FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 13
XA105/19

Lord President
Lord Menzies
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Appeal

by

CITY OF EDINBURGH COUNCIL

Appellants

against

THE SCOTTISH MINISTERS

Respondents

and

(FIRST) GRANTON CENTRAL DEVELOPMENTS LTD and
(SECOND) LESTER GIBBONS

Interested Parties

Appellants: Burnet; Morton Fraser LLP
Respondents: No Appearance
First Interested Parties JD Campbell QC; Turcan Connell
Second Interested Party: Upton; Balfour and Manson LLP

9 April 2020

Introduction

[1] This is an appeal by a local planning authority against a decision of the respondents' reporter. The reporter allowed an appeal by developers against the authority's deemed refusal of the developers' application to permit them to proceed with their development without complying with a condition of their 2003 outline planning permission. The

application proceeded under section 42 of the Town and Country Planning (Scotland) Act 1997. The condition related to the time within which the developers could seek approval of reserved matters.

[2] One of the principal issues in the appeal had been whether the application was to be treated, as the planning authority maintained, as one for a new permission or, as the developers had contended, merely as an amendment to the existing permission. At the hearing of the appeal, the developers accepted that the alteration of the condition, which would add 5 years onto the timescale, would constitute the grant of a new permission (*Pye* v *Secretary of State for the Environment* [1999] PLCR 28; *Lambeth LBC* v *Secretary of State for Housing, Communities and Local Government* [2019] 1 WLR 4317). The appeal became, in large part, a reasons challenge, although it did include *inter alia* whether the reporter had correctly understood his task.

[3] Prior to the hearing of the appeal, the respondents entered into a joint minute with the planning authority which agreed that the appeal should succeed and the reporter's decision should be quashed. The appeal was resisted by the developers. The position agreed by the authority and the respondents was supported by Lester Gibbons, who is a local resident.

Background

The original permission

[4] On 23 June 2003, the planning authority granted outline planning permission to Forth Ports plc for a mixed use development at Granton Harbour, Edinburgh. This consisted of residential units, an hotel and serviced apartments, shops, services, restaurants, cafes, public houses, general business units, leisure facilities and a marina. The permission

incorporated 22 conditions. The first of these was in two parts and stated that it was a requirement that:

> "1 (a) Application for the approval of the under-noted reserved matters [be] made within fifteen years of the date of the Outline Permission, (except where an application for approval of any reserved matters has been refused or an appeal against such refusal has been dismissed, in which case one further such application may be made within six months of the date of such refusal or dismissal, even though fifteen years from the date of the Outline Permission have expired).
> (b) The approved development [be] commenced no later than fifteen years from the date of the Outline Permission or two years from the date of the final approval of any reserved matters, whichever is the greater."

[4] The development was commenced timeously. The reserved matters include: siting; design and height; configuration of public and open spaces; external lighting; external materials and finishes, including their colour; car and cycle parking; access; road layouts and alignment; servicing areas; footpaths and cycle routes; floor levels; and hard and soft landscaping details. The conditions permitted the construction of: up to 3,396 residential units; business or commercial space of up to 23,190sqm; public amenity or leisure use of up to 7,650sqm; retail units limited in size to 250sqm, with the exception of one of 1,500sqm; and a marina containing 630 berths.

[5] An agreement had been entered into between Forth Ports and the planning authority under section 75 of the Town and Country Planning (Scotland) Act 1997. This contained a detailed specification of the proportion of affordable housing which was to be incorporated as different phases of the development were completed. Affordable housing was to form 15 per cent of the total. The agreement provided for a contribution to the planning authority of £1,366 per unit for the provision of schools and another of up to £1.165m for road realignments and improvements. Provision was made for the maintenance of land for a tram route, the improvement of Granton Square and the incorporation of the Western Breakwater.

[6] The developers acquired the site from Forth Ports in 2014. By letter dated 28 March 2018, the developers' planning consultants applied to the planning authority "to amend" the two conditions 1a and 1b under section 42 of the 1997 Act. This was followed, on 12 April 2018, by an application for planning permission in the same terms; that is for an extension of time. The authority were deemed to have refused the application, because they failed to determine it within two months (Scottish Government Planning Circular 3/2013 *Development Management Procedures*, para 4.81).

The Development Plan

[7] In November 2016, the planning authority had adopted the Edinburgh Local Development Plan (LDP). Policy Del 3 *Edinburgh Waterfront* states:

> "Planning permission will be granted for development which will contribute towards the creation of new urban quarters at …. Granton Waterfront (specifically EW … 2a-d [Forth Quarter, Central Development Area, Granton Harbour and North Shore] … on the Proposals Map) …".

These areas are shown as follows:

[8] Policy Del 3 requires: (a) comprehensively designed proposals which maximise the development potential of the area; (b) the provision of a series of mixed use sustainable neighbourhoods that connect to the waterfront, with each other and with nearby neighbourhoods; (c) proposals for a mix of house types, sizes and affordability; (d) the provision of open space in order to meet the needs of the local community and to create local identity and a sense of place; (e) the provision of local retail facilities and leisure and tourism attractions, including water related recreation in and around retained harbours; and (f) transport measures, including a contribution to the proposed tram network and other necessary public transport improvements, and the provision of paths for pedestrians and cyclists. It is stated that the purpose of the policy is to ensure that the regeneration of the Waterfront is carried out in a planned manner. Housing led regeneration is a feature.

The developer's Appeal Statement

[9] On 8 November 2018, the developers appealed to the respondents. Their appeal statement was, under reference to the terms of the section 42 application, headed "Extension of time limit of the existing outline planning approval to extend the duration of the permission for five years to 20th June 2023". The statement contended that the appeal was necessary in order to continue the regeneration of Granton Harbour and to ensure the effective and timeous delivery of housing; both of which were key requirements of the 2016 LDP. The developers wished to retain the existing consent in order to submit applications for the approval of reserved matters, although the application was:

> "…without prejudice to [the developers'] continuing rights to develop in perpetuity as a result of work already completed which commenced in 2004 and was subsequently certified as completed by [the planning authority], this included the implementation of roads and early site work on plots ...".

[10] The appeal statement explained that on 4 March 2009, following a reserved matter application, a masterplan, which provided a structure on which to base future development, had been approved by the planning authority. Roads, services and paths had been built. Significant investment had already been made. The extension of time would allow applications for the remaining reserved matters to be considered in order to deliver the development. The development would provide major sustainable economic benefits and regenerate and transform an area which had suffered from years of decline and underinvestment. The project had already delivered a large number of new houses and would ultimately produce 1,800 new homes. Jobs, housing, facilities and a rejuvenated link between the city centre and the Forth estuary would follow. The development was supported by national, regional and local planning policy, including LDP Policy Del 3 (*supra*). The development was supported by the City of Edinburgh Council Housing Land Audit (2017). It was crucial to Edinburgh's housing land, in view of the 1,220 unit shortfall over the next 5 years.

[11] The appeal statement continued with a narrative that the 2008 recession had slowed development. This had resulted in a need to reconsider the masterplan in light of changing demands. The developers had carried out work to revive interest in response to new market conditions. Considerable interest had been created. New uses for the site, which had been absent from the masterplan but had been envisaged in the 2003 permission, were introduced. These included an enhanced marina, an hotel and healthcare facilities, all of which would give the area a "sense of place". Modifications to the masterplan had been approved by the planning authority (in 2014 and 2016). The 2003 permission remained fit for its purpose.

[12] The section 75 agreement had been agreed by a single landowner (Forth Ports) for the whole site. The agreement, which was a condition of the original consent, had been implemented. A list of the implemented obligations, including those relating to affordable housing and roads infrastructure, was provided. Although the existing requirement was to provide 15% of affordable units, the current masterplan provided for 26%. Some £1,165m had been paid for roads infrastructure. A cycle route and improvements to Granton Square had been delivered. This demonstrated that the existing section 75 requirements were reasonable, being complied with (or exceeded in the case of affordable housing), and remained fit for purpose. It would be difficult to disentangle the plots which were owned by the developers from the existing section 75 agreement. The agreement could not be revoked only in relation to the plots which were still owned by the developers. A requirement for a new agreement would halt progress.

The planning authority's response

[13] The planning authority contended that, in seeking an extension to the 2003 permission, the developers were applying for a new permission. The authority was entitled to reconsider all of the existing conditions. The development had to be assessed against current planning policy (Circular 3/2013 (*supra*), Annex I, para 5). A list of the applicable LDP policies, and the new conditions which should be attached to any new permission, was compiled. A new section 75 agreement would be needed (*ibid* para 2(d)). The overall effect of extending the 2003 permission for a further 5 years had to be considered. The 2003 permission had been considered in the context of the then adopted North West Edinburgh Local Plan (1992) and the emerging draft West Edinburgh Local Plan (2001), alongside the relevant Structure Plans. Under the current 2016 LDP's development principles, the

proposals required to: complete the approved street layout and perimeter block urban form; provide a housing mix that was appropriate in terms of place-making; meet the convenience shopping needs of new and future residents; complete the relevant section of the waterside Edinburgh Promenade; provide for retained and improved mooring facilities and boat storage and retain Middle Pier as a working pier; include tourism and waterfront-related leisure and entertainment uses; and provide a strategic flood risk assessment. There had been a move away from major commercial and business development on the site. The 23,190m² of commercial space was not generally supported by the LDP.

[14] In respect of housing land supply, the 2018 Housing Land Audit, which had been agreed with Homes for Scotland, demonstrated that there was sufficient land to meet the housing land requirement until 2026 and the 5-year completions programme. There was no shortfall in land supply or in the programmed delivery of units. No contribution to the programme from Granton Harbour units, which had yet to receive detailed planning consent, had been assumed.

[15] Numerous masterplans had been submitted. These had made it difficult to ensure that the development accorded with LDP policy Del 3, which required a comprehensive, co-ordinated approach. Physical development on the site had been largely confined to the main infrastructure, including roads, cycle paths, canal features, part of the quay wall and three schemes which had produced 342 completed flats. There were a number of reserved matter applications still under consideration. Decisions on these would be taken in the coming months. The granting of the extension was not the only means of progressing development on the site. There was nothing to prevent the developer submitting one or more new planning applications.

[16] On receipt of the application, the planning authority had undertaken Environmental Impact Assessment screening. Historic Environment Scotland, Scottish Natural Heritage and the Scottish Environment Protection Agency had been consulted, given the time which had elapsed since the original EIA. Regard had to be given to the current LDP on levels of financial contribution. There had been significant increases in developer contributions and changes in affordable housing policy. The authority's finalised Developer Contributions and Infrastructure Delivery Supplementary Guidance of August 2018 set out the up-to-date approach. The Guidance had been submitted to Scottish Ministers, but it was still a material consideration.

[17] There was a requirement to mitigate the effects of the development's impact in line with current policy needs, including affordable housing, transport, education and healthcare. The section 75 agreement, for 15% of affordable housing, had been prescriptive in terms of timescale, phases and numbers. Compliance was now unachievable. The current LDP (Policy Hou 6) required 25% of affordable housing across the development. Under a new permission, a section 75 agreement could ensure that 25% of the total consisted of affordable housing. The existing agreement had required a contribution to education of £1,366 per residential unit. Current policy required £3,536 per flat and £17,487 per house. The Guidance identified a requirement for a new medical practice with a healthcare contribution rate of £945 per dwelling. Transport contributions had been met by Forth Ports, but those relating to signalling improvements at Granton Square and the cycle route had not been delivered.

Reporter's decision

[18] On 31 July 2019, the Reporter allowed the appeal. The deadlines in conditions 1a and

1b were changed to 20 June 2023. The other 21 conditions of the 2003 permission were reproduced precisely in the new grant. The Reporter recorded that the application sought "to amend the time-limiting condition" so that the regeneration of Granton Harbour could continue and to ensure the effective and timeous delivery of housing. The development was a significant one with many complex infrastructure issues. The original 15-year time limit had been generous, but delays were not surprising in a project of this scale and nature. Delays could be attributable to events outwith the control of the parties, including the 2008 recession. It was not until 2009 that the masterplan had been approved by the planning authority. Since 2003, permissions had been granted on several reserved matters, resulting in the creation of roads, servicing, paths and residential units. The Reporter had observed these on his site visit. New flats were occupied and more were being built. Bus services connecting the site to the city centre had been introduced.

[19] Outstanding applications on several reserved matters were yet to be determined. New uses had been introduced, which had not been in the original masterplan, but had been envisaged in the 2003 permission. These included an enhanced marina, an hotel and healthcare facilities. The planning authority had approved modifications to the masterplan, which had incorporated these changes. Policy Del 3 of the current LDP supported redevelopment at Granton Harbour through the creation of new urban quarters on the Leith and Granton Waterfronts. Extending the permission would not conflict with this. Rather it would meet:

> "…the need for comprehensive proposals which maximise the development potential of the area, the provision of mixed use sustainable neighbourhoods, a mix of house types, sizes and affordability and the provision of open space, retail, leisure and tourism attractions."

The 2003 permission still provided an appropriate framework for the redevelopment of Granton Harbour.

[20] It was logical to allow the extension of time in view of: the implementation of the development that had taken place to date; the ongoing work relating to detailed consents; and the pending decisions on reserved matter applications. If it were otherwise, there would be significant uncertainty, which would lead to more delays, particularly if there was a requirement to enter into a new section 75 agreement. The existing section 75 requirements were reasonable and had been complied with. A new section 75 agreement would be challenging, given that the planning authority's original counterpart (Forth Ports) had paid the relevant contributions and had disposed of some 350 plots to several owners.

[21] The proposal represented significant inward investment, providing economic benefits and regeneration in an area that had historically suffered in terms of investment and physical environment. New houses had already been delivered, and more would be built; thus providing an important contribution to the planning authority's "housing shortfall".

[22] There had been various consultation responses and representations from local residents. These had proceeded on the basis that this was a fresh planning application. The appeal was not concerned with reconsidering the planning merits of the existing permission, but an extension to the time limit. The Reporter added that he had:

> "…considered all matters raised by the [planning authority] but there [were] none which would lead [him] to reach a different conclusion."

It was necessary and appropriate to allow the extension to 20 June 2023 to provide sufficient time for the necessary works to progress.

Motion to postpone

[23] Shortly before the diet for the appeal (14 February 2020), the developers sought to

postpone the hearing, even although it had been fixed as a matter of urgency at the behest of both principal parties. The reason for the postponement was that, on 18 October 2019, the developers had made an application for the approval of a reserved matter in terms of the 2003 permission. The planning authority had (possibly on 19 December 2019) refused to accept the application because the 2003 permission was no longer in existence. Presumably, the authority had reasoned that either the deadline for seeking approval had passed or a new (2019) permission was in force. The developers had lodged a petition for the judicial review of the authority's refusal. Their contention, which was not easy to follow, was that if there was a decision which was adverse to the developers in the appeal, prior to that in the judicial review, they would lose "forever" the right to lodge (or to have lodged) a reserved matter application. If the judicial review was determined first, the reserved matter could be approved (or not), irrespective of the eventual decision in the appeal.

[24] The court refused the motion to postpone the diet. If the planning authority were to be successful in the appeal, the Reporter's decision would be quashed. If, upon any reconsideration, the section 42 application appeal were refused, then any reserved matter application would fall with it, since the 2003 permission deadline would have passed before the application had been made. If the section 42 application appeal were allowed once again, no difficulty would arise for the developers. Equally, if the appeal failed, no difficulty for them would arise, since the time window would be extended. That of course is subject to what may be regarded as a somewhat technical criticism, that the reserved matter application may be seen as relating to the wrong (2003) permission.

[25] At the outset of the hearing of the appeal, the planning authority sought the expenses of the motion to postpone, although they had not moved for these at the time of the motion. As a generality, if a party wishes to claim expenses in respect of a particular part of a

process, including an incidental motion, he should seek these at the time of the decision on that part. If he does not, it will be assumed that the parties are content that the expenses are "in the cause" (see Macfadyen ed. *Court of Session Practice*; Lord Carloway *"Expenses"* para L [4]). In the absence of an express reservation, there is no reason to revisit expenses once that part of the process has past. The motion for the expenses of the motion for postponement is accordingly refused. That is not to say that the Auditor will allow the developers' expenses in a taxation in the event of a successful general award in their favour (Taxation Rules, r 2.2(2)(b)).

Submissions

The planning authority

[26] The planning authority reiterated that any decision in relation to the grant of planning permission must have regard to the development plan (1997 Act s 37(2)) and be in accordance with it unless material considerations indicate otherwise (1997 Act s 25). This principle applied to decisions taken on section 42 applications (*Jermon* v *West Dunbartonshire Council* [2008] CSOH 76; *Pye* v *Secretary of State for the Environment* (*supra*)). A successful section 42 application resulted in a new permission (*Pye* v *Secretary of State for the Environment* (*supra*); *Lambeth LBC* v *Secretary of State for Housing, Communities and Local Government* (*supra*)). It was accepted that the scope of a section 42 application was generally restricted to a consideration of the effect of allowing development without the relevant condition or with a different condition. It did not extend to whether development in principle should be permitted. However, where the original time limit for submitting a reserved matter application had expired, it was appropriate for a planning authority, when considering an application to extend, to consider the practical consequences of the extension,

especially in relation to subsequent changes in policy. Current policy and facts should be taken into consideration when deciding whether or not to permit a new condition that would allow a development, which would otherwise be incapable of implementation, to go ahead (*Pye* v *Secretary of State for the Environment* (*supra*); *R* v *Leicester City Council, ex parte Powergen UK* (2001) 81 P & CR 5).

[27] The Reporter's decision should be quashed on each and all of five grounds. First, the Reporter adopted an erroneous approach to section 42. He did not set out the test or the criteria which he was applying. He referred to the "amendment" of the existing conditions and the retention of the existing consent. He did not explain that he was aware that the grant of a section 42 application led to a separate permission. He failed to have regard to Scottish Government policy (paragraphs 2(d) and 6 of Annex I to Circular 3/2013 (*infra*)) or the LDP. He should have considered the practical consequences of the development and taken into account the facts and planning policy current at the time of his decision. Granting the application would allow a development which was now opposed on policy grounds.

[28] Secondly, the reporter had failed to recognise the need for a new section 75 agreement. He erred in dismissing the possibility of a new section 75 agreement by reason of the now fragmented ownership of the site. He erred in his understanding that none of the obligations in the existing agreement were outstanding. His decision ought to have been taken on the bases that a successful application would create a new separate permission and the agreement would refer only to the 2003 permission. Existing obligations may become unenforceable, if the new permission were granted.

[29] Thirdly, the Reporter had regard to irrelevant considerations. He stated that he was "…conscious that there are outstanding AMC [approval of matters in conditions] applications which are yet to be determined". This was irrelevant. Any submitted reserved

matter applications and associated appeals against decisions made in respect of them would continue to be processed.

[30] Fourthly, the Reporter's reasons were inadequate. It was accepted that decision letters should be read as a whole and not subjected to detailed textual analysis and criticism (*Moray Council* v *Scottish Ministers* 2006 SC 691 at para [28]). The Reporter said that he had "considered all matters raised by the [planning authority] but there [were] none which would lead [him] to reach a different conclusion". This left a real and substantial doubt about what his reasons had been and how he had considered and resolved the competing submissions (*South Bucks District Council* v *Porter (No 2)* [2004] 1 WLR 1953, at para [36]; *Uprichard* v *Scottish Ministers* 2013 SC (UKSC) 219, at paras [44] and [47]). The planning authority's submissions had been detailed and lengthy. The Reporter failed to engage with them. He had not addressed the submissions about the adequacy of housing land supply, the need for a new section 75 agreement, potential flood related issues raised by SEPA, LDP policy ENV 22, and the need for an air quality impact assessment.

[31] Fifthly, the Reporter had no evidence of an inadequacy in the housing land supply. The planning authority had submitted that there was no housing shortfall. The reporter had no proper evidential basis on which to conclude that there was a shortfall. He did not give proper, adequate and intelligible reasons to explain why he reached that conclusion.

The Developers

[32] As already observed, the developers did not pursue the principal thrust of their argument that, in a section 42 application, only the variation to the condition should be considered (*Allied London Property Investment* v *Secretary of State for the Environment* (1996) 72 P & CR 327, at 338). Their focus shifted to one which maintained that the Reporter had

adequately dealt with the principal issues, to which he was entitled to confine himself (*Moray Council* v *The Scottish Ministers* (*supra*), at paras [82]-[30]; *Uprichard* v *Scottish Ministers* (*supra*), at paras [44] and [48]). The main criticism of the Reporter was that he had not dealt with the planning authority's submissions; not that a consideration of them would have resulted in a different decision. The Reporter's use of the word "amend" had been wrong, but he had nevertheless done what section 42(2) required him to do. He had duly considered the content of the application, including the fact that the masterplan remained part of the LDP. The Reporter had considered the LDP, notably policy Del 3. The reasoning of the Reporter, in determining whether the timescale should be extended, was intelligible. It was adequate, even if lawyers might argue about the detail. The proposition that the authority did not understand what the Reporter had tried to achieve did not "hold water". At all times, the Reporter remained focused on the condition, having regard to the prospective delivery of the original permission. The reference to a housing shortfall may have been wrong, but it did not make any difference.

[33] The Reporter's decision was coherent, cogent, pragmatic, followed the law, considered all relevant surrounding circumstances and was easily understood. It conformed to the relevant tests (Scottish Planning Circular 4/1998, *The use of conditions in planning permissions*). It satisfied each of the criteria of necessity, relevance to planning, relevance to the development to be permitted, enforceability, precision and overall reasonableness. No informed reader could be in doubt as to the reasons for the decision (*North Lanarkshire Council* v *Scottish Ministers* 2017 SC 88, at paras [27]-[30]). There was no doubt about the meaning and effect of the decision; that the time for implementation of the original permission was being extended by five years for good reason. The reporter pragmatically

explained why, overall, it was reasonable to extend the permission in view of the work that had begun and the work that was progressing as the reserved matter applications are made.

Lester Gibbons

[34] Mr Gibbons' submissions reflected those of the planning authority. The developers' right to implement the original permission was unaffected by the decision on the section 42 application. If they could not implement it, that was because of external circumstances, notably the expiry of a time limit. Because the determination of a section 42 application involved deciding whether to affirm the original permission, the merits of the proposed development required consideration (*Pye* v *Secretary of State for the Environment* (*supra*) at 45). There was particular force in this where, unless the application were granted, the development would not happen in the absence of the grant of a new planning permission. In these circumstances, the scope of what was material to the section 42 application extended to whether the original outline permission remained appropriate (*ibid* at 47; *North Cornwall District Council* v *Cory* (1995) 10 PAD 479 at para 3.1; *R* v *Leicester City Council ex p Powergen UK* (*supra*) at para 1; Circular 3/2013 (*supra*), Annex I, para 5). The Reporter accordingly erred in stating that the appeal was not concerned with reconsidering the planning merits of the 2003 permission and ignoring Mr Gibbons' representations on affordable housing, cycling, and the LDP's policy on Open Space and Play Areas. He had failed to give intelligible and adequate reasons for not adopting this approach to the scope of his analysis (*North Lanarkshire Council* v *Scottish Ministers* (*supra*) at paras [27]-[30].

Decision

[35] Section 42 of the Town & Country Planning (Scotland) Act 1997 applies to

applications for permission for a development "…without complying with conditions subject to which a previous planning permission was granted". The section states that, in relation to such applications:

> "(2) …the planning authority shall consider only the question of the conditions subject to which planning permission should be granted…".

When dealing with section 42 applications, the Scottish Government Planning Circular (3/2013) *Development Management Procedures* repeats (Annex I, para 5) the statutory provision quoted and continues:

> "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".

[36] It is not disputed that a successful application under section 42 of the 1997 Act to allow a person to proceed with a development, which is permitted under an earlier permission, without complying with a condition of that permission, amounts to the grant of a new permission. It follows that any decision on whether to grant the application must be in accordance with the current development plan "…unless material considerations indicate otherwise…" (*ibid* s 25(1)).

[37] In a case where the development has not yet commenced and the effect of a refusal would mean that the original permission cannot be implemented, this may involve a reconsideration of the principle of development in light of any material change in the development plan policies (eg *Pye* v *Secretary of State for the Environment* [1999] PLCR 28, not following *Allied London Property Investment* v *Secretary of State for the* Environment (1996) 72 P & CR 327 at 338; R v *Leicester City Council, ex p Powergen UK* (2001) 81 P&CR 5). That is so even if section 42(2) stipulates that it is only the question of the condition, from which compliance is sought to be avoided, that is to be considered.

[38] That is not to say that, in practical terms, every section 42 application requires to involve a complete consideration of the planning merits of a development *de novo*. The situation on the ground must be taken into account. Where, as here, the original outline planning permission has been implemented to a substantial extent, that will be a material consideration of some force. In that situation, revisiting whether outline permission in principle should continue may not be a practical or reasonable option. That element of the planning equation has not just been accepted at an earlier date, it has also been acted upon. It is a permission which has been implemented in part; in this developers' case substantially so. As a material consideration, depending on the facts and circumstances, it may well indicate that a new planning policy should not be enforced with the vigour which might be appropriate in an entirely new application or in a section 42 application in respect of a development which has not commenced.

[39] On the first of the five grounds, which were advanced by the planning authority, there was no need for the Reporter to set out any test or the criteria which he was applying in circumstances in which the issue was a relatively straightforward one of whether, in effect, to allow the outline permission to continue, and thus to permit further reserved matter applications, or whether to require the developers to lodge a new application for outline permission in respect of those parts of the site which remain undeveloped. There was no need to refer specifically to Annex I of the Scottish Government's Circular 3/2013 *Development Management Procedures*.

[40] The decision letter does not suggest that the Reporter was unaware that its effect was to grant a new permission. The letter commences with the words "I allow the appeal and grant planning permission subject to the 22 conditions listed …". This makes it clear that the Reporter did know that he was granting a new permission. This, and the attachment of the

conditions, indicates that he was aware of Annex I of the Circular. The Reporter's reference to amendment merely reflected the wording of the developers' application.

[41] The letter refers to the Edinburgh Local Development Plan (November 2016). In particular, it quotes policy Del 3 *Edinburgh Waterfront*. The Reporter states in terms that he did not consider that allowing the appeal would conflict with that policy which states that permission would be granted for development which contributed towards the creation of new urban quarters on the site.

[42] On the second ground, the Reporter considered the practicalities of renegotiating a new section 75 agreement, when the existing one continued in force in respect of the original permission and had in substantial part been implemented. The conditions refer to the necessity of concluding an agreement "prior to the issue of consent". Such an agreement had been concluded, albeit that it is the one which was formulated for the 2003 permission. The Reporter considered that the subsisting agreement's requirements were "reasonable" and have been, and are being, complied with. If there is an issue, about the continued application or the interpretation of the existing section 75 agreement, that can be resolved in due course. As matters stand, it remains relevant to the new permission.

[43] On the third ground, the Reporter records, correctly, that there are outstanding reserved matter applications. This is a relevant matter. The Reporter is describing the context in which the section 42 application has been made. That context is one in which "numerous" reserved matter applications have been made and approved. There are more to be considered. Two appeals relative to residential blocks were determined by the Reporter in September 2019. The masterplan had undergone several revisions, including in 2014 and 2016. In short, this was not the type of situation in which an outline permission had lain dormant for years and the application was one which was seeking to resurrect an

unimplemented consent. It was a living permission involving a continuing process of reserved matter approvals over time. The nature of this progress was important when determining whether the original timescale should be extended.

[44] The process involved in making planning decisions was set out by the Lord Justice Clerk (Gill) in *Moray Council* v *Scottish Ministers* 2006 SC 691 (at para [28] *et seq*). Having started with the development plan and reached a view on the determining issues, a Reporter requires to make his findings in fact, based upon the lines of evidence which he deems relevant. The Lord Justice Clerk continued:

> "[30] The reporter must then decide in the light of his findings how he resolves the determining issues. This involves the exercise of his planning expertise and judgment. In his decision letter he must set out the process of reasoning by which he reaches his decision; but that does not require an elaborate philosophical exercise. Nor does it require a consideration of every issue raised by the parties. The reporter is entitled to confine himself to the determining issues. So long as his reasons are intelligible and adequate, he is entitled to express them concisely. The guiding principle is that the decision letter should leave the informed reader in no substantial doubt as to the reporter's findings in fact and conclusions on the determining issues, and as to the way in which he has applied sec 25 of the 1997 Act in reaching his decision (*Perth and Kinross Council* v *Secretary of State for Scotland* [1999 SC 144]).
>
> [31] Lord Brown of Eaton-under-Heywood has observed that 'Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision' (*South Bucks County Council* v *Porter (No. 2)* [[2004] 1 WLR 1953] para 36)."

Lord Brown's dictum is echoed by that of Lord Reed in *Uprichard* v *Scottish Ministers* 2013 SC (UKSC) 2019 (at para [46]). Lord Reed went on to say:

> "[48] It is in addition important to maintain a sense of proportion when considering the duty to give reasons, and not to impose on decision-makers a burden which is unreasonable having regard to the purpose intended to be served".

[45] Applying these *dicta* to the fourth ground, the decision letter is clear and concise. It does not leave the informed reader in any doubt about the Reporter's reasons. He determined, as a matter of planning judgment, that, having regard to the LDP policy which he cited and the other material considerations, notably the part implementation of the original permission and the continuing nature of the development on the site, the time for approval of the remaining reserved matters ought to be extended. The reason for that was to allow the development to continue, without substantial delay, rather than to require the developers to apply for an entirely new permission. It was not necessary, on that line of reasoning, to engage in any detail with submissions about changes in certain other aspects of the LDP, such as increased contributions, flood related issues, cycling routes and open space or play areas which would not have altered the decision. The Reporter's relatively summary dismissal of these objections to the application, notably those of Mr Gibbons, was appropriate in that context.

[46] In relation, fifthly, to the Reporter's comment on "housing shortfall", it may be that, having regard to the most recent figures, the planning authority's programme to complete the assessed required number of housing units is on track for a successful completion. There may be no "shortfall" in that sense. However, the Reporter is to be taken to be referring simply to the existing demand for housing in the city and the well-recognised need for the authority to have, as it does, a programme for completions over a given period. New units in Granton Harbour will contribute to that programme, whether currently formally included in the programme or not.

[47] For these reasons, the appeal is refused, as is also the motion for the expenses of the application for postponement.