



The (Former) Royal High School, Edinburgh

Those who have been following the fate of the Royal High School will remember that the planning application submitted by Duddingston House Properties and the Urbanist Group, to turn the school into a hotel with two substantial blocks of bedroom accommodation was refused by City of Edinburgh Council on 17th December 2015. The scheme had been criticised by the statutory consultees and the City of Edinburgh Council's planning officers, and there had been substantial adverse comment from the community.

Planning law gives applicants, who have had their planning applications refused, three months to appeal. The applicants in the case of the Royal High School appealed on 17th March 2016, the final day of this period.

The appeal process takes the form of an Inquiry before two government Reporters who will report to Scottish Ministers, with recommendations. Scottish Minister will make the final decision. On 20th July 2016 the Reporters convened a Pre-Inquiry Meeting of all the interested parties. At this meeting, the Reporters identified certain areas on which they wished to take evidence, through expert testimony, setting the commencement date for what was anticipated to be a three week Inquiry at 28th November 2016. The parties were all instructed to prepare and submit their Initial Statements – giving, in effect, an outline of the case they would intend making – by 31st August.

The AHSS made good progress, with preparing a statement, raising money, and finding three witnesses, who are generously giving their time to this cause. However, the applicants have successfully requested a 'sist' (a temporary cessation of the process of the appeal) to enable them to submit a fresh application for planning permission. The following, taken from a letter issued by the applicant's lawyer, Mr McMurray, on 26th August sets out the reason advanced in support of the application to sist the proceedings:

Following the council's refusal of planning permission and listed building consent in December 2015, the applicants exercised their right of appeal to the Scottish Ministers and the appeals were lodged on 17 March 2016, just before the expiry of the statutory 3 month appeal period. During that 3 month period, the applicants also attended meetings with council officers to explore possible design changes to address the reason for refusal, without undermining the viability and economic benefits of the project. Although there has been no agreed outcome from these discussions, the appellants are now in a position to take forward applications for PP/LBC for an alternative project and will therefore serve a POAN late next week or the week commencing 5 September to start the application process. A copy of the POAN will be circulated to all parties for information in due course.

For the avoidance of any doubt, the appellants are NOT abandoning nor withdrawing the current appeal. The difference between the projects relates to the balance between the physical scale of the built development and the economic basis of the development and its operational viability. In the current economic climate, these matters are finely balanced and the appellants' position is that both options are feasible and should be consented.

In relation to the new applications, the POAN will be served with a view to lodging the applications on the expiry of the statutory 12 week period. If the applications are validated by Friday 2 December 2016, there will be a right of



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appeal on non-determination to the Scottish Ministers by 3 April 2017. My clients expect that the new applications will be referred to the Scottish Ministers for determination.

The appellants therefore request a sist of the inquiry process to enable the applications, after due process, to be referred to the Scottish Ministers and then conjoined with the current appeal for determination.

We do not know why the applicants took this course. However, it is possible that they were responding to the city council's having given consent to an application which had been lodged by the Royal High School Preservation Trust to convert the school into a new home for the St Mary's Music School.

The Society, through its solicitor, objected to the sist being granted, offering a clear and well-reasoned argument. The text of the Society's objections was as follows:

I refer to your emails below and that from Mr McMurray. On behalf of our client, the Architectural Heritage Society of Scotland ("the AHSS"), I write to object to the proposed sisting of these appeals.

At the outset it is important to record that the purpose of Mr McMurray's request for a sist is:

"...to enable the applications, after due process, to be referred to the Scottish Ministers and then conjoined with the current appeal [sic] for determination."

No reasoned argument at all is advanced in support of this request.

POLICY AND GUIDANCE

It is widely accepted that Scottish Ministers require the planning system to operate efficiently, transparently and fairly. For example, the fourth "Core Value" in Scottish Planning Policy (2014) includes the need to:

"make decisions in a timely, transparent and fair way to provide a supportive business environment and engender public confidence in the [planning] system."

Circular 4/2013 explains at paragraph 3 that:

*"The planning system should operate in support of the Government's central purpose of creating a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth. For decision-making this means providing greater certainty of process, including being **timely and transparent**, as a means to achieve better places for Scotland. Scottish Planning Policy outlines both general planning and subject policy considerations to be given due account in decision-making. The appeal process, as explained in this circular, is intended to ensure that examination procedures are proportionate and efficient;*

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*that **the appeal process is transparent and fair**; and that decisions are both robust and based upon a review of the proposals that were originally considered by the planning authority.” [emphases added]*

There exists a series of guidance notes issued to reporters. Guidance Note 1 (“GN1”), published in August 2014, applies to Mr McMurray’s request. Against the subject heading “Background/legislative and policy framework” it is stated:

“There is no legislation or specific Scottish Government policy about sisting planning appeals, it is a procedural step in the appeal which involves the exercise of discretion. The Government does, however, support efficient decision making and seeks to remove unnecessary uncertainty for communities which may be affected by development proposals.”

In terms of “DPEA practice” it is noted:

*“The Scottish Government expects all cases to be determined expeditiously; **it is rare for a postponement of a case to be in the public interest**. A sist should only be agreed where **all** of the following criteria are met:*

- There is a good reason to do so,*
- It would not prejudice any party, and*
- It has been agreed by the main parties to the appeal.” [emphases added]*

GN1 even goes so far as to specify acceptable reasons to agree to a sist:

“Acceptable reasons to agree a sist include unexpected events, for example the appellant has died or the appellant company has gone into administration.”

Crucially it is recorded that:

“The consideration of a separate planning application by the planning authority would not generally be an acceptable reason (the appellant can withdraw the appeal.)”

MATTERS OF TIMING

In considering fully Mr McMurray’s request, one must look at the timescales of the appeals and that set out by Mr McMurray.

According to the PEM Note and Procedure Notice issued on 1 August 2016, the oral sessions will conclude on 15 December. The arrangements for closing submissions are to be agreed later but it is not unreasonable to suggest that the exchange thereof can be completed by the end of January. Thus the recommendations to Ministers could well be submitted before the end of May 2017.



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Mr McMurray suggests that the proposal of application notice could be served at some point during the course of this week or next week. There exists no certainty that this timescale will be maintained.

Mr McMurray notes the appellants' current intention to lodge the applications "...upon the expiry of the statutory 12 week period." That being so, the appellants do not envisage amending to any significant extent the revised proposal to take cognisance of the responses to the consultation. This approach does not sit comfortably with the legislative and policy requirements of pre-application consultation.

Although Mr McMurray references a right of appeal against deemed refusal, there is no undertaking to lodge such an appeal. It may be that the appellants would opt not to exercise that right and await a decision from the planning authority; it is recorded that Mr McMurray's request does not prevent the appellants from entering into processing agreements or other mechanisms to extend the period of determination.

Mr McMurray notes that the existing appeals were "...lodged on 17 March 2016, just before the expiry of the statutory 3 month appeal period." Mr McMurray does not, on behalf of his clients, provide any undertaking to lodge non-determination appeals in April 2017 or as soon as the right becomes exercisable. Mr McMurray does not include in his timescale the deadline for lodging a non-determination appeal; this would be 3 July 2017. Absenting any undertaking and noting that the appeals were lodged "...just before the expiry of the statutory 3 month deadline" the reporters must assess the request on the basis that any non-determination appeal would not be lodged until July 2017.

Taking into account the need for another pre-examination meeting the existing appeals would be delayed by over a year.

The timescale set out by Mr McMurray is unrealistic and incomplete. Absenting any undertakings on the part of his clients he is asking the reporters to grant an unrestricted sist for an unspecified period of time. That position is wholly unfair and not in accordance with the principles of natural justice. It also fails to accord with the spirit of the legislation, the detailed wording of Scottish Government policies and GN1.

APPLICATION OF TESTS

Applying the unequivocal tests of GN1:

- The sole "reason" advanced by Mr McMurray is specified as "not generally an acceptable reason" to sist an appeal. Mr McMurray provides no explanation why his request should be an exception to the general rule. Thus there is no "good reason" to accede to the request.*
- The AHSS would suffer prejudice if the appeals were to be sisted. The AHSS has already committed significant time and resources reviewing the appeal documents, has commenced preparation of its own submissions and has engaged expert witnesses. To that end diaries have been rearranged and commitments amended to suit the timetable agreed at the pre-examination meeting on 20 July. The AHSS would clearly be prejudiced by the effective substitution of the existing process by one which envisages the incorporation of a different proposal(s) of which it*



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has no knowledge and which is attended by considerable timing uncertainties and delays. It is observed that the applications could have been submitted earlier. The AHSS also wishes to note its concerns that proposed additional delays may impact adversely upon the physical fabric of these internationally important buildings which are, in locations, already exhibiting signs of disrepair. In the event that the sist was granted the AHSS would accordingly adopt the position that any additional costs arising from the appellants' own delay should be set aside in any development appraisal or similar assessment of financial viability.

The AHSS is participating fully in the appeals process. It does not agree that the appeals be sisted.

It follows, therefore, that not one of the criteria specified in GN1 has been met. The appellants have not demonstrated that a sist would be in the public interest. Furthermore, there is nothing to prevent the appellants pursuing the appeals and the applications simultaneously.

It is trite law that the exercise of discretion is subject to the over-riding principles of fairness and natural justice. Participants in an appeal have a legitimate expectation that the DPEA's guidance notes and Scottish Government policy will be applied in their terms. Matters relating to resource, contractual obligations and/or convenience are not relevant and cannot reasonably be included in the consideration of the request. It is neither competent nor reasonable to have regard to any matters or perceived benefits which are not included in Mr McMurray's request.

That the appeals have been called-in by Scottish Ministers for determination makes it imperative that the procedures adopted accord fully with the law, policy and guidance. It has not been demonstrated by the appellants that a sist is in the public interest.

CONCLUSION

In conclusion:

- The purpose of the request for a sist is to enable separate planning applications to be submitted to the planning authority.*
- There exists no legal or policy impediment to the simultaneous pursuit of the appeals and the applications.*
- Mr McMurray's suggested timescale is unrealistic and incomplete. The existing appeals will be delayed by over a year.*
- There being no undertaking on the part of the appellants to lodge applications and appeals within specific timeframes Mr McMurray is inviting the reporters to grant an unrestricted sist for an unspecified time.*
- GN1 specifically states that the consideration by the planning authority of a separate application is not generally an acceptable reason to sist an appeal. Mr McMurray provides no*

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explanation why his request should be an exception to the general rule. Thus there is no “good reason” to accede to the request.

- The AHSS would suffer prejudice were the appeals to be sisted.*
- The AHSS is participating fully in the appeals process. The AHSS does not agree that the appeals should be sisted.*
- The request does not meet any of the three criteria specified in GN1.*
- It is trite law that the exercise of discretion is subject to the over-riding principles of fairness and natural justice. There is a legitimate expectation that the DEPA's guidance notes and Scottish Government policy will be applied in their terms.*
- Matters relating to resources, contractual obligations and/or convenience are not relevant and cannot reasonably be included in the consideration of the request.*
- It is neither competent nor reasonable to have regard to any matters or perceived benefits which are not included in Mr McMurray's request.*
- It has not been demonstrated that a sist is in the public interest.*

In light of the foregoing Mr McMurray's request should be denied.

FURTHER PROCEDURE

I understand from you that, in the event the reporters are minded to accede to Mr McMurray's request, they will invite parties to comment upon the proposed management of the sist. If that is not your intention I reserve our client's right to provide a further representation.

On 9th August the Reporters responded to the objections to the sist being granted which had been lodged by various parties, including the Society, in the following terms:

Dear All

The reporters have carefully considered the appellants' request that the planning permission and listed building consent appeals in this case be sisted.

The appellants explain that they have been in pre-application discussions with the council, aimed at addressing the reasons for refusal. It is said to be their intention, following statutory public consultation, to submit fresh applications to the council imminently. The requested sist of the current appeals is sought in order to enable those



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amended applications, following due process, to be referred to the Scottish Ministers and then conjoined with the current appeals for determination.

In response, the city council and Historic Environment Scotland, two of the main parties to the forthcoming inquiry, have indicated that they do not object to the proposed sist.

A number of parties to the inquiry have, for broadly similar reasons, objected to the proposed sist. In doing so they refer to DPEA Guidance Note 1: Requests to sist, and point out that the circumstances for sist which are set out in that note are not met in this case. They argue that agreeing a sist in this case would prolong uncertainty and that they would suffer prejudice as a result.

The reporters agree that the circumstances for sist envisaged in the guidance note are not met in this case. This guidance is however of general application and they are required to take the particular circumstances of this case into account. While it is correct that an amended application has not as yet been made, the current appeals relate to a significant and high profile development proposal affecting a listed building of national importance in a sensitive location. A 2-week inquiry is scheduled to consider the proposals; the preparation for and attendance at such an inquiry entails a significant commitment of resources for all parties involved, including a number of public bodies. The appellants state that the amended applications (aimed at addressing the reasons for refusal) are to be submitted, most likely, during or shortly after the course of the inquiry. It seems to the reporters, therefore, that there is a significant risk that the planned inquiry and reporting could be overtaken by events and to that extent become abortive.

The reporters have considered the issue of prejudice to objectors and the public interest more widely. While certain past costs will already have been incurred, a sist relieves objectors of making further preparation for the forthcoming inquiry. In addition, in light of the intentions of the appellant, a degree of uncertainty seems likely to continue for the foreseeable future, even if the sist were refused.

In the event that the amended applications are refused, or are not determined by the council, or are otherwise called-in by Ministers (despite the appellants expectation, as set out in their request to sist), the reporters consider that it would be far more preferable – if both are pursued – that they are considered in the round with the current appeals at a conjoined inquiry.

Either way, the reporters balancing the considerations in play here in the public interest consider that a sist would represent a more efficient deployment of resources for all participants in the inquiry process.

For those reasons the reporters have concluded that it would be in the wider public interest for the current appeals to be sisted. They are mindful though of competing considerations and the desirability of expeditious decision making. This will not therefore be permitted to become an open-ended sist. The appellants will be expected to report on progress on the pre-application stage; on submission of the amended applications; and on progress made on the processing of those applications. If it appears to the reporters that timely progress is not being made they will bring the sist to an end and set fresh dates for the inquiry into the current appeals.

In the meantime and for the avoidance of doubt, the inquiry will not commence as planned on 28 November and the steps involved in the prior disclosure of cases, set out in section 7 of the PEM note, should not be followed for now.

I trust this explains the position.

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On 13th September the AHSS recorded its disappointment with the Reporters' decision, in the following terms:

I refer to the reporters' decision to grant the appellants' request for a sist.

I am instructed by the AHSS to record its disappointment at the reporters' decision to set aside its guidance notes to enable the appeals to be sisted. The decision results in additional expenditure, unnecessary delay and uncertainty. It also sends a poor message to other participants in the planning process who have organised their development proposals to accord with the detailed terms and with the spirit of the suite of guidance notes.

The City of Edinburgh Council has confirmed this morning that the appellants have yet to lodge a proposal of application notice ("the Notice") notwithstanding Mr McMurray's clear undertaking to do so by no later than Friday 9 September. That the appellants have failed to meet this first step does not engender confidence in their intention to comply with the timescales set out in their request.

We welcome the reporters' intention to ensure that the sist is not "open-ended" by requiring the appellants to provide reports at various identified points in the application process. To ensure transparency and fairness and to facilitate the expeditious progress of the applications could the reporters set out a timetable to which they expect the appellants to adhere? In these disappointing circumstances it would be sensible and prudent for the reporters to require the Notice to be submitted by close of business on Friday 16 September.

The story is a continuing one and members can keep up-to-date through the AHSS website.