Directorate for Planning and Environmental Appeals

Planning Obligation Appeal Notice of Determination

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The Scottish Government

Determination by Frances 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-270-2003
- Site address: Holly Cottage, Muir of Balnagowan, Ardersier, Inverness, IV2 7QX
- Appeal by Mrs Hazel Leith against the decision by The Highland Council.
- Application to modify or discharge the planning obligation 14/03123/S75D dated 11 August 2014 refused by notice dated 28 November 2014
- Modification sought: Discharge of the obligation
- Planning obligation details: title number INV19480 Date of registration of the planning obligation: 15 December 2010
- Date of site visit by Reporter: 28 April 2015

Date of appeal decision: 26 August 2015

Determination

I dismiss the appeal and refuse to discharge the planning obligation comprising the agreement referred to above.

Background

1. This appeal relates to a site identified as Plot 2, Muir of Balnagowan, The Steading, Ardersier ('Plot 2') on which a new house ('the constructed house') has been partially built. This house is wind and watertight, but is not currently habitable. The site originally contained a farm steading of which the byres and outbuildings are all now demolished, but the original dwelling house ('Holly Cottage') also remains on the site and is currently being lived in by the appellant and her husband. The planning obligation in question in this appeal is an undertaking not to occupy Holly Cottage as a residence. The appellant seeks full discharge of the whole planning obligation. It is uncertain exactly why she requires this, as she is herself unclear about her future plans, but she has referred to her own and her husband's personal and financial circumstances. Discharge would to allow the constructed house and Holly Cottage to co-exist as separate dwellings on the site, and would presumably facilitate a sale, or other dealings with one or other of the properties.

2. On 2 March 2009 the council granted planning permission (reference 7/00580/FULIN) to the appellant for the erection of a new house on Plot 2. I will refer to this as 'the approved house'. Prior to this permission being issued, the appellant and the council had entered into a planning obligation agreement under Section 75 of the Town and Country Planning (Scotland) Act 1997 which was registered in the Land Register of Scotland in February

2009. In December 2010 this obligation was discharged by arrangement between the parties and was replaced by a new agreement executed on the 9th and 10th December 2010. This was because the appellant had asked for the temporary suspension of the prohibition against living in Holly Cottage to allow her and her husband to leave rented accommodation, and to renovate and move in to Holly Cottage until the new house was ready for occupation. It is this replacement agreement which is the subject of this appeal. Clause Second of that agreement binds the owner of the site never to use Holly Cottage as residential accommodation, and is the central clause of the agreement. Clause Third of this agreement provided for 'a temporary relaxation' of this prohibition, allowing the appellant to occupy Holly Cottage as residential accommodation for a temporary period of twelve months until midnight on 30 November 2011. In fact, the appellant and her husband appear to have been living in Holly Cottage up to the present time.

Reasoning

3. The determining issue in this appeal is whether the planning obligation complies with the five national policy tests in paragraphs 14-25 of Circular 3/2012: 'Planning Obligations and Good Neighbour Agreements'. These tests are that the planning obligation must be necessary, serve a planning purpose, have a clear relationship with the development, be proportionate and appropriate in scale and kind, and be reasonable in all other respects. The policy requirement is that the obligation should meet with all of the tests, so a failure on any one of these would be sufficient to render the obligation non compliant with national policy. The tests are applied to the development situation at the time of the appeal, not at the time when they were first imposed.

4. The appellant argues that Holly Cottage has always been inhabited as a croft house; that she has renovated it from poor condition and that it should continue in that traditional use. None of the windows on the constructed house overlook Holly Cottage, and the two houses are no closer than many other houses. Fences could easily be erected if required. She has confirmed that she retains legal ownership of all the land on which the two houses stand. Her agent has referred generally to a shortage of rural housing.

5. The council says that the obligation was and is necessary to preserve a reasonable degree of residential amenity for the approved house. It argues that the circumstances which justified the original obligation remain. Referring to the development plan and supplementary design guidance, they say that the two houses taken together do not comply with council guidance for housing groups.

6. In considering this appeal, I must proceed on the basis that the planning obligation was granted in order to reach a satisfactory development management solution for the proposal contained in planning permission (7/00580/FULIN).

7. In fact, the constructed house has not been built in accordance with planning permission 07/00580/FULIN. The application drawings retained by the council do not include a block plan clearly defining the intended relationship between the two buildings after implementation of the planning permission. However, the approved application drawings 5, 6, and 7, if read together, show that what was intended and permitted included a fairly large single storey corner 'extension' around the north east corner and part of the south east elevation of the ground floor of the approved house. This is marked out on the

drawings as a dining room and utility room. This extension would have butted directly against the rear wall of Holly Cottage. No windows or doors are shown on the plans on the south eastern elevation of the approved house, which faces towards Holly Cottage. If the approved house had been constructed in this fashion, the two buildings would have been extremely close, and virtually adjoining. There is no indication on the approved drawings of any measures such as walls or fences, or layout of garden space, to manage this proximity so as to provide privacy to either house as independent dwellings. It would appear that the planning obligation was considered to be the solution to any privacy issue.

8. The constructed house is somewhat smaller than was approved. It appears that rectangular core of the constructed house may be located more or less as was planned, but that the corner 'extension' on the north east corner of the approved house has not been constructed. There are other differences from the plans on the constructed house including a side door and a window on the south east elevation. From information supplied by the appellant it would appear that a slightly different layout from that approved is now eventually intended for first floor of the constructed house.

9. As the non-conformity with the approved plans had not initially been drawn to my attention by either the council or the appellant, I requested clarification of the position. The appellant has explained that as the project went forward she and her husband realised that they would not be able to afford to complete the house as had been envisaged. The council has confirmed that no planning application has so far been made to them to regularise the non conformity of the constructed house with the approved plans, and that they would be prepared to invite the applicant to submit a planning application for consideration. Until the position has been regularised by this process it would still be possible for the appellant, or anybody else taking over the approved house, to complete the house as originally approved. Hence I must consider the appeal in terms of the approved house, not the constructed house.

10. I now address the five policy tests for a planning obligation required by the Circular.

11. The permission for the approved house was only granted subject to the restriction on occupancy because the council considered that the two houses would be in such close proximity that there would be an unacceptable loss of residential amenity due to lack of privacy and overlooking. They argue that this problem could be resolved if Holly Cottage was not used as a dwellinghouse. They say that a planning obligation, rather than a condition, was considered necessary to ensure that the restriction was binding on any future owners of the buildings and was highlighted in the titles.

12. I consider that if the approved houses had been constructed as was planned there would be an extremely close relationship between the two houses. It is difficult to envisage any arrangement of the gardens of the houses for that proposal which would have ensured a comfortable degree of privacy or residential amenity for either house, had the new house been built as approved. This reflects the normal planning approach which is that each residential unit should in principle have adequate levels of privacy and amenity. No special circumstances which might justify an exception to this, such as the two houses being used as a single residential complex with related persons in each house, has been suggested to me, and I am considering the approved house and Holly Cottage as two separate living units. In those circumstances I agree with the council that the restriction on residential use

of Holly Cottage was justified, and necessary, and that it was expedient that it be contained in a planning obligation imposed on the title of the houses to ensure there was a clear burden on the title of Holly Cottage for any prospective purchaser.

13. I also find that the restriction served a planning purpose, in seeking to secure acceptable levels of residential amenity. It was fairly related to the proposals contained in application 7/00580/FULIN. I also consider that the obligation was proportionate in its effect, and in scale to the development proposals, and was otherwise reasonable in the circumstances. I find that the planning obligation passes all five tests.

14. Clearly, the current situation requires to be regularised in planning terms before being considered further. The development as built is rather different from what was originally considered by the council, and there may be scope for reconsideration of the situation, including the future relationship between the two buildings, and the formal allocation and laying out of garden ground between the two buildings. A planning application could be made to the council to seek to resolve the non-conformity of the constructed house with the approved house, and an applicant could request the council to reconsider the planning obligation in that context.

15. I have considered all other matters raised by the appellant and the council but none of these would lead me to a different conclusion.

Conclusion

16. I therefore consider that the obligation as it relates to the original planning permission meets the policy tests of Circular 3/2012, remains justified in the current circumstances, and should be not be discharged.

Frances M McChlery
Reporter