



Report to the Scottish Ministers

TOWN AND COUNTRY PLANNING (SCOTLAND) ACT 1997

PLANNING (LISTED BUILDINGS AND CONSERVATION AREAS) (SCOTLAND) ACT 1997

Claims for award of expenses

Report by Dannie Onn and Scott M Ferrie, reporters appointed by the Scottish Ministers

- Planning permission appeal references: PPA-230-2178; PPA-230-2213
- Listed building consent appeal references: LBA-230-2076; LBA-230-2118
- Site address: New Parliament House, 5-7 Regent Road, Edinburgh EH7 5BL
- (1) Claim for expenses by the appellants against Edinburgh World Heritage
- (2) Claim for expenses by the Architectural Heritage Society of Scotland against the appellants
- Dates of inquiry sessions: 18 September-19 October 2018
- Dates of hearing session: 23 October 2018
- Dates of accompanied site inspections: 10-11 May 2018

Date of this report and recommendation: 11 June 2020



Scottish Government
Planning and Environmental Appeals Division
4 The Courtyard
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Callendar Road
Falkirk
FK1 1XR

DPEA case references: PPA-230-2178; LBA-230-2076; PPA-230-2213 and LBA-230-2118

The Scottish Ministers
Edinburgh

Ministers

In accordance with our minutes of appointment dated 4 April 2016 and 4 December 2017, we conducted inquiry and hearing sessions in connection with four appeals (two planning permission appeals and two listed building consent appeals) at New Parliament House, 5-7 Regent Road, Edinburgh.

The planning and listed building consent applications which are subject of this report were refused permission by the City of Edinburgh Council and then appealed by Duddingston House Properties & Urbanist Hotels. You recalled the appeals for your own determination because they raise issues of national importance in terms of potential impacts on the historic environment, including the Old and New Towns of Edinburgh World Heritage Site, and in relation to potential economic and tourism benefits.

This report relates to two claims for an award of expenses. Two separate reports have also been submitted to Scottish Ministers in regard to the planning permission and listed building consent appeals.

CHAPTER 1: CIRCULAR 6/1990

1.1 Section 267(7) of the Town and Country Planning (Scotland) Act 1972 (the 1972 Act) empowers the Secretary of State (now Scottish Ministers) to make an order as to the expenses of the parties to an inquiry.

1.2 In planning proceedings the parties are normally expected to meet their own expenses and expenses are only awarded on grounds of unreasonable behaviour. Awards of expenses do not necessarily follow the decision on planning merits.

1.3 Circular 6/1990: Awards of Expenses in Appeals and other Planning Proceedings and in Compulsory Purchase Order Inquiries, states that parties are normally expected to meet their own expenses and that awards of expenses are only met where each of the following tests is met:

- the claim is made at the appropriate stage in the proceedings;
- the party against whom the claim is made has acted unreasonably; and, if so,
- whether the unreasonable conduct has caused the party making the claim unnecessary expense either because it was unnecessary for the matter to come to an appeal, or because of the manner in which the party against whom the claim is made has conducted their part of the proceedings.

1.4 The Circular further advises (at paragraph 10) that awards of expenses either in favour of or against third parties will be made only in exceptional circumstances.

CHAPTER 2: THE APPELLANTS' CLAIM AGAINST EDINBURGH WORLD HERITAGE

Summary of the appellants' claim

2.1 It is stated for the appellants in their [claim](#) for an award of expenses that the claim was intimated before the close of the inquiry on 19 October 2018.

2.2 The appellants' claim for expenses relates to the evidence of Mr Wilkinson, Director of Edinburgh World Heritage (EWH), to the inquiry. During cross-examination, Mr Wilkinson admitted to using Photoshop software to prepare and present an inaccurate montage of the appellants' Scheme 2 hotel proposals because he hadn't found a visualisation within the appellants' submission "which illustrated what [he] wanted to illustrate". This is despite accurate images being freely available, as acknowledged by Mr Wilkinson.

2.3 In these circumstances, the appellants submit that this was more than an "honest mistake" as was suggested by Mr Wilkinson. EWH has clearly acted unreasonably. This unreasonable conduct is particularly serious considering EWH was established, and is funded, by two public bodies, namely Historic Environment Scotland and the City of Edinburgh Council.

2.4 Another factor which demonstrates the seriousness of Mr Wilkinson's conduct is the council's reliance upon EWH in relation to development proposals within the Old and New Towns of Edinburgh World Heritage Site. Furthermore, members of the public and other organisations will look to EWH to assess and report on impacts on the WHS. As was discussed during the inquiry, this photomontage was presented at a public meeting about the appellants' Scheme 2 hotel proposals on 14 March 2017 and arranged by various objectors to the proposals who appeared at the inquiry.

2.5 During the inquiry, it was acknowledged that the inaccurate photomontage had been known about for some time. The appellants would highlight that it took until Mr Wilkinson was cross-examined during the inquiry for him to acknowledge the inaccuracy and that he had gone to the effort of using software to prepare his own photomontage. EWH had the opportunity to acknowledge this in its inquiry statement, topic papers, precognition or examination-in-chief but failed to do so.

2.6 It is submitted that, given the nature and seriousness of the unreasonable behaviour set out above, Mr Wilkinson was an unreliable witness and he should not have appeared before the inquiry. As Mr Wilkinson was the only witness presented by EWH in inquiry session 1, or certainly the only witness for the 'Coalition' who was providing evidence on the impact on the World Heritage Site, EWH should not have appeared in inquiry session 1. EWH's appearance at the inquiry caused unnecessary expense for the appellants because not only did Mr Wilkinson give evidence for EWH which was subject to cross-examination, the appellants had to respond to issues in relation to impact on the World Heritage Site raised by EWH in their evidence and were subject to cross-examination on matters relating to the World Heritage Site by counsel for EWH.

Summary of the Edinburgh World Heritage response

2.7 In [response](#), it is accepted for Edinburgh World Heritage that the claim was made at the appropriate stage in proceedings.

2.8 The appellants do not, however, specify what it was that Mr Wilkinson did at the inquiry session that was unreasonable. The appellants complain that EWH has acted unreasonably and maintain that its conduct is particularly serious. There is no specification of the unreasonable conduct of EWH. Specification is required in order that the reasonableness of the conduct can be assessed and in order that EWH can answer the complaint.

2.9 It is accepted that the public and other organisations will look to EWH to assess and report on impact on the outstanding universal value of the World heritage Site. However, there was no evidence before the reporters about whether the image produced by Mr Wilkinson was relied upon by anyone. The appellants have known of the nature of all of the presentations at the meeting of 14 March 2017 since soon after the meeting took place.

2.10 Had the appellants wanted to suggest malice or deliberate intent on the part of Mr Wilkinson or EWH, or that other persons were influenced by such an image, they should have led evidence on this topic. They chose not to.

2.11 Whether Mr Wilkinson is an unreliable witness is a matter for the merits of the appeal. That issue is not relevant to the question of whether it was unreasonable to call him to give evidence. Mr Wilkinson was not the only witness presented by EWH in Inquiry Session 1. Mr Wilkinson's evidence covered a number of broad topics. To a great extent his contribution served to emphasise and support the evidence of other witnesses for the council and Historic Environment Scotland. The decision of EWH to participate and to call its Director as a witness was reasonable in the circumstances.

2.12 In any event the decisions complained of all took place before 20 August 2018 (the date for lodging precognitions) and therefore did not amount to conduct at a public local inquiry.

2.13 The appellants assert that EWH's appearance caused unnecessary expense. Even if it were to be accepted that EWH should not have appeared (which is not accepted), the appellants would still have needed to address the same issues in respect of the effect of their schemes on the outstanding universal value of the World Heritage Site, as this was a significant factor in the decision of the council to refuse permission, and questions relating to World Heritage Site issues would have been asked by counsel for other participants.

2.14 Paragraph 10 of Circular 6/1990 deals with expenses claims by and against third parties. That paragraph states that awards of expense against third parties will be made only in exceptional circumstances.

2.15 The appellants have failed to specify the unreasonable behaviour complained of; have failed to address the requirements of the Circular; and have ignored the paragraph in the Circular that specifically addresses third parties such as EWH. The claim should be refused.

Reporters' conclusions

2.16 There is no dispute that the claim was made at the appropriate stage of the proceedings.

2.17 Mr Wilkinson's production, and dissemination, of an inaccurate photomontage of the appellants' proposal was clearly unfortunate. That is especially so as photomontages, produced in accordance with relevant guidance, had been prepared by the appellants.

2.18 That photomontage may have caused others to decide to object to the proposed development. EWH is right to point out, however, that the appellants have produced no evidence of this.

2.19 We do not find it credible to believe that the production of the image led Edinburgh World Heritage or Historic Environment Scotland to object to the proposals on the grounds of impact on the World Heritage Site. Nor do we find it credible to believe that the council's refusal of permission on this reason was based to any degree whatever on the inaccurate imagery. On this matter we are of the clear view that the proposals would have come to appeal, notwithstanding preparation of the photomontage by Mr Wilkinson.

2.20 We consider also that the choice of witness was one for EWH to make.

2.21 Taking these considerations, and the provisions of paragraph 10 of the Circular into account, we find that EWH has not acted in an unreasonable manner resulting in liability for expenses.

2.22 In the event that Ministers disagree with this finding, we must also consider whether, had we found that EWH acted unreasonably, that this unreasonable conduct caused the appellants to incur unnecessary expense. In this regard it is unfortunate that EWH, despite being aware of the inaccuracy of its image, did not acknowledge that in submissions made in advance of the inquiry. Clearly, the appellants' counsel was required to address the matter in cross-examination of Mr Wilkinson. To that extent the appellants' incurred unnecessary expense, but we consider that to be to a trivial degree.

2.23 We find overall that EWH did not act unreasonably and that it did not cause the appellants to incur unnecessary expense.

Recommendation

2.24 We recommend that no award of expenses is made in regard to the appellants' claim against Edinburgh World Heritage.

Dannie Onn

Reporter

Scott M Ferrie

Assistant Chief Reporter

CHAPTER 3: THE ARCHITECTURAL HERITAGE SOCIETY OF SCOTLAND (AHSS) CLAIM AGAINST THE APPELLANTS

Summary of the AHSS claim

3.1 It is stated for the AHSS that its [claim](#) for an award of expenses was intimated prior to the close of the inquiry session and that, accordingly, it was made at an appropriate point in proceedings.

3.2 Paragraph 10 of Circular 6/1990 states that awards of expenses in favour of or against third parties will only be made in exceptional circumstances. In general, third parties will not be eligible to receive expenses where unreasonable behaviour by one of the main parties relates to the substance of that party's case, but where unreasonable conduct at a public local inquiry causes unnecessary expense, third parties may be awarded expenses.

3.3 However, the Circular was issued in 1990 and planning reforms mean that much of the Circular and its terminology have been superseded. Appeals are now largely governed by the Town and Country Planning (Appeals) (Scotland) Regulations (2013) which do not support any distinction in the obligations applicable to parties participating in an inquiry session. The appellants have omitted any mention of paragraph 10 in their own claim for expenses against EWH. It would, therefore, be unreasonable for them to invoke it in their defence of this claim for expenses.

3.4 On behalf of the AHSS it is submitted that the appellants have acted unreasonably in making a factually inaccurate allegation of a defamatory nature which lacked reasonable specification. On behalf of the appellants, Andrew Wright (one of the appellants' witnesses) alleged in his inquiry report:

"I have also experienced at first-hand how these heightened levels of apprehension are manifested in the increasing extent to which the city's leading amenity bodies have sought to frustrate schemes in the pipeline by fabricating evidence against them. For the appellants' proposals this claim can be laid fairly at the door of the Architectural Heritage Society of Scotland in setting out to discredit the proposals for Scheme 1 from the moment that the proposals had been announced in February 2015. This was done without seeking a balancing view to counter the arguments being put forward publicly, and in pursuing a sustained and vigorous public campaign against the proposal in the months thereafter. I also raise the unqualified support given by the EWHT to the alternative proposal for the RHSPT scheme which cannot pass without comment. These are all factors that have been patently stacked up against the appellants' schemes being considered fairly in the planning process, to which I, and others, draw to the attention of this inquiry. What may be perceived as taking the line of least resistance in relation to the likely impact on the OUV of the WHS may not satisfy other challenging tests to be satisfied in policy terms over securing a sustainable use for the principal listed building".

3.5 The allegation relates specifically to the AHSS and its conduct in respect of Scheme 1. Given the lack of specification in Mr Wright's allegation the AHSS learned of its genesis only during the cross examination of Mr Wright. His first effort at justification was his complaint that the AHSS had failed to invite the appellants to attend a public meeting on

Monday 23 February 2015. The AHSS lodged an email exchange which demonstrates that, as a matter of fact, the appellants had been invited to address the then forthcoming meeting. Mr Wright then claimed that the AHSS had published an unidentified article in its Journal about the appellants' proposed development at the Royal High School. The appellants have not produced to the inquiry any such article. Mr Drummond explained in his evidence in chief that he could not find any such article within the AHSS Journal. Mr Drummond's evidence on this matter has not been challenged.

3.6 The appellants owe to the inquiry and to all participating parties a duty to present accurate information and to act with reasonable skill and care. The appellants included an allegation of the most serious nature against the AHSS. They have alleged that the AHSS has deliberately presented information which it knew to be false with the intention to deceive the inquiry and Scottish Ministers. The allegation was not made by an inexperienced witness under pressure during cross examination. It was included in a submission which has been carefully drafted and which was lodged by a firm of solicitors on behalf of the appellants.

3.7 It is submitted that the false allegation is so serious in its intent and its effect that the discretion afforded by paragraph 10 of the Circular is triggered.

3.8 Directly as a result of the factually inaccurate allegation within Mr Wright's inquiry report and his insistence upon it at the inquiry session, the AHSS has incurred additional expense which would not otherwise have been necessary. The AHSS has had to investigate it prior to the inquiry session and during the inquiry session. So lacking in specification was the allegation that it required to be the subject of cross examination. The allegation necessitated the submission of an additional document and also required to be countered in the closing submission on behalf of the AHSS. The additional expense incurred by a charity which chose to participate in an inquiry session has been considerable.

Summary of the appellants' response

3.9 In [response](#), it is stated for the appellants that the AHSS's comments about Mr Wright are at best unfortunate. Mr Wright is a highly experienced and respected witness whose evidence lasted almost a full week with most of it cross examination. The AHSS role in publishing the erroneous EWHT photomontage was clarified by Mr Drummond in cross-examination. He explained fairly and reasonably that when the AHSS became aware of the fabrication, AHSS acted appropriately. This included removing it from the AHSS website. Until that explanation it had been thought that the AHSS was involved to some extent as AHSS had hosted or even chaired the relevant meeting. This was all clarified during the inquiry. That should have been the end of this issue.

3.10 Despite Mr Wright's comment (set out above) appearing in his inquiry report, the matter was not addressed in either precognitions or rebuttal precognitions submitted on behalf of the AHSS. Had this been raised in precognitions, Mr Wright would have had the opportunity to respond in rebuttal precognitions.

3.11 Following the evidence of Mr Drummond, counsel for the appellants made it clear that they considered the matter closed in relation to the AHSS in terms of the appeals. The fact that the AHSS continued to pursue the matter in closing submissions was a matter for them but the appellants submit that this was entirely unnecessary.

Reporters' conclusions

3.12 There is no dispute that the claim was made at the appropriate stage of the proceedings.

3.13 For the appellants it has been acknowledged that Mr Wright's statement complained of by the AHSS was made on a mistaken understanding of AHSS's role in the preparation of the inaccurate photomontage produced by Edinburgh World Heritage. The true circumstances, including AHSS's lack of involvement, only became known to the appellants during the inquiry. In the circumstances we consider the appellants' evidence to the inquiry to have been legitimate. During the inquiry, that evidence, together with that relating to a meeting and the AHSS journal, was acknowledged on behalf of the appellants to have been based on a misunderstanding.

3.14 Taking these considerations, and the provisions of paragraph 10 of the Circular into account, we find that the appellants have not acted in an unreasonable manner resulting in liability for expenses.

3.15 In the event that Ministers disagree with this finding, we must also consider whether, had we found that the appellants acted unreasonably, that this unreasonable conduct caused the AHSS to incur unnecessary expense. In this regard, it was clearly necessary for the AHSS's legal representative to address the matters in cross-examination. To that extent the appellants' incurred unnecessary expense, but we consider that to be to a trivial degree.

3.16 We find that the appellants did not act unreasonably and that they did not cause the AHSS to incur unnecessary expense.

Recommendation

3.17 We recommend that no award of expenses is made in regard to the AHSS claim against the appellants.

Dannie Onn
Reporter

Scott M Ferrie
Assistant Chief Reporter