APPEAL DECISION (DPEA)

Appeal Reference POA-110-2010

Planning Reference APP/2015/3464

Planning Proposal - Modification of S75 Legal Agreement (of Planning Approval Reference APP/2007/2299 for Erection of 3 No Wind Turbines & Infrastructure

Summary of Decision
The reporter allowed the appeal and concluded that the planning obligation should be modified to remove Clause 5 as it fails the tests of necessity, relationship to the development, scale and kind, and reasonableness.

Policy Issues

- Policy 9, SG Developer Contributions1: Developer contributions:

Neither the policy nor the supplementary guidance provides for contributions to be made towards the provision of affordable housing by those who erect wind turbines. Contrary to the Council's stated reason for refusal, they do not state that existing Section 75 agreements which were in line with previous planning policies are to be treated as in compliance with the latest policies.

The main determining issue was whether Clause Five complies with each of the 5 test for planning obligations. These tests are: necessity, planning purpose, relationship to the development, scale and kind, and reasonableness.

The reporter found that Clause Five of the agreement fails to meet the following tests; necessity, relationship to the development, scale and kind and reasonableness.

Additional Points

- No evidence was provided by the Council to justify the requirement for the developer of the wind farms to contribute to the funding of affordable housing and is not supported by the current provisions of

the development plan. • Affordable housing and its relationship to the wind turbines has not been explained or justified. Planning obligations should not be used to extract advantages, benefits or payments from landowners or developers which are not directly related to the proposed development. • The Council has provided no evidence that the provision of affordable housing in the Turriff Academy catchment areas is only necessary because of the developments of the wind turbines, whether alone or in conjunction with similar developments. • The Reporter recognises the letter of representation made by the community council and their concerns about more affordable housing in the area.
Actions • Planning obligation should be modified to remove Clause Five

Planning and Environmental Appeals Division

Planning Obligation Appeal Notice of Determination

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The Scottish Government

Determination by David Russell, a Reporter appointed by the Scottish Ministers
Appeal under S75B of the Town and Country Planning (Scotland) Act 1997

- Planning obligation appeal reference: POA-110-2010
- Site address: Cairnhill, Turriff, Aberdeenshire, AB53 5TN
- Appeal by Mr James Norrie against the decision by Aberdeenshire Council
- Application to modify the planning obligation relating to planning permission ref: F/APP/2007/2299
- Application dated 18 December 2015, and refused by notice dated 10 March 2016
- Modification sought: deletion of Clause Five, which provides for an annual financial contribution towards the provision of affordable housing
- Planning obligation details: Registered in the Land Register of Scotland (title number FAS NO 2269)
- Date of recording of the planning obligation: 7 July 2008

Date of appeal decision: 16 May 2016

Determination

I allow the appeal and determine that the planning obligation comprising Clause Five of the agreement referred to above is removed and discharged.

Note: A claim has been lodged on behalf of the appellant for an award of expenses to be made against the council. I will deal with that matter separately.

Background

On 25 July 2008, planning permission was granted for the erection of three wind turbines at this site. Prior to the permission being issued the applicant had entered into a section 75 agreement (now known as a planning obligation) with the council. Clause Five of this agreement states that: "Within one month of the date of issue of the decision notice hereinbefore referred to and at the expiry of each year thereafter the proprietors shall pay to the council the sum of one thousand eight hundred and seventy pounds (£1,870) which shall be used by the council to order the provision of affordable housing within the catchment area of Turriff Academy. The said payments due by the proprietors to the council in terms of this clause shall be increased by the increase in the Retail Price Index from 1st January 2008. Any payment due in terms of this clause shall if not paid within 14 days of becoming due be increased by 3% above the Clydesdale Bank plc base rate from the date it fell due until paid."

The appellant is now seeking the removal of this clause from the agreement.

Reasoning

1. I consider that the determining issue in this appeal are whether Clause Five of the Section 75 agreement complies with each of the five tests for planning obligations as set out in paragraphs 14-25 of Circular 3/2012 'Planning Obligations and Good Neighbour Agreements'. These tests are of the obligation's: necessity; planning purpose; relationship to the development; scale and kind; and reasonableness.

2. In refusing the application to discharge the obligation, the planning authority gave the following reason for its decision: "The proposal does not comply with Policy 9 Developer contributions and SG *(supplementary guidance)* Developer Contributions 1: Developer contributions of the Aberdeenshire Local Development Plan 2012 on the grounds that the Section 75 legal agreement associated with planning approval reference APP/2007/2299 was a legally binding document which both parties had agreed to in line with the policies in place at the time of the application."

3. However the Act now makes provision for those who have entered into a Section 75 legal agreement or obligation, which by definition they had previously agreed to, to apply subsequently to the relevant planning authority to have that agreement or obligation discharged or modified. Circumstances may or may not have changed, but in considering whether or not to discharge or modify the agreement, the basis for that decision is whether the five tests are met at this time.

4. With regard to the test of its necessity, the council has referred to the policy in the local development plan and also to its supplementary guidance which relate to developer contributions. Neither provides for contributions to be made towards the provision of affordable housing by those who erect wind turbines. Contrary to the council's stated reason for refusal, they do not state that existing Section 75 agreements which were in line with previous planning policies are to be treated as in compliance with the latest policies.

5. As the council has not provided any evidence to justify the requirement for the developer of these three wind farms to contribute to the funding of affordable housing, and it is not supported by the current provisions of the development plan, I conclude that the test of necessity for Clause Five is not met.

6. While I consider that the second test is met, as the provision of affordable housing is clearly a planning purpose, the third test is not met as its relationship to the erection and/or operation of the three wind turbines has not been explained or justified. In this regard the circular makes clear that planning obligations should not be used to extract advantages, benefits or payments from landowners or developers which are not directly related to the proposed development. It also advises that authorities should bear in mind that obligations may be subsequently challenged either through an application to modify or discharge the obligation, through an appeal against refusal to modify or discharge the obligation, or indeed in the Courts.

7. Similarly with regard to the scale and kind test, although the specified annual financial contribution may be regarded by some as modest, and could only make a partial contribution to the provision of any affordable housing, the circular confirms that this would only be appropriate in relation to infrastructure (which could arguably include affordable housing) that would not be necessary but for the development. The council has provided no evidence that the provision of affordable housing in the Turriff Academy catchment area is only necessary because of the development of these wind turbines, whether alone or in conjunction with similar developments.

8. I am also satisfied that, despite its apparently modest scale, for all of the reasons outlined above, in this case the requirement to contribute to the provision of affordable housing cannot meet the final test of reasonableness.

9. I have noted the other matters raised, including the community council's concern that more affordable housing should be provided in this area, and the council's assertions regarding consistency with previous planning policies and a failure by the appellant to make payments which were already due under the provisions of this clause of the Section 75 agreement. However none of these leads me to alter my conclusions that Clause Five of the agreement fails to meet all of the five tests for planning obligations which are set out in the circular.

Conclusion

10. As I have found that Clause Five fails the tests of necessity, relationship to the development, scale and kind, and reasonableness, I conclude that the planning obligation should be modified to remove Clause Five.

DAVID A. RUSSELL
Principal Inquiry Reporter

Advisory note: In accordance with Section 75B of the Town and Country Planning (Scotland) Act 1997 (as amended) this determination does not take effect until the date on which this notice is given is registered in the Land Register of Scotland. When submitting this deed for registration it should be identified as a 'Planning notice of determination' on the relevant application form. Further information on the Land Register of Scotland is available from the Registers of Scotland, at www.ros.gov.uk.

Planning and Environmental Appeals Division

Claim for an Award of Expenses Decision Notice

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The Scottish Government

Decision by David Russell, a Reporter appointed by the Scottish Ministers

- Appeal reference: POA-110-2010-E
- Site address: Cairnhill, Turriff, Aberdeenshire, AB53 5TN
- Claim for an award of expenses made by Mr James Norrie against Aberdeenshire Council

Date of decision: 16 May 2016

Decision

I find that the council has acted in an unreasonable manner resulting in liability for expenses. Accordingly, in exercise of the powers delegated to me and conferred by section 265(9) as read with section 266(2) of the Town and Country Planning (Scotland) Act 1997, I find the council liable to the appellant in respect of the expenses of the appeal.

Note: Normally parties are expected to agree expenses between themselves. However, if this is unsuccessful, I remit the account of expenses to the Auditor of the Court of Session to decide on a party/party basis. If requested, I shall make an order under section 265(9) read with section 266 of the Town and Country Planning (Scotland) Act 1997.

Reasoning

1. For the avoidance of doubt, the appeal which I have been appointed to determine has been made against Aberdeenshire Council's decision to refuse the appellant's application for the modification of a planning agreement, now known as a planning obligation. It is not an appeal against a decision of the council to refuse an application to modify a planning permission, which appears to be the basis on which some of the submissions by the appellant's agent and the planning authority have been made.

2. Circular 6/1990 explains that parties are normally expected to meet their own expenses in planning and related appeals. I consider this to be a related appeal. Awards of expenses do not follow the decision on the merits of the appeal itself, and are made only where each of the following tests is met:

- The claim is made at the appropriate stage in the proceedings;
- The party against whom the claim is made has acted unreasonably; and,
- This unreasonable conduct has caused the party making the application to incur unnecessary expense, either because it was unnecessary for the matter to come before the Scottish Ministers, or because of the way in which the party against whom the claim is made has conducted its side of the case.

3. Here, the appellant's agent has lodged the claim at an appropriate stage in the proceedings, prior to my determination of the appeal.

4. With regard to the second test, my consideration does not necessarily follow the outcome of the appeal, in which I found that the planning obligation should be modified as it failed to meet four of the five tests for planning obligations set out in Circular 3/2012. However examples of unreasonable behaviour by a planning authority which can justify awards of expenses include where it fails to give complete, precise and relevant reasons for the refusal of an application. It must also support its reasons for refusal, and show that it had reasonable grounds for doing so.

5. I consider that in this case the planning authority did not fulfil these responsibilities. Its reason for refusal failed to have regard to the need to consider the merits of the application to modify the obligation against the five tests set out in the circular. While its reason stated that the clause seeking annual financial contributions towards the provision of affordable housing was consistent with previous planning policies, this was neither supported in its evidence nor relevant at the time of this application.

6. The council's stated reason also indicated that refusal was justified because the obligation had been freely entered into at the time it was made. I consider that this too is not relevant, particularly as that approach would appear to thwart the statutory right of those who have entered into such an obligation to apply to the planning authority for it to be discharged or modified.

7. The stated reason also indicated that the application to modify the obligation was contrary to the current provisions of the development plan relating to developer contributions, both because it had been entered into freely and because it had been consistent with the planning policies which had applied at that time. This assertion was not borne out by my examination of the current provisions of the development plan.

8. Given all of the above circumstances, I conclude that the council has acted unreasonably in relation to the reason which it gave for refusing the application.

9. It is therefore necessary for me to address the third test, as to whether this unreasonable behaviour has led the appellant to incur additional expenses unnecessarily. I am satisfied that in this case it has, because there was only one reason given for refusing the application and I have found that reason to be fundamentally flawed. This left the appellant with no option other than to lodge an appeal. The appellant's additional expenses related to the appeal have therefore been incurred unnecessarily, as a result of the planning authority's unreasonable behaviour.

10. Accordingly I conclude that all three tests relating to a claim for an award of expenses have been met in this case.

David A. Russell
Principal Inquiry Reporter