

{redacted}

)

From: {redacted}
Sent: 10 October 2019 08:55
To: {redacted}
Subject: City of Edinburgh Council V Scottish Ministers XA105/19
Attachments: City of Edinburgh Council - XA105 of 19 - Answers as Lodged 10 October 2019.pdf

Dear {redacted},

I attach a copy of the answers which will be lodged today. You will see that we are instructed to concede the appeal and we admit that our reporter failed to give proper adequate and intelligible reasons for his decision. We have asked that the decision be quashed and remitted back to us for a fresh decision.

Please would you take instructions from your clients on this proposal. It is our respectful decision that this would be the cheapest and quickest way forward in this case for your clients rather than engage in a full Appeal Procedure with the Developer's arguments, regardless of how successful you feel your arguments might be in the end of the day.

I look forward to hearing from you.

Kind regards

{redacted}

{redacted} | [Solicitor](#) | [Litigation Division](#) | [Scottish Government Legal Directorate](#)
[T 0131 244 7942](#) | [F 0131 244 7527](#)
[Area 1 F North](#) | [Victoria Quay](#) | [Edinburgh](#) | [EH6 6QQ](#) | [DX 557000 Edinburgh -20](#)

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Case Reference: XA105/19

IN THE COURT OF SESSION

ANSWERS

for

THE SCOTTISH MINISTERS, Victoria Quay, Edinburgh, EH6 6QQ

Respondents

in an

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: 18/01/PPP).

ANSWERS TO THE GROUNDS OF APPEAL

- 1 The 2003 Permission and the Section 42 Application are referred to for their terms. *Quoad ultra* admitted.
- 2 The Developer's Appeal Statement and section 42 of the Town and Country Planning (Scotland) Act 1997 are referred to for their terms. *Quoad ultra* admitted.
- 3 Admitted.

4 Admitted.

5 Admitted.

6 Admitted.

7 The comments submitted by the Developer are referred to for their terms. *Quoad ultra* denied.

The Appeal Decision Notice

8 Admitted under explanation that the Decision also contains 22 conditions listed at the end of the Decision.

9 Admitted that paragraph 3 of the Decision states that:

“The appellant seeks to amend the time-limiting condition (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 Admitted that paragraph 9 of the Decision states that:

“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 Admitted that paragraph 10 of the Decision states that:

“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 Admitted that a section 42 application can lead to the grant of a new and separate planning permission under explanation that each application must be determined on its own facts and circumstances.

- 13 Admitted that the Reporter failed to give proper, adequate and intelligible reasons to explain his approach to the decision. *Quoad ultra* denied.
- 14 Annex 1 of Circular 3/2013, *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 UK Ltd) (2001) 81 P&CR 5* are referred to for their terms. *Quoad ultra* denied.
- 15 Annex 1 of Circular 3/2013 and the Council's Appeal Statement are referred to for their terms. *Quoad ultra* denied. Explained and averred that the Reporter did consider whether a new section 75 agreement was required. The Reporter concluded that the "...existing section 75 requirements seem reasonable and have and are being complied with." In doing so he exercised planning judgment.
- 16 Denied. Reference is made to answer 15.
- 17 Denied. Explained and averred that the Reporter was entitled to reach the conclusion he did on the basis of the evidence before him, and he took into account all relevant considerations in doing so.
- 18 Admitted that the Reporter failed to give proper adequate and intelligible reasons for his decision. *Quoad ultra* denied.
- 19 Admitted that 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.*" Admitted that the Reporter failed to give proper adequate and intelligible reasons for his decision in respect of housing land supply. *Quoad ultra* denied.

Questions of Law for the Opinion of the Court

It is respectfully submitted that the answers to the questions of law for the court should be:

- 1 No.
- 2 Yes.
- 3 No.
- 4 No.
- 5 No.
- 6 Yes. The Decision should be quashed and remitted back to the respondents for a fresh decision.

IN RESPECT WHEREOF

{redacted}

From: {redacted})
Sent: 31 October 2019 15:58
To: {redacted}
Cc: {redacted}
Subject: CEC V Scottish Ministers
Attachments: CEC v SM - Joint Minute.docx

Dear all,

I have included {redacted} in this email list as she has just lodged answers on behalf of {redacted}

I attach a joint minute drafted by our Counsel, {redacted} Solicitor Advocate and would be obliged if you could take your clients instructions.

I look forward to hearing from you so that the Joint Minute can be circulated for signature by Counsel* and the appeal disposed of.

Kind regards

{redacted}

*

CEC- {redacted}
SG- {redacted}
Developer – {redacted}
{redacted}

{redacted} | [Solicitor](#) | [Litigation Division](#) | [Scottish Government Legal Directorate](#)
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IN THE COURT OF SESSION

JOINT MINUTE

FOR THE PARTIES

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APPEAL

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for the appellant and for the respondents and for
the interested party concur in stating to the Court that the parties are agreed as follows:

- 1) That the appellant has appealed in terms of section 239 of the Town and Country Planning (Scotland) Act 1997 (the 1997 Act) against the decision of a Reporter appointed by the respondents 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.

- 2) That the effect of granting permission for a section 42 application is such that a new and separate permission exists for the development, not a modification or amendment to the conditions in planning permission 01/00802/OUT dated 23 June 2003.
- 3) That the respondents acknowledges that the respondents' decision in relation to: (1) the test which the Reporter applied per statement 13 of the Grounds of Appeal; (2) the consideration of the parties submissions per statement 18 of the Grounds of Appeal; and (3) the assessment of housing land supply per statement 19 of the Grounds of Appeal failed to give proper, adequate and intelligible reasons.
- 4) That accordingly, the respondents acknowledges for the reason stated in paragraph 3) hereof, the decision was not within the powers of the 1997 Act and that for this reason alone the decision may properly be quashed by the Court and ought to be remitted back to the respondents for a fresh decision.
- 5) That the parties therefore crave the Court:
 1. to allow the appeal; and
 2. to find no expenses due to or by any party.

IN RESPECT WHEREOF

{redacted}

From: {redacted}
Sent: 14 November 2019 09:38
To: {redacted})
Cc: {redacted}
Subject: RE: CEC V Scottish Ministers
Attachments: Joint Minute (revised).docx

{redacted},

We had the opportunity to consult with clients and Counsel earlier in the week. Our Counsel sees benefit in the Council and the Scottish Ministers still lodging a joint minute to record their agreement on matters, albeit this will not be able to dispose of the action where the interested party is still defending the action. However, this may put pressure on GCDL to decide whether they still wish to defend, or may narrow the issues for the substantive hearing in due course.

Our clients would be looking for the Scottish Ministers to meet their expenses up to the date of lodging the joint minute.

I attach a very slightly revised joint minute which seeks to clarify the grounds of appeal which are being conceded by reference to the statements in the appeal, and also amends the position on expenses.

I look forward to hearing from you as to whether the Ministers would be prepared to agree a joint minute in these terms.

Kind regards,

{redacted}

{redacted}

Associate
For Morton Fraser LLP
t: 0131 247 1315 | [LinkedIn](#)
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From: {redacted}
Sent: 06 November 2019 11:10
To: {redacted}
Cc: A{redacted}
Subject: RE: CEC V Scottish Ministers

Dear {redacted}

All parties are content with the joint minute apart from the developer. {redacted} and {redacted} are going to speak to {redacted}

Kind regards
{redacted}

{redacted} | Solicitor | Litigation Division | Scottish Government Legal Directorate
T 0131 244 7942 | F 0131 244 7527
Area 1 F North | Victoria Quay | Edinburgh | EH6 6QQ | DX 557000 Edinburgh -20

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I will discuss with our clients but it may be difficult to take forward if Granton Central Developments are still defending the appeal.

Kind regards,

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I attach a joint minute drafted by our Counsel, {redacted} Solicitor Advocate and would be obliged if you could take your clients instructions.

I look forward to hearing from you so that the Joint Minute can be circulated for signature by Counsel* and the appeal disposed of.

Kind regards

{redacted}

*

CEC- {redacted}

SG- {redacted}
Developer – {redacted}
{redacted} {redacted}

{redacted} | Solicitor | Litigation Division | Scottish Government Legal Directorate
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IN THE COURT OF SESSION

JOINT MINUTE

BETWEEN [THE APPELLANT AND THE RESPONDENT]FOR THE PARTIES

in an

APPEAL

to

THE COURT OF SESSION

under

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

by

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for the appellant and for the respondents and for
the interested party concur in stating to the Court that the parties are agreed as follows:

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- 3) That the respondents acknowledges that the respondents' decision failed to give proper, adequate and intelligible reasons in relation to: (1) the test which the Reporter applied per statement 13 of the Grounds of Appeal; (2) the consideration of the parties submissions per statement 18 of the Grounds of Appeal; and (3) the assessment of housing land supply per statement 19 of the Grounds of Appeal ~~failed to give proper, adequate and intelligible reasons.~~
- 4) That accordingly, the respondents acknowledges for the reason stated in paragraph 3) hereof, the decision was not within the powers of the 1997 Act and that for this reason alone the decision may properly be quashed by the Court and ought to be remitted back to the respondents for a fresh decision.
- 5) ~~That the parties therefore crave the Court: To find the respondents liable to the appellants in the expenses of the appeal up to and including the date of lodging of this joint minute.~~
 1. ~~to allow the appeal; and~~
 2. ~~1. to find no expenses due to or by any party.~~

IN RESPECT WHEREOF

ANNEX**Grounds of Appeal Statements Referred to in Joint Minute**

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.

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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.

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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.

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{redacted}

From: {redacted}
Sent: 26 November 2019 14:47
To: {redacted}
Cc: {redacted}
Subject: RE: CEC V Scottish Ministers

Dear {redacted},

Thank you for this. We are considering the Joint Minute. It looks as if statements 13,18 and 19 go further than we would accept but I am waiting on instructions and will get back to you soon.

Kind regards

{redacted}

{redacted} | Solicitor | Litigation Division | Scottish Government Legal Directorate
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Area 1 F North | Victoria Quay | Edinburgh | EH6 6QQ | DX 557000 Edinburgh -20

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From: {redacted} >
Sent: 19 November 2019 16:20
To: {redacted}
Cc: {redacted}
Subject: RE: CEC V Scottish Ministers

{redacted},

With apologies for chasing, I was wondering if you had managed to consider the revised joint minute with your clients/Counsel?

Kind regards,

{redacted}

{redacted}
Associate
For Morton Fraser LLP
t: 0131 247 1315 | [LinkedIn](#)
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{redacted} – {redacted}

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

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