

e-bulletin

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The Planning Gain Battle in the Recession

It is not unknown for developers to provide so-called planning "gain" in return for planning permission. Typically, infrastructure such as roads and school buildings or public utilities can be required owing to the anticipated increasing demands on public services and infrastructure following development proposals. Currently, local authorities can secure planning gain and developer contributions by way of Section 75 agreements under the Town and Country Planning (Scotland) Act 1997, as amended. Local authorities can also use their general powers of competence under s69 of the Local Government (Scotland) Act 1973 which enables local authorities to do anything conducive or incidental to discharging their functions. Following that, local authorities can enter into a Minute of Agreement with developers for the provision of financial contributions or infrastructure. There is therefore the inherent risk that developers can be left open to exploitation.

In light of the recession, questions on planning gain are no longer asking what developers should be providing but what they can now realistically afford to provide. On 19 August 2008, the First Minister announced that the Government would not be pursuing its scheduled review of planning gain to avoid placing additional burdens on the development industry. Instead, he stated that the focus would be on reviewing the current system to make it more transparent and consistent. The result was a consultation on a draft revision to Circular 12/1996. The changes brought in by the 2006 Act and the proposals in the revised Circular amend the law so that unilateral obligations and appeal mechanisms are

now included. The focus is now on whether an agreement is actually necessary. As a result, planning agreements are now much more open in scope and presuppose action on developers to offer some financial assistance or the provision of infrastructure. The revised Circular is expected later this year.

Until publication, it remains unclear how the legal and policy framework will operate in practice. We can, however consider local planning authorities and how they are currently dealing with planning gain for guidance.

Some local authorities appear to be accepting that developers are less able to provide infrastructure contributions because of the current market conditions. As such, many are taking a more relaxed approach with several, particularly to the South and in the Central Belt, now allowing for phased payment of developer contributions. Similarly, some have suspended their travel co-ordination services. Then still, some have suggested a further option. In recent discussions several developers have raised the possibility of the authorities using their prudential borrowing powers to raise the capital required, have the developers pay the interest thereon and pay off the capital loan over the phasing of the development itself. As yet, no actual conclusion has been reached on that since the public sector itself is also feeling the effects of the credit crunch. In the meantime, one of the Councils in question has revised three agreements with housebuilders to reduce the frontloaded nature of the payments and allowed for phasing of contributions. Others do not have set policies as yet, giving developers a greater degree of flexibility.

Further north, authorities have suggested that agreements are being deliberately stalled within the system, with developers

showing little willingness to progress or conclude agreements until there is a prospect that particular developments will actually proceed. Throughout the country there remain some Councils who are simply not prepared to abandon hard won agreements.

It would seem then that there is some reason to be hopeful for the developer who is finding fulfilment of planning agreements difficult, albeit in the guise of phased payments or alternative solutions. It would appear that the best approach for any such developer is to discuss the possibilities with the relevant local authority.

Planning Gain in the Near Future

As far as the development of planning gain goes, the revised Circular is anticipated before the end of the year. Whether it will hold the key to injecting life back into the system remains to be seen. Scottish Government has indicated that planning gain will not mirror the English Community Infrastructure Levy in the near future.

Further, in relation to hearings and appeals on s75, the Government will consult on the Regulations required before the end of the year with a view to commencing the primary and secondary legislation in the Spring of 2010.

Scottish Government Planning and Environmental Priorities for 09/10

The Scottish Government has outlined its planning and environmental priorities and its legislative programme for the next twelve months.

Priorities

Transport and Infrastructure

- the Scottish Government has introduced the Forth Crossing Bill to Parliament;
- aims to improve rail connections throughout Scotland by investing £1billion in electrifying and improving rail links between Edinburgh and Glasgow and the construction of a new railway station at Gogar to serve Edinburgh Airport;
- intends to provide hourly rail services between Aberdeen and Inverness;
- envisages the construction of a new station at Dalcross to serve Inverness Airport; and,
- a vision for a high speed rail link between Scotland and London.

Renewables and a Greener Scotland

- continued investment in renewables;
- 50% of electricity to come from renewables by 2020;
- electricity to be decarbonised fully by 2030;
- improved sustainability of the natural and built environment;
- climate change targets to be published in June 2010, alongwith a report on the policies and proposals necessary for achieving those targets;
- an Action Plan on energy efficiency, setting out energy efficiency targets for Scotland is also anticipated next Spring;
- consultation on proposals for a Wildlife and Natural Environment Bill;
- conclusion of research on the scope for further permitted development for domestic micro-wind turbines and air-source heat pumps; and,
- addressing section 70 of the Climate Change (Scotland) Act.

Historic Environment

- updating of the Historic Buildings and Ancient Monuments Act 1953, the Ancient Monuments and Archaeological Areas Act 1979 and the Planning (Listed Buildings and Conservation Areas) (Sc) Act 1997; and,
- removal of the uncertainty over the scheduling process by way of the inclusion of a new power to enable Scottish Ministers to issue a building with a certificate of immunity from listing for 5 years.

Planning Legislative Programme 2009-10

- completion of the Modernisation of the Planning system;
- legislation on section 75 agreements and good neighbour agreements can be expected;
- legislation as required through monitoring of the system;
- legislation as required by on-going work linked to the Delivering Planning Reform document; and,
- work in relation to development planning, particularly strategic development plans and SESplan.

Environmental Impact Assessment: Case Law Update

There are two recent rulings to note in the context of Environmental Impact Assessment. The first is the English case, R (on the application of Baker) v Bath and North East Somerset Council, which concerns the procedures for screening applications for planning permission insofar as they relate to changes or extensions to existing or approved developments and the second is a ruling from the European Court of Justice, R (on the application of Christopher Mellor) v Secretary of State for Communities and Local Government which considers whether or not local planning authorities are required to make available to the public any reasons for a negative screening decision in respect of a Schedule 2 development under article 4 of the EIA Directive. For a copy of our article on this please contact Lauren Grant of our Planning and Environmental Team.

Proposed approach for Planning Advice Notes Published

As part of the modernisation of the planning system, the Government has published its proposed approach towards Planning Advice Notes. Some will be retained in their existing form whilst others will be updated over the next two years or will be revoked entirely. More information is available from the Scottish Government website or a note on the full list of amendments is available on Morton Fraser's website.

http://www.morton-fraser.com/publications/articles/335_proposed_approach_for_planning_advice_notes_published

New Notification Requirements now in Place

The changes brought in by the Planning etc. (Scotland) Act 2006 have almost been fully implemented, with several pieces of secondary legislation entering into force on 3 August 2009. One of which relates to new notification requirements. For a detailed consideration of the requirements, including consideration of the requirement to notify owners and agricultural tenants and the notices required on initiation and completion of development, see the full text article on Morton Fraser's website.

http://www.morton-fraser.com/publications/articles/334_new_notification_requirements_now_in_place

Other News

The UK Marine and Coastal Access Bill has gained Royal Assent. The new legislation gives Scottish Ministers new powers to protect Scotland's marine life.

The Town and Country Planning (Miscellaneous Amendments) (Scotland) (No. 2) Regulations 2009 (SSI 343/2009) and The Planning etc. (Scotland) Act 2006 (Development Planning) (Saving, Transitional and Consequential Provisions) Amendment (No. 2) Order 2009 (SSI 344/2009) came into force on November 16, 2009 amending the transitional arrangements for development plans and the EIA regulations.

The Planning (Control of Major - Accident Hazards) (Scotland) Regulations 2009 (SSI 378/2009) came into force on November 23, 2009 and make the necessary amendments to the Development Planning and Planning Hazardous Substances regimes to implement the changes made by Council Directive 2003/105/EC, insofar as they relate to Planning.