

GILLESPIE MACANDREW

Planning and Regulatory Services
Scottish Borders Council Headquarters
Newtown St. Boswells
Melrose
TD6 0SA

Our Ref: IR1/KE1/B.13423.38
Your Ref:
Reply To: Glasgow

Date: 10 June 2019

DT: 0141 473 5560
DF:
E: Isobell.Reid@gillespiemacandrew.co.uk

Dear Sirs

Bentley Developments Limited
Planning Applications 13/01081/FUL and 13/01082/FUL - Land to South East Of Mounthooly House

We are instructed by Bentley Developments Limited in respect of the above application.

We understand that your Assistant Planning Officer, Euan Calvert, has indicated that our client's respective applications under s.42 of the Town and Country Planning (Scotland) Act 1997 to amend the expiry dates of Planning Permissions 13/01081/FUL and 13/01082/FUL will be refused if not withdrawn. The basis of the proposed refusal is that adverse representations have been made by SEPA and by the Council's Flood Risk Officer.

The effect of granting a section 42 application is to create a new and separate planning permission; this new and separate permission being subject to the same conditions as those attached to the original permission with the exception of the wording of the condition to which variation or discharge under section 42 has been sought. As a general rule, when considering a section 42 application, the Council may only consider the issue of the conditions to any resulting permission. The Council cannot consider the overall effect of granting a new permission, except where the previous permission has lapsed

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(please note that in this case, our client's applications were submitted before the original Planning Permissions lapsed) or is not now capable of being implemented. Section 42(2) states that "the planning authority shall consider only the question of the conditions subject to which planning permission should be granted", therefore, the principle of the development proposed is not the subject of the section 42 application, only the extent to which the grant of planning permission subject to the proposed revised condition remains acceptable in planning terms.

In this instance case, the Council are proposing to refuse the application on the basis of the new SEPA and Flood Risk Officer objections (which were not made in respect of the original application). As stated above, the Council are not entitled to consider afresh the principle of the development, only the extent to which the grant of planning permission subject to the new condition (i.e. the extended time limit) remains acceptable in planning terms. We would submit that to refuse the section 42 applications on the grounds of the new objections from SEPA is not a legitimate or lawful ground to refuse the application.

Yours faithfully



Isobell Reid
Partner
for and on behalf of Gillespie Macandrew LLP

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136 West George Street
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Please ask for: Emma Moir Ext: 8078
Our Ref: IR1/KE1/B.12323.38
Your Ref:
E-Mail: emma.moir@scotborders.gov.uk
Date: 17 July 2019

Dear Sirs

Land South East of Mounthooly House, Jedburgh
Planning Applications 18/00748/FUL & 18/00749/FUL
Your client: Bentley Developments Limited

I refer to the above and your letter dated 10th June which has been passed to me by the Council's Planning Department.

The Council acknowledge the statement in the Circular that as a general rule, the Council should only consider the issue of the conditions to any resulting permission. Our position is that the Planning Authority can consider the overall effect of granting a new planning permission where the extension of time for commencement would in effect be consenting a development which would lead to adverse environmental impacts and therefore be contrary to the Development Plan.

In the present case, the flood risk assessment provided by your client demonstrates clearly that the development would result in unacceptable environmental (flooding) impacts.

The condition regarding the commencement of development was put in place to ensure that the development took place within a reasonable time. It is therefore entirely legitimate that with time there may have been material changes and it is appropriate to consider what effect those changes would have if the development were allowed to proceed now. In this case, the material change is the flood risk assessment which now shows that the site is within the functional flood plain for a 1:200 year event.

Circular 3/2013 states at paragraph 5 of Annex I:

"In determining a Section 42 application, authorities may consider only the issue of the conditions to be attached to any resulting permission. 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."

You will note that this states that Planning Authorities are not precluded from considering the overall effect of granting planning permission. The examples of the permission having lapsed or being incapable of being implemented are listed as primary examples, but this does not state that these are the only circumstances in which the Planning Authority can reconsider the principle. In this instance, current flood risk assessments and mapping demonstrate clearly that the development is unacceptable from a flood risk perspective.



For these reasons, it is the Planning Authority's position that extending the time for commencement is not acceptable in planning terms and the application should therefore be refused. Your client will of course have the opportunity to appeal this decision to the Local Review Body.

Yours faithfully

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Solicitor

GILLESPIE MACANDREW

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Our Ref: IR1/KE1/B.13423.38
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Reply To: Glasgow

Date: 20 September 2019

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Dear Sirs

Bentley Developments Limited
Planning Applications 13/01081/FUL and 13/01082/FUL - Land to South East Of Mounthooly House

We refer to your letter of 17th July.

We note what you write in respect of the terms of Circular 3/2013, but do not agree with your interpretation of it.

As you state, paragraph 5 of Annex I of the Circular states:

"In determining a Section 42 application, authorities may consider only the issue of the conditions to be attached to any resulting permission. 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."

The use of the phrases "in some cases" and "primarily" are not particularly helpful in interpreting the provisions of s.42, as the guidance does not then elaborate on what these cases may be, with the

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exception of where the previous provision has lapsed or is incapable of being implemented. In this case, neither of these were the case at the time of our clients' application under s.42.

We would therefore be grateful if you would confirm the authority on which you rely in support of your assertion that the Council are now able to consider the application as a whole under the current circumstances, rather than considering only the conditions to be attached to the permission as prescribed in the Act.

We look forward to hearing from you.

Yours faithfully

A black rectangular redaction box covering the signature of Isobell Reid.

Isobell Reid
Partner
for and on behalf of Gillespie Macandrew LLP

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Please ask for: Emma Moir Ext: 8078
Our Ref: IR1/KE1/B.12323.38
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Date: 11 October 2019

Dear Sirs

**Land South East of Mounthooly House, Jedburgh
Planning Applications 18/00748/FUL & 18/00749/FUL
Your client: Bentley Developments Limited**

I refer to the above and your letter dated 20th September.

Circular 4/1998 The Use of Conditions in Planning Permissions states at paragraph 52:

"As a general rule, such applications [referring to applications for renewal of permissions before expiry of time-limits] should be refused only where:

- a. there has been some material change in planning circumstances since the original permission was granted (e.g. a change in some relevant planning policy for the area, or in relevant road considerations or the issue by the Government of a new planning policy which is material to the renewal application);
- b. there is likely to be continued failure the begin the development and this will contribute unacceptably to uncertainty about the future pattern of development in the area; or
- c. the application is premature because the permission still has a reasonable time to run."

In this case, the Planning Authority consider there has been a material change. As stated in my letter dated 17th July, the material change is the flood risk assessment which now shows that the site is within the functional flood plain for a 1:200 year event.

It is the Planning Authority's position that it is not precluded from considering the overall effect of granting planning permission. This position has been accepted and applied by Reporters in the following decisions (the decision notices for which said decisions are enclosed herewith):

PPA-310-2028

The Reporter, at paragraph 4 of his decision notice, stated:

"The appeal application and therefore this appeal seek a variation of condition 1 on planning permission N/14/00164/PPM to extend the operational time period of the testing facility until 14 October 2019. However, the appeal application is properly regarded as an application for a fresh permission rather than an application to vary a previous permission. Section 42(2) of the 1997 Act, which applies to cases like this, says that, on such an application, the planning authority (and on appeal, Scottish Ministers) "may only consider the question of conditions subject to which planning permission should be granted". However, this provision is not as restrictive as these words might



suggest and does not preclude consideration of the overall effect of granting a new planning permission. If I were to find, for example, unacceptable environmental effects it would certainly be open to me to dismiss the appeal on that basis. That is an important starting point for my consideration of this appeal.”


PPA-270-2172

The Reporter, at paragraph 1 of his decision notice, stated:

“The council granted conditional planning permission for the conversion of the 2 upper floors at the appeal property from offices to provide 8 flats. The appeal is against the conditions attached to that permission. I am however required to consider the development proposal afresh, including whether planning permission should be granted or refused for the proposed development, notwithstanding the council’s previous decision.”

The Planning Authority will now proceed to determine this application. As advised in previous correspondence, your client will have the opportunity to appeal this to the Local Review Body.

Yours faithfully



Solicitor

GILLESPIE MACANDREW

RECEIVED
20 NOV 2019

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Our Ref: IR1/KE1/B.13423.38
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Reply To: Glasgow

Date: 19 November 2019

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Dear Sirs

**Bentley Developments Limited
Planning Applications 13/01081/FUL and 13/01082/FUL - Land to South East of Mounthooly House**

We refer to your letter of 11th October. We note what you write, but are still unconvinced with your interpretation of the supplied authorities.

The effect of the decision in PPA-310-2028 is not analogous to our clients' case. Our clients are not seeking to amend the scope of the planning consent which was previously granted in any manner other than the time-limit for implementation. There is therefore no need or justification for the Council in considering additional information not provided in opposition to our clients' application when first determined.

In PPA-270-2172, the Reporter's statement that "*I am however required to consider the development proposal afresh, including whether planning permission should be granted or refused for the proposed development, notwithstanding the council's previous decision*" is provided without justification as to how that "requirement" arises under Circular 3/2013. As the appeal ultimately resulted in the grant of permission, then we can only assume that this decision was not challenged. This does not, in our opinion, mean that the reasoning is correct.

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We note that you intend to move to determination of the application. We would be grateful if you would reconsider your position in light of the above. In the meantime, our clients reserve the right to appeal this matter to the Local Review Body, and any other remedies that may be available to them.

Yours faithfully



Keith Emmerson
Senior Solicitor
for and on behalf of Gillespie Macandrew LLP