



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 21
XA46/22

Lord President
Lord Pentland
Lord Boyd of Duncansby

OPINION OF THE COURT

delivered by LORD BOYD OF DUNCANSBY

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

Appellants

against

THE SCOTTISH MINISTERS

Respondents

Appellants: J d C Findlay KC; Garrity; Burges Salmon LLP
Respondents: N McLean (sol adv); Scottish Government Legal Directorate

5 May 2023

Introduction

[1] This is an appeal against a decision of Scottish Ministers to refuse an appeal against a refusal of planning permission for a residential development in Strathblane. The central issue is whether it was open to Ministers to determine the appeal on an assumption about the level of shortfall in the five-year land supply, and without determining the appropriate method for calculating that figure, even where the assumption was one that was favourable to the appellants.

Background

[2] The appellants wish to develop land at Campsie Road, Strathblane for up to 70 residential houses and a cemetery. The proposed development is detailed in red on the following plan:



[3] There is a history to this proposed development. The application was made on 30 May 2017. It was refused by the local planning authority, Stirling Council, on 7 November 2017. The appellants appealed to Scottish Ministers against the refusal. On 25 July 2018 Scottish Ministers refused planning permission following the reporter's recommendation. The Ministers' decision was quashed by this court on appeal. One of the

reasons was that the reporter had erred in law by failing to determine the appropriate methodology for calculating whether there was a five-year effective land supply (*Gladman Developments Limited v The Scottish Ministers* [2019] CSIH 34). The application was remitted to Ministers for redetermination who directed that they, instead of a person appointed by them, would determine the appeal as it raised potential issues in terms of the five-year effective land supply, requiring a view to be taken on the methodology used. For that reason it was appropriate that Ministers make the final decision. A new reporter was appointed. On 7 October 2021 he produced a report recommending refusal. Following the submission of the report, Stirling Council published its Housing Land Audit 2021. The appellants and the Council were invited to comment upon how the HLA 2021 affected their case in the appeal to which both parties responded. Having considered the report, and subsequent submissions, Ministers refused planning permission in a decision notice dated 21 July 2022. The appellants appeal that decision.

The relevant planning policies and plans

[4] The relevant policies and plans were set out in some detail in *Gladman Developments v Scottish Ministers* 2020 SLT 898 (paras [4] to [11]). The Town and Country Planning (Scotland) Act 1997 requires planning authorities to prepare a regional Strategic Development Plan and a Local Development Plan. Applications for planning permission must be determined in accordance with the Development Plan (ie the SDP and the LDP) unless material considerations indicate otherwise (1997 Act, ss 24 and 25). The Scottish Government's Scottish Planning Policy is one such material consideration. Housing policies are deemed to be out of date if there is a shortfall in the required five-year effective housing

land supply (SPP para 125). Where relevant policies in a development plan are out of date, a presumption in favour of housing developments which contribute to sustainable development becomes a significant material consideration. That significant material consideration will be overcome only where any adverse impacts of a proposed development significantly and demonstrably outweigh its benefits when assessed against the wider policies (para 33). These principles result in a “tilted balance” in favour of granting permission (*Gladman Developments Ltd v Scottish Ministers* [2019] CSIH 34 per Lord Menzies, delivering the opinion of the court, para 3 and the authorities referred to therein).

[5] The LDP which is applicable to Strathblane is the Stirling Local Development Plan 2018. Policy 2.1 of the SLDP makes further provision regarding the five-year effective housing land supply as follows:

“Policy 2.1: The 5 Year Effective Housing Land Supply

The Council will, at all times, maintain a 5 year effective housing land supply through the annual housing land audit process and the LDP Action Programme. Where the current housing land audit identifies a shortfall in the 5 year effective housing land supply, proposals to extend the supply of land for housing development under SPP’s ‘presumption in favour of development which contributes to sustainable development’ on sites not identified for housing development will require to:

- (a) Be consistent with the LDP Vision and Spatial Strategy; and
- (b) Meet with the provisions of the LDP Overarching Policy, its accompanying Sustainable Development Criteria and all other relevant LDP policies; and
- (c) Be proven, through detailed supporting information, to be effective and capable of delivery within the 5 year period under consideration; and
- (d) Be over 30 units in size in order to make a reasonable contribution to the overall identified shortfall; and
- (e) Demonstrate that development of the proposed site will not compromise delivery of necessary infrastructure supported by the LDP strategy.

The submission of detailed planning applications for such developments will be encouraged by the Council. Any consents issued for planning permission in principle applications may, in line with current legislation, have a shorter time period imposed to assist in meeting the identified shortfall within the 5 year period under

consideration. Developers are encouraged to engage in early discussions with the Council.”

[6] The Scottish Government’s Planning Advice Note 2/2010 Affordable Housing and Housing Land Audits sets out criteria for identifying effective land by means of an audit process. The process includes data-gathering and consultation with house-builders and infrastructure providers in order to identify any constraints which may impact development on a particular site. The Council conducts an annual Housing Land Audit pursuant to that guidance to work out the effective housing land supply in the local development area.

The methodologies advanced to the reporter

[7] Three different methodologies of calculating the five-year effective housing land supply were advanced to the reporter. The first, the average method, was advanced by the Council. That was a straightforward method of calculation which involved averaging the total SLDP housing land requirement (6,417 homes) across the 12 years of the plan to produce an annual target (535 homes) and multiplying it by five to produce a five-year target (2,675 homes). The five-year target was checked against the audited effective housing land supply (2,778 in the HLA 2020). However, the appellants alleged that the audited figure was inaccurate. The reporter accordingly reduced the effective housing land supply (to 2,609). The five-year target was higher than the effective supply; there was effective supply for only 4.9 years.

[8] The second methodology was the appellants’ preferred residual method. That involved factoring any shortfall in development in previous years of the SLDP into the target in order to bring matters up to date at the point of calculation. A new annual average

target for the remaining years of the SLDP (7) was worked out based on the actual number of home completions still required (5,336 homes) if the Council were to meet the total 12 year housing land requirement. That new annual figure was multiplied by five to give the five-year effective housing land supply (3,811). Measuring this against the reduced effective housing land supply (2,609) produced 3.4 years' worth of effective housing supply, which was the greatest shortfall of the three methods.

[9] The third method was an alternative residual method, also advanced by the appellants. That method was similar to the preferred residual method but it used the SLDP housing supply target (7,072) in place of the housing land requirement, and the housing land audit plan period of 17 years instead of the SLDP period of 12 years. This resulted in a slightly higher five-year effective housing land supply of 3.5 years.

The reporter's recommendations

[10] The reporter considered that it was doubtful that the appellants' submission passed the minimum evidential requirement for the reporter to question the effectiveness of sites in the audited supply. Nonetheless, the Council had not provided further evidence in respect of the effectiveness of those sites when it had the opportunity to do so. The PAN 2/2010 audit process was not a process which could be replicated in the context of a planning appeal (report, para 3.78). However, since PAN 2/2010 required the effectiveness of sites to be demonstrated, where there was uncertainty on the evidence as to a site's effectiveness, the site should be discounted (para 3.85). Therefore, cautiously, the effective housing land supply ought to be reduced from 2,778 to 2,609. Albeit, it was highly unlikely that all the

disputed sites in the audited supply would fail and the supply would be reduced to such a degree (paras 3.112 and 14.29).

[11] As a result of the reduction, there was a shortfall no matter which of the three methodologies was applied (para 3.177). The appellant's preferred residual method was not logical, and provided an inflated target. If applied, it would require houses to be built at a rate faster than the SLDP required. This would cause the planning authority to approve sites according to their promoters' priorities rather than according to priorities set in the formulation of the SLDP (para 3.168). The appellant's alternative method was inconsistent with the court's comment in *Gladman Developments v the Scottish Ministers* 2020 SLT 898, which Ministers had since acknowledged was correct, that the housing land requirement ought to be used over the housing supply target (para 3.169). The average method was consistent with that decision (para 3.170) and ought to be applied.

[12] As there was a shortfall, the development required to be considered further in terms of policy 2.1. It did not meet criteria (a) and (b) of that policy (para 14.22). Policy 2.1 therefore did not favour the development (paras 14.23 – 14.29). The development did not support the SLDP Vision and Spatial Strategy (primary policy 2) as it did not represent a sustainable expansion, particularly the likely increase in car-based commuting and the impact on the landscape and the historic environment. The development would prejudice the Strategy (paras 14.7 – 14.12). Given that there was a shortfall in the five-year effective housing land supply, any housing development would almost inevitably meet the community's needs in some form (para 14.17). However, the development did not accord with the overall sustainability criteria or the overarching SLDP policy for the same reasons, despite its economic and other minor benefits, for example, creation of footpath linkage, and

compliance with the policies on flood and air, water and soil quality management (para 14.18 - 14.20).

[13] The proposed development was contrary to the SLDP policies concerning: housing in the countryside (policy 2.10); placemaking (primary policy 1); green belts land (policy 1.5); addressing travel demands of a new development (policy 3.1); greenhouse gas reduction (primary policy 4); historic environment (primary policy 7) and managing landscape change (primary policy 9) (para 14.1). It did not accord with the SLDP, and material considerations did not indicate that planning permission ought to be granted. In terms of SPP, the adverse effects of the development significantly and demonstrably outweighed its benefits, notwithstanding the steep tilt on the balance in favour of development (paras 14.30 – 14.39). Planning permission ought to be refused.

The Ministers' decision notice

[14] The reporter was correct that the process carried out during a housing land audit could not be replicated in the context of a planning appeal. However, a cautious deduction would be made from the HLA 2021 effective housing land supply for the purposes of the present appeal (decision notice, para 26). Calculation of the effective housing land supply was not an exact science. There were different approaches to the task, each of which lead to significantly different results. At paragraph 31 Ministers said this;

“Ministers have not formed a concluded view as to the existence or level of any shortfall. However in order to keep the remainder of this decision letter as brief as possible, Ministers have reached the following conclusions, and determined this appeal, on the assumption that there is a shortfall in the effective housing land supply of 1,621 units or about a third”.

[15] The reporter was correct that certain factors would not, by themselves, justify a refusal of planning permission. Those were: flood risk and drainage; the lack of certainty regarding the location of the cemetery within the development site; groundwater/licensing for dewatering; the capacity of sewerage infrastructure; the capacity of schools; the impact on the setting of the Broadgate Mound; and the quality of pre-application consultation (para 40). Certain matters weighed in favour of the development, namely proposed measures to improve biodiversity, and socio-economic benefits (paras 38 and 39).

[16] The reporter was correct to find that there would be negative effects on: spatial strategy; green belt land; the historic environment, landscape character and setting, in particular, concerning several local views; amenity; addressing travel demands of new development; greenhouse gas reduction; and sustainability, owing to the increase in reliance upon private cars which would result from the development and its inaccessibility from public transport networks (paras 33 and 34, and 41 - 43).

[17] Ministers agreed with the reporter's conclusions that Policy 2.1 of the LDP did not favour the proposed development and that the development did not accord with the development plan for the reasons set out in paragraphs 14.22 to 14.26 and 14.28 of the report. They agreed with the reporter's assessment of the proposed development in relation to the sustainability principles of SPP and with his findings and conclusions in respect of the adverse effects of the proposed development. Ministers concluded (para 47);

"Even assumingthat there is a shortfall in the effective housing land supply of around a third...Ministers agree with the Reporter that..., the adverse effects of the proposed development would significantly and demonstrably outweigh its benefits. This is notwithstanding a steep tilt on the balance in favour of the proposed development...and the potential benefit of the proposed development in helping to address the assumed shortfall."

Ministers agreed that that the proposed development would not be sustainable overall and was not supported by SPP. The proposed development did not accord with the development plan and material considerations did not indicate that planning permission ought to be granted (paras 44 - 48).

The appellants' submissions

[18] Ministers had failed to discharge their duty to reach a determination as to whether there was a shortfall in the five-year effective housing land supply and, if a shortfall existed, what the extent and seriousness of that shortfall was (*Gladman Developments Limited v The Scottish Ministers* [2019] CSIH 34). In assuming a shortfall, they had avoided determining one of the key issues. By stating in terms that they had not formed a concluded view, they had made no determination.

[19] Ministers had failed to determine the appropriate methodology. In order to ascribe appropriate weight to any shortfall in the balancing exercise, Ministers had to form a view on the broad magnitude of that shortfall (*Hallam Land Management v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1808, Lindblom LJ at para [51]). In ascribing weight, it was important to see how one reached that shortfall in the first place, otherwise it was simply a figure without substance, which would change over time.

Ministers had failed to put themselves properly into a position where they could determine the appropriate weight to apply. Whilst Ministers had made a factual presumption about shortfall in the present case, the appellants had been left completely at sea as to how Ministers would approach that question in the future. They had substantially prejudiced the appellants by not determining which was the correct methodology. The appellants could

not determine whether they could pursue some alternative form of development on the site. The decision was not adequately reasoned (*South Bucks District Council v Porter (No 2)* [2004] 1 WLR 1953 per Lord Brown (para 36)).

[20] Ministers had missed a step when considering policy 2.1. That policy required a balancing exercise to be undertaken between any shortfall and the factors listed in the policy. In order to undertake that exercise, it was necessary to know the broad extent of the shortfall, because the higher the shortfall, the greater the tension that required to be put into the balance against the policy factors. The three different methodologies produced different degrees of shortfall. The reporter had considered the extent of the shortfall generated upon the application of each method. Ministers had adopted the reporter's reasoning in relation to the extent of the shortfall generated upon the application of the average method and the appellants' alternative residual method. However, they had not adopted the paragraph of his report (14.27) where he provided his reasoning as to why the application ought still to be rejected when the policy factors were weighed against the highest degree of shortfall, which was that generated by the application of the appellants' preferred residual method. They provided no reasons of their own as to why there was a conflict with policy 2.1 in those circumstances. Having assumed that the highest shortfall was the correct one, Ministers had simply failed to balance the effect of that degree of shortfall with the policy factors. The issue was with the reasons and method, rather than with the outcome.

Scottish Ministers' submissions

[21] In determining a planning appeal, the court is concerned with the legality of the decision-making process and not with the merits of a decision. Matters of planning

judgement are within the exclusive province of the planning decision maker (*Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 at 780). It is for the planning decision maker, having regard to the relevant LDP and the relevant proposal, to decide what the determining issues are, the evidence that is material to those determining issues and the conclusions to be drawn from that evidence. It was for the planning decision maker, applying his expertise and judgement, to resolve the determining issues (*Moray Council v the Scottish Ministers* 2006 SC 691 at paras [29] and [30]). The decision must leave the informed reader in no substantial doubt as to the decision maker's findings in fact and conclusions on the main determining issues (*South Bucks DC v Porter (No.2)* at paras 35 and 36; *Moray Council* at paras [28] to [30]). However, the decision should not be subjected to detailed textual analysis and criticism (*Moray Council* at para [28]).

[22] Ministers had adopted the same straightforward approach in the present case as they had taken in the case of *Taylor Wimpey v The Scottish Ministers* [2023] CSIH 2, namely, they had assessed that there was a shortfall, and considered whether that could be remedied by the grant of planning permission for development of a green belt site by applying the criteria in the SLDP and SPP.

[23] There was no error in law in the approach of Ministers to the question of shortfall. There was no need for a decision maker to calculate the precise level of any shortfall in the five-year effective housing land supply (*Gladman Developments Ltd v Scottish Ministers* 2020 SLT 898, LP (Carloway), delivering the opinion of the court, at paras [43]– [49]). Ministers were entitled to confine themselves to an approximate figure or range. In any event, in estimating the shortfall Ministers applied the appellants' residual methodology and determined the appeal on the assumption that there was a shortfall in the effective housing

land supply of 1,621 units. Planning permission may still be refused notwithstanding the application of the presumption in favour of sustainable development (*Gladman Developments Ltd v Secretary of State for Housing, Communities and Local Government* [2020] PTSR 993, Holgate J at para 80). The appellants' complaint was with the result; not with the means used to achieve it. There was no suggestion by the appellants that an alternative methodology ought to have been used to assess the shortfall. There was no prejudice to the appellants in the process followed. If the appellants wanted to understand the reasons for the refusal of their application, they only had to look at the site specific reasons given in the decision notice.

[24] The appellants' complaint that Ministers did not adopt or agree with paragraph 14.27 of the report was irrelevant. It was clear when reading their reasoning as a whole that Ministers had engaged with the different methodologies. They recognised each of the methods was available, that each had been considered by the reporter, and they had then proceeded on the assumption that the preferred residual method was the correct one. There was no need to adopt paragraph 14.27. One had to read the decision notice in light of Ministers' conclusion that there was a shortfall of around one third. That conclusion was to the appellants' benefit. In any event, paragraph 14.27 did not take account of the HLA 2021 or the parties' submissions on that. Ministers were mindful of the court's comment in *Graham's The Family Dairy v Scottish Ministers* 2019 SLT 258 that a wholesale adoption of a reporter's reasons was a careless approach to decision-making. Ministers took a different approach to that of the reporter in that they adopted the appellants' preferred residual method. It therefore strengthened Ministers' position that they did not adopt that paragraph. Ministers had considered the shortfall and had then gone on to consider the

proposed development against the factors in policy 2.1. Based on that approach, they concluded that policy 2.1 of the SLDP did not favour the proposed development and that the proposed development did not accord with the SLDP. They had not missed a step.

Ministers were entitled to reach the decision they did having carried out that balancing exercise. There was no error in their approach.

Decision

[25] A decision will be regarded as invalid where the decision maker has failed to take account of a relevant consideration or has taken into account an irrelevant one (*Wordie Property Co Ltd v Secretary of State for Scotland*, LP (Emslie) at 1984 SLT 345, pp.347–348). A relevant consideration in this case was whether there was an effective five-year housing land supply.

[26] The central question is whether Ministers were entitled to make an assumption as to the level of shortfall in the five-year housing land supply or whether, as the appellants submit, they were under a duty to determine as a matter of fact, whether or not there was a shortfall and, if so, the extent of that shortfall. The implication is that it was impermissible to make an assumption. They had no option but to determine the shortfall and its extent.

[27] The decision notice states (para 31) that the reason for making the assumption was the desire to keep the remainder of the notice as brief as possible. We are not clear what exactly is meant by this phrase (and we do not find the decision notice to be particularly brief). The appellants are correct that a desire for brevity is not a reason for missing out a required step in the decision making process, but that is not what happened. Ministers explained (para 26) that they agreed with the reporter that the process for carrying out an

HLA could not be replicated in the context of considering a planning appeal. Having considered that it was not open to them to resolve the various challenges to the HLA they had to make an assumption regarding the shortfall in the five-year land supply. In doing so Ministers adopted the appellants' preferred methodology. The shortfall was the one that was most beneficial to the appellants producing, as it did, a steep angle of tilt in favour of the development. Nothing material was left out of account and there was no irrationality in the decision.

[28] The adverse effects of the proposed development are summarised in paragraphs 33 and 34 of the decision notice. Briefly, Ministers agreed with the Reporter that the proposed development would have an adverse effect on the setting and character of Strathblane and several local views. There would be a moderate adverse effect on the green belt. The development would increase reliance on private car use in a way that was not sustainable. It would not be an accessible development in a sustainable location and would not be located so as to reduce travel demand. Transport represented a constraint on the proposed development both in terms of infrastructure and accessibility. Other material considerations were considered by Ministers, some of which weighed in favour of the development, others against. Overall the adverse effects significantly and demonstrably outweighed the development's benefits, even applying the steep tilt.

[29] We do not accept that the reasons given for the decision were inadequate or that the appellants have been prejudiced by not knowing whether Ministers accept their preferred methodology. The informed reader is left in no doubt about the reasons for the decision. Ministers are under no obligation to answer any broader questions on housing land shortages. The appellants know Ministers' views on the specific site constraints. It is to be

expected that any assumption as to the methodology in calculating the shortfall in any future application would remain the same unless clear and cogent evidence dictated otherwise.

[30] The appellants also submit that Ministers failed to take into consideration and balance the effect of any shortfall in the five-year effective land supply with policy 2.1 of the SDLP. Specifically they point to the adoption by Ministers of the reporter's reasons in paragraphs 14.22 to 14.26 and 14.28. In doing so they did not refer to paragraph 14.27 which considers the appellants' preferred method of calculating the five-year land supply.

[31] A number of reasons for not adopting 14.27 were advanced by Ministers, including that that paragraph did not consider the HLA 2021 and this had been taken into account by Ministers in reaching their decision. We are not wholly persuaded by this reason as the preceding paragraphs, which dealt with alternative methodologies, did not take the HLA 2021 into account either.

[32] Nevertheless we are not persuaded that there is any material error in the Ministers' approach. It is clear from the decision notice as a whole, and in particular paragraphs 31 and 41 to 45, that in considering policy 2.1 Ministers made the same assumption about the level of shortfall and the methodology as they had done in considering the balancing exercise under SPP.

[33] The appeal is refused.