

AGENDA ITEM 6

APPENDIX 2

2013/0073/DET

2013/0074/DET

HARPER MACLEOD
LEGAL ADVICE LETTER
TO CNPA

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14 The Square
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3 February 2015

Dear Simon,

**Reidhaven Estate
Residential development Sites at Dalfaber, Aviemore
Applications for Approval of Matters Specified in Conditions**

Further to my recent correspondence with the solicitor advising the applicants, Neil Collar of Brodies, and my various discussions with you and the team, I have set out below my views and advice in relation to the status of the two planning permissions in principle ("PPIPS") previously granted for the Dalfaber site and the pending applications for approval of matters specified in conditions ("MSCs").

This letter updates my advice note which I sent by e-mail on 22 December 2014. I understand that this letter, and the letter from Neil Collar dated 2 February 2015, will be included with the committee paper.

Background

To briefly recap the background, the proposed residential development site at Dalfaber is made up of two adjoining parcels of land. In March 2010, following an appeal by Reidhaven Estate on the basis of non-determination by CNPA within the statutory period, the Scottish Ministers granted a PPIP for each parcel of land under references PPA-001-2001 and PPA-001-2000.

Condition 1 of each of the PPIPs provides that plans and particulars covering the following four matters shall be submitted in accordance with the timescales and other limitations in Section 59 of The Town and Country Planning (Scotland) Act 1997:

- The siting, design and external appearance of all buildings and other structures including all fencing
- The location and specification of all vehicular roadways and of paths for the separate or combined use of pedestrians, cyclists, horse riders and aids for the off-road movement of persons with physical difficulties
- A detailed landscaping plan, including extensive peripheral tree planting, and proposals to protect and maintain the integrity of the site and provide wildlife corridors
- Surface drainage of the site in accordance with Sustainable Urban Drainage Systems principles (SUDS)

MSCs are the current equivalent of reserved matters under the outline planning permissions (which were replaced by PPIPs.) It is clear that the four matters specified in condition 1 are MSCs. MSC's require to be applied for within the timescales stipulated by Section 59(2) of the 1997 Act (considered in more detail below.) Some of the other conditions of the PPIPs refer to condition 1 and provide further detail as to what is required in relation to the MSCs.

The PPIPs also contain other conditions which require certain matters to be approved by the planning authority. These matters don't need to be applied for in accordance with the timescales provided in Section 59(2) but can be applied for and approved at any time prior to commencement of development. Having two levels of matters requiring approval under PPIPs can be confusing. The second level of such matters are however no different to pre-commencement approvals which are frequently required by conditions under a full planning permission. In the context of a PPIP they typically relate to less important matters than MSCs. A good example of a second level approval under the PPIPs in question would be condition 17 of PPIP PPA-001-2001 which requires a site specific construction method statement to be submitted and approved prior to commencement. To distinguish such second level matters from MSCs, I will refer to them as Pre Commencement Approvals ("PCAs.")

In early March 2013 Reidhaven Estates submitted an application for each of the PPIPs to Highland Council. The applications covered both MSCs and PCAs. CNPA exercised its right to call the applications in. The applications were followed by supplementary information.

The applications were scheduled to be considered by the CNPA Planning Committee at the planning committee meeting on 1 August 2014. The applications were recommended for approval, albeit that many of the approvals were heavily conditioned. After reviewing the papers in preparation for attending the planning committee I expressed reservations about certain aspects of the proposed approach. Firstly, while all of the MSCs were recommended for approval, in some cases the proposed conditions required further information to be submitted and approved but such subsequent approval would be by way of a PCA rather than an MSC. Secondly, the proposed approval would have changed the phasing of the development from the phasing imposed as a condition by the Reporter. I thought a more appropriate route would have been for the applicants to seek to change the phasing through a Section 42 application.

I noted that some of the parties who made representations on the applications, including Badenoch and Strathspey Conservation Group and Dalfaber Action Group, had expressed concerns that insufficient information had been provided in relation to some of the matters on which approval was being sought and in relation to the proposed change of phasing.

During the course of exploring these issues with the officers before the planning committee, it appeared that the first matter set out in condition 1 of each of the PPIPs (the siting, design and external appearance of buildings etc) had not been addressed by either the application or the supplementary information and documentation. Moreover, as the 3 year period allowed for making MSC applications under Section 59(2) had expired (in March 2013), it appeared that it would no longer be competent for the applicants to make an MSC application in relation to that matter. That would mean that the PPIPs could never be implemented

To allow CNPA an opportunity to consider the possible implications of the proposed approach of approving subject to conditions, changing the phasing and the Section 59(2) issue, the applications were withdrawn from the agenda of the 1 August 2014.

The applicants and their agent and legal advisers contended that:

- (1) an application for approval of the siting, design and external appearance of all buildings the PPIPs was not required in the particular circumstances of this case;
- (2) the PPIPs have not expired;
- (3) the pending MSC applications remain valid and should be determined on their merits;

(4) it would be competent for them to make an application under Section 42 of the 1997 Act which, if approved, would provide an opportunity for any remaining MSC applications to be submitted and considered.

The applicants asked their solicitor, Neil Collar of Brodies, to liaise with me to explain their contentions. I had a number of discussions with Neil on this matter during September, October, November and December and had an opportunity to review and comment on drafts of a proposed letter which Neil was to issue setting out their position. The purpose of engaging with Neil in this way was to allow me to fully understand and test the arguments being advanced so that these could be taken into account by me when providing my final advice and by CNPA when coming to a conclusion. Neil Collar issued his advice note on 12 December 2014 and I gave what I thought would be my final advice to CNPA on 22 December 2014.

Issues in Dispute

I have had further discussions and exchanges with Neil Collar during the past few weeks and this letter updates my previous advice and reflects issues which have emerged during those exchanges.

I have to say that I am unclear on some of the particular points the applicants are now arguing. I requested clarification on this during the recent exchanges with a view to narrowing the issues in dispute but unfortunately such clarification was not forthcoming. I have therefore assumed and proceeded on the basis that the key arguments of the applicant are as follows:

- an application for approval of the siting, design and external appearance of all buildings the PPIPs was not required in the particular circumstances of this case;
- the PPIPs have not expired;
- the pending MSC applications remain valid and should be determined on their merits;

The applicant's position is however stated in the letter from Neil Collar of 2 February and regard should be had to that to ascertain the applicant's arguments, rather than just my understanding of them.

Analysis and Arguments

The starting point for the analysis is Section 59 of the Town and Country Planning (Scotland) Act 1997. The following is an abridged version:

(1) "Planning permission in principle" is planning permission...

(a) in respect of the carrying out of building, engineering, mining or other operations, in, on, over or under land, and

(b) subject to a condition, imposed under Section 37(1)(a) that the development in question will not begin until certain matters have been approved by the planning authority or the Scottish Ministers

(2) Applications for the approval mentioned in (1)(b) -

(a) must be made before whichever is the latest of the following:

(i) the expiration of 3 years from the date of grant of the planning permission;

(ii) the expiration of 6 months from the date on which an earlier application for the requisite approval was refused; and

(iii) the expiration of 6 months from the date on which an appeal against such refusal was dismissed or, where an earlier application is the subject of a review by virtue of Section

43(A)(8), the expiration of 6 months from the date of the notice of the decision to uphold the determination given by virtue of Section 43A(11)(e).

**(b) may be made for -
(i) different matters, and
(ii) different parts of the development,
at different times."**

(4) a planning permission in principle lapses on the expiration of 2 years from the requisite approval being obtained (or, in the case of approval of different matters on different dates, from the requisite approval of the last such matter being obtained) unless the development to which the permission relates is begun before that expiration.

Section 59(2)(a) is best understood by initially considering a PPIP with only one MSC. In that situation the MSC application needs to be submitted within 3 years of the date of the PPIP. In some limited situations a further application can be made after the 3 year period has expired but those circumstances don't apply here.

Things can become more complicated where a PPIP has multiple MSCs. Section 59(2)(b) makes it clear that these can be applied for at separate times. If MSCs are applied for separately they must however all be applied for within 3 years of the date of the PPIP. If a required MSC is not applied for in the 3 year period, it is no longer possible for an application to be made in relation to that MSC.

Once all required MSCs have been applied for and approved, Section 59(4) applies. This gives the developer a further period of 2 years (from the final MSC being approved) to commence development. If not done so at the MSC stage, the developer can apply for approval of any remaining PCAs during this period.

The difficulty with Dalfaber is that no MSC application has been made in relation to the siting, design and external appearance of buildings. As the 3 year period has now expired it is no longer possible for the applicants to make such an application under the PPIPs. I think this is conceded by the applicants but they argue this is not fatal to the PPIPs or their applications for the following reasons:

Argument 1 – Approval of Siting, design etc not a necessary MSC for Dalfaber

The applicants' first argument is that in the particular circumstances of Dalfaber the approval of the siting, design and external appearance of buildings is not a necessary MSC.

The argument is that the PPIPs provide for a different approach depending on whether the site is built out by a developer as a single entity or if individual house plots are to be purchased and built by individuals. In relation to development of individual plots, they argue that the requirement to submit design statements (condition 13 of PPA-00102001 and condition 12 of PPA-001-2000) satisfies and in effect superseded the need for an application in relation to the siting, design and external appearance of buildings as per condition 1. Any other interpretation would render individual house plot development unfeasible because the permission would expire before the details for each plot would have been obtained.

The view of the CNPA planning team was that from a planning practice perspective, the method of build out was irrelevant to the need for the planning authority to approve, at the MSC stage, the siting, design and external appearance of the buildings to be constructed. Submission of a design statement was not an adequate substitute for details of the particular buildings to be constructed.

It was also worthy of note that each of the PPIPs (condition 14 of PPA-00102001 and condition 13 of PPA-001-2000) required a design statement to be submitted where the development was to be undertaken as a single entity. The design statement was not therefore specifically and exclusively conceived for development of individual plots.

From a legal perspective, I cannot see anything which would indicate that approval of the siting, design etc, which was clearly created as an MSC, should not be treated as an MSC irrespective of which build out method was chosen.

I am therefore of the view that (1) the applicants have failed to make an application for a necessary MSC application within the requisite timescale; and (2) it is no longer possible for the applicants to have this MSC approved under the PPIPs. As a consequence, the PPIPs will never be able to be implemented.

Argument 2 - The PPIPs have not expired

Unfortunately this argument is rather technical in nature but I will do my best to try to simplify and summarise.

If you refer back to Section 59(2)(a) above you will see that applications for approval of all matters imposed under S59(1)(b) MSCs *must* be made within the stipulated timescale (in this case 3 years from the date of the PPIPs). The Section does not however go on to specifically state what, if any, the consequences are of failing to do so.

The only explicit reference in this section to a PPIP lapsing or expiring is in Section 59(4) which concerns development not commencing within the 2 year window (which commences on the approval of the last of the requisite MSCs.)

The applicant's argument is that the only circumstance where a PPIP can expire is under Section 59(4). As the 2 year period has not yet expired for the Dalfaber PPIPs (in fact, it has not yet started), it cannot be said that the PPIPs have lapsed.

Common sense would however suggest that a failure to apply for all MSCs within the mandatory time limits would result in expiry of PPIPs lapsing/expiring as otherwise the mandatory time limits would be rendered meaningless.

In his book "Planning, 3rd Edition", Neil Collar comments: "***Submission of an application for approval in respect of some but not all of the matters, or for part only of the development site, within the time limit will not preserve the remainder of the permission from expiry.***"

On the face of it, the comment in Neil's book appears to follow the common sense argument above, appears directly applicable to the Dalfaber situation and appears to contradict the arguments he is now making.

Neil has sought to explain that his comment only relates to the particular circumstances of the decided case (Hunterston v Secretary of State for Scotland) to which he refers in his book and has sought to distinguish between that case and the circumstances of Dalfaber. I acknowledge that the particular facts of the decided case are different from the Dalfaber situation. In Hunterston the applications which were the subject of court action were made after the expiry of the relevant time limit whereas with Dalfaber they were made within the time limit.

That said, the significance of the Hunterston case is not simply that applications outwith the statutory period are not permissible – that almost goes without saying as the requirement to apply within the statutory time limit is mandatory. In his book 'Scottish Planning Law and Procedure', para 7.30, Jeremy Rowan Robinson, another respected author and commentator on planning law, comments that "***This*** (he is referring to applications for only some reserved matters being applied for within the required period) would **not prevent the remainder of the outline consent expiring**" and cites the Hunterston case as authority for that. The real significance of the Hunterston case for the purposes of Dalfaber is that it is authority for the proposition that a permission for which not all reserved matters/MSCs have been applied for in time will expire. This is very significant as under the version of Section 58 which was then in force didn't mention lapsing or expiry at all (not even if the permission was not implemented following approval of the reserved matters.) Lapsing due to not implementation is now provided for by Section 59(4) but the Hunterston case is still precedent for the proposition that

a PPIP can expire due to not all MSCs being timeously applied for. I therefore remain of the view that the case has relevance beyond the particular circumstances of the case and is applicable to Dalfaber.

If Neil's argument that expiry of the time limit in Section 59(4) is the only circumstance where PPIPs can expire is correct, PPIPs could endure forever notwithstanding that they could never be implemented. In discussion with the planning team and with Neil I have referred to such a permission as a "zombie" permission.

To illustrate this, consider a situation where a PPIP was granted subject to multiple MSCs but no applications for approval of any of the MSCs were made within the 3 year period. The 2 year time limit specified in section 59(4) could never commence (as commencement is from the *last* of the requisite approvals and there would have been no approvals.) As the 2 year period could not commence it could never expire and the lapsing provided for in S59(4) would never occur. The PPIP would therefore never expire.

The Dalfaber situation is slightly different as applications for some but not all of the MSCs have been made. The outcome would however, applying the applicants' argument, be the same. The 2 year period in 59(4) would not commence (and therefore not expire) as it only commences from approval of the last of the requisite consents. Even if all of the pending MSC applications were to be approved, the siting, design and external appearance of buildings, which is a requisite approval for these purposes, would never be approved. The Dalfaber PPIPs would therefore endure forever as lapsing wouldn't occur under S59(4).

It seems clear that the intention of the Act was not to create PPIPs which could endure forever in circumstances where the PPIP could never be implemented. There would be no legitimate purpose to be served by such permissions. Such permissions would at best have potential to cause confusion for planning authorities, applicants and other stakeholders (as is obviously the case here. Moreover, such permissions could potentially be used as the basis for a Section 42 application. Section 42 prevents planning authorities from considering the principle of the development and restricts them to considering the conditions to which the permission should be granted. This means that a planning authority could be forced to grant a new planning permission under Section 42 based on a zombie permission, even in circumstances where there has been material changes in the development plan or other material considerations since the zombie permission was originally granted which would now indicate that the principle of the development was no longer acceptable.

Just to be clear, the above comment is in relation to a possible consequence of interpreting the legislation as the applicants are arguing for. My comments do not relate to the Section 42 applications which the applicants have lodged with Highland Council. It is now a matter for Highland Council to determine the Section 42 applications and CNPA's decision in relation to the pending applications will not impact on and should not be influenced by the pending S42 applications.

I think it is clear that interpreting the legislation in the way the applicants are arguing for could and would lead to absurd outcomes. In these I would argue that it would be appropriate to take a purposive approach to interpreting the legislation.

While I acknowledge that the situation is not clear cut, my view is that there are arguments to support a conclusion that the PPIPs have expired. On balance, my view would be that the PPIPs have expired.

Argument 3 – The pending MSC/PCA applications should be determined on their merits

I think it is clear that if the PPIPs have in fact expired then the pending applications would automatically fall without the need for a decision by CNPA. Such applications cannot exist separately from the parent permission to which they relate.

As the status of the PPIPS is not certain, it is appropriate for completeness to consider the position on the basis that the PPIPS have not expired.

Even if the PPIPs were considered not to have expired, the applicants appear to concede (at least if their argument 1 is wrong) that it is now too late to make such an MSC application in relation to siting, design etc and that the Dalfaber PPIPs can therefore never be implemented.

In these circumstances, would it be appropriate for CNPA to determine applications where the results of such applications would be largely academic? Unfortunately the legislation does not specifically cater for this situation.

The arguments for and against determining the applications on their merits are contained in the committee paper. I agree with the conclusions which the officers have reached in this regard.

Conclusions

The situation which has developed in relation to Dalfaber is both extremely unfortunate and unprecedented. Whichever course of action is followed risks an appeal and/or court action. On the one hand, the applicants have already indicated that they will appeal a refusal if this is not based on the planning merits of the application. On the other hand, proceeding as the applicants have urged would does not appear to be competent and would risk a legal challenge by third parties.

In the circumstances, I believe that the recommended course of action in the committee paper is the best course of action open to CNPA.

Yours sincerely

A black rectangular redaction box covering the signature of Peter Ferguson.

Peter Ferguson
Partner
Harper Macleod LLP