

CEC-18105/19

10/10/19

- AAN telephoning PFS of Turcan Gornell asking that he return our call
- AAN speaking to {redacted} of Markon Fraser. She was heading out to Court. She had pleaded on our email to her clients and had asked for instructions

She had just managed to serve the appeal on the other interested party. That would give us all breathing space as it would mean that a timetable would not be used until at least after 21 days from now.

The other interested party had not liked the decision so would probably be agreeable to the matter being referred back for a new decision.

{redacted}

From: {redacted}
Sent: 23 September 2019 11:28
To: {redacted}
Subject: RE: City Of Edinburgh Council - XA105/19

Hi {redacted},

Thank you for acknowledging receipt. We have instructed {redacted}. I look forward to hearing from you once you have instructions.

Kind regards,

{redacted}

{redacted}
Associate
For Morton Fraser LLP
t: 0131 247 1315 | [LinkedIn](#)
www.morton-fraser.com

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From: {redacted}
Sent: 23 September 2019 11:20
To: {redacted}
Subject: City Of Edinburgh Council - XA105/19

Dear {redacted},

This office acts on behalf of the Scottish Ministers and in this particular case DPEA.

I acknowledge receipt of your client's statutory appeal. I am taking instructions.

Please could you let me know who you have instructed ?

Kind regards

{redacted}

{redacted} | [Solicitor](#) | [Litigation Division](#) | [Scottish Government Legal Directorate](#)
[T 0131 244 7942](#) | [F 0131 244 7527](#)
[Area G A North](#) | [Victoria Quay](#) | [Edinburgh](#) | [EH6 6QQ](#) | [DX 557000 Edinburgh -20](#)

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{redacted}

From: {redacted}
Sent: 02 October 2019 17:31
To: {redacted}
Subject: RE: City of Edinburgh Council -V Scottish Ministers - XA105/19
Attachments: CERTIFIED COPY APPEAL.pdf

{redacted},

I have now received the copy appeal back from Messengers at Arms. A copy is attached, you will note the appeal is stamped with the date of lodging on the final page.

Kind regards,

{redacted}

{redacted}
Associate
For Morton Fraser LLP
t: 0131 247 1315 | [LinkedIn](#)
www.morton-fraser.com

To receive regular news and specialist updates on all areas of the law, subscribe to our [email updates](#)

From: {redacted}
Sent: 24 September 2019 08:58
To: {redacted}
Subject: RE: City of Edinburgh Council -V Scottish Ministers - XA105/19

Dear {redacted},

Thank you very much. That would be great just so I have it on the file.

Many thanks

{redacted}

{redacted} | [Solicitor](#) | [Litigation Division](#) | [Scottish Government Legal Directorate](#)
[T 0131 244 7942](#) | [F 0131 244 7527](#)
[Area G A North](#) | [Victoria Quay](#) | [Edinburgh](#) | [EH6 6QQ](#) | [DX 557000 Edinburgh -20](#)

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From: {redacted}
Sent: 23 September 2019 16:37

To: {redacted}

Subject: RE: City of Edinburgh Council -V Scottish Ministers - XA105/19

{redacted},

It was lodged on 10 September and we received the interlocutor a week later. We did take a copy of the appeal as stamped by the Court but I have given this to Sheriff Officers to serve on one of the interested parties. Once I receive it back, I can provide a copy.

Kind regards,

{redacted}

{redacted}

Associate

For Morton Fraser LLP

t: 0131 247 1315 | [LinkedIn](#)

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From: {redacted}

Sent: 23 September 2019 16:01

To: {redacted}

Subject: City of Edinburgh Council -V Scottish Ministers - XA105/19

Dear {redacted}

Please could you let me have evidence of when you lodged the appeal ? I see the interlocutor is 17 September 2019 but I am aware that there are some delays in processing at the Court of Session.

Kind regards

{redacted}

{redacted} | [Solicitor](#) | [Litigation Division](#) | [Scottish Government Legal Directorate](#)

[T 0131 244 7942](#) | [F 0131 244 7527](#)

[Area G A North](#) | [Victoria Quay](#) | [Edinburgh](#) | [EH6 6QQ](#) | [DX 557000 Edinburgh -20](#)

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CERTIFIED A TRUE
COPY
EDINBURGH
23 SEPTEMBER 2019
Wm A
SOLICITOR



Form 41.25

Form of appeal in appeal under statute to the Court of Session

Appeal

to

THE COURT OF SESSION

under

Section 239 of the Town and Country Planning (Scotland) Act 1997

by

CITY OF EDINBURGH COUNCIL, a local authority constituted under the Local Government etc. (Scotland) Act 1994 and having its headquarters at City Chambers, High Street, Edinburgh, EH1 1YJ

Appellant

against

A decision by Andrew Fleming, a Reporter appointed by the Scottish Ministers, dated 31 July 2019 allowing an appeal by Granton Central Developments Limited (Case Reference: PPA-230-2253) and granting planning permission for development without compliance with condition 1a and 1b imposed in the grant of planning permission 01/00802/OUT dated 23 June 2003 for mixed use development comprising residential units, hotel plus serviced apartments, shops plus retail / services, restaurants / cafes, public houses, general business, leisure facilities plus marina on land at Granton Harbour, West Harbour Road, Edinburgh (Planning Application Reference: 18/01428/PPP)

The Reporter's decision ("**the Decision**") is set out in an Appeal Decision Notice dated 31 July 2019. The Decision is appended to this appeal.

The Appellant is aggrieved by the foregoing Decision and desire to question its validity on the grounds that it was not within the powers of the Town and Country Planning (Scotland) Act 1997 ("**the 1997 Act**"). The Appellant therefore appeals under section 239 of the 1997 Act against the Decision on the following grounds:

GROUNDS OF APPEAL

Factual background

1. On or around 12 April 2018, Granton Central Developments Limited, (“the **Developer**”) applied to the City of Edinburgh Council (“the **Appellant**”) for development without compliance with conditions 1a and 1b imposed in the grant of planning permission 01/00802/OUT (“the **2003 Permission**”) dated 23 June 2003 for mixed use development comprising residential units, hotel plus serviced apartments, shops plus retail / services, restaurants / cafes, public houses, general business, leisure facilities plus marina on land at Granton Harbour, West Harbour Road, Edinburgh (Planning Application Reference: 18/01428/PPP) (“the **Section 42 Application**”). Conditions 1a and 1b relate to the time within which applications for approval of reserved matters are required to be made and the time within which the development required to be commenced.
2. On or around 8 November 2018, the Developer appealed to the Scottish Ministers on the basis that the Appellant had not taken a timeous decision in relation to the Section 42 Application. The Developer set out its grounds of appeal in an Appeal Statement (“the **Developer’s Appeal Statement**”). In the Developer’s Appeal Statement the Developer submitted *inter alia* that the Section 42 Application was being made in terms of Section 42 of the Town and Country Planning (Scotland) Act 1997 (“the Act”) “to amend” the time limiting conditions “to extend” the duration of the 2003 Permission for five years to 20th June 2023. The Developer’s Appeal Statement also argued that the application was required in order to continue the regeneration of Granton Harbour and ensure the effective timeous delivery of housing as required by the Edinburgh Local Development Plan and was being sought “to retain” the 2003 Permission while the latest 4 applications for Approval of Matters Subject to Condition were determined. The Developer’s Appeal Statement referred to the City of Edinburgh Housing Land Audit (2017) and submitted that there was a shortfall in the 5-year housing land supply and there would be a shortfall in the expected completions on the site in 2019/2020. The Developer also argued that the Section 42 Application should be treated as if it were seeking a non-material variation to the 2003 Permission.
3. On or about 29 November 2018 the Appellant submitted its representations in

response to the Developer's Appeal Statement. The Council submitted that the overall effect of the application should be considered *inter alia* under reference to Paragraph 5 of Annex I of Circular 3/2013: Development Management Procedures ("Circular 3/2013"), which provides that:

"In determining a Section 42 application, authorities may consider only the issue of the conditions to be attached to any resulting permission. However, in some cases this does not preclude the consideration of the overall effect of granting a new planning permission, primarily where the previous permission has lapsed or is incapable of being implemented."

4. The Appellant also submitted that the 2003 Permission was granted in the context of the West Edinburgh Local Plan 1992, relevant structure plans and the then emerging draft West Edinburgh Local Plan (2001). The current development plan consists of the strategic development plan, SESplan and the Edinburgh Local Development Plan (2016) ("the LDP"). The Appellant submitted *inter alia* that there had been a move away from major commercial / business development on the site in the LDP and the amount of commercial space in the 2003 Permission would not generally be supported by the current LDP.
5. The Appellant also submitted that in accordance with the 2018 Housing Land Audit which had been agreed with Homes for Scotland there was no shortfall in the five-year supply of effective housing land and it had not expected houses to be produced from this particular development in reaching that conclusion.
6. The Appellant also submitted that a planning permission which is granted in respect of a section 42 application represents a new and separate planning permission from the original permission and is capable of separate implementation and that it is not sufficient to rely on the section 75 agreement which was entered into in respect of the 2003 permission and a new section 75 agreement should be required if the appeal was upheld. It submitted that in considering doing so regard should be had to the current extant development plan, including in relation to what developer contributions might be appropriate. It also submitted that parts of the original Section 75 Agreement were no longer achievable and made detailed submissions in relation to the matters that should be considered in a new Section 74 Agreement. In this context the

Appellant referred to Annex I of Circular 3/2013 at paragraph 2(d) which states:

"Planning authorities will wish to note the following in relation to Section 42 applications: ... d. The need to secure any section 75 legal obligation (or other agreement) to the new permission, where it is intended that this should still apply."

7. On or about 10 December 2019, the Developer submitted comments on the Appellant's response to the Appeal in annotations to a copy of the Appellant's submissions. *Inter alia* the Developer stated that it found it "bizarre" that the Appellant was of the view that the granting of a Section 42 application was a separate planning permission and made detailed submissions in relation to existing Section 75 Agreement and the appropriateness and content of any new Section 75 Agreement. It did not challenge the Appellant's submissions in relation to the 2018 Housing Land Audit and the sufficiency of housing land supply.

The Appeal Decision Notice

8. On 31 July 2019 the Reporter issued his decision in relation to the appeal ("the Decision"). It extends to only 10 paragraphs.
9. At paragraph 3 of the Decision the Reporter states that (emphasis added):
"The appellant seeks **to amend** the time-limiting conditions (1a and 1b) of this permission **to extend the duration of the permission** for five years to 20 June 2023 in order that the regeneration of Granton Harbour can continue and to ensure the effective and timeous delivery of housing. It is sought **in order to retain the existing consent while the latest 'approval of matters specified in conditions' (AMC) applications are determined**. The appeal was brought against the council's non-determination (deemed refusal) of the section 42 application to amend the time-limiting condition of the existing outline planning permission."
10. Paragraphs 9 (emphasis added): "I appreciate that there have been various consultation responses and representations from local residents in regard to this appeal. I note that local residents have commented as if this was a fresh planning application not envisaged in the area or provided comments on detailed design matters. **This appeal is not concerned with reconsidering**

the planning merits of the extant planning permission before me but seeks an extension to the time-limiting condition of that permission.”

11. At paragraph 10 the Reporter states (emphasis added): “In conclusion, I therefore consider it **necessary and appropriate** to allow an extension to the time-limiting condition (1a and 1b) to 20 June 2023 in order to allow **sufficient time for the necessary works** to progress. **I have considered all matters raised by the council but there are none which would lead me to reach a different conclusion.”**

Grounds of Appeal

12. A successful Section 42 application leads to the grant of a new and separate planning permission and not merely a modification or amendment of the conditions attached to a permission previously granted.
13. The Reporter has erred in his approach to the determination of the Section 42 Application *et separatim* failed to give proper, adequate and intelligible reasons to explain his approach to the decision. The Reporter does not explicitly state the test or the criteria he is applying in determining the Decision. He does not indicate that he is aware that the grant of the Section 42 Application will lead to a separate planning permission to the 2003 Permission.
14. Where the original time limit for submitting a reserved matters application or application for approval of matters subject to condition in an outline permission or planning permission in principle has expired, it is appropriate for the authority when considering an application to extend the time period of an outline permission or planning permission in principle, to consider the practical consequences of the development itself - especially in relation to subsequent changes in the development plan policies since the original grant of permission. In that situation current planning policy and facts should be taken into consideration when deciding whether or not to permit a new condition that would allow a development to go ahead which was now opposed on policy grounds and which would otherwise be incapable of implementation. The Reporter has failed to do so. Reference is made to paragraph 5 of Annex I of Circular 3/2013 and *Pye v Secretary of State for the Environment* [1998] 3 PLR 72 and *North Cornwall DC and R v Leicester City Council (ex parte Powergen*

15. Paragraphs 2(d) and 5 of Annex I of the Circular were referred to in the Council's Appeal Statement. The Reporter has not made any reference to this and appears to have failed to have regard to its terms. The Reporter has also failed properly to consider whether to require a new section 75 Agreement in relation to the new planning permission (even to secure the same obligations as the original). The Reporter has failed to consider whether he should be assessing the merits of the application or restricting his consideration only to the time extension condition, which he appears to see as only an "amendment" to the existing permission. He does not appear to consider the need for a new Section 75 Agreement even on the same terms or to achieve the same result as the original Section 75 Agreement. He makes no mention of the Council's submission that there have been significant changes in the policy proposals for the Site.

16. The Reporter has erred in not properly considered imposing a new Section 75 Agreement or whether and, if so, how, adherence to the existing Section 75 Agreement can be achieved in the circumstances. He appears to have dismissed this possibility both because it would be difficult to achieve because there is now a fragmented ownership of the Site and because of his understanding that the existing Section 75 would still apply and that the obligations under it had already been complied with and were not outstanding. He has failed even to secure any reassurance that the same section 75 obligations as already exist in relation to the 2003 Permission would be adhered to. He has not provided proper, adequate and intelligible reasons for his decision. His reference to the Appellant's preference for a new Section 75 Agreement in paragraph 7 indicates he thinks this is a factor only if a wholly new application were to be sought if he refused the application for the "extension" to the existing 2003 Permission. The Decision should have been taken in light of an acknowledgement that the application creates a new separate permission and the original Section 75 Agreement refers only to the 2003 Permission already granted and may not be enforceable in relation to any new Permission granted as a result of the Section 42 Application.

17. The Reporter has taken into account irrelevant considerations. At paragraph 5 the Reporter states *inter alia* that he is "conscious that there are outstanding

AMC applications which are yet to be determined". Although the Appellant refers to the need for the extension of time for this reason, it is not of relevance to the decision before the Reporter. It is clear from the terms of Condition 1a of the 2003 Permission that any on-going applications for AMSC and any appeal against the determination of them would be entitled to continue notwithstanding the expiry of the 15 year period referred to in condition 1a. A further application within 6 months would also be considered and determined.

18. The Reporter has failed to take into account material considerations and / or has failed to give proper, adequate and intelligible reasons for his decision. The Reporter's statement at the end that "I have considered all matters raised by the council but there are none which would lead me to reach a different conclusion" leaves a real and substantial doubt about what and how he has considered and resolved in relation to the competing submissions made by the Developer and the Appellant. The Appellant's submissions were detailed and lengthy and raised a variety of issues. The Reporter has failed to engage with the arguments. He has not explained how he has determined matters that are in dispute between the parties. He has not addressed the Appellant's submissions *inter alia* relation to the adequacy of housing land supply, the need for a new Section 75 Agreement, potential flood related issues raised by SEPA or in relation to LDP policy ENV 22 and the need for an air quality impact assessment. The Reporter has not given proper, adequate and intelligible reasons for dismissing the Appellant's arguments.

19. The Reporter has proceeded on an error of fact and/or reached a conclusion for which he had no proper evidential basis. At paragraph 8 of the Decision the Reporter concluded that "...these new homes will also provide an important contribution to the council's housing shortfall." In its representations to the Reporter the Appellant submitted *inter alia* that, contrary to what the Developer stated, there was no shortfall in the housing land supply that would be addressed by the granting of the Appeal. The Developer based its arguments on the 2017 Housing Land Audit. The Appellant's response referred to the 2018 Housing Land Audit and, in particular, to the fact that there was no shortfall in the five year housing land supply and it had not expected houses to be produced from this particular Development in reaching that conclusion. Those submissions were not challenged in the Developer's response to the Appellant's submissions. The Reporter had no proper evidential basis on which

to conclude there was a shortfall in the housing land supply *et separatim* has not given proper, adequate and intelligible reasons to explain why he has reached that conclusion in relation to a matter in dispute between the parties. He nevertheless relied upon that conclusion as part of his reason for granting the Appeal at paragraph 8 of the Decision.

Questions of Law for the Opinion of the Court are:-

1. Whether, in terms of section 239 of the 1997 Act, the decision was within the powers of the 1997 Act.
2. Whether the Reporter erred in his approach to determining the Section 42 Application.
3. Whether the Reporter took into account an irrelevant consideration.
4. Whether the Reporter failed to take into account a material consideration.
5. Whether the Reporter proceeded on an error of fact or reached a conclusion for which he had no proper evidential basis.
6. Whether the Reporter failed to give proper, adequate and intelligible reasons for his decision.

IN RESPECT WHEREOF

{redacted}

Morton Fraser LLP
Quartermile 2
2 Lister Square
Edinburgh EH3 9GL
DX ED119
Ref: UC/RA4/01393/00543
AGENT FOR THE APPELLANT

SCHEDULE FOR SERVICE

Respondent

- (1) The Scottish Ministers, Victoria Quay, Edinburgh, EH6 6QQ

Interested Party

- (2) Granton Central Developments Limited, P.O. Box 771, Colomberie Close, St Helier, Jersey, JE4 0RX
- (3) Lester Gibbons, Heron Place, Granton Harbour, Edinburgh, EH5 1GG

APPENDIX

1. Decision Notice, 31 July 2019
2. Application for planning permission, 12 April 2018
3. Covering Letter from Applicant dated 28 March 2018
4. Planning Appeal Form and Statement of Appeal, 8 November 2018
5. Planning Authority Appeal Response Form and Appeal Statement
6. Developer's Comments on Council's Response, (colour copy)
7. Section 75 Agreement
8. Circular 3/2103
9. Planning Permission 01/00802/OUT dated 23 June 2003

XA105119



APPEAL

to

THE COURT OF SESSION

under

Section 239 of the Town and Country
Planning (Scotland) Act 1997

by

CITY OF EDINBURGH COUNCIL

Appellant

against

A decision by Andrew Fleming, a Reporter appointed by the Scottish Ministers, dated 31 July 2019 allowing an appeal by Granton Central Developments Limited (Case Reference: PPA-230-2253) and granting planning permission for development without compliance with condition 1a and 1b imposed in the grant of planning permission 01/00802/OUT dated 23 June 2003 for mixed use development comprising residential units, hotel plus serviced apartments, shops plus retail / services, restaurants / cafes, public houses, general business, leisure facilities plus marina on land at Granton Harbour, West Harbour Road, Edinburgh (Planning Application Reference: 18/01428/PPP)



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Ref: UC/RA4/01393/00543
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