



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 11
XA1/22

Lord President
Lord Woolman
Lord Pentland

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

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

by

ROBERT BRUCE

against

MORAY COUNCIL

Appellant

Respondents

Appellant: S Blair; Drummond Miller LLP (for LSA Brown, Glasgow)
Respondents: Dunlop; DWF LLP

21 February 2023

Introduction

[1] This appeal concerns the use of land on and around the former Portessie railway station to the east of Buckie. The Save Slochy Woodlands campaign group aims to protect this land from residential development; principally on the ground that it contains a thriving

ecosystem. The group wishes to preserve the land's status as part of the Buckie ENV5 Green Corridor. The group mainly consists of residents in the local area. Some live in the immediate vicinity, while others, including the appellant, live in Buckie itself or beyond. The appellant is on the group's management committee.

[2] The Moray Local Review Body granted planning permission for the development of seven four-bedroom detached houses on the land. The appellant, who pursues the appeal as an individual rather than as part of the campaign group, contends that the MLRB's decision should be quashed as unlawful.

Moray Local Development Plan 2020

[3] Moray Council published a proposed Local Development Plan in 2019. This updated the 2015 version. Unresolved objections to the proposals were examined by a reporter appointed by the Scottish Ministers. Following receipt of her recommendations, Moray Council modified the LDP and formally adopted it on 27 July 2020.

[4] Although a number of LDP policies are said to be relevant to the proposed development, this appeal is concerned with only one; Policy EP5. It outlines the principles applicable to open space and provides that:

“Development which would result in a change of use of a site identified under the ENV designation in settlement statements ... to anything other than open space will be refused ...

The only exceptions are where the proposal is for essential community infrastructure required to deliver the key objectives of the Council ..., excluding housing, or for a site specific opportunity identified within the settlement statement ...”.

[5] One of the designations is ENV5: “Green Corridors”. Appendix 1 to the Supplementary Guidance on Open Space Strategy 2018 provides a definition of each ENV category. Green corridors are described as:

“Routes including ... old railway lines, linking different areas within a town or city as part of a designated and managed network and used for walking, cycling or horse riding, or linking towns and cities to their surrounding countryside or country parks. These may link green spaces together.”

[6] One such ENV5 green corridor, in terms of Buckie’s Settlement Statement, is Portessie Station/Cycle Path. In the 2019 proposed LDP, a section of the corridor, to the south-east of Station Road and including the cycle path on its northern border, was re-designated for housing. The site was shown in orange as R10 on the 2019 settlement map as follows:



[7] A more detailed view of the site in the proposed LDP showed R10 as a 0.59 acre site on the former station, which was said to be an opportunity for low density housing development of five units. Any proposal would require to preserve the existing cycle path, which runs along the disused railway line and forms part of the National Cycle Path

Network. Landscaping was to be provided on the southern boundary. Morlich Homes duly applied for permission to build seven houses.

[8] Meantime, a member of the public objected to the designation of the site for housing. The Scottish Ministers appointed a reporter to look into this and other issues in dispute. She visited the site, which she described as “mostly ... covered in shrub and ... boggy” and with no important habitat. However, she determined as follows. The site formed an effective screen between the built-up edge of Portessie and the open countryside. It provided Portessie with a valuable landscape setting. Development of the site would breach the natural limit of the village. A precedent would be set. The site’s removal from the LDP as suitable for housing would not impact on the overall supply of housing within the Buckie Housing Market Area.

[9] The reporter recommended a modification to the final version of the LDP reinstating the site’s green corridor (ENV5) designation. That is what occurred. Site R10 was removed from the settlement map which now appears as ENV land as follows:



The Council must have accepted the recommended modification (see below). Its earlier decision to release this site for housing was thus reversed.

The Planning Decisions

[10] Morlich Homes' application had been made prior to the adoption of the 2020 LDP. Its determination occurred after that adoption. The Council's planning officer noted five objections and seven letters of support. The objections included concerns about the impact of the development on the natural environment and the usefulness of the cycle way. The officer recommended that planning permission be refused. He observed that the site comprised "a small portion" of the larger Buckie ENV5 green corridor. It was a dense thicket of bushes. He assessed the application on the basis of the adopted LDP; the site being in an ENV5 area and not the previous R10 housing designation. On that basis the development was contrary to EP5. That policy was very clear that housing with an ENV designation was not acceptable and there was no justification for a departure from the policy. The application was determined under the Council's Scheme of Delegation (ie by an appointed officer; Town and Country Planning (Scotland) Act 1997, s 43A). On 2 December 2020 planning permission was refused.

[11] Morlich Homes requested a review of the refusal by the Council's Local Review Body (1997 Act, s 43A(8)). At a meeting on 25 November 2021, the MLRB considered the proposal and reversed the earlier decision. It granted planning permission, subject to conditions. A transcript of the MLRB hearing reveals that one councillor expressed some exasperation that the site had been designated ENV5 after the Council had "advertised" it for housing. The reporter's reasoning was explained by a planning officer. The councillor

disagreed with that reasoning; stating that “We are screaming out for houses here” and it would “even help the ... primary school roll”. The development would generate three more pupils, albeit in the context of an already stable school roll five-year forecast. Another councillor regarded the site as brown field; describing the station ruins. The Council’s legal adviser explained that the MLRB had to determine the review in accordance with ENV5 and not on the basis that some councillors did not agree with that designation. There required to be strong planning reasons to justify overturning a designation in a newly adopted LDP. The only ground for upholding the appeal would be if the MLRB considered that the development was “an acceptable departure” from LDP policy. In the adviser’s view, the reasons advanced by those in favour of the development, namely community benefit in terms of housing and increase in the school roll, were weak.

[12] Those in favour of the development continued to argue that it would bring more community benefit than would be gained by leaving the site as “scrubland”. The land had been correctly designated for housing in the original proposed LDP. The legal adviser stated that there was no policy support for the position that this was an acceptable departure. The question became whether there were material considerations of sufficient weight to justify a departure from the development plan.

[13] The MLRB upheld the review by five votes to three. In the decision notice of 25 November 2021 it stated that:

“the application is ... an acceptable departure from [policy] ... EP5 ... based on community benefit in terms of housing and the school roll”.

Submissions

Appellant

[14] The appellant's primary ground of challenge was inadequacy of reasons; the MLRB having failed to explain why it had departed from the view of its planning officer (*R (Bates) v Maldon DC* [2019] EWCA Civ 1272 at para [19]). The decision left the informed reader in real and substantial doubt as to what the reasons were (*Wordie Property Co v Secretary of State for Scotland* 1984 SLT 345 at 348). Multiple interlocked policies were in play and pointed to refusal. It was unclear how the MLRB had balanced these against the merits of the application. Housing had been used in support of the departure, but that was expressly excluded in EP5. No evidence had been identified in support of any benefit to the community in terms of: (i) the need for housing; or (ii) the increase in the school roll.

[15] The decision to grant permission was unreasonable. EP5 said that housing on land with an environmental designation was not acceptable. The addition of three pupils to the school roll was not a strong countervailing benefit. Where there was a departure from an LDP, the decision-maker must: (i) identify the provisions of the development plan; (ii) properly interpret them; (iii) consider whether the proposed development accorded with the LDP; (iv) identify all other material considerations; and (v) decide whether there are considerations of such weight that the development plan should not be accorded priority (*City of Edinburgh Council v Secretary of State for Scotland* 1998 SC (HL) 33 at 44-45).

[16] The MLRB misdirected themselves by considering whether the site had been correctly designated as an ENV5 green corridor. Section 25 of the 1997 Act required planning decisions to be taken in accordance with that designation, unless material considerations indicated otherwise. Disagreement with the designation of a site was not a material consideration.

[17] The appellant was an aggrieved person in terms of section 239 of the 1997 Act. He was a member of the campaign group. He lived in Buckie. Incapacity had prevented him from using the woods in recent times, but he intended to do so in the future. He had only become aware of the controversy in May 2021. Reference was made to *Walton v Scottish Ministers* 2013 SC (UKSC) 67 (at paras 89-93); and 152; *R (CPRE Kent) v Dover District Council* [2018] 1 WLR 108 (at para 59).

Council

[18] The appellant was not an aggrieved person. He had not made any representations to the Council about the development. He lived two miles from the site. He was not pursuing the appeal on behalf of his group and had been selected because of his eligibility for legal aid.

[19] Detailed enquiry into the balancing exercise, the weight to be attached to policies and the material considerations was unnecessary. It was sufficient for reasons to be brief and to address the main determining issue, namely whether there were material considerations justifying a departure from the LDP. The material considerations were the need for housing and the contribution to the school roll.

[20] What constituted a material consideration was a matter of law. Material considerations were not defined. They required to be planning considerations. The weight to be attached to them was a matter of planning judgement. Housing supply needs and contribution to a school roll were material considerations. The MLRB were entitled to conclude that they justified a departure from the LDP policies.

[21] The MLRB properly directed themselves in terms of the designation of the site as ENV5 land and recognised the reporter's findings. The fact that one councillor had

disagreed with the designation only reinforced that he understood it. That there was a proper understanding of the site's designation was reinforced by the MLRB's finding that there were material considerations justifying departure from the terms of EP5.

Decision

[22] The appeal draws into sharp focus the roles of all those involved in the planning process. The underlying principle is that national and local planning policy is a participative and democratic exercise. At a local level, the planning authority, namely the Council, will draw up a proposed local development plan which ought to reflect the views of the community as represented democratically through the councillors. One of their, and the community's, concerns will be the sustainability of the towns and villages in the Council area. In 2019, the Council agreed that a modest expansion of Buckie at Portessie was desirable and could be accommodated in what some regarded as the derelict, station site. In terms of the proposed LDP, safeguards to maintain the cycleway and the landscape setting of the village were regarded as necessary. On the face of things, Morlich Homes' seven house development would have met the criteria set out for the site in the Settlement Statement: "R10 Site at Station Road, Portessie".

[23] At a national level, and in accordance with the structure of the planning process as set out in the Town and County Planning (Scotland) Act 1997, the Scottish Ministers required to appoint a reporter to examine any unresolved objections to the proposed LDP taken by one or more persons. The reporter would be expected to have a sound awareness of the relationship between local and national planning policy. Contrary to the views of the campaign group, the reporter on the LDP did not consider there to be any significant habitat

on site; rather it was boggy, shrub covered land. Her reason for recommending removal of the housing designation was that the site provided an effective screen between Portessie and the countryside; thus creating a landscape setting. The reporter considered that the site was outwith the “natural limit” of the village. This is an approach which will be familiar to town planners in relation to the preservation of the settings of individual towns and villages. In effect, the reporter did not consider that, in planning terms, the village should expand eastwards, beyond Station Road, notwithstanding that, until 1968, there was already expansion beyond any natural limit in the form of a railway station and associated buildings and sidings.

[24] It is clear from the minutes of the MLRB that some councillors considered that the reporter’s view was misconceived in that it failed to take sufficient account of local issues and priorities. Herein lay the problem in terms of the structure of planning law. The 1997 Act provides that, once a planning authority receives a report on a proposed LDP, which recommends a modification (as here), it is bound to incorporate that modification in the LDP except in certain defined circumstances. These are set out in the aptly named Town and Country Planning (Grounds for Declining to Follow Recommendations) (Scotland) Regulations 2009. For present purposes, the only relevant ground is that:

“the recommendation in respect of the modification is based on conclusions that the [reporter] could not reasonably have reached based on the evidence ...”. (reg 2)

[25] The Council could have decided that the reporter’s conclusion was unreasonable, declined to follow it and intimated that decision to the Scottish Ministers. The Ministers would then have had to consider whether to issue a direction that the proposed LDP should be modified. No such intimation appears to have been given. The plan as modified having

been adopted, the Council, including the MLRB, were therefore bound by its terms. The result is that the site is undoubtedly within an ENV5 designation. In terms of EP5, a change of use from open space to residential could only be permitted if the proposal was for essential community infrastructure (excluding housing), or was on a site identified in the settlement agreement. It was not suggested that either exception was applicable.

[26] That left section 25 of the 1997 Act, which permits a departure from the development plan only if “material considerations” so indicate. This was, in essence, the task which the Council’s legal advisor had set for the MLRB. She explained that there had to be a sound planning reason, in the form of a material consideration, to justify circumventing a designation in a newly adopted LDP. In examining this issue, it is worth repeating that the court is not concerned with the planning merits of the MLRB’s decision. Its remit is to consider only its legality.

[27] Three issues can be disposed of with alacrity. First, an issue, which had been raised in the appeal about the apparent bias of a councillor, who was present at the MLRB hearing, was not insisted upon. It need not be considered further.

[28] Secondly, the Council’s contention that the appellant was not an aggrieved person falls to be rejected. The court does not have a detailed account of the nature and timing of the campaign group’s objections, but it is evident that there were objections by at least five persons, which the planning officer recorded at the time of the Council’s initial consideration of the development. These included complaints upon environmental, rather than purely planning, grounds. These objections were presumably all before the MLRB.

[29] As a generality, for a person to be aggrieved, he or she ought to have played a part in the process which led to the decision about which a complaint has been made (*Walton v*

Scottish Ministers 2013 SC (UKSC) 67, Lord Reed at para 86); at least unless prevented from doing so. Strictly, the appellant may not meet this test. He is, however, a member of a campaign group whose existence is solely concerned with stopping the development and who had objected timeously. He has “demonstrated a genuine concern about what he contends is an illegality in the grant of consent” (*ibid* para 88). The issue, with which the appeal is concerned, does not involve a person’s use of the site for recreation or other purposes. It is not about environmental impact. The purpose of the reporter’s decision was to preserve the landscape setting of Portessie, not to protect its value for individual users, whether human, flora or fauna. The appellant raises issues which concern the legality of the MLRB’s decision. He has participated in the process through the campaign group and has a sufficient local connection to establish that he is an aggrieved person in terms of section 239 of the 1997 Act.

[30] Thirdly, the reasons given by the MLRB are sufficient to meet the test of being proper and adequate. It is correct to say that, when one planning decision-maker differs from an earlier decision-maker, he must “grasp the intellectual nettle of the disagreement” (see *Dunster Properties v First Secretary of State* [2007] 2 P&CR 26 (Lloyd LJ at para 23, cited by Hickinbottom LJ in *R (Bates) v Maldon DC* [2019] EWCA Civ 1272 at para 19). The situation is rather different here where the MLRB were, as their name suggests, reviewing a decision taken by an appointed planning officer under delegated authority. The process is essentially one of appeal.

[31] The relevant reasons are those in the decision notice of 25 November 2021 and not any comments made during the course of the debate at the MLRB hearing. The notice leaves the informed reader and the court in no real and substantial doubt about what the reasons

for it were and what were the material considerations taken into account (*Wordie Property Co v Secretary of State for Scotland* 1984 SLT 345, LP (Emslie) at 348). Although the contents of the transcription of the MLRB hearing do not form part of the reasons, the knowledge of the informed reader can be gleaned from the transcript and the other background material, in particular the proposed LDP, the report on the modification and the adopted LDP. There is no difficulty in understanding that the MLRB decided that the development was an acceptable departure from LDP policies because of community benefit in terms of housing and the school roll.

[32] Concision of reasoning should seldom be a subject of criticism if it meets the *Wordie* test (*NLEI v Scottish Ministers* [2022] CSIH 39, LP (Carloway), delivering the opinion of the court, at para [54]). Nothing which is said about the process of reasoning in *City of Edinburgh v Secretary of State for Scotland* 1998 SC (HL) 33 (Lord Clyde at 44-45) suggests that there requires to be a detailed philosophical elaboration of that process in the final statement of reasons in support of a planning decision. Provided that reasons are intelligible and adequate, they may be expressed in a concise form. This is especially appropriate where those affected by the decision are aware of the issues involved and the arguments which have been advanced (*Moray Council v Scottish Ministers* 2006 SC 691, LJC (Gill) at paras [30] and [31], citing *South Bucks District Council v Porter (No. 2)* [2004] 1 WLR 1953, Lord Brown at para 36). Whether the reasons constitute material considerations is another matter.

[33] The words used in the decision notice are “acceptable departure”. It is not immediately clear whether there were material considerations which “indicate[d] otherwise” in terms of section 25 of the 1997 Act. However, having regard to what was said by the legal adviser at the MLRB hearing, the court will proceed on the basis that that is

what was intended. The Council accepted that there had been no attempt at the hearing to bring the proposed development within the express exceptions in EP5.

[34] The reasons are encapsulated as “community benefit”; there being two aspects to that, namely housing and school roll. These two aspects are expressed as cumulative. If one is wrong, the conclusion on benefit overall must be an error. The evidence before the MLRB was that the school roll would be increased by three pupils. It was not disputed that the roll was 117 pupils spread over the six primary school years. The MLRB were advised that the school roll would be steady for the next five years without the development. Such a small increase cannot be characterised as a “material” consideration sufficient to contribute to a departure from the general principle that planning decisions ought to be made in terms of the development plan.

[35] “Housing” poses a problem of a different nature. At least one councillor said that the local community was “screaming” for housing. He was entitled to express that view, but the reporter had found that the removal of this small site would not have an impact on the overall supply of housing in the Buckie Housing Market Area. That is not surprising given the numbers involved.

[36] More importantly, EP5 specifically excludes housing is as an exception to the general rule. The court drew parties’ attention to the *dictum* in *Aberdeenshire Council v Scottish Ministers* 2008 SC 485 (Lord Eassie, delivering the opinion of an Extra Division, at para [40]) which the court endorses. This is that:

“a material consideration such as to override the presumption, or enhanced status, given to the development plan by section 25 of the Act must normally be external to the factors included in the overall ponderation (*sic*, ie consideration) of matters in the elaboration of the development plan policy. In essence, were the decision-taker entitled to effect a personal selection of a factor ... in that overall ponderation while ignoring others and treat that selection as the basis for a ‘material consideration’

which elided the responsibility placed upon him by section 25 of the Act, the provisions of section 25 would be much weakened, if not emasculated, and would be in effect little more than a mere statutory exhortation.”

[37] In this case, “housing” cannot be a material consideration given that: (i) it has been specifically excluded as a sufficient reason in EP5 itself; and (ii) it had already been taken into account by the reporter in recommending the exclusion of the site from those areas considered suitable for development and by the Council in adopting that modification.

[38] For these reasons the decision of the MLRB: constitutes an error of law; is therefore *ultra vires* the 1997 Act; and must be quashed. In so determining, the court emphasises again that it is making a decision about the legality of the MLRB decision. It is not expressing any view about whether there may be material considerations which would justify a departure from EP5 in relation to what is a relatively small site on the ENV5 green corridor.