

Determination by Michael J P Cunliffe, a Reporter appointed by the Scottish Ministers Appeal under S75B of the Town and Country Planning (Scotland) Act 1997

- Planning obligation appeal reference: POA-240-1
- Site address: Former Carrongrove Mill, Denny (Land to the west of 21 Old Mill Way, Kirkland Drive, Stoneywood)
- Appeal by Mactaggart & Mickel Homes Limited against the decision by Falkirk Council
- Application to modify or discharge the planning obligation P/13/0074/75M dated 14 February 2013 refused by notice dated 23 September 2013
- Modification sought: Deletion of Clauses 1.27 and 3, which require a transport contribution of £550,000 to be paid to the council
- Planning obligation details: Planning Obligation under Section 75 of the Act among Falkirk Council and Mactaggart & Mickel Homes Limited relating to Subjects at Carrongrove, Denny, registered in the Land Register of Scotland (title number STG58305)
- Date of registration of the planning obligation: 24 May 2012
- Date of site visit by Reporter: 19 February 2014

Date of appeal decision 24 April 2014

Determination

I allow the appeal and determine that the planning obligation comprising Clause 1.27 and Clause 3 of the agreement referred to above is removed and discharged.

Clause 1.27 states that the Transport Contribution means £550,000.

Clause 3 requires the landowner to pay to the council the Transport Contribution. Payment is to be made in instalments as set out in Clause 3.1-3.7. Clause 3.8 states that the Transport Contribution shall be refunded by the council to the party that made the payment in question to the extent that the Transport Contribution has not been disbursed by the council towards the provision of a roundabout at the junction of Nethermains Road and Glasgow Road, Denny within ten years of the date of receipt of the last instalment by the council.

Background

1. In May 2012 planning permission was granted for 129 houses, 53 flats and some commercial development at this site. Prior to the permission being issued the applicant had

entered into a section 75 agreement with the council. Clauses 1.27 and 3 of this agreement were as detailed above and, in short, state that the applicant will pay the council a Transport Contribution of £550,000 in instalments triggered by the completion of phases of the development. The council will apply this contribution to the construction of a roundabout at the junction between Nethermains Road and Glasgow Road, Denny. This junction is located about 2.5 kilometres from the development and forms part of the main road network around Denny. Separately, the appellant has already funded at a cost of £50,000 a mini-roundabout at the junction of Stirling Street and Nethermains Road. Another significant junction is at Denny Cross where Glasgow Road joins the A883 at Stirling Street/Broad Street.

2. The junction at Denny Cross is controlled by traffic lights and is overloaded at peak hours. The council has devised a scheme, the Denny Eastern Access Road (DEAR), which would remove through traffic from Denny Cross. The first section of this new road has been constructed from the A883 east of Denny Cross as far as the new Denny High School. At its other end, DEAR would join the roundabout at the Glasgow Road/ Nethermains Road junction provided for in the planning obligation. The council envisages that the cost of DEAR will largely be met from developer contributions. The Planning Committee has before it an application from Bett Homes to develop housing on the Mydub site adjacent to the proposed roundabout at Glasgow Road. The application includes construction of the roundabout itself, a short section of DEAR and access into the Mydub site. Planning officials have recommended approval, subject to the developer entering into a planning obligation.

3. The appellant is now seeking the removal of Clauses 1.27 and 3 from the agreement (now referred to as a planning obligation). The grounds, in summary, are that the size of the Transport Contribution is disproportionate to the effect of the additional traffic generated by the development; that the roundabout would not on its own provide any relief to Denny Cross; that Bett Homes, if granted permission for the Mydub site, would construct the roundabout anyway; and that there has been a change of circumstances since the obligation was entered into, in that unforeseen piling costs have arisen during the first phase of development at Carrongrove and if repeated on later phases would add about £1 million to the development cost, making the project unviable.

Reasoning

4. I consider the determining issue in this appeal to be whether Clauses 1.27 and 3 comply with the five tests in paragraphs 14-25 of Circular 3/2012: Planning Obligations and Good Neighbour Agreements: necessity, planning purpose, relationship to the development, scale and kind, and reasonableness.

Necessity

5. The development will contribute additional traffic to the road network in and around Denny, and will add to congestion at junctions which are already under pressure. It is therefore reasonable to expect the developer to make some contribution towards the cost of dealing with these effects. This has already been recognised in the construction of the

mini-roundabout at Stirling Street. However, the Nethermains Road/Glasgow Road junction is at a considerable distance from the development site, and the transport assessment has shown only 32 additional peak-hour movements arising from the development, amounting to an increase of about 5 per cent in two-way traffic through the junction, which is already operating above capacity at peak times. Delays will become slightly worse as a result of the development, but a need to upgrade the junction already exists and the council has not sought to impose any restriction (either through a planning condition or through the section 75 agreement) on the occupation of the new homes in advance of roundabout construction. The appellant offered to fund a simpler scheme to improve the junction layout, but this was rejected by the council.

6. I find that the planning obligation does not meet the test of necessity. A roundabout at the Nethermains Road/Glasgow Road junction may be desirable for a number of reasons, including dealing with the existing traffic situation, providing access to the Mydub site in the event of the approval of housing development there, and providing a connection with DEAR. However, it is not a necessary consequence of the Carrongrove development. The junction could cope with the small increase in traffic, albeit with slightly longer waiting times, and a simpler junction improvement could have been sufficient to deal with this.

Planning purpose

7. The obligation does serve a planning purpose, in that it is rooted in the development and use of land and seeks to address the consequences of development. The test of planning purpose is therefore satisfied.

8. The appellant points out, however, that the need for a transport contribution was not flagged up in the development brief for the site. While there is a reference to DEAR in the adopted Falkirk Council Local Plan including a requirement for developer funding, no specific policy for contributions to DEAR is set out there. The council, after the approval of the Carrongrove development, adopted supplementary planning guidance for DEAR which set out the basis on which developers' contributions towards the new road would be expected. It is not, however, appropriate to apply this retrospectively to development already granted planning permission by saying that the £550,000 represents, in effect, the appellant's contribution to DEAR. The only road improvement mentioned in the agreement is a roundabout at the Nethermains Road/Glasgow Road junction.

Relationship to the proposed development

9. The obligation is related to the proposed development, in that it seeks to mitigate the effects of the development on the road network. The council points out that the cost of the proposed roundabout would be more than £550,000, but it considers that sum a reasonable contribution by the appellant. The roundabout could, however, also be related to other proposed developments. The Mydub application by Bett Homes includes construction of the roundabout (though not necessarily meeting the whole cost of the size of roundabout envisaged by the council). A roundabout or other form of controlled junction at this location is absolutely necessary for the Mydub development to proceed. Other schemes such as the possible redevelopment of the former school site north-west of the junction could also

have a close relationship to the roundabout. In comparison, the Carrongrove development at a distance of around 2.5 kilometres and contributing only 32 peak hour movements has a rather weaker relationship to the roundabout than these other schemes.

Scale and kind

10. The circular states that planning obligations must relate in scale and kind to the proposed development. The obligation provides over £17,000 for each additional peak hour movement contributed by the Carrongrove development. The development will contribute only 5% to the traffic through the junction, and yet is being asked to bear over 50% of the cost of the upgrade. I do not consider that this represents a reasonably proportionate contribution. The appellant offered to fund a simpler and cheaper form of junction upgrade which would have dealt with the direct consequences of the development. I can understand why the council chose to reject that proposal, given that a roundabout would serve other useful purposes related to DEAR, Mydub and other possible developments. However, the cost of the cheaper scheme could have provided a more reasonable basis for the financial contribution required from the appellant.

11. The council maintains that the scale of the Transport Contribution should be judged in relation to the effect of the development on Denny Cross as well as the Nethermains Road/ Glasgow Road junction. Rather more peak hour movements will be generated through Denny Cross than through the other junction. However, the proposed roundabout on its own would do nothing to relieve traffic congestion at Denny Cross. Only the completion of DEAR as a whole will affect that. The agreement relates only to the roundabout and, as indicated above, I do not consider it appropriate to regard the £550,000 retrospectively as a contribution to DEAR.

12. I therefore find that the size of the Transport Contribution provided by the agreement is disproportionate to the effect of the development and that it fails the scale and kind test.

Reasonableness

13. The circular sets out questions which should be considered in determining whether a planning obligation is reasonable. One of these is whether the requirement in the obligation is so directly related to the regulation of the proposed development that it should not be permitted without it. As indicated above, no restriction has been imposed on the occupation of the development in advance of the roundabout being built. I do not consider that the improvement of the Nethermains Road/Glasgow Road junction is a necessary precondition of the development.

14. I also have, in terms of paragraph 74 of the circular, to take into account any change in circumstances since the obligation was entered into. The appellant has produced evidence that the first phase of the development, comprising affordable housing (and not therefore triggering any payments under Clause 3 of the agreement) incurred unforeseen additional piling costs of £150,000. There is good reason to believe that similar costs would be incurred on the rest of the site, adding a total of £1 million to the cost of developing a site whose economics were already marginal. To persist with a Transport Contribution of

£550,000 in these circumstances would make the development unviable, even with phased payments as provided by the agreement, and would jeopardise the renewal of a brownfield site and the provision of homes to meet housing needs.

15. The council argues that the financial appraisal represents only a snapshot in time, that the scale of any additional development cost is uncertain, and that the improving economics of the housing market would be likely to cancel out any rise in costs. However, I consider that the appellant's assessment is realistic and that the £550,000 Transport Contribution would severely affect the viability of the whole project.

16. For the above reasons, I do not consider that the planning obligation meets the test of reasonableness.

Conclusion

17. Circular 3/2012 requires that planning obligations must meet all five tests in paragraph 14. I consider that Clauses 1.27 and 3 fail the tests of necessity, scale and kind, and reasonableness. I therefore conclude that the planning obligation should be modified to remove Clauses 1.27 and 3.

Michael J P Cunliffe

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 General Register of Sasines and the Land Register of Scotland is available from the Registers of Scotland, www.ros.gov.uk.