



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2026] CSIH 25
XA60/25

Lord President
Lady Wise
Lord Ericht

OPINION OF THE COURT

delivered by LORD PENTLAND, the LORD PRESIDENT

in the appeal under section 239 of the Town and Country Planning (Scotland) Act 1997

by

STEPHEN G DALTON & SON LIMITED

Appellant

against

THE SCOTTISH MINISTERS

Respondents

and

THE CITY OF EDINBURGH COUNCIL

Interested Party

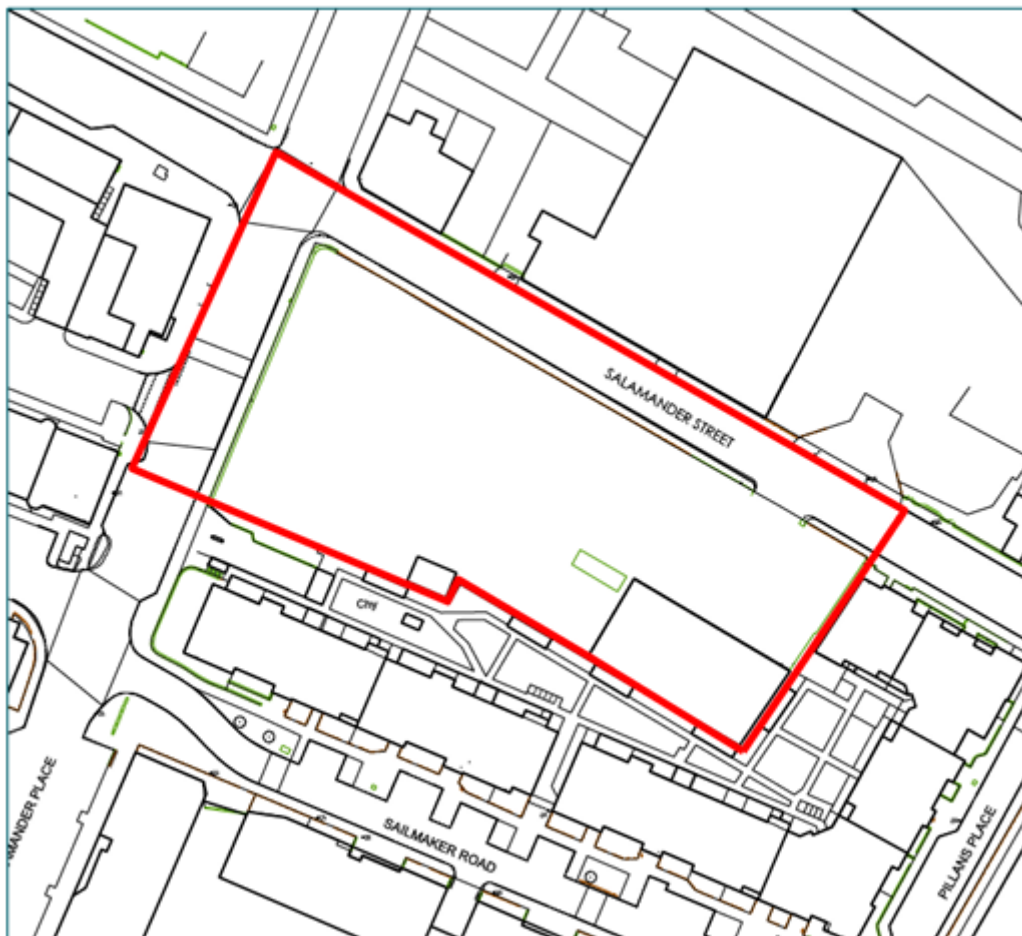
Appellant: J d.C. Findlay KC, A Sutherland (sol adv); Burness Paull LLP
Respondent: A Sutherland; Scottish Government Legal Directorate
Interested Party: Armstrong KC; The City of Edinburgh Council Legal Department

29 May 2026

Introduction

[1] In November 2023 the appellant applied to the interested party, the local planning authority, seeking planning permission to develop a site located at 52-66 Salamander Street

in Leith, Edinburgh. The appellant had used the site as a scrap metal recycling and processing yard for many years. The surrounding area was previously largely industrial in character, but in more recent times has become predominantly residential. The site is approximately 0.463 hectares in area and is broadly rectangular in shape. It is shown in the following drawing:



[2] The amended planning application described the proposed development as involving demolition of an existing building (an industrial shed in the south-east corner of the site) and the construction of a mixed-use development, including residential development (build-to-rent) and purpose-built student accommodation with commercial/retail floorspace (Class 1A) at street level with associated amenity space, landscaping and cycle parking.

[3] After discussions with planning officers and some amendment of the original design, the scheme ultimately proposed comprised a six-storey “L” shaped building with distinct build-to-rent (BtR) and purpose-built student accommodation (PBSA) uses. There were to be 230 PBSA beds and 46 BtR dwellings. There would also be a self-contained affordable housing block containing 16 dwellings at the south-west part of the site.

[4] The interested party refused planning permission on the basis that the proposed development was contrary to the housing policies contained in the local development plan (LDP). The scheme failed to deliver the number of houses it required. Less than 50 per cent of the site was proposed for housing; this was contrary to the LDP. The reasons for refusal reflected the interested party’s position that PBSA did not qualify as housing for the purposes of the plan.

[5] The appellant appealed to the Scottish Ministers, the respondents, who appointed a reporter. He dismissed the appeal. The appellant now appeals to this court on the ground that the reporter erred in his interpretation of the development plan and made other material errors of law.

The development plan

[6] In terms of section 37(2) of the Town and Country Planning (Scotland) Act 1997, in dealing with an application for planning permission the planning authority must have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations. Section 25(1) provides that where, in making any determination under the planning Acts, regard is to be had to the development plan, the determination is, unless material considerations indicate otherwise, to be made in accordance with that plan.

[7] The interpretation of policies in a development plan is ultimately a matter of law for the court, not for the planning authority. Policy statements in a plan must be interpreted objectively in accordance with the language used, read in its proper context. A development plan must not, however, be construed as if it were a contract or a statute. Inevitably, such plans contain broadly expressed statements of planning policy; they may pull in different directions so that in a particular case one must give way to another. The potential for this to happen means that the authority will often have to exercise judgement in deciding how the policies should be applied in the circumstances of a particular case. Decision-making of this nature can be successfully challenged in the courts only where it can be shown to have been exercised in a perverse or irrational way. It requires to be borne in mind, however, that planning authorities cannot simply make the development plan mean whatever they would like it to mean; they do not live in the world of Humpty Dumpty (*Tesco Stores v Dundee City Council* [2012] UKSC 13; 2012 SC (UKSC) 278, Lord Reed at para 19).

[8] With these principles in mind, we turn to consider the policies in the development plan that are relevant in the circumstances of the present case.

[9] The development plan consists of National Planning Framework 4 (NPF4), adopted and published by the respondents on 13 February 2023, and the LDP, also known as City Plan 2030, adopted by the interested party on 7 November 2024. The effect of section 24(3) of the 1997 Act is that in the event of any incompatibility between the two plans the LDP, as the later in date, is to prevail.

[10] The section of NPF4 entitled Quality Homes explains that LDPs are expected to identify a Local Housing Land Requirement (LHLR) for the area they cover. This is to meet the duty for a housing target and to represent how much land is required. To promote an

ambitious and plan-led approach, the LHLR is expected to exceed the 10-year Minimum All-Tenure Housing Land Requirement (MATHLR) set out in Annex E of NPF4.

[11] Deliverable land should be allocated to meet the 10-year LHLR in locations that create quality places for people to live. The LDP delivery programme is expected to establish a deliverable housing land pipeline for the LHLR.

[12] Policy 16 of NPF4 states in sub-paragraph (a) that development proposals for new homes on land allocated for housing in LDPs will be supported.

[13] Sub-paragraph (c) of Policy 16 of NPF4 provides as follows:

“Development proposals for new homes that improve affordability and choice by being adaptable to changing and diverse needs, and which address identified gaps in provision, will be supported. This could include:

- i. self-provided homes;
- ii. accessible, adaptable and wheelchair accessible homes;
- iii. build to rent;
- iv. affordable homes;
- v. a range of size of homes such as those for larger families;
- vi. homes for older people, including supported accommodation, care homes and sheltered housing;
- vii. homes for people undertaking further and higher education; and
- viii. homes for other specialist groups such as service personnel.”

[14] In the foreword to City Plan 2030 the Convenor for the Planning Committee, Councillor James Dagleish, explains that the plan translates national policy to address Edinburgh’s needs, requiring more affordable housing from private developments, seeking renewal of city areas with housing as a priority on brownfield sites and seeking housing provision alongside new commercial developments to build neighbourhoods that support essential services, including better public transport links.

[15] The strategy reflected in City Plan 2030 sets out a number of aims. These include delivering land to meet Edinburgh’s housing needs over the next decade and securing a minimum 35 per cent affordable housing contribution from new developments in

Edinburgh. Another aim is to protect the availability of housing and to protect residential amenity by ensuring that any uses in residential areas are appropriate. The plan notes at paragraph 2.87 that the greatest need is for affordable housing. Affordable housing in Edinburgh is to be delivered directly through the interested party's affordable housing programme and a requirement for market housing developments to deliver a proportion of their units for affordable housing. City Plan 2030 aims to increase the number of new homes that are affordable and requires that market sites provide 35 per cent of their units to deliver affordable housing in mixed-use sustainable communities.

[16] The Plan draws a clear distinction between commercial developments and housing. It treats student accommodation as a type of commercial development and not as housing.

This can be seen, for example, from paragraph 2.88 which states as follows:

“Purpose-built student accommodation, retail, leisure, hotels and other commercial developments are often being built at the expense of creating strong, sustainable communities. To make best use of the limited space in our city and meet our housing need in sustainable mixed-use communities, proposals for commercial developments of a certain size, including student accommodation, should also deliver new housing.”

[17] There are other parts of City Plan 2030 where it is made clear that student accommodation is not to be regarded for the purposes of the plan as being in the same category as mainstream housing. Another example can be found in paragraph 2.90. It is in the following terms:

“There is a large student population in Edinburgh and the higher and further education institutions contribute significantly to Edinburgh's success as a city. City Plan supports the provision of purpose-built student accommodation ensuring that student housing is delivered at the right scale and in the right locations, helping to create sustainable communities and looking after students' wellbeing.”

[18] Paragraph 2.91 acknowledges the expectation created by NPF4 that local development plans are to set a LHLR in excess of the 10-year MATHLR. In annex E to NPF4 the MATHLR for Edinburgh is stated to be 36,750.

[19] City Plan 2030 continues in paragraph 2.92 by explaining that evidence from the housing needs and demand assessments of 2015 and 2022 showed a continuing strong need for affordable housing. The interested party's business plan for 2017 to 2022 set out a commitment to develop a programme for the delivery of at least 10,000 social and affordable homes over the following five years, with a plan to build 20,000 by 2027.

[20] There can be no doubt that a desire to increase substantially the amount of affordable housing in Edinburgh is a central aim embedded in City Plan 2030.

[21] City Plan 2030 also contains policies on open space in new developments.

Paragraph 3.166 explains that non-residential development (including student accommodation and specialist housing) must be considered against Policy Env 31, Useable Open Space in non-residential Development. The policy requires new-build development to include the provision of good quality, attractive, usable and where appropriate accessible open space that forms at least 20 per cent of the site area. The note accompanying Policy Env 31 states that the policy ensures that development proposals (other than private and affordable housing development) include appropriate open space provision. Paragraph 3.168 explains that Policy Env 32 applies to all private and affordable housing developments, including mixed-use developments containing housing of these types. It also includes build-to-rent accommodation. The paragraph continues as follows:

“This policy does *not* apply to open space in student or other specialist accommodation which is addressed by Env 31.”

[22] Turning to the housing policies, Policy Hou 1 in City Plan 2030 is entitled Housing Development. The first part of this policy states as follows:

“For housing proposals (Table 2) and Opportunity sites (Table 15) as shown on the Proposals Map, development should accord with the Place-based policies and development principles set out in Place 1 to Place 36 and Appendix D. This supply is augmented by the established land supply (as audited in 2022) in order to meet the housing land requirement.”

[23] Policy Hou 2, entitled Affordable Housing, requires that developments consisting of 12 or more units should normally provide affordable housing amounting to 35 per cent of the total number of units proposed. The provision should normally be on site.

Paragraph 3.190 explains that given the scale of affordable need housing, developments should support the delivery of new affordable homes as far as possible. Affordable housing is defined as housing that is available for rent or sale to meet the needs of people who cannot afford to buy or rent the housing generally available on the open market. The paragraph states that the policy will be applied to all developments of 12 or more residential units, but it does not apply to student accommodation.

[24] Policy Hou 5 is entitled Student Accommodation. The policy is in the following terms:

“Planning permission will be granted for purpose-built student accommodation where:

- a. there is good access by public transport and active travel routes to further and higher education institutions,
- b. it provides suitable amenity to students, including open space,
- c. no more than 10% studio flats are provided and,
- d. there will be no adverse impact on the established character of the area”

[25] In the text accompanying Policy Hou 5 paragraph 3.196 explains that larger sites provide an opportunity to balance the mix of land uses and to contribute to delivery of housing. A mix of student accommodation and housing is required on all sites greater than 0.25 Ha. Where compatible and appropriate within the site context, at least 50 per cent of

the site is to be provided for housing. The affordable housing policy of 35 per cent will apply.

[26] By way of background, it is important to understand that the appeal site formed part of allocation EW 1C (Leith Waterfront (Salamander Place)) in the immediately preceding LDP, the Edinburgh Local Development Plan 2016. In Table 2 of City Plan 2030 the site is no longer included in that allocation. City Plan 2030 sets out specific proposals for sites which are included in the area designated as Edinburgh Waterfront. The strategic importance of this area is recognised in NPF4, which identifies the area as a national development. City Plan 2030 contains Policy Place 4 Edinburgh Waterfront; this states that planning permission will be granted for development which will contribute towards the creation of new urban quarters at Leith Waterfront and Granton Waterfront (specifically EW 1 a-c and EW 2 a-d on the Proposals Map). Importantly, Table 2 identifies the appeal site as a new housing proposal, separate from EW 1C, which is described as an existing housing proposal. Table 2 designates the site as H35. The table states that the site is to accommodate 113 housing units. This is to be in addition to the 757 units required for proposal EW 1C, the existing ELDP 2016 proposal.

[27] Table 2 states that development of site H35 is to accord with the Development Principles set out in Appendix D. The Development Principles in Appendix D for site H35 state that redevelopment of the site should include class 4 business space along the Salamander Street and Salamander Place frontages. There should be active frontages to those streets. Private open space should be provided adjacent to the green space serving the neighbouring development. There should be public realm improvements for the active travel space proposed along Salamander Street.

[28] Amongst the economy policies set out in City Plan 2030 is Policy Econ 2 entitled Commercial Development. This states that proposals for commercial uses within the urban area on sites 0.25 Ha or larger should, where compatible and appropriate within the site context, provide at least 50 per cent of the site for housing. Paragraph 3.247 accompanying the policy states as follows:

“This policy supports the approach of the plan to create sustainable communities, maximise opportunities for housing and avoid large mono use developments. It applies to development for commercial uses including student housing, retail, leisure, hotels and other commercial developments where they are compatible with residential use. This policy does not apply to sites allocated for housing or designated by this plan for a specific use.”

The reporter’s decision

[29] The reporter identified PBSA as a Class 8 use (“residential institutions”) under the Town and Country Planning (Use Classes) (Scotland) Order 1997 as distinct from flats which were *sui generis* and houses (Class 9). It is common ground between the parties to the present appeal that this was an error and the reporter should have classified PBSA as *sui generis* housing.

[30] The reporter considered that City Plan 2030 (the LDP) treated land for housing and for student accommodation differently. Policy Hou 1 covered sites allocated for housing. Student housing was commercial development, covered separately by Policies Econ 2 and Hou 5.

[31] The reporter was not convinced that there was any incompatibility between NPF4 and the LDP. This was because the LDP set out how it would treat land relating to two different uses which were both referenced without priority in NPF4 Policy 16(c). This meant that the proposed development could draw some support from NPF4 but could ultimately be refused or allowed on the basis of LDP policy or vice versa. None of this suggested that

he should disregard the LDP in favour of NPF4 alone. In any event if there was any incompatibility, section 24(3) of the 1997 Act provided that the more recent policy was to prevail. In the present case that would be the LDP. Either way, the LDP policies prevailed or at least formed a key part of consideration of the appeal proposal.

[32] The fact that the LDP treated land for student accommodation differently to land for other types of housing did not suggest that sites allocated for housing in the LDP could automatically be used for PBSA instead or that PBSA would count towards what was sought by the LDP on allocated sites under Policy Hou 1. Therefore, although the principle of development on the appeal site was established, PBSA was not automatically supported by the LDP. It was contingent on other elements of the LDP policy.

[33] In considering the question of site allocation, the reporter noted that the appeal proposal excluded any Class 4 uses and included only 46 build-to-rent flats (16 of which were affordable). That was 67 homes short of the 113 homes allocated by the LDP. This appeared to be the consequence of the proposal including a 230-bed space PBSA. Overall, the appeal proposal did not do what the LDP sought for allocated site H35.

[34] The reporter noted that the appellant argued that the appeal proposal was acceptable on the basis that the balance of 67 undelivered homes from the appeal site could be accommodated on the rest of allocated site EW1c by increasing density. This was because the appellant believed the appeal site to be part of EW1c. The reporter rejected this argument. There was no reference to the appeal site (H35) amongst the matters covered by LDP Policy Place 4 – Edinburgh Waterfront. That policy referred only to LDP allocated sites EW 1 a-e. Even if he was mistaken in that view, there was nothing in that policy stating that what site H35 was allocated for should be set aside to accommodate PBSA proposals of the

kind forming the appeal proposal. On the Proposals Map the appeal site was labelled H35, not EW 1c or EW 1C.

[35] The LDP clearly allocated the appeal site as H35 and did not identify it as part of the sites forming the EW1c/EW1C grouping or the wider Edinburgh Waterfront designation. The reporter therefore treated site H35 independently of sites EW1 a-e covered by the Edinburgh Waterfront on the Proposals Map and in LDP Policy Place 4. The reporter distinguished the present case from that considered in an appeal relating to Ashley Place in Edinburgh where the proposal did not cover the entirety of the appeal site. That was not the position in the present case where there was no remaining site capacity for the balance of 67 homes that would not be built as part of the appeal proposal. The reporter's conclusion was that the appeal proposal failed to achieve what was sought for the appeal site in LDP Policy Hou 1 and Appendix D.

[36] In its appeal statement the appellant submitted that there would be a 60:40 split between PBSA and build-to-rent homes; the interested party calculated the build-to-rent flats as representing 38 per cent of the proposal. In another part of its submission, the appellant inferred that the PBSA would represent an equivalent of 76 three-bedroom flats or 115 two-bedroom flats. The reporter noted that neither of these measures represented the 50:50 ratio sought by Policy Econ 2. The reporter concluded that the appellant had not provided justification for why a 50:50 mix would not be compatible or appropriate. He therefore assumed that appellant preference formed the reason. Based on the submitted designs there appeared to be no location or design reason why it would not be compatible or appropriate for a greater share of the proposed development to be build-to-rent and a lesser share to be PBSA. The possibilities were not considered in the appellant's evidence. On balance, the reporter was not convinced that the proposal achieved what was sought by

Policy Econ 2 or that the reasons for not doing so were properly justified in terms of that policy.

[37] The appeal proposal failed to deliver the planned number of homes and, as such, fewer homes overall and fewer affordable homes than the LDP expected. This failed to achieve what the LDP sought from development of the site.

[38] The reporter concluded that the proposed development did not accord overall with the relevant provisions of the development plan and that there were no material considerations which would justify granting planning permission. He therefore refused the appeal.

Submissions

The appellant

[39] The appellant initially advanced four grounds of appeal. The first focused on the reporter's error in treating PBSA as a Class 8 use, an error of fact and law said to have infected his entire reasoning. The second was a challenge to the reporter's interpretation of the development plan. He had wrongly concluded that the appellant's proposal was non-compliant with Policy Hou 1 and had further supplied no proper explanation of how he reached that conclusion. The reporter's decision was inconsistent with other decisions by planning reporters. Emphasis was placed on planning appeals PPA-230-2557 and PPA-230-2558, where another reporter had allowed two linked appeals against the refusal of permission for the construction of PBSA at 137 – 145 Pitt Street, Edinburgh. The third ground of appeal maintained that the reporter had misunderstood the Proposals Map in the LDP. The fourth ground of appeal was that the reporter had wrongly held that there was no

justification for the proposal's failure to comply with the 50/50 mix of PBSA to housing mandated by Policy Econ 2.

[40] The appellant prosecuted all four grounds of appeal with equal attention at the stage of exchanging notes of argument. However, by the time the appeal came before us for a hearing the appellant's focus was on the second ground. The third ground of appeal was no longer insisted in; it being conceded that if the appellant was unsuccessful on the second ground of appeal it could not succeed on the third.

[41] The appellant submitted that the main issue in the appeal was whether a student in Edinburgh was entitled to a home in terms of the development plan. The reporter had made a fundamental error of law in finding that the LDP treats land for student accommodation differently to land for other types of housing. He ought to have found that, properly construed, the term "housing" where it appears in Policy Hou 1 includes PBSA. That was the ordinary and natural meaning of the development plan, especially given the reference in NPF4 Policy 16c to "homes for people undertaking further and higher education". The appellant submitted that the carve-out for student accommodation in the supporting text of Policy Hou 2 was applicable to the single specific issue of affordable housing; the only purpose of the text being to make clear that the affordable housing requirements did not apply to student accommodation.

[42] This interpretation was consistent with the LHLR in the LDP, which exceeded the MATHLR in NPF4. The appellant noted that MATHLR is an "all-tenure" requirement. PBSA fell within the envelope of "all-tenure". The appellant referred to the supporting text accompanying Policy Hou 5, where it was stated that PBSA "makes a valuable contribution to housing Edinburgh's many students". There was no incompatibility between Hou 1 and NPF4 Policy 16, a conclusion which the Examination Reporters for the LDP had reached.

Properly read, Policy Hou 1 and Policy 16 were complementary. Both supported providing housing on allocated sites, with “housing” in this context including PBSA. The fact that PBSA was treated as commercial use for the purposes of one policy in the development plan did not preclude it from being treated as housing for the purposes of another policy. The appellant submitted that the commercial nature of PBSA was shared with build-to-rent, care homes, supported accommodation, and sheltered housing. The LDP was plainly not intended to be read in such a way as to restrict these developments.

[43] Not only was this interpretation consistent with the wording of the plan itself, it had been adopted by another of the respondents’ reporters, Mr Stuart West, in the Pitt Street decisions. In those appeals, Mr West had correctly noted that Policy 16 imposed no restrictions on the types of home which could be permitted on LDP housing allocations. There was no policy in the LDP which limited development of housing sites to general or mainstream housing only. Such an approach might have the unintended effect of restricting the development of other types of housing, such as care homes. It was notable that there was no independent allocation within the LDP to meet the needs of the student community. That implied it fell to be considered under NPF4 Policy 16 and as part of MATHLR. Mr West accepted that there was a “degree of tension” between the wording of Policy 16 and Policy Econ 2. However, he considered that the resolution of any such tension was to be found in Policy Hou 5, which enabled a case-by-case approach to be taken to each allocation. The appellant commended Mr West’s approach as a discerning one, in contrast to the absolutist approach taken by the reporter in the present case.

[44] The appellant advanced concise submissions anent the first and fourth grounds of appeal. It was common ground between parties that PBSA is a *sui generis* use and that in determining that it was Class 8 use, the reporter had erred. On any reasonable reading of

the decision notice, it was clear that, although not “pivotal”, the reporter’s error had had a significant effect upon his decision-making and set him off on the wrong track. Specifically, it led him to identify a non-existent distinction between PBSA and Class 9 housing and *sui generis* flats. Had the appellant been afforded an opportunity to comment, it would have corrected the reporter. The appellant had been denied a “fair crack of the whip” (*E v Home Secretary* [2004] EWCA Civ 49, [2004] 2 WLR 1351). The appellant had provided a justification for the sub-50/50 split of PBSA to housing; the replacement of the scrapyards would improve the amenity of the area, and the ratio was required to make the development viable. If the reporter did not accept the appellant’s justification, it was open to him either to seek more information and issue a procedure notice or to reject it. The only course not open to him was the one he had adopted: simply to fail to address the justification.

The respondents

[45] The crux of the respondents’ submission was that the development plan drew a real distinction between PBSA and housing, which the reporter had correctly identified. Contrary to the appellant’s submission, the LDP clearly treated PBSA and housing distinctly. Policy Hou 1 provided for housing in general, whereas Policy Hou 5 made specific provision for PBSA. That itself was a clear illustration of the approach to be adopted. Policy Hou 1 was clear in allocating specific areas of land – such as H35 – for housing. By contrast, Policy Hou 5 made general provision for the proximity of student accommodation to institutions of higher education. In requiring proximity or connectivity between student housing – not “housing” *simpliciter* – it recognised that student housing was ancillary to higher education rather than being there to meet the city’s housing need. If there were no universities, there would be no need for student housing. Crucially, Policy

Hou 5 did not allocate any land for student accommodation. All of this strongly implied that, as the reporter had held, the development plan distinguished between housing and PBSA, and that was put beyond doubt by other passages in the development plan – e.g. at paragraph 2.88 of the LDP which observed that “[PBSA], retail, leisure, hotels and other commercial developments are often being built at the expense of creating strong, sustainable communities”. The respondents highlighted other quotations from the LDP but submitted that the question was essentially one of common sense: were the appellant’s interpretation of the LDP correct, then the interested party would have decided that 100 per cent of Edinburgh’s housing need for the next decade could be met by building more PBSA. That was contrary to common sense and the clear wording of the LDP itself.

[46] The Pitt Street decisions did not assist the appellant. The LDP’s clear expectation for H35 was that it would provide 113 units of housing. The appellant’s proposal generated a deficit of 67 units. The manner in which the appellant’s position had shifted was significant – the appellant had argued before the reporter and had initially argued under their third ground of appeal, that this did not matter because H35 was part of the wider EW 1C site. Hence, a deficit could be made up by future development elsewhere on EW 1C. That ground was no longer insisted in. The appellant now accepted that the proposal failed to accomplish what H35 envisaged. This was the crucial distinction between the present case and the Pitt Street decisions: the Pitt Street proposal did not take up the entire allocation of its proposal site and there remained scope for the Pitt Street housing allocation to be met by increasing density elsewhere on the site.

[47] The reporter’s error in classifying PBSA as a Class 8 use was no more than an aside. The appellant itself acknowledged it as “non-pivotal”. If the court was to put a metaphorical pen through that entire paragraph of the decision it would not weaken the

reporter's reasoning nor make his decision any less straightforward to follow. The reporter had addressed the justification put forward for the sub-50/50 split of PBSA to general housing. He correctly noted there was no objective justification; the appellant's arguments as to amenity could potentially justify any split in favour of PBSA. There was no reason why an equal split would not achieve the same amenity improvements.

The interested party

[48] The interpretation contended for by the appellant would have seriously adverse implications for the key aims of the LDP, namely its objective of delivering land to meet Edinburgh's substantial housing need and securing a minimum of 35 per cent affordable housing. PBSA was a commercial use. The interested party supported the development of PBSA in appropriate locations. It did not, consistent with the LDP, support it on sites entirely allocated for housing. The process of drafting the LDP had commenced before the adoption of NPF4 and had been amended to bring it into compliance. The drafters of the LDP were therefore aware of the requirements of Policy 16. They had set out in the LDP, at a high level, a strategy which identified that: i) Edinburgh's most acute need was for affordable housing and ii) PBSA was often being built "at the expense of creating strong, sustainable communities" (paragraphs 2.92 – 2.93 of the LDP). The LDP further identified the sites within the interested party's area which could be developed to meet MATHLR. The Housing Land Audit and Completions Programme for 2022 had been prepared by the interested party to identify the state of the housing land supply in Edinburgh. Where sites had been developed as PBSA, they were effectively removed from the housing land supply.

[49] It was in this context that the court should interpret references to "housing" within the LDP. Once it was understood that PBSA was not counted in the audit, which in turn had

informed the LDP, it was clear that the PBSA and housing were treated differently. That was made explicit by the terms of Policies Hou 1 and Hou 2. The appellant's proposal was to use 100 per cent of a housing site to deliver a commercial development which would be less than 50 per cent housing. The reporter had correctly identified that this was impermissible.

[50] Otherwise, the interested party adopted the respondents' submissions.

Decision

[51] We are satisfied that the reporter correctly interpreted the development plan. He did not, contrary to the appellant's submission, create a false dichotomy between general or mainstream housing and purpose-built student accommodation (PBSA). Properly interpreted, City Plan 2030 draws a clear distinction between housing and student accommodation.

[52] It is notable that in the amended description of the development proposed by the appellant a distinction between "residential development" and "purpose-built student accommodation" was expressly made (para 1.7 of the appellant's Appeal Statement). This is hardly surprising since there are fundamental and obvious differences between PBSA and mainstream housing. The former is designed for a transient population of occupants linked to higher or further education facilities. The latter is aimed at settled and sustainable communities of longer-term residents. Moreover, the appeal proposal covered the whole of allocated site H35. To address that, the appellant argued that the balance of undelivered housing could be accommodated by increasing density on what it maintained was the remainder of allocated site EW 1c. Such an argument is inconsistent with the appellant's

contention before this court that the PBSA fell to be treated as housing for the purposes of the local development plan (LDP).

[53] The reporter correctly identified that National Planning Framework 4 (NPF4) Policy 16 does not seek to place a ranking, in terms of importance or priority or any other criterion, on the different types of homes to which it refers. Sub-paragraph c) of the policy merely provides some examples of the kinds of homes that may be included in development proposals which the policy supports because they will improve affordability and choice, are adaptable to changing and diverse needs, and address identified gaps in provision. The effect of Policy 16 c) is that proposals for student accommodation that are shown to improve affordability and choice and to address gaps in provision are capable of deriving support from the policy. This was the reporter's approach, as he explained in para 9 of the decision notice.

[54] As the reporter observed (para 7), City Plan 2030 was based on evidence about the housing requirements for Edinburgh. The reporter was correct to find that the LDP allocation of the appeal site for housing was one factor (not necessarily a determinative factor) likely to influence the acceptability of the proposal.

[55] The LDP places substantial emphasis on the need for more homes and especially on the need to increase the provision of affordable housing in the city. That is the rationale for the requirement for a minimum 35 per cent affordable housing contribution from new developments (aim 6 in para 2.2). Market sites are required to provide 35 per cent of their units to deliver affordable housing in mixed-use sustainable communities (para 2.87). The housing policies in the plan must be interpreted with the aim of promoting the development of affordable housing in mind.

[56] The housing policies in City Plan 2030 distinguish between land allocated for housing (Policy Hou 1) and purpose-built student accommodation (Policy Hou 5). The plan does not allocate any land for student housing. The purpose of Policy Hou 5 is to ensure that student accommodation is delivered at the right scale and in the right locations. The aim of the policy, as explained in para 3.195, is to deliver a balance between PBSA and the needs of the existing community including the need for residential dwellings. There are to be good transport links with further and higher education institutions. These features of Policy Hou 5 indicate that PBSA is treated differently for the purposes of the LDP from mainstream housing.

[57] The same can be seen from para 3.196 (further explaining Policy Hou 5). There it is observed that larger sites provide an opportunity to balance the mix of land uses and contribute to delivery of housing. The text continues by stating that a mix of “student accommodation and housing” is required on all sites greater than 0.25 Ha. At least 50 per cent of the site is to be provided for “housing”. In context the references to “housing” can only sensibly be read as meaning mainstream housing. The paragraph continues by stating that the affordable housing requirement of 35 per cent will apply. It is significant that this requirement, insofar as it relates to student accommodation, appears under reference to Policy Hou 5. This can be contrasted with the text accompanying Policy Hou 2 on affordable housing (para 3.190) the final sentence of which says that the policy does not apply to student accommodation. Again, one can see that housing and student accommodation are distinct from one another.

[58] Read together and in context the policies and text dealing with housing in City Plan 2030 make clear that housing and student accommodation are to be treated differently.

[59] There are other aspects of City Plan 2030 which lend clear support to the reporter's interpretation. Para 2.88 groups PBSA alongside retail, leisure, hotels and "other commercial developments". The paragraph says that such developments are often being built at the expense of creating sustainable communities. The text continues by stating that to make best use of limited space and to meet housing need in sustainable mixed-use communities, proposals for commercial developments of a certain size, including student accommodation, should also develop new housing. A clear differentiation is made between housing and commercial developments; student accommodation is treated as commercial development in contradistinction to housing.

[60] The distinction running through City Plan 2030 between mainstream housing and PBSA is also acknowledged in the section of the plan dealing with open space in new development. Para 3.166 makes clear that "non-residential development (including student accommodation ...)" must be considered against Policy Env 31; that policy covers useable open space in new development. It is distinct from Policy Env 32, which is concerned with useable communal open space and private gardens in "housing development". The note accompanying the former policy explains that it is intended to ensure that development proposals (other than private and affordable housing development) include open space provision. Student accommodation is treated as non-residential development.

[61] The fact that City Plan 2030 proceeds on the basis that PBSA is a species of commercial development as opposed to housing is evident from the section of the plan relating to economic policies. Policy Econ 2 provides that proposals for commercial uses within the urban area on sites 0.25 Ha or larger should, where compatible and appropriate within the site context, provide at least 50 per cent of the site for housing. In paragraph 3.247 the policy is explained as one that supports the approach of the plan to

create sustainable communities, maximise opportunities for housing and avoid large mono use developments. The policy is said to apply to “developments for commercial uses including student housing, retail, leisure, hotels and other commercial developments where they are compatible with residential use.” The policy is expressly stated not to apply to sites allocated for housing.

[62] From all this it can be clearly seen that City Plan 2030 has been prepared on the basis that mainstream housing and student accommodation are fundamentally different types of development. The former is housing; the latter is a form of commercial development. In Appendix D site H35 is identified as suitable for housing and should contain 113 units. It follows that the reporter was correct to conclude (para 17) that City Plan 2030 specified that the appeal site was to accommodate 113 homes. The proposal fell 67 homes short of this requirement. It did not meet the plan’s allocation for site H35. It also failed to provide for any Class 4 business space as required by Appendix D. As the reporter put it in paragraph 57, what is clear is that the direct consequence of the appeal proposal’s inclusion of the scale of PBSA is that the appeal site would fail to deliver the amount of housing (including affordable housing) that City Plan 2030 expects.

[63] There is nothing in the Pitt Street decisions that is inconsistent with the reporter’s analysis in the present case. Mr West was of the view that the principle of the proposed development in the appeals before him was not automatically established given that the site was allocated for housing as H39 within the LDP and the Proposals Map. The Pitt Street proposals had to be addressed against the relevant development plan policies (para 18). He recognised that the PBSA proposal could draw support from NPF4. It had to be balanced against Policies Hou 1 and 5. There was no evidence that an additional 35 (or more) housing units could not be delivered on the wider site. Were that to happen there would be a

modest reduction of only 10 housing units within site H39. The benefits of the proposed scheme outweighed such a modest reduction in the number of general housing units for which the plan provided in the allocation. The proposal did not take up the whole of the allocated site whereas in the present case the proposed scheme would occupy the entirety of allocated site H35. The decision turned on its own facts; these differed fundamentally from those in the present case.

[64] Nor is there any conflict with the reasoning of the reporter in the Ashley Place appeal. He concluded (para 15) that it would be possible to accommodate the proposal within a specific LDP site allocation but nonetheless to leave scope for sufficient mainstream homes to be built on the balance of the land while adequately realising the development principles of the allocation. Any adverse impact on the housing target for City Plan 2030 would be limited.

[65] For these reasons the second ground of appeal fails.

[66] The first ground of appeal can be disposed of briefly. While the reporter was mistaken to categorise PBSA as Class 8 use, this had no material effect on the substance of his reasoning. His analysis did not depend on use class categorisation. It was based on his interpretation and application of the policies in the development plan. Use class played no significant part in the reporter's determination of the central question in the appeal: whether the proposal would deliver what the LDP sought for the appeal site. The error had no material effect on the reporter's reasoning; it may properly be characterised as an inconsequential aside. The court rejects the first ground of appeal.

[67] That leaves the fourth ground of appeal. The reporter correctly recognised that Policy Econ 2 provided a degree of flexibility by inclusion of the wording "where compatible and appropriate within the site context". He concluded, however, that the

appellant had failed to provide any justification for it not being compatible or appropriate for there to be a 50/50 mix of housing and student accommodation as opposed to approximately 60/40 in favour of student accommodation. The appellant submitted to the reporter that its proposed split was justified because the development would deliver significant enhancement in terms of noise, air and visual amenity as compared with the existing scrapyards use and that there was a need for there to be a viable development to facilitate relocation of the scrapyards (appeal statement, para 4.50). The reporter was entitled to take the view that this did not amount to a sufficient justification. The factors relied on by the appellant would justify any split from 0/100 to 49/51 in favour of student accommodation. Moreover, the improvements referred to by the appellant would equally be delivered by a 50/50 split.

[68] The reporter examined the submitted designs and concluded that there was no location or design reason why it would not be compatible or appropriate for a greater share of the proposed development to be build-to-rent housing and a lesser share to be PBSA so as to achieve the ratio required in Policy Econ 2. He took the view that there was no sound reason for the appellant's approach. Essentially, this amounted to a planning judgement for him. The court cannot interfere with it.

[69] For the reasons we have set out, none of the grounds of appeal on which the appellant insisted can succeed. The appeal is refused.