



Decision by Mike Shiel, a Reporter appointed by the Scottish Ministers

- Appeal reference: PPA-270-2220
- Site address: Land to the north of Sun Dorne, Jamestown, Strathpeffer IV14 9EP
- Claim for expenses by Mr R MacDonald against Highland Council

Date of decision: 2 April 2020

Decision

I find that the council has not acted in an unreasonable manner resulting in liability for expenses and, in exercise of the powers delegated to me, I decline to make any award.

Reasoning

1. Circular 6/1990 states that in planning proceedings the parties are normally expected to meet their own expenses. Awards of expenses do not necessarily follow the decision on the planning merits. Before an award of expenses is made three conditions will normally need to have been met. In terms of the first of these conditions, the claim in this case has been made at the appropriate stage of the proceedings.
2. The second condition is that the party against whom the claim has been made has acted unreasonably. On behalf of the appellant it is argued that the council's behaviour was unreasonable because the disputed part of the condition, which was the subject of the appeal, did not meet the required tests contained in Circular 4/1998: The Use of Conditions in Planning Permissions; in particular, it was not necessary, relevant to the development, relevant to planning or reasonable in all other respects.
3. The appellant's arguments in this respect follow those put forward in the appeal against the condition. The council has defended its decision to impose the condition as worded. I have considered the disputed wording of the condition against the tests in Circular 4/1998, and have concluded that it complied with those tests. It follows that I do not consider that the council's behaviour was unreasonable.
4. I therefore conclude that the council is not liable for expenses.

M D Shiel
Reporter





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- Planning appeal reference: PPA-270-2220
- Site address: Land to the north of Sun Dorne, Jamestown, Strathpeffer IV14 9EP
- Appeal by Mr R MacDonald against the decision by Highland Council, dated 4 November 2019, to grant planning permission reference 13/02314/FUL subject to conditions.
- The development proposed: Formation of four serviced house plots
- The condition appealed against is: see paragraph 1 below

Date of appeal decision: 2 April 2020

Decision

I dismiss the appeal and refuse to vary the terms of the planning permission.

The appellant has submitted a claim for an award of expenses against the council. I have issued a separate decision on that claim.

Preliminary

As a result of the restrictions imposed because of the Covid-19 epidemic, I was unable to carry out a site inspection for this case. I have, however, been able to view photographs of the site. The principal parties have indicated that they are content for me to determine the appeal without a site inspection.

Reasoning

1. On 4 November 2019, the council granted planning permission for the formation of four serviced house plots at the above-mentioned site. The permission was subject to 11 conditions, of which the first is:

“1. No development shall commence until full details of the road improvements at the junction of the A834 with the eastern Jamestown Access Road (U3066) shown on drawing 2358:103 approved under application 12/02388/FUL (or another such scheme which has been submitted to and approved in writing by the Planning Authority) together with the additional widening of the U3066 to the proposed site access, provision of a rural bus layby on the A834 and provision of a footway from the proposed site access to the bus layby, as shown on drawing PL007 Rev O submitted with the planning application have been submitted to and agreed in writing by the Planning Authority in consultation with the Roads



Authority. For avoidance of doubt these works shall include provision of the visibility splay of 4.5m x 120m at the junction of the U3066 with the A834, appropriate road drainage and the relocation of all the equipment and street furniture affected by the road junction improvement. The detailed proposals shall comply with the Council's Roads and Transport Guidelines for New Developments. Thereafter the junction improvements and the provision of the footway and the bus layby shall be formed in accordance with these details and be available for use before any other works commence.

Reason: in the interests of road safety.”

2. The appeal is solely against that part of the final sentence of the above-mentioned condition which requires the provision of the footway and bus layby before any other works commence on the approved development.

3. I consider that the determining issue in this case is whether the disputed part of condition 1 meets the six tests set out in Circular 4/1998: The Use of Conditions in Planning Permissions; having regard to the provisions of the development plan and any other relevant material considerations. Before considering this issue, however, I think that it is helpful to briefly summarise the history of recent development at Jamestown.

Recent development at Jamestown

4. Jamestown is a small settlement containing some 36 houses, situated on the east side of the A834 road to the south of Strathpeffer. It is served by two access points from that road, which form a loop through the settlement. The appeal site is adjacent to the northernmost of those accesses.

5. The council has explained that because of the deficiencies of the junctions with the A834, the Mid-Ross Local Plan 1990 stated that, without any improvements, Jamestown was capable of accommodating a maximum of an additional three houses. Sites for these houses were allocated and developed. The subsequent Ross and Cromarty East Local Plan contained no specific policies for development at Jamestown, and this has been carried forward into the current Inner Moray Firth Local Development Plan 2015.

6. Proposals for new houses at Jamestown were therefore refused permission. However, in 2012 planning permission was granted for improvements to the junction adjacent to the appeal site (application 12/02388/FUL, referred to in condition 1 above). Thereafter, permission has been granted for a number of additional houses in the settlement; most recently in October 2017. These permissions have been subject to conditions that require details of the improvements to the northern road junction to be submitted and approved, and thereafter to be implemented, before any other works commence on the development. None of these earlier permissions contain conditions relating to the provision of a bus layby and footway link. A total of five houses was approved between 2011 and 2017.

7. The application for development on the current appeal site, although submitted in 2013, was not considered by the North Planning Applications Committee until 10 January

2017. Because of the need to negotiate a planning obligation under section 75 of the Town and Country Planning (Scotland) Act 1997, as amended, relating to a financial contribution towards affordable housing, the permission was not issued until November 2019. By this time, as indicated above, a further five houses had been approved at Jamestown.

8. The planning officer's Committee report on this development in 2017 does not contain any reference to the bus layby/footway link. However, the Minutes of the Committee Meeting make reference to a recommended amendment to condition 1 to include that provision. This amendment was approved as the basis for issuing permission.

The development plan

9. The development plan for this area comprises the Highland-wide Local Development Plan 2012 and the Inner Moray Firth Local Development Plan 2015, together with any associated statutory supplementary guidance. The latter plan contains no specific proposals for Jamestown, which is identified as being within the Hinterland; defined as areas of land around settlements that fall under pressure from commuter driven housing development, as defined in the Highland-wide Local Development Plan. In that plan Policy 35 deals with housing in the countryside (Hinterland areas). The council considered that the development of four house plots on the appeal site would "round-off" the existing group of houses at Jamestown, and would therefore accord with its statutory Supplementary Guidance on Housing in the Countryside and Siting and Design. Whilst there were a significant number of objections to the original application (which I refer to further below) I see no reason to disagree with the council's view that, in land use terms, the development of this site for houses is acceptable in principle.

10. The appellant has made reference to Policy 31 (Developer contributions) in the Highland-wide Local Development Plan. The first part of this policy states:

"For development proposals which create a need for new or improved public services, facilities or infrastructure, the Council will seek from the developer a fair and reasonable contribution in cash or kind towards these additional costs or requirements. Such contributions will be proportionate to the scale and nature of the development proposed and may be secured through a Section 75 obligation or other legal agreement as necessary. Other potential adverse impacts of any development proposal will normally be addressed by planning condition but may also require a contribution secured by agreement."

11. It is argued that the council could have used a planning obligation to secure a developer contribution towards the bus layby/footway link, but did not choose to do so. I deal with this issue further below, when considering the wording of the condition in relation to the tests in Circular 4/1998.

Circular 4/1998: The Use of Conditions in Planning Permissions

12. The circular sets out six tests which conditions on planning permissions should meet. There is no dispute between the parties that condition 1 is enforceable and precise.

I therefore focus my attention on the other four conditions, although not in the order contained in the circular.

Is the condition, as worded, relevant to planning, and to the development to be permitted?

13. The appellant argues that the condition meets neither of these tests. It is suggested that the requirement for the bus layby/footway link was imposed to meet the responsibilities of the roads authority, which would otherwise provide and adopt these facilities and make them available for the public to use. Any planning requirement has been met by identifying on the approved site layout plan an area of land to be reserved for these facilities.

14. At present southbound buses require to stop on the carriageway of the A834. I understand that passengers waiting to board buses currently have to stand close to the northernmost access road to Jamestown, next to the appeal site. This area will be affected by the proposed junction improvement, which involves widening of the U3066 and the provision of the necessary visibility splays. According to representations from local residents there are currently three bus services on the A834, as well as school buses.

15. I do not agree with the appellant's line of argument that the provision of safe stopping and waiting facilities for buses is solely the concern of the roads authority. Encouragement of the use of public transport is clearly a legitimate planning interest, especially with the increasing concern over climate change.

16. As to whether the condition is relevant to this particular development, I note that paragraph 24 of Circular 4/1998 states:

"24. It is not, therefore, sufficient that a condition is related to planning objectives: it must also be justified by the nature of the development permitted or its effects on the surroundings."

It further states that it would be wrong to impose conditions to meet a need that already exists, or where the need for the action would not be created by the new development.

17. In general terms, the development of an additional four houses at Jamestown is likely to increase the number of vehicles using the adjoining junction with the A834, thereby increasing the potential conflict with passengers waiting in the vicinity to board buses. It may also increase the number of potential passengers. As such I consider that there is a relevant link between the proposed development and the facility being sought by the disputed condition. Whether that link is sufficient to make the condition necessary and reasonable in all other respects I consider below.

Is the condition, as worded, necessary and reasonable in all other respects?

18. A key question in relation to the first test in Circular 4/1998 is whether, in the absence of the particular condition, planning permission for the development would have had to have been refused. I note the appellant's argument that neither the original Committee report nor the Minutes of the Committee Meeting contains any justification

for the requirement for the bus layby/footway link. The reason given for condition 1 (“in the interests of road safety”) is very general, although I acknowledge that the provision of these facilities is a matter of road safety.

19. The appellant has pointed out that, during the long period when this application was under consideration, permission was granted for five additional houses in Jamestown. Although in each case there is a requirement for the junction improvement, there is no mention of the need for the bus layby/footway link. The council has argued that it could not impose such a condition in these earlier cases because, unlike the junction improvement which will be on land owned by the council, the land for the layby/footway was in third party ownership, over which the earlier applicants had no control. Conversely, that land is owned by the current appellant, and such a condition is therefore reasonable in the circumstances of this case.

20. I am not convinced by the council’s argument in this respect. There is no legal impediment to imposing a suspensive condition on a planning permission requiring something to be done before the development can be implemented, if that is a reasonable requirement, even though the applicant may not be in a position to undertake the prior works needed.

21. I do accept, however, that given the incremental increase in the number of houses approved (one in 2011, two in 2013, and two in 2017) it might have been more difficult for the council to argue the need for the bus layby/footway link in each case. The issue is whether the current proposal, which nearly doubles the number of proposed houses in Jamestown, has crossed a threshold, making the provision of this facility essential as the council has argued.

22. There is no quantitative evidence before me on bus usage in Jamestown. I doubt, in any event that, given the small size of this settlement, any quantitative evidence would be of assistance in determining whether the stage has now been reached that better and safer provision for bus stopping and waiting facilities should be provided. It is essentially a matter of judgement whether a “tipping point” has occurred, whereby no further development should take place in Jamestown unless such improved facilities are provided. I appreciate that, in a situation where small incremental changes are being made, it can be difficult to decide when such a point has been reached. However, on balance, I accept the council’s argument that, whilst the number of houses involved in this development (four) may be small, in the context of Jamestown it represents a significant increase in the size of the settlement. Consequently, I conclude that it is necessary to ensure that the new bus layby/footway link is implemented before the approved development on the appeal site takes place.

23. The appellant has argued that the cost of providing these facilities, which has been estimated as £40,750, is unreasonable and disproportionate to the overall development costs of the scheme. A viability assessment of the development has been submitted, which was prepared in association with negotiations with the council about the amount of the commuted sum to be paid towards the provision of affordable housing as part of a planning obligation. This estimated the total cost of off-site works to be £118,221. This included the

provision of the bus layby/footway link, off-site drainage provision, and the full cost of the road junction improvement. In combination with the on-site development costs, the assessment concluded that, taking account of the likely value of each of the development plots, the overall site value was nil, and that the scheme was not viable in terms of acquisition by a developer.

24. The council has stated that the cost of providing the bus facilities was taken into account in negotiating the amount of the commuted sum for affordable housing, which was accordingly substantially reduced from what would otherwise have been required. It is not part of my remit to consider the negotiations that took place on this matter, but in relation to the viability assessment I note two points:

- In assessing the value of the development plots, it assumed that one would be reserved for affordable housing, as was originally the intention; whereas it was subsequently agreed that this would be replaced by a commuted sum for the provision of affordable housing elsewhere in lieu of on-site provision.
- The off-site costs appear to include the whole cost of carrying out the necessary junction improvement.

25. In terms of this latter provision, the need for the upgrading of the U3066/A834 junction is also a prior requirement before development can be started on the other approved housing sites in Jamestown. It is therefore arguable that the owners/developers of these site should bear a proportionate share in the costs of the necessary works, as has been pointed out by the council. The appellant has submitted evidence to show that meetings have taken place between the interested parties on this issue, but I do not know what the outcome has been.

26. It is evident that, from the time of the pre-application discussions on this development in 2013, the need for the bus layby was raised by the council. The consultation response from the roads authority in 2013 is explicit in stating that the developer should provide the bus layby and footway link. I also accept, however, that the appellant's understanding was that provision for this facility should be shown on the drawings, but this did not imply a commitment to provide it. The Design and Access Statement submitted with the application makes reference to the *reservation* of land for the formation of a rural bus layby and for a footpath to link to it.

27. It is perhaps unfortunate that what appears to have been a mutual misunderstanding was not resolved much earlier, especially as the application was under consideration for some six years. However, I must deal with the situation as I now find it. As it stands, the wording of condition 1, including the disputed section, has the effect of suspending work on the approved development until certain prior works have been carried out. It is a suspensive condition. As such it does not directly require the appellant to carry out or pay for the bus layby/footway link. Rather, it means that he cannot implement the approved development until the off-site works have been undertaken, however that might be achieved.

28. I fully understand that the condition represents a significant impediment to the implementation of the development but that does not, of itself, mean it is unreasonable. It is for the appellant (or a subsequent developer) to choose whether or not to proceed with the development and, if the former, how to overcome the impediment (including the possibility of seeking other sources of finance for the off-site works). I have concluded above that the stage has been reached in Jamestown where the provision of four additional houses on this site should not proceed unless improved bus facilities have been provided.

29. All told, therefore, I am satisfied that the terms of condition 1, as currently worded, meet the six tests set out in Circular 4/1998.

Compliance with the development plan

30. As indicated in paragraph 10 above, Policy 31 of the Highland-wide Local Development Plan makes provision for developer contributions where development proposals create a need for new or improved public services, facilities or infrastructure. In this case, I consider that the development of four houses on the appeal site has created a need for new public facilities in the form of the bus layby and footway link. Whilst the council could have sought to include this provision in a planning obligation, the policy states that potential adverse impacts can also be dealt with through planning conditions, as in this case. I conclude that the disputed condition does not conflict with the Policy 31, and is therefore in accordance with the relevant provisions of the development plan.

Material considerations

31. At the time that the planning application was under consideration by the council, 21 representations were received from 13 local residents in Jamestown objecting to the development. These raised a number of matters, including the principle of the development and its impact on the character of Jamestown, the number of houses proposed (which was originally six), drainage and flooding issues, and the impact of wildlife. In addition, all raised concerns about the impact of additional traffic on the narrow road through Jamestown, and its junction with the A834.

32. These issues were addressed in the Committee report of January 2017, when it was recommended that planning permission be granted for four houses, subject to the necessary conditions and the signing of a planning obligation. This recommendation was accepted by the North Planning Applications and permission was eventually granted, including with an amended condition 1 as referred to in paragraph 8 above. I do not consider that it is necessary for me to re-open the question of whether planning permission should be granted.

33. In connection with the present appeal, a further eight representations have been received. All stress the need for the provision of the bus layby and footway link in the interests of bus users, including school children. Whilst this public concern is not determinative of the need for these facilities, I consider that it supports my view that a stage has now been reached where they need to be provided before four further houses are built at Jamestown.

Overall conclusion

34. I therefore find that condition 1 of the planning permission no. 13/02314/FUL, dated 4 November 2019, as currently worded, meets the six tests set out in Circular 4/1998, and that there are no overriding reasons to warrant amending that condition. I have considered all the other matters raised, but there are none which would lead me to alter this conclusion.

M D Shiel

Reporter