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Planning Obligation Appeal
Notice of Determination

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

- Planning obligation appeal reference: POA-270-2007
- Site address: (1) Corrieview, Claggan Road, Fort William, PH33 6PH (registered under title number INV18919) (2) Unit 4, Claggan Road, Fort William, PH33 6PH (registered under title number INV5529) and (3) subjects north of Claggan Road (and south of Ardnevis Road) Fort William (registered under title number INV15495)
- Appeal by John McLean Bamber and Margaret Bamber against the decision by the Highland Council to refuse an application dated 20 October 2021 for discharge of the planning obligation detailed below
- Application to discharge the planning obligation detailed below refused by notice dated 15 July 2022
- Planning obligation details: The planning obligation contained in the agreement between the Highland Council, John McLean Bamber and Margaret Bamber registered over title numbers INV5529 and INV15495 on 3 June 2008.
- Date of site visit by Reporter: 29 November 2022

Date of appeal decision: 1 February 2023

Determination

I allow the appeal and determine that the planning obligation contained in the agreement referred to above is discharged.

Background

1. I understand planning permission to have been granted for the erection of the house, now named Corrieview, on Claggan Road, on 9 June 2008. Before the permission was granted, the applicant had entered into a section 75 agreement with the council. The intended effect of the agreement was to prevent separate sale of the house so permitted from a neighbouring industrial unit. This unit is the easternmost unit of a row of industrial units to the west of Corrieview and has the address Unit 4, Claggan Road. The intended purpose of the obligation was, in the words of the council's report of handling, "to ensure that the commercial operation of the industrial unit [was] not unduly restricted and to safeguard neighbouring amenity". I understand the amenity referenced to be that of Corrieview in respect of any impact from operations in Unit 4.

2. At the time of the agreement's registration, Unit 4 was owned in common by John McLean Bamber and John Lorrimer Hogg. It appears that this is still the case (or was on 18 August 2021). It was registered under title number INV5529.

3. The land on which Corrieview now stands is registered under title number INV18919. Since 9 May 2007 it has been owned in common by John McLean Bamber and Margaret Bamber. It was split off, apparently on 12 June 2006, from title number INV15495.

4. Title number INV15495 comprises land between Claggan Road and Ardnevis Road, lying to the north of land registered under title number INV5529 (and of the other industrial units further west along Claggan Road) and to the west of Corrieview (registered under title number INV18919). It is owned by John McLean Bamber and John Lorrimer Hogg.

5. The planning obligation comprised in the agreement was clearly intended to bind the land registered under title numbers INV5529 and INV18919. However, an error occurred and the agreement was in fact registered over title numbers INV5529 and INV15495. It is not clear whether this arose from a mutual error of the parties in entering into the agreement, from an error by representatives of the parties in registering the agreement, or from an error by the Keeper of the Registers. I have only seen the title sheets extracted from the Land Register, not the original deed, and so I am not in a position to say whether the error was contained in the agreement or arose subsequently.

6. The appellant is now seeking the discharge of the planning obligation.

Reasoning

7. The determining issue in this appeal is whether the obligation complies with the five policy 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.

8. It appears from the evidence provided to me that the agreement (at least in the way it has been registered) does not effectively prevent the separate sale of Unit 4 and Corrieview (in which case it would plainly serve no purpose). However, it may be that the Land Register could be corrected so that the agreement would attach to title number INV18919 as well as or instead of title number INV15495, to reflect what was evidently the intention of the parties at the time it was entered into. It may also be, because the ownership of neither Unit 4 nor Corrieview has apparently changed since the agreement was entered into, the parties remain personally bound by the agreement, even if (presently) their successors are not. For this to apply, I believe the original agreement would have had to have referred to title number INV18919 and the error would have had to have arisen in the registration process.

9. Be that as it may, it seems to me that even if the register can be corrected or if the obligation is enforceable against the current parties to the agreement, the obligation would face another technical difficulty in achieving its purpose. The owners of Unit 4 and of Corrieview are in fact different – or at least, there is one co-owner of both properties (John McLean Bamber), but each property has another co-owner who is different (John Lorimer Hogg and Margaret Bamber respectively). There are two problems that arise as a result.

10. First, the obligation seeks to prevent separate transfer, assignation, sale or disposition of the two properties – but it seems to me that it must be ineffective in preventing at least some separate transfers of the ownership interests. In particular, if either John Lorrimer Hogg or Margaret Bamber were to die or to become bankrupt, there would be a separate transfer of their interest to their separate heirs or creditors respectively by operation of law, which could not be prevented by the obligation.

11. Second, it appears to me that, as regards the purpose of the agreement, any restriction that might arise on the operation of Unit 4 from proximity of the Corrieview would arise in the context of a complaint by the occupants of the house about nuisance emanating from Unit 4. However, if a nuisance were to be caused by industrial operations in Unit 4 to Corrieview, then the agreement does not prevent such a complaint being made. There would be nothing in law presently to prevent Margaret Bamber (or her heirs or other successors in title) as co-owner of Corrieview either raising an action for nuisance or complaining to the council of a statutory nuisance under section 79 of the Environment Act 1990. She (or they) would not be prevented from doing so just because John McLean Bamber (or his heirs or successors in title) is a co-owner of both properties. He cannot acquiesce on behalf of other co-owners of Corrieview to such a nuisance. There is nothing in the agreement to indicate that Margaret Bamber, let alone her successors in title, must acquiesce to such a nuisance.

12. I therefore find that the obligation is ineffective in its purpose of ensuring that the commercial operation of the industrial unit is not unduly restricted as a consequence of the proximity of the house. Consequently I find that the obligation does not meet the policy tests that it should be necessary and reasonable. I therefore grant the appeal and discharge the obligation.

13. Even if I had not found the planning obligation was ineffective, I would still have granted the appeal. The scale of the industrial unit is small. There is no land outside the building itself that could have been used for industrial operations, and therefore operations would have been contained within the building. The house at Corrieview is separated from the unit by a driveway. Its windows are double-glazed. It seems to me that these are factors that would limit the likelihood of a nuisance arising to residents in the house itself. I acknowledge that the terrace attached to Corrieview, particularly the part nearest Unit 4 (which is likely to be the most attractive part for sitting out, since it faces south and would not be so much in the shadow of the house) could potentially be affected by noise or other effects of operations in Unit 4. Nonetheless, it seems to me that the provisions of paragraph 49 to 51 of circular 3/2012 would apply, since restricting the transfer of the house is effectively a restriction on its occupancy or use. It seems to me that the restrictions are likely to be intrusive for the owners of Corrieview – not just in terms of restricting onward sale of the house or its transfer to other members of the family, but also in terms of obtaining mortgage finance, and so restricting its usefulness as an asset. Clause (Three) of the agreement, which permits the council to inspect the house at any time (on reasonable notice) is highly intrusive. It appears to me that in balancing the interest of protecting industrial use of Unit 4 and the burden placed on the owners of Corrieview, the balance would favour the discharge of the agreement. I consider that such a balance is an element of the test of reasonableness in circular 3/2012.

14. There was no similar restriction in respect of the industrial units lying just to the west or in respect of Howden's Joinery, lying about fifty metres to the east (with an open yard at closer proximity to Corrieview. I agree with the appellant that the new flats in the Achriach development are in a not-dissimilar relationship to Howden's Joinery as Corrieview is to Unit 4. It has not been considered necessary to impose a similar obligation on them or make other provision to prevent an impact on the joinery's operation. This confirms me in my view that it would have been the right course for me to discharge the obligation even if I had not already found that the obligation was ineffective.

15. I make no criticism of the council's approach at the time of grant of permission for the house of requiring the obligation to prevent any restriction of the operation of the industrial

unit while permitting the house to be built. It seems to me that the council took a pragmatic and flexible approach at the time it granted permission. The policy set out in circular 3/2012 paragraphs 49 to 51 was made after the council's decision to require the obligation, and it seems to me that it represents a relevant change of circumstances since the time the obligation was entered into (if, indeed, any change of circumstances is required for me to reach a decision to discharge the obligation).

Conclusion

16. For the reasons set out above, I grant the appeal and discharge the obligation.

Robert Seaton
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 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 Land Register of Scotland is available from the Registers of Scotland, www.ros.gov.uk.