Archibald B (Brian)

From: Archibald B (Brian)
Sent: 13 May 2016 14:00
To: Andrew Brownrigg (ABROWNRIGG@aberdeencity.gov.uk)
Cc: Donna Laing (DLaing@aberdeencity.gov.uk); 'RDickson@nestrans.org.uk'; 'john.findlay@ryden.co.uk'; 'elaine.farquharson-black@burnesspaull.com' (elaine.farquharson-black@burnesspaull.com)
Subject: FW: PROPOSED ABERDEEN LOCAL DEVELOPMENT PLAN - FURTHER INFORMATION REQUEST 14 - ISSUE 22 – INFRASTRUCTURE DELIVERY AND ISSUE 23 TRANSPORT ACCESSIBILITY

Tracking:

Recipient	Delivery
Andrew Brownrigg (ABROWNRIGG@aberdeencity.gov.uk)	
Donna Laing (DLaing@aberdeencity.gov.uk)	
'RDickson@nestrans.org.uk'	
'john.findlay@ryden.co.uk'	
'elaine.farquharson-black@burnesspaull.com' (elaine.farquharson-black@burnesspaull.com)	
[redacted]	[redacted]

Sent to: Aberdeen City Council

Cc: Nestrans (representee 059)
Stewart Milne Homes (representee 085)
Elaine Farquharson Black (representee 129)

For information only at this stage. No further information is being sought from parties beyond the council at this stage. Depending on the council's response, it may be that other parties will be given the opportunity to comment on this in due course.

LDP-100-2

13 May 2016

Dear Andrew

PROPOSED ABERDEEN LOCAL DEVELOPMENT PLAN
THE TOWN AND COUNTRY PLANNING (DEVELOPMENT PLANNING) (SCOTLAND) REGULATIONS 2008
NOTICE: FURTHER INFORMATION REQUEST 14 - ISSUE 22 – INFRASTRUCUTRE DELIVERY AND ISSUE 23 - TRANSPORT ACCESSIBILITY

I am writing regarding the above plan which has been submitted to DPEA for examination by Scottish Ministers. Under Regulation 22 of the Town and Country Planning (Development Planning) (Scotland) Regulations 2008, the appointed reporter can request, by way of notice,

further information in connection with the examination. This request is a notice under Regulation 22.

The reporter has identified that further information, as listed below, should be provided by the council. It would be helpful if you could send this information to me to pass on to the reporter by 5pm on 27 May 2016.

Please e-mail your response, however, if it is more than 10 pages or in colour, please also provide a hard copy. Please note that DPEA cannot accept hyperlinks to documents or web pages. When replying to this request please quote the request number above.

Background

The reporter has decided to accept the submission from Burness Paull LLP of 10 May relating to the strategic transport fund and the attached decision of the court of session dated 29 April 2016 (please see the attached email and the court decision).

The reporter notes that the strategic transport fund was established under supplementary guidance to the strategic development plan, and that its contents do not fall within the scope of this examination. However, while the strategic transport fund is not mentioned in Policy I1 of the proposed plan or the subsequent section entitled 'Supplementary Guidance', it is referred to under 'Managing the Transport Impact of Development'. At least one representation (85) has called for "the requirement for contributions to [the fund to] be removed from the plan.

Information requested

The council is invited to comment on any implications for the content of the plan arising out of the court of session decision of 29 April and the email from Burness Paull LLP of 10 May. Please ensure the council also send a copy of its response to the other parties copied in to this email.

Please acknowledge receipt of this request and confirm that your response will be provided within the time limit.

A copy of this request will be published on the DPEA website, together with a copy of the council's response.

http://www.dpea.scotland.gov.uk/CaseDetails.aspx?id=117092

Please do not hesitate to contact me if there is anything you would like clarified.

Brian Archibald
Development Plan Officer

The Scottish Government
Planning and Environmental Appeals Division
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Archibald B (Brian)

From: Archibald B (Brian)
Sent: 10 May 2016 14:21
To: 'elaine.farquharson-black@burnesspaull.com' (elaine.farquharson-black@burnesspaull.com)
Cc: 'Jennifer Bell'
Subject: FW: Proposed Aberdeen Local Development Plan 2016 (PAU/1010/00274)
Attachments: STF Appeal Decision of First Division of the Inner House of the Court of Session.PDF

Importance: High

Tracking:

Recipient	Delivery
'elaine.farquharson-black@burnesspaull.com' (elaine.farquharson-black@burnesspaull.com)	
'Jennifer Bell'	
[redacted]	[redacted]

Hello Elaine

I acknowledge receipt of your e-mail. I will pass this to the reporters

Thanks
Brian

From: Elaine Farquharson-Black [mailto:Elaine.Farquharson-Black@burnesspaull.com]
Sent: 10 May 2016 12:53
To: Archibald B (Brian)
Cc: Jennifer Bell
Subject: Proposed Aberdeen Local Development Plan 2016 (PAU/1010/00274)
Importance: High

Dear Mr Archibald

Proposed Aberdeen Local Development Plan 2016
Objection Reference: LDP-100-2 – Policy I1 and Supplementary Guidance on Infrastructure Delivery and Planning Obligations

I refer to the objection which my firm submitted to Policy I1 and Supplementary Guidance on Infrastructure Delivery and Planning Obligations in the Proposed Aberdeen Local Development Plan. The objection has been allocated reference number LDP-100-2. In paragraph 6 of the objection, we highlighted concerns with the Council's proposal to seek contributions to towards the Strategic Transport Fund (STF), highlighting that the supplementary guidance underpinning the STF had been criticised by the Reporter during the Examination into the Strategic Development Plan (Document BP1). The Scottish Ministers required the Strategic Development Plan Authority to prepare new supplementary guidance in order to be able to adopt it as statutory guidance pursuant to the SDP.

The supplementary guidance was revised and was adopted as part of the SDP despite objections from a number of landowners and developers and a statutory challenge to the guidance was raised in the Court of Session.

Since the submission of our representations on the Proposed LDP, the Inner House of the Court of Session has issued its decision on the statutory challenge. As this decision has only recently been issued, we wish to bring it to the

attention of the Reporters as we consider it to be very relevant to this LDP examination. Indeed, it may be that the Council has already highlighted the decision to the Reporters. A copy of the decision is attached.

The Court of Session ruled that the supplementary guidance on the STF is contrary to Circular 3/2012 and is therefore unlawful. The Court found that it was *"difficult to improve upon the reasoning of the Reporter"* at the SDP examination who concluded that there is a *"distinction..between sharing costs among developments which cumulatively require a particular transport investment and the funding of a basket of measures, not all of which are relevant to every development"*.

In light of the quashing of the STF guidance, there is no basis for the LDP and related supplementary guidance to seek contributions towards STF and the relevant sections require to be excised from the Plan and the supplementary guidance.

Kindly acknowledge safe receipt.

Yours sincerely

Elaine

Elaine Farquharson-Black
Partner
Burness Paull LLP

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FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2016] CSIH 28
XA75/15

Lord President
Lord Menzies
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Appeal under Section 238 of the Town and Country Planning (Scotland) Act 1997

by

ELSICK DEVELOPMENT CO LTD

Appellants;

against

ABERDEEN CITY AND SHIRE STRATEGIC DEVELOPMENT PLANNING AUTHORITY

Respondents;

and

GOODGRUN LTD

Interested Party:

Act (Appellants and Interested Party): Martin QC, GA Dunlop; Burness Paul LLP
Alt (Respondents): Gale QC; Morton Fraser LLP

29 April 2016

Background

[1] The respondents are the Strategic Development Planning Authority for Aberdeen city and county. In terms of sections 4 and 22 of the Town and Country Planning (Scotland) Act 1997, they are responsible for the production of, and any amendment or addition to, the

Strategic Development Plan (SDP) and any statutory Supplementary Guidance (SG) adopted in relation to it.

[2] The appellants are the developers of a new community on land around Elsick, Stonehaven. On 30 September 2013, they entered into an agreement with Aberdeenshire Council and others in terms of section 75 of the 1997 Act. Clause 13 of the Agreement provides that, in the event of Elsick being developed, the owners of the land are to pay certain sums to a Strategic Transport Fund (STF) in terms of non-statutory Supplementary Planning Guidance (SPG). The Agreement refers to the SPG "or any subsequent revision or replacement thereof". It also provides that no contributions need be paid if the SPG were found to be invalid.

[3] On 2 October 2013 the Council granted planning permission in principle for the development of over 4,000 houses, together with commercial, retail and community facilities on the site and detailed planning permission for a first phase, comprising 802 houses and other facilities.

[4] On 22 July 2011 the respondents published draft SPG entitled "Delivering Identified Projects through a Strategic Transport Fund" and based on a Cumulative Transport Appraisal (CTA) which had been completed in 2010. The CTA presupposed the realisation of predictions in what was then the Structure Plan. The vision was that, by the year 2030, there would be a significant increase in population and employment (6 to 9%) in the Aberdeen area and an even greater increase in the number of "households" (19 to 24%) in comparison with figures for 2007. The changes would see development around the periphery of Aberdeen and along the A96 and A90 corridors in Aberdeenshire. An Aberdeen Housing Market Area, envisaging development north to Ellon (including the interested party's site at Blackdog), west to Inverurie (through Kintore) and south to

Stonehaven (including Elsick), was identified. The various development zones would involve more car and public transport movements, which would require accommodation, if congestion were to be avoided.

[5] A number of strategic public transport "interventions" were accordingly mooted; notably orbital bus services and bus priority measures leading to development zones, including Blackdog and Elsick, and a new railway station at Kintore. Junction and route improvements at a series of locations on the three corridors (A90 north and south and A96 west) leading to these zones, including a new bridge across the Dee, were envisaged. A table (Table 7.2) detailed the proportion of new development traffic relative to existing levels. In respect of many of the development zones, the impact on the intervention locations was rated at zero. For the appellants' site at Elsick, it was zero for one intervention (the upgrade of the A947), 2% or less at 5 others, 7% for the new bridge and 79% for the bus priority "fastlink" to Elsick. The figures for Blackdog were all zero, apart from one which registered 1%.

[6] The draft SPG (Version 4.1, 22 July 2011) stated:

> "1.2 ... By sharing the financial burden widely across the region, no one development will be liable for the cost of a specific strategic project or delayed by its implementation. By being upfront about the mechanisms for making contributions, developers will have greater certainty over strategic transport requirements ...".

The idea was, and is, that all new housing, business, industrial, retail, commercial leisure developments in the Housing Market Area would be expected to make a contribution to all the interventions, estimated to cost around £86.6m up to 2023. The levels of contribution were tabulated. For a 3 bedroom house, for example, it would be just over £2,000 and for non-residential developments there were figures per hectare of particular use class projects.

[7] The SPG continued:

> "5.1 A planning obligation or legal agreement will be used to secure contributions; these will be paid into a dedicated [STF]. Developers will be allowed to defer payment of their contributions until such time as revenue begins to be generated by the site ...".

The funds were to be placed in a ring-fenced account and be available only for delivering the interventions identified.

[8] On 9 August 2011 the appellants expressed concerns in relation *inter alia* to: the draft SPG's compliance with the predecessors of the Scottish Government Circular "Planning Obligations and Good Neighbour Agreements" (Circular 3/2012); the CTA used in its preparation; and the mechanism for calculation and use of contributions to the STF. On 18 November 2011 they intimated formal objections. Nevertheless, in December 2011 the respondents approved the SPG. Their decision was ratified by both councils in January and March 2012.

[9] In February 2013 the respondents published their proposed SDP, which identified 3 strategic growth areas, including those along the traffic corridors already described. This stated that the respondents would prepare supplementary guidance which would allow, through a STF, transport projects:

> "5.9 ... needed as a result of the combined effect of new development in the strategic growth areas within the Aberdeen Housing Market Area to be funded and delivered".

The respondents anticipated that:

> "5.10 ... the increase in land value, as a result of granting planning permission, will fund a large percentage of the new infrastructure needed, ..."

On 10 April 2013, the appellants objected to the proposed SDP. They sought deletion of the basic funding plan as being contrary to the 2012 Circular.

[10] A reporter was appointed by the Scottish Ministers to conduct an examination of the proposed SDP and, in particular, what was referred to as "Issue 9"; that is the STF and the

proposed SPG. On 8 October 2013 the appellants made representations in relation to Issue 9, repeating their contention that the respondents' approach was contrary to the Circular. The respondents nevertheless remained of the view that they could look at cumulative impact over the whole Housing Market Area and require all developers to contribute towards the range of interventions, including those which were not directly linked to specific developments or groups of developments.

[11] On 13 December 2013 Nestrans (the transport partnership for Aberdeen city and county) commenced a consultation on the prioritisation of the interventions. On 16 January 2014 the appellants expressed surprise that the consultation was being undertaken whilst the principle of the STF was still being considered. They contended specifically that, other than intervention F (bus priority measures), the only two in the A90 corridor relevant to Elsick were A (the River Dee crossing) and B (A956 junction capacity improvements). The remaining interventions were all remote from the development.

[12] On 21 January 2014 the reporter determined that the mechanism envisaged in the SPG failed to comply with the Circular. He stated:

> "13 … there is a distinction to be made between sharing costs among developments which cumulatively required a particular transport investment and the funding of a basket of measures, not all of which are relevant to every development. According to table 7.2 of the [CTA], none of the individual development areas shown generate traffic that will make significant use of all the proposed new infrastructure…
> 14 … the mechanism currently envisaged by the authority in the [STF] would not comply with national policy as expressed in Circular 3/2012 because the relationship between the development supplying the contribution and the infrastructure improvement to be delivered is not sufficiently clear or direct."

He determined that a departure from Government policy had not been justified. The wording in the proposed SDP required to be supplemented in order to address this, and:

> "In particular, ... needs to establish that the fund will only be used to gather contributions towards infrastructure improvements that are related to the

> developments concerned and strictly necessary in order to make any individual development acceptable in planning terms."

The SDP was approved on 28 March 2014.

[13] On 24 September 2014 the respondents resolved to convert the SPG into statutory form; that is into supplementary guidance (SG) under section 22 of the 1997 Act. On 12 December 2014 they issued a consultation draft: "Supplementary Guidance: Strategic Transport Fund". The report to the relative planning meeting noted *inter alia* that the reporter had been critical of the absence of a relationship between the development supplying the contribution and the interventions. It continued:

> "this weakness in the case presented to the SDP examination has now been resolved. The consultants who prepared the original CTA have re-presented Table 7.2 of the original study from the perspective of individual development areas and demonstrated that all development impacts on all the required transport infrastructure, with the exception of the link between one development area and one intervention. The re-presentation of Table 7.2 form the CTA will be published as an Addendum to the CTA."

[14] The new look table (Table 3 in the SG and becoming the "Updated – Table 7.2") did not obviously address new development traffic as a proportion of the whole using the interventions. Rather, it was a "Proportion of New Development Traffic using Road Infrastructure (Compared against Total Level of New Development Area Traffic)". It was accepted by the respondents that it was an estimate of the proportion of the new development traffic, which would use the interventions, expressed as a fraction, not of the interventions traffic, but of the traffic from the particular new development. The figures for the Elsick site are all under 9% (the new Dee Bridge being 8.39%). For 3 of the 6 interventions analysed they are less than 1%. Those for the Blackdog development are not dissimilar.

[15] By letter dated 6 February 2015, a senior planner at the Scottish Government

commented on the SG, expressing support for "innovative approaches to address cumulative impacts on infrastructure" and setting out certain, transparent contributions. He wrote that the Government generally supported the principle of the SG. A few revisals were suggested, including changes (to para 7.3 *infra*) to make it clear that no contributions would be used to support interventions which were unrelated to the particular development.

[16] On 24 April 2015 the respondents approved the revised SG and sent it to the Scottish Ministers for ratification. They had welcomed the planner's comments as a "recognition of the legitimacy of considering the cumulative impacts of development under the Circular". They had concluded that "the modelling has demonstrated that there is a cumulative impact from all development areas to all interventions". The SG did not, therefore, "fail the tests of the Circular". By letter dated 2 June 2015, the Scottish Ministers advised the respondents that they could only adopt the SG when they had amended it to include the following sentence:

> "The use of any planning obligation shall follow the guidance in Circular 3/2012: ...".

The SG (para 6.1) was so amended. The respondents adopted the SG on 25 June 2015.

[17] In its final form, the SG explains (para 1.5) that its purpose is to set out a mechanism to ensure that the cumulative impact of development is "mitigated" in such a way as to facilitate development. In relation to its evidential base, it states:

> "3.2 [The CTA] appraisal demonstrated that new development across the north-east will have an impact on transport infrastructure and that movements rely on a network of road, rail and public transport with a high degree of interdependency between the two council areas. A package of defined transport projects was identified by the CTA (and now established in the SDP) to mitigate the cumulative impacts of new development and the purpose of this guidance is to provide a mechanism for securing contributions from development to fund the delivery of this infrastructure."

The SG repeats (in para 3.3) the reference to sharing the financial burden contained in the

2011 version (at para 1.2 *supra*) before stating the principle that all developers in the Housing Market Area would be expected to contribute according to house size or use class hectare. The requirement for a STF contribution was generally to be dealt with at the planning permission in principle stage, with details determined at the later stage when conditions would be formulated. The SG continues:

> "4.9 The STF contributions are specifically to deal with the cumulative impact on the wider transport network. This enables individual developments to focus on the extent of the network that would require mitigation measures in the local area identified through agreed traffic thresholds. The mitigation of these local impacts has to be dealt with by individual development regardless of whether this contributes towards the delivery of an STF project ... [W]here the mitigation measures proposed are more than would be required to address local impacts alone and this can be shown to contribute towards the delivery of a specific STF project, this can be recognised through the offsetting of a proportion of STF contributions."

In detailing the level of contributions, the SG states as an alternative that:

> "5.4 Developers can elect to assess and mitigate their cumulative impact outwith the STF, although this will require a considerably more comprehensive Transport Assessment and the design and delivery of the mitigation measures shown to be necessary ...".

In the section on how contributions will be used, the SG states (para 7.1) that they will be directed only to specified interventions, notably the Kintore station, new bus services and priorities, junction and capacity improvements on several roads, including the A90 and A96, and the new bridge over the Dee. It continues:

> "7.3 No contributions from development sites will be used to support projects where the development in question is predicted to gain no mitigation benefit from the infrastructure being provided and therefore is un-related to the development making the contribution. The CTA has shown that the delivery of each of the projects identified above is necessary to make all developments acceptable in planning terms (see Appendix 2)."

Appendix 2 contains Table 3. Appendix 3 states a general requirement for all developers in the Housing Market Area to pay contributions in accordance with a detailed table.

Contributions are to be held for 20 years, with unused sums "returned" after that time (para 6.4).

The Circular

[18] The terms of the Circular (3/2012) require to be quoted at some length. In its introduction, it states that "Planning authorities should promote obligations in strict compliance with the tests set out in this circular." It continues:

> "**SCOPE AND LIMITATIONS**
> ...
> 13 ... Where a planning obligation is considered essential, it must have a relevant planning purpose and must always be related and proportionate in scale and kind to the development in question. These principles are central to the guidance that follows.
>
> **POLICY TESTS**
> 14 Planning obligations ... should only be sought where they meet all of the following tests:
> - necessary to make the proposed development acceptable in planning terms (paragraph 15)
> ...
> - relate to the proposed development either as a direct consequence of the development or arising from the cumulative impact of development in the area (paragraphs 17-19)
> - fairly and reasonably relate in scale and kind to the proposed development (paragraphs 20-23)
> - be reasonable in all other aspects (paragraphs 24-25)
> ...
>
> **Relationship to proposed development test**
> 17 Planning obligations must relate to the development being proposed. Where a proposed development would either; create a direct need for particular facilities, place additional requirements on infrastructure (cumulative impact) or have a damaging impact on the environment or local amenity that cannot be resolved satisfactorily through the use of planning conditions or another form of legal agreement, a planning obligation could be used provided it would clearly overcome or mitigate those identified barriers to the grant of planning permission. There should be a clear link between the development and any mitigation offered as part of the developer's contribution. ...
> 18. Planning obligations should not be used to extract advantages, benefits or payments from landowners or developers which are not directly related to the

proposed development. The obligation should demonstrate that this test is met by specifying clearly the purpose for which any contribution is required, including the infrastructure to be provided.
...

Scale and kind test
20. Planning obligations must be related in scale and kind to the proposed development. Developers may, for example, reasonably be expected to pay for, or otherwise contribute towards the provision of, infrastructure which would not have been necessary but for the development. In assessing such contributions planning authorities may take into account the cumulative impact of a number of proposed developments, and use obligations to share costs proportionately. An effect of such infrastructure investment may be to confer some wider community benefit but contributions should always be proportionate to the scale of the proposed development. Attempts to extract excessive contributions towards the costs of infrastructure or to obtain extraneous benefits are unacceptable.
21. Planning obligations should not be used to resolve existing deficiencies in infrastructure provision or to secure contributions to the achievement of wider planning objectives which are not strictly necessary to allow permission to be granted for the particular development. Situations may arise where an infrastructure problem exists prior to the submission of an application for planning permission. Where the need to improve, upgrade or replace that infrastructure does not arise directly from the proposed development then planning authorities should not seek to address this through a planning obligation.
...

Reasonableness test
24 Planning obligations should be reasonable in the circumstances of the particular case. The following questions should be considered:

...
- in the case of financial payments, will these contribute to the cost of providing necessary facilities required as a consequence of or in connection with the development in the near future?
...

25 Where the answer to any of the questions would be no, a planning obligation is generally not appropriate."

Submissions

Appellants

[19] The development plan for an area consisted of the SDP, the local development plan and any statutory SG (1997 Act, s 24). It was supposed to be a "carefully drafted and considered statement of policy, published to inform the public of the approach which will be

followed ... in decision making unless there is a good reason to depart from it." (*Tesco Stores* v *Dundee City Council* 2012 SC (UKSC) 278 at para [18]). In order to be a relevant material consideration in relation to a planning decision, the terms of any section 75 Agreement had to relate to the proposed development. Circular 3/2012 reflected this principle. The fundamental point was that, if the requirement to pay contributions was flawed, the SG could not stand. The reporter had found the SG to be disconform to the Circular and the respondents had been required to insert a sentence whereby the Circular had to be followed. This was the only change. The SG was essentially a tax and as such unlawful (cf in England, the community infrastructure levy; Planning Act 2008, s 205).

[20] The first ground of appeal was that, in adopting the SG, the respondents had erred in law. The SG was contrary to national policy. It failed to comply with the requirement that any planning obligation must relate directly to the development proposed (Circular 3/2012, paras 17-19). There was nothing in the Circular to suggest that the respondents could obtain money for interventions not required by a particular development. The SG did not require that any contribution be fairly and reasonably related to a particular intervention or that such a payment should be used to fund an intervention that was required as a result of the development.

[21] Paragraph 7.3 of the SG suggested that the CTA demonstrated that the delivery of each of the projects identified was necessary to make all developments acceptable in planning terms. That was not logical. Even if all of the interventions were required for all the developments to be acceptable, that did not mean that they were required for any individual development to be acceptable. The SG said that the funds received would be pooled. There was no provision for individual agreements to specify which interventions they would be used to fund. It would be impossible to ascertain whether or not particular

funds had been used for any particular intervention.

[22] The second ground was that the use in the revised Table 7.2 of the proportion of traffic from each new development that would use the interventions was inappropriate and unreasonable. The appropriate measure was the proportion of total traffic using the intervention from the new development. That was the approach used in the original CTA. Reference to the percentage of traffic from a development which used an intervention, as opposed to the percentage of the total using the intervention, led to a number of illogical results. For example, where a high percentage of traffic from a development used an intervention, that could still be a low absolute number and a low percentage of the total traffic using that intervention. It did not indicate the significance of the impact of the new development on the road infrastructure.

[23] It was unreasonable to conclude that all the interventions were required to make any particular development acceptable. The Table indicated that in several instances significantly less than 1% of the traffic generated by one of the development zones would use the intervention. This was *de minimis* and no reasonable planning authority would rely upon that to justify a contribution to the cost of the infrastructure. In any event, such a condition would not comply with the requirements of the Circular.

[24] The third ground was that the respondents' response to the appellants' representations on the SG submitted to Scottish Ministers and the reasons for rejecting these representations were inadequate. The decision maker required to give proper and adequate reasons for a decision; that is, reasons which leave the informed reader in no substantial doubt as to what the reasons were (*South Bucks District Council* v *Porter (No. 2)* [2004] 1 WLR 1953 at para [36]). The respondents' statement that the SG

did not fail the tests of the Circular, did not address the critical question of the need for a link between the development and the intervention to which it required to contribute. The reasons given for regarding all the interventions as having a strong inter-relationship and being affected by all development zones were inadequate. They did not comply with the Circular and were unreasonable. The interventions lay in different directions from the city centre and related to different transport corridors. It was unreasonable to state that the modelling demonstrated that there was a cumulative impact from all development zones to all interventions when many of those impacts were less than 1%. An approach which required contributions based upon the cumulative impact of a number of developments did not comply with the Circular.

[25] The fourth ground concerned the rationality of the statement that the SG complied with the Circular. The letter from the Scottish Ministers approving the SDP but insisting upon the insertion of an additional sentence in the SG did not resolve the deficiency of the SPG as found by the reporter nor did it render the SG lawful. It added nothing. It was a statement about the correct approach to be taken, but did not cure the defects. The effect of paragraph 5.4 of the SG may be that a developer could opt to proceed along traditional lines. However, contributions to the STF did not result in a developer not being required to contribute to local interventions caused by the development. In any event, if the STF concept were unlawful, no developer should be paying into it (cf *Persimmon Homes (North East)* v *Blyth Valley BC* [2008] EWHC 1258 Admin, Collins J at paras 13 and 73). The money in the STF was to be pooled. Even if a developer succeeded in restricting his contribution to the costs of the impact of his particular development, the money paid would not necessarily be used for any project thus identified.

[26] In the circumstances, the statutory SG relating to the STF should be quashed. The

ground of appeal alleging inadequate consultation was not insisted upon.

Respondents

[27] The respondents had required to submit proposed SG to the Scottish Ministers (1997 Act, s 22(6); Town and Country Planning (Development Planning) (Scotland) Regulations 2008, reg 27). The Ministers could require the respondents to make modifications (*ibid* s 22(8)). The Ministers would not wish to allow SG to be adopted which was "significantly" contrary to planning policy (Circular 6/2013: Development Planning, para 143). A degree of latitude was thereby implied. Strict compliance was not necessary. The SPG conformed to national planning policy, was reasonable and was adopted without taint of any procedural impropriety.

[28] The draft SDP had been considered by a reporter prior to its adoption. He had concluded that the mechanism envisaged in the STF would not comply with Government policy, as expressed in Circular 3/2012, because the relationship between the development supplying the contribution and the intervention was not sufficiently clear or direct. The respondents had had regard to his comments. The reporter had concluded that the existing wording was acceptable, but there required to be additional wording to address what he regarded as well-founded concerns about the need for the principles in the Circular to be adhered to. The words added by the respondents fully addressed those concerns. The eventual wording was subsequently approved by the Scottish Ministers. Accordingly the Ministers must have been satisfied that the wording rendered the SPG compliant with the Circular.

[29] The SG made it clear that the STF was to fund projects which were required as a direct consequence of the combined effect of new development. As such the obligation to

make contributions was related to the use and development of the land. The new Table 7.2 was what it was, but it did establish a link between the developments and the interventions. The SG achieved an appropriate three stage approach which conformed to the Circular. First, the interventions were required as a result of the developments. Secondly, each particular development contributed to the need for the interventions. Thirdly, therefore each development should contribute to the solution.

[30] The STF was not mandatory on developers. It was accepted that this submission was not reflected in either the Answers to the appeal or the respondents' written Note of Argument. However, it was clear that this was the position from the terms of paragraph 5.4 of the SG. The SG did not require developers, who had carried out their own traffic impact studies, to contribute.

[31] The appeal should accordingly be dismissed.

Decision

[32] It is a fundamental principle of planning law that a condition attached to the grant of planning permission, whether contained in a section 75 Agreement or otherwise, must "fairly and reasonably relate to the permitted development" (*British Airports Authority* v *Secretary of State for Scotland* 1979 SC 200, LP (Emslie) at 210 citing *Pyx Granite CO* v *Minister of Housing and Local Government* [1958] 1 QB 554, Lord Denning MR at 572). This principle is reflected and explained by the Scottish Government Circular (3/2012) "Planning Obligations and Good Neighbour Agreements". This makes it clear to planning authorities that an obligation must be "related and proportionate in scale and kind to the development" (para 13) and "necessary to make the proposed development acceptable in planning terms" (para 14). The relationship to the development may be direct or as a result of "the

cumulative impact of development in the area" (*ibid*). The reference to cumulative impact is to a situation where a number of developments place "additional requirements on infrastructure" but, as a generality, there has to be a "clear link between the development and any mitigation offered as part of the developer's contribution" (para 17).

[33] It is specifically provided by the Circular that planning obligations should not be used to extract "payments … which are not directly related to the proposed development" (para 18). Although account may be taken of "the cumulative impact of a number of proposed developments" and costs may be shared "proportionately", the contributions have to be proportionate to the development (para 20). Obligations cannot be used to "secure contributions to the achievement of wider planning objectives which are not strictly necessary to allow permission … for the particular development" (para 21). They cannot be used where the need to improve infrastructure "does not arise directly" from the development (*ibid*). Financial payments cannot be demanded if they do not contribute to "necessary facilities" required in connection with the development (paras 24 and 25).

[34] The question in this case is whether any obligation upon what is a substantial development at Elsick, or a lesser one at Blackdog, to pay a contribution to a Strategic Transport Fund (STF), which is designed to pay for infrastructure upgrades on, for example, the A96 west of Aberdeen, is lawful, having regard to the terms of the Circular. The answer is that it is not. The STF, and the requirement in the statutory Supplementary Guidance (SG) to contribute to it, may be regarded as a sound idea in political or general planning terms. It may be seen as an imaginative idea which allows advanced strategic planning objectives to be achieved in a structured manner, financed by new development. That does not, however, permit the imposition of an obligation on a developer to contribute to an intervention which is simply not related to the proposed development. The Tables produced to demonstrate

any such relationship do not achieve that objective. It may be that legislation could authorise the type of contribution envisaged by the respondents (cf Planning Act 2008, s 205) but it has not yet done so in Scotland.

[35] In analysing the meaning of cumulative impact, upon which the respondents understandably place reliance, it is difficult to improve upon the reasoning of the reporter (para 3 of his report, *supra*) that there is a "distinction … between sharing costs among developments which cumulatively required a particular transport investment and the funding of a basket of measures, not all of which are relevant to every development". That is the essential flaw in the concept of contributions to the STF as a lawful planning obligation. The reality is that many of the planned developments in the designated zones have no impact at all on the interventions proposed as part of the STF's programme of improvements. This applies to both Elsick and Blackdog relative to a number of the interventions. In respect of others the impact is *de minimis*. This is evident from the original Table 7.2. The revised version, which will be considered below, does not assist the respondents in this area. Ultimately, as the reporter found (*ibid,* para 14), "the relationship between the development … and the infrastructure improvement … is not sufficiently clear or direct".

[36] The SG does include (para 6.1) the sentence imposed by the Scottish Ministers to the effect that any planning obligation must follow the guidance in the Circular. However, this aphorism cannot avoid the consequence that any use of an obligation to secure a contribution to the STF will inevitably breach the terms of that Circular. Equally, the apparent option to proceed outwith the STF (para 5.4) does not detract from the position that the SG, which requires STF contributions, is still unlawful. For these primary reasons, the first ground of appeal must be sustained.

[37] The general statement (in para 7.3) to effect that contributions will not be used to support projects not affected by the contributing development can have little meaning where the contributions are all pooled. The statement goes on to say that all the interventions are "necessary to make all developments acceptable in planning terms". For the reasons outlined above, that statement is materially flawed given the accepted lack of any impact on many of the interventions by several of the development zones and consequently the developments within them. In so far as the revised Table 7.2 has been employed to support the proposition, that the developments can only be regarded as acceptable in planning terms if each intervention is delivered, the basis for the SG is unreasonable. The new figures do not demonstrate a relationship between any, or all, of the new developments and the intervention proposed. The statistic, that a certain proportion of new development traffic will use a particular intervention, does not provide any material to support a contention that the intervention is necessary by reason of the new development by itself or when accumulated with the effects of other developments. In this respect, the second and fourth grounds of appeal fall to be sustained.

[38] The reasons given by the respondents for approving the SG and developing the idea of the STF are not inadequate in any formal sense. They do not "leave the informed reader in any substantial doubt as to what the reasons … were and what material considerations … were taken into account" (*Wordie Property Co* v *Secretary of State for Scotland* 1984 SLT 345, LP (Emslie) at 348). As outlined above, the reasons may be regarded as deficient in a number of ways, but they are not unintelligible or lacking in clarity. The third ground of appeal therefore falls to be rejected.

[39] In all these circumstances, the appeal is allowed and the Supplementary Guidance – Strategic Transport Fund is quashed.