



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 44
XA108/19

Lord President
Lord Brodie
Lord Woolman

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the appeals under section 238 of the Town and Country Planning (Scotland) Act 1997 by

(1) MACTAGGART and MICKEL HOMES LIMITED; (2) MILLER HOMES LIMITED;
(3) CALA MANAGEMENT LIMITED; (4) PERSIMMON HOMES LIMITED; and
(5) WALLACE LAND INVESTMENT AND MANAGEMENT LIMITED

Appellants

against

INVERCLYDE COUNCIL

Respondents

and

THE SCOTTISH MINISTERS

Interested Parties

Appellants: Armstrong QC; Shepherd & Wedderburn LLP
Respondents: Gale QC; Clyde & Co (Scotland) LLP
Interested Parties: J McKinlay; Scottish Government Legal Directorate

22 July 2020

Introduction

[1] This is an appeal by five housing developers against the decision of the respondents to adopt the 2019 Inverclyde Local Development Plan. Two reporters were appointed by the interested parties to examine, report on and make recommendations about the proposed

LDP. The appellants challenge the chapter of the Examination Report entitled: *Housing Land Supply, Housing Supply Targets and Housing Land Requirement*.

[2] A number of issues arise for determination: (1) did the reporter use the appropriate methodology when determining whether there was a 5-year effective housing land supply; (2) was proper account taken of the “generosity allowance” which is to be applied to Housing Supply Targets to produce the Housing Land Requirements; (3) did the LDP make sufficient provision for private tenure housing; (4) did the LDP identify sufficient Housing Land Supply for the different market areas for the two periods in the Strategic Development Plan; (5) did the reporter use the correct figures from the 2018 Housing Land Audit; and (6) overall, did these errors result in the LDP failing to comply with SPP and the SDP?

[3] For ease of reference, the following acronyms are occasionally used:

HfS	Homes for Scotland
HLA	Housing Land Audit
HLR	Housing Land Requirement
HLS	Housing Land Supply
HMA	Housing Market Area
HNDA	Housing Need and Demand Assessment
HSMA	Housing Sub-Market Area
HST	Housing Supply Target
LDP	Local Development Plan
SDP	Strategic Development Plan
SPP	Scottish Planning Policy

Law and Policy Framework

[4] The appeal concerns the adoption of an LDP, rather than a decision on a specific application for planning permission. It was in the latter context that much of the law and

policy, which is relevant to the present appeal, was recently explored in *Gladman Developments v Scottish Ministers* [2019] CSIH 34 (at paras [3] and [4]). *Gladman* was concerned in part with the methodology which should be adopted to calculate the number of years' effective housing land supply. This was necessary for the purpose of the planning authority's Housing Land Audit, the figures in which were material to the determination of a particular planning application for housing development. The HLAs constitute an annual snapshot of the amount of housing land available (Planning Advice Note 2/2010 *Affordable Housing and Housing Land Audits*, para 45). In this appeal, the court is again concerned with, *inter alia*, a dispute about the methodology which should be used to produce the figures which will appear in the LDP. This is important because the effective Housing Land Supply should be sufficient to meet the Housing Land Requirement which is set for the respondents in the SDP. The latter was approved by the interested parties in July 2017.

[5] A local authority is required to adopt an LDP at least every five years (1997 Act, s 16(1)(a)(ii)). The authority must ensure that the LDP is consistent with the SDP (s 16(6)). The SDP establishes an HST and an HLR for each local authority housing market area. Once an LDP is in place, there is a presumption that a planning decision will be determined in accordance with it, unless material considerations indicate otherwise (*ibid* s 25(1)). The decision-maker must have regard to the LDP (*ibid* s 37(2)); hence its significance for the appellants' businesses. One of the functions of an LDP is to allocate sufficient sites for housing. It needs to demonstrate how the HLR is to be met. That involves having a 5-year supply of effective housing land (*Scottish Planning Policy*, para 110). Unless such a supply exists, the presumption in favour of sustainable development becomes a significant material consideration (*ibid*, paras 32, 33 and 125) in individual planning applications.

[6] In preparing an LDP, the local planning authority will compile a main issues report (1997 Act s 17). Representations may then be made to the authority. The appellants, both individually and through their collective body, namely Homes for Scotland, made such representations. The proposed LDP was then produced and submitted to the interested parties for examination (*ibid* s 18). The reporter, who was appointed by the interested parties, carried out an examination. The Town and Country Planning (Development Planning) (Scotland) Regulations 2008 provide (reg 21) that an examination “is only to assess issues raised in unresolved representations”. Once that is done, the reporter will set out his conclusions and recommendations, including any amendments to the LDP (*ibid* s 19).

[7] The planning authority must (1997 Act, s 19(10)) make the modifications which the reporter recommends, unless they contravene the National Planning Framework (ie SPP), and/or the SDP, or the reporter could not reasonably have reached the relevant conclusion (Town and Country Planning (Grounds for Declining to Follow Recommendations) (Scotland) Regulations 2009, reg 2; Scottish Government’s Planning Circular 6/2013: *Development Planning*, paras 92-94). A person who is aggrieved by the content of the LDP can challenge the validity of the plan by way of an appeal (1997 Act, s 238) on the grounds that it is not within the powers in the Act or relative regulations. The court may, in that event, “wholly or in part quash the plan”.

Scottish Planning Policy

[8] SPP contains policies which are directed towards the delivery of new homes. The policy principle is that:

“110. The planning system should:

identify a generous supply of land for each housing market area within the plan area to support the achievement of the [HLR] across all tenures, maintaining at least a 5-year supply of effective housing land at all times;

...

113. Plans should be informed by a robust ... (HNDA), prepared in line with the Scottish Government's HNDA Guidance. This assessment provides part of the evidence base to inform ... development plans ... It should produce results both at the level of the functional housing market area and at local authority level, and cover all tenures. ...

...

115. Plans should address the supply of land for all housing. They should set out the [HST] (separated into affordable and market sector) for each functional housing market area, based on evidence from the HNDA. The [HST] is a policy view of the number of homes the authority has agreed will be delivered in each housing market area over the periods of the development plan ... The target should be reasonable, should properly reflect the HNDA estimate of housing demand in the market sector, and should be supported by compelling evidence. ...

116. Within the overall [HST], plans should indicate the number of new homes to be built over the plan period. This figure should be increased by a margin of 10 to 20% to establish the [HLR], in order to ensure that a generous supply of land for housing is provided. ...

117. The [HLR] can be met from a number of sources, most notably sites from the established supply which are effective or expected to become effective in the plan period, sites with planning permission, proposed new land allocations, and in some cases a proportion of windfall development. ...

118. [SDPs] should set out the [HST] and the [HLR] for the plan area, each local authority area, and each functional housing market area. They should also state the amount and broad locations of land which should be allocated in [LDPs] to meet the [HLR] up to year 12 from the expected year of plan approval, making sure that the requirement for each housing market area is met in full...

119. [LDPs] in city regions should allocate a range of sites which are effective or expected to become effective in the plan period to meet the [HLR] of the [SDP] up to year 10 from the expected year of adoption. ...".

[9] SPP provides (para 125) a regime where, if there is a shortage in the 5-year effective HLS, development plan policies for the supply of housing land will not be considered up-to-

date. In that event (paras 32-34), the presumption in favour of development that contributes to sustainable development will be a significant material consideration.

The Strategic Development Plan

[10] The SDP states (para 6.23) that the HLR will “enable ambitious yet realistic levels of growth to be planned for across the city region”. The SDP’s aim (para 6.27) is “to meet the need and demand for housing in full by setting a policy context that provides for a generous supply of land and which assists in enhancing the delivery of new housing”. Policy 7 states that there should be a “focus on the existing [HLS] and public sector estate whilst bringing forward new opportunities in accordance with Policy 8”. The HNDA (para 6.38) estimated the number of additional homes which are required. It provided (para 6.39) an evidence base for identifying housing requirements, including the strategic HLR. It enabled LDPs to be based on a common understanding of existing and future demand. The time periods were (para 6.41) the years to 2024 and 2029; that is to years 7 and 12 from the SDP’s approval date of 2017. The housing estimates for years 7 and 12 provided the context for establishing the HLR for the 5 and 10 year periods. The estimates are divided (para 6.45) into the private and social sectors. The social sector is based on local authority boundaries. The private sector is based on a HMA framework.

[11] The HLR was arrived at (para 6.47) by taking, and adjusting (para 6.53), the HNDA figures in order to set HSTs for the social and private sectors (para 6.48). An all tenure HST (para 6.60) recognised the role of the private sector in providing affordable housing. In terms of SPP, a generosity element (para 6.61) requires to be added to the HST to establish the HLR. In order to provide flexibility, with a view to supporting the housebuilding industry and to provide for long term growth, a generosity level of 15% was applied to the

HST (para 6.62) to reach the HLR. The HLR can be met (para 6.65) from a number of sources, but mostly from sites in the established land supply which are considered to be effective over the plan period. The private sector HLR is to be met at HMA and HSMA levels.

[12] LDPs are (para 6.66) to:

“ensure, in accordance with Policy 8 and informed by up to date [HLS] data, that sufficient housing land is allocated which is effective... such as to meet the [HLR] for each [HSMA] and each Local Authority as set out in Schedules 8, 9 and 10...”.

[13] Policy 8 provides:

“In order to provide a generous supply of land for housing and assist in the delivery of the [HSTs]..., Local Authorities should:

make provisions in [LDPs] for the all tenure [HLR] by Local Authority set out in Schedule 8, for the Private [HLR] by [HSMA] set out in Schedule 9 and for the Private [HLR] by Local Authority set out in Schedule 10;

allocate a range of sites which are effective or expected to become effective in the plan periods to meet the [HLR], for each [HSMA] and for each Local Authority, of the SDP up to year 10 from the expected year of adoption;

provide for a minimum of 5 years effective land supply at all times for each [HSMA] and for each Local Authority; and,

undertake annual monitoring of completions and land supply through [HLA].

Local Authorities should take steps to remedy any shortfalls in the five-year supply of effective housing land through the granting of planning permission for housing developments, on greenfield or brownfield sites, subject to satisfying each of the following criteria: ...”.

[14] Schedule 6 of the SDP designated the HSTs and the HLRs for social and private housing over three time periods. Schedules 7 and 8 provided figures for the all tenure HST and resultant HLR for the local authority. They are as follows:

	2012–2024			2024–2029			2012–2029		
	Social	Private	Total	Social	Private	Total	Social	Private	Total
HST	1,100	2,050	3,150	400	850	1,250	1,500	2,900	4,400
HLR	1,270	2,360	3,630	460	980	1,440	1,730	3,340	5,070

The SDP continued (para 6.67) by emphasising that, for the purposes of strategic planning, it was essential to consider the longer term supply of land available to meet housing need and demand for these planning periods.

The Proposed Local Development Plan and the Housing Land Technical Report 2018

[15] On 30 April 2018, the respondents' proposed LDP was published alongside a *Housing Land Technical Report 2018*, which was intended to demonstrate that the SDP's HLR would be met. The LDP identified land for 528 new private houses at 7 locations specified in Schedule 3. These were all in Greenock, Gourock or Port Glasgow. A total of 5,576 sites (including those already in Schedule 3) were identified in Schedule 4. These can be summarised as follows for the Inverclyde HMA:

	Private	Affordable	Mixed	All Tenure
Port Glasgow	419	386	140	945
Greenock	2209	873	360	3442
Gourock	335	18	0	353
Inverkip & Wemyss Bay	723	0	0	723
Inverclyde total	3686	1277	500	5463

A further 113 private houses were included for Kilmacolm and Quarriers Village, which made up the Renfrewshire HSMA, to produce the total for Inverclyde of 5,576. Policy 18 provided that new housing development on the Schedule 4 sites would be supported in principle.

[16] The mixed sites were, as the name suggests, expected to have a mix of private and affordable housing. They were in Port Glasgow (R3 - 140 units at Woodhall) and Greenock (R24 - 100 at Gareloch Road, R36 – 60 at Union Street and R47 -200 at Ravenscraig Hospital). The appendices to the Technical Report had allocated the mix as follows: Woodhall, private 122 – affordable 18; Gareloch Road 25 -75; Union Street 20 -40; and Ravenscraig Hospital 50 – 150.

[17] Policy 17 provided that the respondents would carry out an annual audit in order to ensure a 5-year effective housing land supply. If additional land were required, they would consider individual proposals.

[18] The Technical Report recorded that, although the HLR had been set out in the SDP, it had to be adjusted to match the period covered by the LDP. There were two methods of doing this; an annualised and a compound method. The compound approach took the HST across the relevant period (2012-24) and deducted the houses which had already been completed. If past completions had been lower than required to meet the HSTs, the deficiency would have to be made up in the remaining years. The results of this approach were set out in Table 6, which can be summarised as follows:

		Inverclyde HMA Private	Renfrewshire HSMA Private	Inverclyde Affordable	Inverclyde All Tenure
A	HLR 2012-2024	2,220	140	1,270	3,630
B	HST 2012-2024	1,930	120	1,100	3,150
C	Completions 2012-2017	516	3	269	788
D	HST 2017-2024 (B - C)	1,414	117	831	2,362
E	Adjusted HLR 2017-2024 (D + 15%)	1,626	135	956	2,717

[19] The annualised method divided the HLR into an annual figure and calculated a 5-year (2019-2024) amount. It did not take account of previous completions. The results of this approach were in Table 7:

		Inverclyde HMA Private	Renfrewshire HSMA Private	Inverclyde Affordable	Inverclyde All tenure
A	HLR 2012-2024	2,220	140	1,270	3,630
B	Annual HLR (A ÷ 12)	185	12	106	303
C	HLR 2019-2024 (B × 5)	925	60	530	1,515

[20] Appendix 1 to the Technical Report listed the sites which had been identified in the proposed LDP. These were based on the 2017 HLA, but had been amended to take account of a number of different factors. Tables 9 and 10 provided a comparison of the HLS with the HLR for the first LDP period using, respectively, the compound and annualised methods:

	Table 9 – Compound Approach 2017-24	Inverclyde HMA Private	Renfrewshire HSMA Private	Inverclyde Affordable	Inverclyde All tenure
A	Adjusted HLR (Table 6)	1,626	135	956	2,717
B	Adjusted Effective HLS (Appdx 1)	1,413	110	1,421	2,944
C	Comparison	-213	-25	465	227

Thus, when the adjusted HLRs for the Inverclyde and Renfrewshire Market and Sub-Market Areas were compared with the land identified for private housing by the proposed LDP, the full HLR for the period, that is the private sectors, was not met.

	Table 10 – Annualised Approach 2019-24	Inverclyde HMA Private	Renfrewshire HSMA Private	Inverclyde Affordable	Inverclyde All tenure
A	HLR 2019-2024 (Table 7)	925	60	530	1,515
B	Adjusted Effective HLS 2019-2024 (App 1, 5 ÷ 7 of 2017-2024 figure)	1,009	79	1,015	2,103
C	Comparison	84	19	485	588

For the annualised calculation, only the 5-year period, from 2019 to 2024, was compared. A $5 \div 7$ adjustment was made to the effective HLS for the LDP period. Table 10 showed that, using that methodology, the HLR in the Inverclyde HMA and the Renfrewshire and HSMA would be met.

[21] Table 11 carried out a comparison of the HLR with the proposed HLS for 2024 to 2029 as follows:

		Inverclyde HMA Private	Renfrewshire HSMA Private	Inverclyde Affordable	Inverclyde All tenure
A	HLR 2024-2029 (Table 8)	920	60	460	1,440
B	Adjusted Effective HLS post 2024 (Appendix 1)	2,490	3	139	2,632
C	Comparison	1,570	- 57	- 321	1,192

[22] The Technical Report concluded:

“Inverclyde [HMA] private sector – Table 9, based on the compound approach indicates that insufficient effective land has been identified to meet the [HLR], whilst Table 10 based on the annualised approach indicates that the [HLR] can be met (in both instances to 2024).”

[23] The Housing Land Audit 2018 showed 542 private home completions in Inverclyde since 2012, of which only 3 were in the Renfrewshire HSMA. It identified the effective future HLS for Inverclyde to 2024 at 1,588 for private housing and 1,216 for social (2,804 all tenure). Some 107 of the 1,588 were in the Renfrewshire HSMA.

The Main Issues Report

[24] The appellants made representations which addressed whether the LDP met the SDP's HLR. The LDP had to set out how the strategic (all tenure) HST of 4,400 new homes in the period from 2012 to 2029 (the schedule 7 figure) would be met. The generosity margin

had to be applied to ensure enough land was available to meet the HST. The HLR that had to be met was 5,070 between 2012 and 2029 (the schedule 8 figure).

[25] The reporter requested further information from the respondents in respect of the HLR in the part of Inverclyde (principally Kilmacolm and Quarriers Village), which was within the Renfrewshire HSMA. This HSMA extended across the boundaries of three local planning authorities; the whole of Renfrewshire, part of East Renfrewshire and part of Inverclyde. The rest of Inverclyde was defined as a separate, and self-contained, HMA. The respondents referred to the two different methodologies, both of which had been used in the Technical Report. HfS's response to the request had included a *Housing Land Supply Statement* which had been prepared by Geddes Consulting.

[26] The *Statement* argued (para 3.4) that there was clear guidance in the SDP on how the HLR was to be met. In the preparation of the SDP, each local authority's HLA (for 2013) had been used to estimate the future sources of housing land to meet the HLR. In terms of the SDP, it was for LDPs to ensure, in accordance with Policy 8 and informed by up to date HLS data, that sufficient effective housing land was allocated to meet the HLR for each HMA and HSMA together with each Local Authority area. Completions had to be included in assessing whether or not the HLR was met. The correct approach was to take the HLR in the SDP and deduct both the completions and the existing land supply to reach a surplus or shortfall.

[27] The *Statement* made reference to the terms of the 2018 HLA, which had not been available at the beginning of the process. There were 890 completions, including 542 in the private sector, of which 3 were in the Renfrewshire HSMA. The predicted effective HLS was 1,588 private, of which 107 was in the HSMA, and 1,216 social. There were 877 disputed

private houses but 245 additions in the 2018 HLA. This meant that the private sector programme was 956, of which 65 would be in the HSMA. The HLA contained no programming beyond 2024. Geddes Consulting reasoned that the all tenancy shortfall could be calculated as follows:

	2012-2024	2024-2029	2012-2029
HLR (SDP)	3,630	1,440	5,070
Completions (HLA 2018)	890	0	890
Windfall allowance (HLA 2018)	90	150	240
HLS (HLA 2018)	1,870	746	2,616
Shortfall	-780	-544	-1,324

The private sector shortfall figures were -1,030 and -343 over the two periods and -1,373 in total, with the Renfrewshire HSMA components being minus figures of 72, 60 and 132.

Examination Report

[28] The Examination Report was submitted to the respondents on 3 April 2019. Issue 5: *Housing Land Supply, Housing Supply Targets and Housing Land Requirement* contains a summary of the unresolved issues and the reporters' response to them. Designating some sites as being of mixed tenure prevented the LDP from demonstrating that the separate HSTs and HLRs would be delivered, either for the affordable or the private sectors in the Inverclyde HMA (para 19). This approach was "not inappropriate" (para 21). The experience of the respondents (para 20) had been that sites which had been designated for the private sector were often bought by social landlords and developed as affordable housing. The figures still demonstrated that the more important all tenure HLR was being met. The respondents' Table 5 showed that the private HLR for the Inverclyde part of the

Renfrewshire HSMA could be derived by comparing Schedules 8 and 9 of the SDP as follows:

Private HLR by HMA			
	2012-2024	2024-2029	2012-2029
Inverclyde Area (a)	2,360	980	3,340
Inverclyde HMA (b)	2,220	920	3,140
Renfrewshire HSMA ((a)-(b))	140	60	200

[29] The reporter agreed (para 37) that it was appropriate to take account of the house completions. These totalled 788 out of the 4,400 all-tenure HST for Inverclyde. The 15% generosity allowance did not need to be applied to that element of the HST in order to secure their delivery. On this basis (para 38), the LDP required only to provide land that was sufficient to enable some 3,612 more houses to be completed between 2017 and 2029. The updated HLR was 4,154 (3,612 + 15%). The 2017 HLA projected 708 completions to 2022 and identified sites with a further potential for over 4,000 houses. On that basis, the reporter found (paras 46-48) that:

“... the scale and nature of the land being made available through this [LDP] is sufficient to meet the council’s ambitions, which are embodied in the all tenure [HST] and the [HLR] for the whole of Inverclyde that are set out in [the SDP] for the period 2012 to 2029...”

...this plan is generally consistent with the [SDP’s] requirements. It provides sufficient housing land to meet Inverclyde’s all-tenure [HLR] for 2012-2029 set out in [SDP]; ... and is also sufficient to enable the all-tenure [HST] for the whole of Inverclyde to be met by 2029 ...

... there is no overall deficiency in the provision of housing land in the proposed plan across the whole of Inverclyde which might, for that reason, separately justify releasing additional greenfield land at Kilmacolm or Quarriers Village for private sector house-building on sites that have not previously been allocated for development...”.

[30] The reporter took the view (para 53) that a decision on the most appropriate methodology could not be resolved through the examination of an individual LDP, albeit that the role of the LDP was to ensure that sufficient sites are available during the plan period to enable the HLR to be met. The LDP provided for a five years' effective supply through Policy 17, which set out the means of addressing any identified shortfall. SPP (para 123) confirmed that the HLA was the tool to be used. There ought to be a specific reference to Policy 17 in the LDP to confirm that it was a statutory requirement for it to be consistent with the SDP. The policy should also confirm that the sites listed in Schedules 3 and 4 are to be allocated to meet the SDP's HLR and that proposals for housing development on these sites will be supported in principle. It was not the role of the LDP to seek to re-interpret the HNDA which informed the SDP nor was it appropriate for the respondents to restrict the time horizon of the housing land allocations to 2024. That would be contrary to Policy 8 of the SDP and SPP (para 119) whereby LDPs are required to allocate effective sites to meet the SDP's HLR up to year 10 from the expected year of adoption.

[31] The reporters recommended as follows:

1. Modify Policy 17, by adding ...: "In order to enable [the SDP's] all-tenure [HST] ... of 4,400 house completions between 2012 and 2029, to be delivered, proposals for housing development on the sites listed ... will be supported in principle...
2. Modify paragraph 7.2 by replacing the first three sentences with: "The [SDP] has established that the all-tenure [HST] ... for the period from 2012 to 2029 is for a total of 4,400 house completions. By adding a 15% 'generosity allowance', it also confirmed that an all-tenure [HLR] for 5,070 houses should apply. This is intended to provide sufficient sites to enable that level of completions to be delivered... In the five years to 2017, some 788 house completions have already been achieved. That leaves this plan being required to provide sufficient land to enable a further 3,612 new homes to be completed by 2029, and to allocate land with capacity for around 4,150 house (*sic*) (calculated by adding the 15% 'generosity allowance'). This plan is consistent with these requirements of [the SDP], as it will support housing

development on each of the sites listed in Schedules 3 and 4, and as shown on the proposals map. These sites have a total capacity for some 6,100 houses.”

[32] On the basis of the reporter’s view, the respondents determined that there was no overall deficiency which might justify releasing greenfield land at Kilmacolm and Quarriers Village. The respondents accepted the Examination Report and the modifications, subject to one correction. The figure 6,100 in modification 2 should have been 5,576 (*sic*). The reporter had wrongly assumed that the 528 houses in schedule 3 were not included in the 5,576 total in schedule 4.

Submissions

Appellants

[33] The appellants submitted, first (ground of appeal 1), that the reporter failed to address unresolved issues. He recognised that there were different methodologies with which to calculate whether there was an effective 5-year HLS in terms of SPP (para 110) and the SDP’s Policy 8 and whether the 2024 requirements of the SDP, as also set out in Policy 8, were likely to be met. He did not reach a conclusion on which methodology to follow. He did not state whether the SDP requirements for house building to 2024 would be met. He failed to set out a proper basis for his conclusion that the LDP provided for a minimum of 5-years effective HLS at all times. This was central to the assessment of whether the LDP was consistent with the SDP and SPP para 119. If there was no effective 5-year HLS, LDP policies for housing would not be considered up-to-date (SPP para 125). Assessing whether there was a 5-year HLS was a key tool in determining whether the HLR and HST were likely to be met.

[34] Although a decision on methodology was one of planning judgment, no such decision had been made. A reporter required to address the key issues (*Gladman Developments v Scottish Ministers* (*supra*) at para 44; *Scottish House Builders Association v Secretary of State for Scotland* 1995 SCLR 1039 at 1042). The view that the issue could not be resolved in an LDP planning process was at odds with the decisions of other reporters (*Gladman Developments v Scottish Ministers* (*supra*) at para [28]). The use of the words “planning judgment” did not entitle a decision maker to make fundamental mistakes on matters of policy (eg *Persimmon Homes (North East) v Blyth Valley BC* [2009] JPL 335 at paras 33-36. 42-44). The reporter was not entitled to rewrite the SDP (*Tesco Stores v Dundee City Council* 2012 SC (UKSC) 278 at para 19).

[35] HfS had identified that the two approaches, which had been adopted by the respondents in the Technical Report, were contrary to SDP Policy 8. If the correct methodology had been followed, the proposed LDP had not identified sufficient effective land to meet the HLR. The reporter required to reach a conclusion on which methodology should be used. Policy 8 required the LDP to provide a minimum 5-year effective HLS at all times. Policy 17 of the LDP did not ensure that minimum was met. It provided a remedy if there was no 5-year effective supply and the LDP did not provide sufficient land. The reporter erred in his conclusion to the contrary. If there was a shortfall in the HLS, the policy would be deemed out of date.

[36] Using the undisputed figures in the 2017 HLA, the programmed output to 2024 was 2,155. The completions which were predicted on new sites in the LDP to 2024 were 474, thus totalling 2,629 in the years 2017-2024. This produced an effective 5-year supply of 1,878 ($2629 \times (5 \div 7)$). Applying the $5 \div 7$ fraction to the respondents’ reduced HLR of 2,717,

produced 1,941. This produced a shortfall even if the appellants' arguments on site effectiveness, the reduction of the HLR and the 2018 HLA were rejected.

[37] Secondly (ground 2), the reporter misinterpreted the SDP and the role of the generosity allowance in calculating the SDP's HLRs and HLTs. He effectively recalculated the HLR. His approach to the generosity allowance was not consistent with the SDP. He confused the issues of supply and demand. The HLR identified the total number of houses that needed to be planned for, if the HST was to be achieved. The figures for actual and future completions were supply figures. They showed whether it was likely that the HLR and HST would be met. In concluding that the 15% generosity allowance did not need to be applied to the existing completions, the reporter displayed a fundamental misunderstanding of the issue and the SDP. Such an approach effectively reduced the HLR.

[38] The number of actual completions (788) was considerably below the number which was needed to keep pace with the HSTs and HLRs. The all tenure HST figure for 2012-2024 was 3,150. Keeping pace with the HST would have involved 1,312 completions $((3,150 \div 12) \times 5)$. The HLR equivalent figures were 3,630 and 1,512. The completions were respectively 60% and 52% of what was needed. Far from showing that the HSTs and HLRs were likely to be met, the figures showed that the current land supply was not providing for the completions which were needed (see *Hopkins Homes v Secretary of State for Communities and Local Government* [2017] 1 WLR 1865 at para 78). If the HLR figure of 3,630 was taken, and the completions were subtracted from it to reach 2,842, the annual HLR for the period to 2024 was 406 $(2,842 \div 7)$. The HLS was 370 *per annum*. This was calculated by taking the 2,944 all tenure adjusted HLS figure in Table 9. Account had to be taken of the appellants'

contentions in relation to disputed sites which contained 315 homes. When they were deducted, an HLS figure of 370 $((2904 - 315) \div 7)$ was reached.

[39] Thirdly (ground 3), the reporter found that it was not possible to conclude that the LDP was compliant with the SDP for each housing tenure. Accordingly, he did not reach a conclusion on whether the LDP had made provision for the private sector HLR. This was an unresolved issue which was central to whether the LDP was consistent with the SDP. HfS had set out their conclusions on whether the private HLR would be met. Schedule 4 of the LDP identified only four sites under the tenure "Mixed". The 2018 HLA had already identified these sites, their capacity and their indicative tenure. Had the reporter properly considered the HLA and the evidence, he would have had a better understanding of the likely indicative tenures. Policy 8 of the SDP required local authorities to make provision in LDPs for the all-tenure HLR by HMA and HSMA, as set out in Schedule 9, and for the private HLR by local authority area, as set out in Schedule 10. The reporter did not set out a proper basis for concluding that the plan was consistent with the SDP.

[40] The reporter had rejected or ignored the evidence on the mixed tenure sites R3, R24, R36 and R47 in the Technical report. Table 9 showed that there were insufficient sites to meet the HLR to 2024. Table 11 indicated that there was insufficient land to meet the 2029 HLR. The appendix to Table 11 set out the respondents' position on the likely tenures of the mixed sites. There was no explanation on why this information was not used.

[41] Fourthly (ground 4), the reporter identified the requirement of the SDP to consider housing need and demand for the periods 2012 to 2024 and 2024 to 2029. There had been detailed submissions and evidence on the housing need and demand for these two periods. The reporter did not set out any conclusions on this issue and the extent to which the LDP

had allocated land to achieve the 2017 to 2024 and 2024 to 2029 figures for private and all tenure housing. He made no finding on whether the private sector HLR would be met. He could not do so in the absence of a choice on methodology. He had misapplied the generosity allowance. He had miscalculated the total site capacity. In terms of Policy 8, LDPs had to indicate that sufficient land was available for the HLR for each HMA and each HSMA.

[42] Fifthly (ground 5), through HfS, the appellants had produced evidence and advanced arguments on the 2018 HLA. The Examination Report did not summarise them or address the relevance of the 2018 HLA. The SDP identified that LDPs should be informed by up to date HLS data. When reading the Examination Report, the informed reader would be left in real doubt about what regard, if any, the reporter had to the 2018 HLA and the submissions on it. The reporter failed to set out proper, adequate or intelligible reasons for taking no account of the submissions or the 2018 HLA.

[43] Sixthly (ground 6), the Reporter concluded that the LDP was generally consistent with the SDP. This conclusion was flawed. It formed the basis for the recommendations and the rejection of the modifications proposed by HfS and the appellants. The LDP ought to be quashed in its entirety since the housing policies affected the others (*Tesco Stores v Dundee City Council (supra)* at para 22). The housing element was a major part of the LDP's land use planning. Alternatively, chapter 7.0 *Our Homes and Communities* should be quashed.

[44] The respondents regarded their powers to reject the reporter's conclusions as limited, but they did correct the obvious error in relation to the Inverclyde total HLS figure. It was unclear whether the respondents had considered whether this error of fact had influenced

the reporter's conclusions. Flaws in a reporter's conclusions, including an absence of reasoning, permitted a challenge to the adoption of an LDP (*Eadie Cairns v Fife Council* [2013] CSIH 109 at para [40], citing *Wordie Property Co v Secretary of State for Scotland* 1984 SLT 345 at 349).

Interested Parties

[45] The interested parties submitted that there was no basis upon which the respondents could refuse to make the recommended modifications to the LDP. There was no exercise of discretion or judgment in section 19(10) of the 1997 Act (cf *Retail Property Holdings v Scottish Ministers* [2015] CSIH 69). It was not open to the respondents to refuse to accept the recommendations because they differed from the reporter on a matter of planning judgment (Planning Circular 6/2013 (*supra*) paras 92-94). The scope for altering the reporter's recommendations was limited (1997 Act s 19(10) and 2009 Regs, reg 2; *Tesco Stores v Aberdeen City Council* 2013 SCLR 71). Even if there had been a failure to comply with the Act or the 2008 Regulations, no substantial prejudice to the appellants had been identified. The LDP was not outwith the powers of the Act. The 2008 Regulations confined (reg 21(2)) the examination to the unresolved representations (Planning Circular 6/2013 (*supra*) paras 116-117). It was not the function of the court to re-examine the factual conclusions drawn by the reporter. Matters of planning judgment were within the exclusive province of the reporter and the respondents (*City of Edinburgh Council v Secretary of State for Scotland* 1998 SC (HL) 33 at 44).

[46] On ground 1, the reporter had addressed the issue of the appropriate methodology. He had accepted that past completions ought to be taken into account. He had concluded that the examination of an LDP was not an appropriate forum in which to resolve the issue

of methodology. The role of the LDP was to ensure that sufficient sites were allocated and that these would be sufficient to enable the HLR to be met. The reporter determined that the LDP did this. The compound method had been adopted. The reporter held that, if a shortfall arose, it would be addressed in the context of LDP Policy 17. There was no error disclosed in the conclusion reached. It was an appropriate exercise of planning judgment.

[47] The reporter had preferred the evidence of the respondents on the disputed sites and the HLS as set out in the Technical Report. The sites were set out in the LDP. The HST was 4,400 from which completions of 788 were to be deducted before the generosity allowance was applied to produce the HLR of 4,154. The reporter held that the sites identified on the plan had a total capacity of 6,104 (which should have been 5,651), to which 75 houses would be added once the modifications, to delete 40 houses at Papermill Road, Greenock, and to add 115 houses at Arran Avenue, Port Glasgow, were implemented. The Technical Report had updated the HLA of 2017 by including some sites and reprogramming others. On the basis of the evidence, the reporter was able to conclude that the 5-year all tenancy HLS was sufficient to meet the HLR. The Technical Report predicted 2,944 (plus 75) houses for the period 2017 – 2024 and 2,632 for the post 2024 period. The Technical Report and the Examination Report together identified an annual HLS for 2017-2024 of 431 homes per annum. The HLR for 2019-2024 was 388. That figure was calculated by taking the HST of 3,159, deducting the completions and adding the generosity allowance. The Technical Report had concluded that there was sufficient to provide for the all tenure adjusted HLR. Policy 17 would deal with any shortfall if it arose. There was no failure on the part of the reporter.

[48] On ground 2, there was nothing unreasonable about the reporter's approach to the generosity allowance (para 116). The respondents' area had an all-tenure HLR for the period 2012-2029 of 5,070 (rounded up). This incorporated a generosity margin of 15% on the HST of 4,400 in schedule 7. There had been 788 homes completed, so these were deleted from the 4,400 figure and the 15% generosity was applied to the balance. Retrospectively applying a generosity margin to ensure delivery to homes that had been delivered was not rational.

[49] On ground 3, the reporter found the approach to the HMAs in the LDP to be broadly consistent with that in the SDP. He recognised that designating the nature of some sites as "mixed tenure" prevented the LDP from demonstrating that the particular HSTs and HLRs would be delivered. He went on to find that in the circumstances it was not inappropriate for the LDP to identify some sites as mixed tenure. This enabled the LDP to demonstrate compliance with the more important all tenure HLR. For the private sector, the SDP identified almost the whole of Inverclyde as a separate HMA and set out both an HST and an HLR for this.

[50] On ground 4, the HLR for the LDP period, being up to 10 years from the anticipated year of adoption (SPP para 119), was for 2019-2029. The SDP set out the HLR for 2012-2024, 2024- 2029 and 2012-2029. Schedules 8, 9 and 10 set out the HLR for 2012 to 2029. The SDP did not require the LDP to disaggregate Schedules 8, 9 and 10 into two periods. The LDP referred to the whole of the period 2012- 2029. The reporter had correctly held that it was not for the respondents to reinterpret the HNDA which had informed the SDP or to restrict the time horizon to 2024. The requirement of SPP was to meet the HLR for the 10 year period.

[51] On ground 5, there was no substantial doubt about what the reporter took into account and what the reasons for his conclusions were. There had been no basis for the submission of additional material in the course of an examination, unless it was requested by the reporter (2008 Regulations, reg 22; *Eadie Cairns v Fife Council (supra)*). There were good reasons for this (Planning Circular 6/2013 paras 112 – 114). Lengthy examinations were to be avoided. The 2018 HLA had not been final at the time when the LDP was submitted for examination. It had not been requested by the reporter, although it had been submitted following upon his request for information on the proper interpretation of the SDP relative to the Renfrewshire HSMA. The reporter took account of the material which was submitted in response to the request but only in so far as it related to that request. The reporter had said that explicitly in an email dated 20 February 2019 to those who had responded to the request.

[52] When considering the adequacy of the reasons, regard had to be made to their purpose (*Uprichard v Scottish Ministers* 2013 SC (UKSC) 219 at paras 44-48; *Calmac Developments v Dumfries and Galloway Council* [2015] CSOH 129). The purpose of the examination was to resolve the unresolved issues and to report to the respondents so that they could proceed with any proposed modifications and adopt the plan. The report is addressed to the respondents who had provided the material for the reporter. The respondents were familiar with this material.

[53] On ground 6, the reporter concluded that the LDP was consistent with the SDP. He was entitled to reach that conclusion. The appellants had failed to specify how they are substantially prejudiced (*Save Britain's Heritage v Number 1 Poultry* [1991] 1 WLR 153).

Respondents

[54] The respondents focused on the limited basis upon which they could refuse to make the modifications to the LDP which had been recommended by the reporter (1997 Act s 19(10) and (11); 2009 Regulations reg 2). They could not refuse on the basis that they disagreed with the reporter's planning judgment (Planning Circular 6/2013, paras 92-94; *Tesco Stores v Aberdeen City Council* (*supra*) at 71; *Eadie Cairns v Fife Council* (*supra*) at paras [38] – [44]).

[55] The reporter had not erred in his approach to methodology, maintenance of the 5-year HLS, the generosity allowance, compliance with the SDP, the HLR or the 2018 HLA. On each subject, he gave clear and rational explanations. It was not for the court to review matters of planning judgment (*City of Edinburgh Council v Secretary of State for Scotland* (*supra*) at 43; *Tesco Stores v Secretary of State for the Environment* [1995] 1 WLR 759 at 780; *Bolton Metropolitan DC v Secretary of State for the Environment* (1995) 71 P&CR 309 at 313). Any quashing of the LDP should be limited to the matters challenged (*Tesco Stores v Aberdeen City Council* (*supra*) at para [33] approving *Hallam Land Management v City of Edinburgh Council* 2011 SLT 965 at paras [21] *et seq*).

[56] The respondents essentially adopted the submissions of the interested parties on the specific grounds of appeal.

Decision

[57] The scheme in Scottish Planning Policy is straightforward. The Strategic Development Plan identifies the Housing Land Requirement. The all tenure HLR for Inverclyde set out in schedule 8 produces a total of 5,070 for the period to 2012 - 2029 (3,630

2012 to 2024). This is broken down into private sector units of 3,340 (2,360) and social or affordable ones of 1,730 (1,270). The private sector HLR by housing sub-market area was contained in schedule 9. This shows 3,140 for the period 2012 - 2029 (2,220 2012 - 2024). The private sector HLR by local authority was set out in schedule 10 with the figures for Inverclyde being 3,340 (2,360).

[58] The function of the Local Development Plan is (SPP para 119) to allocate sufficient effective sites to meet the HLR. That requires the LDP to identify sites in respect of each HLR (all tenure, private and social). The SDP divides the HLR figures into two time periods. LDPs require to follow that scheme by allocating sites which are capable of meeting the HLR in each period. The purpose of doing so stems from the important regime in SPP (paras 110 and 125) whereby the planning system must provide an effective 5-year housing land supply. This is what is provided for in SDP Policy 8. A central question for the reporter to answer was whether the LDP complied with SPP and the SDP by allocating sufficient sites to achieve the 5-year HLS.

[59] The LDP identified 5,576 houses at sites referred to in schedule 4, with 3,686 (plus 113) of these in the private sector and 500 "mixed". In the Technical report, 217 of the mixed sites were attributed to the private sector. The all tenure Inverclyde HLR of 3,630 for 2012-2024 was broken down into, *inter alia*, figures for the private Inverclyde HMA and the Renfrewshire HSMA (Table 6 *supra*) once completions had been deducted. This produced a HLR for respectively the Inverclyde HMA and the Renfrewshire HSMA of 1,626 and 135. On the compound approach, this resulted in a shortage in the effective HLS of, respectively, 213 and 25 for the period to 2024. If correct, the LDP would not accord with the SDP or SPP.

The Technical Report required to use the annualised approach to demonstrate that the HLR was being met.

[60] In those circumstances, the reporter had to determine which methodology to use.

Otherwise a properly reasoned decision on whether the HLR would be met could not be made. A decision had to be made (see *Scottish House Builders Association v Secretary of State for Scotland* 1995 SCLR 1039, Lord Sutherland, delivering the opinion of the court, at 1045).

On the face of things, the compound approach would seem to be the most sensible one.

However, the decision is one of planning judgment and the annualised method may be capable of being supported. The problem with this Examination Report is that no judgment was exercised and consequently no decision was made.

[61] The need to take a decision on the methodology and its consequences cannot be avoided by making reference to Policy 17. It requires the respondents to carry out an HLA in order to check whether the 5-year HLS is being maintained. If a shortfall were identified, it directs them to consider individual proposals. If that has occurred the policies are themselves already out of date. In short Policy 17 is not a safety valve which permits an LDP to avoid compliance with the SDP so far as achieving the HLR figures as at its date of adoption. It does not of itself do anything to secure that compliance.

[62] SPP is phrased in a manner whereby it is not the housing supply target which is to be met but the HLR (see eg SPP paras 118 and 119). The purpose of the generosity allowance is to provide a margin to ensure that there is a plentiful supply of land (*ibid* para 116). The HLR is set by the SDP. It cannot be changed by the LDP in the manner accepted by the reporter. It cannot be read in a different manner to suit a particular point of view (see *Tesco Stores v Dundee City Council* 2012 SC (UKSC) 278, Lord Reed at para 19). The fact that a

certain number of houses have been completed does not result in the generosity margin being removed from the number of these completions, as they feature as part of the HLR.

That would only be legitimate if it was the HST and not the HLR that was to be achieved. It follows that the reporter's calculations in that regard are erroneous and do not accord with SPP or the SDP.

[63] The reporter was bound to consider whether the LDP would achieve the HLR not only in relation to the time periods but also the different HMAs and HSMA's (SPP para 115). It was not sufficient, for the LDP to comply with SPP and the SDP, for the reporter to make a general finding only in relation to the all tenure figure over the whole of the 10 year period. SPP is clear that each discrete area should be looked at. The LDP is the mechanism whereby land for each HMA, HSMA and local authority area is provided and is effective to produce a 5-year supply. If only the all tenure figure for the whole of the SDP was considered, the LDP would fail to comply with SPP and the SDP Policy 8. There is force in the criticism that the reporter ought to have had regard to the allocations of the mixed tenure sites in the Technical Report. It is not apparent that he did so. Only by doing so could he have reached an accurate calculation on whether the HLR for each area was likely to be met.

[64] The reporter had up to date information in the form of the 2018 HLA. The Geddes Consulting report included detailed submissions on the subject. It produced significant shortfalls in the all tenancy and private figures for both periods in the SDP and in both the Inverclyde HMA and the Renfrewshire HSMA. This information was *ex facie* relevant to the determination of the critical issue of whether the LDP had demonstrated that the HLR was going to be met as required by the SDP and SPP. It was a relevant consideration. It may be, as the interested parties maintain, that the reporter deliberately ignored this information

because it came too late and was produced in response to a request for further information which it did not answer. The reporter did not say that he had ignored the information or explain why, if he did, he had done so. If the email of 20 February 2019 was intended to convey that message, it did not do so. If the reporter intended to ignore what appeared to be relevant information, it was incumbent upon him to say so and to give some reason for doing so.

[65] The Examination Report thus contains a number of material errors. It did not resolve the dispute on methodology which it required to do in order to see whether there was an effective 5-year supply of housing in terms of Scottish Planning Policy. It illegitimately altered the Housing Land Requirement which was set in the SDP and immutable. It did not answer the critical question on whether the private tenure HLR in the different market areas would, on the basis of the LDP, be likely to be met. It did not explain what account, if any, was taken of the 2018 Housing Land Audit. For these reasons the Report, and consequently Chapter 7.0, *Our Homes and Communities*, of the LDP, upon which it is based, is equally materially flawed. In terms of section 238(1) and (2) of the Town and Country Planning (Scotland) Act 1997, this results in the LDP being outwith the powers of the Act. The prejudice to the appellants in not having sufficient sites for house building in terms of SPP and the SDP is self-evident. The provisions in relation to house building are relatively self contained. The appropriate remedy is to allow the appeal and to quash only that chapter of the LDP. That is what the court will do.