accommodate a number of touring caravans. Each stance would be provided with an electrical connection and its own toilet, washing and laundry building. This site also incorporates part of the adjoining embankment slope, which is currently occupied by a vegetated bund of material. As it lies within the SSSI it is proposed to remove this bund and carry out remedial works, including new planting.

On the permanent site, south of the halting site, there are ten stances, most of which are now occupied by a mobile home. There are also various outbuildings and sheds within each stance, and a number of touring caravans. On one of the stances is a portable building which houses a classroom for the younger children living on the site. It is proposed to install a foul sewer serving both sites, connected to a pumping station within the permanent site, and thence to a package drainage treatment plant located in the currently undeveloped land south-west of the permanent site. From there, there would be an outfall running across the road and the land adjoining the fishing lodge to discharge into the River North Esk.

The history of development at this location

Development started on these sites in September 2013 without the benefit of planning permission. Despite the council serving a temporary stop notice and obtaining an interdict at Stonehaven Sheriff Court, work continued. Two retrospective applications were submitted in September and November 2013, seeking permission for each part of the development. Both applications were subsequently withdrawn before a decision on them was made by the council. In October 2013 the council served an enforcement notice requiring compliance in January 2014. In September 2014, two further applications were received: one for an eight stance permanent site, and one for a touring site for gypsies/travellers, with the formation of two permanent stances and a toilet block. The council refused permission for both applications on 30 April 2015. No appeals were lodged against those decisions.

The council served three further enforcement notices; two relating to the permanent and halting sites respectively, and the third to the bund that had been created in the SSSI. Appeals were lodged against the notices. The reporter appointed to determine these appeals found that the notice relating to the bund was so defective as to constitute a nullity. Consideration of the other two notices was subsequently sisted because a further planning application had been submitted in about November 2015. This covered the whole of both sites, and included 19 pitches on the touring site and ten stances on the permanent site. On 28 April 2016 the full council indicated that it was minded to grant planning permission. Scottish Ministers subsequently called in the application for their determination, and also recalled the two enforcement notice appeals so that they could be considered in parallel.

The appointed reporter recommended that planning permission be refused, and that the enforcement notices be upheld with alterations to their periods for compliance. On 14 September 2017 the Scottish Ministers issued their decisions, refusing planning permission and upholding the enforcement notices. The enforcement notices therefore came into effect and the period for compliance expired on 31 July 2018. Following further works on the site in September 2018, an interim interdict was obtained for the halting site preventing

the continuation of further works. A further interim interdict was obtained for the permanent site on 16 November 2019, following more works on that site.

The two applications which are the subject of this report were submitted on 14 December 2018. They were considered by Aberdeenshire Council on 27 June 2019, when it agreed to delegate authority to the Head of Planning and Building Standards to grant retrospective planning permission for both developments, subject to conditions and notification to the Scottish Ministers because of the outstanding objection from SEPA. Ministers issued Directions calling-in the two applications for their own determination on 5 September 2019.

Policy and guidance

The development plan for this area consists of the Aberdeen City and Shire Strategic Development Plan 2014 and the Aberdeenshire Local Development Plan 2017, together with the relevant statutory Supplementary Guidance associated with the latter. The Strategic Development Plan contains generalised policy relating to flood risk and meeting the needs of gypsies/travellers.

The Local Development Plan contains a specific policy (H5) on making provision for gypsies and travellers. It also contains a policy (C4) on flooding, which states that development should avoid areas of medium to high flood risk. Other relevant policies are R1 (development in special rural areas), E1 (natural heritage), E2 (landscape) and HE1 (impact on listed buildings). These are supported by related statutory supplementary guidance.

In terms of national planning policies, Scottish Planning Policy 2017 indicates that local development plans should make provision for sites for gypsies/travellers, where there is evidence of need. In terms of flood risk, it states that vulnerable uses should not be located in areas of medium to high risk of coastal or watercourse flooding (a probability greater than 0.5% (1 in 200 years)). Vulnerable uses include caravans, mobile homes and park homes intended for permanent residential use.

The Scottish Environment Protection Agency (SEPA) also provides guidance on dealing with flood risk in relation to development management, which contains similar policy advice to that in SPP.

Aberdeenshire Council has submitted a number of documents relating to the need for gypsy/travelling people provision within its area.

Reference has also been made by parties to the Human Rights Act 1998, the Equality Act 2010, and the UN Convention on the Rights of the Child.

Summary of the case for the applicants

The council has been unable to provide suitable sites for gypsies/travellers in the last 20 years, and there are no other suitable locations in the Kincardine and Mearns area. The gypsy/travelling people community has therefore had to provide this much-needed accommodation. The sites are clean, tidy and well-managed.

The current proposals have addressed the reasons for the previous refusal of planning permission. The original Landscape and Visual Report has been supplemented by a further submission, which has concluded that the developments do not have a major adverse effect

on the landscape character of the area, and would not affect its inherent open character, panoramic views and exposed nature. Further mitigation would be provided by new tree and hedge planting. The developments do not have an adverse impact on the majority of sensitive visual receptors, including residents and the users of the path across the former railway viaduct to the south of the sites. They would also not have an adverse effect on the setting of this listed structure. A restoration strategy has been submitted for the part of the St Cyrus and Kinnaber SSSI that has been affected by the soil bund that was created along part of the north-western boundary of the site when the developments took place. Removal of this bund will not affect the stability of the steep slope beyond it.

In relation to the potential flood risk, updated Flood Risk and Drainage Appraisals (FRDA) have been undertaken for each of the sites. The greatest risk is from flooding from the nearby River North Esk, and there would be little risk from coastal flooding or the small watercourse which runs along the northern boundary of the halting site. There is no evidence of the sites having been subject to river flooding in the last 70 years, including following the most recent severe flooding event in December 2015.

The detailed hydraulic model for the North Esk constructed to inform the FRDA predicts that parts of the two sites would be flooded to a depth of no more than 0.1 metres during a 0.5% (1 in 200 year) Annual Exceedance Probability (AEP) event. Taking climate change into account, the maximum depth of flooding would not exceed 0.3 metres. Parts of the sites would, however, remain unflooded and the mobile homes, with a height of 0.7 metres above ground level, would provide a safe place of refuge if evacuation were not possible.

However, SEPA aims to provide at least three hours' warning of flooding within the catchment area, whilst residents of the site would be aware of rising water levels in the North Esk. A community resilience plan has been prepared and tested, showing that evacuation of the sites is feasible, even if the access road beneath the viaduct becomes flooded earlier than water reaching the sites themselves.

The FRDA has demonstrated that the limited amount of ground raising within the sites that was carried out when their development took place would have no significant impact on flooding levels on adjoining land.

It is considered that the development complies with all the relevant local development plan policies and meets the provisions of SPP.

In determining these applications, regard must be had to the Human Rights Act and the Equality Act, especially with regard to the impact on the 30 or so children currently living on the permanent site. To uproot these children would be very disruptive to their education and to their assimilation into a settled community in accordance with their culture and lifestyle. The current development is doing much to foster good relations between the traveller and non-traveller communities.

Summary of the case for Aberdeenshire Council

The council has agreed to grant planning permission for both developments in view of the overriding need for permanent and halting sites for travellers in Aberdeenshire. Since the previous refusal of permission by Scottish Ministers, no other sites have been forthcoming in South Aberdeenshire, and it cannot be demonstrated that there are any other suitable

sites. The council is aware of its Public Sector Equality Duty under section 149 of the Equality Act 2010.

Whilst it acknowledges that there is a flood risk, the council does not believe that this equates to a substantial risk to life. As a result of the establishment of a Flood Resilience Group and the preparation of a flood resilience plan, the council is satisfied that the flood risk can be managed.

The council has a responsibility to consider the wider planning issues and, in this context, it considers that the provisions of the local development plan policies, as well as in SPP relating to flood risk, are overridden by other material considerations. In any event policy H5 contains a presumption in favour of halting and permanent sites for gypsies/travelling people. The present sites have well-established links with education, community facilities, healthcare, and the main road network. The overriding need for the sites in their current location therefore justifies departing from policy.

Summary of the case for SEPA

SEPA objects in principle to the two applications on the grounds of flood risk to people and property. The proposed developments conflict with national policy on flooding in SPP, and with policy C4 of the local development plan, and no additional information can be provided to alter its position, which was supported by the reporter and Scottish Ministers in 2017.

The FRDA confirms that the sites are at flood risk, but SEPA considers that this has been significantly underestimated. Identification of parts of the site as being within the 1 in 200 year plus climate change floodplain conflicts with SPP, where use of sites for caravans is identified as a most vulnerable use. Because of this, SEPA considers that a more stringent approach is required, avoiding the 1 in 1000 year plus climate change floodplain.

SEPA believes that the FRDA has adopted a flawed approach by fitting a Generalised Extreme Value (GEV) distribution to the annual maximum flows for the nearest gauging station on the River North Esk, instead of the Generalised Logistic (GL) distribution recommended in the Flood Estimation Handbook. It has undertaken a similar flood frequency analysis using the GL distribution, which produces substantially greater peak flows for both the 0.5% and 0.1% AEP events – 14.2% and 29.6% respectively.

SEPA also considers that the impact of a tidally dominated flood event, taking account of the effects of climate change, has not been fully considered; and that the assessment of potential flooding from the small watercourse along the northern boundary of the site is inadequate.

SEPA considers that the flood risk management measures proposed are inadequate because the extent of flood risk has been underestimated; the predicted flooding of the access road beneath the viaduct; and the policy approach which is to avoid flood risk and not to manage it. It is concerned with the view expressed that the mobile homes would provide a safe place of refuge during flooding, given the unpredictability of the depth of water, as well as increasing velocity, scour and erosion, and debris.

Representations from third parties

In all, some 50 representations were received in support of the developments. The main points raised were: the need to find accommodation for gypsies/travelling people in the area, the council having failed to do so; avoidance of prejudice and discrimination against such people; removal of the families now living on the site would have a devastating impact on them; the environmental and flooding concerns are overstated; the sites are tidy and well-managed; and they are well-located for access to schooling and local facilities.

Some 30 representations were made objecting to the developments. The main points raised were: the previous refusal of permission and upholding of the enforcement notices by Scottish Minister; circumstances have not significantly changed since those decisions and restoration of the sites should take place; the developments are contrary to local and national planning policies; they have an adverse effect on the landscape, neighbours, the SSSI, and the listed viaduct; the sites are liable to flooding and SEPA has maintained its objections.

Reporter's consideration of the issues

The need for gypsy/travelling peoples' sites

The evidence indicates that there is a need to provide facilities for gypsies/travelling people in south Aberdeenshire, and that granting planning permission for these two developments would significantly help to meet that need. Policy H5 in the local development plan does not require developers of private gypsy/traveller sites to prove a specific need for their proposals. It does, however, require that the other policy tests in the plan should be met.

The environmental effects of the developments

The proposals do not comply with policy R1 of the local development plan, as they do not require a coastal location, or meet any of the nine criteria for location in a special rural area.

The sites lie within the South East Aberdeenshire Coast Special Landscape Area (SLA). Although visible in views of this area from the North Sea Coastal Path on the former railway viaduct, the developments form only a small part of the wide panorama visible from this viewpoint. They do not cause unacceptable harm to the features, character or inherent quality of the SLA; and, as such, would not conflict with policy E2 of the local development plan.

Although the existing development on the sites is visually incongruous within its rural setting, its visual impact on the wider area is not unduly obtrusive. It does, however, have some adverse effect on the amenity of the immediately adjoining house at Eskview Farm. This could be mitigated to some degree by planting along the boundary. The developments do have some adverse visual impact on the immediate surroundings, but the sites are visually well-contained, and neither the landscape nor visual impact would justify the refusal of planning permission.

The developments would have a neutral impact on the setting of the listed former railway viaduct to the south of the site, thereby preserving its setting. They would not, therefore conflict with policy HE1 of the local development plan.

The creation of a bund of material scraped from the site when development was initially carried out has impinged on the St Cyrus and Kinnaber Links SSSI. The applicants have proposed to remove that bund and carry out restoration work in the SSSI. Scottish Natural Heritage (now nature.scot) advised that the restoration strategy was acceptable. Subject to its implementation, the developments would not conflict with policy E1 of the local development plan.

Flood risk

The liability of the application sites to flooding from the River North Esk was a key issue in the previous refusal of permission by Scottish Ministers in 2017. Policy guidance in SPP and in SEPA's documents is that areas of medium to high risk of flooding (when the annual probability is greater than 0.5% (1 in 200 years)) are generally not suitable for the most vulnerable uses, which include caravans, mobile homes and park homes intended for permanent residential use. Local development plan policy C4 also states that development should avoid such areas.

The key issues relating to flood risk are: (a) the extent of the predicted flood risk and the methodology used for the prediction; (b) the consequences resulting from the potential flooding of the site; and (c) the impact of flooding on drainage and water supply.

The extent of the predicted flood risk and the methodology used for the prediction

There is no dispute between the parties that the application sites are predicted to flood during 0.5%, 0.5% plus climate change and 0.1% AEP fluvial flood events. SEPA, however, considers that the extent and depth of potential flooding have been underestimated in the FRDA undertaken for the applicants. In large part, this is a result of the methodology used in the hydraulic model which informs the FRDA; and, in particular, the method used to create a best-fit curve for the distribution of annual peak flows in the River North Esk in order to extrapolate peak flows for longer return period events, where there is no current data.

SEPA considers that the Generalised Logistical (GL) distribution should be used, as advised in the Flood Estimation Handbook. The applicants' consultant, SLR Consulting Ltd, has adopted an alternative approach, using the Generalised Extreme Value (GEV) distribution, which it considers give a somewhat better fit to the existing data in this instance. It also states that the GEV distribution is not "bounded above" in this case (i.e. it does not put a cap on upper limits.)

Whilst the arguments about which is the best distribution to use, and other methodological issues in dispute, are matters of genuine professional judgement, the analysis undertaken by SEPA, using its preferred methodology, produces predicted peak flows in the river 14.2% greater than those in the FRDA for the 0.5% and 0.5% with climate change flood events, and 29.6% greater for the 0.1% flood event.

Taking a precautionary approach, I prefer SEPA's figures for predicted peak flows. SLR Consulting has carried out a further modelling exercise using these figures. On that basis I have reached the following conclusions on the worst-case scenarios for flooding from the North Esk:

- at a 1 in 200 year (0.5% AEP) flood event, all of the halting site and a significant part of the permanent site would be flooded, with a maximum flood depth of about 0.3 metres;
- taking into account the likely effects of climate change, the maximum depth of flooding would increase to about 0.48 metres;
- for the 1 in 1000 year (0.1%) flood event, the maximum depth of flooding would be about 0.4 metres, and probably more, given that the impact of climate change has not been modelled;
- the depth of flooding across the two sites would not be uniform, and part of the permanent site is likely to remain unflooded in all scenarios; and
- the public road leading to the sites from beneath the former railway viaduct would be flooded to at least 0.5-0.7 metres during the 0.5% AEP event, and at least 0.8 metres in the 0.1% AEP event.

I have accepted that, in respect of the possible combined effect of fluvial and coastal (tidal) flooding, the analysis in the FRDA is robust, at least for the reasonably foreseeable future, and that the greatest risks to the site is from the former. I have also accepted that the risk of flooding from the minor watercourse along the northern boundary of the site is negligible compared to the risk from the River North Esk.

The consequences resulting from the potential flooding of the site

SEPA has indicated that it would aim to give three hours' warning before the sites were due to flood, based on a threshold flow at Law of Craigo, about four kilometres upstream. The applicants have indicated that any significant flood event would be likely to be preceded by antecedent events, such as prolonged rainfall, as occurred with Storm Frank in 2015; and that residents on the sites would therefore be well aware of rising water levels in the river.

The North Esk Community Resilience Group has been set up, and a flood resilience plan prepared. This has been tested in association with the relevant agencies. Evacuation of the sites would be the first option in the event of potential flooding, but the mobile homes would provide some freeboard above the maximum predicted flood levels, thereby providing a safe place of refuge if evacuation were not possible. The existence of the flood resilience plan is not a mitigation measure against flooding, but rather a means of managing the flood risk.

Potential water velocities on the sites in the event of flooding would be low compared to those in the river itself. This together, with the relatively low depth of flood water and the impact of the walls and fences within the site, is likely to reduce damage to the mobile homes from entrained debris.

Notwithstanding some concerns about the practicalities of evacuation, provided there is adequate warning of an impending flood, there should be sufficient time for the occupants of both sites to safely evacuate. Consequently, the risk to the life of occupants is low. There would, however, be some damage to property, especially the existing outbuildings within the grounds of the mobile homes, and possibly to some touring caravans if they cannot be safely removed in time.

The effect of raising ground levels within the application sites on the depth of flooding on surrounding land would be insignificant. Immediately adjoining land to the north-east, at Eskview Farm, is predicted to experience a reduction in flood depth. The possible diversion

of water from the small watercourse northwards onto Eskview Farm land is complicated by the fact that it has been culverted in part, thereby reducing its effective capacity. However, the evidence suggests that the overall risk of flooding from this stream is low.

The impact of flooding on drainage and water supply

The proposed package sewage treatment plant serving both sites would be located above the 0.1% AEP flood event level. In the event of the evacuation of the site as a result of predicted flooding the pump could be switched off to ensure no further flow of foul drainage to the plant. As long as the water level in the river was below the top of the outlet pump, there would always be a small head of pressure to force water into the river, thus ensuring no backflow into the plant along the outlet pipe.

Contrary to their original submissions, the applicants are now proposing to connect the developments to the public water supply, thus obviating any concerns over the adequacy of the existing borehole supply or the effect of flooding on it.

These matters can be covered by appropriate planning conditions.

Conclusions in respect of the development plan

The developments would not cause unacceptable effects to the features, character or inherent quality of the South East Aberdeenshire Coast SLA; or conflict with policy E2 in that respect.

The developments do preserve the setting of the listed former railway viaduct, and therefore do not conflict with policy HE1.

Subject to the proposed restoration strategy being implemented, the developments do not conflict with policy E1, in relation to their impact on the St Cyrus and Kinnaber Links SSSI.

The developments are not consistent with policy R1, in that they do not require a coastal location or meet the other criteria for location in special rural areas.

The developments are contrary to policy C4 relating to flooding, in that they are located within an area of medium to high flood risk, and do not meet any of the criteria for location in such areas.

Because the developments do not comply with all the remaining policy tests in the local development plan, they are not consistent with policy H5 on the provision for gypsies/travelling people.

Whilst, as is the case with many developments, they meet certain of the development plan policies but fail to comply with others, the non-compliance relates to the two key policies relevant to these developments. Consequently, my overall conclusion is that they do not comply with the development plan.

Other material considerations

National planning policies on flood risk contained in SPP weigh against these developments.

It will be for Ministers to decide the extent to which the equalities and human rights legislation has a bearing on the decisions that they are required to make in these cases. However, I make the following observations:

- the establishment of the permanent site in particular has provided a settled location for the families living on it, giving them access to health and welfare services and, particularly important, a settled education for their children;
- refusal of permission would lead to the need to secure the removal of all the development that has taken place on the sites, through either planning enforcement action or other legal measures; and this will undoubtedly be difficult, prolonged and traumatic, especially for the children currently living on the site;
- set against the above-mentioned considerations is the fact that the applicants would appear to have deliberately set out to carry out development in breach of planning control and, through the extent of development that they have carried out, sought to make any subsequent enforcement measures more difficult to implement; and
- granting permission for these developments could lead to a perception amongst certain members of the public that carrying out unauthorised development will ultimately be rewarded. This is apparent from a significant number of the representations objecting to these applications. The previous decisions of Scottish Ministers to refuse planning permission for the earlier application and confirm the enforcement notices has been remarked upon in many of these. This perception is of some weight in the determination of these applications.

I believe that there is no wholly satisfactory solution to the issues raised in these cases. It is easy to say with hindsight that the current situation should not have been allowed to develop as it has, with the sites having been developed and first occupied some seven years ago. I do not condone the actions of the applicants in carrying out these developments in breach of planning control. However, in making my recommendations to Scottish Ministers, I must consider the applications on their merits, rather than their histories.

The overall planning balance

The planning policy context has not changed significantly since the decision in 2017 to refuse planning permission. However, I differ somewhat from the previous reporter's conclusions. Thus, I found that the effect of the developments on the landscape character of the area and on the setting of the listed viaduct were not unacceptable. However, the proposals conflict with ALDP policy C4 because the sites are at medium to high risk of flooding. Whilst the current proposals do not contain any mitigation in relation to possible flooding, which would require actual physical measures to prevent flooding of the sites, they do contain measures to manage the flood risk through the flood resilience plan. Taken together with the predicted flood depths during the 0.5% and 0.1% AEP events (even accounting for the worst-case scenarios using SEPA's peak flow figures), there are reasonable measures in place to ensure that the sites could be safely evacuated in the event of impending flooding, and that the risk to life is therefore low.

SEPA's consistent objections to these developments stem from its opposition to allowing new development within floodplains, which accords with national planning policies in SPP. As such, to allow the current proposals would be counter to the aims of achieving sustainable development, as recognised by the previous reporter.

Nevertheless, I am conscious of the implications of refusing planning permission. If this option were to be adopted, the council, notwithstanding its present views on the situation, would be obliged to seek the removal of the present development from the site. A continued failure to do so would risk bringing the planning system into disrepute, at least locally. Such enforcement measures would be likely to prove lengthy and difficult, and I am in little doubt that they would cause genuine hardship to the families currently living on the site; and, in particular, their children. Whilst it could be argued that they have put themselves in this position, through developing and occupying the sites in breach of planning controls, the practical consequences of refusing permission have to be taken into consideration.

Whilst I appreciate the reasons for the previous reporter's recommendation, and the Scottish Ministers' decision to refuse planning permission, I am persuaded that, on balance, the situation before me warrants the approval of the current proposals. I would qualify my view by stating that, if planning permission is to be granted, it should be on a temporary, albeit relatively long-term basis. In the circumstances of these cases, because of the need for a significant amount of additional investment in the sites (for the amenity blocks, sewage facilities, mains water supply and landscaping) I consider that a period of 15 years should be allowed. In this case, I believe that there are a number of reasons for adopting this approach:

- it would allow a further period of time for peak flow conditions in the River North Esk to be recorded and monitored, the resulting statistics from which might modify the flood risk predictions;
- it would allow a further period of time for alternative facilities for gypsies and travelling people to be provided in south Aberdeenshire; for example at Chapelton of Elsie;
- it would allow at least one generation of children living on the site to have a settled education through to the end of secondary school;
- in the intervening period, the circumstances of some of the families on the site might change, so that they might seek permanent housing; and
- the nature of these development is such that they constitute changes of use of the land under the terms of section 26(1) of the Town and Country Planning (Scotland) Act 1997, as amended, rather than the carrying out of building or other operations. The mobile homes, although substantial structures, are nevertheless essentially temporary structures that can be removed from the site.

For the above-mentioned reasons, I consider that temporary permissions would be appropriate, towards the end of which the situation could be reviewed in the light of the circumstances pertaining at the time; namely, the flooding situation, condition of the sites and structures on them, and the on-going need for these facilities.

Overall conclusions

The two developments, which are the subject of these applications, do not comply with the Aberdeenshire Local Development Plan, when taken overall, because of the location of the sites in an area of medium to high risk of flooding.

They also do not comply with national planning policies in relation to flood risk, as set out in Scottish Planning Policy.

Notwithstanding this lack of compliance with local and national planning policies, the material considerations in these cases justify the granting of planning permission. Those considerations are:

- the lack of readily available facilities for gypsies/travelling people in south Aberdeenshire;
- the significant hardship that would be caused to the families currently living on the site that would result from the refusal of planning permission, and the subsequent enforcement measures that would have to be taken, taking into account the provisions of the Equalities Act 2010 and the Human Rights Act 1998; and
- the measures that have been taken to manage the predicted flood risk which will, in my opinion, significantly reduce any risk to the life of people living on these sites.

For the reasons set out above, if planning permission is granted it should be for a temporary period in each case, not exceeding 15 years.

Recommendations

That planning permission be granted for the change of use of agricultural land to form a nine stance caravan park touring gypsy/traveller site, formation of road and erection of boundary fences, walls, gates, pump station and amenity blocks (part retrospective) (Scottish Government ref. NA-ABS-047; Aberdeenshire Council ref. APP/2018/3027).

That planning permission be granted for the retrospective change of use of agricultural land to form a 10 stance private permanent caravan park, formation of road, erection of boundary fencing, walls, gates and education facility (Scottish Government ref. NA-ABS-048; Aberdeenshire Council ref. APP/2018/3028).

That the permissions be subject to the relevant conditions set out in Appendices 1 and 2 to this report. If the Scottish Ministers do not agree on the granting of temporary permissions, and wish to grant permissions on a permanent basis, the same conditions could be imposed with the exception of the first one in each case, which contains the time limits on the permissions.

DPEA case references: NA-ABS-047 & NA-ABS-048

The Scottish Ministers
Edinburgh

Ministers

In accordance with my minutes of appointment dated 11 December 2019, I conducted an accompanied site inspection on 30 January 2020 in connection with two planning applications on land south-west of Eskview Farm, St Cyrus, Montrose. The applications were for the following developments:

NA-ABS-047: Change of use of agricultural land to form a nine stance caravan park touring gypsy/traveller site, formation of road and erection of boundary fences, walls, gates, pump station and amenity blocks (part retrospective);

and

NA-ABS-048: Retrospective change of use of agricultural land to form a 10 stance private permanent caravan park, formation of road, erection of boundary fencing, walls, gates and education facility

Aberdeenshire Council had resolved to grant planning permission for both developments but was required to refer them to Scottish Ministers because of unresolved objections from the Scottish Environment Protection Agency (SEPA). By [notices dated 5 September 2019](#) [Ministers](#) directed, in exercise of the powers conferred on them by Section 46(1) of the Town and Country Planning (Scotland) Act 1997, as amended, that Aberdeenshire Council refer the applications to them for determination. The Scottish Ministers made these Directions in view of the proposed developments' potential conflict with national policy on flooding.

On 21 November 2019 the Planning and Environmental Appeals Division issued a request for further written submissions to the applicants' agent (Seath Planning Consultancy Ltd), Aberdeenshire Council and SEPA. Following my appointment and site inspection, having considered all the written information submitted, I decided to hold a hearing session to consider further matters relating to flood risk, drainage and water supply. The hearing was originally planned to be held on 29 April 2020, but had to be postponed because of the Covid-19 pandemic. A further date was set for 27 October 2020, but this also had to be cancelled because of the prevailing health situation. As a result, a virtual hearing was held on 3 November 2020, at which representatives of the applicants, Aberdeenshire Council and SEPA took part (the agenda for the hearing, and a full list of those taking part is attached as Appendix 4). I made a further, unaccompanied site inspection on 9 December 2020.

The two applications relate to developments on adjoining sites, and raise essentially the same issues. I have therefore prepared one report to cover both applications. In the report I have described the background to the proposals, the relevant planning and other policies,

and the cases for the parties, including those made in consultation responses and by third parties; and then set out my own consideration of the relevant issues, followed by my recommendations. In preparing this report, I have had regard to all the written submissions from the parties, and the evidence from the hearing session. I have included links to the appropriate documents in the body of the report. I have listed additional documents in Appendix 3.

Abbreviations

AEP/AP	Annual Exceedance Probability/Annual Probability
ALDP	Aberdeenshire Local Development Plan 2017
CAR	Controlled Activities Regulations
FRDA	Flood Risk and Drainage Appraisal
GEV	Generalised Extreme Value distribution
GL	Generalised Logistical distribution
HES	Historic Environment Scotland
LCA	Landscape Character Area
LNCS	Local Nature Conservation Site
SDP	Strategic Development Plan
SEPA	Scottish Environment Protection Agency
SLA	Special Landscape Area
SPP	Scottish Planning Policy 2017
SSSI	Site of Special Scientific Importance
SuDS	Sustainable Drainage System

CHAPTER 1: BACKGROUND

Site location and description

1.1 The sites for these two developments adjoin each other, and are located about 2.5 kilometres south-west of the village of St Cyrus. They are on the western side of the minor road that runs eastwards from the A92 Stonehaven to Montrose road, before passing under the former railway viaduct and turning north-eastwards past the sites and running to the visitor centre and beach access at the St Cyrus National Nature Reserve, some 1.6 kilometres to the north-east.

1.2 The sites, which I understand were formerly used for agriculture (primarily the grazing of horses), have largely been levelled and covered with aggregate to form a base for the caravans and mobile homes. The northern site (for the touring caravans) has an area of approximately 1.36 hectares, and encompasses part of the steep embankment on the north-west side. The southern site (for the permanent caravan park) extends to about 1.95 hectares. It includes an area of currently undeveloped land to the south-west of the area now occupied by mobile homes.

1.3 The two sites lie on the western edge of the low-lying, flat coastal plain which extends from the River North Esk in the south, which here forms the boundary between the administrative areas of Aberdeenshire and Angus Councils, north-eastwards to the sand dunes and marshland of the nature reserve. The coastal plain is backed by steep slopes, part of which form the north-west boundary of the application sites. At the top of this slope is a former railway line, with the A92 beyond. The lower part of the steep slope adjoining the sites forms a detached section of the St Cyrus and Kinnaber Links Site of Special Scientific Interest (SSSI). On the opposite side of the minor road from the two sites is open agricultural land. To the south-east there is a fishing lodge adjacent to the river.

1.4 The northernmost site is bounded on its northern side by a small watercourse that emerges towards the top of the steep slope to the west and runs eastwards before passing into a culvert before it reaches the road. Beyond this stream is Eskview Farm, a dwellinghouse and bed and breakfast establishment.

1.5 To the south of the site the former railway viaduct across the river (referred to as the North Water Viaduct) is listed as category B in the List of Buildings of Special Architectural or Historic Interest. It now carries a footpath and cycleway, part of the North Sea Coastal Path.

The applications for planning permission

1.6 The two applications are largely for retrospective permission, as much of the development has already been carried out.

1.7 On the northern site it is proposed to provide nine stances for touring travellers, each with a capacity to accommodate a number of touring caravans. Each stance would be provided with an electrical connection and its own toilet, washing and laundry building. The site has its own gated access from the adjacent road, flanked by walls, and there is a vertical-boarded timber fence, about 1.8 metres high, along the frontage with the road. Within the site there is a portable-type building which houses the borehole and pump that provides the private water supply for the whole development. I understand that there was

originally another building providing communal toilet, washing and laundry facilities, but that this has since been removed.

1.8 This site also incorporates part of the adjoining embankment slope. This is currently occupied by a vegetated bund of material, which I understand comprises material scraped off the original surface of the sites. As it lies within the SSSI it is proposed to remove this bund and carry out remedial works, including new planting.

1.9 On the permanent site, south of the halting site, there are ten stances, most of which are now occupied by a mobile home. There are also various outbuildings and sheds within each stance, and a number of touring caravans. On one of the stances is a portable building which houses a classroom for the younger children living on the site. There is a central access road providing access to each stance, which are separated from each other by rendered masonry walls, in some cases topped with vertical boarded timber fencing. There is a gated access from the public road, with rendered masonry flanking walls and a 1.8 metre high vertical boarded fence along the road frontage and southern boundary of the site.

1.10 I understand that, at present, each mobile home is served by a septic tank discharging into individual soakaways. It is proposed to install a foul sewer serving both sites, connected to a pumping station within the permanent site, and thence to a package drainage treatment plant located in the currently undeveloped land south-west of the permanent site. From there, there would be an outfall running across the road and the land adjoining the fishing lodge to discharge into the River North Esk. A series of trench soakaways is also proposed alongside the access roads within each site to deal with surface water runoff.

1.11 Within this same area of land it is proposed to provide a raised mound seven metres wide with woodland planting. Hedgerow planting is also proposed along the road frontage of each site, and further shrub planting along the northern side of the halting site, adjacent to the small watercourse.

The history of development at this location

1.12 I understand that development started on these sites in September 2013 without the benefit of planning permission. Despite the council serving a temporary stop notice and obtaining an interdict at Stonehaven Sheriff Court, work continued. Two retrospective applications were submitted in September and November 2013, seeking permission for each part of the development. Both applications were subsequently withdrawn before a decision on them was made by the council.

1.13 In October 2013 the council served an enforcement notice. No appeal was lodged against the notice, and it therefore became effective, requiring compliance in January 2014. I understand that the requirements of the notice were not complied with.

1.14 In September 2014, two further retrospective planning applications were received: one for an eight stance permanent site, and one for a touring site for gypsies/travellers, with the formation of two permanent stances and a toilet block. The council refused permission for both applications on 30 April 2015. No appeals were lodged against those decisions.

1.15 The council then served three further enforcement notices; two relating to the permanent and halting sites respectively, and the third to the bund that had been created in the SSSI (see paragraph 1.8 above). In each case, the notice required the removal of all works. Appeals were lodged against the notices. The reporter appointed to determine these appeals found that the notice relating to the bund was so defective as to constitute a nullity. Consideration of the other two notices was subsequently sisted because a further planning application had been submitted in about November 2015. This covered the whole of both sites, and included 19 pitches on the touring site and ten stances on the permanent site. On 28 April 2016 the full council indicated that it was minded to grant planning permission. However, because of a formal objection from SEPA relating to flooding, the council was required to refer the application to Scottish Ministers. That was done on 28 June 2016. The Ministers subsequently called in the application for their determination, and also recalled the two enforcement notice appeals so that they could be considered in parallel.

1.16 The appointed reporter issued his [report](#) on 4 July 2017, recommending that planning permission be refused, and that the enforcement notices be upheld with alterations to their periods for compliance. On 14 September 2017 the Scottish Ministers issued their decisions, refusing planning permission ([reference NA-ABS-043](#)) and upholding the enforcement notices ([ENA-110-2012](#) and [ENA-110-2013](#)). The enforcement notices therefore came into effect and the period for compliance expired on 31 July 2018.

1.17 On 28 June 2018 the council agreed to note progress being made towards submitting a new planning application and to attempt to find alternative sites to which the current residents could move. It also agreed to approve an additional six months of engagement in pursuit of an acceptable solution. At its meeting on 17 January 2019 the council was advised that some works had been undertaken in part compliance with the enforcement notice for the halting site. However, following further works on 26 September 2018 in respect of the alleged provision of nine sets of new drainage and water pipes (including new septic tanks) on this site, an interim interdict was obtained for the halting site preventing the continuation of further works. A further interim interdict was obtained for the permanent site on 16 November 2019, following more works on that site, including the delivery of a further mobile home and the subdivision of a plot.

1.18 The two applications which are the subject of this report were submitted on 14 December 2018. They were considered firstly by the Kincardine and Mearns Area Committee on 21 May 2019 and then by the full Council on 27 June 2019, when it agreed to delegate authority to the Head of Planning and Building Standards to grant retrospective planning permission for both developments, subject to conditions and notification to the Scottish Ministers because of the outstanding objection from SEPA. That notification took place on 5 August 2019, and the Ministers issued Directions calling-in the two applications for their own determination on 5 September 2019.

CHAPTER 2: POLICY AND GUIDANCE

The development plan

2.1 The development plan for this area consists of the Aberdeen City and Shire Strategic Development Plan 2014 (SDP) and the Aberdeenshire Local Development Plan 2017 (ALDP), together with the relevant statutory Supplementary Guidance associated with the latter.

Aberdeen City and Shire Strategic Development Plan

2.2 The SDP, although now more than five years old, contains a number of policies that are still relevant to the present applications. Thus, in paragraph 4.11 it states, in relation to sustainable development and climate change, that:

“Areas of Aberdeen and Aberdeenshire are already at risk from flooding, but increased risk comes about through changing and more unpredictable weather patterns and rising sea levels. Avoiding flood risk is an important measure to adapt to climate change. We will need to take account of the scale of these changes when we consider what new developments should be built and where they should be located.”

2.3 In this context, the SDP establishes the following target (para 4.17ff):

“To avoid developments on land which is at an unacceptable risk from coastal or river flooding (as defined by the ‘Indicative River and Coastal Flood Map for Scotland’ or through a detailed flood risk assessment), except in exceptional circumstances”

It goes on to indicate how this target can be met:

“Local development plans should not identify sites for new development which are at an unacceptable risk from flooding, except for brownfield sites which have appropriate flood prevention measures in place. Unacceptable risk will normally be more than a 1 in 200 (0.5%) chance of a flood happening in any year, although this will vary with the type of development being proposed.”

2.4 Paragraph 4.36 of the SDP, in relation to sustainable mixed communities, states:

“It is important that new development meets the needs of the whole community, including the specific needs of Gypsies/Travellers.”

Aberdeenshire Local Development Plan

2.5 More specific policy guidance is contained in the ALDP. In particular, policy H5 deals with provision for gypsies and travellers, and states:

“Specific gypsy/ traveller sites have been identified in the settlement statements to meet an identified need and to provide certainty to both gypsy/ travellers and the settled community.

We will generally approve permanent or temporary halting sites for gypsies and travellers on sites allocated for that purpose in the plan, or on unallocated sites where there is a proven need. In either case, the applicant must demonstrate that the site would not

appreciably detract from the character, appearance or amenity of the area. Developers of private gypsy/ traveller sites for their own use do not have to prove a specific need for their proposals but they will still need to meet the remaining policy tests.

Proposals must also provide a secure environment and essential services (in the case of halting sites: water connection, refuse facilities and portable toilet), and allow reasonable access to employment, education and other community infrastructure, and the main road network. In the case of sites that are not intended solely for private use, applicants will need to demonstrate that the site will be properly managed.”

2.6 Also of particular relevance to these cases is policy C4 on flooding. This states:

“Flood risk assessments will be required for development in the medium to high category of flood risk of 0.5%-10% annual probability (1 in 200 years to 1 in 10 years). Assessment may also be required in areas of lower annual probability (0.25-0.5%) in circumstances where other factors indicate a potentially heightened risk. Assessment should include an allowance for climate change and freeboard. Development should avoid areas of medium to high risk, functional floodplain or other areas where the risks are otherwise assessed as heightened or unacceptable except where:

- It is a development to effect flooding or erosion.*
- It is consistent with the flood storage function of a floodplain.*
- It would otherwise be unaffected by flooding (such as a play area or car park).*
- It is essential infrastructure.*

The location is essential for operational reasons for example for water based navigation, agriculture, transport or utilities infrastructure and an alternative lower risk location is not available.

If development is to be permitted on land assessed as at a medium to high risk of flooding it should be designed to be flood resilient and use construction methods to assist in the evacuation of people and minimise damage. It must not result in increased severity of flood risk elsewhere through altering flood storage capacity or the pattern and flow of flood waters.

Maintenance buffer strips must also be provided for any water body. These measures may also be required in areas of potentially lower risk of flooding (annual probability of more than 1:1000 years) or in coastal areas below the 10 metre contour should local evidence demonstrate a heightened risk.

In such areas land raising and/ or excavations will only be permitted if it is for a flood alleviation measure, it is linked to the provision and maintenance of direct or indirect compensatory flood water storage to replace the lost capacity of the functional flood plain, and it will not create any inaccessible islands of development during flood events or result in the need for flood prevention measures elsewhere.

We will not approve development that may contribute to flooding issues elsewhere. Sustainable Urban Drainage principles apply to all sites.”

2.7 Other ALDP policies also have a bearing on the issues raised in these cases, as follows:

- Policy R1 covers development in special rural areas, including the coastal zone, in which the application sites are located. It sets out the types of development that will be permitted in such areas. In the coastal zone development must require a coastal location, and the social and economic benefits must outweigh any adverse environmental impact. There must be no coalescence of coastal developments or significant adverse impacts on natural coastal processes or habitats. Great care must be taken to assess flood and erosion risk.
- Policy E1, on natural heritage, states that new development will not be allowed where it may have an adverse effect on a nature conservation site designated for its biodiversity or geodiversity importance, except in certain circumstances. In the case of an internationally designated nature conservation site, development which may have an adverse effect on its integrity will not be allowed, except where there are imperative reasons of overriding public importance and there is no alternative solution. For nationally designated sites it must be demonstrated that the objectives of designation and the overall integrity of the site will not be compromised, or that any significant adverse effects on the qualities for which the site has been designated are clearly outweighed by social, environmental or economic benefits of national importance. In this context, the application sites include part of the St Cyrus and Kinnaber Links SSSI. For other recognised nature conservation sites, the proposal's public benefits must clearly outweigh the nature conservation value of the site.
- Policy E2, relating to landscape, indicates that development will be refused that causes unacceptable effects through its scale, location or design on key natural landscape elements, historic features or the composition or quality of the landscape character. Developments located within Special Landscape Areas will only be permitted if the qualifying interests are not being adversely affected or effects of the development are clearly outweighed by social, environmental or economic benefits of at least local importance.
- Policy HE1 states that development will not be allowed that would have a negative effect on the character, integrity or setting of listed buildings, scheduled monuments, or other archaeological sites.

Statutory Supplementary Guidance

2.8 This section deals with statutory supplementary guidance which has been adopted by the council, and therefore carries the same weight as the development plan.

2.9 Supplementary Guidance 4: The Coastal Zone contains plans identifying in detail the boundaries of this area, within which ALDP policy R1 applies. It confirms that the application sites are within the coastal zone.

2.10. Supplementary Guidance 5: Local Nature Conservation Sites identifies the Local Nature Conservation Sites (LNCS) covered by ALDP policy E1. This indicates that the application sites are within the St Cyrus LNCS (No. 85), which is described as being an extensive coastal site with geological and geomorphological features; and containing dunes, coastal grassland, saltmarsh, maritime grassland and rocky shore, woodland within the steep dens, and being botanically rich.

2.11 Supplementary Guidance 9: Aberdeenshire Special Landscape Areas (SLA) identifies ten such areas, which are a local landscape designation placed on an area that exhibits particular qualities and characteristics within them that are valued locally. They are covered by ALDP policy E2. The application sites are within the South East Aberdeenshire Coast SLA. The Statement of Importance for this SLA defines it as a narrow but continuous strip that includes areas with strong coastal influence, the landward extent of which is generally restricted due to the high cliffs that separate the hinterland from the sea. Designation of this area recognises the importance of its rugged scenery of weathered coastal cliffs and atypical raised beach features, which form an important setting to the numerous coastal villages and towns as well as an important natural habitat. Designation also acknowledges the importance of the area for enjoyment, with its numerous coastal paths, beaches and long distance touring routes, providing connectivity for people as well as opportunities for expansive views out to sea. One of the landscape features noted as worthy of recognition is the broad sweep of sand at St Cyrus, backed by dunes that form a National Nature Reserve.

2.12 The Supplementary Guidance sets out management recommendations for this SLA, including the following:

- It is classed as a coastal landscape type, where the emphasis should be to maintain the focus of development within existing coastal settlements in order to retain the character of the coastal area. The effects of development along the coastal edge and within the hinterland adjacent to the SLA should be carefully considered through a coastal character assessment.
- Development should only be permitted where it can be demonstrated that the sense of place associated with the cliffs in this area will be unaffected.
- Development which may impact on the headlands, beaches and landmarks in the area should be carefully considered in order to ensure that the panoramic views within are not negatively impacted upon including the view over the sands at St Cyrus.

National planning policies

2.13 These are contained in Scottish Planning Policy 2017 (SPP). Paragraph 133 states that Housing Needs and Demand Assessments should provide evidence of the need for sites for gypsies/travellers; and, if there is a need, local development plans should identify suitable sites. They should also consider whether policies are required for small privately-owned sites for gypsies/travellers. It further states that these communities should be appropriately involved in identifying sites for their use.

2.14 With regards to the issue of managing flood risk and drainage, paragraph 254 of SPP notes that National Planning Framework 3 supports a catchment-scale approach to sustainable flood risk management. Amongst the aims of its spatial strategy is to encourage sustainable land management in rural areas, and to address the long-term vulnerability of parts of the coast. The paragraph notes that climate change will increase the risk of flooding in parts of the country; and that planning can play an important part in reducing the vulnerability of existing and future development to flooding.

2.15 Paragraph 255 states that:

“The planning system should promote:

- a precautionary approach to flood risk from all sources, including coastal, water course (fluvial), surface water (pluvial), groundwater, reservoirs and drainage systems (sewers and culverts), taking account of the predicted effects of climate change;
- flood avoidance: by safeguarding flood storage and conveying capacity, and locating development away from functional flood plains and medium to high risk areas;
- flood reduction: assessing flood risk and, where appropriate, undertaking natural and structural flood management measures, including flood protection, restoring natural features and characteristics, enhancing flood storage capacity, avoiding the construction of new culverts and opening existing culverts where possible; and
- avoidance of increased surface water flooding through requirements for Sustainable Drainage Systems (SuDS) and minimising the area of impermeable surface.”

2.16 Paragraph 256 of SPP states:

“To achieve this the planning system should prevent development which would have a significant probability of being affected by flooding or would increase the probability of flooding elsewhere. Piecemeal reduction of the functional floodplain should be avoided given the cumulative effects of reducing storage capacity.”

2.17 Paragraph 258 requires planning authorities to have regard to the probability of flooding from all sources and to take flood risk into account when determining planning applications. It notes that the calculated probability of flooding should be treated as a best estimate and not a precise forecast. In that context, planning authorities should avoid giving any indication that a grant of planning permission implies the absence of flood risk.

2.18 SPP paragraph 263 sets out a flood risk framework to guide development. This recognises that vulnerability to flooding varies between different categories of development, such that less vulnerable types of development may be acceptable in locations at greater risk of flooding. The paragraph identifies the categories of development not generally suitable to be located in areas at “Medium to High Risk” of coastal or watercourse flooding, defined as a probability greater than 0.5% (1 in 200 years). Amongst the categories of development listed as not generally suitable in such locations are those which are for the most vulnerable uses, as well as additional development in undeveloped and sparsely developed areas. The Glossary to SPP contains a definition of what is meant by “most vulnerable uses” in the context of flood risk. This specifically lists caravans, mobile homes and park homes intended for permanent residential use, and sites used for holiday or short-let caravans and camping. Where such development is nevertheless to be permitted, paragraph 263 states that measures to protect against or manage flood risk will be required and any loss of flood storage capacity mitigated so as to achieve a neutral or better outcome.

2.19 Paragraph 264 notes that it is not possible to plan for development solely according to the calculated probability of flooding, and sets out a list of factors to be taken into account in applying the risk framework.

2.20 Paragraph 265 states that land raising should only be considered in exceptional circumstances, and only then where it is shown to have a neutral or better impact on flood

risk outside the raised area. It points out that compensatory storage may be required in such circumstances.

Other national guidance on flooding issues

2.21 The Scottish Environment Protection Agency has provided guidance to planning authorities on dealing with flood risk in relation to development management:

- [SEPA Planning Information Note 3 : Flood Risk Advice for Planning Authorities \(August 2017\); and](#)
- [Development Management Guidance: Flood Risk \(July 2018\)](#)

2.22 The latter document contains detailed development management requirements relating to flood risk context, flood impacts, access and egress, and freeboard; and includes recommendations relating to climate change, flood resilient design, and pluvial flooding. It makes reference to another SEPA document (Flood Risk and Land Use Vulnerability Guidance; July 2018), which classifies the vulnerability of different land uses. As in SPP, caravans, mobile homes, chalets and park homes intended for permanent residential use, are included in the most vulnerable category. It states that such uses may be suitable in areas of low to medium risk areas (0.1% - 0.5% annual probability; 1in1000 to 1in 200 years), but not generally in medium to high risk areas (greater than 0.5% annual probability; greater than 1in 200 years) in undeveloped and sparsely developed areas.

Other policy/guidance on the provision of sites for gypsies/travellers

2.23 In its submissions, Aberdeenshire Council has referred to a number of local documents concerning the provision of sites for gypsies and travellers. These include the following:

- [Aberdeenshire Gypsy/Traveller Provision Strategy 2019-2024;](#)
- [Aberdeenshire Local Housing Strategy 2018-2023;](#)
- [Grampian Gypsy/Traveller Accommodation Needs Assessment 2017;](#) and
- [Aberdeenshire Council Gypsy/Traveller Stopover Site Development Guidance, June 2013.](#)

2.24 Reference has been made in the submissions to the following legislation:

- the Human Rights Act 1998, bringing into domestic law the European Convention on Human Rights;
- the UN Convention on the Rights of the Child; and
- the Equality Act 2010.

CHAPTER 3: SUMMARY OF THE CASES

The case for the applicants

3.1 Although there are separate applicants for the two planning applications, the cases presented on their behalf are essentially the same.

3.2 It is argued that the council has been unable to provide suitable sites for gypsies/travellers, despite 20 years of trying, and the current developments represent a response to the unmet need. There are no other suitable sites in the Kincardine and Mearns area. The council has one permanent seasonal site in Banff. One halting site has been established at Aikey Brae, and another approved near Boyndie for seasonal use. Two other private sites have been approved elsewhere in Aberdeenshire. It is the gypsy/traveller community that is providing much-needed accommodation rather than the council.

3.3 Sites within the permanent park have been sold to individual families who have settled and reside there permanently. It is maintained in a clean, tidy and well-managed condition. There are ten families living on this part of the site; 21 adults and 30 children. Many of the latter attend school or nursery in St Cyrus, but an education unit has also been provided on the site. In the past the halting site had a cramped layout, but it is now proposed to provide nine pitches, with hardstandings, mains electrical hook-ups, and individual toilet, washing and laundry blocks for each pitch. It will be maintained in a clean and tidy condition by the occupants in accordance with a management plan to be agreed with the council. The development will be managed by an on-site warden. Both sites are served by a private water supply which has been tested under the terms of the Private Water Supply (Scotland) Regulations 2006 and has proven to be fit for human consumption.

3.4 The current proposals have addressed the reasons for the refusal of planning permission in 2017, which were flood risk and drainage; geotechnical issues; landscape and visual impact; heritage assessment; and impact on the St Cyrus and Kinnaber SSSI. It is considered that the primary reason for refusal related to the flood risk, but it is recognised that the other matters are also of importance. They have been addressed as indicated below.

3.5 *Geotechnical issues.* The original Geotechnical Review published in October 2015 has been confirmed as remaining valid, and a [further report](#) has been submitted in support of the present applications. It is concluded that the slope failure on part of the steep embankment on the western side of the site which had occurred in 2015 was the result of a localised issue caused by the ponding of water in the surface of the field at the top of the embankment. There has been no further movement and no evidence of similar slumps elsewhere on the embankment. The removal of the bund that currently exists at the foot of the slope, proposed as part of the SSSI restoration work, would have no impact on slope stability, as it has no engineering purpose in terms of providing a buttress for the slope.

3.6 *Landscape and visual impact* A [Landscape and Visual Report](#) was produced in October 2015 in support of the previous application. In light of the refusal of permission, a [further submission](#) has been made responding to points raised in the reporter's report of 4 July 2017. In terms of its landscape impacts, it is concluded that the development, by reason of its nature, scale and location, does not have a major adverse effect on the landscape character of the Kincardine Links Landscape Character Area (LCA), which is part

of the Coast Landscape Character Type identified by the South and Central Aberdeenshire Landscape Character Assessment (1998). The inherent open character, panoramic views and exposed nature of the LCA are not affected by the presence of the development, which sits on the edge of the LCA at the foot of a tall and enclosing escarpment. Mitigation can be provided in the form of planting in order to improve its setting. It is recognised that the introduction of local landscape designations, in the form of Special Landscape Areas in the ALDP (see paragraphs 2.11 and 2.12 above), has increased the level of significance of the landscape impact of the development from minor to moderate.

3.7 In terms of the visual impact of the development, it is concluded that it does not have an adverse impact on the majority of sensitive visual receptors, including from coastal routes and the nearby nature reserve. For many residential receptors in the area views are screened by existing vegetation or local topography. It is recognised that the development does have an effect on the visual amenity of the adjacent property, Eskview Farm, but this could be mitigated by appropriate planting. Elevated views are available from the nearby viaduct, which forms part of the National Cycle Network, but the development does not interfere with vistas of the river or estuary from this viewpoint. It is seen against the backdrop of the embankment on the periphery of the overall coastal view. Mitigation through planting would improve its setting.

3.8 *Heritage assessment* A [Heritage Statement](#) has been submitted with the two applications, assessing the impact of the development on the nearby category B listed former railway viaduct (referred to as North Water Viaduct). It concludes that the heritage significance of the viaduct itself is considerable. It is of regional significance to North-east Scotland, demonstrating the history of railways in the area. However, in relation to the setting of the listed building, this was not a consideration when the viaduct was built. The cultural heritage significance of the setting is relatively minor. The aesthetic significance of the viaduct is based on a contemporary perception of it and its setting as a beautiful place, which is a recent attribute. The most significant view of the viaduct is from the south-west, where it is seen in combination with the nearby road bridge. The views eastwards from the viaduct would not have been particularly important when the viaduct was built; they have become important recently because of tourism and leisure factors, which do not form part of an assessment of setting impacts. The impact of the development on the cultural heritage significance of the viaduct is slight, and it has no influence on the understanding, appreciation or experience of the viaduct.

3.9 Whilst the development can be seen from the viaduct and in views of the viaduct from the north-east, it does not dominate those views. Its extent and scale are relatively small in panoramic views, and are considerably less than the viaduct itself in terms of its impact and visibility in the landscape. Consequently its impact on the setting of the listed structure is fairly minimal, in a situation where that setting is not particularly sensitive. The viaduct is able to absorb this limited new development without its key characteristics being eroded, although mitigation in the form of new planting would help in ensuring that the development is absorbed better.

3.10 *Impact on the St Cyrus and Kinnaber SSSI* The planning application for the halting site includes part of the SSSI, and a [restoration strategy](#) has been submitted, designed to remediate the damage which it is acknowledged was caused when the bund was formed from material scraped off the surface of the site. The strategy has been agreed with Scottish Natural Heritage and will be implemented within an agreed timescale.

Flood risk

3.11 This was the principal reason that led to the refusal of planning permission by the Scottish Ministers in 2017. The earlier application had been accompanied by a Flood Risk and Drainage Appraisal (FRDA) produced in 2015. This concluded that, following filling of the site, the development platform lay within a “low to medium “ flood risk category (i.e. was above the 0.5% (1 in 200) annual event probability flood level); but that the access route to the site would be flooded in such an event. It also concluded that the filling of the site would have no significant impact on flood levels on adjoining undeveloped land, and would slightly reduce the risk of flooding to Eskview Farm.

3.12 The Scottish Environment Protection Agency (SEPA), however, considered that the hydrological analysis that provided inputs to the hydraulic model was flawed; and that the flood risk from the minor watercourse along the northern boundary of the site had not been explicitly addressed. In deciding to refuse permission, the Scottish Ministers preferred the advice provided by SEPA to that presented in the FRDA. In submitting these fresh applications, new FRDAs have been carried out, taking into account the previous reasons for refusal. The assessments for the two sites are virtually identical and, for the purposes of summarising the applicants’ case, I have concentrated on the [FRDA](#) for the permanent site (NB. Links to all the parts of the FRDA are contained in Appendix 3).

3.13 The assessment considers that there are three potential sources of flood risk to the sites: river (fluvial) flooding; sea (tidal) flooding; and surface water. In relation to the last of these, there is some photographic evidence that, prior to the present development having taken place, the lower parts of the sites were at risk of surface water flooding during periods of prolonged rainfall. It is considered that this was because parts of the site were at a lower level than the road to the east, which therefore impeded the drainage of surface water in that direction. The raising of ground levels on the site has effectively eliminated the lower-lying areas, so that they are no longer susceptible to surface water flooding.

3.14 With regards to tidal flooding, the sites are above the extreme tidal surge level up to and including the 0.1% Annual Exceedance Probability (AEP) event. Although it is predicted that climate change will increase sea levels by 0.686 metres in 2100, the 0.5% AEP extreme tidal surge level will still be below the lowest points of the site. As the site is set back some 1.5 kilometres from the coast, it is considered that the long run-up across the gently sloping coastal flood plain would attenuate the potential effects of wave action. All told, it is concluded that the sites would be at little or no risk from coastal flooding.

3.15 For fluvial flooding, the flood maps published by SEPA are indicative only, and provide a high level, strategic overview, which is not appropriate for assessing flood risk to individual properties. In addition, they make no allowance for climate change. The SEPA maps indicate that, prior to filling, the sites were at low likelihood of river flooding (defined as a flood event that has a 0.1% (1 in 1000) chance of occurring in any one year).

3.16 There is no evidence of the sites being subject to river flooding in the last 70 years. However, a major flood occurred in the River North Esk in December 2012. Photographs show that flooding extended onto part of the public road beneath the North Water Viaduct to a point close to the current entrance to the permanent site. Water on the sites themselves is considered to be from surface water flooding (see paragraph 3.13 above). A further major flood event occurred on 30 December 2015, following Storm Frank. By that time the sites were occupied, and photographic evidence shows that floodwater did not reach the

sites, although the public road was again flooded to a similar extent as in 2012; as was the triangular area of land south-west of the permanent site.

3.17 Records from the Logie Mill gauging station on the North Esk, some four kilometres upstream from the site, show that this was the largest flood on record with a peak flow of 770 cubic metres/second; equivalent to a 1.5% (1 in 67 year) AEP. In contrast the peak flow in December 2012 was 541 cubic metres/second (an 8.3% (1 in 12 year) AEP). This flow was exceeded in November 2014 when the third highest event on record was 584 cubic metres/second (5.9% (1 in 17 year) AEP). The site did not flood on that occasion.

3.18 A detailed hydraulic model of the North Esk has been constructed to inform the FRDA. The results of this predict that:

- the lower lying part of the pre-development sites is at risk of flooding from a 0.5% AEP fluvial flood event, along with the road between the southern boundary and the viaduct, to a maximum depth of 0.5 metres;
- the lower lying part of the pre-development sites is also at risk of flooding from a 0.1% AEP fluvial flood event;
- the road beneath the viaduct at its lowest point starts to flood when flows reach approximately 676 cubic metres/ second, equivalent to a 2.9% (1 in 34 year) AEP event;
- the raising of ground levels within the site as part of the development has significantly reduced the depth of flooding to no more than 0.1 metres during a 0.5% AEP fluvial flood event;
- the impact of climate change will be to increase peak river flows by 20% in 2100; and
- this would be likely to increase the depth of flooding by approximately 0.2 metres, to no more than 0.3 metres.

3.19 The FRDA also predicts that the flood risk from the minor watercourse along the northern boundary of the sites would not be significant.

3.20 Overall, it is concluded that minor flooding could be expected over parts of the sites as currently developed during a 0.5% AEP flood event, with both the extent and depth of flooding likely to increase as a result of climate change. However, floor levels of the mobile homes on the site are generally about 0.7 metres above ground level, thus giving a freeboard of some 0.5 metres above the predicted flood level for the pitches that would be flooded in such circumstances. It is recommended that residents should evacuate the site on receipt of a flood warning. However, in the event of their being unable to do so, it is considered that the mobile homes would provide a safe place of refuge during a 0.5% (1 in 200 year) event; whilst parts of the site would remain unflooded.

3.21 SEPA provides flood warning on a catchment-specific basis, and the application sites lie within the Logie Mill & Craigo flood warning area. Warnings are based on forecasted flows, and the lowest forecast flow at which a warning would be issued is 536 cubic metres/second, when the level of water in the North Esk would be around the top of the embankment at Law of Craigo, some four kilometres upstream of the sites. This would give at least three hours warning of likely flooding at the sites. At the flood warning level flow the sites and access road would remain free of flooding. It would take approximately 30 minutes for the water level to rise from the forecast flow to the level of the road beneath the viaduct, thus allowing a further period of dry access after the warning had been issued.

3.22 During the prevailing conditions required to generate a flood of sufficient magnitude to flood the sites, the residents would be aware of rising river levels and would be able to make an informed choice to evacuate the sites. As was the case with Storm Frank, for a significant flood to develop in a river catchment the size of the North Esk, the catchment has to be saturated by a period of prolonged rainfall and then followed by a major storm. This would allow residents to make arrangements to leave the site well before any flood warning was received. It is predicted that the site would be flooded for no more than about four hours.

3.23 A North Esk Community Resilience Group has been formed, with the assistance of the Scottish Flood Forum. A [community resilience plan](#) has been developed and this was tested by way of a desk-top exercise on 20 June 2018, with representatives of the Scottish Flood Forum, Aberdeenshire Council, Police Scotland and SEPA. It was considered to be a success. A further successful multi-agency exercise was completed on 23 May 2019, and a full test evacuation on 20 June 2019. In that case the site was vacated by 40 residents in 18 minutes. In a real flood situation, it is anticipated that evacuation time would be extended by about 45 minutes.

3.24 The access road to the sites beneath the viaduct is likely to flood during the 0.5% and 1% AEPs, and during the 0.5% AEP allowing for climate change. The Flood Hazard Rating for the first of these occurrences is “Very low hazard – caution”, rising to “Danger for some” over a short stretch when the impact of climate change is taken into account. Thus, whilst a dry egress route would not be available for the more extreme flood events, it would be possible to traverse the floodwaters with care should the need arise. The maximum depth of water under the viaduct at the peak of the flood would be about 0.5-0.6 metres.

3.25 The FRDA contains an assessment of the off-site impacts that might arise during flooding events as a result of the ground-raising that has taken place within the sites. It concludes that there would be no significant effect on flood depth beyond the sites during a 0.5% AEP event. The depth of flooding on the road south of the proposed screening bund along the southern boundary of the site would be increased by about 0.15 metres above the pre-development flood depth of 0.3 metres. For land on the opposite side of the road from the sites, a very minor increase in flood depth of about 0.05 metres would occur, compared to pre-development flood depths varying from 0.1 to 2 metres. In contrast, there would be a reduction in flood depths for the adjoining residential property to the north, Eskview Farm. When the impact of climate change is taken into account, the raising of ground levels has a somewhat greater effect beyond the site, with flood depth on the opposite side of the road increasing by no more than 0.1 metres. This land is in agricultural use, and the increase in flood depth would be unlikely to be significant. The depth of flooding on the access road would be increased by 0.27 metres compared to the pre-development levels, but this would still only lead to a maximum flood depth of 0.6 metres; the same as on the road beneath the viaduct, where there is no impact from the ground-raising. Overall, it is concluded that the increased ground levels on the sites have no material impact on the flood risk elsewhere.

3.26 Finally, the FRDA concludes that the increase in surface water runoff from the increased extent of impermeable surfaces within the sites would be dealt with through a sustainable drainage system using soakaways. Whilst these may be ineffective during flooding events, the depth of any resultant localised flooding would be minimal.

Assessment of the development against the development plan

3.27 It is considered that the development complies with ALDP policy H5 (Gypsies and Travellers), in that it does not appreciably detract from the character or appearance of the area; does not unacceptably detract from the amenity of local residents; is sympathetically located in a secure environment and provided with essential services; the location allows reasonable access to employment, education, community facilities and the main road network; and it has been and will continue to be properly managed. In addition, this policy states that developers of private gypsy/traveller sites for their own use do not have to prove a specific need for their proposals, but must meet the above-mentioned tests.

3.28 The site has been well designed and laid out. It is well managed and has become an exemplar of developments of this nature. It is distinctive, safe and pleasant, welcoming, adaptable to future needs, resource efficient and well connected. It therefore demonstrates the six qualities of successful places, and complies with ALDP policy P1 (Layout, siting and design).

3.29 The development also complies with other relevant development plan policies: C4 (Flooding); E1 (Natural heritage); E2 (Landscape); and HE1 (Protecting historic buildings, sites and monuments). Policy RD1 (Providing suitable services) states that the council will only allow developments that provide adequate road, waste management, water or waste water facilities, connections and treatment as appropriate. It also states that all new developments must be served satisfactorily either by a mains water supply, or by a private supply if the developer is able to show that this supply is adequate to serve the proposed development, including, where necessary, that it is safe to be consumed as drinking water. In this case, the water supply has been tested under the relevant legislation and is suitable for consumption. It is therefore considered unnecessary to spend money to connect to a mains water supply.

Other material considerations

3.30 It is considered that the development meets the provisions of Scottish Planning Policy (SPP) for gypsies/travellers, as the council has failed to bring forward suitable sites in the Kincardine and Mearns area, despite the pressing need. The submitted FRDA shows how the development can be made to accord with SPP in relation to flood risk. This is considered to be a sustainable development, and therefore to benefit from the presumption in SPP in favour of development that contributes to sustainable development.

3.31 In relation to the impact of the development on the setting of the listed railway viaduct, the development accords with the guidance in the Historic Environment Scotland document "Managing Change in the Historic Environment: Setting (2016)".

3.32 In determining these applications, regard must be had to the European Convention on Human Rights, which has been brought into domestic law by the Human Rights Act 1998. In particular the following provisions are relevant:

- Article 8: respect for private and family life;
- Article 6: right to a fair hearing;
- Article 11: freedom of assembly and association;
- Article 14: prohibition of discrimination;
- First Protocol, Article 1: protection of property; and

- First Protocol, Article 2: the right to education.

3.33 In the last context, the requirements of Article 3(1) of the UN Convention on the Rights of the Child are a particular consideration in determining the proportionality of action in terms of the above-mentioned Article 8. With regards to gypsies and travellers the Best Interests of the Child include such matters as:

- the ability of children to develop and maintain friendships;
- the children's interests and their protection from social isolation and the traumatic experience of eviction; and
- the adverse implications for health and safety implicit in roadside living.

There are now 30 children living on the permanent site, attempting to access education facilities and, in the course of doing so, integrating with the settled community. To uproot these children would be very disruptive to their education and to their assimilation into a settled community in accordance with their culture and lifestyle. It is submitted that the disruption to these children's lives through the refusal of planning permission would be disproportionate.

3.34 Finally, section 149 of the Equality Act 2010 introduced the "Public Sector Equality Duty", which must be taken into account in the determination of these planning applications. It requires that due regard should be had to the need to:

- eliminate unlawful discrimination, harassment and victimisation and other prohibited conduct;
- advance equality of opportunity between people who share a relevant protected characteristic and those who do not; and
- foster good relations between people who have a protected characteristic and those who do not.

This development is calm, clean and tidy, and is doing much to foster good relations between the traveller and non-traveller communities, as has been evidenced over the last five years.

The case for Aberdeenshire Council

3.35 The council has agreed to grant planning permission for both developments at this site. In doing so, it recognised an overriding need for permanent and halting sites for travellers in Aberdeenshire. There have been historical and ongoing difficulties in identifying such sites. Since the Scottish Ministers' previous decision to refuse permission, no other sites have been forthcoming in South Aberdeenshire. It cannot be demonstrated that there are any other suitable sites. Significant weight has therefore to be given to the overall housing need for gypsy and traveller sites in the area.

3.36 In addition, the council is aware of its duties under section 149 of the Equality Act 2010, as referred to in paragraph 3.34 above. The council is aware that the applicants have invested heavily in the site since the previous refusal of permission. It acknowledges that there is still a flood risk, but the council does not accept on the basis of historical information and projected flood levels that this equates to a substantial risk to life. It has given weight to the extensive mitigation measures put in place by the applicants, including the establishment of a Flood Resilience Group, and the development of a flood resilience

and evacuation plan. As a result, the council is satisfied that flood risk can be managed. In addition, the provision of foul drainage can be adequately controlled by a planning condition.

3.37 The council has pointed out that SEPA's role is restricted to the assessment of flood risk and environmental impact, whereas the council, as planning authority, has to consider the wider planning issues. In this context, it considers that the provisions of ALDP policies C4, R1, H5 and RD1, as well as in SPP and the Scottish Government Online Planning Advice on Flood Risk, are overridden in this case by other material considerations; namely the need for sites for travellers and the council's Equality Act duties.

3.38 The council notes that, in any event, ALDP policy H5 contains a presumption in favour of halting and permanent sites for gypsies and travellers. The present site has well-established links with education, community facilities, healthcare and the main road network. It is the council's view that, with robust mitigation measures in place to address flood risk, the site provides a secure and suitable environment for its residents. The overriding need for the sites in their current location therefore justifies departing from policy in this case.

The case for the Scottish Environment Protection Agency (SEPA)

3.39 SEPA has objected to the two applications in principle on the grounds of flood risk to people and property. It considers that the proposed developments conflict with national policy on flooding, as set out in SPP, and with the relevant provisions of the Aberdeenshire Local Development Plan, particularly policy C4. SEPA does not believe that any additional information could be provided to alter its position on flood risk at these sites, which was supported by the reporter's recommendation and the Scottish Ministers' decisions in 2017.

3.40 It notes that the FRDA confirms that the sites are at flood risk, but considers that it significantly underestimates the extent of that risk. SEPA does agree, however, that despite this underestimation, the FRDA identifies parts of the sites as being within the 1 in 200 year plus climate change flood plain. Development within these areas would conflict with the abovementioned policies. The proposed use of the sites for caravans is identified as a most vulnerable use in SPP, which requires an even more stringent approach, with such developments being outwith the 1 in 1000 year plus climate change floodplain. SEPA also notes that the land-raising carried out on the sites is contrary to local development plan policy C4.

3.41 In its detailed comments on the FRDA, SEPA states that it understands that the area flooded in 2002, 2012 and 2013, prior to any development taking place, and that, during a significant flood event on the North Esk in December 2015, the access road was flooded. On that occasion, the emergency services attended to assist in the evacuation of the sites, owing to concerns over flood risk. SEPA considers that the evidence of flooding on the sites themselves, which the FRDA puts down to surface water, could have been caused by floodwater from the small watercourse along their northern side. It does not consider that the FRDA's assessment of the flood risk from this watercourse is satisfactory.

3.42 SEPA notes that the Hydrology Report in the FRDA has fitted a Generalised Extreme Value (GEV) distribution to the annual maximum flows for the Logie Mill gauging station on the North Esk. The Flood Estimation Handbook recommends the use of a Generalised Logistic (GL) distribution for most watercourses in the UK. However, the FRDA considers

that the GEV distribution provides a best fit for the North Esk data. SEPA states that, in practice, the GEV distribution can be the best fit if there is significant upstream floodplain storage, which is not the case for the North Esk, and it considers that the GL distribution better represents the river at this location.

3.43 SEPA has undertaken a similar flood frequency analysis to that in the FRDA, using the recommended GL distribution, and believes that it provides more robust estimates of design flows at the application sites. The FRDA estimate of the 0.1% (1 in 1000) AEP event is 23% less than that estimated by SEPA, using what it considers to be the preferred methodology. Similarly, its estimate of the 0.5% (1 in 200) AEP event is 12% less. Consequently, SEPA believes that the extent of flooding across the site predicted in the FRDA is significantly underestimated.

3.44 SEPA also considers that a tidal dominated event, with climate change allowance added to water levels, may show that the pre-development sites and access road are also at risk from a tidally dominated flood event.

3.45 Although the FRDA refers to flood risk management measures, including deployment of flood warnings, SEPA believes that this approach is flawed, because the extent of flood risk has been underestimated; the policy approach to flood risk and new development in Scotland is to avoid flood risk and not to manage it; and the previous reporter concluded that the establishment of a flood emergency plan was insufficient to ameliorate the level of risk, bearing in mind the serious consequences arising from potential flooding. The access road to the sites will be subject to flooding relatively frequently, with the FRDA estimating that this would occur at the lowest point of the road when flows reach approximately 676 cubic metres/second, which is equivalent to a 2.9% (1 in 34 year) AEP event. Even allowing for the underestimation of the flood risk, a 2.9% risk of the road being flooded in any one year is not in accordance with national or local planning policies.

3.46 SEPA is also concerned about the statement in the FRDA that the mobile homes would provide a safe place of refuge during flooding. The notion of a 1 in 200 or 1 in 1000 year flood level only provides a statistical estimate to the potential risk of flooding. Larger floods can and do occur, and are associated not only with a rising water level, but also with increasing velocities, scour and erosion, and can carry large floating debris. Furthermore, it is generally considered that a water depth of 150 millimetres will reach the bottom of most cars, causing loss of control and potential stalling, whilst a depth of 300 millimetres will float many vehicles.

3.47 SEPA has also expressed concerns over the proposed foul drainage arrangements for the development, the discharge of which into the North Esk would require an application under the Controlled Activities Regulations. It accepts, however, that whilst the fundamental issues relating to flood risk remain unresolved, it would not advise the applicants to devote further resources to addressing the drainage matters, given the in-principle objection which SEPA has lodged to the developments.

Other consultation responses

3.48 The council carried out consultations on each of the planning applications. The responses received were essentially the same, and are summarised below.

3.49 *Aberdeenshire Council Education and Children's Services (Learning Estates Team)* had no objections to the developments. The primary school catchment is St Cyrus school, and the secondary catchment Mearns Academy.

3.50 *Aberdeenshire Council Infrastructure Services (Environmental Health)* objected to the developments on the basis that the use of a private water supply was proposed, when it is understood that there is the potential to use a mains water supply. Should this not be possible, details would be required for the source, quality and quantity of the water supply, as well as any necessary treatment to make it of a sufficient standard.

3.51 *Aberdeenshire Council Infrastructure Services (Environment Team)* commented that further details of the proposed landscaping should be provided; and that locally sourced plants should be used, as they would have the best chance of surviving in this relatively exposed coastal location and of blending visually with the local environment, including the SSSI.

3.52 *Aberdeenshire Council Infrastructure Services (Flood Risk and Coastal Protection)* objected to the developments, as being contrary to ALDP policy C4 (Flooding), as development should avoid areas of medium to high risk. The submitted FRDA indicates that the access to the site would be flooded to a depth of 0.5 metres during a 0.5% AEP, resulting in no safe means of access or egress during such an event. It also shows that land raising on the site has increased flood depths on the adjoining public road and farmland to the south. They also state that sites which require a flood resilience and evacuation plan are not suitable for this type of development, and that flood risk from the minor watercourse has not been adequately considered.

3.53 *Aberdeenshire Council Infrastructure Services (Housing Strategy)* commented that the Aberdeen City and Shire Housing Need and Demand Assessment (2017) and the Grampian Gypsy/Traveller Accommodation Needs Assessment (2018) identify a need for increased gypsy/traveller site provision. In addition, the Aberdeenshire Local Housing Strategy 2018-2023 and the Aberdeenshire Gypsy/Traveller Site Provision Strategy (2015) identify a need for sites in north, central and south Aberdeenshire. Four sites have been identified through the local development plan, but it is unlikely that they will be developed in the short term. The Local Housing Strategy seeks to ensure that gypsies/travellers normally resident in Aberdeenshire or visiting the area have accommodation that meets their needs, culture and lifestyle.

3.54 *Aberdeenshire Council Infrastructure Services (Roads Development)* originally objected to the developments on the basis of insufficient visibility and road safety. However, following a site visit and additional measurements, they removed the objection subject to a condition requiring the implementation of visibility splays within a suitable time period.

3.55 *Aberdeenshire Council Infrastructure Services (Waste Management)* had no objection to the development subject to the roads and access being designed and constructed to the satisfaction of the roads authority.

3.56 *Scottish Natural Heritage (SNH)* advised that there are natural heritage interests of national importance that are affected by the development. The proposed restoration strategy for the SSSI, involving the removal of dumped material and management of the vegetation, is acceptable to SNH.

3.57 *Scottish Water* has no objections to the developments. The development could be fed from the Waterhillocks Water Treatment Works, but no confirmation could be given to capacity at this time.

Representations from third parties

3.58 A total of 80 representations (50 support / 30 objection) was submitted to the application for the touring site; although, as there were multiple representations from some households, this equated to 96 letters in all. For the permanent site, there was a total of 49 representations (20 support / 29 objection). Again, there were multiple representations from some households which equate to 55 letters in total. A link to the representations received is contained in Appendix 3.

3.59 Those who have expressed support, which, understandably, include some currently living on the site, have raised the following issues in relation to either or both developments:

- the residents have been in-situ for some time, and making them move would have devastating impacts on those families;
- the site would benefit those struggling to find a permanent address, and would avoid the need to utilise roadside lay-bys;
- the travellers have built this site at their own cost after the failure of the council, which has a responsibility to provide sites for gypsies/travellers, to deliver a site in over 20 years;
- under the Human Rights Act, everyone is entitled to a safe place to call home;
- prejudice and discrimination against travellers should not be accepted in any form;
- the environmental/flooding concerns are not factual; other developments are provided on river banks, so why should not this be too;
- the area is being treated with respect, and the site is always clean and tidy;
- low levels of noise are associated with the site;
- traffic generation is also minimal;
- the proposed landscaping would add to environmental benefits;
- the caravan park at St Christopher's in Montrose is a great example of a site provided for travelling families, and Aberdeenshire Council should follow suit;
- the site is in an ideal location which offers security, privacy and access to local schooling; and
- this would be good for the community and employment, as well as the economy and tourism.

3.60 Those who have objected have raised the following points, again in relation to either or both developments:

- the focus should be upon finding a safe, risk-free site that avoids flood risk and is not contrary to policy;
- restoration of the site should be taking place in accordance with the Scottish Ministers' previous decision;
- these applications are a delaying tactic to avoid previous enforcement timescales, the ministerial decision having required this land to be cleared by July 2018;
- the development is retrospective and should never have taken place in the first place, and the site is the subject of injunctions which have been ignored;
- the current applications do not appear materially different from previous applications;

- the adjacent small watercourse was previously acceptable when there was a functional floodplain, but without a buffer this is no longer the case;
- implications on the neighbouring tourism business;
- the development has an enormous detrimental effect on the environment, community and lives of neighbours;
- the detrimental visual impact of the development on the local landscape;
- potential impacts on the adjacent nature reserve;
- the development adjoins and would be detrimental to the SSSI;
- impacts on the setting of the adjacent category B listed viaduct;
- the development results in the loss of prime agricultural land;
- private water supplies could ultimately become contaminated;
- there is a risk to life from flooding and climate change will make future flooding events worse;
- SEPA has maintained its objection on flooding grounds;
- the drainage measures proposed do not resolve the flooding issue;
- the land raising has resulted in significant impacts to water flows and adjacent residents;
- the development does not accord with the council's current local plan policies relating to location, housing in the countryside, or layout siting and design; and
- the development is contrary to Scottish Planning Policy relating to flooding.

CHAPTER 4: REPORTER'S CONSIDERATION OF THE ISSUES

4.1 Section 25 of the Town and Country Planning (Scotland) Act 1997, as amended, requires that, in making a decision on an application for planning permission, the determination shall be made in accordance with the development plan, unless material considerations indicate otherwise.

4.2 I consider that the main determining issues in these two applications are:

- a. the need for additional provision for gypsies and travelling people in Aberdeenshire;
- b. the environmental effects of the development at the application sites; and
- c. the extent of the flood risk at the application sites.

4.3 In assessing these issues, I have had regard to the provisions of the development plan and associated statutory supplementary guidance; the relevant provisions of national planning policy as set out in SPP; other relevant national policies and guidance; and human rights and equalities legislation. I have also had regard to the submissions of the parties, as summarised in Chapter 3.

The need for gypsy/travelling peoples' sites

4.4 At the national policy level, paragraph 133 of SPP states that, where a need has been established, local development plans should identify sites for gypsies/travelling people; and should also contain policies for small privately-owned sites if necessary. The Aberdeen City and Shire Strategic Development Plan also refers to the importance of meeting the needs of gypsies and travellers, but contains no specific guidance as to how this should be achieved.

4.5 The key planning policy relating to this issue is therefore policy H5 in the adopted Aberdeenshire Local Development Plan (ALDP), the wording of which is set out in paragraph 2.5 above. Of particular significance in these cases is the statement that the council will generally approve permanent or temporary halting sites for gypsies and travellers on unallocated sites where there is a proven need. However, the applicant must demonstrate that the site would not appreciably detract from the character, appearance or amenity of the area. It is further stated that developers of private gypsy/traveller sites for their own use do not have to prove a specific need for their proposals, but they will still need to meet the remaining policy tests.

4.6 A key argument for the current applicants is that, over the last 20 years or so, the council has failed to provide suitable sites and that, as a result, the gypsy/travelling people community has had to make its own provision; as has been done at this location. In particular there are no suitable alternative sites in the Kincardine and Mearns area of Aberdeenshire.

4.7 Although it has previously refused planning permission for development on these sites, and served enforcement notices against the currently unauthorised development, the council now appears to essentially agree with the applicants' position on the issue of need. In its submissions on these applications, the council has indicated that other policy considerations in the ALDP are overridden by the need for touring and permanent halting sites for travellers in Aberdeenshire, and its duties in terms of section 149 of the Equalities Act 2010, to advance equality of opportunity between those who share a protected

characteristic and persons who do not share it, and to foster good relations between these two groups.

4.8 The council has referred to a number of documents, the most recent of which is the [Aberdeenshire Gypsy/Traveller Site Provision Strategy 2019-2024](#). This indicates that in 2018 there were 22 unauthorised gypsy/traveller encampments in Aberdeenshire, a number that had reduced substantially from 65 in the previous year. 24% of the unauthorised encampments were in Kincardine and Mearns. The council currently provides two sites, with a total of 30 pitches. There are six privately provided sites, of which that at St Cyrus is potentially the largest, albeit that it is currently unauthorised. There is a permanent, serviced site at St Christophers in Montrose, approximately five kilometres from the current application sites, but this is within the area of Angus Council. Four sites for gypsies/travellers are allocated in the LDP. Of these, the nearest one is within the new settlement at Chapelton of Elsick, which is under construction. The council does not believe this site will be developed in the short term.

4.9 The document acknowledges that the present development at the application sites helps to meet the needs of gypsies/travellers in south Aberdeenshire, whilst recognising that its planning status is unresolved. Irrespective of the outcome of these applications, however, it states that there is a need in central and south Aberdeenshire that will require to be met through either local authority or private provision.

4.10 The [Aberdeenshire Local Housing Strategy 2018-2023](#) states:

“We will provide assistance to Gypsy/Travellers who would like to develop private sites. We will use the policy on managing unauthorised encampments to support Gypsy/Travellers to meet their needs and follow the code of conduct.”

4.11 I am satisfied that the evidence indicates that there is a need to provide facilities for gypsies/travelling people in south Aberdeenshire, and that granting planning permission for these two developments would significantly help to meet that need. I note also that policy H5 in the ALDP does not require developers of private gypsy/traveller sites to prove a specific need for their proposals. It does, however, require that the other policy tests in the plan should be met.

4.12 In order, therefore, for the present applications to be consistent with policy H5 it must be demonstrated that they also do not conflict with any other policies in the ALDP. Consequently, I consider the other relevant policies below.

The environmental effects of the developments

4.13 I have set out in paragraph 2.7 above a number of ALDP policies which I consider relevant to the consideration of these applications (policy C4 relating to flooding is considered separately in the following section of this chapter).

Landscape and visual impact

4.14 The sites lie within an area designated as Coastal Zone in the ALDP. The development proposals do not meet any of the nine criteria set out in policy R1 for the types of development that might be considered acceptable in such a location. Nor do they require a coastal location. As such I consider that the proposals do not comply with policy R1.

Whether this non-compliance is overridden by the need to make adequate provision for the gypsy/travelling people community, as contended by the applicants and the council, is a matter to be taken into account in drawing up the overall planning balance; which I consider later in this report.

4.15 ALDP policy E2 states that development will be refused that causes unacceptable effects through its scale, location or design on key natural landscape elements, historic features or the composition or quality of the landscape character. Developments located within Special Landscape Areas will only be permitted if the qualifying interests are not being adversely affected or effects of the development are clearly outweighed by social, environmental or economic benefits of at least local importance.

4.16 The previous application in 2015 (see paragraph 1.15 above) had been accompanied by a Landscape and Visual Report. The current applications is accompanied by an addendum to that report, intended to provide a response to some of the comments made in the previous reporter's report.

4.17 The application sites lie within the South East Aberdeenshire Coast Special Landscape Area (SLA), the extent of which is defined in the council's statutory Supplementary Guidance 9: Aberdeenshire's Special Landscape Areas. In this document, a number of features of the SLA are identified which are of some relevance to the application sites:

- the broad sweep of sand at St Cyrus, backed by dunes that form a National Nature Reserve;
- coastal routes, including the A92, footpaths and National Cycle Network Route 1, all offering expansive views over the sea; and
- panoramic views out to sea from headlands and beaches and important views along the coast, including over the sands at St Cyrus.

4.18 The sites lie on the inland boundary of the narrow SLA, set against the steep slope that marks the edge of the flat, low-lying coastal plain. The existing development on these sites can only be glimpsed from the A92 to the west, but there is a clear view of it from the former railway viaduct to the south, which carries part of the North Sea Coastal Path. However, it forms only a small part of the panorama visible from this viewpoint, which is focussed to the north-east towards the mouth of the River North Esk and the sea. As such, I do not consider that the developments cause unacceptable harm to the features, character or inherent quality of the SLA; or that they would conflict with policy E2 in that respect.

4.19 With regards to the more local visual impact of these developments, the previous reporter concluded (in paragraph 6.13 of his report):

"The LVR understates the visual impact of the development on the landscape in my view. The cluster of mobile homes, outbuildings, touring vans and facilities buildings set within a largely hard surfaced site is in my judgement incongruous within this sparsely developed coastal strip."

4.20 I agree with his comment on the visual incongruity of the development that has taken place within the context of its rural setting, which is characterised by a pattern of scattered dwellings and farm steadings. From close to on the adjoining road, in particular, the non-rural nature of the development is accentuated by the high timber fencing along the

southern and eastern boundaries of the site. Although it has the benefit of screening much of the development within the sites, it is a somewhat alien feature in this landscape and contributes to what I would describe as an essentially suburban character that has been created at this location.

4.21 In longer views from the road to the north-east, although the development is clearly noticeable, it is not unduly obtrusive within the overall landscape. Its scale is significantly less than the extensive farm buildings and external storage areas at Nether Warburton. From the St Cyrus Nature Reserve Visitor Centre it is barely perceptible.

4.22 In terms of its impact on existing residents in the area, I consider that it is not unduly obtrusive, except from the adjoining house at Eskview Farm. This single-storey dwelling, which also provides bed and breakfast accommodation, has windows facing towards the touring site. Whilst this is presently unoccupied there is not a problem, but I can envisage that when it is in use the impact of a significant number of touring caravans, plus associated vehicles and activity, would have an adverse impact on the amenity of the neighbouring residents. There is an existing timber-boarded fence along the section of the mutual boundary closest to the house, and it is proposed to carry out planting to further mitigate the impact on Eskview Farm.

4.23 Further hedge planting is proposed along the road frontage of the two sites. In addition, along the southern boundary on land outwith the permanent caravan park it is proposed to create a seven-metre wide earth mound with extensive planting on it. These measures, if fully implemented and subsequently maintained, will eventually soften the appearance of the development. A [photomontage](#) submitted with the original Landscape and Visual Report suggests that extensive screening could be achieved in 12 years from the implementation of the planting. However, the rate of growth and overall success of the planting cannot be guaranteed.

4.24 All told, I consider that the developments do have some adverse visual impact on its immediate surroundings. However, the sites are visually relatively well-contained, being bounded by the embankment to the north-west and west. Consequently, the visual impact of the development does not extend over a wide area, and the flat coastal plain to the east is largely unaffected by it. I therefore conclude that neither the landscape nor visual impact of these developments would warrant the refusal of planning permission.

Impact on the setting of the listed viaduct

4.25 In his report on the previous application, the reporter concluded (paragraph 6.14):

“Section 14 of the Planning (Listed Buildings and Conservation Areas) Act 1997 requires that special regard is had to the desirability of preserving the setting of a listed building. The development intrudes into close and more distant views of the B-listed former railway viaduct, and is prominent in views obtainable at high level from the public foot and cycle route that passes across it. In both these respects the development does not preserve the setting of the listed building.”

4.26 In response to that conclusion, the present applications were accompanied by a detailed Heritage Statement for the viaduct. This states that the historic significance of the structure is considerable, as it is illustrative of the history of railways in North-east Scotland. However, whilst it is now appreciated as a historic structure in a beautiful location, these

were not important features in relation to the design or setting of the viaduct when it was built. Whilst the view east towards the sea is very attractive, it would not have been considered important when the viaduct was being built. The Historic Environment Scotland (HES) document “Managing Change in the Historic Environment: Setting” states:

“Tourism and leisure factors may be relevant in the overall analysis of the impact of a proposed development, but they do not form part of an assessment of setting impacts.”

4.27 The Heritage Statement notes that the development at the application sites has no physical impact on the viaduct or its immediate setting. It further states that the cultural heritage significance of its setting is relatively minor, and that the aesthetic significance of the viaduct is essentially a contemporary perception. It considers that the most interesting views of the viaduct are from the west, where it is seen in the context of the earlier road bridge, and that the cultural heritage significance of the setting is confined to the view which encompasses both of these structures.

4.28 I appreciate that, when the viaduct was built, its setting would have been of no aesthetic significance and it would have been designed as a functional means for the railway to cross the North Esk valley. Nevertheless the design of the structure would no doubt have taken into consideration aesthetic, as well as purely engineering, factors. The result is a structure which is now considered attractive in its own right, and which is enhanced by its present setting. The development on the application sites is visible in views of the viaduct from the north-east. However, as I have stated in paragraph 4.21 above, in longer distance views it is not unduly obtrusive and I consider that it does not detract from the appreciation of the viaduct from this direction. From nearer viewpoints, there is inevitably a closer visual relationship between the development and the viaduct, but I am not convinced that this has caused significant harm to the setting of the listed structure. Similarly, in views from the path crossing the viaduct, whilst the mobile homes and associated development are clearly visible, they form a relatively small part of the wide vista available from this viewpoint. The value of the viaduct as a tourism and leisure asset is recognised but, as the above-mentioned quote from the HES document indicates, this does not affect the assessment of the intrinsic historic or cultural significance of the setting of a listed building.

4.29 Overall, I arrive at a somewhat different conclusion to that of the previous reporter, in that I find that, on balance, the developments which are the subject of these applications have a neutral effect on the setting of the listed viaduct; and, therefore, preserve its setting. Consequently, I also conclude that they would not conflict with ALDP policy HE1 (see paragraph 2.7 above).

Natural heritage impacts

4.30 When the sites were originally cleared to allow the current development to take place, some of the material was placed in a bund along the north-western side of the halting site, where it has impinged on part of the St Cyrus and Kinnaber Links SSSI. The applicants have now put forward a strategy for the removal of the bund and the restoration of the part of the SSSI that has been affected. In its consultation response to the planning applications Scottish Natural Heritage (now nature.scot) advised that the proposed strategy was acceptable to it. A Geotechnical Review submitted with the applications has demonstrated that removal of the bund would not affect the stability of the steep slope above it. I am therefore satisfied that subject to the implementation of the remediation

strategy, which can be covered by appropriate planning conditions, the developments will have no adverse impact on natural heritage interests in the area. Consequently, I conclude that it would not conflict with ALDP policy E1 (see paragraph 2.7 above).

Flood risk

4.31 In his conclusions on the previous application, which were accepted by Scottish Ministers, the reporter states (paragraph 6.24):

“The potential for the site to flood from more than one source leads me to conclude, bearing in mind the precautionary approach which SPP requires, that it would be unsafe to consider that the risk of flooding is outweighed by the contribution that the site currently makes towards meeting the undoubted need for gypsy / traveller accommodation in the locality. The application development gives rise to substantial risk to life and property on account of the propensity of the site to flood. In these ways, the development is in conflict with national policy on flooding, as set out in SPP and elsewhere. Accepting such risk would run counter to the social strand of sustainable development, the fostering of which is a core principle of national and development plan policy, reflecting the Scottish Government’s central purpose. By involving development of land at significant risk of flooding, and in other ways as I have identified, the development also conflicts with the environmental strand of sustainability.”

4.32 The policy background in relation to flood risk is set out in Chapter 2. Paragraphs 2.15 to 2.20 summarise the guidance at national level, as set out in SPP. In particular, paragraph 263 of SPP indicates that areas of “Medium to High Risk “ of flooding (defined as when the annual probability of coastal or watercourse flooding is greater than 0.5% (1 in 200 years)) are generally not suitable for new caravan and camping sites and the most vulnerable uses. The latter are in turn defined in the Glossary of SPP as including caravans, mobile homes and park homes intended for permanent residential use.

4.33 This echoes the advice in SEPA’s guidance relating to flooding (see paragraphs 2.21 and 2.22 above). In its document Flood Risk and Land Use Vulnerability Guidance, it is stated that areas of low to medium risk (0.1% - 0.5% AP) may be suitable for other most vulnerable uses if the risk from the 0.1% AP event can be alleviated through appropriate mitigation.

4.34 In the ALDP policy C4 concerns flooding, and is set out in paragraph 2.6 above. In summary, it states that development should avoid areas of medium to high risk, functional floodplains or other areas where the risks are assessed as heightened or unacceptable, except in certain circumstances. It also states that, if development is to be permitted on land assessed as at a medium to high risk of flooding, it should be designed to be flood resilient and use construction methods to assist in the evacuation of people and minimise damage. It must not result in increased severity of flood risk elsewhere through altering flood storage capacity or the pattern and flow of flood waters.

4.35 In response to the previous refusal of planning permission, the applicants have submitted new Flood Risk and Drainage Appraisals (FRDA) for each site. As these are nearly identical, I have focussed on the one submitted for the permanent site. I consider that the key issues relating to flood risk are: (a) the extent of the predicted flood risk and the methodology used for the prediction; (b) the consequences resulting from the potential flooding of the site; and (c) the impact of flooding on drainage and water supply.

The extent of the predicted flood risk

4.36 Using a hydraulic model constructed for the River North Esk, the FRDA predicts that parts of both sites, as they have now been developed, could be subject to flooding from both a 0.5% AEP and 0.1% AEP fluvial flood event. In the case of the former, the maximum depth of flooding is predicted to be largely about 0.1 metres, without taking into account of climate change considerations. If the latter are accounted for, the maximum flood depth is predicted to vary from 0.1 to 0.3 metres in different parts of the site. Some areas within the permanent site would, however, remain unflooded.

4.37 For the 0.1% AEP, the maximum depth of flooding predicted by the model would vary from 0.1 to 0.4 metres, without taking account of climate change. In this scenario, all the halting site would be flooded largely to a depth of 0.3 metres, but with a maximum of 0.4 metres. Parts of the permanent site would be flooded to varying depths from 0.1 – 0.3 metres, although an area closest to the north-western boundary would remain unflooded. The FRDA does not contain a prediction for the 0.1% AEP with climate change.

4.38 The FRDA also shows that the predicted depth of flooding for the adjoining road which provides access to the sites, as it passes beneath the viaduct, would be about 0.5 metres (0.5% AEP), 0.7 metres (0.5% with climate change), and 0.8 metres (0.1% AEP).

4.39 These predictions can be compared to existing records of flooding in this part of the North Esk catchment. Recent significant flood events have taken place on six occasions in the 36-year record for the Logie Mill gauging station – twice in 2002, twice in 2012, in 2014, and most recently on 30 December 2015, following Storm Frank. The FRDA includes photographs for this last flood and for one on 23 December 2012. In neither case did flood water from the river reach the sites, although in the earlier event, the photographs show water standing on the site which, at that time, had not been developed. It is suggested for the applicants that this was the result of localised surface water, rather than fluvial, flooding. In the 2015 event there was no flooding on the sites, which were then occupied. In both, cases, the adjoining road was flooded from beneath the viaduct to a point close to the current entrance to the permanent site.

4.40 The FRDA used the two above-mentioned floods for the calibration of the model. It suggests that the 2012 flood had an AEP of approximately 7.7% (i.e. it was an approximately 1 in 13 year event). The 2015 flood, which is the largest so far recorded, is estimated as an approximately 1.6% AEP (1 in 67 year) event. Thus the largest flood event that has been experienced is significantly less than the 1 in 200 year event for which predictions have been made.

4.41 There is no dispute between the parties that the sites are predicted to be flooded by water from the North Esk by a 0.5% AEP event. In accordance with SPP policy and SEPA advice, they are therefore at medium to high risk of flooding, and not suitable for the type of development that has taken place. ALDP policy C4 also indicates that development should avoid such areas except in certain circumstances that do not apply in this case.

4.42 SEPA has maintained a consistent objection to all the applications for development at this location on the grounds that the developments are contrary to both national and local planning policies relating to flood risk. It considers that, because of the vulnerability of the developments involved, a more stringent test of being outwith the 0.1% floodplain should be used. This seems to me to go somewhat beyond the policy guidance in paragraph 263 of

SPP. It states that areas of low to medium flood risk (i.e. 0.1% to 0.5% AEP) are suitable for most developments, although a flood risk assessment may be required at the upper end of the probability range (i.e. close to 0.5%) and for the most vulnerable uses. SEPA's own document "Flood Risk and Land Use Vulnerability Guide" states that low to medium risk areas may be suitable for other most vulnerable uses if the risk from the 0.1% AEP event can be alleviated through appropriate mitigation measures.

4.43 In this case there is, again, no dispute that the sites would be flooded during a 0.1% AEP event. By definition, such an event is likely to be a very infrequent occurrence and therefore a low risk. However, I recognise that the consequences of such low risk but severe flooding could be potentially very serious for the occupants of mobile homes and caravans on the application sites. As such, I recognise that it is appropriate to take a precautionary approach in assessing flood risk, as has been done by SEPA.

4.44 In addition to its objection as a matter of principle, SEPA also considers that the applicants' FRDA has underestimated the extent of the flood risks at the sites. This is because of the methodology adopted in the construction of the hydraulic model used to predict flood risk. This is an issue which has been debated at some length, both in correspondence between SEPA and the applicants' consultant, SLR Consulting, who prepared the FRDA; and at the virtual hearing on 3 November 2020.

4.45 In order to create the hydraulic model it is necessary to derive the hydrological inputs to be used. The record of actual peak flows in the River North Esk at the nearest gauging station to the sites (Logie Mill) is only available for 36 years. It is therefore necessary to mathematically create a best-fit curve for the actual data plot in order to extrapolate peak flows for longer return period events, where there is no current data. This is a complex technical procedure, and I recognise that the differences in the views expressed by SEPA and SLR reflect genuine differences in professional judgement.

4.46 Whilst not the only area of disagreement, the principal one is the method used to create the best-fit curve for the data. SEPA advised that the Flood Estimation Handbook advises that the default position is to use what is known as the Generalised Logistical (GL) distribution. In the FRDA, SLR has used an alternative method, known as the Generalised Extreme Value (GEV) distribution. SEPA believes that this distribution tends to produce predictions of lower maximum annual flows for higher return period events, so that it can predict maximum flows not much greater than those actually recorded. It considers that the use of the GEV distribution is best suited to river catchments where there is extensive water storage in the upper reaches (e.g. a lake or reservoir), as this tends to damp down maximum flows. The GL distribution does not put any cap on upper limits (in technical terms it is not "bounded above").

4.47 In its response SLR has argued that, whilst the Flood Estimation Handbook makes broad recommendations that the GL distribution should be used, it is not necessary in all cases. In this instance the GEV distribution provides a slightly better fit to the actual data than does the GL distribution. The shape of the curve also indicates that it is not "bounded above", and therefore does not cap the predicted maximum flow; a point which I think was accepted by SEPA's hydrologist at the hearing.

4.48 There are other technical differences between the parties relating to the construction of the hydraulic model, which I do not consider it is necessary to go into for the purposes of this report. However, SEPA carried out its own flood frequency analysis, using the GL

distribution, for the Logie Mill gauging station, which it considers provides more robust estimates of design flows at the application sites. For the hearing I produce a table showing the different results of the SLR and SEPA modelling, which both parties agreed was accurate. It is reproduced below:

Annual Exceedance Probability	SLR (pooling group analysis for target site, from Table 3-2 of Hydrology Report) (cu.m/sec)	SEPA (from its letter of 18.2.2019 using enhanced single site analysis) (cu.m/sec)	% increase
0.5%	937	1070	14.2
0.5% + climate change	1124	1284	14.2
0.1%	1221	1582	29.6

4.49 This shows a substantial increase in the predicted peak flows (cubic metres/second) in the River North Esk adjacent to the application sites using SEPA's methodology. All these flows compare to the flow of about 676 cubic metres/second when the access road starts to flood, and to a peak flow of about 770 cubic metres/second during the December 2015 flood event. On the basis of the GL distribution, SEPA estimates this to have been a 1 in 50 year event, slightly more frequent than SLR's estimate of it as a 1 in 67 year event.

4.50 I respect the genuine differences in professional judgement between the parties on these technical matters. I do not think that it is possible for me to state categorically whether each approach is right or wrong. Rather, they represent a different emphasis. However, I do agree with SEPA that, given the inherent uncertainty of predicting low frequency events, and given the potentially serious consequences of severe flooding, it is appropriate to take a precautionary approach, and to avoid any approach that might be deemed to be somewhat over-optimistic. As a result, I prefer SEPA's figures for predicted peak flows, as set out in the table above.

4.51 SLR has, in fact, carried out a further modelling exercise using those figures, which has produced the following results:

- for the 0.5% AEP event the depth of flooding would be increased to a maximum of about 0.3 metres;
- this would represent an increase of about 0.18 metres on the permanent site and 0.16 metres on the halting site;
- the depth of flooding on the access road would increase from about 0.5 metres to 0.75 metres;
- taking account of a potential increase of 35% for climate change, this would further increase by about 0.18 metres.

4.52 The same exercise has not been undertaken for the 0.1% AEP event, and flooding depths would be greater. However, SLR has argued that an increase in flows in the river does not necessarily increase the depth of flooding, as the area of flooding would increase.

4.53 Despite SEPA's general criticisms of the modelling method used, I acknowledge that the applicants' hydraulic model is the only detailed technical evidence of the likely extent

and depth of flooding that would be experienced on the application sites. Given the inherent uncertainty involved in flood modelling, and the need that I have identified to take a precautionary approach, I reach the following conclusions for the worst-case scenarios:

- at a 1 in 200 year (0.5% AEP) flood event, all of the halting site and a significant part of the permanent site would be flooded, with a maximum flood depth of about 0.3 metres;
- taking into account the likely effects of climate change, the maximum depth of flooding would increase to about 0.48 metres;
- for the 1 in 1000 year (0.1%) flood event, the maximum depth of flooding would be about 0.4 metres, and probably more, given that the impact of climate change has not been modelled;
- the depth of flooding across the two sites would not be uniform, and part of the permanent site is likely to remain unflooded in all scenarios; and
- the public road leading to the sites from beneath the former railway viaduct would be flooded to at least 0.5-0.7 metres during the 0.5% AEP event, and at least 0.8 metres in the 0.1% AEP event.

4.54 Before considering the impacts of such flooding, there are two other sources of flooding that need to be covered. Because of the location relatively close to the sea, the effect of possible tidal flooding needs to be taken into account. The FRDA states that the sites lie above the extreme tidal surge level for all events up to and including the 0.1% AEP, even taking into the effect of climate change in increasing sea levels over time. However, the impact of high tide levels travelling up the River North Esk combined with a flood event in that river could increase the extent and depth of flooding over the adjoining flood plain. The FRDA investigated this scenario and concluded that the fluvial flood risk dominates the sites.

4.55 Whilst agreeing with that conclusion, SEPA considers that the tidal flood risk is a complicating factor and increases uncertainties in modelling flood risk. In a very large coastal surge event where sea levels are very high, even moderate flows in the river at the same time could give a combined effect of flooding in the area. In the future, given the effect of rising sea levels as a result of climate change, the sites would be at greater risk of tidally dominated flooding, and any floods where tidal events coincided with high river levels could be exacerbated. SEPA accepts that this issue is most relevant when considering the effect of climate change.

4.56 Whilst acknowledging that, taking a long-term view, the impact of climate change will have an impact on possible flood risk because of rising sea levels, I accept that the FRDA analysis is robust when looking at the reasonably foreseeable future, and that the greatest risk to the sites is from fluvial flooding from the River North Esk.

4.57 A further source of possible flooding is from the small watercourse that runs along the northern boundary of the halting site. The FRDA contains an assessment of the risk from this source, and concludes that there is no flood risk. I consider this matter further when I deal with the possible consequences of flooding, but I am satisfied that any risk of flooding on the application sites from this stream is negligible compared to the risk from the North Esk.

The consequences of flooding of the sites in terms of the risk to people and property

4.58 The applicants' position is that SEPA has confirmed that it would aim to give three hours' warning before the sites were due to flood. This would be triggered when a threshold flow of 536 cubic metres/second is forecast at Law of Craigo, about four kilometres upstream. This compares to a flow of about 676 cubic metres/second, when the access road would start to flow. In addition, any likely significant flood would be preceded by antecedent events, as in the case of Storm Frank, with probable prolonged rainfall for several days. As a result, residents on the site would be well aware of rising water levels in the North Esk.

4.59 The North Esk Community Resilience Group has been set up with the assistance of the Scottish Flood Forum, and a flood resilience plan has been prepared. This plan sets out procedures to be followed in the event of a flood warning being received, as well as the relevant contacts in the emergency services. The plan was tested as a desk-top exercise with representatives of the Scottish Flood Forum, Aberdeenshire Council, Police Scotland and SEPA, when it was considered to be a success. A further successful multi-agency exercise was carried out in May 2019, followed by a full test evaluation in June when 40 residents were evacuated in 18 minutes. In a real flood situation it is anticipated that evacuation would take 45 minutes.

4.60 Whilst evacuation of the site would be the first option in the event of a flood warning, the applicants have pointed out that the mobile homes on the permanent site are generally about 0.7 metres above ground level. This would therefore give at least 0.4 metres freeboard above flood water levels for a 0.5% AEP event on this part of the site, so that the mobile homes would provide a safe place of refuge if evacuation were not possible.

4.61 SEPA does not believe that the existence of a flood resilience plan alters the flood risk to the sites, or is an appropriate mitigation for such risk in terms of SPP. Whilst it supports the preparation of such plans for existing properties at risk of flooding, it does not consider that they justify introducing further properties and people into a flood risk area. Indeed, the need for a flood resilience plan for a new development can be argued to demonstrate that it is not in a suitable location in the first place. SEPA states that the cornerstone of sustainable Scottish flood risk planning policy is to avoid flood risk, not to try to deal with its consequences.

4.62 In general I agree with SEPA's stance on this matter. The existence of a flood resilience plan does not physically mitigate the risk of flooding; but, rather, seeks to deal with the consequences of flooding having taken place. This view was also taken by the reporter in the previous case, who concluded, in paragraph 8.2 of his report:

"I do not consider that the establishment of a flood emergency plan as proposed by the applicant can sufficiently ameliorate the level of risk, bearing in mind the serious consequences arising from potential flooding."

4.63 I appreciate that there is no record of these sites having been flooded in the past from the North Esk, including during the largest flood recorded in recent years in December 2015. The danger is that this could lead to a degree of over-confidence amongst the occupants of the site, given that that flood was significantly less severe than is predicted for the 0.5% and 0.1% AEP events. The issue of evacuation could be more complicated if it has to take place in the dark and by possible flooding of the adjacent public road, where it

passes beneath the viaduct, which would be likely to occur before the sites themselves were flooded. Flood depths of 0.5 – 0.8 metres are predicted on this section of road, which could make the passage of vehicles, even relatively large ones, difficult. No consideration appears to have been given to the use of the road in the opposite direction, towards St Cyrus, for evacuation, although it would also become flooded.

4.64 At the hearing, I examined the physical consequences of flooding of the site. The mobile homes are substantial structures, weighing up to 20 tonnes, and are supported by brick columns in order to protect the framework which supports their floor. SLR has provided a map showing predicted water velocity on the site in the event of flooding – 0.2 metres/second for the 0.5% AEP flood, and 0.6 metres/second for the 0.1% AEP event. These compare to flows in the main channel of the river of about 10 metres/second. Given these relatively low velocities and the relatively low depths of the flood water, it is unlikely to support large debris such as trees that could cause damage to the supporting columns and therefore undermine the stability of the mobile homes. The various walls and fences in and around the sites would also help to limit water velocities and the spread of debris. A considerable depth of water, which is not predicted to occur, would be needed to float the mobile homes.

4.65 I therefore consider that the mobile homes would not be likely to be physically damaged during flood events. They would therefore remain as potential refuges if evacuation were not possible, although I recognise that the level of freeboard might be less than the 0.6 metres recommended by SEPA. With regards to any touring caravans on the halting site, the practice is to tether them to the ground. In any event, the applicants have stated that a maximum flood depth of 0.3 metres would not float the caravans. Providing that there was adequate warning the owners of such caravans would most likely seek to remove them from the site.

4.66 I consider that, notwithstanding the points I have made in paragraph 4.63 above, providing that there is adequate warning of an impending flood, the occupants of both sites would have sufficient time to safely evacuate. I note the comment made by SEPA at the hearing that flood warnings for this catchment area have been issued five times and have been very reliable. Overall, I conclude that, notwithstanding that the sites will be flooded on occasions, the risk to the life of the occupants is low.

4.67 There will however be damage to their property. Even if the mobile homes themselves remain undamaged, most of them have ground-level outbuildings, which are used to provide additional facilities, such as utility rooms, kitchens and dining rooms. The fabric of these buildings could suffer damage, as could fixing and fittings inside them. In addition any vehicles and caravans left on the sites would be likely to suffer some damage, depending on the depth of flooding. Any such damage would not, however, prevent residents from returning once the flood had subsided. The view was expressed by one of the applicants at the hearing that some limited damage to his property and belongings was a price worth paying for having a secure home.

4.68. On the halting site, the amenity blocks for each of the nine pitches could be vulnerable to flood damage. However, as they have not yet been constructed, they could be specifically designed to avoid this through, for example, the provision of raised floor levels and the use of flood-resilient fittings. I am satisfied that this could be achieved through a planning condition if permission were to be granted.

4.69 An area of concern raised by SEPA as a potential consequence of flooding is the effect on adjoining land resulting from the raising of ground levels that has taken place on the application sites. For the applicants, it was explained that any increase in ground levels was part of the creation of a level platform, and that some areas have actually been excavated; there was no specific objective of raising levels to avoid flooding. The level of fill across the site varies from about 0.25 metres to a maximum of 0.88 metres. The comparison between pre-and post-development flood impacts contained in the FRDA clearly shows a significant decrease in likely flood depths within the site as a result of the raised ground levels.

4.70 The FRDA has modelled the potential impact on adjoining land. In the 0.5% AEP flood event, taking account of climate change, the predicted depth of flooding on the land immediately to the south-west of the permanent site would be up to 0.45 metres; and there is a similar increase along sections of the road adjacent to the site. On the agricultural land on the opposite side of the road, flood depths would be increased by a maximum of 0.1 metres. It is therefore considered that the effect of the displacement of flood water as a result of the filling of parts of the application sites would be insignificant, given the depths of flooding that these areas would experience in any event.

4.71 In contrast, some land to the north-east of the sites, at Eskview Farm, would experience a reduction in flood depths, presumably because it would receive some protection from the raised ground levels within the sites.

4.72 A further issue relating to Eskview Farm, however, is the possible diversion of flood water from the small watercourse running along the boundary between it and the halting site. There is no firm evidence that this stream has ever caused flooding on the application sites. Photographs taken at the time of the 23 December 2012 flood show standing water on the sites, which the applicants suggest was as a result of the build-up of surface water. SEPA has pointed out that an earlier hydraulic model prepared by a different consultant suggested that water from this stream could have flooded onto the sites. Because the ground level on the halting site immediately adjacent to the stream has been raised slightly, it is possible that if it were to flood the water would be diverted northwards onto land belonging to Eskview Farm.

4.73 A complication in this case is that the stream has been culverted before it passes beneath the adjoining road. It is assumed that this has been done by the owners of Eskview Farm. The effect has been to reduce the effective capacity of the stream. Notwithstanding this, I consider that the evidence suggests that the overall risk of flooding from this stream is low.

4.74 All told, I consider that any issues relating to the possible displacement of flood water onto adjoining land as a result of the development are not significant.

The impact of flood risk on drainage and water supply

4.75 At present, each of the mobile homes on the permanent site is served by an individual septic tank. This is not considered to be acceptable in the longer term because the ground is not sufficiently permeable to provide soakaways for the discharges from these tanks. It is therefore proposed to install a package sewage treatment plant on the area of land to the south-west of the permanent site. This would also deal with foul drainage from the halting site pitches. Because the land on which it would be situated is potentially

subject to flooding, the plant would need to be located on the highest part, in the north-western corner, to be above predicted flood levels. As a result of its height above the sites, a pump would need to be installed at the end of the main sewer within the permanent site.

4.76 It is proposed that the outfall from the treatment plant would cross the public road and land within the grounds of the fishing lodge to discharge into the North Esk. Any such discharge would require a licence from SEPA under the Controlled Activities Regulations (CAR). Whilst the treatment plant would be above the 0.1% AEP flood envelope, I was concerned whether flooding in the river could cause a backflow in the discharge pipe, resulting in damage to the plant. At the hearing, the SLR representative advised that, as long as the water level in the river was below the top of the outlet pump, there would always be a small head of pressure to force water into the river.

4.77 The sewage pump within the site would be affected by any flooding but, as it would be a submersible pump in any event, it would not be damaged. Its control equipment would, however, need to be suitably protected by being elevated above potential flood levels. It was pointed out that, following evacuation of the sites, there would be very little sewage left in the drainage pipes or pump; and that provision could be made for shutting down the drainage plant during flooding events, and subsequently re-starting it. Whilst there might be a slight risk of some surface contamination from sewage, it could be relatively easily cleaned up.

4.78 I consider that that the provision of adequate drainage facilities could be made the subject of a planning condition, requiring the submission of such details, with the necessary certification from a suitable qualified expert that it was of an appropriate standard to meet the particular circumstances of this location. I appreciate that SEPA would still have to make an independent decision on the application for a CAR licence, using its own criteria.

4.79 The current water supply for this development is obtained from a borehole situated within the halting site. At the hearing I was advised that, contrary to their original submissions, the applicants now intend to bring mains water to the site, if planning permission is granted. I consider that this would be the most satisfactory outcome, and could be achieved through suitable planning conditions. I understand that both Eskview Farm and the fishing lodge are served by mains water, so that there should be no particular physical obstacles to making such a connection.

4.80 If, for whatever reason, such a connection proved to be technically unfeasible, the applicants accepted that further hydrogeological investigations would be needed to determine the adequacy of the underlying aquifer to provide a long-term supply, including the impact of any drawdown on the quality of the water supply. In addition the borehole, its pump and controls would need to be adequately protected from flooding, to prevent the possible contamination of the water supply.

Conclusions in respect of the development plan

4.81 In assessing these development against the relevant provisions of the ALDP, I reach the following conclusions:

- I do not consider that the developments cause unacceptable effects to the features, character or inherent quality of the South East Aberdeenshire Coast SLA; or that they would conflict with policy E2 in that respect.

- I consider that the developments do preserve the setting of the listed former railway viaduct, and therefore do not conflict with policy HE1.
- Subject to the proposed restoration strategy being implemented, the developments do not conflict with policy E1, in relation to their impact on the St Cyrus and Kinnaber Links SSSI.
- The developments are not consistent with policy R1, in that they do not require a coastal location or meet the other criteria for location in special rural areas.
- The developments are contrary to policy C4 relating to flooding, in that they are located within an area of medium to high flood risk, and do not meet any of the criteria for location in such areas.
- Because the developments do not comply with all the remaining policy tests in the ALDP, they are not consistent with policy H5 on the provision for gypsies/travelling people.

4.82 Whilst, as is the case with many developments, they meet certain of the development plan policies but fail to comply with others, I consider that the non-compliance relates to the two key policies relevant to these developments. Consequently, my overall conclusion is that they do not comply with the development plan.

4.83 It therefore remains to consider whether there are any other material considerations which outweigh this non-compliance, as is argued by the council.

Material considerations

National planning policies

4.84 As is set out in paragraph 2.13 above, paragraph 133 of SPP requires local development plans to identify suitable sites for gypsy and travelling people communities, if a need has been identified in their area. I have considered the question of need in paragraphs 4.8-4.11 above, and have found that there is a definite need for such sites in southern Aberdeenshire. The council has taken steps to comply with paragraph 133 of SPP by identifying four locations for gypsy/travellers sites, the closest one to the current location being at Chapelton of Elsick. The implementation of that site is to be achieved through a planning obligation with the developer of the major development which is now under construction, but the council has stated that it will not be delivered in the short-term.

4.85 I acknowledge that SPP provides general support for the provision of additional sites for gypsies/travelling people where a need has been identified, as in this case; and that such provision can be met by privately provided sites if necessary. As is to be expected, national policies give no guidance on the location of such sites. On the other hand, the policies relating to flood risk are quite specific in stating, in paragraph 263 of SPP, that areas of medium to high risk are generally not suitable for vulnerable uses. Such uses include caravans and mobile homes and park homes intended for permanent residential use.

4.86 On balance, therefore I consider that national planning policies weigh against the present development at this location.

The needs and rights of the gypsy and travelling people community

4.87 Both the council and the applicants have drawn attention to section 149 of the Equalities Act 2010, which introduced the “Public Sector Equality Duty”, which must be taken into account in the determination of planning applications. It requires that due regard should be had to the need to:

- eliminate unlawful discrimination, harassment and victimisation and other prohibited conduct;
- advance equality of opportunity between people who share a relevant protected characteristic and those who do not; and
- foster good relations between people who have a protected characteristic and those who do not.

4.88 It is the applicants’ contention that they have taken action to provide these sites in the face of an identified need and the council’s failure over a long period to provide suitable facilities for gypsies/travellers in the Kincardine and Mearns area. They argue that to refuse planning permission would deny them these much-needed facilities, and force them onto other, unauthorised sites, which may be characterised by tensions with the settled community.

4.89 They also state that, in determining these applications, regard must be had to the European Convention of Human Rights, as brought into domestic law by the Human Rights Act 1998. Article 8 of the Convention (respect for private and family life) is, they argue, particularly relevant to any decision that may involve the loss of accommodation, eviction proceedings and site clearance. In assessing the proportionality of any such actions, the Best Interests of the Child, as set out in Article 3(1) of the UN Convention on the Rights of the Child need also to be taken into account. Those interests include:

- the ability of children to develop and maintain friendships;
- the children’s interests and their protection from social isolation and the traumatic experience of eviction; and
- the adverse implications for health and safety implicit in roadside living.

4.90 It will be for Ministers to decide the extent to which the equalities and human rights legislation has a bearing on the decisions that they are required to make in these cases. I would, however, offer the following observations:

- the establishment of the permanent site in particular has provided a settled location for the families living on it, giving them access to health and welfare services and, particularly important, a settled education for their children;
- refusal of permission would lead to the need to secure the removal of all the development that has taken place on the sites, through either planning enforcement action or other legal measures; and this will undoubtedly be difficult, prolonged and traumatic, especially for the children currently living on the site;
- set against the above-mentioned considerations is the fact that the applicants would appear to have deliberately set out to carry out development in breach of planning control and, through the extent of development that they have carried out, sought to make any subsequent enforcement measures more difficult to implement; and
- granting permission for these developments could lead to a perception amongst certain members of the public that carrying out unauthorised development will ultimately be rewarded.

4.91 The last point is apparent from a significant number of the representations objecting to these applications. The previous decisions of Scottish Ministers to refuse planning permission for the earlier application and confirm the enforcement notices has been remarked upon in many of these, as well as concern about the council's decision to accept the further applications in 2018. I consider that this perception is of some weight in the determination of these applications.

4.92 I believe that there is no wholly satisfactory solution to the issues raised in these cases. It is easy to say with hindsight that the current situation should not have been allowed to develop as it has, with the sites having been developed and first occupied some seven years ago. I recognise that the council, in the earlier stages, did take measures to remove the unauthorised development, through both enforcement notices and obtaining interim interdicts. These actions, however, were not followed up. I do not underestimate the problems faced by planning authorities in taking enforcement action in cases such as these. The council, of course, has now changed its position and is supporting the developments on the basis that they provide much-needed facilities for the gypsy/travelling people community.

4.93 I do not condone the actions of the applicants in carrying out these developments in breach of planning control. However, in making my recommendations to Scottish Ministers, I must consider the applications on their merits, rather than their histories. As such, it is necessary for me to set out what I believe to be the planning balance to be drawn in these two cases.

The overall planning balance

4.94 In his report in 2017, the reporter carried out a similar exercise. In deciding to refuse planning permission, the Ministers agreed with his conclusions. His key conclusions, I consider, relate to the risk of flooding and, for ease of reference, I set them out below:

“6.24 The potential for the site to flood from more than one source leads me to conclude, bearing in mind the precautionary approach which SPP requires, that it would be unsafe to consider that the risk of flooding is outweighed by the contribution that the site currently makes towards meeting the undoubted need for gypsy / traveller accommodation in the locality. The application development gives rise to substantial risk to life and property on account of the propensity of the site to flood. In these ways, the development is in conflict with national policy on flooding, as set out in SPP and elsewhere. Accepting such risk would run counter to the social strand of sustainable development, the fostering of which is a core principle of national and development plan policy, reflecting the Scottish Government's central purpose. By involving development of land at significant risk of flooding, and in other ways as I have identified, the development also conflicts with the environmental strand of sustainability. The effect of the development on the setting of the listed viaduct building is such that granting planning permission would not be consistent with the statutory duty to have special regard to the desirability of preserving the setting of the listed building.

6.25 I therefore conclude that the development conflicts with national policy on flooding, and with the relevant provisions of the development plan which I have drawn attention to.”

4.95 The planning policy context has not changed significantly since that earlier decision. Nevertheless, the drawing up of the appropriate planning balance is a matter of judgement and, in that respect, I differ somewhat from the previous reporter's conclusions. Thus,

I found that the effects of the developments on the landscape character of the area and on the setting of the listed viaduct were not unacceptable. I agree, however, that the proposals conflict with ALDP policy C4, because the sites are at medium to high risk of flooding.

4.96 Whilst I do not consider that the current proposals contain any mitigation in relation to possible flooding, which I believe would require actual physical measures to prevent flooding of the sites, they do contain measures to manage the flood risk through the flood resilience plan. Taken together with the predicted flood depths during the 0.5% and 0.1% AEP events (even accounting for the worst-case scenarios using SEPA's peak flow figures), I consider that there are reasonable measures in place to ensure that the sites could be safely evacuated in the event of impending flooding, and that the risk to life is therefore low. There would, however, be inevitable damage to property in the event of flooding taking place, although I recognise that the mobile homes may have sufficient freeboard to prevent them from being flooded.

4.97 I recognise that SEPA's consistent objections to these developments stem from its opposition to allowing new development within floodplains, which accords with national planning policies in SPP. As such, I accept that to allow the current proposals would be counter to the aims of achieving sustainable development, as recognised by the previous reporter.

4.98 Nevertheless, I am conscious of the implications of refusing planning permission. If this option were to be adopted, the council, notwithstanding its present views on the situation, would be obliged to seek the removal of the present development from the site. A continued failure to do so would risk bringing the planning system into disrepute, at least locally. As I have already indicated, such enforcement measures would be likely to prove lengthy and difficult, and I am in little doubt that they would cause genuine hardship to the families currently living on the site; and, in particular, their children. Whilst I recognise that it could be argued that they have put themselves in this position, through developing and occupying the sites in breach of planning controls, the practical consequences of refusing permission have to be taken into consideration.

4.99 Whilst I appreciate the reasons for the previous reporter's recommendation, and the Scottish Ministers' decision to refuse planning permission, I am persuaded that, on balance, the situation before me warrants the approval of the current proposals. Having said that, I would qualify my view by stating that, if planning permission is to be granted, it should be on a temporary, albeit relatively long-term basis. In the circumstances of these cases, because of the need for a significant amount of additional investment in the sites (for the amenity blocks, sewage facilities, mains water supply and landscaping) I consider that a period of 15 years should be allowed.

4.100 I am aware that the granting of such long-term temporary permissions is generally not considered to be good planning practice. In this case, I believe that there are a number of reasons for adopting this approach:

- it would allow a further period of time for peak flow conditions in the River North Esk to be recorded and monitored, the resulting statistics from which might modify the flood risk predictions;
- it would allow a further period of time for alternative facilities for gypsies and travelling people to be provided in south Aberdeenshire; for example at Chapelton of Elsick;

- it would allow at least one generation of children living on the site to have a settled education through to the end of secondary school;
- in the intervening period, the circumstances of some of the families on the site might change, so that they might seek permanent housing; and
- the nature of these development is such that they constitute changes of use of the land under the terms of section 26(1) of the Town and Country Planning (Scotland) Act 1997, as amended, rather than the carrying out of building or other operations. The mobile homes, although substantial structures, are nevertheless essentially temporary structures that can be removed from the site.

4.101 For the above-mentioned reasons, I consider that temporary permissions would be appropriate, towards the end of which the situation could be reviewed in the light of the circumstances pertaining at the time; namely, the flooding situation, condition of the sites and structures on them, and the on-going need for these facilities.

Conditions to be applied to any planning permissions granted

4.102 The council has submitted a list of the conditions that it would wish to see imposed if permissions are granted for the developments. I have adopted these with some modifications and additions, particularly to take account of my recommendations. There has been recent correspondence between the parties regarding the proposed condition concerning drainage provisions. I have taken account of the views expressed in drafting this condition. The recommended conditions are set out in Appendices 1 and 2, with respect to the two applications

4.103 If the Scottish Ministers do not agree with my views on the granting of temporary permissions, and wish to grant permissions on a permanent basis, the same conditions could be imposed with the exception of the first one in each case, which contains the time limits on the permissions.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

Conclusions

5.1 Based on my consideration of the issues in the preceding chapter, I conclude that the two developments, which are the subject of these applications, do not comply with the Aberdeenshire Local Development Plan, when taken overall, because of the location of the sites in an area of medium to high risk of flooding.

5.2 I also conclude that they do not comply with national planning policies in relation to flood risk, as set out in Scottish Planning Policy.

5.3 Notwithstanding this lack of compliance with local and national planning policies, I conclude that the material considerations in these cases justify the granting of planning permission. Those considerations are:

- the lack of readily available facilities for gypsies/travelling people in south Aberdeenshire;
- the significant hardship that would be caused to the families currently living on the site that would result from the refusal of planning permission, and the subsequent enforcement measures that would have to be taken, taking into account the provisions of the Equalities Act 2010 and the Human Rights Act 1998; and
- the measures that have been taken to manage the predicted flood risk which will, in my opinion, significantly reduce any risk to the life of people living on these sites.

5.4 For the reasons set out in paragraph 4.100 above, I consider that, if planning permission is granted it should be for a temporary period in each case, not exceeding 15 years.

Recommendations

5.5 I recommend that planning permission be granted for the change of use of agricultural land to form a nine stance caravan park touring gypsy/traveller site, formation of road and erection of boundary fences, walls, gates, pump station and amenity blocks (part retrospective) (Scottish Government ref. NA-ABS-047; Aberdeenshire Council ref. APP/2018/3027), subject to the conditions set out in Appendix 1 below.

5.6 I further recommend that planning permission be granted for the retrospective change of use of agricultural land to form a 10 stance private permanent caravan park, formation of road, erection of boundary fencing, walls, gates and education facility (Scottish Government ref. NA-ABS-048; Aberdeenshire Council ref. APP/2018/3028), subject to the conditions set out in Appendix 2 below.

M D Shiel

Reporter

APPENDIX 1: CONDITIONS TO BE ATTACHED TO PLANNING PERMISSION NO. NA-ABS-047 (ABERDEENSHIRE COUNCIL REF. APP/2018/3027)

1. Permission is hereby granted for a period of 15 years from the date of this permission unless a further application for the continuation of the use has been submitted to and approved by the planning authority before that date. Not later than one year before the expiration of the permission, detailed proposals for the restoration of the land, including the removal of all caravans, vehicles, buildings, walls and fences, and drainage facilities shall be submitted for the approval of the planning authority. The restoration of the land shall thereafter be completed in accordance with the details as approved by the planning authority within one year of the expiry of the permission.

Reason: to enable the planning authority to review the permission in the light of conditions pertaining at the end of the permitted period, including the continued need for the facility, a further assessment of the flood risk, and the condition of the site.

2. Within three months from the date of this permission, a Flood Emergency Plan, for the evacuation of the occupiers of the development hereby approved in the event of a flood, shall be put in place and a copy of such plan shall be submitted to the planning authority.

Reason: In the interests of safety and to minimise risk to life and property.

3. Within three months from the date of this permission, full details of the proposed means of disposal of foul and surface water from the development and the proposed future maintenance of the foul and surface water drainage system shall be submitted for the written approval of the planning authority in consultation with the Scottish Environment Protection Agency. The submitted details shall set out, with written certification from a suitably qualified drainage engineer, how the foul drainage system shall be protected from flood level events of at least 0.5% (1:200) plus climate change (as derived from the SLR Hydraulic Modelling Report Appendix HMR 25 "Post-Development 0.5% AEP Flood Depth Inclusive of Climate Change" dated December 2018). Such protection measures shall include, as necessary, provisions for shutting down and subsequently re-starting the drainage system in the event of such flooding.

Within three months from the date of the written approval by the planning authority of the drainage systems required by this condition, the planning authority shall be provided with written certification from a suitably qualified drainage engineer that the approved foul drainage system has been installed and is serving the development in accordance with the approved scheme. Thereafter the foul drainage system shall be retained throughout the lifetime of the permitted development, and maintained in accordance with the approved maintenance scheme.

Surface water shall be disposed of via the use of Sustainable Drainage Systems. Within three months from the date of the written approval from the planning authority of the drainage systems required by this condition, the surface water drainage system shall be installed in accordance with the approved details and shall be retained throughout the lifetime of the permitted development, and maintained in accordance with the approved maintenance scheme.

For the avoidance of doubt, the existing foul drainage scheme installed on the site is not approved.

Reason: In the interests of protecting public health, preventing pollution, and minimising localised flood risk, and to ensure the provision of acceptable drainage systems in the interests of general amenity.

4. Within six months from the date of this permission, the development shall be connected to the public water supply, unless otherwise approved by the planning authority.
Reason: to ensure the provision of an adequate long-term water supply for the occupants of the site.

5. Within three months from the date of this permission, the bund (area of spoil) that exists in the area of ground lying within the application site along the west/north-west boundary at the bottom of the escarpment slope and lying within the St. Cyrus and Kinnaber Site of Special Scientific Interest (SSSI) shall be removed in its entirety and the area of ground/slope restored to pre-development levels. The final finished restored levels, post removal works, shall be agreed in writing with the planning authority following a site inspection. In addition, during the first planting season (October – March) following the removal of the bund, the ground shall be reinstated in full accordance with the agreed proposals for reinstatement set out in the Restoration Strategy (Alan Seath Planning Consultancy – December 2018). For the avoidance of doubt, the removal works shall also be in accordance with the same Restoration Strategy, and beyond the removal and reinstatement works, no further development shall take place within the boundaries of the SSSI.

Reason: to remove this unauthorised and unacceptable part of the development which is considered to have an adverse impact on the natural heritage interests of the SSSI; to avoid any further longer term damage to or deterioration of the adjacent SSSI; and to restore the area of ground to its condition prior to development and promote re-colonisation with appropriate indigenous species.

6. Within three months from the date of this permission, a detailed scheme for all landscaping and tree planting proposals, shall be submitted for the written approval of the planning authority. Details of the scheme shall include:

- a. a schedule of planting, including trees, to comprise species, plant sizes, proposed numbers and density to be planted throughout the development including along the northern boundary with Eskview Farm; and
- b. a programme for the implementation, completion and subsequent maintenance and management of all such landscaping and tree planting.

All soft landscaping proposals shall be carried out in accordance with the approved planting scheme (during the first available planting season), and maintenance and management programme. Any planting which, within a period of 5 years from the completion of the landscaping, which in the opinion of the planning authority is dying, being severely damaged or becoming seriously diseased, shall be replaced in the next planting season by plants of similar size and species to those originally required to be planted.

Reason: To ensure the implementation and management of a satisfactory scheme of landscaping which will help to integrate the development into the local landscape, and in the interests of protecting the amenity of neighbouring residents and the visual amenity of the wider area.

7. Within six weeks of the site being brought into use, the first five metres (as measured from the edge of the public road) of the access that serves this development shall be constructed or reconstructed to be fully paved and shall be retained as such.

Reason: To ensure the provision of a means of access to an adequate standard in the interests of road and public safety.

8. Within six weeks of the site being brought into use, off street parking for 18 cars surfaced in hardstanding materials must be provided within the site.

Reason: To ensure the provision of off-road parking at all times and to an adequate standard to serve the development in the interests of road and public safety.

9. Within six weeks of the site being brought into use, visibility splays of 120 metres in each direction shall be provided from a point 2.4 metres measured at right angles from the existing edge of the road carriageway surface along the centre line of the approved access. The visibility splays shall be physically formed on the ground and any existing fences, walls, hedges or other means of enclosure or obstructions within the splays shall be removed or relocated outwith the splays. Once formed, the visibility splays shall be retained thereafter throughout the lifetime of the permitted development, and no visual obstruction of any kind shall be permitted within the visibility splays so formed.

Reason: To enable drivers of vehicles using the access to have a clear view of other road users and pedestrians in the interests of road and public safety.

10. Within three months of the date of this permission, details of a scheme for the storage of recycling, food waste and residual waste within the site shall be submitted for the written approval of the planning authority. The refuse and recycling bins shall include 3 x 1100 litre refuse bins, 3 x 1100 litre recycling bins and 2 x 240 litre food waste bins. These receptacles should be located beside the site road to reduce the distance needed to pull the bins to the lorry. Once provided, the recycling, food waste and residual waste storage scheme shall thereafter be retained and managed throughout the lifetime of the permitted development.

Reason: To ensure that suitable provision is made for the storage of communal recycling, food waste and residual waste bins in the interests of protecting public health and visual amenity.

11. Before the amenity blocks are erected on the site, full details of their design and external materials shall be submitted to and approved by the planning authority. Their design shall include measures to ensure that the buildings are flood resilient. The blocks shall thereafter be erected in accordance with the approved plans.

Reason: to ensure that the appearance of the amenity blocks does not detract from the visual amenity of the area, and that they do not suffer damage during any flooding events.

APPENDIX 2: CONDITIONS TO BE ATTACHED TO PLANNING PERMISSION NO. NA-ABS-048 (ABERDEENSHIRE COUNCIL REF. APP/2018/3028)

1. Permission is hereby granted for a period of 15 years from the date of this permission unless a further application for the continuation of the use has been submitted to and approved by the planning authority before that date. Not later than one year before the expiration of the permission, detailed proposals for the restoration of the land, including the removal of all buildings, structures, caravans, vehicles, walls and fences, and drainage facilities shall be submitted for the approval of the planning authority. The restoration of the land shall thereafter be completed in accordance with the details as approved by the planning authority within one year of the expiry of the permission.

Reason: to enable the planning authority to review the permission in the light of conditions pertaining at the end of the permitted period, including the continued need for the facility, a further assessment of the flood risk, and the condition of the site.

2. Within three months from the date of this permission, a Flood Emergency Plan, for the evacuation of the occupiers of the development hereby approved in the event of a flood shall be put in place and a copy of such plan shall be submitted to the planning authority.

Reason: In the interests of safety and to minimise risk to life and property.

3. Within three months from the date of this permission, full details of the proposed means of disposal of foul and surface water from the development and the proposed future maintenance of the foul and surface water drainage system shall be submitted for the written approval of the planning authority in consultation with the Scottish Environment Protection Agency. The submitted details shall set out, with written certification from a suitably qualified drainage engineer, how the foul drainage system shall be protected from flood level events of at least 0.5% (1:200) plus climate change (as derived from the SLR Hydraulic Modelling Report Appendix HMR 25 "Post-Development 0.5% AEP Flood Depth Inclusive of Climate Change" dated December 2018). Such protection measures shall include, as necessary, provisions for shutting down and subsequently re-starting the drainage system in the event of such flooding.

Within three months from the date of the written approval by the planning authority of the drainage systems required by this condition, the planning authority shall be provided with written certification from a suitably qualified drainage engineer that the approved foul drainage system has been installed and is serving the development in accordance with the approved scheme. Thereafter the foul drainage system shall be retained throughout the lifetime of the permitted development, and maintained in accordance with the approved maintenance scheme.

Surface water shall be disposed of via the use of Sustainable Drainage Systems. Within three months from the date of the written approval from the planning authority of the drainage systems required by this condition, the surface water drainage system shall be installed in accordance with the approved details and shall be retained throughout the lifetime of the permitted development, and maintained in accordance with the approved maintenance scheme.

For the avoidance of doubt, the existing foul drainage scheme installed on the site is not approved.

Reason: In the interests of protecting public health, preventing pollution, and minimising localised flood risk, and to ensure the provision of acceptable drainage systems in the interests of general amenity.

4. Within six months from the date of this permission, the development shall be connected to the public water supply, unless otherwise approved by the planning authority.
Reason: to ensure the provision of an adequate long-term water supply for the occupants of the site.

5. Within three months from the date of this permission, a detailed scheme for all landscaping and tree planting proposals, shall be submitted for the written approval of the planning authority. Details of the scheme shall include:

- a. a schedule of planting, including trees, to comprise species, plant sizes, proposed numbers and density to be planted throughout the development including along the northern boundary with Eskview Farm; and
- b. a programme for the implementation, completion and subsequent maintenance and management of all such landscaping and tree planting.

All soft landscaping proposals shall be carried out in accordance with the approved planting scheme (during the first available planting season), and maintenance and management programme. Any planting which, within a period of 5 years from the completion of the landscaping, which in the opinion of the planning authority is dying, being severely damaged or becoming seriously diseased, shall be replaced in the next planting season by plants of similar size and species to those originally required to be planted.

Reason: To ensure the implementation and management of a satisfactory scheme of landscaping which will help to integrate the development into the local landscape, and in the interests of protecting the amenity of neighbouring residents and the visual amenity of the wider area.

6. Within three months from the date of this permission, the first five metres (as measured from the edge of the public road) of the access that serves this development shall be constructed or reconstructed to be fully paved and shall be retained as such.

Reason: To ensure the provision of a means of access to an adequate standard in the interests of road safety and public safety.

7. Within three months from the date of this permission, off street parking for 30 cars surfaced in hardstanding materials must be provided within the site.

Reason: To ensure the provision of off-road parking at all times and to an adequate standard to serve the development in the interests of road and public safety.

8. Within three months from the date of this permission, visibility splays of 120 metres in each direction shall be provided from a point 2.4 metres measured at right angles from the existing edge of the road carriageway surface along the centre line of the approved access. The visibility splays shall be physically formed on the ground and any existing fences, walls, hedges or other means of enclosure or obstructions within the splays shall be removed or relocated outwith the splays. Once formed, the visibility splays shall be retained thereafter throughout the lifetime of the permitted development, and no visual obstruction of any kind shall be permitted within the visibility splays so formed.

Reason: To enable drivers of vehicles using the access to have a clear view of other road users and pedestrians in the interests of road and public safety.

9. Within three months of the date of this permission, details of a scheme for the storage of recycling, food waste and residual waste within the site shall be submitted for the written approval of the planning authority. The refuse and recycling bins shall include 3

x1100 litre refuse bins, 3x1100 litre recycling bins and 2 x 240 litre food waste bins. These receptacles should be located beside the site road to reduce the distance needed to pull the bins to the lorry. Once provided, the recycling, food waste and residual waste storage scheme shall thereafter be retained and managed throughout the lifetime of the permitted development.

Reason: To ensure that suitable provision is made for the storage of communal recycling, food waste and residual waste bins in the interests of protecting public health and visual amenity.

APPENDIX 3: ADDITIONAL DOCUMENTS

Application drawings

[Drawing No. 2180 D 001 Location Plan \(Permanent Site\)](#)
[Drawing No. 2180 D 011 Location Plan \(Halting Site\)](#)
[Drawing No. 2180 D 005C Proposed Site Plan - West](#)
[Drawing No. 2180 D 009C Proposed Site Plan - Halting](#)
[Drawing No. 2180 D 010A Entrance Gate and Boundary](#)
[Drawing No. 2180 D 012A Swept Path – Refuse Vehicle](#)
[Drawing No. 2180 D 013A Access Road North Visibility Splays](#)
[Drawing No. 2180 D 014 Access Road South Visibility Splays](#)
[Drawing No. 2180 D 015 Swept Path Refuse Vehicles West Site](#)
[Drawing No. 2180 D 002A Store Blocks with Walls and Gates](#)
[Drawing No. 18-044-255 Proposed Amenity Block Floor Plans and Elevations](#)
[Drawing No. JFLA NEP PP 001 Proposed Planting](#)

Application documents

[Application form for permanent site](#)
[Application form for halting site](#)
[Planning Statement for permanent site](#)
[Planning Statement for halting site](#)
[Flood Risk and Drainage Appraisal \(Part 2\)](#)
[Flood Risk and Drainage Appraisal \(Part 3\)](#)
[Flood Risk and Drainage Appraisal \(Part 4\)](#)
[Flood Risk and Drainage Appraisal \(Part 5\)](#)
[Flood Risk and Drainage Appraisal \(Part 6\)](#)
[Flood Risk and Drainage Appraisal \(Part 7\)](#)
[Flood Risk and Drainage Appraisal \(Part 8\)](#)
[Flood Risk and Drainage Appraisal \(Part 9\)](#)
[Flood Risk and Drainage Appraisal \(Part 10\)](#)
[Flood Risk and Drainage Appraisal \(Part 11\)](#)
[Flood Risk and Drainage Appraisal \(Part 12\)](#)
[Flood Risk and Drainage Appraisal \(Part 13\)](#)

Links to other documents submitted with the applications are included within the body of the report.

Other documents

[SEPA consultation response 18 February 2019](#)
[SEPA consultation response 10 April 2019](#)
[Representations received on the applications](#)
[Photographs of the site on 18 January 2019 submitted by the council](#)
[Photographs of the proposed drainage connection area submitted by the council](#)
[Report to Kincardine & Mearns Area Committee 21 May 2019](#)
[Report to full Aberdeenshire Council 27 June 2019](#)

Further written submissions

[First request for further information 21 November 2019](#)

[Response on behalf of applicants 4 December 2019](#)
[Response from Aberdeenshire Council 5 December 2019](#)
[Response from SEPA 5 December 2019](#)
[Rebuttal Statement on behalf of applicants 19 December 2019](#)
[Rebuttal Statement by SEPA 20 December 2019](#)
[Written response from SEPA to the hearing questions](#)

Development plan documents

[Aberdeen City and Shire Strategic Development Plan 2014 and Aberdeenshire Local Development Plan 2017](#)

APPENDIX 4: VIRTUAL HEARING 3 NOVEMBER 2020

Agenda for the hearing

1. Methodology – implications of using the Generalised Extreme Value as against the Generalised Logistic distribution curves.
2. The consequences of flooding on the site in terms of risk to life and property.
3. The impact of possible flooding from the small watercourse on the northern boundary of the site.
4. The potential impact of flooding on foul drainage from the developments.
5. The water supply for the developments.

A link is provided to the detailed [hearing questions](#) issued by the reporter to the parties prior to the hearing taking place.

Participants

For the applicants:

Elaine Farquharson-Black, Solicitor, Brodies LLP
Ian Walton, Technical Director, SLR Consulting Ltd
Bill McDonald, resident
Jim Reid, resident

For SEPA:

Craig Whelton, Solicitor, Burges Salmon LLP
Claire Wheeler, Senior Hydrologist
Jim Mackay, Planning Manager (North)
Clare Pritchett, Planning Officer

For Aberdeenshire Council:

Rob McIntosh, Principal Solicitor
Paul Williamson, Senior Planner
Councillor Leigh Wilson