

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

- Planning obligation appeal reference: POA-270-2004
- Site address: 'Carrickholm', Cantray Crossroad, Croy, IV2 5PN
- Appeal by George Byers against a decision by The Highland Council
- Application to modify a planning obligation 14/0483/S75M dated 7 November 2014 refused by notice dated 5 January 2015 (dated 5 January 2014 in error)
- Modification sought: to provide for the construction of a boundary wall 1 metre in height to permit a parcel of land to be contained within the curtilage of 'Carrickholm'
- Planning obligation details: Minute of Agreement under Section 75 of the Town and Country Planning (Scotland) Act 1997 between the Highland Council and Mr Stephen Murray and Mrs Jacqueline Murray in relation to subjects at 'Westerlea', Croy, Inverness, dated 12 and 23 August 2010 and registered in the Land Register of Scotland and the General Register of Sasines for the County of Inverness on 31 August 2010 against title number INV8675
- Date of site visit by Reporter: 28 April 2015

Date of appeal decision: 15 July 2015

Determination

I dismiss the appeal and refuse to modify the planning obligation under section 75 of the Town and Country Planning (Scotland) Act 1997, as amended, ('the Act') comprising Clause FIRST of the Minute of Agreement referred to above.

Background

1. Clause FIRST reads as follows:

"With effect from the date of grant of the Planning Permission for the New Dwellinghouse, (One) no further or additional dwellinghouses shall be erected within the Subjects beyond the existing dwellinghouse known as and comprising 'Westerlea' shown on the said plan annexed and signed as relative hereto and the New Dwellinghouse to be constructed pursuant to the Planning Permission or any amendment thereof approved by the Council and (Two) that part of the Subjects lying on the south-west side of and adjoining the site of the New Dwellinghouse shall be used as amenity or garden ground only."

2. The word 'Subjects' is defined in the preamble to the Agreement and extends to the whole of the property comprised within Title Number INV8685, which extends beyond the area in the plan referred to in Clause FIRST.
3. On 11 February 2013 planning permission in principle 10/0005/PIPIN was granted for the erection of a house on ground to the south east of a house known as 'Westerlea'. Prior to the permission being issued that applicant had entered into the section 75 agreement with the council. Clause FIRST of this agreement was as detailed above and in so far as relevant to this appeal, was intended to maintain the undeveloped balance of the ground in garden use.
4. The appellant here is the next door neighbour to the south east of 'Westerlea', and the owner with his wife of a house called 'Carrickholm'. He has bought a more or less rectangular plot of ground about 33m x 6 to 8m from the garden of 'Westerlea', contiguous with his north eastern property boundary, in order to enlarge the area of land around the house. I will refer to this plot as 'the rectangle' for the purposes of this appeal. The appellant has proceeded throughout this matter on the basis that the rectangle is affected by the section 75 planning obligation that the land 'shall be used as amenity or garden ground only.'
5. Both houses sit on the north eastern side of the B9006 from Croy to Culloden, which the council consider to be a tourist route. The houses and their gardens sit within an extensive roadside belt of mixed trees about 35 metres wide, and extending along both sides of the road for some distance. This woodland is part of a larger area of trees identified in the National Woodland Inventory as 'Long Established Woodland of Plantation Origin'. The larger woodland area has proven continuity as woodland for at least 140 years. The council has promoted various Tree Preservation Orders ('TPO') under Part VII of the Act to protect the whole of this area of trees on the basis that they add to the amenity of the area and the road.
6. There appears to be a history of some dispute between the appellant and the council in relation to his treatment of trees within his garden. The appellant now wishes to extend a 1 metre high boundary wall of stone or breeze block around his new property boundary to include the rectangle. The council have told him that he cannot do this because it will damage protected trees. They have told him that they do not regard the rectangle as part of his curtilage, so that he does not have permitted development rights to construct the wall and that he will require to apply for planning permission for it. They have taken steps to safeguard the trees further through making a new TPO, although it would appear that the appellant is challenging the validity of this. He has previously applied for permission to carry out work to the trees to enable him to build the wall, on the basis that the trees were protected by a previous TPO, but this was refused by the council. In what seems to be an attempt to make progress through this dispute, the appellant decided to apply to the council for a modification to the planning agreement in the following terms:

“to provide for the construction of a boundary wall 1 metre in height to permit a parcel of land to be contained within the curtilage of 'Carrickholm'”.

7. The council refused this application, giving as a reason:

“It is considered that modifying the obligation to enable the construction of the wall would, if implemented, impact directly on a number of trees protected by a tree preservation order resulting in their subsequent loss, which is not considered to be acceptable in amenity terms when other boundary treatments (post & wire fence, wooden fence, hedge) are available that would not impact on the trees.”

Reasoning

8. I consider the determining issue in this appeal to be whether Clause FIRST, if amended by wording which would expressly permit the construction of a boundary wall, would comply with the five tests in paragraphs 14-25 of Circular 3/2012: Planning Obligations and Good Neighbour Agreements, which are: necessity, planning purpose, relationship to the development, scale and kind, and reasonableness.

9. It should be appreciated that the issues in this appeal are circumscribed by the terms of the application, and that much of the dispute around this matter falls outside that. It does not lie within my remit to take any view on the validity or otherwise of the tree preservation order. My remit does not include taking any view on the policy compliance or otherwise of the original section 75 agreement, or whether or not it could be discharged, because that has not been asked for. As to any question of whether or not the section 75 agreement affects the rectangle, I take the same view on which the appeal was predicated, which is that the current planning obligation would be enforceable against the owner of the rectangle.

10. The question before me is restricted to whether the planning obligation, if modified as proposed, would comply with all of the national policy tests.

11. The first test is one of necessity in planning terms, or to put it another way, is it necessary to have the agreement as modified in order to make a development on this site acceptable in planning terms?

12. I consider that the modification to the agreement is unnecessary. This because the questions relating to the proposed construction of the wall are already covered by a framework of planning procedures laid down by law. These are the processes which should properly be used to determine the question of whether the wall can be built, instead of the simplistic declaration which the applicant seeks.

13. For instance, the appellant could apply for planning permission to build the wall. Alternatively, if he considers that he may have permitted development rights to build a wall, he could apply to the council for a determination of lawfulness of proposed development under section 151 of the Act. For each of these mechanisms there are appeal or review procedures. These questions should be carefully considered by the council and the appellant with proper regard to the facts and circumstances of the case.

14. I consider that the addition of the phrase to the Section 75 agreement will not resolve the detailed issues behind these questions, and it may further complicate the application of the appropriate legal rules. I do not consider that it is competent to use Section 75 of the Act to attempt to pre-empt the detailed questions and tests which should be applied to the situation. The legal rules are sufficient to resolve the issues between the council and the appellant, if these are pursued to a conclusion through the appropriate processes. The requested modification is superfluous and therefore unnecessary.

Conclusion

15. Circular 3/2012 requires that planning obligations must meet all five tests in paragraph 14. As I consider that the proposed modification fails the test of necessity it is unnecessary for me to consider it further against the other tests.

Frances M McChlery

Reporter