



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

**[2019] CSIH 3
XA58/18**

Lord President
Lord Menzies
Lord Brodie

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Appeal by

**GRAHAM'S THE FAMILY DAIRY LIMITED and MACTAGGART & MICKEL HOMES
LIMITED**

Appellants

against

THE SCOTTISH MINISTERS

Respondents

Appellants: J d C Findlay QC, A O Sutherland; DWF LLP

Respondents: Crawford QC, Van der Westhuizen; Scottish Government Legal Directorate

23 January 2019

Introduction

[1] This is an appeal against a decision of the respondents, dated 18 June 2018, dismissing an appeal against Stirling Council's decision to refuse planning permission for a development in the green belt. The development was for 600 housing units (including affordable housing), a public park, commercial space (neighbourhood centre), improvements to road and drainage, and a new primary school, located between Bridge of

Allan and Causewayhead. The primary issue is whether the respondents failed to take into account a relevant consideration or took into account an irrelevant one, notably in connection with the outcome of a local development plan process, which had occurred between the date of a reporter's recommendation to the respondents and their decision which was taken about a year later.

Legislative and Policy Framework

[2] Scottish Planning Policy attempts to deliver the objectives of the National Planning Framework, which provides for Scotland's long-term spatial development as envisaged by the respondents (Town and Country Planning (Scotland) Act 1997, Pt 1A). A key component in SPP is "a presumption in favour of development that contributes to sustainable development". This means that:

"28. The planning system should support economically, environmentally and socially sustainable places by enabling development that balances the costs and benefits of a proposal over the longer term. The aim is to achieve the right development in the right place; it is not to allow development at any cost."

One of the requirements of SPP is the maintenance of an effective housing land supply.

Planning authorities "123. ... should ... ensure a generous supply of land for house building is maintained and there is always enough effective land for at least five years".

[3] Planning decisions require to be made in accordance with the relevant local development plan, "unless material considerations indicate otherwise" (1997 Act, s 25(1)).

Where a shortfall in the 5-year effective housing land supply exists, LDP policies for the supply of housing land will not be considered up-to-date (SPP, para 125). Where that occurs, the status of the sustainable development presumption is elevated from a "material" (para 32) to a "significant material" (para 33) consideration. In that situation:

“Decision-makers should also take into account any adverse impacts which would significantly and demonstrably outweigh the benefits when assessed against the wider policies in this SPP.”

[4] If an LDP is under review, it may be appropriate to consider any prejudice to a new plan, where the development:

“34. ... is so substantial, or its cumulative effect would be so significant, that to grant permission would undermine the plan-making process by predetermining decisions about the scale, location or phasing of new developments that are central to the emerging plan. Prematurity will become more relevant as a consideration the closer the LDP is to adoption or approval.”

[5] Regulation 13 of the Town and Country Planning (Appeals) (Scotland) Regulations 2013 provides that, if an appointed person (reporter) proposes to take into consideration any new evidence which is material to the appeal, the appellant and the planning authority must be given an opportunity to make representations about it.

Planning History

[6] In September 2014 the appellants sought permission for their development from Stirling Council. The report from the Council’s planning officials had recommended approval because: the benefits of the development would outweigh non-compliance with the LDP (green belt), which had been adopted in 2014; significant weight had to be attached to SPP, which provided for a presumption in favour of sustainable development; the SPP outweighed the LDP; and a proposed Agreement under section 75 of the 1997 Act and the imposition of planning conditions could mitigate the impact of the development.

[7] On 23 March 2016, following a pre-determination hearing and contrary to the advice of their officials, the Council refused permission. The reasons for refusal, were that: the benefits of the development would not outweigh the disadvantages arising from non-

compliance with the LDP; and the section 75 agreement would not satisfactorily mitigate the impact of the development, in connection with the erosion of the green belt and flooding and transport risks.

[8] The appellants appealed to the respondents under section 47 of the 1997 Act. The respondents resolved to determine the appeal themselves (1997 Act, sch 4, para 3(1)), rather than have a reporter do so, because: the development involved over 100 residential units; high priority was placed on the delivery of good quality housing; and the respondents played an important part in the monitoring of the practical application of SPP. On 11 October 2016 the respondents appointed a reporter to examine and report on the appeal. In January 2017 the reporter requested information on the relevance of a replacement LDP, which was then being developed, and the weight to be attached to it in the context of any potential prejudice which might be caused to it by the grant of permission for the development. The parties were agreed that the emerging LDP was relevant, but disagreed on the weight which might be attached to it. On 1 June 2017, the reporter recommended refusal of the appeal.

The Report

[9] The report identified the principal issues in the appeal as being the impact on the green belt, flooding and transportation. Other matters included economic benefits, enabling development, infrastructure improvements, the emerging LDP, the historic environment and visual impact. The report explained that the development would meet a number of SPP objectives, which could be improved during the detailed design phase. These were local and city wide economic benefits, including the provision of: construction and other local jobs; affordable housing; businesses, both retail and leisure; easy access by road, public

transport and on foot; support for infrastructure; improvement in terms of flood prevention; and the enhancement of green infrastructure.

[10] The report acknowledged (para 2.12) that there was a shortfall of 896 housing units in the land which had been identified in the extant LDP as suitable for housing. That requirement, minus completions, was for 4,536 units, giving an annual target of 504 to the end of the 10 year plan period in 2024. The effect of this was that the LDP had identified an effective supply of only 3.2 years. The LDP was thus deemed out of date. The reporter reasoned that the development would “only address this shortage in part, as the programmed delivery of the housing is mostly beyond the five years’ supply shortfall”. This reasoning was based upon the development having a ten year programme. There were several constraints to be overcome before the grant of permission in principle could result in houses being built. These constraints, including drainage, road infrastructure, conditions and legal agreements, could take more than a year to resolve. The appellants’ phasing showed a maximum of 225 houses being built in the first four years and 350 within five. Given the lead in time, the reporter determined that a maximum of 175 units would be built within the five years and thus contribute to the elimination of the shortage. It could be greater or lesser. In relation to the replacement of the deemed out of date LDP, the reporter concluded that there was an “expectation” that it would “8.5 ... properly address the shortfall before any housing is built on this site if the appeal is allowed”.

[11] The report noted that the development would be contrary to the existing LDP, which sought to protect the green belt from development. There would be:

“8.6 ... a significant reduction in the separation of the settlements at Bridge of Allan and Causewayhead, Stirling. This would be noticeably more pronounced by the local topography and the isolation of the remaining section of green belt and its effective suburbanisation as parkland.”

The conclusion section of the report continued:

“8.11 Taking all the issues into account... a judgement on the appeal comes down to the weight to be given to the current development plan policy in relation to the green belt, set against the expectations of SPP for sustainable development and providing a housing land supply. The importance of the green belt in this location has been highlighted ... and there is no doubt that many local people value the contribution this site makes to the separation and retention of identity of the two communities of Bridge of Allan and Causewayhead. At the same time, the proposal would make a contribution to the shortfall in housing land supply, including affordable housing, whilst providing for the infrastructure requirements it would generate. The proposal would also contribute to sustainable development.”

[12] Given that a new LDP was in formation, the reporter considered that the grant of permission would, in terms of SPP (para 34, *supra*):

“8.13 ... have a prejudicial effect on a central aspect of the emerging LDP, namely the location of sufficient housing land for a five years’ effective supply and the extent of the green belt ... [T]his is a relatively significant and contentious issue which should be considered by LDP examination. ... it would be premature to grant planning permission in principle.”

[13] The reporter continued:

“8.14 Weighing up the benefit of part of the scheme to housing land supply and the benefits of the scheme in terms of local infrastructure against the total harm to the green belt, ... the green belt in this location is of such sensitivity, that it carries considerable weight. Housing should be planned for and provided in the context of the new LDP. ... The SPP presumption in favour of the development is a significant material consideration in this case, but, in the light of the scale of development related to its impact on housing land supply shortfall, I do not consider that this is sufficient to outweigh the development plan presumption against allowing the appeal.”

The overall conclusion was that the development would be “8.15 ... contrary to the development plan and that material considerations do not indicate that it should be allowed”.

[14] The report was not, at that stage, disclosed to the parties.

The Respondents' Decision

[15] After the report had been submitted, it ultimately became apparent to the reporters, who had been appointed by the respondents to examine the emerging LDP, that, rather than providing an effective five year supply of housing land, as the reporter in the appeal had anticipated, it would produce a shortfall of 169 units. Homes for Scotland, who represent many in the housebuilding industry, later contended that even this was out of date and the shortfall could be as much as 897. When the new LDP was approved by Stirling Council in May 2018, it confirmed the 169 shortfall.

[16] The respondents' officials presented a submission on the appeal to the respondents on 17 May 2018. The delay which had occurred by then was attributed to a previous decision to await the adoption of the emerging LDP; the timing of which had "slipped". The LDP had been approved by the Council for adoption on 3 May 2018, although that would not formally occur until October 2018. The submission drew the respondents' attention to the reporter's acknowledgement that the emerging LDP ought to have identified sufficient sites to resolve the then shortage according to the existing LDP of some 896 units. The new LDP had, however, after the identification of an arithmetical error, produced the 169 unit shortfall. The SPP presumption in favour of development was therefore a "significant material consideration". The submission went on to summarise the report by stating that the reporter did not consider that the presumption, as a material consideration, or the development's benefits outweighed the LDP's green belt policy.

[17] The submission continued:

"Conclusion

12. Taking all the issues into account, a judgement on the appeal comes down to the weight to be given to development plan policy in relation to the greenbelt, set

against the expectations of SPP for sustainable development and providing a housing land supply.

13. The reporter acknowledges that the proposal would in some ways contribute to sustainable development and helping to meet the housing shortfall. However, the proposal is also a major development at a strategic scale, would result in the loss of a significant area of sensitive greenbelt and is considered contrary to the development plan. The green belt provides an important gap between Causewayhead and Bridge of Allan, preventing further coalescence of settlements. ... Overall, the appeal reporter concluded that neither the contribution to the housing land supply nor the benefits of the scheme in terms of sustainability or local infrastructure are sufficient material considerations to outweigh the development plan particularly the harm to the green belt in this sensitive location and further coalescence of settlements.

Recommendation

14. SPP requires that planning applications must be determined in accordance with the development plan unless material considerations indicate otherwise. SPP aims to achieve the right development in the right place, not to allow development at any cost. We therefore agree with the reporter's overall conclusions and recommendation that the proposed development does not accord overall with the relevant provisions of the development plan and that material considerations do not indicate that the appeal should be allowed. We are satisfied that the site has recently been assessed through examination, and was not considered suitable for housing. The site remains as greenbelt in the emerging LDP2. We conclude that there are no planning reasons for us to recommend a departure from the reporter's recommendation.

15. On balance it is recommended that you agree that the appeal is dismissed and refuse to grant planning consent."

[18] In a section entitled "Presentation" it was suggested that a press release should read,

inter alia:

"Having carefully considered the reporter's report, [the respondents] agreed with the reporter's recommendation and have refused planning permission in principle. The proposed development does not accord overall with the relevant provisions of the development plan due to the loss of an important area of greenbelt and coalescence of settlements ...".

[19] The respondents' decision, which was issued on 18 June 2018, dismissed the appeal and refused planning permission. The decision letter simply stated that the respondents accepted the reporter's conclusions and recommendations and "adopt them for the purpose

of their own decision". The letter gave no further reasons. It did not refer to the reporter's prior unrealised expectation that the new LDP would "properly address the shortfall before any housing is built on this site if the appeal is allowed".

Submissions

Appellants

[20] With the exception of their second ground of appeal, the appellants did not challenge the content of the report to the respondents. Their criticisms were directed towards what had happened after the report had been submitted. As at the date of their decision, the respondents were bound to take into account all material considerations (1997 Act, s 25; *North Lanarkshire Council v Scottish Ministers* 2017 SC 88 at paras 25-28). If the respondents were (or ought reasonably to have been) aware of a material consideration at the time of their decision, they were bound to take it into account (*R (Kides) v South Cambridgeshire DC* [2003] 1 P&CR 19 at para 125). If they did not do so, and there was a real possibility that it would have made a difference, the decision would be invalid (see eg *Carroll v Scottish Borders Council* 2016 SC 377 at para [66]).

[21] The grounds of appeal were, first, that the respondents erred by failing to take into account that the new LDP had been approved for adoption with the housing land supply shortfall of 169 units; a position not anticipated by the reporter. The respondents failed to take into account that the actual shortfall could be as much as 897 homes. The respondents appeared to have taken account of the prejudice to the LDP process, as described by the reporter, when that process had been almost complete and was no longer a relevant consideration. The reporter had contemplated that the relevant material considerations, including the development's contribution towards sustainable development, indicated that

permission in principle could be granted. There was a real possibility that the respondents would have reached a different conclusion if they had not left out of account a relevant consideration and taken into account an irrelevant consideration. In that context, there was a “tilted balance” in favour of development. What required to be assessed was whether the adverse impact on the green belt “significantly and demonstrably” outweighed the benefits of the development (SPP paras 33 and 125; *Hopkins Homes v Communities Secretary* [2017] 1 WLR 1865 at paras 54-59).

[22] In reaching his recommendation, the reporter had taken into account that, when the new LDP was in place, there would be no shortfall. He had thought that the development would have a limited impact on any shortfall. He had taken into account the prematurity of the application, given the development of the new LDP. There was no indication that the new LDP would remedy the shortfall within a reasonable time. The respondents’ contention, that the reporter’s reasoning had not proceeded on the basis that any shortfall would be remedied, was incorrect. Whilst there was a shortfall, both at the time of the report and the decision, the level of that shortfall was also material (*Hallam Land Management v Communities Secretary* [2019] JPEL 63 at paras 47 and 51-52). Homes for Scotland had advanced certain figures in that regard.

[23] The respondents accepted that they had been aware that the new LDP had produced a shortfall. If so, they were bound to take it into account and, in terms of regulation 13 of the 2013 Regulations, to allow the appellants and the Council to make representations upon it. If the respondents had taken the shortfall into account, which was unclear from their adjusted answers, they failed to explain how they reached their decision, having regard to the new LDP’s housing land supply shortfall of 169 homes.

[24] In terms of the second ground of appeal, the respondents erred in taking into account the reporter's finding that a maximum of only 175 units would contribute to the reduction in the housing supply shortage. The evidence had been that the proposed development would contribute 450 units in the first five years of development, or 350 if the first year were discounted. The effectiveness of the proposed development to achieve that rate had not been challenged. There was no evidence before the reporter to support his conclusion that the appellants' phased strategy showed a maximum of 225 units being built in the first four years or that the maximum was 175. The reporter had not been entitled to reach these conclusions on the evidence. There was a real possibility that the respondents would have reached a different conclusion, if they had not taken into account the reporter's findings in this regard. Again, alternatively, the respondents had failed to give proper, adequate and intelligent reasons in respect of the potential contribution to the housing land supply shortfall.

Respondents

[25] The respondents maintained that paragraphs 33 and 125 of the SPP did not alter the approach as set out in section 25 of the 1997 Act. The respondents had to decide the application in accordance with the LDP, unless material considerations indicated otherwise. The LDP had been deemed out of date at the time of both the report and the decision, thus triggering the presumption in favour of sustainable development. The weight to be attached to the presumption became a matter for planning judgment; balancing the presumption against the impact on the green belt policy. The recommendation in the report had still been valid at the time of the respondents' decision. The reporter's recommendation, that the appeal should be refused, and the respondents' subsequent decision had been determined

on the basis of a balancing exercise between the protection of the green belt on the one hand and the expectations of SPP for sustainable development and housing land supply on the other. They had not been determined on the basis of the new LDP. The new LDP's relevance was no more than as confirmation that the factual matrix remained the same, both when the decision was made and when the report was submitted.

[26] The policies in the existing LDP did not all become out of date. It was still possible to attach weight to them (*Hopkins Homes v Communities Secretary (supra)*). The extent of the housing supply shortfall was not material. The reporter had recognised that the development was on land designated as green belt in the existing LDP and not zoned for housing in the proposed LDP. He had considered that the development in the green belt would be contrary to the LDP. He had recognised that SPP was a significant material consideration, in so far as it contributed to sustainable development and the maintenance of a minimum five year housing supply. That notwithstanding, the protection of the green belt outweighed the SPP. The respondents similarly determined the appeal on that basis. The respondents knew, at the time of their decision, that the proposed LDP had been finalised and contained the 169 shortfall.

[27] The relevance of the new LDP to the reporter had been in the context of prematurity. It had not affected his balancing decision. The LDP had become irrelevant. That was a self-evident matter of fact. There was no need for the respondents to add a postscript to deal with it. The parties were assumed to have known what the outstanding issues were.

[28] Adequate and intelligible reasons had been given in the report and in the respondents' determination. The change from a surplus to a shortfall, which occurred in relation to the examination of the new LDP after the reporter had issued his report, was not

a material consideration or new evidence requiring an opportunity for the appellants to comment.

[29] Although the appellants had referred to a build rate of 450 units in the first five years of the development, this had been under reference to a phasing strategy. This had indicated a rate of 225 units in the first five years. There was accordingly evidence before the reporter to support his conclusion. The reporter had been entitled to estimate a maximum of 175 houses, as contributing to the elimination of the housing supply shortage, taking into account a lead time of more than a year to deal with matters subject to planning conditions and the construction of the necessary infrastructure.

Decision

[30] The court is concerned only with the legal validity of the respondents' decision and not with matters of planning judgment. A decision will be regarded as invalid where the decision maker has failed to take account of a relevant consideration or taken into account an irrelevant one (*Wordie Property Co v Secretary of State for Scotland* 1984 SLT 345, LP (Emslie) at 347-8). The respondents' decision is contained exclusively in their letter of 18 June 2018, which adopted the reporter's conclusions and recommendations *simpliciter*. The questions then are, first, whether the material considerations, which were taken into account by the reporter, and which had been so adopted, remained relevant at the time of the decision and, secondly, whether there were material considerations, which had emerged since the report, which were not taken into account by the respondents. If one or more of the reporter's material considerations had become irrelevant, but was still taken into account by the respondents, or if a new material consideration had emerged which was not taken into account by them, the decision would be invalid.

[31] The material considerations which the reporter took into account are expressed in clear and unambiguous terms in the conclusions to his report. One critical factor was that the reporter was proceeding (para 8.5) on the basis that the emerging LDP would “properly address the shortfall” before any houses could ever be built on the development site. This was a material consideration (“all the issues”) which the reporter then took into account (para 8.11) when he conducted his analysis of the competing values of the green belt and the SPP presumption in favour of sustainable development. A second factor, and one which was undoubtedly material (para 8.13) in the reporter’s recommendation, was that the grant of planning permission would have a prejudicial effect on the location of housing land, which was sufficient to provide a five year supply, in the new LDP. However, the significance of the new LDP was not just in the context of prematurity. The reporter had considered (para 8.14) that what was a “significant and contentious issue”, that is the conflict between an adequate housing land supply and the importance of the green belt, ought to be considered in the context of the wider LDP examination, rather than in an individual appeal. It is significant that, when he came to weigh the balance, the reporter specifically commented (*ibid*) that: “Housing should be planned for and provided in the context of the new LDP”. This view reflects SPP (para 34) that the grant of permission for a substantial development undermines the planning process.

[32] In arriving at his conclusion, the existence of an ongoing LDP process, which the reporter anticipated would satisfactorily address the housing land supply shortage, was a material consideration not only on the prematurity point but also in his assessment of the correct planning balance. Once that consideration had ceased to be part of the equation, it was incumbent upon the decision maker to re-calibrate the balance and determine where the scales came to rest in a situation in which not only had that consideration ceased to be

material but also a new LDP had produced a housing land supply shortage in respect of which there was no apparent solution. This itself became a new material consideration. It may be correct to say that there was a shortage both at the time of the report and the point of the decision. The difference, and it was an important one to the reporter, was that at the time of the report it was anticipated that the shortage would soon be resolved. At the time of the decision, there was no resolution in sight.

[33] The respondents therefore failed to take into account a relevant material consideration; that the LDP process had been practically completed and produced a housing land supply shortage for which no solution was offered. They purported to take into account an irrelevant consideration; that there was an ongoing LDP process which would resolve the shortage in the relatively short term. For both of these reasons, the appeal must be allowed.

[34] The respondents were bound to regard the change brought about by the approved LDP as a material change in circumstances. Although it may not strictly fall within the ambit of regulation 13 of the Town and Country Planning (Appeals) (Scotland) Regulations 2013, it would certainly have been within the spirit of that regulation to allow the parties to address the significance of this change before making a decision. It was incumbent upon the respondents to do so as a matter of fairness. When the matter falls to be reconsidered by the respondents, it will be for them to determine how that is to be done in terms of procedure.

[35] The respondents' wholesale adoption of the reporter's reasoning betrays a somewhat careless approach to decision making or at least the provision of adequate reasons; since it adopts a ground for refusing permission (prematurity) which was, on any view, no longer valid. It is not a sufficient explanation now to assert that the redundancy of

the reason would be obvious to the parties and therefore did not require to be dealt with at all.

[36] The parties to the appeal are entitled to reasons for the decision which “leave them in no real and substantial doubt as to what the reasons for it were and what were the material considerations” (*Wordie Property v Secretary of State for Scotland* (supra) LP (Emslie) at 348, followed in *RSPB v Scottish Ministers* 2017 SC 552, LP (Carloway) delivering the opinion of the court, at para [226]). The respondents cannot be expected “to address, line by line, every nuance of every matter raised” (*Uprichard v Scottish Ministers* 2013 SC (UKSC) 219, Lord Reed at para [48]). They must, however, in this case address how they have approached the “tilted” balancing exercise which the housing land shortage requires (SPP paras 33 and 125; *Hopkins Homes v Communities Secretary* [2017] 1 WLR 1865, Lord Carnwath at para 59, Lord Gill at para 80). In particular, they must make it clear whether and how, in accordance with SPP (paras 33 and 125), they regarded the shortage as a “*significant* material consideration” (cf the conclusion and recommendation in the submission to the respondents and the proposed press release) and the extent to which they regarded the green belt as “*significantly and demonstrably*” outweighing or otherwise the benefits of the development.

[37] Two matters require to be addressed for completeness. First, the reporter, as a specialist in planning matters, was entitled to reach a broad view, based upon his own skill and experience as well as any specific material before him, on the annual build capacity of the development site. Although the appellants had submitted that they could achieve a total of 450 units in five years, they had produced a phasing strategy which had described a maximum of 225 houses in those years. There was ample material before the reporter to suggest that this was optimistic given the infrastructure constraints; especially those relating to flooding, drainage and transport. The reporter was entitled as a matter for his judgment

to regard 175 units as a reasonable estimate for the level of contribution to the elimination of the five year supply shortage. The second ground of appeal falls to be rejected.

[38] Secondly, the figure of 897 units estimated by Homes for Scotland was not one which found its way as established fact into the new LDP. It did not become a material consideration merely by being advanced by that organisation. There was no obligation for the respondents to take account of a figure which had not been proved to be accurate.

[39] The appeal is allowed and the decision of 18 June 2018 is quashed.