

**ANGUS COUNCIL**

**DEVELOPMENT CONTROL COMMITTEE**

**13 JUNE 1996**

**SUBJECT: PLANNING APPEAL DECISION  
MEIKLE MILL, KIRRIEMUIR**

**REPORT BY DIRECTOR OF PLANNING, TRANSPORT & ECONOMIC DEVELOPMENT**

**Abstract: This report presents the findings of the Reporter appointed by the Secretary of State to determine an appeal against a condition imposed upon a planning consent by Angus District Council for a housing scheme road layout etc. at Meikle Mill, Kirriemuir.**

**1 RECOMMENDATION**

It is recommended that the Committee notes the findings of the Secretary of State's Reporter and awaits a further report once the expenses claim by the appellant, C. Ogilvie, has been submitted.

**2 INTRODUCTION**

2.1 With reference to Angus District Council minute 848(2)/95, the Planning and Development Committee at their meeting of 30 October 1995 granted consent for a road layout for an approved housing development at Meikle Mill, Kirriemuir. Outline consent (01/94/0034) for the residential development had been granted on appeal after being refused by the Council. Application No. 01/95/1574 refers.

2.2 In granting outline consent, the Secretary of State's Reporter had appended a condition requiring an archaeological overview of the development. This condition placed the onus on the Planning Authority to appoint and fund an archaeologist to observe work in progress, record items etc. In the road layout approval, the District Council re-imposed a similar but amended condition.

2.3 The amended archaeological condition was appealed by the applicant, Mr. C. Ogilvie, and expenses were claimed by both parties. The Inquiry Reporter's conclusions and decision are presented below.

**3 REPORTER'S DECISION**

3.1 "On the basis of the written submissions and the site inspection, I consider that the determining issue in this appeal is whether or not it is competent for the Planning Authority to attach a condition to a reserved matters approval which is materially different from that attached to the original outline planning permission and, if so, whether the condition attached to the approval of reserved matters dated 2 November 1995 is appropriate and acceptable.

- 3.2 The Act clearly distinguishes between planning permission and the approval of "reserved matters" not particularised in outline planning applications. The Town and Country Planning (General Development Procedure) (Scotland) Order 1992 defines the terms "reserved matters" as "any matters in respect of which details have not been given in the outline planning application and which concern the siting, ..... of any building ..... or the means of access to such building". Although I am aware that many Planning Authorities process applications for reserved matters in a similar way applications for Planning Permission, any subsequent approval of reserved matters does not constitute the granting of further planning permission.
- 3.3 SDD Circular 18/1986: The Use of Conditions in Planning Permissions states, in paragraph 43, that the only conditions which can be imposed when reserved matters are approved are conditions which directly relate to those matters. Conditions relating to anything other than the reserved matters should be imposed when outline permission is granted.
- 3.4 In this instance, a condition protecting the archaeological interest was attached to the original outline planning permission granted in July 1995. I recognise that the Planning Authority may not be entirely satisfied by the wording of this condition and I am aware that it does not reflect, in total, the wording of this condition and I am aware that it does not reflect, in total, the wording of the model condition suggested in paragraph 35 of PAN 42: Archaeology. Nevertheless, it does follow, precisely, the wording of the model condition set out in paragraph 36 of Appendix A to circular 18/1986.
- 3.5 The archaeological condition attached to the outline planning permission relates to the development of the site as a whole, including the siting of buildings, the construction of road access and other works, and not to any one particular aspect of the development. This is the reason for attaching the condition to the outline planning permission. Otherwise it would be necessary to attach the condition to every approval of reserved matters, for example, to the approval of each individual house on the site. I consider that this condition is reasonable and satisfactorily protects the archaeological interests of the site.
- 3.6 The application to which this appeal relates is for the approval of the road layout for the residential development, in compliance with condition 1 of the outline planning permission. I do not consider that any useful purpose would be served by attaching a further archaeological condition to the approval of this one particular aspect of the development. It does not relate to any of the reserved matters and circular 18/1986 states quite clearly that conditions relating to anything other than the reserved matters should be imposed when outline permission is granted. The references in PAN 42, in respect of archaeological conditions, all relate to the attachment of such conditions to planning permissions. This application for the approval of reserved matters is not an application for planning permission and I conclude therefore that it is not competent for the Council to impose this materially different condition on this approval of reserved matters.

- 3.7 It is unfortunate that your client and the Council were not able to agree, at the outset, an acceptable way of addressing the archaeological interest in the site, in accordance with the condition attached to the original planning permission. Clearly the onus was on the Council, in the first instance, to nominate an archaeologist to observe work in progress. However, I note that your client has now nominated an acceptable organisation, and submitted information to the Council to allow the observation of work in progress and the recording of items of interest, by an accredited archaeological organisation.
- 3.8 I have taken account of all other matters raised, but none outweighs the considerations leading to my conclusions. Accordingly, in exercise of the powers delegated to me, I hereby sustain this appeal against condition 2 attached to the reserved matters approval dated 2 November 1995. Condition 2 is therefore discharged and shall have no further effect."

#### **4 CLAIM FOR AWARD OF EXPENSES**

- 4.1 The District council lodged a claim for expenses but this was not upheld by the Reporter.
- 4.2 In respect of the appellant's claim for an award of expenses the Reporter responded as follows:-
- 4.3 "I refer to the claim for an award of expenses which was made on behalf of your client in your planning appeal dated 16 January 1996. My decision on the appeal was issued on 23 April 1996 and I have now considered the merits of the claim for expenses.
- 4.4 You submitted that an award was justified due to the actions of the former Angus District Council in attempting to substantially change the archaeological condition attached to the outline planning permission granted on appeal, by attaching a materially different condition to the reserved matters approval of the road layout for the proposed residential development at Meikle Mill, Kirriemuir, Angus. You asserted that an application for the approval of reserved matters is not an application for planning permission, and that only conditions which apply directly to these matters can be imposed when reserved matters are approved. You maintained therefore that the Council had acted unreasonably in attempting to materially change the condition attached to the outline planning permission.
- 4.5 In response, it was submitted by the former Angus District Council that the re-worded condition was necessary, relevant, enforceable, precise and reasonable, and that it satisfied the tests for conditions in SDD Circular 18/1986. The Council also maintained that your client had failed to present a reasoned argument for an award of expenses.
- 4.6 As noted in paragraph 4 of SDD Circular 6/1990, parties are normally expected to meet their own expenses. In planning appeals, awards of expenses do not follow the decision on the planning merits but are made only in respect of unreasonable behaviour. Your claim for an award of expenses was made at the appropriate stage in the proceedings.

- 4.7 The Act clearly distinguishes between planning permission and the approval of reserved matters, which are defined in the Town and Country Planning (General Development Procedure) (Scotland) Order 1992. SDD Circular 18/1996: The Use of Conditions in Planning Permissions states, in paragraph 43, that the only conditions which can be imposed when reserved matters are approved are conditions which directly relate to those matters. The archaeological condition attached to the outline planning permission relates to the development of the site as a whole, and all the references in PAN 42: Archaeology: in respect of archaeological conditions, relate to the attachment of conditions to planning permissions. Your application for the approval of reserved matters was not an application for planning permission and it was not competent for the Council to impose a materially different condition on the approval of the reserved matters.
- 4.8 In this instance, I find that the Council, who were clearly dissatisfied with the condition attached to the outline planning permission, have attempted to materially change this condition in contravention of Government guidance in SDD Circular 18/1986. I do not consider that this was the correct course of action to take.
- 4.9 No other matters outweigh these considerations. I therefore consider that the former Angus District Council has acted in an unreasonable manner. I find that this unreasonable behaviour caused your client to appeal; that the matter should not have had to come before the Secretary of State, and that as a result the appellant incurred unnecessary expense in preparing and participating in the appeal process. In the exercise of the powers delegated to me, I therefore award expenses against the former Council in favour of your client."

## 5 COMMENT

- 5.1 Angus District Council was rightly concerned about the original archaeological condition imposed by the Reporter following the appeal against refusal of outline consent. Up until that date the Council had not funded archaeological work or watching briefs. Clearly there was a significant and potentially costly precedent being created by the Reporter. In addition there were undesirable implications for the Council in appointing consultants to undertake such work, opening-up the possibility of allegations of nepotism or favouritism.
- 5.2 Furthermore the condition was contrary to the advice and guidance put forward by the Government in NPPG5 "Archaeology and Planning" and PAN42 "Archaeology".
- 5.3 Paragraph 25 of NPPG5 states:-
- "ensure, where appropriate, that the prospective developer arranges for an archaeological assessment and, if necessary, a field evaluation."
- Paragraph 26 states that where development is granted affecting archaeological remains:-
- "the Planning Authority should satisfy itself, before granting planning permission, that the developer has made appropriate and satisfactory provision for the excavation, recording, analysis ....."

- 5.4 PAN42 follows in very much the same vein with the emphasis on the applicant appointing and funding specialists, e.g:-

"the Planning Authority may reasonably require evidence that the developer has made satisfactory provision, including provision of funding or identification of the sources of funding for the excavation, recording .....".

Funding by the Planning Authority is suggested only where the developer:-

"is a non-profit making, community body, such as a charitable trust which is unable to raise the funds ..... etc."

- 5.5 PAN42 recommends certain conditions which are considerably closer to that imposed by the District Council than that laid down by the Reporter:-

"No development shall take place within the areas indicated until the applicant has secured the implementation of a programme of archaeological work ..... and approved by the Planning Authority."

and

"The developer should afford access at all reasonable times to any archaeological organisation acceptable to the Planning Authority and shall allow them to observe work in progress and record items of interest and finds. Notification of the commencement date ..... and the name of the archaeological organisation retained by the developer shall be given to the Planning Authority .....".

- 5.6 From the above quotations from Government publications NPPG5 and PAN42, it is very evident that the onus for appointing and funding archaeological work is the responsibility of the applicant and that the original Reporter made an error when he imposed a condition placing those responsibilities on the Planning Authority.

PAN42 makes it clear that these standardised conditions supersede those suggested in Circular 18/1986 and, accordingly, the Reporter was wrong to support the earlier Reporter's condition as complying with the condition in 18/1986 (see para 3.4 above).

- 5.7 It is particularly frustrating, when the Planning Authority has attempted to redress the error made by one Reporter, by imposing a condition very much in-line with Government recommendations, not only for another Reporter to indirectly support that error but also award costs against the Council.

## 6 FINANCIAL IMPLICATIONS

- 6.1 Until the appellant formally submits his claim, the financial implications are unknown but the costs are unlikely to be exceptional. Again members should note that no provision for meeting such costs was made within the disaggregated budget for the department.

- 6.2 One saving grace is that the archaeological work, subsequently undertaken by the applicant, has been completed. In the absence of the appeal, this cost would have to have been met by the Council, thus to some extent cancelling out the award of appeal expenses against the Council.

## **7 CONSULTATION**

- 7.1 The Director of Finance and the Director of Law and Administration have been consulted in the preparation of this report.

### **NOTE**

No background papers, as defined by Section 50D of the Local Government (Scotland) Act 1973, (other than any containing confidential or exempt information) were relied on to any material extent in preparing the above Report.

AA/JJ/KW  
5 July 1996

Alex Anderson  
Director of Planning, Transport & Economic Development