



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

**[2019] CSIH 30
XA89/18**

Lord President
Lord Menzies
Lord Brodie

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Appeal by

PERSIMMON HOMES LIMITED

Appellants

against

THE SCOTTISH MINISTERS

Respondents

**Appellants: Armstrong QC; Shepherd and Wedderburn LLP
Respondents: Burnet; Scottish Government Legal Directorate**

15 May 2019

Introduction

[1] This is an appeal, under section 239 of the Town and Country Planning (Scotland) Act 1997, against the respondents' refusal of an appeal against the decision of Dundee City Council to refuse the appellants' application for planning permission. The permission sought was for residential development at the site of the former Kingspark School. The issues are whether the respondents' Reporter: (1) failed to take account of material

considerations contained in a report by the Council's Director of City Development;
(2) erred in his interpretation of the relevant Local Development Plan; and/or (3) failed to give proper, adequate and intelligible reasons for his decision.

Legislation and Policy

[2] Applications for planning permission require to be determined in accordance with the development plan, unless material considerations indicate otherwise (1997 Act, ss 25(1)(a) and 37). The relevant development plan is TAYplan's Strategic Development Plan and the Dundee City Council's Local Development Plan. TAYplan are a statutory partnership between Dundee City, Angus, Perth and Kinross, and Fife Councils. The TAYplan SDP, which was approved by the respondents in October 2017, sets out planning policies to guide development in the period 2016-2036. Each of the four councils in TAYplan prepares their own LDP to reflect the SDP (1997 Act, s 16(6)). The relevant Dundee City LDP (2014) was adopted on 5 December 2013. In the Reporter's Decision Notice of 11 September 2018, he took account (at para 29) of the proposed LDP 2 (2017; later adopted on 5 February 2019) as the Council's up-to-date view.

[3] Policy 4 (Homes) of the SDP provides that LDPs shall: (a) identify sufficient land within each Housing Market Area to meet the housing land requirement; (b) ensure a minimum of 5 years effective land supply at all times; and (c) ensure that the mix of housing type, size and tenure meets the needs and aspirations of a range of different households throughout their lives, including the provision of an appropriate level of affordable housing based on defined local needs. For the whole of the TAYplan area this is to be an approximate ratio of 25% affordable to 75% market homes but it may vary between housing market areas and Local Authorities.

[4] Policy 8 (Housing Land Release) of the LDP 2014 states:

“Priority will be given to the development of the allocated brownfield and the greenfield sites.

To ensure that an effective 5 year supply of housing land is maintained over the plan period the sites allocated in Appendix 2 shall not be developed for other uses.

Housing land release on brownfield sites, in addition to the allocations set out in Appendix 2, may be acceptable where it can be demonstrated that it will improve the tenure mix in an area where existing choice is limited and would make a positive contribution to the regeneration objectives of the area.”

Policy 9 is the equivalent policy in LDP 2. It does not differ materially from the LDP 2014.

The site at the former Kingspark School was not allocated in Appendix 2 of LDP 2014 or in the equivalent appendix of LDP 2.

[5] Meantime, a Site Planning Brief was approved by the Council’s City Development Committee at a meeting on 25 January 2016. The SPB was specific to the former Kingspark School and identified 2.85 hectares of land as suitable for housing, with 1.60 hectares of retained open space. The land was owned by the Council and “available for immediate sale”. It is surrounded on three sides by existing “modern residential properties” and on the fourth by a school with playing fields. The SPB states:

“Introduction

The former Kingspark School site is now surplus to ... requirements. An opportunity exists to create a high quality housing development providing a mix of house types and sizes, whilst retaining an area of open space for community use. The Site Planning Brief has been prepared in support of the [LDP] 2014.”

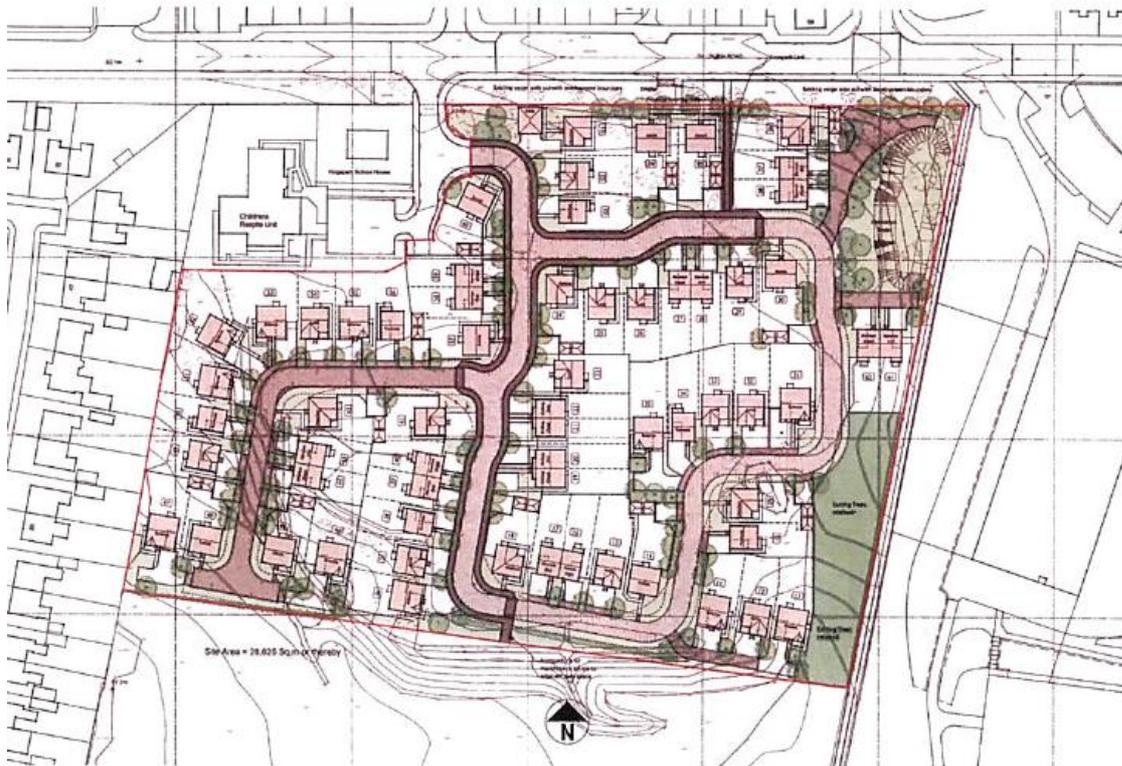
[6] The Design Guidance anticipated a high quality scheme which would “contribute to creating places that build on and enhance the identity of different parts of the city”. The Public Realm section expected that the scheme would “complement the wider setting of the development site”. An area of open space was to be retained by the Council “to serve

existing residents in the area as well as the new housing". The scheme would be required to take into consideration the "potential for improvements to the biodiversity of the site and its surroundings" and would retain an existing line of trees. A "permeable network of pathways should be part of any layout providing a choice of routes through the development and linking with surrounding areas". The SPB identifies the site as follows:



Background

[7] The appellants applied for planning permission for a residential development of 62 houses on the former site, which was classified as a brownfield, as follows:



[8] On 19 March 2018, the Council's Executive Director for City Development produced his report on the development. It concluded that the proposals complied with the relevant policies of the SDP and the LDP 2014, including Policy 8 (*supra*), because:

"7.22 Policy 8: Housing Land Release

...

7.24 The site is not allocated for housing in the [LDP] 2014. However, the site is subject of [an SPB] which establishes the principle of residential development at this site as acceptable. The [SPB] has been prepared in support of the [LDP].

7.25 The proposal would provide a mix of 3 and 4 bedroom detached and semi-detached properties for private sale. This would enhance the tenure mix in the locality and contribute to the regeneration objectives of this area. In addition to the proposed residential development, 1.6 hectares of land to the south of the application site will be retained and form public open space in accordance with the [SPB].

7.26 The principle of re-developing this brownfield site for residential development is considered to be in accordance with the requirements of Policy 8."

[9] The report observed that the reason for the site not having been allocated for housing in the LDP 2014 was because the site had not at that time been declared surplus to

requirements. The SPB had subsequently been approved by the Council for housing. The report identified LDP 2 as relevant, but there were no material differences between it and the LDP 2014. The explanation for the non-allocation of the site in LDP 2 was as follows:

“7.99 ... sites with planning permission are not included as the decision to approve the principle of development has already been taken. In preparing [LDP 2] the site at Kingspark was not included as a [proposal] had been submitted by the developer with the intention to submit a planning application for a housing development in due course. Given that a decision on the application would be taken by the Council before [LDP 2] was adopted (anticipated towards the end of 2018) it was decided not to include the site in [LDP 2] as the future use of the site would have already been decided.”

[10] The Council refused permission on the basis that the development would not: comply with Policy 8 of the LDP 2014 as the site was not allocated for housing in Appendix 2; demonstrably improve the tenure mix in the area; make a positive contribution to regeneration objectives or the local area generally; and comply with Policies 36 (Open Space), 38 (Trees and Urban Woodland), 44 (Air Quality) and 52 (Accessibility of New Development). There were no material considerations justifying approval of the application contrary to the provisions of the development plan.

Appeal

[11] The appellants appealed to the respondents. In their Appeal Statement, they drew attention to the fact that the LDP 2014 had been prepared at a time when the Council had not yet decided whether the site was still required for education purposes. Policy 8 allowed for development on non-allocated brownfield sites; an approach supported by TAYplan, Policy 4. Policy 8 referred to “tenure mix” on a city-wide basis. The development would contribute to a more balanced tenure mix and improvement in choice, both locally and on a city-wide basis. The Council’s agreed objective for regeneration of the site had been

disclosed by the approval of the SPB. The Council's decisions on the SPB and in the planning application were "obviously contradictory". The Statement concluded:

"5.14 ... the Council's Planning Committee has chosen to disregard a decision taken by the Council to redevelop and regenerate the Kingspark site taken only a short time before determining the planning applications now subject to these appeals. The refusal reasons indicate that the Planning Committee do not accept the principle of development on the site, which is clearly at odds with the previous decision of the Council and the status of the [SPB] as a significant material consideration.

...

6.5 These proposals are for a high quality residential development on a brownfield site in a residential area close to local facilities and highly accessible to public transport and open space. The development can be served by necessary infrastructure. In short, this is a highly sustainable development proposal.

...

6.7 The appeal proposals are supported by the [SDP 2014], being within a Tier 1 settlement and in the top bracket of the sequential criteria identified in TAYPLAN Policy 1. TAYPLAN Policy 4 identifies Dundee City as an exceptional location for housing and supports windfall development.

6.8 The principle of development is also supported by LDP [2014] Policy 8, which supports the development of unallocated brownfield sites for housing in Dundee City, which improve tenure mix and contribute to regeneration objectives. The proposal will support the delivery of accessible housing allowing both existing and new residents the opportunity to move from existing housing stock freeing it up for other purchasers at other points along the housing ladder, creating wider choice for all involved. The site will be regenerated in accordance with the [SPB] approved by the Council."

[12] In its response, the Council agreed that housing land release on non-allocated brownfield sites may be acceptable where it could be demonstrated to improve tenure mix in an area where existing choice is limited and would make a positive contribution of the regeneration objectives of the area. The Council had not said that the application fell to be rejected solely because the site was unallocated, but that did mean the development was *prima facie* contrary to that element of Policy 8 which provided for further requirements in relation to tenure mix and regeneration.

[13] In terms of tenure mix, all of the 62 residential units were to be privately owned. There would be no social housing or 1 or 2 bedroom flats. The units were very similar to those proposed and being delivered at a variety of other sites within the city. The tenure mix element referred not to Dundee as a whole, but to specific areas to which the LDP 2014 applied. The correct area was Kirkton. There was no evidence from the appellants to show that the development would address an existing limited choice or make a positive contribution to regeneration objectives. Policy 4 of TAYplan, and Policy 8 and Appendix 2 of the LDP 2014, were designed to ensure an adequate supply of land for housing. This would be achieved by identifying prioritised allocated sites throughout the city.

[14] The Council accepted that the SPB weighed in favour of granting the appeal, but the position of the local community was not to support housing on the site. The proposals may have been within the terms of the SPB but they also resulted in a detriment to the amenity through the loss of a significant area of open space. Any weight given to the SPB was not sufficient to justify approval contrary to the development plan.

[15] The appellants responded with additional comments. On tenure mix, a lack of flats in the development was irrelevant. Policy 8 was concerned with tenure, in terms of the type of ownership, not the physical type of accommodation. It did not require the provision of affordable or social housing on the site. The SDP and Planning Advice Note 2/2010, "Affordable Housing and Housing Land Audits" provided that LDPs should set out any affordable housing requirements. The LDP 2014 did not do so. Policy 8 provided no guidance on what "improve the tenure mix" meant in practice or the "area" to which it applied. Good-value private family homes were in demand. There was a limited choice in the area. The word "area" in Policy 8 was not to be construed as referring to Kirkton. The relatively low proportion of owner-occupied housing in Dundee was a relevant

consideration. Even if Policy 8 addressed Kirkton alone, there was limited choice there, partly because of the area's relatively small size. More modern private houses would provide more choice, in terms of tenure and in other respects.

[16] The development would make a positive contribution to the regeneration objectives of the area. The Council had approved regeneration objectives for the area, following the demolition of the school, through its approval of the SPB. The Council had not referred to TAYplan Policy 4, which provided for Dundee to have the flexibility to plan for housing numbers in excess of the housing land requirement. Policy 8 did not refer to "the local area" as stated by the Council above, but to "the area". The SPB had been prepared and approved after full consultation with the local community. It supported housing on the site and an area of open space considered sufficient to meet the community's needs.

Reporter's decision

[17] The Reporter dismissed the appeal and refused planning permission. The Reporter reasoned that, as the development was contrary to Policy 8 in the LDP 2014, it did not comply with the development plan. Policy 8 was very specific about the tests to be met before brownfield land would be released for housing. The first element was satisfied in that the site was brownfield. The two other elements were not. First, the appellants had not demonstrated that development would improve the tenure mix in the "local area", in respect of which there was no specific information that choice was limited. Secondly, although the site would be in a predominantly residential area, and housing development on it had the potential to complement the character of the area, new homes would not contribute to any specific regeneration objectives. It was for the appellant to present a compelling case to satisfy the policy tests.

[18] The development would bring a brownfield site into reuse, but the development of brownfield land:

“25. ... will require to be carefully managed to ensure that the benefits of new developments are fully realised, particularly to ensure public/private investment in regeneration/neighbourhood renewal areas and the Waterfront is maximised.

26. ... LDP policy 8 is designed to support additional brownfield land for housing only where there are contributions to a stated regeneration objective for an area” (emphasis added).

There were no specific regeneration activities associated with the site. Although the Council had approved the SPB as non-statutory supplementary guidance in 2016, its more recent position was set out in LDP 2, which did not identify the site as a brownfield site prioritised for housing. There was no reason to regard LDP 2 as anything other than the up-to-date view of the Council on the proposed use for the site.

[19] The finding that the development did not comply with Policy 8 of the LDP 2014 meant that there was no need to consider other, more specific matters, such as the quality and design of the new housing, landscaping and impacts on trees, the risk of flooding posed by the new existing housing, the impacts on air quality and transport networks, and the general accessibility of the housing layout proposed.

[20] The general presumption in favour of sustainable development did not alter the status of the development plan as the starting point for decision making. It did not override a “clear and up-to-date land use strategy for housing in Dundee” which was set out in the LDP 2014 and LDP 2. A generous supply of housing land had been identified into which new housing would be guided. The release of brownfield sites (other than those allocated) was a “tightly controlled policy”.

Submissions

Appellants

[21] The question of what was a material consideration was a question of law (*Tesco Stores v Secretary of State for the Environment* [1995] 1 WLR 759, at 764 and 780). If a decision maker failed to take account of a material consideration, that was an error of law (*City of Edinburgh Council v Secretary of State for Scotland* 1998 SC (HL) 33, at 44-45). The decision maker must give an account which is sufficient to enable the parties and the court to understand the reasoning (*City of Edinburgh (supra)*, at 50; *Moray Council v Scottish Ministers* 2006 SC 691, at paras [30]-[31]). The decision maker must enter into the issues canvassed and explain why one argument was preferred to another (*Flannery v Halifax Estates Agency* [2000] 1 WLR 377, at 382). A decision will be quashed if it lacks the factual basis required to support it (*Wordie Property Co v Secretary of State for Scotland* 1984 SLT 345, at pp 347-348).

[22] The Reporter's conclusion that he had "no reason to regard the proposed LDP as anything other than the up-to-date view of the Council on the proposed use for the site" indicated that he had ignored: the conclusion of the Executive Director that the site had been approved in principle for development; the Director's explanation for the site's exclusion from LDP 2; relevant parts of the appellants' Appeal Statement; and the continuing status of the SPB as supplementary guidance for the Council. There was no reasoned basis for this conclusion. The issue of what was the up-to-date policy view on the site was an important issue in the determination of the appeal.

[23] A decision maker had to interpret planning policy objectively in accordance with the language used, read in its proper context. Such interpretation was a matter of law (*Tesco Stores v Dundee City Council* 2012 SC (UKSC) 278, at paras 17-23). By reading the word "stated" into Policy 8 of the LDP 2014 with no explanation, the Reporter had interpreted the

policy differently from the Council and the appellants. The Reporter had failed to set out the basis for this interpretation of the policy. He had failed to have regard to the SPB, which set out regeneration objectives for the area, when considering whether the proposal complied with Policy 8.

[24] The Reporter concluded that: the test in Policy 8 applied to a localised area within the plan area; the appellants were required to present a compelling case, supported by quantitative evidence; and that the LDP 2014 did not provide a basis to support a development if it was not met. This interpretation was wrong. The Reporter did not have a proper understanding of the policy. The Policy and its supporting text did not set out a requirement for a compelling case supported by quantitative evidence or justify the word “local” being implied. Such an interpretation was not consistent with TAYplan and the LDP 2014 support for the development of brownfield sites. The policy should not have been interpreted as a negative one which excluded development on brownfield sites unless compelling evidence were presented. In the circumstances the Reporter had to set out the basis for his interpretation. He had not done so.

[25] The Reporter had no basis upon which to conclude that the proposal would undermine the LDP 2014 strategy. The Reporter failed to set out proper, adequate and intelligible reasons for his conclusions on why: the appellants’ evidence and the conclusion by the Executive Director that the proposal complied with Policy 8 should be rejected; and granting permission would undermine the land use strategy for Dundee.

Respondents

[26] The appellants had failed to show any failure or error of law or breach of statutory duty by the respondents. The Reporter’s conclusions could only be challenged if irrational

(*Moray Council v Scottish Ministers (supra)* at paras [28]-[30]). It was for the court to determine what a relevant consideration was, but the weight to be attached to one, and whether it justified a departure from the development plan, was for the decision maker (*Tesco Stores v Secretary of State for the Environment (supra)* at 764 and 780). The application of planning policy and the exercise of planning judgment was a matter for the decision maker (*Tesco Stores v Dundee City Council (supra)* at para 19). Decision letters, and reports, should be read as a whole and should not be subjected to detailed textual analysis (*Moray Council v Scottish Ministers (supra)* at para 28). The court should not engage in a full and detailed exposition of the whole process of reasoning (*City of Edinburgh Council v Secretary of State for Scotland (supra)* at 49). The appellants had to demonstrate that the reasons were inadequate and that they had been substantially prejudiced (1997 Act, s 239; *South Bucks District Council v Porter (No 2)* [2004] 1 WLR 1953, at para 36).

[27] The Council had not agreed with their Executive Director because the Council's reasons for refusal were that the application failed to comply with Policy 8 of the LDP 2014 as the site was not allocated for housing. The appellants had failed to demonstrate: improvement in tenure mix; a positive contribution to regeneration objectives; or that development of the site would contribute positively to the local area. If the Council had agreed with the assessment in the report, they would have granted permission.

[28] The Reporter did not rely on any erroneous fact in his assessment. He accepted the SPB as a material consideration, but found that it did not outweigh the development plan. The Reporter was entitled to take LDP 2 into account as the Council's up-to-date view. The appellants misinterpreted the SPB and the reason given by the Executive Director as to why the site was not included in LDP 2. The Executive Director did not say that the site was to be granted permission before the LDP was adopted; only that a decision would have been

taken. The complaint may be properly directed at the decision by the Council not to allocate the site in LDP 2, but the appellants did not promote this. The Reporter's references to the site not having planning permission, or featuring in the existing supply of effective land, were correct.

[29] Policy 8 gave priority to the development of allocated brownfield and greenfield sites. The decision should be viewed in the context: that there was no shortfall in the 5-year effective housing land supply in Dundee; the LDP 2014 provided for a generous supply; and the SPB did not imply an irrevocable decision that there was a need to develop the site for housing in order to meet a regeneration objective.

[30] The Reporter's use of the word "stated" in relation to regeneration objectives was not unreasonable. The Reporter required to consider whether the development would contribute to regeneration. The interpretation of the policy, as applying to specific areas within Dundee City, was reasonable. The appellants had to satisfy the policy requirement by producing evidence about compliance with the stated criteria. The Reporter did not insist on the application incorporating quantitative and substantiated evidence. He said only that that would have been a way of helping to persuade him that the burden on the appellants, to demonstrate that the proposal satisfied the criteria, had been met. He applied his planning judgment to the relevant tests in Policy 8.

[31] The housing strategy was a key element in any development plan. The Reporter was entitled to take the view that failure to comply with the most relevant and fundamental policy in relation to the method by which additional sites might be released had the potential to undermine the LDP 2014 land use strategy.

Decision

[32] In *Wordie Property Co v Secretary of State for Scotland* 1984 SLT 345, the Lord President (Emslie) identified (at 347-8) a number of bases, other than a straightforward material error of law, upon which a decision would be vitiated. These included taking into account an irrelevant consideration or finding that a critical fact existed when there was no basis for it. The Reporter's decision, that there was no reason to regard LDP 2 as other than the up-to-date view of the Council on the proposed use for the site, falls foul of both of the errors identified in *Wordie*. The most up-to-date expression of the Council's view (prior to the refusal of the application) was contained not in LDP 2, which did not specifically address the site, but in the SPB. The Council had not maintained otherwise. Rather they had accepted that the SPB supported granting the application. It was, as the Council submitted, the local community which did not support the development.

[33] The SPB had made it clear that the site was "An opportunity ... to create a high quality housing development", which the Council regarded as supporting LDP 2014. The uncontradicted information before the Reporter from the Council's Executive Director was that the reason, for it not having been included as a brownfield site suitable for housing in Appendix 2 of LDP 2014, was because the Council had not decided whether it might yet be needed for educational purposes. The reason why it was not included in the equivalent appendix to LDP 2 (2017) was because the appellants had intimated an intention to apply for planning permission for a residential development. The Reporter thus had a very sound reason for holding that LDP 2 was not an up-to-date statement of the Council's view of the site. Rather that view was contained, as extant supplementary non-statutory guidance, in the SPB which addressed the Kingspark School site specifically. Seen in this light, the grant of permission cannot be regarded as undermining the land use strategy for housing in

Dundee. The Reporter's dismissal of the SPB, as superseded by LDP 2, meant that he regarded the SPB as effectively irrelevant. On the contrary, it ought to have been regarded as a material consideration in the determination of the appeal.

[34] That is sufficient to determine the appeal and to quash the decision given the failure to take this material consideration into account (*Wordie Property Co v Secretary of State for Scotland (supra)*, LP (Emslie) at 348). However, it may be helpful if the court were to express its views on the meaning of the relevant policies as a matter of law for the benefit of the Reporter in the event of re-consideration. In doing so, the court remains anxious not to trespass into the field of planning judgment.

[35] First, the third paragraph of Policy 8 in the LDP 2014 ought not to be construed in a negative way and regarded as a means of preventing development. It should be seen as a positive statement which permits housing development on brownfield sites, even if they are not (as the Kingspark site effectively is, in terms of the SPB) included in the relevant appendix. The reference to "tenure" mix is not to types or sizes of dwelling, but to the manner of holding (eg social rented or below market rent as set against private rented or owner occupied; see *Gladman Developments v Scottish Ministers* [2018] CSIH 17). This is clear from the distinction in Policy 4C of the TAYplan SDP with its reference to a "mix of housing type, size and tenure". In that context, the policy does not anticipate that these different tenures should be intermingled within a very small urban district like Kirkton. Such an acute mix, in what is essentially a small residential housing scheme of semi-detached and terraced dwellings, would be difficult to achieve. Rather, a much larger area is in contemplation. The purpose of the policy is to secure a mix of tenures across each Housing Market Area (HMA) in order to meet the needs and aspirations of a range of different households. The relevant HMA is Greater Dundee. In addition, for this part of the policy to

be relevant, the Reporter would have to have a reason for concluding that existing choice in the area selected is limited. It is not for the appellants to demonstrate that there is a limited choice of tenure in a particular area; that being a matter peculiarly within the knowledge of the Council. If there is no limited choice, there is no need to improve it.

[36] Secondly, in relation to the need for a contribution to the “regeneration objectives of the area”, in the absence of there being any such objectives “stated” in the development plan, it is unreasonable to qualify them by adding, as the Reporter did, that word. In this case, the manner in which the objectives of regeneration were to be met was by creating a high quality housing development in what is currently a brownfield site, which has no use other than as informal open space. The objectives are already set out in the SPB. These are that the ground is regenerated by being put to a structured use with a balance of housing and maintained open space for general community use (ie the existing residents and not just the incoming house occupiers). Sub-divisions of this are improvements in biodiversity, the preservation of existing trees and the creation of the permeable network of pathways.

[37] In all of this, and, as stated above, approaching Policy 8 in a positive way, there is no requirement for an appellant to present “a compelling case”.

[38] The appeal will be allowed and the decision of the Reporter dated 11 September 2018 will be quashed.