



25 October 2017

PRESS SUMMARY

Aberdeen City and Shire Strategic Development Planning Authority (Appellant) v Elsick Development Company Limited (Respondent) (Scotland) [2017] UKSC 66
On appeal from [2016] CSIH 28

JUSTICES: Lord Neuberger, Lady Hale, Lord Mance, Lord Reed, Lord Hodge

BACKGROUND TO THE APPEAL

The Appellant is a strategic development planning authority for the Aberdeen region. In February 2013, it produced draft supplementary planning guidance in support of its proposed strategic development plan for its area. This guidance allowed for a Strategic Transport Fund (“the Fund”) to deliver infrastructure needed because of proposed development in four strategic growth areas. In substance, the guidance required developers to enter into planning obligations under the Town and Country Planning (Scotland) Act 1997 (“the 1997 Act”) with the Appellant to make financial contributions to the Fund. Such contributions were to be pooled and spent on required infrastructure.

The Respondent property developer objected to the draft supplementary planning guidance. It sought removal of reference to the Fund from the proposed strategic development plan on the basis that it was contrary to Scottish Government guidance on planning obligations (“The Circular”). The Respondent asserted that the contribution it was required to pay to the Fund was disproportionate to the infrastructure demands created by its development. In the meantime, the Respondent voluntarily entered into a planning obligation under s75 of the 1997 Act to contribute to the Fund in terms of the draft supplementary guidance but on the basis that no contributions would be paid if the guidance was found to be invalid.

The Appellant adopted the supplementary guidance after making an amendment advised by the Scottish Ministers to the effect that the use of any planning obligation should follow the advice in the Circular. As adopted, the supplementary guidance listed the cumulative infrastructure requirements identified by the cumulative transport appraisal (“CTA”) for the area. These requirements had been revised following criticism by the Reporter appointed by the Scottish Ministers that it had not been demonstrated that there was a clear and direct relationship between the development contributing to the Fund and the infrastructure which would be delivered.

Upon appeal by the Respondent, the Inner House of the Court of Session quashed the supplementary guidance on the basis that, notwithstanding the amendments made thereto, the obligation to contribute to the pooled Fund breached the Circular and such a planning obligation must fairly and reasonably relate to the permitted development. The Appellant appealed to the UKSC and argued, amongst other things, that the policy tests in the Circular were not part of the legal tests for the validity of a planning obligation.

JUDGMENT

The Supreme Court unanimously dismisses the Appellant’s appeal. Lord Hodge gives the lead judgment with which the other Justices agree.

REASONS FOR THE JUDGMENT

An approved strategic development plan is of central importance to planning decisions under the 1997 Act [25]. Supplementary guidance deals with the provision of further information in respect of proposals set out in the plan [24].

Planning obligations in terms of s75 of the 1997 Act do not necessarily need to relate to a particular permitted development on the burdened land. A planning obligation may be entered into in circumstances which are not connected with any planning application [38]. For instance, a planning authority may contract for the payment of financial contributions towards certain infrastructure necessitated by the cumulative effect of various developments, so long as the land which is subject to the obligation contributes to that cumulative effect [41].

However, it is not lawful to restrict the commencement of development by planning obligation until the developer undertakes to make a financial contribution towards infrastructure which is unconnected with the development of the site [42-43]. If such a planning obligation were lawful, an authority could use an application to extract benefits which are unrelated to the proposed development [44]. Moreover, it is not lawful to require contributions towards such infrastructure in a planning obligation which does not restrict the development of the site by means of a negative suspensive condition, as such a planning obligation would neither restrict nor regulate the development of the site in terms of s75 [43].

In determining a planning application, the authority must take into consideration material provisions of the development plan and other material considerations. For a planning obligation to be material it must have some connection with the proposed development which is not trivial [47-48]. If a planning obligation, which is otherwise irrelevant to the application, is sought as a policy in the development plan, the policy seeking to impose such an obligation is an irrelevant consideration for determination of the planning application [51].

In the instant case, the scheme established in the supplementary guidance involved the pooling of payments which were not tied to a particular development [56]. The opt-out did not make the scheme voluntary in any real sense [57]. The 1997 Act does not allow for such a scheme. The supplementary guidance and the planning obligations which it promotes are unlawful for two reasons [60].

Firstly, the use of the developer's contribution to the pooled Fund on infrastructure with which its development has no more than a trivial connection means that the planning obligation is not imposed for a purpose related to the development and use of the burdened site as required by s75, [61] nor did the planning obligation restrict or regulate the development within the meaning of s75 [62].

Secondly, the planning obligation entered into by the Respondent was an irrelevant consideration in terms of a planning application because there was only a trivial connection between the development and the infrastructure intervention(s) which the proposed contribution would fund. An authority is not empowered to require a developer to enter into an obligation which would be irrelevant to an application for permission as a precondition of the grant of that permission [63].

The scheme was not unlawful because it did not comply with the Circular. The Circular was simply a material consideration which was required to be taken into account but not necessarily followed [53-54; 60].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>