

**REPORT TO:** Planning Committee

**MEETING DATE:** Tuesday 1 October 2013

**BY:** Depute Chief Executive  
(Partnership and Services for Communities)

**SUBJECT:** Application for Planning Permission for Consideration

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*Note - this application was called off the Scheme of Delegation List by Councillor Innes for the following reason: the Council has granted permission for a significant development at this location previously, I therefore believe the applicant should have the opportunity to put his case to the Planning Committee.*

Application No. **11/00363/P**

Proposal Erection of nursing home and associated works

Location **Cockenzie House  
22 Edinburgh Road  
Cockenzie  
East Lothian  
EH32 0HY**

Applicant Mr James McDonald

Per Gilberts Ltd

RECOMMENDATION Application Refused

#### PLANNING ASSESSMENT

The application site consists of the eastern part of the grounds of Cockenzie House. The remainder of the grounds of Cockenzie House and the building itself are outwith the application site.

Cockenzie House and its stone boundary walls, gates and garden features are listed as being of special architectural or historic interest (Category A). The garden features consist of two stone gazebos and a vaulted Gothic grotto. The House and its grounds are designated as the Cockenzie House Designed Landscape. They are within the Cockenzie and Port Seton Conservation Area. All of the trees within the grounds of Cockenzie House are protected by Tree Preservation Order 21- Cockenzie House.

The land to the south of the building consists of a tripartite walled garden, which is subdivided into three sections by stone walls. The two stone gazebos and the vaulted Gothic grotto are located within the central or inner garden (once the entrance court).

It is the eastern part of the tripartite walled garden that forms most of the application site. It consists of a central area of grassed open space, which is bounded to the north,

east and south by tree planting. The application site also includes an area of land that is located to the east and northeast of Cockenzie House.

The property is bounded to the north by the public road of the High Street, to the east by the public roads of South Doors and School Lane, to the south by the public road of Edinburgh Road, and to the west by the public road of West Harbour Road. The grounds of Cockenzie House are enclosed by stone boundary walls.

Cockenzie House has an extensive planning history. It was previously used as a nursing home but that use ceased in March 2008. It has more recently been used as a hostel and cafe. Planning permission (Ref: 08/00656/FUL) was retrospectively granted in February 2009 for the change of use of the nursing home to a hostel for a temporary period until the 3 February 2014. Planning permission (Ref: 10/00604/P) was retrospectively granted in October 2010 for the part change of use of the hostel to a café for a temporary period until the 3 February 2014. Planning permission (Ref: 11/00217/P) was retrospectively granted in June 2011 for the part change of use of the building from hostel use to 3 houses. One house is contained within the main part of the building. The other two houses are contained within the smaller wing that adjoins the eastern end of the main building. The drawings docketed to planning permission 11/00217/P indicate that the three storey wing adjoining the western part of the building would be retained for hostel use and as a café.

Through application 11/00692/P, planning permission is sought for alterations and extension to and conversion of most of Cockenzie House from a hostel, café and 2 houses to 19 flats and 1 house. One of the existing houses would be retained in use as a house. Planning permission is also sought for other associated works, including alterations to the existing vehicular access. A separate report on application 11/00692/P is, at this time, on the Scheme of Delegation List.

Through application 11/00692/LBC, listed building consent is sought for alterations and extension to the building, for alterations to the boundary wall, for the formation of a bin and cycle store, the formation of hardstanding areas and for the part demolition of walls and steps. A separate report on application 11/00692/LBC is, at this time, on the Committee Expedited List.

Planning permission is now sought for the erection of a new, detached nursing home and associated works on the application site. The nursing home would contain 66 bedrooms.

The proposed nursing home would be erected within the eastern section of the tripartite walled garden of Cockenzie House. The proposed building would sit on a roughly north-south axis, perpendicular to the main house, and parallel to the path that runs from the formal entrance on Edinburgh Road to the central bay of the house. The proposed building would sit forward of the front building line of Cockenzie House, and would occupy the greater part of the east garden. It would have a broadly rectangular shaped footprint and would be mostly three storeys in height (although part of the building would be single storey and parts of the building would be two storeys in height). The building proposed would be of a contemporary design. The roof of the single storey part of the building, which would consist of a sun room, would be mono-pitched. The roofs of the some of the two storey parts of the building would be flat whilst the roofs of the other two storey parts of the building would be mono-pitched. The roofs of the larger three storey part would mainly be flat but would also have a mono-pitched section at the eastern end of the proposed building. The walls of the building would mainly be finished in white smooth render with smaller sections of wall being finished in timber wall cladding. Dark grey coloured metal faced windows would

be installed in the building. The mono-pitched roofs of the building would be clad in metal, standing seam, roof panels.

The removal of a number of trees is proposed in order to facilitate the proposed nursing home.

It is proposed that a new vehicular access would be formed to the site from High Street, at a point close to the eastern end of the site's boundary with the High Street. To facilitate the formation of the proposed vehicular access and to provide appropriate visibility splays, some 26 metres of the existing roadside stone boundary wall would be removed or lowered and new, set back sections of wall, would be erected on either side of the proposed vehicular access. Access to the nursing home from the proposed vehicular access would be taken via a new access road that would be some 4.3 metres wide and would be finished in tarmac. The access road would serve a total of 22 car parking spaces, which would principally be provided immediately to the east of the nursing home building. The proposed vehicular access would also provide access to the proposed car park that would serve the 19 flats and 1 house that are the subject of planning application 11/00692/P. One tree in the northern part of the site would be removed to facilitate the proposed access and parking arrangements. A total of 9 replacement trees within the northern part of the site are proposed. An existing outbuilding that is located to the northeast of the main House would be altered and extended to form a bin and cycle store. The mono-pitch roof of the outbuilding would be removed, the walls of it would be heightened and a new flat roof would be installed. The walls of the altered outbuilding would then be clad in timber cladding. The outbuilding as it is to be altered would be used for the storage of bicycles. A timber fence some 2 metres in height would enclose a small area of land to the southwest of the outbuilding. This would be used for the storage of bins. The remainder of the application site would be landscaped.

Through separate application 11/00363/LBC listed building consent is sought for the proposed alterations to the boundary wall, for the formation of the bin and cycle store, the formation of hardstanding areas and for the part demolition of walls. A separate report on application 11/00363/LBC is, at this time, on the Committee Expedited List.

Amended plans have been submitted in respect of changes to the layout of vehicular and pedestrian access arrangements.

A design statement has been submitted with the planning application. It states that the development is proposed to fund renovation of the existing walled east garden, and a portion of the revenue generated by the nursing home is to be allocated to the future management of the grounds.

Under the provisions of The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011 the proposed development falls within the category of a Schedule 2 Development, being one that may require the submission of an Environmental Impact Assessment (EIA). Schedule 3 of The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011 sets out the selection criteria for screening whether a Schedule 2 development requires an EIA. On 5 November 2012 the Council gave a formal screening opinion. The screening opinion concludes that the proposed development is unlikely to have significant effects on the environment to the extent that expert and detailed study through EIA would be necessary to properly assess any effect. Therefore, there is no requirement for the proposed housing development to be the subject of an EIA.

Section 25 of the Town and Country Planning (Scotland) Act 1997 requires that the

application be determined in accordance with the development plan, unless material considerations indicate otherwise.

The development plan is the approved South East Scotland Strategic Development Plan (SESplan) and the adopted East Lothian Local Plan 2008.

Relevant to the determination of the application is Policy 1B of the approved South East Scotland Strategic Development Plan (SESplan) and Policies ENV1 (Residential Character and Amenity), ENV3 (Listed Buildings), ENV4 (Development within Conservation Areas), ENV8 (Gardens and Designed Landscapes), C12 (Residential Care and Nursing Homes- Location), DP2 (Design), DP14 (Trees on or adjacent to Development Sites), DP17 (Artworks- Percent for Art), T2 (General Transport Impact), DP20 (Pedestrians and Cyclists) and DP22 (Private Parking) of the adopted East Lothian Local Plan 2008.

Material to the determination of the application are Sections 59 and 64 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 and Scottish Planning Policy: February 2010 on development affecting a listed building or its setting, on development within a conservation area, and on development affecting a designed landscape.

Scottish Planning Policy: February 2010 echoes the statutory requirements of Section 59 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 that in considering whether to grant planning permission for development which affects a listed building or its setting a planning authority shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.

Scottish Planning Policy: February 2010 also echoes the statutory requirements of Section 64 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 that a planning authority must have regard to the desirability of preserving or enhancing the character or appearance of a conservation area in exercising its responsibilities in the determination of any application for planning permission for development affecting a conservation area. It is stated in Scottish Planning Policy that proposed development that would have a neutral affect upon the character or appearance of a conservation area (i.e. does no harm) should be treated as one which preserves that character or appearance. The design, materials, scale and siting of new development within a conservation area should be appropriate to the character of the conservation area.

It is stated in Scottish Planning Policy: February 2010 that planning authorities have a role in protecting, preserving and enhancing gardens and designed landscapes of national importance that are included in Historic Scotland's Inventory of Gardens and Designed Landscapes. The affect of a proposed development on a garden or designed landscape should be a consideration in decisions on planning applications. Change should be managed to ensure that the significant elements justifying designation are protected or enhanced.

Also material to the determination of the application are the representations received from the public.

There are a total of 11 written representations, 10 of which make objection to the proposed development. The other representation does not state whether it objects to or is made in support of the proposed development.

The main grounds of objection are summarised as follows:

- \* Proposed nursing home would have a substantial detrimental effect on the character and setting of the listed building of Cockenzie House;
- \* Proposed nursing home would have an enormous footprint, height and design completely out of keeping with the surrounding buildings and would not preserve or enhance the Conservation Area;
- \* Proposed nursing home would harm the conservation objectives of the Cockenzie House Designed Landscape;
- \* The extra traffic generated by the proposed development would increase congestion; and
- \* An additional care home is not identified in the Council's Older People's Strategy;

Whether or not a nursing or care home is identified in the Council's Older People's Strategy is not a material consideration in the determination of this planning application.

Policy C12 of the adopted East Lothian Local Plan 2008 states that developers of nursing homes are encouraged to choose sites within, or close to, existing settlements. Proposals must have reasonable access to the normal range of services. In this case, the proposed nursing home would be located within the village of Cockenzie. Residents would have reasonable access to the normal range of services. On this consideration the proposed nursing home is consistent with Policy C12 of the adopted East Lothian Local Plan 2008.

The application site is situated in a predominantly residential area within Cockenzie, as defined by Policy ENV1 of the adopted East Lothian Local Plan 2008. Policy ENV1 states that the predominantly residential character and amenity of existing housing areas will be safeguarded from the adverse impacts of uses other than housing. Development incompatible with the residential character and amenity of an area will not be permitted.

The proposed nursing home use of the site would be compatible with the predominantly residential use of the area. Thus the principle of use is consistent with Policy ENV1 of the adopted East Lothian Local Plan 2008.

It is proposed that a new vehicular access would be formed to the site from High Street, at a point close to the eastern end of the site's boundary with the High Street. To facilitate the formation of the proposed vehicular access two sections of the existing roadside stone boundary wall would be removed or lowered and new, set back sections of wall, would be erected on either side of the proposed vehicular access.

Planning permission (Refs. 90/00870/HIS\_P) was previously granted for, amongst other things, the formation of a new vehicular access at Cockenzie House, in a similar position to the new access now proposed. A section of the front boundary wall has been removed in the position shown for the new access, although the new access has not been formed.

The existing stone boundary wall that encloses the northern end of the grounds of Cockenzie House is, in association with the listing of Cockenzie House, listed as being of special architectural or historic interest (Category A). It makes a positive contribution

to this part of the Conservation Area and to the Cockenzie House Designed Landscape. The formation of the proposed vehicular access and the realignment of the stone walls on either side of the new access would result in a noticeable change to this part of the boundary wall. Nevertheless, if the realigned lengths of walls were to be constructed in stone salvaged from the dountakings, then those proposed works would not have an unacceptable impact on the architectural or historic integrity of the stone boundary wall, on the character or appearance of the Conservation Area, or on the conservation objectives of the Cockenzie House Designed Landscape.

The proposed cycle and bin store would be positioned some 15 metres to the northeast of the existing building. Due to the distance it would be away from the existing building the proposed cycle and bin store would not draw the focus away from or harmfully impose itself on the setting of that listed building. It would not harm the integrity of the stone boundary wall. In its position, and by virtue of its size, proportion, materials and architectural form, the proposed cycle and bin store would preserve the character and appearance of the Conservation Area. It would not harm the conservation objectives of the Cockenzie House Designed Landscape.

The proposed cycle and bin store and the proposed alterations to the stone boundary wall are consistent with Policy 1B of the approved South East Scotland Strategic Development Plan (SESplan) and Policies ENV3, ENV4, ENV8 and DP2 of the adopted East Lothian Local Plan 2008.

By virtue of its distance away from neighbouring residential properties and because of the presence of mature landscaping which would be retained, the proposed building and the use of it would not lead to harmful overlooking or overshadowing of any of the neighbouring residential properties. Neither would the use of the north and east parts of the site for access and car parking have a harmful impact on the amenity of neighbouring residential properties. The Council's Environmental Protection Manager raises no objection to the proposals subject to planning control being exercised over noise emanating from any plant and equipment associated with the nursing home, in order to protect the amenity of neighbouring residential properties. In this, he advises that noise emanating from any plant and equipment should not exceed noise-rating curve NR20 at any frequency when measured in any neighbouring property. He also recommends that a construction method statement to minimise the impact of construction activity on the amenity of the area should be submitted to and approved by the Planning Authority. He further recommends that details of the proposed ventilation system to be provided for the control of cooking odours should also be submitted to and approved by the Planning Authority. Subject to such planning control the proposals would not be harmful to the amenity of any neighbouring property.

On these matters of privacy and amenity the proposed development is consistent with Policy DP2 of the adopted East Lothian Local Plan 2008.

The Council's Senior Environmental Health Officer raises no objection to the proposed nursing home, although she makes various recommendations in respect of the kitchen of the proposed nursing home.

The Scottish Environment Protection Agency were consulted on this application, as the application site is within an area of known flood risk. Their consultation response on the planning application is outstanding, and it is not yet known whether or not they are satisfied that there would be no unacceptable flood risk in respect of the proposed nursing home. This is therefore an unresolved material consideration in the determination of this application.

The Council's Transportation service raises no objection to the proposed nursing home development. In this they are satisfied that it would not have harmful impact on the local road network and that the proposed vehicular access, parking and turning arrangements within the site, including the level of parking proposed, are all acceptable. They recommend that a continuous footway be provided immediately to the north of the application site, in accordance with details to be submitted to and approved by the Planning Authority. This can be made conditional on the grant of planning permission.

On these transportation considerations the proposed development complies with Policies T2, DP20 and DP22 of the adopted East Lothian Local Plan 2008.

The Council's Waste Services Manager raises no objection to the proposed residential development.

All of the trees within the grounds of Cockenzie House are protected by Tree Preservation Order 21- Cockenzie House. Those trees help to define the setting of the listed building of Cockenzie House and make an important contribution to the Designed Landscape and Conservation Area. The Council's Policy and Projects Manager recommends that a woodland management plan for the long term management of those trees is submitted to and approved by the Planning Authority. This requirement can be made conditional on the grant of planning permission for the proposed residential development. Some of the trees within the eastern part of the tripartite walled garden would be removed. The Policy and Projects Manager raises no objection to this. He initially advised that he had concerns over the proposed removal of six of the seven trees to the north of the building, particularly given that the applicant was not proposing any replacement tree planting. The applicant has submitted an Arboricultural Method Statement and revised plans to address these concerns. The revised plans show that five of the seven trees to the north of the building would be retained. Additionally it proposed to plant 9 replacement trees. The Arboricultural Method Statement confirms that the new walls to be erected within the root protection areas of two of the existing trees will be constructed using a mini-pile and beam configuration. The Policy and Projects Manager accepts the recommendations of the Arboricultural Method Statement and is satisfied that the proposed measures are an acceptable means of protecting the tree root systems of the trees potentially affected. The proposed development is consistent with Policy DP14 of the adopted East Lothian Local Plan 2008.

The proposed development by its scale and prominent public location would result in significant change to the local environment and thus in accordance with the requirements of Policy DP17 of the adopted East Lothian Local Plan 2008 it should incorporate artwork either as an integral part of the overall design or as a related commission. This can be secured by a condition on the grant of planning permission for the proposed residential development.

Notwithstanding these considerations, the principal material considerations in the determination of this application is whether or not the proposed nursing home would be an appropriate form of development within this sensitive location and if not, whether other material considerations justify approving the application contrary to the development plan.

The original building dates from around 1680, although over the centuries it has been altered and extended. The main building is three storeys in height, with some of its accommodation in the roofspace. The main building is positioned on the northern part of its grounds with its principal elevation facing southwards, towards Edinburgh Road.

A smaller wing, which is partly two storeys in height and partly single storey, adjoins the eastern end of the main building. A three storey wing (known as the Hanseatic Barn) adjoins the western end of the main building. garden ground.

The land to the south of the building consists of a tripartite walled garden, which is subdivided into three sections by stone walls. The two stone gazebos and the vaulted Gothic grotto are located within the central, or inner garden (once the entrance court).

The garden walls are of rubble stone, raised in height with what is thought to be clinker, and a series of gates in the dividing walls bordering the central garden allow access between the gardens. The central, or inner garden (once the entrance court) is divided by an axial path of concrete slabs. The two adjacent walled gardens are entered to by three doors in each wall, one in each corner and one in the centre point of the walls.

The original approach to the house was from the south, where entrance gates are set back from Edinburgh Road. A secondary entrance is to the north on Cockenzie High Street, and leads to the North Court to the rear of the house, used primarily for car parking.

It is the eastern part of the tripartite walled garden that forms most of the application site. It consists of a central area of grassed open space, which is bounded to the north, east and south by tree planting. The application site also includes an area of land that is located to the east and northeast of Cockenzie House.

Cockenzie House, including the Hanseatic Barn, gazebos, grotto, garden walls and gates were listed in 1971 as being of special architectural or historic interest (Category A). By being Category A listed, Cockenzie House is a building of national importance. The house and its grounds are also designated as the Cockenzie House Designed Landscape, added to the Inventory in 2001. The Inventory notes that the arrangement of house and walled garden has high value as a Work of Art. Furthermore, the known history and associations with the development of Cockenzie's early trading links and industries give this site outstanding Historical Value; the garden layout is a rare survival of its type. The garden has outstanding Architectural value as it provides the setting for a Category A listed building, the gazebos and walls provide a strong architectural dimension, and the grotto provides architectural interest and is important as evidence of the occupation of the owners of the house.

The site is also within the Cockenzie and Port Seton Conservation Area. The Conservation Area Character Statement in the adopted East Lothian Local Plan 2008 notes that most buildings in the Conservation Area are in dense groups and open spaces are rare. The grounds of Cockenzie House are noted as an important open space, whose mature trees are important to the setting of the Conservation Area. The trees within the site are protected by tree preservation order number 21 – Cockenzie House, confirmed in 1973.

In the applicant's design statement, it is stated that the proposals "conform to the greater scale and height of existing buildings within the walls of the site, rather than the smaller scale of the urban development beyond the garden walls". It goes on to note that "the new elements should still be visually and architecturally subservient to the existing house" and argues that this has been achieved as "the highest point of the new extension (sic) is to remain lower than the ridge of the existing main house". It also argues that the location and appearance of the proposed development will reinforce the formal axis running from the entrance on Edinburgh Road to the central bay of the main house.



It is the case that the scale of the proposed nursing home has more in common with existing buildings within the site (i.e. Cockenzie House) than with any other buildings within the surrounding settlement. However, given the unique nature of Cockenzie House within the settlement and its historic relationship to the rest of the village (i.e. having originally been built as a harbour manager's house), this does not provide justification for locating another large building within the site.

The submitted drawings indicate that the highest point of the proposed new building would be around 2m lower than the ridgeline of Cockenzie House, and marginally higher than the roof of the Hanseatic Barn. Its length would be over 1.5 times that of the frontage of Cockenzie House and its total footprint would be similar, if not larger, to that of Cockenzie House.

The proposed nursing home by virtue of its size, scale and positioning would dominate and compete with the listed building within the site such that the listed building would no longer be the focus of its setting. From significant parts of the central and west garden the proposed nursing home would be clearly visible and would be almost the same height as, and have a significantly longer frontage than the main house. By being positioned only some five metres from both Cockenzie House itself and from the wall separating the east and central gardens of the tripartite walled garden, the proposed nursing home would appear as a prominent and incongruous feature from the central garden, from where its full length would be seen. The character of the east garden itself would be fundamentally altered, and it would be entirely dominated by the proposed nursing home. The open, undeveloped form of the east garden is an important part of the setting of the listed building. This setting would be significantly harmed by the presence of the nursing home buildings and its associated infrastructure. As it would harm the setting of the listed Cockenzie House, the proposed development is contrary to Policy 1B of the approved South East Scotland Strategic Development Plan (SESplan), Policy ENV3 of the adopted East Lothian Local Plan 2008 and Scottish Planning Policy: February 2010 on development affecting a listed building or its setting.

Historic Scotland object to the planning application, as they advise that the size and scale of the proposed nursing home would clearly dominate the visual envelope of the listed building. It would overwhelm the setting of the house, which should always remain the dominant focus of the site. From outwith the site the proposed nursing home would be clearly visible in key views, including those from the open village green. Such views will adversely affect the setting of the house and gardens within their carefully walled grounds.

Policy ENV8 of the adopted East Lothian Local Plan 2008 states that development that would harm the conservation objectives of areas included within the Inventory of Gardens and Designed Landscapes will not be permitted.

The open and undeveloped tripartite garden layout to the front of Cockenzie House is an extremely important element of the Designed Landscape and its relationship with Cockenzie House. The proposed nursing home would result in the loss of much of the east garden of the tripartite garden. It would adversely affect the whole concept of the tripartite design with formal gardens to the centre framing the front of the house, flanked by less formal pastoral gardens and woodlands to the east and west. The proposed development would significantly harm the conservation objectives of the Cockenzie House Designed Landscape. On this consideration the proposed development is contrary to Policy 1B of the approved South East Scotland Strategic Development Plan (SESplan), Policy ENV8 of the adopted East Lothian Local Plan 2008 and Scottish Planning Policy: February 2010 on development affecting a designed landscape.

Historic Scotland object to the planning application, as they advise that the proposed nursing home would have a major negative impact on the integrity of the Cockenzie House Designed Landscape.

Policy ENV4 of the adopted East Lothian Local Plan 2008 requires that all new development in Conservation Areas must be located and designed to preserve or enhance their special architectural or historic character. The land of the application site forms part of the tripartite gardens of Cockenzie House, which is a historic feature of the Conservation Area and significantly contributes to the character of it. In its open form the garden is important to the setting of the Category A listed Cockenzie House. It is important to the quality of the urban environment of Cockenzie. The visual impact of the proposed nursing home would result in the loss of the open character of part of the tripartite gardens of Cockenzie House, to the detriment of the character, appearance and amenity of the Conservation Area. On this consideration the proposed development is contrary to Policy 1B of the approved South East Scotland Strategic Development Plan (SESplan), Policy ENV4 of the adopted East Lothian Local Plan 2008 and Scottish Planning Policy: February 2010 on development affecting a conservation area.

It is now necessary to consider whether or not there are any material considerations that outweigh the scale of the departure from the development plan.

In his design statement, the applicant makes reference to the previous planning history of the site. He correctly advises that planning permission (Ref: 90/00870/HIS\_P) was granted in February 1994 for the conversion of the Hanseatic Barn to form an extension to the then existing Cockenzie House Nursing Homes, for the erection of a building to contain 30 sheltered housing flats within the eastern garden of Cockenzie House and for other associated works. The applicant further correctly states that this planning permission was partially implemented, as the Hanseatic Barn was converted. As that planning permission has been partially implemented, the applicant therefore advises that the building to contain the 30 sheltered housing flats could therefore be erected at any time within the eastern garden of Cockenzie House. In his view, the nursing home building now proposed would have less of an impact than the 30 sheltered housing flats. This position is generally referred to as 'fallback'.

In this regard, it is worth noting that the original approval for the sheltered housing was in the context of being part of a single planning unit that took in the entire curtilage of Cockenzie House, approval being given for a sheltered housing use (Class 8 of the Town and Country Planning (Use Classes) (Scotland) Order 1997) that was functionally related to the use of the rest of the site as a nursing home (also Class 8). The use of the main house is no longer as a nursing home, with planning permission having subsequently been granted for its use as 3 houses, a hostel and a cafe. Those approved uses have been implemented. This has started a new chapter in the planning history of the whole planning unit and there are no lawful use rights to revert back to a nursing home within the site. In other words, planning permission would be required to resume Class 8, nursing home use. The change of use has affected the whole site and the use rights that existed under planning permission 90/00870/HIS\_P are no longer extant. It therefore follows that this previous permission is not a lawful 'fallback' position and should not be accorded any weight as such.

In any event, even if the sheltered housing permission did remain extant and hence represent a lawful fallback position, it would only be appropriate to accord it weight in decision-making if there was a realistic prospect of it actually being exercised in the event of refusal. Case law suggests that the test should be made on the balance of

probabilities rather than the balance of possibilities, i.e. whether there is an actual likelihood of the fallback being implemented as opposed to a theoretical possibility. This seems unlikely given the lack of evidence of any serious intention by the applicant to implement the permission (a stage II building warrant application has been pending since 2001, reference 00/00812/BW\_S2). Moreover, regulatory changes in respect of matters such as fire safety mean that the approved design is unlikely to be capable of implementation in its current form as it would not comply with current regulations.

Other material considerations, including the jobs that would be created through the development of the nursing home and the applicant's intention to fund renovation of the existing walled east garden and future management of the grounds, do not justify a departure of the scale proposed.

#### REASONS FOR REFUSAL:

- 1 The proposed nursing home by virtue of its size, scale and positioning would dominate and compete with the listed building within the site such that the listed building of Cockenzie House would no longer be the focus of its setting. Moreover, the open setting of the listed building would be significantly harmed by the presence of the nursing home buildings and its associated infrastructure. As it would harm the setting of the listed Cockenzie House, the proposed development is contrary to Policy 1B of the approved South East Scotland Strategic Development Plan (SESplan), Policy ENV3 of the adopted East Lothian Local Plan 2008 and Scottish Planning Policy: February 2010 on development affecting a listed building or its setting.
- 2 The proposed development would significantly harm the conservation objectives of the Cockenzie House Designed Landscape, contrary to Policy 1B of the approved South East Scotland Strategic Development Plan (SESplan), Policy ENV8 of the adopted East Lothian Local Plan 2008 and Scottish Planning Policy: February 2010 on development affecting a designed landscape.
- 3 The visual impact of the proposed nursing home would result in the loss of the open character of part of the tripartite gardens of Cockenzie House, to the detriment of the character, appearance and amenity of the Conservation Area. On this consideration the proposed development is contrary to Policy 1B of the approved South East Scotland Strategic Development Plan (SESplan), Policy ENV4 of the adopted East Lothian Local Plan 2008 and Scottish Planning Policy: February 2010 on development affecting a conservation area.