

# AGENDA ITEM 6

## APPENDIX 3

2013/0073/DET

2013/0074/DET

BRODIES LEGAL  
SUBMISSIONS

OUR REF        NAC/REI0077.00348  
YOUR REF

Board Members  
Cairngorm National Park Authority

2 February 2015

Dear Board Member

**REIDHAVEN ESTATE  
CAIRNGORM NATIONAL PARK AUTHORITY  
APPLICATIONS FOR APPROVAL OF SPECIFIED MATTERS [2013/073/MSC Conditions 1,4, 8, 9, 10, 11, 12,  
14, 16, 17 & 19 plus 2013/0074/MSC 1, 4, 8, 9, 10, 12, 13, 15, 17, 18 and 20]  
DALFABER**

This letter refers to my clients' applications for approval of specified matters (AMSC), which I understand are to be discussed in a report which will be considered by the CNPA planning committee on 13 February. I have not seen a draft of that report, so I cannot comment directly on that report at the time of writing this letter.

The application has been a long running project where we have worked closely with CNPA officials since 2005 concerning the intended means of development, where it might be via a plot by plot approach or a single developer approach. All the earlier decisions (both by DPEA Reporters and CNPA) have allowed for this and until late in 2014 there had never been any suggestion that what was being dealt with was legally 'not-competent'.

I remain confident that there is nothing which prevents you from determining the 22 MSCs, least of all your lawyer's view that one matter has not been addressed.

This letter does not discuss my clients' section 42 applications, which I understand are to be determined by The Highland Council as CNPA decided not to call in those applications.

#### Overview

According to your lawyer Peter Ferguson's e-mail of 22 December 2014, "the two PPIPs for Dalfaber have expired due to the fact that no application for approval of the siting, design and external appearance of the buildings was made within 3 years of the date of the PPIPs."

For that statement to prevent you from determining 22 AMSCs (all of them timeously submitted) the Act must state

that this consequence follows - from one AMSC not being submitted within that 3 year time limit. Remember that in our view the PPIPs consents specifically cover this circumstance.

Mr Ferguson's legal opinion is unprecedented - it is not supported by legislation and caselaw, and runs counter to the approach taken by the other Scottish planning authorities.

CNPA officers previously recommended approval of the PPIPs on the planning merits. My clients fail to see the prejudice to CNPA in determining the AMSCs on their planning merits, rather than debating these legal technicalities, which were only raised 18 months after the AMSCs were submitted.

#### Approach to be taken to the AMSCs

Mr Ferguson has not provided me with clear legal authority. It is particularly important for there to be "clear" legal authority, for the following reasons:

- There are serious consequences – if CNPA refuse the AMSCs on the grounds that the PPIP has expired, that in effect removes my clients' PPIP without any compensation or indeed any due process.
- Under the Human Rights Act 1998 CNPA must not act in a way which is incompatible with my clients' Convention Rights, particularly the First Protocol article 1 re protection of property. In particular, the 1998 Act states that legislation must be read and given effect in a way which is compatible with Convention rights. If there is any uncertainty at all about the meaning of the statutory provisions, CNPA must therefore assume the PPIPs have not expired.
- In the 22 December e-mail Mr Ferguson says "I agree with Neil that the legislation in relation to these issues is extremely poorly drafted". That makes it very hard to be clear about what the law is. The e-mail of 22 December mentions that Mr Ferguson attended a Scottish Government stakeholder meeting. I believe it was acknowledged at that meeting that there are considerable uncertainties about the meaning and application of the relevant statutory provisions.
- My clients' applications follow usual planning practice; it is Mr Ferguson's advice regarding the expiry of the PPIPs which is unprecedented. It is not for my clients to prove that the PPIPs are valid – it is for CNPA to prove that the PPIPs have expired.
- Finally, the terms of the PPIPs are unusually complicated.

#### The PPIPs

This discussion is only relevant if all the MSCs have not been applied for yet.

The terms of the PPIPs make it difficult to identify whether all the MSCs have been applied for. That lack of certainty is a further reason why there are insufficient grounds for the CNPA to decide that the PPIPs have expired.

The Dalfaber PPIPs are unusual, because the conditions give potential for development by a housebuilder or development of individual house plots (for example, conditions 5 and 13 of permission PPA-001-2001). Mr Ferguson's e-mail of 22 December appears to place significance on the planning practice perspective which he obtained from "Simon and Jane". However, planning practice is not relevant – the AMSCs must be decided in accordance with the actual terms of the PPIPs.

It is clear from the wording of the PPIPs that the time limit only applies to the approvals referred to in condition 1, which have all been applied for. Only condition 1 of each permission specifically refers to section 59, which indicates that the Reporter did not intend the matters referred to in other conditions to be subject to the time limit (with the exception of the conditions which flesh out the detail of matters referred to in condition 1). That approach is consistent with section 59(1)(b) which refers to "a condition ... that the development in question will not be begun until certain matters .. have been approved" (my emphasis).

The conditions have to be read as a whole. In particular, condition 1 has to be interpreted together with condition 13 (of permission PPA-001-2001; condition 12 of PPA-001-2000). That provides a different approach if individual house plots are to be developed. Read together, these conditions indicate that submission of the design statement satisfies the requirements of condition 1. Any alternative interpretation would render individual house plot development unfeasible because the permission would expire before approval of the details for each plot would have been obtained.

At very least there is insufficient clarity in the terms of the PPIPs, for CNPA to take the step of finding that the PPIPs have expired, especially given their duties under the Human Rights Act.

### Planning Act

Mr Ferguson's view is that section 59(2) requires all MSCs to be applied for within the 3 year period, otherwise the PPIP expires. However, he accepted in the e-mail of 22 December 2014 "that section 59 is rather poorly worded in that it doesn't spell out the consequences of an MSC not being applied for within the relevant timescale".

In my view, that is an end to the case. There is no clear statement in the Act which says that the PPIP expires (and, as mentioned below, no caselaw either).

The rest of Mr Ferguson's case is about potential consequences. However, that approach is contrary to the obligations imposed on CNPA to interpret legislation to be compatible with my clients' Convention Rights.

Also, I do not agree with his conclusions about potential consequences.

His main point seems to be that there is a flaw in the legislation because there could be circumstances in which a PPIP would never expire even if the time limit for some AMSCs to be submitted had expired. However, the flaw in his approach is that section 59(4) will lead to the Dalfaber PPIPs expiring 2 years from the date of approval of the AMSCs. His approach relies on an assumption that the AMSCs will be refused, but there is no certainty about that, since CNPA officers have previously recommended approval, and there is also a right of appeal to the Scottish Ministers if the AMSCs are refused by CNPA.

Mr Ferguson also suggested there is uncertainty in section 59(4) because of the reference to "in the case of approval of different matters on different dates, from the requisite approval for the last such matter being obtained". He suggests that requires section 59(2) to be interpreted to require all AMSCs to be submitted within the 3 year period.

I do not agree about that uncertainty. Section 59(2) is clear about the time limits for submission of AMSCs. Once those time limits have expired, no further AMSC can be submitted/ determined but this categorically doesn't prevent all the existing AMSCs from being determined.. At that point it is straightforward to identify the date of "the requisite approval for the last such matter being obtained". His concerns about the operation of section 59(4) are therefore

unfounded. In consequence, it cannot be said that the Dalfaber PPIPs have expired, until such time as the AMSCs have been refused (on their planning merits), both by CNPA and by the Scottish Ministers if there is an appeal, or approved.

Mr Ferguson's comments on consequences also mention the potential for section 42 applications. The competency of such applications is an issue to be decided in the context of those applications, not the current AMSCs. It is inappropriate for CNPA to refuse the AMSCs to avoid the potential for section 42 applications.

Mr Ferguson also says that it would be "pointless as the remaining MSC could never be approved and the permissions could not therefore be implemented". Even if that were true, it is not a legal reason to support his conclusion that the PPIPs have already expired. Also it is for my clients to decide whether the approval of the AMSCs would be worthwhile or not – they have submitted applications which CNPA are required to determine, irrespective of whether they regard those applications as pointless.

It is worth explaining that this situation exists throughout Scotland, especially for business parks where market conditions mean that individual plots can take many years to get developed. It is common for all the infrastructure to be built and an initial plot(s) to be constructed through the PPIP/ MSC route, and, after expiry of the time limit for further MSC applications, new applications for planning permission are submitted, using the PPIP to support the principle of the development. It is in my clients' interests to obtain the MSC approvals, both to obtain approval for the details submitted so far, and also to extend the time limit for the expiry of the PPIP. Ultimately my clients might need to obtain a fresh detailed planning permission, but that does not make the current MSC applications "pointless" or unworthy of determination.

Mr Ferguson commented that "The whole purpose of the requirement that applications be made within a certain time limit is to bring certainty to the situation for all stakeholders. It cannot have been intended that failure to comply with the mandatory requirements to make applications within the stipulated period would give rise to what I have described as zombie permissions above as these would create uncertainty for all parties." I do not accept there would be uncertainty. It is undeniable that this has been the basis for these applications since 2005. Furthermore, as mentioned above, while section 59(2) sets out the time limits for submission of AMSCs once those time limits have expired, the only consequence is that no further AMSCs can be submitted. At that point, the site has the PPIP and whatever MSCs have been granted. If further approvals are required before development can commence, the landowner has to apply for those approvals, probably by submitting an application for detailed planning permission. This is not unusual, since a landowner has the right to apply for detailed planning permission for any site even if it has never had planning permission. Mr Ferguson has not explained why there is a greater degree of uncertainty because of the lack of clarity in section 59, which he is using to justify interpreting the statutory provisions to impose a time limit which he himself acknowledges is not clearly expressed in those provisions as they currently stand.

#### **Hunterston Developments case**

Mr Ferguson also states that a sentence in my book, referring to the decision of the Court of Session in the Hunterston Developments case, indicates that the PPIPs have expired. However, the Hunterston decision is quite different from the current circumstances. The Hunterston decision was about whether an AMSC had been submitted before the PPIP expired. It is agreed that the Dalfaber AMSCs were submitted prior to the expiry of the PPIP. The circumstances are therefore different, and the Hunterston decision is not clear legal support for Mr Ferguson's view.

In the Hunterston decision, Lord Milligan said:

*"that the application for approval of a reserved matter within that provision must be made within 3 years of the date of the grant of the outline planning permission concerned"*

It is agreed that the MSC applications for Dalfaber were submitted within the 3 year period. Mr Ferguson's view is that all the applications must be submitted within that period, but that is not what Lord Milligan says. This is where the Dalfaber case is crucially different – the application at issue in the Hunterston case was submitted outwith the 3 year period, whereas the Dalfaber applications were submitted timeously.

*"In my opinion, the contention that the admittedly timeous applications for approval of reserved matters concerned in the same grant 498, namely those made on 22 July 1975 and 14 August 1975, had the effect of freeing, for all time coming, any subsequent application for approval of reserved matter concerned with grant 498 from the requirement of being made within 3 years after the date of the grant 498, is unsound"*

Lord Milligan does not go on to say that that necessarily means that the outline permission (PPiP) expires. My clients are not seeking confirmation that a new AMSC can be submitted; what they want is for CNPA to determine the existing AMSCs. There is nothing in Lord Milligan's judgment to say those AMSCs cannot be determined.

It is therefore quite clear that the Hunterston case does not support Mr Ferguson's view that the Dalfaber PPiPs have expired.

As the sentence in my book refers to the Hunterston case, there is no inconsistency between my views on the non-expiry of the Dalfaber PPiPs and the contents of my book. Even if there was an inconsistency, it would be unreasonable to place emphasis on one brief sentence, especially since the Preface states that the book is intended as an introduction for those who are unfamiliar with the subject, not a comprehensive analysis.

## Conclusion

It is clear from this analysis that Mr Ferguson's approach is not supported by either the legislation or the caselaw. It relies on a "consequences" approach to interpretation, but he has not provided any legal authority to support that approach. My analysis also shows that his view of the potential consequences is unfounded.

In my view, there are no legal grounds for CNPA to decide that the PPiPs have expired, especially given the duties imposed on CNPA to interpret legislation in compliance with my clients' Convention Rights.

Yours faithfully



Neil A Collar  
Partner/Head of Planning Law Department  
On behalf of Brodies LLP  
Direct Line: 0131 656 0125  
E-mail: [neil.collar@brodies.co.uk](mailto:neil.collar@brodies.co.uk)