



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 2  
XA28/22

Lord President  
Lord Pentland  
Lord Boyd of Duncansby

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the appeal under the Town and Country Planning (Scotland) Act 1997

by

TAYLOR WIMPEY UK LIMITED

Appellants

against

THE SCOTTISH MINISTERS

Respondents

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**Appellants: J d C Findlay KC, Colquhoun; Shepherd and Wedderburn LLP**  
**Respondents: Haddow; Scottish Government Legal Directorate**

20 January 2023

**Introduction**

[1] The appellants are developers. They applied for planning permission to construct around one hundred houses at Planetreeyetts Farm, to the north of Kilmacolm. The local planning authority, Inverclyde Council, refused permission. The appellants appealed. The respondents appointed a reporter. The reporter refused the appeal on the basis that the

development would harm the landscape character and setting of Kilmacolm and would lead to an unsustainable increase in the use of cars in the area. She concluded that these adverse impacts significantly and demonstrably outweighed the benefits.

[2] The appellants appeal that decision primarily on the basis that the spatial strategy, which is contained in a proposed Local Development Plan, already envisaged the provision of a substantial number of new houses in the vicinity of Kilmacolm. That would inevitably lead to an increase in the number of car journeys. The reporter therefore erred in refusing permission on the basis of that increase. A similar ground, which is based on the reporter having taken into account green belt considerations, was not pressed as it became clear that the reporter had not done this. The following acronyms are occasionally used:

<b>Clydeplan</b>	The Glasgow and The Clyde Valley Strategic Development Plan 2017
<b>HLA</b>	Housing Land Allocation
<b>HLR</b>	Housing Land Requirement
<b>HLS</b>	Housing Land Supply
<b>HSMA</b>	Housing Sub Market Areas
<b>LDP</b>	Local Development Plan
<b>SDP</b>	Strategic Development Plan
<b>SPP</b>	Scottish Planning Policy

### **Planning policies and plans**

[3] The court has set out the relevant policies and plans in some detail in *Gladman Developments v Scottish Ministers* 2020 SLT 898 (paras [4] to [11]). In summary, the Town and Country Planning (Scotland) Act 1997 requires planning authorities to prepare a Strategic Development Plan and a Local Development Plan. Any application for planning permission must be determined in accordance with the development plans unless material

considerations indicate otherwise (1997 Act s 25). The relevant development plans for Kilmacolm are the Glasgow and the Clyde Valley SDP 2017, known as the Clydeplan, and the Inverclyde LDP 2019.

[4] The Government's Scottish Planning Policy is a material consideration in planning applications. This provides that there is a presumption in favour of sustainable development (para 28). Where relevant policies in a development plan are out of date or the plan contains no relevant policies, the presumption becomes a significant material consideration in favour of development. Whether a proposed development is sustainable is assessed according to thirteen principles (para 29). These include: (5) supporting delivery of accessible housing development; (7) supporting climate change mitigation and adaptation; and (11) protecting, enhancing and promoting access to natural heritage, including green infrastructure, landscape and the wider environment. Adverse impacts are to be taken into account where they significantly and demonstrably outweigh the benefits (para 33). Housing policies are deemed to be out of date if there is a shortfall in the required 5-year effective housing land supply (para 125).

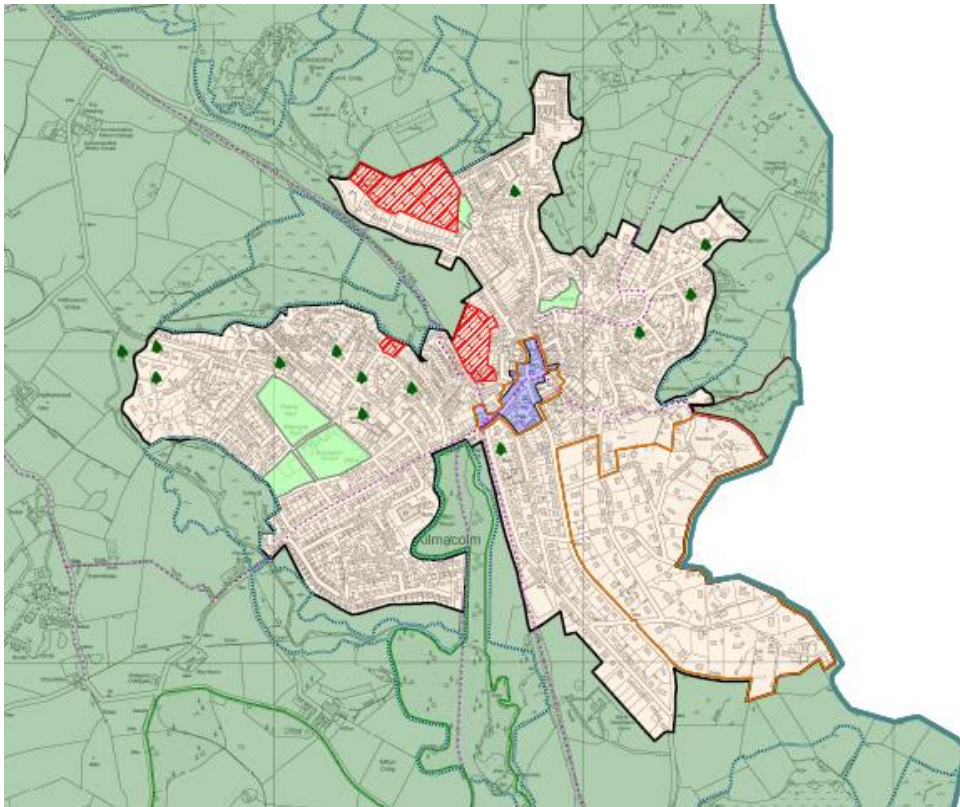
[5] The Clydeplan provides the mechanism whereby applications for planning permission for new housing on greenfield sites can be granted where there is a shortfall in the five-year supply (Policy 8). Applications can be granted only if the development satisfies five criteria. Those are that the development will: (i) help to remedy the shortfall; (ii) contribute to sustainable development; (iii) be in keeping with the character of the settlement and the local area; (iv) not undermine green belt objectives; and (v) fund any additional infrastructure.

[6] Following the requirements of SPP (para 110 *et seq*), the Inverclyde LDP 2019 required to identify land both to meet the Housing Land Requirement set by the Clydeplan

and to maintain a 5-year effective land supply. The requirement relates to both local authority areas and Housing Sub Market Areas. The LDP allocated two sites for development in Kilmacolm; at Smithy Brae (42 units) and Whitelea Road (4 units). The lawfulness of the LDP was challenged in *Mactaggart and Mickel Homes v Inverclyde Council* 2021 SLT 19. Chapter 7 of the LDP (“Our Homes and Communities”) was quashed. It has not yet been replaced. The LDP has therefore no detailed housing policy content. Recourse must be had to the Clydeplan in order to understand the HLR and the policy framework for new housing in the event of a shortfall in the 5-year supply.

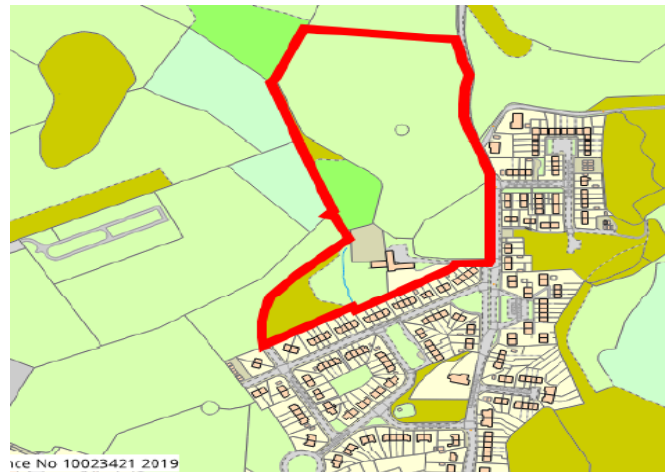
### Facts

[7] Kilmacolm is surrounded by land which is designated as green belt. This is illustrated in the following plan:



The two smaller red hatched areas to the west of the purple area depict the proposed areas for development; Smithy Brae and Whitelea Road.

[8] On 21 November 2018, the appellants applied for planning permission to build some 100 houses at Planetreeyetts Farm. This is within the green belt. It is shown to the north of Kilmacolm, west of Finlaystone Road and north of Quarry Drive's back gardens as follows:



[9] While the application was being processed, the local planning authority reconsidered the LDP; in particular a replacement for chapter 7. A proposed new LDP was approved for consultation by the authority's Environment and Regeneration Committee on 13 April 2021. This set out (para 5.11) the HLR for 2019-24 and 2024-29/32. These totalled 197 for the Inverclyde component of the (private) Renfrewshire HSMA in which both Kilmacolm and Quarrier's Village are situated. It concluded (para 5.12) that additional land for 100 houses (units) was required for what the LDP considered to be a discrete HSMA. Planetreeyetts had been considered as part of the exercise of identifying the required sites, but the local planning authority did not consider that it was needed. Rather, the proposed LDP identified two additional sites (over and above the existing 46 units) in Quarrier's Village (15 units) and one site "West of Quarry Drive" in Kilmacolm (78 units). The latter is the third red

hatched area on the first plan (above). It lies to the west of, and partly adjacent to, Planetreeyetts.

[10] In an internal report on the West of Quarry Drive site dated 28 April 2021 the local planning authority recognised that this development constituted a departure from the Clydeplan. There was an overall surplus in the Renfrewshire HSMA, but a shortfall of 100 units in the discrete Inverclyde component of the Renfrewshire HSMA was noted. The ultimate conclusion was that a new housing land allocation for West of Quarry Drive in the new LDP was justified. The LDP had concluded that a land release was required as part of a planned expansion of Kilmacolm.

[11] West of Quarry Drive was to incorporate: a car charging point for each house; high speed broadband; secure lockers for home deliveries; potential to convert rooms to home office use; cycle storage; air source heat pumps; rooftop solar panels; and construction techniques to maximise solar gain, optimise insulation and minimise energy consumption. Although the site was less than ideal, improvements to the walking and cycling environment could encourage those options. The travel implications may not have fully complied with development plan policies. Nevertheless, the development was “acceptable in general terms”. A recommendation to grant was made.

[12] The report on Planetreeyetts from the same local planning authority official, and also dated 28 April 2021, recommended refusal of permission. Much of what was said in relation to West of Quarry Drive was repeated *verbatim*. In particular, this development was also a departure from the Clydeplan. It failed when tested against the Policy 8 criteria. In reaching a view on car use, it was said that the development would be highly car dependent and would not constitute a low-carbon place. It would have a significant visual impact within the landscape. Notwithstanding potential mitigatory measures, the development was not

designed to protect, enhance and promote the landscape. Looking at material considerations which might “indicate otherwise”, the development created an unacceptable level of tension with SPP. It did not protect the quality, character, landscape setting and identity of the village. It constituted an unjustified, car dependent development. As the LDP process had concluded that the site was not required to address the shortfall, granting permission would:

“undermine the plan-led process and result in a cumulative impact with the proposed plan-led and proportionate expansion of Kilmacolm with a resultant inappropriate level of new housing development contrary to the ... Clydeplan”.

[13] As distinct from Planetreeyetts, the location of the West of Quarry Drive site and its lack of prominence meant that there would be little effect on the character, landscape, setting or identity of Kilmacolm. Although there was no significant difference between the two sites in terms of car travel, in that both would generate a certain level of travel to school or work, there was, in the local planning authority’s view, a difference in respect of other journeys. Planetreeyetts was generally further away from the centre of Kilmacolm. It was uphill from the centre. There was an existing bus service for West of Quarry Drive. Planetreeyetts was a larger site. More houses meant that there was an increase in unsustainable travel impact.

[14] Permission for the Planetreeyetts site was refused by the local planning authority on 27 May 2021. That decision was appealed on 20 August 2021. The West of Quarry Drive application was called in by the respondents on 5 July 2021. The reporter for the latter issued his report recommending the grant of permission on 15 December 2021. He found that there was a shortfall in the Inverclyde supply of private housing. The development was in accordance with Clydeplan Policy 8. Notwithstanding the concerns about car usage, the

development was, overall, in accordance with the development plan. Because of the shortage there was a presumption in favour of sustainable development, which the development constituted. This was a significant material consideration which was not outweighed by the adverse impacts. The respondents accepted the recommendation on 12 May 2022.

### **The reporter's decision**

#### *The Development Plan*

[15] Meantime, a (different) reporter on Planetreeyetts issued her decision on 10 March 2022. She considered whether, in terms of Clydeplan Policy 8, there was a shortfall in the 5-year supply. She was not convinced that the Inverclyde part of the Renfrewshire HSMA should be considered to be a discrete HSMA (report para 21). She concluded that there was a sizeable shortfall in the Inverclyde local planning authority area (para 22). The effective HLS was not sufficient to meet the 5-year requirement (para 23) and so, provided the five criteria could be met, the presumption in favour of development, contained in Policy 8, applied.

[16] Applying the first of the five criteria, the local planning authority had consented to West of Quarry Drive, but it was, at the time of the report, subject to approval from the respondents (para 29). Although it was allocated in the proposed LDP, that plan might be modified. The appellants maintained that there was no developer interest in Smithy Brae. Accepting that there was a degree of uncertainty in relation to other sites, Planetreeyetts could contribute towards a reduction in the shortfall. On the fifth criterion, it was not suggested that any additional infrastructure could not be funded by the appellants. However, the remaining three criteria were not met.



[17] On sustainable development, most residents would have to travel outwith Kilmacolm for work or to go to the local state secondary school. Car was likely to be the more attractive travel option. All that the appellants had advanced by way of mitigation of the impact of car use was a “Residential Travel Pack”. The reporter agreed with the local planning authority that:

“36 ... the proposed development would not encourage travel by more sustainable modes for journeys to school and work. It would therefore not represent low carbon place-making”.

Overall, the proposal did not constitute sustainable development.

[18] On the impact of the proposal on the character of Kilmacolm, the area was “rugged upland farmland” in which new residential development should be confined to small-scale and well-sited proposals. Having conducted a detailed examination of various views, the reporter concluded (para 56) that the site:

“forms an important part of the landscape setting of the village and in this respect [it] ... would have an adverse visual effect both on the approach to and from Kilmacolm. ... [T]he proposed development would have a harmful impact on the landscape character and setting of the settlement and the local area”.

A rigid enforcement of green belt policy would not assist the objective of delivering the HLR. However, a grant of permission could detract developer attention from other sites in need of regeneration. It would detract from Kilmacolm’s countryside setting and would harm its identity by reducing its landscape setting.

### *Material considerations*

[19] Overall, the development did not fully comply with the development plan (para 71). Having reached that conclusion, the reporter went on to consider whether material considerations “indicate[d] otherwise”. This involved regarding the presumption in favour of development as a significant material consideration (SPP, para 33); the “tilted balance” (at

para 73). The existence of a sizeable shortage of housing meant that there was a relatively steep “angle of tilt” in favour of the development. SPP required the reporter to consider whether any adverse impacts significantly and demonstrably outweighed the benefits of the development (para 75); that is whether these impacts tipped the balance against the grant of permission. This in turn involved considering the 13 principles in SPP (para 29) (report para 76). While most of the thirteen principles were either satisfied or not directly relevant, not all were met. The fifth, seventh and eleventh principles gave rise to issues which significantly and demonstrably outweighed the benefits of the development.

[20] The fifth principle sought to ensure that new housing was accessible by a choice of transport modes. The proposed development would not help promote a pattern of development that encouraged wider active travel and the use of alternatives to cars. It did not represent low-carbon place-making. The seventh principle attempted to ensure support for climate change mitigation. The likelihood of new residents relying on cars for commuting did not support climate change measures. The eleventh principle concerned the protection and enhancement of natural heritage, landscape and the wider environment. The proposed development would have an adverse impact on the landscape character and setting of Kilmacolm and the local environment.

[21] The reporter considered (para 89) the emerging LDP to be a material consideration. The local planning authority had submitted that any shortfall would be addressed by the LDP and particularly the consultation which would follow. The reporter emphasised that decision-makers had to reach their determinations on the basis of existing policies and any other material factors. The proposed LDP was likely to be modified, republished and consulted on because it had been based on SPP 2020 and PAN1/2020, both of which had

been quashed (see *Graham's The Family Dairy (Property) v Scottish Ministers* 2021 SCLR 569).

The proposed LDP was not likely to go ahead. There was:

“91 ... considerable uncertainty ... over the timescales for any modified plan and its eventual content. ... it [was] unfeasible to determine at this juncture what effects the proposed development may have with regard to the scale, location or phasing of new development in Kilmacolm in any emerging plan”.

[22] The reporter concluded that:

“92. This ... development could make a valuable contribution to a sizeable shortfall in the five-year effective housing land supply. However ... it [is] contrary to the development plan overall. Although I have applied a steep ‘angle of tilt’ in favour of the development relative to the level of shortfall, I do not find this wholly determinative.

93. ... [T]he adverse impacts of the ... development, primarily its harmful effect on the landscape character and setting of Kilmacolm and the local area, and that it would encourage unsustainable vehicle trips, significantly and demonstrably outweigh the benefits.

94. ... [T]he ... development does not accord overall with the ... development plan and ... there are no material considerations which would still justify granting planning permission. ...”.

## Submissions

### *Appellants*

[23] The reporter had misdirected herself when balancing the presumption in favour of development which contributed to sustainable development against the potential negative effects. A development which would remedy, to some extent, a housing shortage, was a development which would almost inevitably contribute to sustainable development (*Gladman v Scottish Ministers* at para [46]).

[24] The reporter failed to take into account material considerations (*R (FoE) v Transport Secretary* [2021] PTSR 190 at para [116]). She had failed to address the existing and future development of housing in Kilmacolm; notably the spatial strategy which referred to the

need for such housing. It was inevitable that increased traffic would be produced by further development. Any site would give rise to that same drawback. The reporter's approach was therefore, in effect, an embargo on any development. Her remarks on car use were not site specific. The local planning authority had admitted that there was no significant difference between West of Quarry Drive and Planetreeyetts.

[25] The same issue arose in relation to the reporter's treatment of the quality, character, landscape setting and identity of Kilmacolm, and green belt objectives. However, it was recognised that green belt had not been a determining issue.

### *Respondents*

[26] There were three considerations which a reporter required to take into account; those to which regard must be had according to statute; those to which regard must not be had in terms of statute; and those to which a decision maker may have regard if they thought it right to do so as a matter of judgement and discretion (*R (FoE) v Transport Secretary* at para [116]). Planning judgement applied to considerations in the third category. The matter said to have been left out of account had to have been obviously material. This was a high hurdle and was equivalent to irrationality (*ibid* at para [119]).

[27] The appellants' arguments amounted to a disagreement with the weight which the reporter attached to various factors when applying the tilted balance. Whilst other developments may also generate unsustainable vehicle trips, the weight to be attached to that factor was inherently site specific and a matter of planning judgement. A reporter had to exercise his or her own judgement in relation to similar decisions (*St Modwen v Communities and Local Govt Secretary* [2018] PTSR 746 at para 6). The weight to be attached in a different development would depend on, among other things, the scale, location, transport

assessment and proposed mitigations. The reporter's assessment of the character of Kilmacolm and the local area was site specific. She concluded the impact of the development would be harmful to the character of the area. That was not challenged. It was a major factor in her refusal of the appeal. It could not be said that another development which encouraged unsustainable journeys on the one hand, but which did not have harmful landscape impact on the other, would have been refused.

[28] The reporter did not treat the impact on green belt objectives as a significant material consideration. She only considered green belt objectives as one of the three reasons why the development did not full meet the criteria in Policy 8.

[29] There was no requirement on a reporter to speculate as to what other developments might be proposed or to attempt to assess possible alternative developments in the hypothetical. Such an exercise would go far beyond what a reporter was required to do. It was not definite that 100 additional houses would be built around Kilmacolm. The reporter examined the particular proposal in the context of the existing plans and policies. That is what she was bound to do.

### **Decision**

[30] In *Wordie Property Co v Secretary of State for Scotland* 1984 SLT 345, the Lord President (Emslie) explained (at 347-348) that a planning decision taken by the respondents will be regarded as *ultra vires* if they have failed to take into account a relevant consideration. What is relevant will vary from case to case. It is for the decision maker to determine in the first instance what is relevant and material and what is not. Unlawfulness will only arise if the decision to discount a particular factor is ultimately unreasonable in the sense of it being one that no reasonable decision maker could have made. That means, in the context of this case,

that unlawfulness will be made out only if the reporter's decision not to take account of the inevitable increase in traffic flow from any development of 100 additional houses around Kilmacolm involved a consideration which was "obviously" relevant (cf *R (FoE) v Transport Secretary* [2021] PTSR 190, Lords Hodge and Sales at paras 116-121).

[31] The appellants' central contention in this regard fails. The reporter's task was to examine the Planetreeyetts application on its merits and to determine it in accordance with the development plan unless material considerations indicated otherwise. That is precisely what the reporter did.

[32] First, she determined that there was a shortfall in the 5-year housing supply in terms of Policy 8 of the Clydeplan. That meant that steps had to be taken to remedy that problem through the granting of permission on greenfield sites provided that each of the five criteria were met. Whether these criteria had been met was essentially a matter of planning judgement, albeit that a failure to have regard to a relevant factor may vitiate that judgement. Similar considerations apply in relation to the application of the three principles in SPP (para 29), *viz.* accessibility of housing, climate change mitigation and landscape, which the reporter considered to outweigh the tilted balance significantly and demonstrably (SPP para 33).

[33] The reporter did not fail to take into account the equivalent impact of a similar development. Rather, she took specific cognisance of the prospect of the addition of 100 houses, but considered that this was not a prospect to which she could afford any weight because that prospect was derived from a proposed LDP which, after re-drafting in the light of the quashing of SPP 2020 and PAN1/2020 and any representations made during the consultation period, may not accord with the original's view that Kilmacolm and Quarrier's Village required an additional 100 houses.

[34] The reporter also took into account the local planning authority's decision to grant consent to the West of Quarry Drive site, but considered that she could give that consideration little, if any, weight because, at the time of her decision, it awaited the respondents' decision. The reporter was bound to consider Planetreeyetts on its own merits. Although it would generate the same kind of problems in terms of car journeys and landscape impact, as the local planning official had described, the two sites were different in several areas. Planetreeyetts is bigger in scale. Its epicentre is further away from that of Kilmacolm. The mitigatory measures in relation to cars, which were proposed for West of Quarry Drive, were significantly greater than those proposed by Planetreeyetts. Planetreeyetts' landscape setting differs from that of West of Quarry Drive. These matters were site-specific. In these circumstances, not holding that West of Quarry Drive, or another or other developments in terms of the proposed LDP, would result in equivalent car journeys or landscape impacts, does not constitute a failure to take into account an obvious relevant consideration.

[35] Consideration of each development will be site specific. Each requires to be assessed against the existing development plans and SPP rather than a proposed LDP which may be significantly modified. As already noted, this is the exercise which the reporter embarked upon and followed through. Her conclusions, which flowed from her reasoning on matters of planning judgment, cannot be faulted.

[36] The appeal is refused.