OUTER HOUSE, COURT OF SESSION

[2021] CSOH 74

P111/21
P118/21

OPINION OF LORD CLARK

In the cause

(FIRST) GRAHAM'S THE FAMILY DAIRY (PROPERTY) LIMITED AND
(SECOND) MACTAGGART AND MICKEL HOMES LIMITED

and in the petition of

ELAN HOMES SCOTLAND LIMITED.

Petitioners

for

Judicial Review of decisions of the Scottish Ministers

Petitioners: J d C Findlay QC, Colquhoun: Shepherd and Wedderburn LLP and Campbell Smith (for Burges Salmon LLP)
Respondents: Crawford QC, P Reid; Scottish Government Legal Directorate

21 July 2021

Introduction

[1] The petitioners seek judicial review of decisions of the Scottish Ministers to make changes to planning policy, following a consultation process. The decisions challenged are: firstly, to amend Scottish Planning Policy ("SPP (2014)") in accordance with the document Scottish Planning Policy- Finalised Amendments-December 2020 ("the Finalised Amendments"); secondly, to publish SPP- Finalised Amendments Impact Assessments

("FAIA"), and thirdly to publish Planning Advice Note 1/2020 ("PAN 1/2020"). These documents were published on 18 December 2020. The petitioners in the first petition are Graham's The Family Dairy (Property) Limited and Mactaggart and Mickel Homes Limited. The second petition is raised by Elan Homes Scotland Limited. The parties moved the court to have the petitions heard together as they raise the same issues and the same arguments would be made in each case. Accordingly, this opinion deals with both petitions.

Background

Planning law and policy

[2] A central feature of the challenges made by the petitioners concerns the changes to paragraph s 32, 33 and 125 of SPP (2014). In their original form, they state:

> "Development Management
>
> 32. The presumption in favour of sustainable development does not change the statutory status of the development plan as the starting point for decision-making. Proposals that accord with up-to-date plans should be considered acceptable in principle and consideration should focus on the detailed matters arising. For proposals that do not accord with up-to-date development plans, the primacy of the plan is maintained and this SPP and the presumption in favour of development that contributes to sustainable development will be material considerations.
>
> 33. Where relevant policies in a development plan are out-of-date or the plan does not contain policies relevant to the proposal, then the presumption in favour of development that contributes to sustainable development will be a significant material consideration. 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. The same principle should be applied where a development plan is more than five years old.
> …
> Maintaining a 5-year Effective Land Supply
> 125. Planning authorities, developers, service providers and other partners in housing provision should work together to ensure a continuing supply of effective land and to deliver housing, taking a flexible and realistic approach. Where a shortfall in the 5-year effective housing land supply emerges, development plan policies for the supply of housing land will not be considered up-to date, and paragraph s 32-35 will be relevant."

[3] Two recent decision of the Inner House are of particular importance and assistance in relation to the meaning of these paragraph s in SPP (2014), as well as providing the relevant context in planning law and policy. The following acronyms are occasionally used in those decisions and in this opinion:

HLA	Housing Land Audit
HLR	Housing Land Requirement
HLS	Housing Land Supply
HST	Housing Supply Target
HNDA	Housing Need and Demand Assessment
LDP	Local Development Plan
NPPF	National Planning Policy Framework (England)
SDP	Strategic Development Plan

[4] In the first decision, *Gladman Developments Ltd* v *The Scottish Ministers* [2020] CSIH 28 *("Gladman 2"),* issued on 3 June 2020, delivering the opinion of court the Lord President (Carloway) noted that there was, in respect of paragraph 33 of SPP (2104) a similar provision (paragraph 14) in the NPPF that applies in England. The conclusions reached by the Inner House in *Gladman 2* on the meaning of SPP (2014) are of particular significance for the purposes of the present petitions and the key points are as follows:

> "[45] Once a housing land shortage is established, SPP paragraph 125 dictates that paragraph s 32 to 35 become relevant. Paragraph 33 provides that the effect of this is that the presumption in favour of development becomes a significant material consideration. The paragraph requires that the development contributes to sustainability. That is not a barrier to the application of the tilted balance. *Graham's The Family Dairy* v *Scottish Ministers* (*supra)* determined that the tilted balance did apply, in much the same way as under the similar but by no means identical English provisions, for the reasons given in *Hopkins Homes* v *Secretary of State for Communities and Local Government* [2017] 1 WLR 1865…

> [46] A housing development which will remedy, to some extent, a housing shortage is something which almost inevitably "contributes to sustainable development", which is what paragraph 33 requires, in one degree or another. It will do so also in terms of the economic benefits of construction and in other ways too. Whether it is, in overall terms, a sustainable development is another question. That is one for planning judgement, but it involves the use of the tilted balance. The correct approach, in practical terms, where there is a housing shortage, is to regard that shortage as 'a significant material consideration'. It is not determinative. Paragraph 33 goes on to provide that, in such a situation, where the tilted balance is thus in play, the decision maker must take into account any adverse impacts. These will include factors such as greenbelt, environmental and transport policies as set out in the otherwise 'out-of-date' SDP or LDP. Each factor will play a part in the determination of whether, overall, the development is to be regarded as sustainable. In short, the existence of one or more adverse findings in relation to the thirteen guiding principles to sustainability in terms of SPP (para 29) does not prevent the operation of the tilted balance, but it may result in the balance tilting back to a refusal."

[5] Applying that approach to the decision under challenge in that case, the Inner House held that:

> "[47]…The starting point ought, on the contrary, to have been that there was a presumption in favour of this development because, *inter alia*, it provided a solution, at least in part, to the housing shortage. Thereafter, the question was whether the adverse impacts, notably the other policies in the development plan, 'significantly and demonstrably outweighed' the benefits of the development in terms of the housing shortage and the economic gain."

[6] In addition, on calculation of the level of housing shortage, the Inner House stated:

> "[50] SPP (para 115) states that development plans should address the supply of land for housing. They require to set out the HLS target for each area, based on the HNDA. This is the number of houses which the planning authority has determined will be delivered over the period of the development plan. It represents the demand in the particular market sector. This number is (para 116) to be increased by a margin of 10 to 20% in order to ensure a generous supply of land for housing. It is this augmented figure which represents the housing land requirement. When the SPP is referring to a shortage in the 'effective housing land supply', it is to the figure identified in the development plan as increased by the percentage margin selected; ie the housing land requirement. It is to that figure that regard should be had by a reporter in order to determine the level of shortage. The greater the shortage, the heavier the weight which tilts the balance will be. If the appellants' figures for the shortage are correct, that weight may well be very substantial."

[7] The second of the two decisions, *Mactaggart and Mickel Homes Ltd and Others* v *Inverclyde Council and The Scottish Ministers* [2020] CSIH 44, was issued on 22 July 2020 and contains a succinct summary of aspects of the law and policy framework relevant for present purposes. Again delivering the opinion of the court, the Lord President (Carloway) noted that:

> "Law and Policy Framework
>
> [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)).. 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."

Assessing the extent of the 5-year supply of effective housing land

[8] The number of houses which in terms of the development plan are to be completed over the next five years can be identified (by differing methods, discussed below). The annual HLA to be conducted in terms of paragraph 123 of SPP (2014) will provide information showing what land is available to seek to satisfy the 5-year supply of effective HLS. A comparison will then show whether there is to be a shortfall or a surplus (see e.g. *Gladman Developments Ltd* v *Scottish Ministers* [2019] CSIH 34 ("*Gladman 1*")). There are two main candidates for the appropriate method of calculation of the number of houses needed to comply with the development plan. The first is what is described as the "residual" (or "compound") approach. The formula which can be applied is to take, over the period of the development plan, the number of homes to be built, minus the completions to date, divide

that figure by the number of years for the plan left to run and then multiply the resulting figure by 5. It would be possible to use either the HST or the HLR in working out the number of homes to be built to comply with the plan. As the HLR is always to be 10%-20% higher than the HST, use of the HLR increases the prospect of there being a shortfall. As noted above, in *Gladman 2*, the Inner House considered that the HLR should be used. In *Mactaggart and Mickel*, (at [60]) the Inner House concluded that, on the face of it, the compound (residual) approach would seem to be the most sensible one.

[9] The other main approach is the "average" method. This does not rely upon actual completions to date. The average method is normally to use the HST, divided by the plan period to give an annual figure and then multiply that by five. In effect, the average method ignores past shortfalls of actual construction when measured against the intended annual amount of housing in the given year. The residual method does take account of the completions and if there are past shortfalls as against the intended annual amount then the 5-year effective HLS actually needed will be greater and is more likely not to be met by the amount of land that is available. By way of example, the Housing Land Research Paper, which is discussed further below, when looking at the position in Stirling, indicates that using the average method the required forward 5-year effective HLS would be for 2,080 homes. For the residual method and using the HST it would be 2,944 and if the HLR is used rather than the HST then it would be 3,471.

Internal memorandum

[10] On 25 June 2020, the Planning and Architecture Division of the Scottish Government issued a memorandum to the Minister for Local Government, Housing and Planning concerning the decision in *Gladman 2*. The Memorandum was, as I understand it, disclosed to

the petitioners after the present complaints were raised. It stated, *inter alia:-*

> "5 …The Court found against the Scottish Ministers on both grounds. As previously discussed, we recommended not appealing the decision to the Supreme Court, given the uncertainty of a positive outcome, the lengthy period involved to achieve a decision, and because Scottish Ministers have the more effective option of altering the disputed policy."
>
> …
>
> 7. The Court's view is at odds with our view of the meaning and application of several aspects of the SPP. We are concerned that the decision and its acceptance of a 'tilted balance' is based on the English system. We also disagree with the technical approach of calculating the 5-year land supply, and have concerns that the application of the 'residual approach', particularly at this time when completions are low, will result in many more development plans being viewed as out-of-date and the presumption (including a more heavily 'tilted balance') being used more frequently as a justification for granting consent for unsuitable housing developments."

The consultation

[11] In July 2020, the Scottish Government published a consultation document entitled "The Scottish Planning Policy and Housing - Technical Consultation On Proposed Policy Amendments". It includes the following:

> "Overview
> 1. The Scottish Ministers are consulting on proposed interim changes to the Scottish Planning Policy (SPP) (2014) to clarify specific parts of the Scottish Planning Policy that relate to planning for housing.
>
> 2. The changes, once finalised, will apply over the interim period ahead of the adoption of National Planning Framework 4 (NPF4). Publication of the draft NPF4 is expected in September 2021. Following consultation and consideration by the Scottish Parliament, SPP will be fully replaced when the final version of NPF4 is published in 2022.
>
> Why We are Consulting
>
> 3. The Scottish Government is committed to a plan-led planning system. This was comprehensively supported by a wide range of stakeholders through the review of the planning system. Development plans form the basis of planning decision-making to enable the right developments in the right locations.
>
> 4. The context for planning for housing in Scotland has changed significantly in recent months. The pandemic is having an impact on the ability of planning

authorities to maintain the review cycle of local development plans within the timeframes they intended. We expect that more development plans will extend beyond five years in the coming months and are keen to support authorities in adapting to the current circumstances. The pandemic is also affecting delivery programmes and the rate of housing completions. This, coupled with revised plan timescales, has implications for the plan-led approach to development.

5. Furthermore, a recent decision by the Court of Session on an appeal by *Gladman Developments Ltd* raises a number of issues about the current wording of the policy that we now believe require clarification.

Introduction

6. The Scottish Ministers want the planning system to support the delivery of good quality homes in the right locations. This is of even greater importance now, as it has become even clearer that the quality of our homes can contribute a great deal to our health and wellbeing, and that housing delivery will play a key role in our future economic recovery. However, to achieve housing development in a sustainable way that works with, rather than against, the needs of communities, we need to overcome current conflict in the system, and actively address the lengthy technical debates we are seeing about the numbers of homes that we will need in the future. This will allow us to focus more on how we can strengthen delivery and enable good quality development on the ground.

7. Taking this into account, and to ensure that our policy is clear and can be more easily and consistently applied in practice, the Scottish Ministers wish to update and clarify specific parts of the SPP to achieve the following policy objectives:

- Supporting a plan-led approach to decision-making and maintaining the legal status of the development plan as a basis for decisions in all cases.
- Removing the presumption in favour of development that contributes to sustainable development from the SPP ('the presumption') given that it is considered to have potential for conflict with a plan-led approach and has given rise to significant number of issues it has generated for decision-makers in its application.
- Providing a clearer basis for decisions on applications for housing on sites that have not been allocated in the local development plan where there is a shortfall in the effective housing land supply.
- Clarifying what is meant by a 5-year effective housing land supply and in particular preventing sites that are capable of becoming effective being excluded solely on the basis of programming assumptions.

8. This consultation paper sets out proposed policy amendments to achieve these objectives and invites views on them. The relevant policies are set out in paragraph s 28, 29, 30, 32, 33 and 123-125 of the Scottish Planning Policy."

The consultation document proposed *inter alia* the removal of the reference to the presumption in paragraph 30, the removal of paragraph s 32 and 33 in their entirety, and the deletion of the last sentence in paragraph 125 (which refers to a shortfall and plans not being considered to be up-to-date, resulting in paragraph s 32-35 applying). In relation to calculation of the forward 5-year effective HLS, the proposed amendment to paragraph 125 stated that it should be calculated by dividing the HST set out in the adopted local development plan by the plan period (to identify an annual figure) and multiplying that figure by 5; that is, the average method.

[12] The consultation document goes on to explain:

> "15. These proposals have been designed to address issues associated with planning for housing. We recognise that paragraph s 28, 29, 30, 32 and 33 have wider application but we do not expect that the proposed amendments will directly affect decisions relating to other types of development to the same extent as housing proposals."

[13] In certain circumstances, assessments are required in relation to the impact of proposals such as those in the consultation document on the environment, equality, child welfare and any business and regulatory impact. Declarations or statements can be made by the Scottish Government to exempt it from undertaking these assessments. Several of these declarations or statements were published on the website alongside the consultation document. The consultation document goes on:

> "16. We have considered the requirements for statutory impact assessments, including by screening the proposals in relation to the criteria for Strategic Environmental Assessment, Equalities Impact Assessment, and Children's Rights and Wellbeing Impact Assessment. Our view at this stage is that a fuller assessment is not required, given the procedural and technical nature of the proposals."

[14] In relation to paragraph s 15 and 16, consultees were then asked whether they agreed or disagreed with the views stated and, if the latter, to provide evidence to support their own view. While paragraph 15 may appear to hint at a potential effect on decisions in

relation to housing proposals, each of the four impact assessments published alongside the consultation paper stated that the proposed amendments were to clarify the existing policy and were of a technical and procedural nature (echoing the point made in paragraph 16). Importantly, three of the impact assessments expressly stated that the proposed amendments would or will "not influence the outcome of planning decisions".

Homes for Scotland

[15] The response to the consultation by Homes for Scotland, a body which represents housing developers, included the following comment:

> "With the Scottish Government having characterised the consultation as purely technical and procedural, and the policy changes as only clarificatory and without impact, many stakeholders have little impetus to engage. We know from our early discussions with other stakeholders that some have indeed considered the consultation to be of little or no importance to them; wrongly assuming that the changes only apply to housing, given the title of the consultation paper. The outcome will be that you are unlikely to achieve the depth and reach of engagement I am sure you would want."

Thereafter, on 6 August 2020, staff from Homes for Scotland attended a meeting with members of the Scottish Government's planning team and in a subsequent letter dated 19 August 2020 Homes for Scotland recorded the following concern behind the consultation, arising from *Gladman 2*, as expressed on behalf of the Scottish Government at the meeting:

> "You are concerned the court decision will require planning authorities and Reporters to approve development that they would not have granted permission in the period between Scottish Planning Policy being introduced in 2014 and the…decision."

The outcome of the consultation process

[16] In the Finalised Amendments, the wording added to the key paragraph s in SPP (2014) is underlined below, other wording having been deleted:

"Development Management
32. The presumption in favour of sustainable development does not change the statutory status of the development plan as the starting point for decision-making. The 1997 Act requires planning applications to be determined in accordance with the development plan unless material considerations indicate otherwise. Proposals that accord with development plans should be considered acceptable in principle and the consideration should focus on the detailed matters arising.

33. Proposals that do not accord with the development plan should not be considered acceptable unless material considerations indicate otherwise. Where a proposal is for sustainable development, the presumption in favour of sustainable development is a material consideration in favour of the proposal. Whether a proposed development is sustainable development should be assessed according to the principles set out in paragraph 29.

Maintaining an effective housing land supply

125. Planning authorities, developers, service providers and other partners in housing provision should work together to ensure a continuing supply of effective land and to deliver housing, taking a flexible and realistic approach. Proposals that do not accord with the development plan should not be considered acceptable unless material considerations indicate otherwise. Where a proposal for housing development is for sustainable development and the decision-maker establishes that there is a shortfall in the housing land supply in accordance with Planning Advice Note 1/2020, the shortfall is a material consideration in favour of the proposal. Whilst the weight to be afforded to it is a matter for decision-makers to determine, the contribution of the proposal to addressing the shortfall within a five year period should be taken into account to inform this judgement. Whether a proposed development is sustainable development should be assessed according to the principles set out in paragraph 29."

[17] The document FAIA summarised the finalised policy changes:

- Amendment of the wording of the presumption in favour of development that contributes to sustainable development. We originally proposed removing relevant sections of the Scottish Planning Policy and associated paragraph s. However, having taken into account views and evidence received, we have now decided that the policy can be amended rather than removed. The proposed changes would clarify that there is a presumption in favour of sustainable development, rather than in favour of development that contributes to

sustainable development. We will also set out that this should be assessed with reference to the principles set out under paragraph 29. This would help to ensure decision-makers understand that we support sustainable development rather than any development which may not be sustainable. The proposed changes also amend wording of paragraph 33 of the Scottish Planning Policy to set out how applications that do not accord with the development plan should be considered. The references in paragraph 33 to policies in a development plan being out-of-date and to the age of the development plan would be removed to confirm the statutory status of the development plan.

- We are amending the policy on housing and maintaining a five year effective housing land supply (paragraph 125). Rather than the changes originally proposed, setting out a full methodology for calculating the land supply in the SPP, we are linking changes with guidance on our preferred methodology for calculating the extent of the land supply. This is based on an average rate of housing delivery over the plan period as a whole, rather than adjusted to factor in housing completions.
- The proposed changes clarify how proposals for housing development which do not accord with the development plan should be assessed where there is a shortfall in the 5-year effective housing land, by linking decisions to the presumption in favour of sustainable development.
- Other changes originally proposed will no longer be taken forward, including references to site programming and revised glossary definitions.

The document contains declarations that, on the impact of proposals on the environment, equality, child welfare and any business and regulatory impact, no further impact

assessments were required, including for the reason that "the impact on numbers of homes delivered is unknown but could reasonably be expected to be neutral". In the Fairer Scotland Duty Assessment, contained within the document, reasons are given as to why no assessment in that regard is required.

[18] PAN 1/2020 advises that in assessing the extent of the 5-year supply of effective housing land, the average method is to be used, based on the HLR rather than the HST.

[19] On 18 December 2020, the Scottish Ministers also published a document entitled Housing Land Research Paper, which was stated as having been used to inform the amendments to the Scottish Planning Policy.

The key changes

[20] In summary, as a result of the changes, where a proposal for housing development is for sustainable development (rather than being just a contribution to sustainable development), the existence of any shortfall in the 5-year effective HLS (preferred now to be determined after calculation by the average method) is a material consideration (rather than a significant material consideration) in favour of the proposal and the contribution of the proposal to addressing the shortfall is to be taken into account (rather than the benefits having to be significantly and demonstrably outweighed). While the complete removal of the presumption and of paragraph s 32 and 33, as originally proposed, did not occur, the changes made substantially alter the policy from the meaning explained in *Gladman 2*.

Grounds of challenge

[21] The petitioners put forward seven grounds of challenge. Ground 1 concerns the consultation process, which is argued to have been so unfair as to be unlawful. Ground 2

challenges the consideration of the changes to paragraph s 32 and 33 of SPP and ground 3 attacks the introduction of the average method in relation to calculating whether there is a shortfall in the 5-year effective HLS. Ground 4 challenges the FAIA and ground 5 criticises the Fairer Scotland Duty Assessment. Grounds 2-5 allege that the decisions on these points were irrational as a result of specific errors in the decision-making process. Ground 6 argues that the FAIA are materially flawed for the reasons set out in Grounds 4 and 5. Ground 7 contends that PAN 1/2020 is irrational for the reasons set out in Grounds 2 and 3. The respondents deny that the test for unlawfulness in respect of the consultation is met and also argue that the petitioners present no proper basis for concluding that any of the resulting decisions were irrational.

Submissions

[22] The court had the benefit of full and detailed Notes of Argument for the parties, as well as extensive oral submissions over several days. These have been taken fully into account and what follows is a brief summary of the central points made on behalf of the parties.

Submissions for the petitioners

Ground 1: errors in relation to the consultation

[23] The consultation process necessarily undertaken by the Scottish Ministers in advance of the changes was unlawful. The Court of Appeal in England had provided a helpful exposition of the relevant principles. Reference was made to *R (Bloomsbury Institute Ltd) v Office for Students* [2020] EWCA Civ 1074; *R (Help Refugees Ltd) v SOSHD* [2018] 4 WLR 168;

R v *N&E Devon HA, ex p. Coughlan* [2001] QB 213; *R (Moseley) v Haringey LBC* [2014] UKSC 56; and *R (Stephenson)* v *SOSHCLG* [2019] EWHC 519 (Admin).

[24] There was very little, if any, evidence or analysis supplied as part of the consultation in either the consultation document or the pre-screening assessments. Simply asserting absence of impact was not enough. The clear driving motivation behind the consultation was dissatisfaction with the Inner House's decision in *Gladman 2*. The lack of material in the consultation to respond to was alluded to at the time by each of the petitioners. Homes for Scotland had made similar points. The Scottish Ministers' assertions that the petitioners were perfectly well able to make an intelligent response to the questions posed was no answer. Homes for Scotland made clear that other stakeholders considered the consultation to be of no importance because of its misleading terms. The correct standpoint was to assess it from the viewpoint of the reasonable reader.

[25] By contrast, the Finalised Amendments relied heavily on the material primarily provided in the Housing Land Research Paper. That paper went some way to providing an evidential and analytical basis for the policy changes, capable of evoking an intelligent response. But it was never subject to consultation and, if it had been, the petitioners and many others no doubt would have responded. There were a number of arguably highly contentious conclusions reached in the Housing Land Research Paper, which should have been consulted upon if they were to be relied upon (which they were) as influencing the outcome of the consultation.

[26] The lack of evidence was most acute in terms of the surprising assertion that the changes would have no impact on planning decisions. It was particularly unfair for the Scottish Ministers to reach that view on either (i) no evidence justifying a mistaken supposition of no impact at the time of consultation or (ii) on evidence which was asserted

to justify a neutral view as set out in the December paper without consultees having a chance to consider such evidence and respond thereto. In fact, the internal memorandum made clear that the consultation was prepared specifically to address a concern that, following *Gladman 2,* the combination of the residual method and the tilted balance would result in more decisions to grant planning permission. The changes proposed were apparently designed to ensure there would be an impact on decision-making, albeit this material only came to light after the outcome of the consultation was known.

[27] Such material as was contained in the Housing Land Research Paper, and in the Finalised Amendments, should have been made available for consultation: *R* v *SOS for Health, ex parte United States Tobacco International Inc* [1992] QB 353 per Taylor LJ at 371G-H and Morland J at 376 D-G; *Edwards* v *Environment Agency* [2006] EWCA Civ 877, [2007] Env.L.R. 9, Auld LJ (at [10] and [105-106]). The expressly *obiter* comment on this issue by Lord Hoffmann following appeal to the House of Lords [2008] UKHL 22 (at [44]) was not relevant.

[28] In the consultation and pre-screening assessments, the reader was told that the changes would not influence the outcome of planning decisions, whereas it is clear they could well do so (see e.g. *Gladman 2*). This would be so both in housing and in the other planning cases. This statement was misleading. It was important to note that the impact would be (i) the removal of the tilted balance and (ii) the removal of the concept of plans being out-of-date and (iii) the adoption of an average approach to assessment of the 5-year effective housing land supply, which means that far fewer authorities will be considered to have a shortage of housing land supply. By the time of the Finalised Amendments, it appeared to be accepted in terms of (i) above that the tilted balance "has the potential to mean that developments may … be granted consent where there is a shortfall in housing

land supply" but no view seemed to have been taken in respect of the impact of changes (ii) or (iii). It was wrong for the consultation to assert that there would be no impact on planning decisions when that appears to have been one of the very purposes of the changes and it was misleading not to bring that to the consultees' attention. The Scottish Ministers took their decision against the background of admitted uncertainty as to impact in respect of an issue they had previously expressed certainty on. They should have realised the need for a change of view both as to impact on housing and on other developments.

[29] The changes were neither technical nor procedural, nor were they required to add clarity, save arguably as to methodology. As the Inner House had stated, with the exception of the method to be used to calculate the 5-year effective HLS where a policy vacuum existed, the pre-existing provisions were clear. The proposed changes were potentially far reaching. More importantly, the Scottish Ministers were seeking to change policy, and significantly so, but misrepresented the position. By contrast, in terms of the methodology for calculation of the 5-year effective HLS they were introducing new policy with potentially significant impacts. Reference was made to *R* v *Secretary of State for Transport ex p. Richmond Upon Thames LB* 1995 Env L.R. 390, at 405.

[30] The Scottish Ministers' position failed publicly to recognise that, in respect of many of the changes, it was changing its policy in direct response to the decision of the Inner House in *Gladman 2.* A lawful process involves a public recognition that it is seeking to materially change its policy. There was no basis for the Scottish Ministers' suggestion that the result in *Gladman 2* subverted the original policy intent of paragraph 33 of SPP. The words used made the policy intent clear. That view was reached in several cases, including *Graham's The Family Dairy Ltd* v *Scottish Ministers* [2019] CSIH 3, and *Gladman 1*. In those cases, there was no submission of the kind now made about the original policy intent. In

Gladman 2, there was an express admission by the Scottish Ministers about the tilted balance. In *Mactaggart and Mickel Homes Ltd and Others* v *Inverclyde Council and The Scottish Ministers*, the Lord President re-iterated the legal and policy framework, at [4]-[10], consistent with the above cases. There was nothing in the consultation that preceded SPP (2014) or the SPP position statement of January 2014 supporting any different approach. If the policy intention was so different from that consistently identified by the court it surely would have found exposition in some contemporaneous document. Reference was made to *Tesco* v *Dundee CC* [2012] UKSC 13, at [19].

[31] The proposals were also misleading as to: (a) impact on planning decisions; (b) impact on planning in aspects other than housing; (c) the import of *Gladman 2*, with the suggestion being it was somehow inconsistent with the primacy of the development plan or overrode normal planning judgment; and (d) failure to identify the consequences of removal of the concept of a plan being out-of-date for development management purposes.

Ground 2: errors in considering changes to paragraph s 32 and 33 of the SPP

[32] In the Finalised Amendments, the Scottish Ministers erred in law in their consideration of changes to paragraph s 32 and 33 of SPP (2014). They took as their starting point that "there are different interpretations of the existing policy", which ignored the fact that in *Gladman 2* the court found the correct meaning of relevant existing policy, and further clarified it in *Mactaggart and Mickel*. They materially misconstrued the court's opinion in *Gladman 2*. They continued to imply that *Gladman 2* supports the approach of development at any price or in any location or that calculations on land supply should not be the determining factor in planning decisions to the extent that it outweighs other factors required to make a development sustainable. *Gladman 2* does not support either approach.

The Scottish Ministers also failed to provide any or any logical explanation for the inclusion in the original paragraph 33 in SPP (which reflects in part at least the then wording of the NPPF) of the tilted balance if it was not "an intended feature of our policy", and thus failed to recognise that it was changing its policy away from, a tilt in favour of housing development where there was a shortfall. They also failed to consult on the material in the FAIA and provided no or any adequate reason for failing to consult on such material at the appropriate stage contrary to the guidance they produced in respect of such impact assessments. There should have been a further consultation, particularly given an acceptance that at least 5,000 houses had been granted planning permission as a result of the presumption, and the very limited detailed analysis upon which Scottish Ministers relied. There was no assessment of the impact of removal of the concept of a plan being out-of-date or recognition as to the change to the SPP in this regard. These flaws and failures resulted in the decision on these paragraph s being irrational.

Ground 3: errors in considering changes to calculation of 5-year effective housing land supply

[33] The prescribed method of calculation was now to be the average method. The respondents were entitled to adopt, within reason, whatever methodology they wished to, including the average method, but had to do so lawfully. There was no assessment of the impact of such changes. These were likely to have a significant impact on provision of housing if, as instanced in one of the affidavits, many local authorities can now demonstrate absence of any shortfall whereas they could not before. It was perverse to institute such a change without evaluating the impact, let alone failing to consult on it.

[34] There was no recognition that adopting an average method will mean that the HLR set out in the relevant development plan will not be met. This left out of account an

obviously material consideration. This outcome was reflected in several of the Inner House decisions, particularly *Gladman 1*. There was also a failure to give balanced consideration. The average method directs decision-makers to ignore shortfalls in delivery of housing against the housing requirement. It was unclear how a decision-maker could reach a view on unmet demand without considering the number of houses delivered to date.

[35] The Scottish Ministers' answer that PAN 1/2020 is not prescriptive and with good reason need not be followed wholly missed the point. No policy was prescriptive but the Scottish Government clearly intended that its reporters and local authorities should follow it. Its terms did not suggest that it was simply a preferred methodology. If decision-makers were to be allowed complete freedom to choose between the application of the residual and average methods, there was no purpose in specifying only the average method.

[36] There was a fundamental uncertainty as to what methodology should apply to development planning and as to the interface between a development plan calculated on one basis and a 5-year effective HLS calculated on another basis. SPP and SDPs require an LDP to maintain a 5-year effective HLS at all times. There could be no justification for one methodology applying on the date of adoption and another applying the day after. If the average methodology applied from the date of adoption, the LDP may never allocate the right sort of land to ensure that the needs of future residents are met as they arise. If, as the Scottish Ministers appeared to suggest, the methodology in PAN 1/2020 is not directly applicable at the development planning stage, that was a material consideration which had been left out of account, or at least was a matter which should have been considered and consulted upon.

Ground 4: material flaws in Finalised Amendments Impact Assessments

[37] There was a lack of assessment of the impact of changes other than to paragraph s 32 and 33 of SPP. In particular, the failure to compare the position with what should happen post-*Gladman 2* was not met by the assertion relating to the original policy intention. The true impact of the changes should have been comparing the likely outcome between decision-makers following *Gladman 2* and the approach of the Inner House on the one hand and the new policy on the other. That reinforced the view that Scottish Ministers' claim that the changes would be neutral was simply perverse, and indeed inconsistent with concerns expressed outside the consultation. No specification was provided as to where impact on non-appeal decisions was assessed.

Ground 5: Fairer Scotland Duty Assessment was irrational

[38] On ground 5 the complaints were largely parasitic on the points made above, although it was also wrong for the Scottish Ministers to conclude that the changes were not strategic. The first reason given by the Scottish Ministers was that the amendments are closely targeted interim amendments to an existing policy to reflect the original policy intention. This failed to recognise that what is proposed is a change of policy, not clarification, and does not represent the original policy intention. The second reason given by the Scottish Ministers was that the amendments do not directly address the preparation of local development plans. This was flawed as the amendments may well affect the preparation of local development plans, and changes to the approach to development management can be properly described as strategic, and regard appears only to be had to the removal of the tilted balance but not the alteration to the calculation of the 5-year housing land supply and the removal of the concept of out-of-date development plans, both of which can properly be described as strategic. Reference

was made to how that term is explained in the "Fairer Scotland Duty Interim Guidance for Public Bodies" at page 11, and to the Equality Act 2010. The third reason given was that the amendments do not set priorities, allocate resources or commission services. The third reason was also flawed as it failed to recognise that the outcome will affect the priority to be given to the provision of new housing where there is a shortfall in any particular local authority area. The changes were indeed strategic; that they were considered not to be is consistent with the playing down of the impact of the proposals.

Grounds 6 and 7

[39] On ground 6, the FAIA were materially flawed for the reasons set out in Grounds 4 and 5. On ground 7, PAN 1/2020 was irrational for the reasons set out in Grounds 2 and 3.

Submissions for the respondents

Relevant legal principles

[40] In respect of planning law generally, reference was made to: *R (West Berkshire DC)* v *Secretary of State for Communities and Local Government* [2016] 1 WLR 3923; sections 25 and 37 of the 1997 Act; *City of Edinburgh Council* v *Secretary of State for Scotland* 1998 SC (HL) 33; *Tesco Stores Limited* v *Dundee City Council*; *R (Friends of the Earth Ltd and another)* v *Secretary of State for Transport* [2021] PTSR 190; sections 7 and 8 of the Environmental Assessment (Scotland) Act 2005 and the Children and Young People (Scotland) Act 2014. As to the requirements of a lawful consultation: the "Sedley criteria", were approved in *R (Moseley)* v *Haringey London Borough Council*. Reference was also made to *R* v *North and East Devon Health Authority, ex parte Coughlan*; *Uprichard* v *Scottish Ministers* 2013 SC (UKSC) 219; *R (Law Society)* v *Lord Chancellor* [2019] 1 WLR 1649; *R (Medway Council)* v *Secretary of State for*

Transport [2002] EWHC 2516 (Admin); *R (Robin Murray & Co) v Lord Chancellor* [2011] EWHC 1528 (Admin); *R (Nettleship)* v *NHS South Tyneside Clinical Commissioning Group* [2020] PTSR 928.

Ground 1: errors in relation to the consultation

[41] There was nothing before the court to support the suggestion that others may not have been able to properly respond to the consultation. Given that lack of evidence, and standing the admission now made by the petitioners that they were fully able to respond, this ground was, on the facts, unfounded.

[42] On the alleged absence of information, the reasons for the proposed changes were enumerated: (i) the existing terms had caused considerable confusion and undermined the transparency of the system; (ii) the court's interpretation of the wording of the presumption was not consistent with the policy intention; (iii) the primacy of the development plan should not be undermined in decision-making; (iv) the tilted balance was not intended to be a feature of the Scottish planning system that overrides normal planning judgment based on the development plan and other material considerations; (v) the reference to relevant policies of plans being out-of-date had a range of interpretations and differing positions were being taken; and (vi) as a result of Covid-19 restrictions and to ensure proper consultation, more development plans were likely to exceed five years in age in the coming months and the Scottish Ministers did not wish to undermine a plan-led system. The Scottish Ministers were entitled, from their own knowledge of the planning system, to form the view that there was considerable confusion regarding these aspects of SPP (2014). This was reflected by the use of the tilted balance argument by developers that is applicable in the English planning policy and how the angle of any such tilt is to be assessed.

[43] It was perfectly plain from the submissions presented to the court in *Gladman 2* that the Scottish Ministers' policy intention did not accord with the meaning the SPP was held by the court to have. The statutory provisions of sections 25 and 37 of the 1997 Act directed decision-makers to determine planning decisions in accordance with the development plan unless material considerations indicate otherwise. The court's interpretation of paragraph s 33 and 125 of SPP (2014) (both in respect of the tilted balance and the degree to which it should be angled) would have the effect of diluting the primacy of the development plan and its weight which would otherwise remain for the decision-maker. The import of the English concept of a tilted balance to the Scottish planning system was not what had been intended. The practical consequences of *Gladman 2* were matters properly for the Scottish Ministers to consider.

[44] The petitioners incorrectly averred that the proposal was to remove the development management concept of out-of-date development plans. If a plan is out-of-date it was, and is, the development plan. No changes were proposed to paragraph 30 which required, *inter alia,* development plans to be up-to-date. An out-of-date policy in a development plan could continue to be a material consideration in the determination of a planning application. The proposed change was to paragraph 33 and the concept of "relevant policies" being "out-of-date", and similarly to paragraph 25 which treated relevant policies as being out-of-date where a housing shortfall was identified. The effect of paragraph 125 was to render newly adopted plans as being out-of-date by virtue of a housing shortfall being identified and thereby becoming a significant material consideration in favour of a development, thus diluting the plan-led system.

[45] In relation to plans exceeding five years in age, the Scottish Ministers were entitled to consider the impact of Covid-19 restrictions on development plan making, and the

consequent effect on development management. The consultation addressed paragraph 125 and proposed providing a clearer approach to establishing the extent of the 5-year effective HLS and taking this into account in decision-making. The reasons were that: (a) there was a need for standard calculation; (b) the current circumstances and Covid-19 meant that the Scottish Minister were not convinced that the residual method would produce accurate outputs; (c) a shortfall is relevant, but should not be determinative, as part of the wider planning judgment; and (d) exceptional releases of land may be appropriate. The Scottish Ministers maintained their view of the need for the adequate forward supply of effective land.

[46] The Scottish Ministers were entitled, having regard to the nature and extent of the proposed changes in the consultation and to how SPP (2014) had been applied prior to *Gladman 2*, to conclude that the proposed changes would have no or minimal impact: the proposed changes were designed to reflect the policy intention, were consistent with previous decision-making and confirmed that decisions should be based on planning judgment taking into account the development plan and leaving it to the decision-maker to establish the weight to be given to material considerations. They were entitled to state (para 14 of the consultation) that the presumption proposals would not directly affect other types of development to the same extent as housing proposals.

[47] Following the close of the consultation the Scottish Ministers considered, *inter alia*, the objections to the proposed changes. The responses were analysed by external consultants. The Scottish Ministers decided to undertake research and analysis in order to address the responses and, in particular, the objections in order to inform their decision. The Finalised Amendments document explained what the Scottish Ministers took into account when making those amendments. That included their internal analysis of planning appeals

(as reported in the Housing Land Research Paper), views from the construction sector, evidence about the housing market, evidence provided to the Scottish Parliament by industry bodies, external Research Papers such as the Scottish Housing Market Review July-September 2020, the impact of Covid-19, assessment of housing land audit practice, evidence from Heads of Planning on the availability of housing land and the Development Planning Consultation and Engagement May 2020. There were no fundamental changes in the proposals that required re-consultation. The petitioners had identified no basis on which the Scottish Ministers were obliged to consult on the Housing Land Research Paper.

[48] As a result of the responses received to the consultation, a fuller screening was undertaken. The view was taken that full assessments were not required. In respect of the SEA screening, the statutory consultees agreed with that view. There was no statutory obligation to consult publicly on any of these screening decisions, other than with the statutory consultees. The consultation considered that the presumption proposals would not directly affect other types of development to the same extent as housing proposals. Consultees were expressly invited to comment on the Scottish Ministers' assessment. Responses to the consultation were not limited to the housing sector. The effect of *Gladman 2* would result in an imbalance of the planning judgment required under the 1997 Act. It was said by the court that a housing development which will make any contribution to housing shortage "almost inevitably" contributes to sustainable development (para [46] of *Gladman 2*). The nature of the proposed changes were made clear in the consultation.

Ground 2: errors in considering changes to paragraph s 32 and 33 of the SPP

[49] The Scottish Ministers properly directed themselves to what was decided in *Gladman 2* and the consequences of that decision. The Scottish Ministers did not require to

consult on the material in the FAIA. There was no fundamental change in circumstances. The Scottish Minsters were entitled to conclude that there would be no significant impact as a result of the finalised amendments. In so far as reasons were required for why the Scottish Ministers did not consult, those were provided by the terms of the FAIA.

Ground 3: errors in considering changes to calculation of 5-year effective housing land supply

[50] The calculation of a 5-year effective HLS had been controversial and there have been various arguments about how best to calculate it. That controversy had necessarily given rise to a degree of uncertainty. Certainty and consistency are important values of public law and were to be encouraged. Accordingly, there was nothing inherently objectionable in the Scottish Ministers issuing guidance on the calculation of 5-year effective HLS. The Finalised Amendments document took account of the Housing Land Research Paper. Objections to the average method were noted and the fact that the residual method has been used in many cases was taken into account. The Finalised Amendments set out and explained that the reasons for a shortfall will be varied and may not be due to a lack of availability of land or planning consents. This will be addressed in the fuller review of NPF4. The Scottish Ministers explained that pending that review a cautious approach is appropriate when considering the release of additional land (land that is not allocated in the development plan). They also noted that exceptional release of land was no guarantee that development will in fact proceed. The Scottish Ministers' consideration of the strengths and weaknesses of the residual versus the average method of calculation was carried out having taken into account, *inter alia*, the objections to the average method. The average method, for the interim period until completion of NPF4, was considered to be realistic and to accord with past levels of completion. The Scottish Ministers took account of the inaccuracy of the

housing land audits. The Scottish Ministers were entitled to exercise their judgment in the manner that they did and for the reasons provided. The Scottish Ministers accordingly set out their preferred methodology in PAN 1/2020, which represents advice. The Scottish Ministers do not usually consult on PANs. The petitioners could have had no expectation that they would be consulted on a PAN. PAN 1/2020 did not prescribe that only the average method should be used. Decision makers retained discretion in the exercise of their planning judgment to prefer an alternative methodology. PAN 1/2020 was adopted to support the amendments to paragraph 125 of SPP (2014).

Ground 4: material flaws in Finalised Amendments Impact Assessments

[51] Out-of-date development plans will remain a material consideration for the decision-maker to take into account and weigh in the exercise of planning judgment and there was no need to consider adequately, or at all, the impact of adopting an average method particularly on the long-term delivery of development plans, not least because the focus of PAN 1/2020 is on development management. In any event, it was an interim change pending the adoption of NPF4. The Scottish Ministers were entitled to conclude that the impact of the changes would be minimal for the reasons stated and had a proper basis to do so. They were entitled to compare how decision-makers applied SPP (2014) pre *Gladman 2* to address whether the decisions accorded with the law as decided in *Gladman 2*. The pre *Gladman 2* approach was broadly consistent with the Scottish Ministers' original policy intention and the changes would have a minimal impact. The Scottish Ministers explained in the Housing Land Research Paper why they examined appeal decisions, not least because those provide readily accessible reasons.

Ground 5: Fairer Scotland Duty Assessment was irrational

[52] This ground was a repetition of earlier complaints about the nature of the proposed changes and their likely impact. For the reasons already given, those complaints are unfounded. In respect of the Fairer Scotland Duty Assessment, the reasons given for not requiring a full assessment were clear, rational and sound.

Grounds 6 and 7

[53] Grounds 6 and 7 added nothing to the grounds set out above. They fell to be refused as unfounded or, in the alternative, as being superfluous to the grounds already discussed.

Decision and reasons

Ground 1: errors in relation to the consultation

Relevant legal principles

[54] Senior counsel for each of the parties referred to a number of decisions concerning the law on consultations. I summarise the relevant principles as follows. Ultimately, it is a question of fairness: has the consultation process been so unfair as to be unlawful?: *R (West Berkshire DC)* v *Secretary of State for Communities and Local Government*, at [60]. What fairness requires will turn on the individual circumstances. That will include, for example, the identity of who is being consulted and the extent to which they could be expected to understand the issue(s): *R (Moseley)* v *Haringey LBC*, at [26]. The consultation documentation must be read and examined in the spirit of the purpose for which it is produced. It must be read and considered from the standpoint of a reasonable member of the public or reasonable reader: *R (Stephenson)* v *SOSHCLG*, at [44]. When considering whether the non-disclosure of particular information renders a consultation process so

unfair as to be unlawful, relevant considerations include: (i) the nature and potential impact of the proposal; (ii) the importance of the information to the justification for the proposal and the ultimate decision; (iii) whether there was good reason for not disclosing the information; and (iv) whether consultees were prejudiced by the non-disclosure: *R (Law Society)* v *Lord Chancellor*, at [73].

[55] The public body which is consulting must put a consultee into a position properly to consider and respond to the consultation request, without which the consultation process would be defeated. Consultees must be told enough, and in sufficiently clear terms, to enable them to make an intelligent response. Therefore, a consultation will be unfair and unlawful if the proposer fails to give sufficient reasons for a proposal or where the consultation paper is materially misleading or so confused that it does not reasonably allow a proper and effective response: *R (Help Refugees Ltd)* v *SOSHD*, at [90], under reference to several authorities. What the duty requires of the consultation is fact-specific and can vary greatly from one context to another, depending on the particular provision in question, including its context and purpose (*ibid*). The courts will not lightly find that a consultation process is unfair. Unless there is a specification as to the matters that are to be consulted upon, it is for the public body charged with performing the consultation to determine how it is to be carried out, including the manner and extent of the consultation, subject only to review by the court on conventional judicial review grounds. Therefore, for a consultation to be found to be unlawful, "clear unfairness must be shown" (*ibid*). A duty of consultation will exist in circumstances where there is a legitimate expectation of such consultation, usually arising from an interest which is held sufficient to found such an expectation, or from some promise or practice of consultation: *R (Moseley)* v *Haringey LBC*, at [35]. The

proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response (*ibid*, per Lord Wilson, at [25], approving the "Sedley criteria").

[56] While an earlier authority stated that there had to be a factual finding that "something has gone clearly and radically wrong", this is not an additional hurdle to be jumped and the test remains whether the process was so unfair as to be unlawful. This expression also does not assist much, if at all, in cases where the allegation is that a claimant or class of claimants likely to be particularly affected by the operation of the policy was not given sufficient information which they needed to know in order to make informed and meaningful representations to the decision-maker before a decision was made: *R (Bloomsbury Institute Ltd)* v *The Officer for Students*, at [69]. Consultation is not negotiation: *R (Medway Council)* v *Secretary of State for Transport,* at [26). It is not, absent exceptional circumstances, necessary to share matters that emerge internally during a consultation. To do so has the potential to lead to a never-ending dialogue and to be inimical to the principle that there must come a time when finality is achieved: *R (Robin Murray & Co)* v *Lord Chancellor*, at [47]. It is probably correct that there is no duty to re-consult unless there is a fundamental change of circumstance: *R (Nettleship)* v *NHS South Tyneside Clinical Commissioning Group*, at [43].

Application of these principles

Assertions about the impact of the proposals

[57] Planning decisions on housing are plainly of importance to all stakeholders, including the general public. Whether any proposed policy changes will impact on such decisions is obviously a material factor. While there was, in paragraph 15 of the consultation document, perhaps a hint of some potential impact of the proposed

amendments on the outcome of planning decisions, the impact assessments (referred to in the consultation document) expressly stated that there will be no impact. The assertion of no impact was apparently based upon a comparison between the proposed amended policy and how it was understood (although not evidenced) that reporters had approached matters pre-*Gladman 2*. However, the consultation did not state that to be the comparison and also failed to state that the impact on future decisions which would otherwise have followed *Gladman 2* was not considered.

[58] A comparison between the effects of the proposed amendments and planning decisions post-*Gladman 2* would not have supported the assertion of no impact. The internal memorandum expressed clear concerns about the impact of *Gladman 2* and that it might result in granting consent for unsuitable housing developments. This was also noted as a concern of the Scottish Government in the letter dated 19 August 2020 from Homes of Scotland. When, after the consultation, this comparison was made in the Finalised Amendments document, it was accepted that the decision could change how the policy is applied and that the amendments may therefore lead to different decisions. However, it was then said that "the evidence shows that the role of the presumption is neither clear cut nor determinative" and that:

> "The impact, in terms of numbers of homes built or other developments affected cannot be accurately predicted. However the impact on number of homes delivered could reasonably be expected to be neutral given the continuing role of planning judgement in decision-making and taking into account the revised amendments we are now proposing. The effect of changes on other sectors is also expected to limited."

[59] In my view, it was incumbent upon the Scottish Ministers, when making the comparison and concluding on impact at the time of the consultation, to make clear to the reader what it was comparing in reaching that conclusion. As that was not done, the

reasonable reader had no inkling of what was being compared. The reasonable reader would be likely to take the assertion of no impact at face value and rely upon it. As a consequence, the reasonable reader may well have decided either not to respond at all to the questions or may have given a response that was largely or at least partly predicated on accepting that assurance. As is obvious, a clear statement about the absence of any impact of proposed changes is a significant factor in the participation and thought-process of a consultee in such a consultation. The making of such statements, based on a comparison that was not explained and which actually ignored the effects of *Gladman 2,* was a materially unfair aspect of the consultation process.

Other factors contributing to unfairness

[60] A number of other points contribute to, or compound, the unfairness of the key factor of the impact of the proposed amendments. Firstly, viewed from the objective perspective of the reasonable reader, there was little or no evidence or analysis supporting the proposals in the consultation document and in particular the assertion that there would be no impact on planning decisions on housing. There was no proper basis given for any assessment of the impact of the proposed changes. In addition, there was a failure in the consultation document to identify or assess the consequences of removal of the concept of a plan being out-of-date for development management purposes. Further, on the proposed introduction of the average method of calculation, there was no assessment of how this could affect whether the HLR would be met or whether it had any potential consequences in relation to development planning. Secondly, the absence of impact also seems (although this was not stated in the consultation document) to have been based on there having been a uniform approach in practice before *Gladman 2*. On the information put before me there is

real room to doubt that proposition and if it was to underpin the point about impact then it would have required evidence. Thirdly, the Housing Land Research Paper shows, in part, the actual form of reasoning, evidence and analysis that supported and justified the changes that came to be made. It demonstrates that material of that kind was missing in the consultation document. I appreciate of course that this paper was not available at the time of the consultation, but that does not in my view justify proceeding with a consultation when evidence or analysis for important factual issues is not made available. The affidavits lodged by the petitioners explain that there were matters of some significance (such as how previous decisions had dealt with the application of the presumption on contribution to sustainable development) that consultees would have wished to raise had they been given notice of the content of the paper. I do not go as far as concluding that the Housing Land Research Paper involved a fundamental change that required re-consultation and that an actual failure to re-consult occurred. Rather, its content illustrates the absence of evidence and analysis, on matters of materiality which had a bearing on the final decisions, in the original consultation document. Fourthly, when viewed in their proper context and in light of their intended impact, the proposed changes cannot properly be described (as they were in the consultation document) as clarification, or technical and procedural. They were indeed substantive and potentially far-reaching.

Other considerations

[61] The planning policy is not a set of rules, but it is plainly very significant guidance. I do of course accept that there were divided responses to the consultation and it is clear that persons with an interest similar to the petitioners opposed many of the proposals. It seems fair to say that all of the responses were properly considered. It is also correct that the

reasons for the proposed changes were set out, at least in summary form (although not including reasons for concluding that there would be no impact and not setting out evidence or analysis for that conclusion). When one considers the terms of the reasons stated, it is clear that many of them did not require further evidence or analysis. In particular, the effects of Covid-19 and the assertion by the Scottish Ministers that the decision in *Gladman 2* did not reflect their policy intentions did not, in my opinion, require any further vouching. I bear in mind that there is a temporary or interim lifespan to the changes and therefore that their impact may be limited. But there was seen by the Scottish Ministers to be a pressing need for the amendments, even though perhaps temporary, and it is also clear that they were intended to reflect the current policy intentions and so could be viewed as laying a potential path for the way forward. The interim policy would of course affect decisions in that interim period. I also have full regard to the fact that the Covid-19 pandemic does seem to have played a significant role in the decision-making. However, these points do not outweigh the factors that contribute to unfairness.

[62] I also bear in mind that direct unfairness to the petitioners is difficult to identify, given their own resources and knowledge and indeed what they said in response. I also note that the response from Homes for Scotland does not itself actually identify other stakeholders who did not participate because of what was represented to them. There is no direct evidence of a consultee having been unable properly to respond or being misled. However, all consultees, including the petitioners, were unable to comment on evidence and analysis that later came to be relied upon. Also, this was a consultation open to the general public, and individuals made up a reasonable proportion of the responders (just over 38%). These are likely to be individuals with some interest in planning matters and I take that into account in assessing fairness. But individuals with an interest in the practical outcome, that

is, the provision of housing including affordable housing, form part of that group and were not treated fairly for the reasons I have given.

[63] There were a number of submissions on behalf of the petitioners suggesting that the Scottish Ministers were, and knew that they were, changing their policy. In contrast, the respondents contended that the original policy intentions differed from the interpretation in the recent case law, and in particular in *Gladman 2*, in which the submissions for the Scottish Ministers included that it was only if a developer succeeded in passing the gateway of sustainability that the tilted balance came into play. While one does not see (e.g. in the consultation pre-SPP (2104)) any express reference to a different intended meaning of the paragraph s that came to be interpreted in *Gladman 2,* there is also nothing that I have seen from the Scottish Ministers to suggest that a tilted balance approach of the kind determined in that case was intended. I do not consider it necessary for the Scottish Ministers to have demonstrated their original policy intention. However, I conclude that a change to the wording of a policy to alter its meaning, that meaning having been determined by the Inner House, is to be viewed as a change in policy. As is obvious and already noted, going forward without such changes would result in the court's view being the meaning of the policy. The fact that there was this level of change in policy goes to the nature and impact of the proposed amendments.

[64] On the other points raised on behalf of the petitioners as to the consultation being misleading, the document specifically asked consultees whether or not they agreed that planning decisions on other types of development would be affected and did not mislead in that regard. Its summary of *Gladman 2* may not have been absolutely correct but the general gist of the decision was set out.

Conclusions on ground 1

[65] In summary, I accept the submission that consultees were not put into a position properly to consider and respond to the consultation request. I view the Homes for Scotland response, quoted above, as providing some support for that view. The consultees were not told enough, and in sufficiently clear terms, to enable them to make an intelligent response. The reasons given, of themselves, did not suffice. Viewed from the perspective of the reasonable reader who would have some form of interest in this kind of consultation, no evidence or information supporting there being no impact was given and that assertion was made on a wrong comparison and in the context of the characterisation of the consultation process as being to give clarification and it being technical and procedural. This resulted in it being materially misleading, albeit not intentionally, and not reasonably allowing a proper and effective response. The fact that the Scottish Ministers noted that there was a good level and range of responses to the consultation does not affect assessment of how the consultees would have responded had they been given the required information. Nothing was presented to counter the inference that the reasonable reader would have been misled.

[66] The consultation resulted in the issuing of Finalised Amendments and PAN 1/2020. For the reasons explained above, having regard to the nature, purpose, scope and overall effect of the consultation, I conclude that the process was so unfair as to be unlawful. This results in sustaining the petitioners' submissions seeking the reduction of the Finalised Amendments and PAN 1/2020.

Ground 2: errors in considering changes to paragraph s 32 and 33 of the SPP

[67] Grounds 2-7 assert irrationality on the part of the Scottish Ministers. The relevant legal principles are reasonably well-established (see e.g. *Wordie Property Co Ltd* 1984 SLT 345,

per the Lord President (Emslie), at 347-8). In *R (Friends of the Earth Ltd)* v *Heathrow Airport Ltd* [2020] UKSC 52 Lord Hodge and Lord Sales (at [116]-[120]) give guidance as to the materiality of factors that are considered in public decision-making, in particular to considerations so obviously material that regard has to be had to them so as to avoid challenge. They viewed that test as the familiar *Wednesbury* irrationality test, under reference to that case and *Council of Civil Service Unions* v *Minister for the Civil Service* [1985] AC 374, (at 410–411, *per* Lord Diplock), in which irrationality was said to apply:

> "to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it".

The petitioners argued that a flaw in logic can render a decision unlawful, under reference to *Coughlan* (above, at p 244D-E), but in my view such a flaw requires to be of the nature described by Lord Diplock. I also regard it as important to recognise that the decisions challenged in grounds 2-7 were made post-consultation, in light of the consultation responses and the substantial further material that was available and that some of the proposed changes (including removal of the presumption and of paragraph s 32 and 33 in SPP (2014) in their entirety) were not carried through. The arguments about irrationality have to be considered in that context.

[68] Much of what is argued in support of ground 2 relies upon the respondents having erred in law in their consideration of changes to paragraph s 32 and 33 of SPP (2104) by misconstruing the court's opinion in *Gladman 2*. It is true that one could arguably take from what is said in the Finalised Amendments document that it does not fully and accurately reflect the approach taken in *Gladman 2* (for example, the implication that the approach taken dilutes a plan-led system and a failure to recognise that in *Gladman 2* the Lord President explicitly stated that the contribution to sustainability of a shortage of housing land supply was capable of

being outweighed by other factors on sustainability). But I do not regard the discussion of *Gladman 2* as involving any obviously material error or irrationality. For example, the reference to tilted balance applying in the context of deciding whether a development is a sustainable development has some support in *Gladman 2* (at [46]). The reference in the Finalised Amendments document to there being different interpretations of the existing policy is not in my view a slight on the court's decision in *Gladman 2* or other cases. It is merely making the point that the Scottish Minister's understanding of the policy, and its application (by, for example, at least some reporters) differed. The argument that the Scottish Ministers failed to take into account the shortfall issue when explaining *Gladman 2* is not well-founded. A summary of the matters covered by the decision is given in the Finalised Amendments document, including that the decision-maker should first identify whether or not there is a shortfall, based on the housing land requirement and comparing this with the amount of effective land included in the 5-year programme in the latest HLA to determine the scale of any shortfall. They were aware of the court's position on shortfall.

[69] As regards the failure to recognise that the Scottish Government was changing its own policy, I accept (in light of the meaning of the policy explained in *Gladman 2* and as noted above) that this occurred. However, that failure, when considering changes to paragraphs 32 and 33 post-consultation is not in my view irrational in the sense explained in the authorities. It was clear that the Scottish Ministers wished to take a different approach from that in *Gladman 2.*

[70] I also conclude that in reaching the final decisions the respondents did not require to re-consult upon the material set out in the FAIA. Rather, I take that material as evidencing the importance of a proper impact assessment and the lack of this in the initial consultation. The failure to address the impact of removal of the concept of a plan being out-of-date can be regarded as a flaw. But given that the reference in paragraph 30 requiring development

plans to be up-to-date remained, and the Scottish Ministers appear to have proceeded on the basis that a decision-maker may have regard to that matter, I am unable to view this flaw as meeting the test for irrationality.

[71] Viewed individually or cumulatively, I therefore do not consider the points in ground 2 to establish that the consideration of changes to paragraphs 32 and 33 was irrational.

Ground 3: errors in considering changes to calculation of 5-year effective housing land supply

[72] There has for some time been a lack of clarity and consistency in relation to the calculation of the 5-year effective HLS. The issuing of further guidance was justified and it was for the Scottish Ministers to decide which method should be recommended. Objections by consultees to the use of the average method were considered. The Housing Land Research Paper formed the basis for the decision reached on this matter. Within that document, there is a reasonably detailed consideration of the methods of calculation and their consequences. While the discussion in the paper is not absolutely comprehensive and there is force in some of the submissions for the petitioners as to failings in relation to the implications and impact of use of the average method (for example in relation to meeting the HLR) there is in my view no obviously material factor that was left out of account such as to satisfy the test of the decision being irrational. In reaching that view, I take into account the various points made in the Finalised Amendments document about this issue and that this was a decision as to the appropriate mode of planning guidance in the interim period, having regard to the effects of Covid-19, and prior to the fuller review for the purposes of NPF4. As to whether it is unclear if PAN 1/2020 applies to development planning, there is some force in that point and as I have noted, any such impact was not considered in the

consultation document. However, the Scottish Ministers could it seems have proceeded on the basis that its link to paragraph 125 suggests that it is a tool for development management, albeit it is not in terms expressly restricted to that issue. I am not satisfied that this failure demonstrates that the decision reached was irrational. I therefore accept the respondents' submissions on this ground and conclude that no irrationality has been identified.

Ground 4: material flaws in Finalised Amendments Impact Assessments

[73] Several alleged "material flaws" are founded upon by the petitioners on this ground. On a detailed forensic analysis of the approach taken in these finalised assessments, there is some basis for the criticisms made. But these are points of some intricacy and in my view the broad decisions made in the FAIA were open to the Scottish Ministers to reach, on the basis of the reasonably substantial further information obtained post-consultation. The criticisms do not, individually or cumulatively, satisfy the test for irrationality. Again, PAN 1/2020 is guidance rather than an absolute requirement and its focus appears to have been intended to be on development management, on an interim basis prior to NPF4. A reasonably detailed consideration of the appropriate approach is given in the Housing Land Research Paper. Rather than there being an express conclusion of the proposed changes having no effect, the Scottish Ministers now concluded that the effect was unpredictable but reasonably expected to be neutral. In reaching their views in respect of the FAIA, in respect of the SEA screening, the Scottish Ministers did consult with those whom they were required to consult under the relevant statute.

Ground 5 - Fairer Scotland Duty Assessment was irrational

[74] On this ground, the petitioners again found upon flaws, said to be material, in the reasons given for the view that the amendments to SPP (2014) did not constitute a strategic decision. The challenge founds in part upon the absence of any material showing the original policy intention. For the reasons I have given earlier, that position does not, in my view, require to be vouched by evidence. The petitioners did not present any proper basis for the proposition that the changes do not represent the original policy intention.

[75] I accept the respondents' position that this assessment was not irrational. The reasons given for not requiring a full assessment are reasonably clear and once again while there might be some criticisms these fall short of the hurdle for irrationality. It cannot be said that not viewing the changes as strategic was a clear defiance of logic, given the differing interpretations in this context as to what may be strategic. The concept of an out-of-date plan has been removed from paragraph s 33 and 125, which is an important change and in relation to potential impact it is relevant to the unfairness point in ground 1 above. But for the purposes of ground 5 and the test of irrationality, I see some force in the respondents' position that paragraph 30 still requires plans to be up-to-date. Quite how that will come to be interpreted remains to be seen. While PAN 1/2020 would in practice be likely to be applied, it is not "prescriptive in its application" of the average method.

Grounds 6 and 7

[76] These grounds allege irrationality in relation to the Finalised Amendments Impact Assessments and PAN 1/2020, founding upon points made in the grounds 2-5, which I have already held do not meet that criterion.

Conclusions

[77] The consultation process challenged in ground 1, considered in terms of the authorities on the procedural fairness of a consultation, was in my view so unfair as to be unlawful for the various combined reasons given. On the separate challenges in the other grounds to the decisions made post-consultation, while some of the factors relied upon contributed to that earlier unfairness and other criticisms on points of detail are legitimately made, I am not persuaded that the rigorous test for irrationality in respect of any of these decisions is satisfied.

Disposal

[78] In relation to ground 1, I shall sustain the first plea-in-law for the petitioners and grant decree of reduction of the Scottish Planning Policy-Finalised Amendments-2020 and PAN 1/2020. On the remaining grounds, I shall sustain the fourth, fifth and sixth pleas-in-law for the respondents. I shall also repel the parties' other pleas-in-law and reserve in the meantime all questions of expenses.