



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2026] CSIH 30
XA62/24

Lord President
Lady Wise
Lord Clark

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

ABBOTSWELL DEVELOPMENTS LIMITED

Appellant

against

THE SCOTTISH MINISTERS

Respondents

Appellant: A Sutherland (sol adv); Burness Paul LLP
Respondents: N McLean (sol adv); The Scottish Government Legal Directorate

19 June 2026

Introduction

[1] In this appeal a development company (the appellant) contends that the respondents' reporter erred in refusing to modify a planning obligation requiring the provision of on-site affordable housing as part of a residential development. The appellant submits that the reporter was wrong to hold that it had not been proved that the development had become unviable due to an increase in building costs following the COVID-19 pandemic. The reporter is said to have misinterpreted the concept of viability in

planning law and policy. The appellant invites the court to quash the reporter's decision and remit the case to a different reporter for consideration of new.

Background

[2] In February 2020 the planning authority, the City of Edinburgh Council (the Council) granted planning permission for the demolition of a motor dealership near the junction of Craiglockhart Avenue and Lanark Road in Edinburgh and the construction of 50 flats on the site. Alongside the planning permission, an agreement was entered into under section 75 of the Town and Country Planning (Scotland) Act 1997. Clause 3 required the appellant to provide 12 on-site affordable housing units. This requirement was in accordance with national and local planning policies seeking to promote the building of affordable housing.

[3] In May 2022 the appellant applied to the Council under section 75A of the 1997 Act for modification of the clause 3 requirement by replacing the affordable housing obligation with a requirement to pay a commuted amount of money. The appellant maintained that since the pandemic there had been a material change in circumstances necessitating reconsideration of the affordable housing provision for the site. The pandemic had introduced significant market uncertainty and while this had abated somewhat, build costs had increased very significantly to the extent that the overall viability of the proposed development was threatened by the obligation to provide affordable housing.

[4] The appellant submitted that the return on gross development value (GDV) predicted in March 2021 had been between 14% and 19%. This made the development viable at the higher sales values and more marginal at the lower values, based on the benchmark District Valuer (DV) profitability threshold of 17.5%. By April 2022 the return on GDV was said to have "plummeted" to between 1% and 6%. This was largely attributable to

increases in construction costs of 31% and overall costs of 22%. Paragraph 15 of the appellant's planning statement in support of the application stated as follows:

"The development will therefore not be viable and will not proceed if the [appellant] has to provide 12 affordable housing units on site in terms of the Obligation. The [appellant] has considered all options for the delivery of affordable housing and concluded that delivery in the form of a commuted sum is the only viable option to enable the development of this redundant brownfield site to proceed."

[5] The Council's Chief Planning Officer recommended that the application should be granted. The Development Management Sub-Committee (DMSC) of the Council took a different view. It refused the application. It considered that there had been no substantive change in policy or other material considerations. Therefore, the section 75 agreement in its existing form was still necessary and should not be modified. In general development was undertaken at the developer's risk. This might result in instances where profit margins were greater or lower than initial forecasts. There was a lack of detail supporting the appellant's contention that there were exceptional circumstances sufficient to justify substitution of a commuted sum for the obligation to provide affordable housing on the site.

[6] The appellant appealed to the respondents under section 75B of the 1997 Act. The respondents appointed a reporter to determine the appeal.

[7] In support of the appeal the appellant argued that the DMSC had failed to take account of the relevant considerations, that its decision was unsupported by the evidence and was irrational. There were exceptional circumstances showing that the affordable housing obligation made the project unviable. Building costs had increased very significantly; the overall viability of the project was thereby threatened. The DV was satisfied that payment of a commuted sum of £166,000 was justified. There was no evidence to contrary effect.

The reporter's decision

[8] Having examined the relevant national and local planning policies on affordable housing, the reporter noted that the Council's non-statutory *Affordable Housing Guidance* (updated in May 2021) set out circumstances in which payment of a commuted sum instead of on-site provision of affordable housing would be acceptable. The present appeal is concerned only with the first criterion identified in the guidance. It is in the following terms:

“There are exceptional reasons to avoid on-site provision, such as the site being poorly located for affordable provision, where conversions do not lend themselves to affordable provision, where it is evidenced to be unviable or unfeasible or where there are other advantages to the Council in accepting a commuted sum such as achieving more, higher quality or better-located affordable units elsewhere”.

[9] The appellant's case was that exceptional reasons existed to avoid on-site provision because it had shown that the development had become unviable.

[10] The appellant's evidence was that the originally anticipated return on the project (calculated as between 14% and 19%) was now assessed as being between 1% and 6% if the affordable housing obligation remained in place. The basis for the reduction in viability was the increased cost of materials because of the pandemic. Since the Council had produced no evidence contradicting the appellant's evidence, the reporter accepted the factual information submitted to him in support of the new anticipated return. He agreed that if the obligation remained effective the return on GDV would reduce to between 1% to 6%.

[11] The reporter observed that it could be considered that such a small positive figure was so close to a loss that the risks of proceeding on such small margins were not acceptable; businesses would generally treat such a positive return as amounting in effect to a loss. The appellant had not, however, produced evidence to vouch this proposition. Its position was that the range of between 1% and 6%, despite being a positive range, still met the first criterion in the guidance as being a loss or in other words representing non-viability as that

criterion required. The appellant's position was that a profit was at the same time a loss or that a positive rate of return still represented unviability.

[12] The appellant contradicted that by saying in its planning statement only that the overall viability of the proposed development was "threatened" by the affordable housing obligation. Moreover, nothing in the appellant's case explained why, even if such a low return comprised non-viability at the outset of the project, it established non-viability in light of the level of substantial completion of the development as at the time of the reporter's decision.

[13] In paragraph 60 of the decision letter the reporter said the following:

"With the development substantially complete and 10 out of 50 units sold, it seems reasonably clear that a return on GDV as described (along with the attendant commercial risk) requires to be contextualised. Despite seeking views on levels of completion in my second Procedure Notice, the [appellant did] not address this factor."

[14] The only evidence in support of the appellant's position that the range now anticipated comprised non-viability came from the indirect reliance on the report of the DV in relation to the assumption accepted in the DV report that developer profit was 17.5%.

[15] This reliance was flawed for three reasons (para 62):

(1) the DV report was commissioned for a different reason. It was commissioned to calculate the sum representing the residual value of the affordable units at the site in order to allow assessment of the second criterion in the guidance. It was not a critique of the appellant's viability information;

(2) the 17.5% figure was no more than a working assumption in that calculation. It did not vouch that anything less than a 17.5% return equated to non-viability or that a return of between 1% and 6% equated to non-viability; and

(3) the DV report was commissioned after the application was made. While it might amount to secondary evidence, there was no primary evidence. It could not have informed the appellant that it had a viability case and should make an application for modification in consequence.

[16] There was no explanation as to why the case for unviability was said to be made out, based on the evidence placed before the reporter. He accepted that the return figure of 17.5% was acceptable as being typical of developer expectations. That was not enough, however. The question remained where events had caused a likely lower return (but not moving into a negative figure) of what evidence could trigger the conclusion that the development (at an advanced stage of completion) should be treated as not viable.

[17] The appellant indicated that a 12% return would be acceptable but “not ideal” if the DV figure was used. It stated that that was now the minimum required to make the development viable. However, such vague, subjective and unevidenced assertions fell short of explaining why a positive rate of return nonetheless represented unviability.

[18] The reporter continued at paragraph 66 as follows:

“Where 12% is acceptable as viable (though not ideal) and the range of 1% to 6% is not, it may be assumed that the viability trigger point in the view of the [appellant] falls somewhere between 6% and 12%. It is not clear where within that range and whether this is in general (as a matter of developer risk) or based on site specific factors. Evidence of neither is before me.”

[19] Accordingly, even taking the appellant’s evidential case at its highest there was no evidential or other basis in the appeal to conclude that the development had become unviable. The appellant accordingly failed to meet the first criterion. There were no exceptional circumstances to justify modification of the obligation. There was no other basis for allowing the appeal on the ground that the planning obligation was unreasonable.

The appellant's submissions

[20] The appeal raised a short point: had the reporter misinterpreted the meaning of viability in the Council's *Affordable Housing Guidance* by requiring evidence that the development would make a loss for it to be unviable. The reporter had misinterpreted the Council's policy, applied the wrong test and erred in law.

[21] A development did not need to make a loss for it to become unviable. Unviability simply meant not working successfully. No developer would invest in a project which would only break even. The respondents' discussion paper on an infrastructure levy for Scotland (May 2024) stated that a site was viable if the value generated by the development was more than the cost of developing it. Developer profit was an important factor in assessing viability; this was recognised in the respondents' recently adopted Circular 4/2025: *Planning Obligations and Good Neighbour Agreements* (December 2025).

[22] The reporter incorrectly determined that the test for unviability had been met on the basis that the appellant had not evidenced a loss. This amounted to an error of law.

[23] The reporter mistakenly described the DV's use of developer profit of 17.5% as no more than a working assumption. The inclusion of developer profit of 17.5% was the accepted level of assessing development viability in planning. It was the level of profit the Council itself adopted. There was no evidence before the reporter challenging the DV's use of this figure in his independent assessment of viability. The reporter also failed to have regard to the Chief Planning Officer's recommendation.

The respondents' submissions

[24] The reporter had correctly understood the test under the first criterion in the Council's *Affordable Housing Guidance*. He gave detailed consideration to the evidence on the

viability of the development. The appellant failed to produce evidence that the development was no longer viable. The reporter was entitled to reach the decision he did, having assessed the evidence before him.

[25] The reporter considered the UK Government's *Planning Policy Guidance on Viability* (updated February 2024) at paragraph 67 of the decision and concluded that a reduction in profitability did not in itself equate to non-viability. The UK Guidance observed that:

"The weight to be given to a viability assessment is a matter for the decision maker, having regard to all the circumstances in the case..."

[26] The proposed developer return figure of 17.5% was an indicative figure only and, while it might represent an industry target, it was not binding on the reporter when it came to assessing the viability of the development. There was no adopted national planning policy or guidance to indicate what constituted a viable development. Consistent with the UK Guidance, the reporter was entitled to reach his own view as to viability, having regard to the evidence and all the circumstances of the case. He considered the relevance of the DV report. The reporter concluded that reliance on the DV report as evidence of non-viability was flawed for the reasons set out in paragraph 62 of the decision. The DV report did not assess the viability of the development. It calculated the residual value as the sum to be paid as an alternative and commuted sum, in accordance with the *Affordable Housing Guidance*. The appellant's application to modify the section 75 obligation was made on 6 May 2022. The DV report was dated 28 February 2023. Therefore, the reporter was correct to place limited weight on it as supporting the appellant's position on viability. The Chief Planning Officer's recommendation did not amount to evidence of unviability.

Decision

[27] While interpretation of planning policy is a question of law for the court, application of policy is a matter of judgement for the decision-maker alone (*Tesco Stores Ltd v Environment Secretary* [1995] 1 WLR 759). It is a fundamental principle that the courts are concerned only with the legality of the decision-making process and not with the merits of the decision.

[28] It is clear from the reporter's decision that he focussed his attention carefully on the question of whether the evidence placed before him showed that the project had become unviable. This was quintessentially an issue of fact on which it was for him to reach a conclusion. The issue may be encapsulated in this way: was he persuaded by the evidence that an anticipated return for the appellant of between 1% and 6% above gross development value (GDV) meant that the development was no longer viable in circumstances where the project had been substantially built out? The reporter correctly identified that question as being central to his decision. He held that the evidence was not sufficient to prove unviability. The court is not empowered to interfere with a factual decision of this nature. To do so would subvert the fundamental principle to which we have referred in paragraph [27].

[29] We do not accept that the reporter misunderstood what is meant by unviability. The *Oxford English Dictionary* (3rd ed. 2010) defines "unviable" as meaning "not working successfully; not feasible". The reporter considered whether the appellant had proved that the development had become unfeasible in this sense. He applied the ordinary meaning of the word to the facts of the case.

[30] While the reporter said that the predicted revised range of return was close to a loss, he did not proceed on the footing that unviability could only be established in circumstances

where a loss was likely to occur. In paragraph 55 of the decision, he observed that such a small positive return could be regarded as being close to a loss so that businesses would generally treat it as in effect amounting to a loss. That was a perfectly legitimate and appropriate observation for the reporter to make. It is clear, however, that he did not go so far as to hold that there had to be an anticipated loss before unviability could be shown.

[31] The reporter accepted that a return of 17.5% was typical of developer expectations. That was not enough, however. It did not address the question of what evidence was sufficient to justify the conclusion that this substantially completed development had become unviable. The appellant regarded a return of 12% as acceptable though not ideal. There was no evidence to show at what point between 6% and 12% the development became no longer viable.

[32] The reporter exercised his own planning judgement on the issue of viability. He correctly understood the applicable policy framework, and he took fully into account all the evidence put before him. He assessed the evidence on the issue of viability comprehensively and on an entirely sound basis.

[33] The weight to be given to the District Valuer's (DV) report was a matter for the reporter to reach his own conclusion on. He gave sound reasons for the approach he took towards that part of the evidence.

[34] The court is not persuaded that the reporter erred in any material respect. The appeal is refused.