

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

- Planning obligation appeal reference: POA-140-2004
- Site address: land south of Meigle Row, Clovenfords, Galashiels TD1 1LX
- Appeal by BDW Trading Limited against the decision by the Scottish Borders Council
- Application to modify or discharge the planning obligation 14/01231/MOD75 dated 3 December 2014 which the council has failed to determine within the statutory time period
- Modification sought: discharge of the obligation to pay a road network contribution
- Planning obligation details: Clauses 2(a) (in part), 2(h) and 2(i) of the Minute of Agreement between the Scottish Borders Council and Barratt Homes Limited dated 29 November 2007 and 11 January 2008 as varied by the Minute of Variation between the Scottish Borders Council and BDW Trading Limited, formerly known as Barratt Homes Limited, dated 6 June 2011 (Land Register of Scotland Title Number SEL4095)
- Date of registration of the planning obligation: 2 April 2008 as varied by the Minute of Variation registered on 8 June 2011

Date of appeal decision: 10 April 2015

Determination

I allow the appeal and determine that that part of the planning obligation comprising the words: “*Seventy Thousand Pounds Sterling (£70,000) (“the Road Network Contribution”)*” within clause 2(a) of the agreement referred to above, together with clauses 2(h) and 2(i), are removed and discharged.

Clause 2(a) reads as follows:

The Developers shall pay to the Planning Authority the sums of One Hundred and Twenty Thousand Six Hundred and Ten Pounds Sterling (£120,610) (“Waverley Line Contribution”), One Hundred and Ninety Eight Thousand Seven Hundred and Twenty Pounds Sterling (£198,720) (“Affordable Housing Contribution”), Two Hundred and Sixty Nine Thousand Three Hundred and Eighty Pounds Sterling (£269,380) (“Education and Lifelong Learning Contribution”), Seventy Thousand Pounds Sterling (£70,000) (“the Road Network Contribution”), Forty Two Thousand Pounds Sterling (£42,000) (“the Play Park Provision Contribution”), giving a total payable of Seven Hundred Thousand and Seven Hundred and Ten Pounds Sterling (£700,710) (“the Consideration”) relative to the Planning Application.

Clauses 2(h) and 2(i) relate, respectively, to the timing of the road network contribution and to the application of that contribution to road network improvements in the area.

Background

1. On 22 April 2008, planning permission 06/01404/FUL was granted for 70 houses at Meigle, Clovenfords. Prior to the permission being issued the applicants had entered into an agreement with the council under section 75 of the Town and Country Planning (Scotland) Act 1997, as amended. As detailed above, clause 2(a) of that agreement was later varied by a Minute of Variation, dated 6 June 2011, between the council and BDW Trading Limited, formerly known as Barratt Homes Limited. This variation did not alter the road network contribution element.
2. In a subsequent appeal (reference POA/140/2002, dated 21 October 2014), the appellants unsuccessfully sought the modification of Clause 2(a) to reduce the affordable housing and education contributions and to remove the road network and play park contributions.
3. In the 2014 decision notice the reporter concluded: *“Clause 2(a) includes a number of developer contributions and this appeal is unusual as it encompasses a number of proposed changes to this clause. It is not open to me to determine that the obligation should be subject to any modification other than those modifications set out in the application. I find the wider transport contribution does not comply with all the tests set out in the circular. However, all the other contributions which are the subject of this appeal meet these tests and are compliant with Circular 3/2012. The legislation does not permit me to modify the agreement in a manner other than that sought in the application to the planning authority, for example, by deleting the road network contribution and leaving the others in place. Consequently, I conclude that this appeal should be dismissed.”*
4. The appellants are now seeking the removal from the agreement (now referred to as a planning obligation) of only the road network contribution element within Clause 2(a).

Reasoning

5. Circular 3/2012: Planning Obligations and Good Neighbour Agreements indicates the terms on which planning obligation appeals should be assessed, including that the decision taker should take account of changes in circumstances since the obligation was made. I therefore consider the determining issue in this appeal to be whether, as matters now stand, the relevant part of Clause 2(a) complies with the five tests in paragraphs 14-25 of the circular. The tests may be summarised as: necessity, planning purpose, relationship to the development, scale and kind, and reasonableness. I must also have regard to any relevant provisions of the development plan.
6. In looking through the submissions I noted that considerable attention was given to the history of the parties' dealings over the past 7 years or so. Since I am required to assess the situation as it stands now, I am able to give limited weight to those matters.
7. From the submissions, it is also apparent that the tests from the circular which are at issue in this case are necessity, scale and kind, and reasonableness.
8. I am satisfied that the broad basis for developer contributions is clearly set out in the development plan. Policy G5: Developer Contributions of the Scottish Borders Local Plan

(2008), as amended, refers to the need for contributions to address deficiencies in infrastructure which will be created or exacerbated as a result of a development. The appropriate level of contribution is to be guided by the council's supplementary planning guidance, by planning or development briefs, and by other information including research and studies such as transport assessments. Contributions may be required for, among other things, off-site transport infrastructure, and will be made through section 75 or alternative legal agreements. In some instances, contributions relating to the cumulative effects of a number of developments will be held by the council until sufficient funds are available to undertake the relevant works. The range of infrastructure works and level of costs will be periodically reviewed and updated by the council to reflect its on-going needs and priorities.

9. Associated (non-statutory) Supplementary Planning Guidance on Developer Contributions were published in 2007. It expected that, for larger developments, the findings of an agreed transport assessment would be the primary basis for setting out the potential requirement to fund off-site transport infrastructure. The requirement would apply to all new development.

10. That document was updated and revised in April 2014. As well as repeating the above guidance, the new version indicated that the council had developed a Central Borders Traffic Model to determine the impact of new development in the Central Borders (associated with the local plan) on transport infrastructure. It stated that this traffic model would identify the required transport infrastructure upgrades. The guidance specified that in the interim period the council would seek a contribution of £1,000 per dwelling unit for residential developments and a pro-rata contribution for other types of development. Within the Central Borders zone, development of residential sites in excess of 25 units and other types of development likely to generate similar increases in traffic movements were expected to contribute to such upgrading work. This is the current guidance.

11. This revised guidance was in place at the time of the 2014 appeal. In her decision notice, the reporter considered that there was, at that time, a lack of detailed evidence to confirm that the interim rate of £1,000 per dwelling for residential developments, as set out in the April 2014 guidance, was reasonable and necessary for the Clovenfords development at Vinery Park (as the development is now known). I note that this decision has not been challenged by the council, either in court or in the submissions for this appeal.

12. To confirm a contribution requirement through the mechanism described in the 2014 guidance would necessitate further work. In that work, the cost of relevant road infrastructure upgrades identified through the Central Borders Traffic Model would be apportioned among the relevant developments in the Central Borders as informed by, among other things, the outputs of a revised transport assessment covering the extent of off-site traffic impacts from the Vinery Park development.

13. The need for this further work is acknowledged in correspondence between the parties dated 25th November and 8th, 11th and 16th December 2014. However, the appellants have declined to commission a revised transport assessment on the basis that there is no requirement on them to do so, and that it is now for the council to justify its transport contribution requirement. In response, the council stated that it would undertake further modelling work to provide that justification, including instructing consultants to

undertake the transport assessment. However, it argued that the appellants would have to settle the fees for the consultancy work. No firm timescale was indicated.

14. For the disputed part of Clause 2(a) to satisfy the tests in the Circular, the council require, at minimum, to demonstrate that the developer contribution sought does not exceed the potential share of network improvement costs likely to be needed to cope with the additional traffic generated by the development. The council have confirmed that they would not seek any contribution above the figure contained in the planning obligation.

15. The council argue that the interim rate of contribution is significantly below the level which has been identified by the traffic model. To this end, their Strategic Transport Officer is reported as stating that the additional infrastructure pressure points at 2017 can be assessed, taking account of committed developments, including Vinery Park. On that basis, a schedule of 10 potential schemes to alleviate congestion and improve the network has been drawn up. I have been supplied with a single sheet listing the schemes, which includes cost estimates, but no timescales; they have a total estimated cost of £13 million.

16. It is explained that the traffic model has a 2007 base with a 10 year projection. The housing projections used in the model were for 2,169 units completed by the end of 2017. The Housing Land Audit indicates that there have been 585 residential units completed between 2007 and the end of 2013. It also projects that 1,385 units will be completed by the end of 2017.

17. The council contend that sharing out the total cost of potential works between either of the above projected housing completion figures would result in contribution requirements well above the interim contribution figure. Their calculations are:

£13 million divided by 2,169 units equals approximately £6,000 per unit

£13 million divided by 1,385 units equals approximately £9,000 per unit.

18. There are, however, many concerns and uncertainties around that attempt to justify the interim contribution figure.

- The council maintain that because the additional pressure points identified by the model were not problematic in the 2007 base they must be caused by traffic generated from the committed developments. However, on the face of it, that appears to ignore the impact of general growth in traffic levels.
- Of the £13 million total for upgrade schemes, £10 million is for a single scheme comprising a new bridge across the River Tweed at Gattonside – Lowood Bridge on the far side of Galashiels. This is described as a “*suggested improvement*” and no timescale is offered. The total cost figure for all schemes is therefore highly dependent on the realism and necessity of a single scheme. Most of the other schemes listed are also described as suggested improvements.
- No account is taken of the impact of non-residential development on the need for infrastructure improvements or the proportion of the upgrade costs they should bear.
- The appellants have argued that travel by residents of Vinery Park would have little impact on many of the locations listed in the schedule. That could have significant

implications for the share of total infrastructure costs which might be apportioned to the Vinery Park development. However, that is a case which should properly be made through a revised transport assessment.

19. The circular expects planning authorities *“to undertake a robust assessment of infrastructure requirements, the funding implications and the timescales involved. From this the level of provision to be delivered by planning obligations can be identified.”* *“Where standard charges and formulae are applied to individual developments, they should reflect the actual impacts of, and be proportionate to, the development and should comply with the general tests set out in this circular.”*

20. However, from the information in front of me, it appears that the council’s traffic modelling exercise is incomplete and inconclusive with respect to justification of the developer contribution required for the Vinery Park development. I have not been given any indication of the likely timescale for completion and ratification of the traffic model. The schedule of infrastructure schemes was submitted in the course of the previous application to amend the planning obligation but I have not been made aware of any progress in the status of the schedule, or indeed the traffic model, since that time. No consideration or ratification of these matters by council committee has been referenced.

21. Whilst no revised transport assessment has been undertaken for the appellants, that would not suffice without input from the traffic model.

22. The council’s final position in this appeal is that *“clarity and requisite detail in respect of all the circular tests can be achieved should a fresh transport assessment, in conjunction with traffic modelling, be conducted.”* I am therefore asked to dismiss this appeal *“pending the outcome of further analysis.”*

23. I have given the council’s position careful consideration, but have concluded that to dismiss the appellants’ appeal pending additional work, the execution of part of which lies within the council’s control (and with no indication of a timescale), would be unfair. The appellants are entitled to a definitive decision now rather than a determination which would effectively be a postponement of the decision, and for an unspecified period. I therefore require to decide on the information before me whether the tests in the circular are satisfied. For the reasons set out above, I find that there remains (in the words of the 2014 decision notice) *“a lack of detailed evidence on which to confirm the required scale of this contribution and whether the guideline contribution of £1,000 per dwelling is reasonable or necessary in this location.”*

Conclusion

24. Circular 3/2012 requires that planning obligations must meet all five tests in paragraph 14. I consider that the relevant part of Clause 2(a) fails the tests of scale and kind, necessity and reasonableness. I therefore conclude that the planning obligation should be modified to remove from Clause 2(a) the words *“Seventy Thousand Pounds Sterling (£70,000) (“the Road Network Contribution)”*.

25. Clause 2(h) and 2(i) of the obligation deal with the timing of the road network contribution and with the application of that contribution to road network improvements.

From my foregoing conclusion, it follows that those clauses become redundant and should be removed from the obligation.

Malcolm Mahony

MALCOLM MAHONY
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.

Richborough Estates