**Michaelmas Term**

**[2017] UKSC 66**

On appeal from: [2016] CSIH 28

**JUDGMENT**

**Aberdeen City and Shire Strategic Development Planning Authority ( Appellant ) v Elsick Development Company Limited ( Respondent ) (Scotland)**

**before**

**Lord Neuberger**

**Lady Hale**

**Lord Mance**

**Lord Reed**

**Lord Hodge**

**JUDGMENT GIVEN ON**

**25 October 2017**

**Heard on 13 June 2017**

| Appellant | Respondent |
| --- | --- |
| Martin Kingston QC | Roy Martin QC |
| Alasdair Sutherland | Alasdair Burnet |
| (Instructed by Morton Fraser LLP) | (Instructed by Burness Paull LLP) |

**LORD HODGE: (with whom Lord Neuberger, Lady Hale, Lord Mance and Lord Reed agree)**

1.
This appeal raises an important question of planning law. A planning authority foresees and plans for significant growth in its area. Major investment in transport infrastructure is required to accommodate the aggregate of the planned development. The planning authority seeks to achieve this investment by adopting a policy in its development plan which in substance requires developers to enter into planning obligations with it to make financial contributions to the pooled fund to be spent on the infrastructure, including interventions at places where a particular development has only a trivial impact. Is such a policy within the existing powers of the planning authority under current planning legislation?

Factual background

2.
The Aberdeen City and Shire Strategic Development Planning Authority ("the Authority") has the responsibility for preparing a strategic development plan for its area. The Authority foresaw the need for significant new and improved infrastructure to accommodate the cumulative impact of new development for which it planned. There were already proposals for transport infrastructure which involved major public sector investment, including the Aberdeen Western Peripheral Route ("AWPR"), new bridges, park and ride sites, making the A96 into a dual carriageway road and the creation of twin tracks on significant parts of the Aberdeen-Inverness railway line, all of which was to be paid for out of public funds. In 2010 the North-East of Scotland Transport Partnership ("Nestrans") commissioned a cumulative transport appraisal for the area ("the CTA"), in which it estimated that £86.6m was required on top of already committed public sector investment in order to fund a package of infrastructure developments, which it identified, to address the cumulative impact of the proposed new development in the area.

3.
In December 2011 the Authority approved non-statutory supplementary planning guidance which proposed the establishment of a Strategic Transport Fund ("the Fund"). In February 2013 the Authority published its proposed strategic development plan. In that plan the Authority stated that it intended to prepare supplementary guidance in support of the plan. This guidance would allow for the Fund to deliver the transport projects which were needed to deal with the combined effect of new development in four identified strategic growth areas within the Aberdeen Housing Market Area. The Authority stated that it would need to secure a higher percentage of the increase in land values, which resulted from the grant of planning permission, than it had in the past in order to be able to create sustainable mixed communities.

4.
Elsick Development Ltd ("Elsick") proposes to develop approximately 4,000 houses together with commercial, retail and community facilities at Elsick, near Stonehaven. Elsick's site is located within the southerly of the four strategic growth areas. In November 2011 Elsick objected to the draft supplementary planning guidance while it was subject to consultation.

5.
Elsick also objected to the proposed strategic development plan and sought to have the reference to the Fund removed from that plan on the ground that it was contrary to the guidance of the Scottish Ministers on planning obligations which is set out in circular 3/2012, "Planning Obligations and Good Neighbour Agreements" ("the Circular"). The Circular advised planning authorities to seek to have developers enter into planning obligations only if the obligations met specified tests. These tests were that the obligations (i) were necessary to make the proposed development acceptable in planning terms (para 15), (ii) served a planning purpose (para 16), (iii) related to the proposed development either as a direct consequence of the development or arising from the cumulative impact of development in the area (paras 17-19), (iv) fairly and reasonably related in scale and kind to the proposed development (paras 20-23), and (v) were reasonable in all other respects. Elsick's principal concern was with (iv); Elsick asserted that the contribution to the Fund which the proposed plan envisaged was out of all proportion to the demands which its development would make on the infrastructure which expenditure from the Fund was to improve.

6.
In the meantime, on 30 September 2013 Elsick entered into a planning obligation under section 75 of the Town and Country Planning (Scotland) Act 1997 (as amended) ("the 1997 Act") with

Aberdeenshire Council ("the Council") to contribute to the Fund in terms of the draft non-statutory supplementary planning guidance or any revision or replacement of it in the proposed strategic development plan, but the agreement also provided that no contributions to the Fund needed to be paid if the supplementary planning guidance were found to be invalid. On 2 October 2013 the Council granted outline planning permission for the development and detailed planning permission for a first phase of 802 houses and other facilities.

7.
The proposed strategic development plan was examined by a reporter appointed by the Scottish Ministers. In his report dated 21 January 2014 the reporter stated that it was right that the principle of the Fund should be established in the development plan and concluded that the CTA had demonstrated that the overall traffic growth, which the development promoted in the plan would create, would have harmful effects unless there were mitigation measures. He expressed concern that the mechanism for raising contributions to the Fund did not comply with national policy in the Circular because there was not a sufficiently clear and direct relationship between the development supplying the contribution and the infrastructure to be delivered. He advised that para 5.9 of the proposed plan be amended "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".

8.
The Strategic Development Plan was amended to take account of the reporter's comments. As so amended the relevant paragraphs of the Plan stated:

"5.8 Developers will have to accept the need for contributions towards necessary infrastructure, services and facilities within their own site. However, in cases where development has wider effects, we will have to secure contributions to deal with these as well, although the public sector will also need to make an important contribution.

5.9 We will prepare supplementary guidance in support of this plan. This will allow (through a 'Strategic Transport Fund') transport projects which are needed as a result of the combined effect of new development to be funded and delivered. … We will look for contributions from housing, business, industrial, retail and commercial leisure developments in the strategic growth areas within the Aberdeen Housing Market Area, (detailed criteria will be set out in the supplementary guidance). We will only use contributions to support projects that are related to the developments concerned and that are necessary to make those developments acceptable in planning terms."

9.
The Authority then resolved to convert the non-statutory supplementary planning guidance into statutory guidance. On 12 December 2014 the Authority issued a consultation draft of the proposed statutory guidance. In a report to the meeting of the Authority which approved the consultation draft it was explained that the consultants who had prepared the CTA had re-presented table 7.2 of the study, which I discuss in more detail in para 16 below, to show a clear and direct link between the development providing a contribution to the Fund and the infrastructure improvement to be delivered. The report also stated that the supplementary guidance was

"based on a strategic level evidence base and uses this to derive appropriate contribution levels for individual developments. The main driving force behind the preparation of the existing non-statutory guidance was the need to facilitate development rather than leave it to individual developers to try to

satisfy Transport Scotland and the two councils that they had adequately mitigated all their cumulative impacts on the transport network."

10.
Elsick and others objected to the consultation draft on several grounds, including that it failed to comply with the Circular. The Authority responded to Elsick's representations by stating that all but one of the transport interventions were within a three-mile radius of Aberdeen City centre and had strong inter-relationships and that the modelling of the CTA had demonstrated that there was a cumulative impact from all development areas to all of the interventions. The Authority approved the draft supplementary guidance on 24 April 2015 and sent it to the Scottish Ministers for ratification.

11.
The Scottish Ministers advised that the Authority could adopt the draft supplementary guidance if they added a statement that the use of any planning obligation shall follow the guidance in the Circular. The Authority made that amendment and adopted the supplementary guidance ("SG") on 25 June 2015. As I explain below when I discuss the legislative background, the SG forms part of the development plan for the purpose of determining planning applications.

The Supplementary Guidance

12.
After setting out the purpose of and background to the SG and who would be expected to contribute, the SG explained that the purpose of the Fund was to mitigate the cumulative impact of developments at specific "hotspots" in the network which the CTA had identified. It continued (in para 4.8): "[t]here will still be a requirement to mitigate impacts specific to the development (defined as local impacts) whether they are on the local or strategic network". In section 5 the SG set out the contributions which were required to deliver the proposed interventions at an estimated cost of £86.6m. In Table 1 in that section the SG set out contribution levels which for residential developments were fixed by reference to unit size, ranging from £1,350 per unit for a one bedroom unit to £3,148 per unit for a unit of five bedrooms or more. The table also provided for contributions from non-residential developments.

13.
Because the Authority has argued that contribution to the Fund was voluntary (para 20 below), I set out para 5.4 so far as relevant. It provided:

"Developers can elect to assess and mitigate their cumulative impact outwith the [Fund], although this will require a considerably more comprehensive Transport Assessment and the design and delivery of the mitigation measures shown to be necessary. This will definitely be more time-consuming and almost certainly more expensive, if it can be achieved at all." (emphasis added)

14.
Section 6 of the SG addressed how and when contributions would be payable. Para 6.1 stated that a planning obligation or other legal agreement would normally be used to secure contributions. In accordance with the advice of the Scottish Ministers, the paragraph also stated that the use of any planning obligation shall follow the guidance in the Circular.

15.
Section 7 of the SG explained that the contributions would be used only to fund the transport interventions which it listed. Para 7.3 stated:

“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).” (emphasis added)

16.
Appendix 2 summarised the CTA and listed the cumulative infrastructure requirements which it had identified. It reproduced as Table 3 the revised table 7.2 of the CTA, which had been prepared in response to the reporter’s criticism (para 7 above) 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. But that table showed the traffic generated by each development which would use the infrastructure at the identified “hotspots” as a percentage of the total traffic generated by that development. For example, the table showed the following in relation to the Elsick site:

| Development Zone | Persley Bridge | A947 | A96 East of AWPR | Kingswells North | A944 | New Bridge of Dee |
|---|---|---|---|---|---|---|
| Elsick | 3.45% | 0.10% | 0.76% | 1.46% | 0.79% | 8.39% |

Thus, taking the columns on the left, the table showed that 3.45% of the traffic which the Elsick development would generate would use Persley Bridge and 0.10% of that traffic would use the A947.

17.
The previous table 7.2 in the CTA was more informative about the impact of the proposed developments on the infrastructure. It showed the percentage of the total traffic using the new infrastructure at the identified “hotspots” which the traffic generated by each proposed development was estimated to create. For example, in relation to the Elsick development, it had shown that the percentage of the total traffic predicted to use the same infrastructure as the following:

| Development Zone | Persley Bridge | A947 | A96 East of AWPR | Kingswells North | A944 | New Bridge of Dee |
|---|---|---|---|---|---|---|
| Elsick | 1% | 0% | 1% | 2% | 1% | 7% |

It also showed that 2% of the traffic on the Loirston Link would be generated by the Elsick development and 79% of the traffic on the Elsick Fastlink. In relation to a separate development at Blackdog the original table 7.2 of the CTA showed that 1% of the traffic on the A947 would be attributable to that site and 0% of the traffic on all of the other listed infrastructure.

18.
Paragraph 7.4 explained that the contributions would be used to deliver the specified transport interventions. It stated:

“Nestrans as the Regional Transport Partnership will hold and administer contributions in a strategic transport fund. As contributions are received they will be placed into a ring-fenced account. The monies in this account will only be available for delivering the strategic transport projects listed above, including detailed assessment, development and design work.”

The challenge

19.
Elsick appealed against the adoption of the SG to the Inner House of the Court of Session under section 238 of the 1997 Act. On 29 April 2016 the First Division of the Inner House (The Lord President (Lord Carloway), Lord Menzies and Lord Drummond Young) allowed the appeal and quashed the SG: [2016] CSIH 28. The First Division upheld three of the four grounds of appeal which Elsick advanced. First, the court upheld the submission that the Authority had failed to comply with national policy on the use of planning obligations, holding that it was a fundamental principle of planning law, which was reflected in the Circular, that a condition attached to the grant of a planning permission, whether contained in a planning obligation or otherwise, must fairly and reasonably relate to the permitted development. The First Division accepted the distinction, which the reporter had drawn, between the sharing of costs among developments which had cumulatively required a particular investment in transport infrastructure on the one hand and the funding of a basket of measures, not all of which were relevant to every development. The court referred (in para 35 of its opinion) to the original Table 7.2 and held that many of the planned developments had no impact at all on several of the proposed infrastructure interventions. It added: “[t]his applies to both Elsick and Blackdog relative to a number of the interventions. In respect of others the impact is de minimis”. The result was that the additional sentence in the SG about complying with the guidance in the Circular, which was added at the request of the Scottish Ministers (para 11 above), could not prevent the obligation to contribute to the Fund, in which contributions were pooled, from breaching the Circular. The First Division also upheld Elsick’s submission that there was no rational basis for relying on Table 3 of Appendix 2 of the SG (ie the revised table 7.2 of the CTA) to support the contention that a particular intervention was made necessary by reason of either a particular development or the cumulative effect of it along with other developments.

20.
The Authority applied for and was given permission to appeal to this court arguing that the policy tests in the Circular were not part of the legal tests for the validity of a planning obligation, that the Inner House had taken an unduly restrictive approach to policy, and that the Authority had substantially complied with the Circular when the SG afforded the opportunity to a developer to make mitigation contributions to infrastructure wholly outside the Fund (para 5.4 of the SG, which is set out in para 13 above). This court refused to allow the Authority to argue that the Inner House had erred in law and fact in finding that many of the planned developments, such as Elsick and Blackdog, have no impact on some of the proposed interventions and, in the case of Elsick and Blackdog, the impact on some other interventions is de minimis, because that was a finding of fact, based on the original table 7.2 of the CTA, the contents of which were not disputed.

Discussion

21.
The central issue in this appeal is the lawfulness of the planning obligation which Elsick has entered into in conformity with the requirements of the SG. The Authority challenges the First Division’s conclusion that the tests applicable to a planning condition are properly to be applied to a planning obligation. To address this challenge I examine (i) the correct legal test as to the lawfulness of a planning condition, (ii) the correct legal test as to the lawfulness of a planning obligation, (iii) the role of a planning obligation in the decision to grant or refuse planning permission, and (iv) the boundary between questions of legality and questions of policy.

22.

I set out the legislative background before turning to each of the four questions. Finally, I will apply the answers to those questions to the facts in this appeal.

The legislative background

23.
The 1997 Act was amended extensively by the Planning etc (Scotland) Act 2006 to provide in Part 2 for strategic development planning: see section 2 of the 2006 Act. Section 4 of the amended 1997 Act empowers the Scottish Ministers to designate a group of planning authorities as authorities which are jointly to prepare a strategic development plan for the area which the Scottish Ministers determine (section 5(3)). Section 7 provides that a strategic development plan is to include a vision statement, which is to be a broad statement setting out the strategic development planning authority's views on how development could and should occur in its area and the matters, including infrastructure, which might affect that development. The 1997 Act provides for the preparation and publication of a proposed strategic development plan (section 10), the appointment by the Scottish Ministers of a reporter to examine the proposed plan (section 12), the approval or rejection of the proposed plan by the Scottish Ministers (section 13), and, on such approval, the publication of the constituted strategic development plan.

24.
Section 22 empowers a strategic development planning authority to adopt and issue supplementary guidance in connection with a strategic development plan, which guidance has to be submitted to the Scottish Ministers who can by notice require the authority to modify it. The Town and Country Planning (Development Planning) (Scotland) Regulations 2008 (SSI 2008/426) provide (in regulation 27(2)) that such supplementary guidance may only deal with the provision of "further information or detail in respect of the policies or proposals set out in [the] plan and then only provided that those are matters which are expressly identified in a statement contained in the plan as matters which are to be dealt with in supplementary guidance".

25.
Section 24 defines the development plan, which is an important concept in relation to decisions taken under the planning Acts, as including the provisions of the approved strategic development plan for the time being in force for the area and also the supplementary guidance issued in connection with that plan. The central importance of the development plan to planning decisions can be seen in two provisions of the 1997 Act. First, section 25(1) provides:

"Where, in making any determination under the planning Acts, regard is to be had to the development plan, the determination is, unless material considerations indicate otherwise - (a) to be made in accordance with that plan …"

Secondly, section 37(2) provides:

"In dealing with [an application for planning permission] the authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations."

Sections 25(1) and 37(2) in combination set up what has been called "a presumption that the development plan is to govern the decision on an application for planning permission": City of Edinburgh Council v Secretary of State for Scotland 1998 SC (HL) 33, 43G; [1997] 1 WLR 1447, 1458 per Lord Clyde. I will return to these two provisions when I consider question (ii) below.

26.
In order to address question (i) (the lawfulness of a planning condition) I refer to section 37(1) which provides:

“Where an application is made to a planning authority for planning permission - (a) … they may grant planning permission, either unconditionally or subject to such conditions as they think fit”,

and section 41(1) which provides so far as relevant:

“Without prejudice to the generality of section 37(1) to (3), conditions may be imposed on the grant of planning permission under that section -

a) for regulating the development or use of any land under the control of the applicant (whether or not it is land in respect of which the application was made) or requiring the carrying out of works on any such land, so far as appears to the planning authority to be expedient for the purposes of or in connection with the development authorised by the permission;

b) for requiring the removal of any buildings or works authorised by the permission, or the discontinuance of any use of land so authorised, at the end of a specified period, and the carrying out of any works required for the reinstatement of land at the end of that period. …”

27.
Of direct relevance to question (ii) (the lawfulness of a planning obligation) is section 75 (as substituted by section 23 of the 2006 Act) which, so far as relevant, provides:

“(1) A person may, in respect of land in the district of a planning authority -

(a) by agreement with that authority, or

(b) unilaterally,

enter into an obligation (referred to in this section and in sections 75A to 75C as a ‘planning obligation’) restricting or regulating the development or use of the land, either permanently or during such period as may be specified in the instrument by which the obligation is entered into (referred to in this section and in those sections as the ‘relevant instrument’)

(2) Without prejudice to the generality of subsection (1), the reference in that subsection to restricting or regulating the development or use of land includes - (a) requiring operations or activities specified in the relevant instrument to be carried out in, on, under or over the land, or (b) requiring the land to be used in a way so specified.

(3) A planning obligation may - …

(b) require the payment -

(i) of a specified amount or an amount determined in accordance with the relevant instrument. …”

Section 75(5) provides that a relevant instrument, to which the owner of the land is a party, may be recorded in the Register of Sasines or registered in the Land Register of Scotland so that the planning authority may enforce certain obligations in the instrument against both the owner and his successors in title. Sections 75A and 75B provide for the modification and discharge of planning obligations by agreement with the planning authority or by the determination of the Scottish Ministers on an appeal.

Question (i): the lawfulness of a planning condition

28.
A planning condition is a statutory creation. Section 37(1) of the 1997 Act (para 26 above) and similar legislative provisions in England and Wales (section 70(1) of the Town and Country Planning Act 1990 ("the 1990 Act")) authorise a planning authority to impose planning conditions when it grants a planning permission. The apparently unlimited power ("subject to such conditions as they think fit") has long been interpreted restrictively by the courts to prevent its abuse. The courts have formulated three principal constraints. First, the conditions must be imposed for a planning purpose and not solely to achieve some ulterior object, however desirable in the public interest that object may be. Secondly, the conditions must "fairly and reasonably relate to the permitted development". Thirdly, the conditions must not be unreasonable in the Wednesbury sense (Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223, 233-234).

29.
The first constraint arises from the statutory origin of the power of a planning authority to impose conditions: administrative law provides that it must be exercised for the purposes of the 1997 Act, namely planning purposes. The second constraint was first articulated by Lord Denning in Pyx Granite Co Ltd v Ministry of Housing and Local Government [1958] 1 QB 554, 575. His statement has been endorsed on several occasions by the House of Lords in Fawcett Properties Ltd v Buckingham County Council [1961] AC 636, Mixnam's Properties Ltd v Chertsey Urban District Council [1965] AC 735, and Newbury District Council v Secretary of State for the Environment [1981] AC 578. It arises from the statutory context of the power in section 37: a planning authority is tasked with determining an application for planning permission on its merits having regard to the development plan so far as relevant and other material considerations; the power to attach conditions to the permission is an inherent part of the power to grant permission for the development of land; therefore the conditions imposed on the grant of that permission must relate to the development for which permission is given. The third constraint is a feature of our administrative law.

30.
The second legal requirement - that a condition must fairly and reasonably relate to the development - requires there to be a reasonably close relationship between the development and the condition which governs it. In British Airports Authority v Secretary of State for Scotland 1979 SC 200 the Inner House looked for a "clear relationship" between the condition and the permitted development (218 per the Lord President (Emslie)) or "a recognised and real relationship … that is fair and reasonable" (220 per Lord Cameron).

31.
Such a relationship between a condition and the permitted development existed where a planning authority imposed a negative suspensive condition, that development of a site should not commence until an event had occurred which the developer alone did not have power to bring about. In Grampian Regional Council v Secretary of State for Scotland and City of Aberdeen District Council 1984 SC (HL) 58 the House of Lords upheld the validity of such a condition which overcame an objection to a proposed industrial development on the ground of road traffic safety. The condition was that the development of the site could not commence until the road on the western boundary of the site had been closed by a road closure order which the Secretary of State would have to confirm. In the leading speech, Lord Keith of Kinkel (pp 66-67) accepted the three tests which I have stated in para 28 above and which have come to be associated with the Newbury case and held that the condition met the third test because it was not unreasonable to impose such a condition which was in

the public interest and where there were reasonable prospects that a road closure order would be confirmed.

32.
The three-fold legal test for validity, having been repeatedly approved by judges at the highest level, is an established part of planning law. Other rules of administrative law, such as the requirement to take account of all relevant considerations and not to take account of irrelevant considerations in decision-making, apply to a decision to impose a particular condition.

Question (ii): the lawfulness of a planning obligation

33.
A planning obligation also is a statutory creation. As with a particular planning condition, the lawfulness of a particular obligation depends upon (i) the wording of the statute, and (ii) the rules of our administrative law.

34.
Section 75 of the 1997 Act, like its predecessor legislation (section 50 of the Town and Country Planning (Scotland) Act 1972), requires that the obligation restricts or regulates the development or use of the land to which it relates. As section 75(3)(b) shows, the planning obligation can include the payment of money.

35.
Prima facie the planning authority is given a wide discretion as to the circumstances in which it can seek a planning obligation and the nature of that obligation. While it is not uncommon for planning authorities to duplicate some planning conditions in a section 75 agreement and thereby obtain an alternative means of enforcement, planning obligations also enable a planning authority to control matters which it might otherwise have no power to control by the imposition of planning conditions. Planning obligations are most commonly required in the context of an application for planning permission, but they are not confined to such circumstances and are available as a means of keeping land free from any development. It is not surprising therefore that there is no general legal requirement that there be a relationship to a permitted development.

36.
In Good v Epping Forest District Council [1994] 1 WLR 376, in which Ralph Gibson LJ delivered the leading judgment, the Court of Appeal addressed the question whether a planning authority could validly achieve by agreement any purpose which it could not validly achieve by planning condition or whether the test for validity was the same in each case. In substance, the Court held that the powers of a planning authority to bring about a planning obligation were not controlled by the nature and extent of its statutory powers to grant planning permission subject to conditions (p 387C). A planning obligation did not have to relate to a permitted development.

37.
In Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759, which I discuss more fully when addressing question (iii) below, both Lord Keith of Kinkel (769B-C) and Lord Hoffmann (779C-D) referred with approval to the judgment of the Court of Appeal in Good v Epping Forest District Council (above). Lord Hoffmann (779D) summarised the case thus: “the only tests for the validity of a planning obligation outside the express terms of section 106 [of the 1990 Act] are that it must be for a planning purpose and not Wednesbury unreasonable”. Thus beyond the restrictions implicit in the words of the section there are only the constraints of administrative law, which requires

the planning authority to exercise its power to seek a planning obligation for a planning purpose: its exercise solely for a purpose unrelated to land use planning would be an abuse of power. Similarly, if a local planning authority acts unreasonably in the Wednesbury sense in requiring the undertaking of a planning obligation, the obligation may be reduced (nullified). Other rules of administrative law, such as the requirement to take into account all relevant considerations, also apply.

38.
The express words of section 75 require a relationship between the planning obligation and the land to be burdened by the obligation because the obligation must in some way restrict or regulate the development or the use of that land. But those restrictions or regulation do not necessarily relate to a particular permitted development on the burdened land. A planning obligation may prohibit the development of the land in a particular way or the use of the land for particular purposes. A planning obligation may keep the burdened land free from any development and may be entered into in circumstances which are not connected with any planning application.

39.
Restrictions may validly be imposed in the context of the development of another site. Thus, to take an example discussed in Good v Epping Forest District Council, the owner of two farms, A and B, within the area of a planning authority might apply for planning permission to develop and operate an intensive breeding establishment on farm A. The owner of the farms might offer, or the planning authority might require, a section 75 planning obligation preventing the use of farm B for that purpose. The restriction would relate to farm B and would be justified for the planning purpose of preventing an undesirable number of such establishments in the same area.

40.
A planning obligation may also regulate the development or use of the burdened site. An example, in the context of a planning application, is where a planning obligation requires the developer to provide affordable housing as a component of a development on its site or to create specified infrastructure on its land to meet the needs of that development.

41.
Similarly, a planning authority may contract for the payment of financial contributions towards, for example, educational facilities, healthcare facilities, sewerage or waste and re-cycling: requiring a development to contribute to, or meet, its own external costs in terms of infrastructure involves regulating the development of the land which is burdened by the obligation. The financial contribution can be applied towards infrastructure necessitated by the cumulative effects of various developments, so long as the land which is subject to the planning obligation contributes to that cumulative effect and thereby creates a sufficient relationship between the obligation in question and the land so that one can fairly speak of the obligation as regulating the development of the land.

42.
In each of the examples in paras 38-41 above the restriction or regulation serves a purpose in relation to the development or use of the burdened site. In this appeal a question of principle arises: can a restriction or regulation of a site be imposed in the form of a negative suspensive planning obligation, analogous to the negative suspensive planning condition in the Grampian Regional Council case, for a purpose which does not relate to the development or use of the site? In particular, is it lawful by planning obligation to restrict the commencement of the development of a site until the developer undertakes to make a financial contribution towards infrastructure which is unconnected to the development of the site? Alternatively, is it 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 obligation?

43.
The answer to each question is no. Dealing first with the latter question, a planning obligation which required a developer to contribute to infrastructure unconnected with its development but did not make the payment of the contribution a pre-condition of development of the site would not fall within section 75 as it would neither restrict nor regulate the development or use of the site. In Tesco Stores Ltd v Secretary of State for the Environment (1994) 68 P & CR 219, Beldam LJ (pp 234-235) stated:

“In section 106(1) [of the 1990 Act] the obligations referred to in subsections (a), (b) and (c) clearly relate to the land in which the person entering into the obligation is interested. The obligation entered into by a person interested in land under subsection (d) to pay money to the authority is not expressed to be restricted to the payment of money for any particular purpose or object. But all the planning obligations are, by section 106(3), enforceable not only against the person entering into the obligation but also against his successors in title to the land. Against the background that it is a fundamental principle that planning permission cannot be bought or sold, it does not seem unreasonable to interpret subsection (1)(d) so that a planning obligation requiring a sum or sums to be paid to the planning authority should be for a planning purpose or objective which should be in some way connected with or relate to the land in which the person entering into the obligation is interested.”

In my view, this analysis is equally applicable to section 75 of the 1997 Act which, in so far as is relevant, is in substantially similar terms as section 106 of the 1990 Act (as substituted by section 12(1) of the Planning and Compensation Act 1991) as the obligations in section 106(1)(a) - (d) are reflected in section 75(1)(2) and (3)(b).

44.
A planning obligation, which required as a pre-condition for commencing development that a developer pay a financial contribution for a purpose which did not relate to the burdened land, could be said to restrict the development of the site, but it would also be unlawful. Were such a restriction lawful, a planning authority could use a planning obligation in the context of an application for planning permission to extract from a developer benefits for the community which were wholly unconnected with the proposed development, thereby undermining the obligation on the planning authority to determine the application on its merits. Similarly, a developer could seek to obtain a planning permission by unilaterally undertaking a planning obligation not to develop its site until it had funded extraneous infrastructure or other community facilities unconnected with its development. This could amount to the buying and selling of a planning permission. Section 75, when interpreted in its statutory context, contains an implicit limitation on the purposes of a negative suspensive planning obligation, namely that the restriction must serve a purpose in relation to the development or use of the burdened site. An ulterior purpose, even if it could be categorised as a planning purpose in a broad sense, will not suffice. It is that implicit restriction which makes it both ultra vires and also unreasonable in the Wednesbury sense for a planning authority to use planning obligations for such an ulterior purpose.

45.
It is, perhaps, surprising that the legal boundaries of a planning obligation have not been the subject of more extensive judicial comment, beyond the cases discussed in Good v Epping Forest District Council, the comment by Beldam LJ in the Court of Appeal in Tesco (para 43 above), and the opinion of Lord MacLean in McIntosh v Aberdeenshire Council 1999 SLT 93 (which upheld the validity of a

planning obligation to build an estate road to serve the owner's development of his land and also to facilitate the development of neighbouring land in third party ownership) when the risk of misuse of planning obligations has long been recognised as a matter of policy. There were concerns that some planning authorities were tempted to make exorbitant demands for what has been called "planning gain", to confer benefits on the community which were not part of the developer's original proposal. A developer in order to obtain a planning permission might be forced to incur disproportionate costs in providing such gains which were unrelated or insufficiently related to its development or otherwise suffer the delay and expense of an appeal to the Scottish Ministers. This practice risked bringing the planning system into disrepute. In 1981, in a report to the Secretary of State for the Environment called "Planning Gain", the Property Advisory Group advised that planning obligations be used only to overcome legitimate planning objections to an application for planning permission and that the practice of bargaining with developers for planning gain was unacceptable. The report, which was criticised for taking too narrow an approach to the planning process, advocated that the Secretary of State should issue guidance. The Department of the Environment and the Welsh Office produced such guidance in 1983 in circular 22/83, which sought to control rather than exclude the pursuit of planning gain. In Scotland, the Scottish Development Department issued a circular in 1984, entitled "Section 50 Agreements" (SDD circular 22/1984). Current guidance on the use of planning obligations in Scotland is contained in the Circular (para 5 above). As I explain when addressing question (iv) below, this guidance, while an important statement of national policy, does not have the force of law.

46.
There was also a perceived risk that developers, who were each promoting a different site in a competition for what might be an exclusive permission to develop one of the sites, would offer to enter into an obligation with the planning authority to fund infrastructure or other community facilities which were unrelated or only marginally related to their developments. This practice similarly threatened to bring the planning system into disrepute, by creating the impression that they were buying planning permissions. In the heady days of the "store wars", major supermarket chains competed with each other before planning authorities and in planning appeals to obtain permission to develop rival sites up and down the United Kingdom. This competition, which often involved offers to provide "planning gain", led to authoritative judicial guidance on the relevance of a planning obligation to the grant or refusal of a planning permission, which I now consider under question (iii).

Question (iii): the role of the planning obligation in the grant or refusal of planning permission

47.
What is the role of a planning obligation in the decision to grant or refuse planning permission? In Scotland that decision is governed by section 37(2) of the 1997 Act which requires that the planning authority have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations (para 25 above). In Tesco Stores Ltd v Secretary of State for the Environment (above) the House of Lords, when considering a legislative provision in identical terms (section 70(2) of the 1990 Act), gave guidance on the relevance of a planning obligation to the grant or refusal of planning permission. That guidance is not challenged in this appeal.

48.
In the leading speech, which Lord Keith of Kinkel delivered, the House held that for a planning obligation to be a "material consideration", which it interpreted as a "relevant consideration" (764G), in the decision whether to grant planning permission, the obligation must have some connection with the proposed development which is not de minimis (ie too trifling for the law to be concerned with it).

In what follows, I paraphrase the Latin phrase as “trivial”. Lord Keith described the relevance of a planning obligation in these terms (770A-B):

“An offered planning obligation which has nothing to do with the proposed development, apart from the fact that it is offered by the developer, will plainly not be a material consideration and could be regarded only as an attempt to buy planning permission. If it has some connection with the proposed development which is not de minimis, then regard must be had to it.”

49.
In that case, developers, including Tesco and Tarmac, which was associated with Sainsburys, competed to obtain planning permission for their sites for a superstore outside the centre of Witney in Oxfordshire. The Witney local plan proposed a new link road, including a new river crossing, to relieve traffic congestion. Tesco entered into a planning obligation with the planning authority under section 106 of the 1990 Act to fund that road. The Secretary of State on appeal favoured the Tarmac site and refused permission to the Tesco application, holding that the link road was not needed to enable any of the food stores to be developed or so directly related to any of the developments or the use of the land after completion that any of the developments should not be permitted without it. Tesco appealed under section 288 of the 1990 Act, arguing that the Secretary of State had erred in law in not treating the offer to fund in the planning obligation as a material consideration. The House held that the Secretary of State had correctly had regard to the offer but had chosen in the exercise of his planning judgement to attach little weight to it and so had not erred in law.

50.
No challenge was made in Tesco, in the House of Lords or in the courts below it, to the validity of the planning obligation: the question whether the obligation regulated the development of Tesco’s site was not put in issue and only Beldam LJ commented on the legality of an obligation to contribute money (para 43 above).

51.
The inclusion of a policy in the development plan, that the planning authority will seek such a planning obligation from developers, would not make relevant what otherwise would be irrelevant. Section 37(2) (para 25 above) requires the planning authority to have regard to the provisions of the development plan “so far as material to the application” and treats its provisions as a relevant consideration only to that extent. Thus, a green belt policy will be relevant to an application if the site of the application falls within the specified green belt and a requirement that a certain amount of open space is provided in a proposal for residential development will be relevant to an application for residential development. Similarly, a requirement in the plan that an applicant should agree to contribute to the cost of offsite infrastructure, which is related to its development, will be relevant to the application. But the words, which I have emphasised, mean that if a planning obligation, which is otherwise irrelevant to the planning application, is sought as a policy in the development plan, the policy seeking to impose such an obligation is an irrelevant consideration when the planning authority considers the application for planning permission.

52.
It is important to recall that the question whether a benefit conferred by a planning obligation is a material consideration in the determination of an application for planning permission is quite separate from the question whether a planning obligation restricts or regulates the development or use of a particular piece of land. Thus, to use the example of the farmer with two farms, A and B. He wishes to develop farm A and is prepared to enter into a planning obligation to restrict the development or use

of farm B in the context of his negotiation of a permission for farm A. The legality of the planning obligation in relation to farm B will depend, among other things, on whether it restricts or regulates the development or use of farm B. The relevance of the planning obligation to the determination of the application in relation to farm A depends upon there being a more than trivial connection between the benefit conferred by controlling farm B and the development of farm A, as the Tesco case decided.

Question (iv): The boundary between questions of legality and questions of policy

53.
Relevant ministerial guidance which sets out national planning policy is unquestionably a material consideration for any planning authority when it determines applications for planning permission. A failure by a planning authority to take into consideration national guidance, such as that in the Circular (para 5 above) on the tests which a planning authority should apply when deciding whether to seek a planning obligation, would be unlawful. Further, if a planning authority were to depart from national planning guidance when refusing an application for planning permission, it might risk an appeal by the disappointed applicant to the Scottish Ministers. But a decision by the planning authority is not illegal if it departs from ministerial guidance in a planning circular, provided that the authority has treated that guidance as a relevant consideration when it reached its decision.

54.
In Tesco (above) Lord Hoffmann pointed out (780F-G) that the law has always made “a clear distinction between the question of whether something is a material consideration and the weight which it should be given”. The former is a question of law; the latter is a matter for the planning judgement of the planning authority. Accordingly, a failure by a planning authority to have regard to relevant guidance as a material planning consideration would be an error of law. A decision, after considering the guidance, not to follow it, would (absent another ground of challenge in administrative law) be a matter of planning judgement, in which the courts have no role.

The legality of Elsick’s planning obligation

55.
What is the nature of the scheme which the SG has established?

56.
First, it involves the payment by developers of financial contributions towards the funding of specified transport infrastructure in and around Aberdeen, principally through the mechanism of planning obligations. It involves the pooling of the contributions and no one developer is liable for the costs of any of the specified interventions (paras 1.5 and 3.3 and Appendix 2). Secondly, the obligation to contribute to the Fund is in addition to the requirement that a developer mitigate impacts specific to its development (para 4.8). Thirdly, the contributions from residential developers are fixed at a sum per unit (Table 1 summarised in para 12 above). Fourthly, those payments are not tied to the impact of a particular development on the transport network. The original table 7.2 in the CTA suggested that there was no connection between traffic generated by certain developments and the need to intervene at particular hotspots. The revised table 7.2 which is referred to in para 7.3 of the SG and reproduced in Appendix 2 shows that some vehicles from each of the developments will use the proposed infrastructure but in many cases such use is at a very low level.

57.
Fifthly, the opt-out which para 5.4 of the SG offers (para 13 above) does not make the scheme voluntary in any real sense. The developer is still expected to provide a contribution towards the

cumulative impact of the developments on infrastructure over and above the impact of its individual development and the paragraph understandably expresses doubt whether a developer could create the needed assessment, design and provide for the necessary mitigation measures. Unless a developer were able to perform this daunting task and persuade the planning authority that it was robust, it is clear that the scheme envisages that it would not obtain planning permission for its development.

58.
Sixthly, the statement in para 6.1 that the use of any planning obligation shall follow the guidance in the Circular is inconsistent with the nature of the scheme. This is because the pooling of fixed per unit contributions towards the funding of infrastructure interventions, which include many on which a particular development's impact is minimal, does not meet the criterion in the Circular that the obligation is fairly and reasonably related in scale and kind to the proposed development. The statement which the Scottish Ministers inserted into the SG therefore is no safeguard.

59.
As the Lord President has observed, there appears to be much that can be said in favour of such a scheme. It enables a planning authority to facilitate development within its area. Inclusion of such a scheme in a development plan allows a public debate during the statutory process of the approval of the plan. The scheme allows developers in the area to assess the viability of their proposed developments knowing the extent of their liability to the Fund before they spend large sums pursuing their applications. In England and Wales Part 11 of the Planning Act 2008, which provided for a community infrastructure levy, was enacted to achieve similar ends.

60.
But the 1997 Act does not allow for such a scheme. The Inner House has found that the connection between certain developments, including the development at Elsick, and some of the interventions which the pooled Fund is intended to finance is at best trivial. The illegality of the scheme is not because it does not comply with the Circular. The guidance in the Circular is simply a material consideration which the planning authority must take into account when deciding whether to grant planning permission. The weight which the planning authority attaches to such guidance is a matter of planning judgement. The scheme of the SG and the planning obligations which it promotes are unlawful for two separate reasons.

61.
First, the requirement imposed on a developer to contribute to the pooled Fund, which is to finance the transport infrastructure needed to make acceptable all of the developments which the development plan promotes, entails the use of a developer's contribution on infrastructure with which its development has no more than a trivial connection and thus is not imposed for a purpose in relation to the development and use of the burdened site as section 75 requires.

62.
Further, the Council did not include any provision in the planning obligation restricting the development of the Elsick site until a contribution was made. Instead it resolved to grant planning permission for the development but to issue that permission only once Elsick had entered into the obligation. The planning obligation was therefore neither restricting nor regulating the development of the Elsick site and so was outside the ambit of section 75.

63.
Secondly, Tesco (above) establishes that for a planning obligation, which is to contribute funding, to be a material consideration in the decision to grant planning permission, there must be more than a

trivial connection between the development and the intervention or interventions which the proposed contribution will fund. The planning obligation which Elsick entered into could not be a relevant consideration in the grant of the planning permission. In my view, it was not within the power of the planning authority to require a developer to enter into such an obligation which would be irrelevant to its application for permission as a precondition of the grant of that permission.

64.
If planning authorities in Scotland wish to establish a local development land levy in order to facilitate development, legislation is needed to empower them to do so.

Conclusion

65.
I would dismiss the appeal.