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Challenger To The Trump Development Fails To Obtain Interim Orders
Forbes v Aberdeenshire Council and Trump International Golf Links [2010] CSOH 01

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This is the first piece of litigation to emerge after the grant of the conditional outline planning permission for the so-called 'Trump development' in December 2008. At that stage, following a decision to call in the application by the Scottish Ministers,¹ a subsequent four week planning inquiry and a lengthy report by three planning reporters, the Scottish Ministers had granted outline planning permission for the development of two 18-hole golf courses and associated golf facilities, a 450-bedroom hotel with conference centre and spa, 950 holiday apartments, 36 golf villas, accommodation for 400 staff and a new access onto the A90 trunk road (see (2009) 131 SPEL 6).

The matter considered in this case was a relatively minor element of the overall development proposal, namely the planting of marram grass, preparatory earth works and chestnut pale fencing on the inner dunes at Menie Links on land at Menie Estate, aimed at stabilising an area of sand dunes to facilitate creation of part of one of the golf courses.

Rather than seek approval of a reserved matter, Trump International elected to lodge an application for (full) planning permission to subsume those matters left open by the outline planning permission and to provide further detail of the works proposed. On 12 November 2009 Aberdeenshire Council granted planning permission for those works.

Mrs Forbes, a mobile home resident, living about 1km from the site sought to have the planning permission suspended and for interdict to be pronounced preventing Trump International or anyone on their behalf from doing anything to implement that permission. Both orders were sought ad interim, that is immediately, and as a matter of urgency prior to the full case being heard in court since the marram grass works had just commenced.

Title and interest

The issue arose as to whether Mrs Forbes had the necessary standing (normally referred to as 'title and interest') to bring the case in the first place. She argued that she had the necessary standing under the Aarhus Convention of 1998 to which both the UK and EU are signatories. That Convention is aimed at providing for public participation and wide access to justice in relation to environmental matters which includes providing for challenges to alleged procedural irregularities. The Aarhus Convention was incorporated into EU Law by Directive 2003/35/EEC which amends the Directive upon which the Environmental Impact (Scotland) Regulations 1999 are based. One of the matters which Mrs Forbes complained of was the failure of Aberdeenshire Council to hold a pre-determination hearing in terms of 38A of the Town and Country Planning (Scotland) 1997 ('the 1997 Act').

The court held that it was clear from the terms of the Aarhus Convention that not everyone was entitled to 'access to justice' and Mrs Forbes was suing in an individual capacity, rather than as an adjoining proprietor or a recognised interest group or organisation. Second, the application had been advertised in accordance with s34 of the 1997 Act but she had not lodged an objection in response to that. Had she done so, Aberdeenshire Council would have been obliged to take her representations into account and in light of her failure to make representations in respect of the application she was not entitled to attend any predetermination hearing. In short Mrs Forbes had failed to show that she is affected in some identifiable way.

Was an EIA required?

Another argument to the effect that the marram grass works application constituted a standalone application for works which would have a significant environmental impact and therefore required a separate Environmental Impact Assessment ('EIA') was also rejected by the court. It held that the new application had to be viewed as part of the overarching outline planning permission which had undergone a full EIA and to which were attached conditions aimed at protecting the environment. It was not therefore necessary to undergo those procedures afresh and therefore there had been no procedural irregularity.

Decision

Taking these; and various other strands together, the court held that Mrs Forbes did not have sufficient interest to challenge the grant of planning permission and her case was not of sufficient strength to warrant granting the interim orders sought and that to do so would render Trump International liable to commercial expenses which would not be recoverable. Those orders were therefore refused.

Comment

This decision might be subject to appeal. However, it represents just an opening salvo prior to a number of other arguments to be raised in relation to five other parts of the Trump development to be heard at later dates. Watch this space.

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¹ <http://www.scotland.gov.uk/News/Releases/2007/12/05082758>