



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 34
XA72/18

Lord President
Lord Menzies
Lord Brodie

OPINION OF THE COURT

delivered by LORD MENZIES

in the Appeal

by

GLADMAN DEVELOPMENTS LIMITED

Appellants

against

THE SCOTTISH MINISTERS

Respondents

Appellants: J Findlay, QC, A O Sutherland; Burness Paull LLP
Respondent: Burnet; Scottish Government Legal Directorate

14 June 2019

Introduction

[1] This is a statutory appeal under section 239 of the Town and Country Planning (Scotland) Act 1997 against the respondents' refusal of an appeal against the decision of Stirling Council to refuse the appellants' application for planning permission in connection with a proposed development consisting of 70 houses, a cemetery with associated engineering works and landscaping on 11ha of land to the south of Campsie Road, Strathblane ("the Site").

[2] The issues are whether the Reporter appointed by the respondents to make the decision erred in failing, **first**, to decide whether the Council's 5-year effective housing land supply is currently being met by failing to determine whether the Council had used the correct methodology to be used in calculating that supply, **second**, to take account, as material considerations, of previous decisions made by the respondents and their appointed reporters concerning that methodology (in particular decisions on whether the methodology should take account of under-supply relative to previous targets), and, **third**, to give reasons why she disagreed with the conclusions in those decisions in relation to the correct methodology. Underlying the appeal is the appellants' view that the figure for the Council's 5-year effective housing land supply should be arrived at by taking into account under-supply of housing in previous years.

Law and Policy Framework

[3] Scottish Planning Policy provides for "a presumption in favour of development that contributes to sustainable development" (paras 28 to 31) according to which planning authorities "should ... ensure a generous supply of land for house building is maintained and there is always enough effective land for at least five years" (para 123). While planning decisions require to be made in accordance with the relevant local development plan "unless material considerations indicate otherwise" (1997 Act, s 25(1)), where there is shortfall in the 5-year housing land supply, Local Development Plan (LDP) policies in that regard will not be considered up to date (Scottish Planning Policy (2014) (SPP), para 125); further, the status of the sustainable development presumption is elevated from a "material" (para 32) to a "significant material" (para 33) consideration. In that situation:

“Decision-makers should also take into account any adverse impacts which would significantly and demonstrably outweigh the benefits when assessed against the wider policies in this SPP.” (para 33)

This latter requirement results in a “tilted balance” in favour of granting permission

(*Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] 1 WLR

1865, per Lord Carnwath at p 1887, para 59, and Lord Gill at p 1891, para 80). For discussion

of the same framework of law and policy arising in relation to different issues, see *Gladman*

Developments Ltd v Scottish Ministers [2018] CSIH 17 (LP (Carloway), opinion of the court,

paras 2 and 5 to 9) and in *Graham’s The Family Dairy Ltd v Scottish Ministers* 2019 SLT 258 (LP (Carloway), opinion of the court, paras 2 and 3).

[4] How the number of years of effective supply of housing land is established requires to be explained. The number of years is assessed annually in a planning authority’s Housing Land Audit (HLA). HLAs provide a snapshot of the amount of land available for the construction of housing at a particular time each year (Planning Advice Note 2/2010 Affordable Housing and Housing Land Audits, para 45). They are the measurement through which the respondents are able to monitor planning authorities’ compliance with the requirement for an effective 5-year housing supply. PAN 2/2010, issued to promote greater consistency and transparency in the content of audits and the way in which they are carried out (para 40), recognised the value of systematic collection of information to assess the extent to which planning authorities are identifying and delivering sufficient land for housing (para 44), and addressed the methodology and content of HLAs as follows:

“Methodology and Content

51. A housing land audit should contain relevant information about the established and effective housing land supply, allowing for monitoring and comparison with the housing land requirement. The starting point each year will be the inclusion of:

- all land with planning permission for residential development, including the remaining capacity of sites under construction;
- land allocated for residential development (including the residential component of any mixed-use development) in adopted development plans (LDP); and
- other land with agreed residential potential, such as land identified for housing in proposed LDPs or assessed as appropriate for housing following an urban capacity study.

52. Local authorities should consider including a range of variables in an audit including a unique site reference, site area, site capacity, site ownership, the planning status of the site, annual completions, the greenfield or brownfield status of the land, whether it is a windfall site, and the type of housing being provided.

53. It is good practice to ensure that individual sites can be tracked readily from one audit to the next until such time as development is completed. If the audit is to provide an accurate picture of housing land supply, it will be necessary to ensure that the annual completions are recorded accurately and shown in the audit, including the residential component of mixed-use developments and the unplanned contribution to the housing supply made by windfall sites and conversions. Completions on regeneration sites should be shown net of any demolitions which have taken place. All sites completed in any given year should be listed in a separate schedule and a comprehensive table of historical annual completions should also be provided.

Effective Land Supply

54. Not all of the sites in the audit will be effective, and it is important that the audit distinguishes effective, i.e. unconstrained sites, from those which are affected by constraints which cannot be overcome in time to contribute to the housing land requirement. The decisions and assumptions around effectiveness and programming are crucial to the accuracy and usefulness of the data in the audit and therefore merit careful consideration.

55. The effectiveness of individual sites should be determined by planning authorities in the light of consistent interpretation of the following criteria and through discussions with housing providers. The aim is to achieve a realistic picture of the available effective land supply which can contribute to the housing requirement so that the level of additional housing, and therefore land needed to meet the overall requirement, can be established. To assess a site or a portion of a site as being effective, it must be demonstrated that within the five-year period beyond the date of the audit the site can be developed for housing (i.e. residential units can be completed and available for occupation), and will be free of constraints on the following basis:

ownership: the site is in the ownership or control of a party which can be expected to develop it or to release it for development. Where a site is in the ownership of a local

authority or other public body, it should be included only where it is part of a programme of land disposal;

physical: the site, or relevant part of it, is free from constraints related to slope, aspect, flood risk, ground stability or vehicular access which would preclude its development. Where there is a solid commitment to removing the constraints in time to allow development in the period under consideration, or the market is strong enough to fund the remedial work required, the site should be included in the effective land supply;

contamination: previous use has not resulted in contamination of the site or, if it has, commitments have been made which would allow it to be developed to provide marketable housing;

deficit funding: any public funding required to make residential development economically viable is committed by the public bodies concerned;

marketability: the site, or a relevant part of it, can be developed in the period under consideration;

infrastructure: the site is either free of infrastructure constraints, or any required infrastructure can be provided realistically by the developer or another party to allow development; and

land use: housing is the sole preferred use of the land in planning terms, or if housing is one of a range of possible uses other factors such as ownership and marketability point to housing being a realistic option.

56. Programming of sites is an important element of the audit. Programming is an indication of the expected annual completions on each site, taking account of the lead-in times, the ability of the site to be developed, and the capacity of the local housing market. The housing land audit should show the expected completions on sites over the following five years. The contribution of any site to the effective land supply is that portion of the expected output from the site which can be completed within the five-year period. It will be important that the programming is also related to the expected timing of housing land allocations in the local development plan.

57. Programming is widely recognised as a less than scientific exercise. Nonetheless it is important that assumptions do not overestimate the likely completions, as the audited effective supply forms the basis for the calculation of the additional housing land requirement to be provided through the development plan. Overestimation of the potential of the effective supply will reduce the amount of additional land allocated and therefore reduce the flexibility available in the supply to address market fluctuations and other constraints to the delivery of housing. Realistic programming will demonstrate the continued availability of sites to maintain a five-year supply and help to monitor the availability of sufficient sites to continue to meet the housing land requirement. It will also show whether the supply includes a

sufficient range of sites to meet the varying requirements of different parts of the housing market. House builders are discouraged from underestimating the yield from effective sites with the aim of seeking additional land allocations, and, equally, local authorities are encouraged to become familiar with the realities of the operation of the housing market in their areas and not to overestimate the likely level of completions.

58. Planning authorities should use the information from the audit process to ensure that at all times sufficient effective land is available to meet the housing land requirement for at least the following 5 years. Planning authorities, housing and infrastructure providers should work together to ensure that sites identified as effective are successfully developed within the expected timescale. Where constraints arise, or funding commitments necessary to delivery of the site are delayed, the status of the site should be reviewed as part of the next housing land audit.

Non-Effective or Constrained Sites

59. Where sites which form part of the established housing land supply are identified as non-effective, the audit should identify the nature of the constraint and the necessary action and time required for resolution of the constraint to allow house building. Planning authorities, housing and infrastructure providers should work together to ensure constraints inhibiting the development of sites are removed, particularly where the site is needed or expected to contribute to the housing land requirement during the life of the development plan. In a small minority of cases it may prove impossible to remove development constraints. Where this occurs, the site should be removed from the audit of housing land supply.

Land with Agreed Potential

60. Land with agreed potential includes any land which is not formally identified in an adopted development plan or which does not have planning permission. It can include land identified for housing in proposed local development plans or assessed as appropriate for housing following an urban capacity study. Careful consideration should be given as to whether to include such sites in the audit, although inclusion will not pre-empt subsequent consideration of the status of the site by the planning authority when finalising a development plan or determining a planning application. If a site ultimately is rejected by these processes, it should not be included in the next audit."

[5] On 17 February 2016, the respondents published their "Draft Planning Delivery Advice: Housing and Infrastructure" ("the Draft Advice"). Under the heading "How should the 5 year effective housing land supply be calculated?", this document stated (para 22):

"The baseline for determining whether there is a 5 year supply of effective housing land is the Housing Supply Target (HST). The HST should be expressed as a total figure to be achieved over the development plan period under consideration, although an annual figure may also be set out."

[6] The Housing Supply Target (SPP, para 115) is a policy view, set out in the LDP, of the number of homes the authority has agreed will be delivered over the periods of the development plan and local housing strategy, taking into account wider economic, social and environmental factors, issues of capacity, resource and deliverability; requires to be reasonable, should properly reflect the Housing Need and Demand Assessment (HNDA) estimate of housing demand in the market sector, and should be supported by compelling evidence.

The Draft Guidance went on, at para 23:

“Below is an example of how the 5 year effective land supply should be calculated. It is taken from the Heads of Planning Scotland Planning Performance Framework. See: PPF4 Guidance: Annual report template and guidance notes – v4. February 2015.

Table 1: 5 Year Effective Land Supply

5-year effective land supply (years) =	5-year effective housing land supply (units) <i>[over]</i> 5-year housing supply target (units)	X 5
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This calculation will give a numerical shortfall or surplus. For example, if the Housing Land Audit shows a 5 year effective housing land supply of 9500 effective units, but the local development plan has a 5 year housing supply target of 10000 units:

$9500/10000 = 0.95 \times 5 = 4.75$ years effective housing land supply. In this case there is a numerical shortfall in the 5 year effective housing land supply of 500 units has emerged.”

It further stated (para 75) that:

“As part of the Housing Land Audit process, information on completions can be used to identify how much land remains available. Completion rates should not automatically be used as an indicator for additional land release. Where past completions are lower than expected, it does not always follow that additional land needs to be allocated for housing. A balance needs to be struck to ensure that low levels of anticipated completions (arising from wider factors including market

conditions) do not artificially inflate the level of additional land release required. Solutions may lie in unlocking allocated sites which remain constrained through more proactive intervention such as the provision of infrastructure.”

[7] The Draft Guidance was subsequently withdrawn by the respondents on 29 November 2017, effective 1 December, but according to the open letter issued by the Chief Planner, there remained “a strong policy position on planning for housing which is set out in Scottish Planning Policy (SPP) and supported by PAN 2/2010”.

[8] In general terms the equation used to establish the number of years of effective supply divides the actual 5-year effective supply by the annual HST. Prior to Stirling Council’s 2017 HLA, previous completions were subtracted from the Housing Land Requirement, which figure was then divided by the years remaining in the LDP to provide a figure for the annual HST, to be used in the equation described (2016 HLA, p 5). The HLR figure from which the completions would be subtracted was the number of new homes to be built (based on the LDP’s HST) plus the “generous margin” specified in the LDP, ie 10 to 20% on the HST, depending on local circumstances, to ensure a generous supply of housing land (SPP, para 116). In 2016, both calculations were discussed: taking into account previous under-supply by subtracting completions from the HLR produced a supply of 3.9 years; without the subtraction it was 4.9 years (p 16). The former method was adopted. The 2017 HLA, issued on 30 June 2017, used only the latter method. It said that the Council had decided to use the calculation method specified in the Planning Performance Framework, which itself referred (p 21) to paragraph 55 of PAN 2/2010 (*supra*). It recognised that the precise method of calculating the number of years of effectively supply was disputed, that there was a variety of approaches at both local and national levels of government and in the private sector, and that there was no finalised guidance from the respondents in place (page 14). Using its method, it arrived at a figure of 5.3 years’ effective supply of housing

land. Accordingly, absent a shortfall on the 5-year supply, in any planning applications for housing, the sustainable development presumption would only be a material – as opposed to a significant material – consideration, LDP policies in relation to the supply of housing land would be considered up to date, and there would be no tilted balance in favour of permission. The appellants challenge the conclusion that there was no such shortfall on the basis that previous completions should have been taken into account.

[9] The equivalent issue also arose in the course of the preparation of Stirling Council's latest LDP in relation to the setting of the Housing Supply Target for the plan period. There was a shortfall in delivery for the previous LDP of 540 homes. On 24 November 2017, the respondents' Reporters issued their report on the proposed LDP 2 ("the Examination Report"). In this it was stated that paragraph 75 of the Draft Guidance (*supra*):

"does not actually exclude previous under performance in relation to completions rates from being used as an indicator for additional land release. I find that paragraph 75 cautions against ensuring that low completion rates do not artificially inflate the level of additional land release required, but requires that a balance be struck between low completions rates and the wider factors that contribute to such low rates, and the level of additional land release required." (Issue 3, p 48, para 18)

The Reporters recommended that previous completions should be taken into account in LDP

2. LDP 2 in the form in which it was adopted by the Council in October 2018 did take account of past completions in arriving at a figure for the HST for the plan period.

Stirling Council Decision

[10] The appellants applied to Stirling Council for planning permission for the proposed development at the Site. On 7 November 2017, the Council refused permission on the basis that the application was contrary to the Development Plan and there were no material considerations that would support any other conclusion. The Council considered that the development would be contrary to Primary Policies 1 (Placemaking), 2 (Vision and Spatial

Strategy), 7 (Historic Environment) and 9 (Managing Landscape Change), and Policies 1.1(b) (Site Planning), 1.5 (Green Belts; and the Council's Supplementary Guidance, SG03, on Green Belts), 2.1 (concerning Vision and Spatial Strategy and Sustainable Development) and 2.10 (Housing in the Countryside), of the 2014 LDP and proposed 2016 LDP. On the basis that they would result in over-development of the settlement edge, and would not protect or enhance the historic environment, the Council also considered that the proposals would be contrary to guiding sustainable development principles in the SPP (para 29). In particular, the decision letter noted that the scale of the residential development was beyond that supported by its green belt and housing in the countryside policies, and would not provide significant economic and social support to the local area in terms of Primary Policy 2.

Reporter's Decision

[11] The respondents' Reporter dismissed the appeal and refused planning permission by letter of 25 July 2018 ("the decision"). The Reporter identified (para 2) the key issue as being whether there was a shortfall in the 5-year effective housing land supply, which may have justified approval despite the Site being within the green belt and the spatial strategy of the LDP. The issues in the appeal to this court arise from the Reporter's treatment of the question of whether the 5-year effective supply was being met. It is therefore worth setting out the Reporter's conclusions on this matter in full:

"14. The requirement on councils to maintain a five years' effective housing land supply is emphasised in Scottish Planning Policy and is reflected in both the adopted and the proposed local development plans. Currently, the appropriate methodology for calculating whether there is a five years' effective housing land supply is a matter of considerable dispute, principally between local planning authorities and those with an interest in building new houses or in securing planning permission for residential developments. Advice on the appropriate methodology which had been published in draft by the Scottish Government in February 2016 was withdrawn in November 2017. In doing so, the Chief Planner drew attention to the existing policy position in Planning Advice Note 2/2010.

15. That advice note confirms that the annual housing land audit is the established means of monitoring housing land. It provides a snapshot of the amount of housing land available for housing construction at the particular time, and it also demonstrates whether sufficient effective housing land is available to meet the requirement for maintaining a continuous five year supply. In preparing the annual audit, planning authorities are encouraged to consult widely with the house-building industry. I note that Stirling Council did so, and reached agreement on the future programming of construction on all of the sites included in the 2017 annual audit.

16. The council's conclusion was that the audit confirmed that the effective housing land supply exceeded the five years' requirement. I note that the methodology it applied broadly reflected that contained in the Scottish Government's draft delivery advice which has now been withdrawn. However it has not yet been replaced with an alternative methodology. I also consider that it is clear from Planning Advice Note 2/2010 that the responsibility for undertaking the annual audit rests with the planning authority and, while it is expected to consult widely, it is not required to obtain agreement to its conclusions. In these circumstances I am not in a position to contradict the council's conclusion that its 2017 annual housing land audit confirms that the commitment to maintaining a five years' effective housing land supply is currently being met.

17. For the avoidance of doubt, I do not consider that the conclusions of the reporter who recently examined the proposed local development plan are of direct relevance to the determination of this planning application. Her task in assessing how much housing land should be allocated for housing development in the next Stirling local development plan to cover the period to 2027 was different from that which is before me. My task in this appeal is to decide whether there is currently (or at least at the base date of the 2017 audit) a shortfall in the effective housing land supply for the next five years which might justify granting planning permission. The findings of the 2018 annual audit will reflect the changes which have occurred, and different conclusions may then be drawn."

Submissions

Appellants

Ground 1

[112] The Reporter abdicated her responsibility to determine whether or not there was a shortfall in the five year effective housing land supply. While as a matter of planning judgment she may have been entitled to accept the Council's methodology as reasonable, on a fair reading of the decision, the Reporter simply considered herself bound by the Council's

findings. That was not an exercise of judgment; it was a misdirection and an erroneous fettering of her responsibility as decision maker. The respondents' contention that the Reporter would have reached the same conclusion on the basis that she considered the application did not contribute to sustainable development was an impermissible invitation to the court to make a planning judgment as to the weight that would be applied to the lack of an effective 5-year supply.

Ground 2

[13] The Reporter failed to take account of the decisions of reporters and the respondents in previous planning appeals or, in the alternative, if she did take them into account, she failed to explain why she disagreed with them in relation to the correct methodology. Policies should be consistently applied and previous decisions concerning matters of national policy are capable of being material considerations, that is, "like cases should be decided in a like manner". Three recent decisions, one of which was accepted and adopted by the respondents, concerning the methodology, and in particular whether it should take account of past completions, were clearly material in view of the withdrawal of the Draft Advice on the appropriate methodology. The Reporter came to a different conclusion on the methodology from other Reporters, including the Examination Reporters, and the respondents. The issues in those decisions were sufficiently closely related to the present appeal that she should have had regard to them and explained why she was not following them or why they were distinguishable.

[14] The Reporter failed to deal with the relevant conclusions of the Examination Reporters, which had been raised by the appellants; in particular, the conclusions on the methodologies for calculating the effective housing land supply and any shortfall. It is at

least arguably illogical to suppose that a different methodology should be used for housing need in development plan terms, on the one hand, and development management, on the other. Whether under-supply and past completions should be taken into account affected the whole area and should not change depending on the facts and circumstances of the planning application. The respondents do not refer to any particular decisions in support of the assertion that there were decisions indicating that past completions should not be taken into account. If the Reporter took account of any such decisions, for which there was no basis in the evidence, that would have been unfair and would give rise to a further ground of challenge.

Respondents

Ground 1

[15] Whether or not there was a 5-year supply of effective housing land was a matter of planning judgment for the Reporter, as was the methodology to be used in calculating it in the circumstances of a particular case. The Reporter, in exercising her judgment in respect of both of these matters, did not act wholly unreasonably, which is the applicable standard of review. The methodology was in accordance with the Draft Advice published by the respondents; the withdrawal of the Draft Advice did not imply that the method proposed was inappropriate.

[16] As the appellants accept, the Reporter was correct that the conclusions of the Examination Reporters were not of direct relevance to the application. The Reporter knew that the proposed development plan process was considering the appropriate future allocation. The new LDP would require to allocate sufficient land for housing to ensure a 5-year supply when it was adopted. The Examination Reporters had identified the Site as a

possible housing land allocation, but concluded that it should not be allocated within the forthcoming LDP, notwithstanding that she was considering recommending additional sites to meet the housing land supply requirement. It was a matter of planning judgement in the circumstances whether to include past under-delivery.

[17] The Reporter did not abdicate her responsibility to make a decision on whether the 5-year supply was met: she accepted that it was on the basis of the 2017 Housing Land Audit and the submissions of the Council. She did give reasons, on which she was entitled to place considerable weight: she acknowledged that the methodology was a matter of dispute, that the 2017 HLA was recent and had been agreed, and that the evidence provided by the appellants (including the previous appeal decisions) did not contradict it.

Ground 2

[18] Each planning appeal required to be determined on its own facts and circumstances. The extent to which previous decisions were relevant material considerations was limited. Only if the issue and the facts were sufficiently closely related did any regard require to be had to a previous decision. The extent of the material consideration that required to be taken into account as a result of the appellants' submissions in relation to previous decisions was that the methodology was a matter of dispute. The appellants' three examples are not sufficiently closely related to amount to relevant material considerations that required a detailed explanation distinguishing them from the present appeal. Further, there are dozens of decisions in which the respondents or a Reporter have required to decide whether there was a 5-year effective supply, and to determine the appropriate methodology. In the cases of *DLA Delivery Ltd v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1305 and *Hallam Land Management Limited v Scottish Ministers* [2014] CSIH 110A, the

policies which were required to be consistently applied were clearly more closely related to the relevant previous decisions in terms of the particularity of the policies under consideration and being within the same planning authority area. *DLA* implied that a decision-maker was required to take into account his previous decisions if the issues were sufficiently similar, even if they were not specifically brought to his attention.

[19] In any event, it was clear that the evidence on effective supply presented to the Reporters in the other appeals was materially different to the equivalent evidence in the present appeal. Other previous decisions did reach different conclusions in relation to the methodology, for example, PPA-200-2035: Tower Farm, Torrance. This court cannot consider all the different decisions in relation to this general matter and discern an established consistent approach that required to be distinguished if it is not being followed. Regardless, the three decisions referred to did not create a precedent; indeed, they also recognised that there was no definitive method endorsed by the respondents. In particular, the Reporter in the Murieston Road Appeal concluded that whether there needed to be a standard methodology and, if so, which one, is largely a policy matter for the respondents. She also recognised that an up to date HLA is a very important tool in establishing the effective land supply. In that appeal, the latest agreed HLA was 3 years out of date and in those circumstances she could not agree that it was the only definitive assessment of the effective supply. Similarly, in PPA-400-2071: Wellhead Farm, the Reporter also noted that the latest HLA agreed between the Council and Homes for Scotland was 3 years out of date. The 2016 HLA he referred to was not agreed and he had concerns about its robustness and credibility. In PPA-320-2118: Hornhill Farm Road, there was no up to date agreed HLA, the accuracy of the latest HLA was disputed and the LDP was out of date.

Decision

[20] As noted above (para [10]), the Reporter identified only one key issue in this appeal, namely whether there was a shortfall in the five years' effective housing land supply which might justify approval of the proposed housing development, despite the appeal site's location within the green belt and the spacial strategy of the local development plan. Both parties agreed that this was indeed the key issue, and that the Reporter was correct to identify it as such.

[21] The dispute between the parties before this court (and between the appellants and the Council before the Reporter) focussed on the proper methodology for assessing whether there was a shortfall in the five years' effective housing land supply, and if so, the extent of such shortfall. The appellants maintained before the Reporter, and before this court, that the correct methodology was to take account of past completions and any past under supply when determining whether there was a 5-year supply of effective housing land. The position adopted by the Council before the Reporter was that past under supply and completions should not be taken into account when assessing the 5-year effective land supply.

[22] The differences in methodology may be significant – as was recognised by the Council in its Housing Land Audit 2016. Page 16 of that document sets out the two alternative methodologies in table 9a and 9b, together with a commentary on methods of calculation, as follows:

“

Table 9a Five Year Effective Land Supply													
Period 1 Phase 1 Requirement									Period 1 Phase 2 Requirement				
2010/11	2011/12	2012/13	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20	2020/21	2021/2022	2022/2023	2023/2024
Actual Completions				Programmed Completions									
344	306	247	321	322	368	258	260	393	562	552	531	578	552
Total Completions			1908	5 Year Effective Programming				2025	Housing Land Requirement				6076
				5 Year Effective Land Supply Target				2605	Completions and Programmed Completions for Development Plan Period				5594
				Years Supply	3.9	Gain/Shortfall Units		-580	Predicted Gain/Shortfall Units				-482

Table 9b Five Year Effective Land Supply													
Period 1 Phase 1 Requirement									Period 1 Phase 2 Requirement				
2010/11	2011/12	2012/13	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20	2020/21	2021/2022	2022/2023	2023/2024
Actual Completions				Programmed Completions									
344	306	247	321	322	368	258	260	393	562	552	531	578	552
Total Completions			1908	5 Year Effective Programming				2025	Housing Land Requirement				6076
				5 Year Effective Land Supply Target				2080	Completions and Programmed Completions for Development Plan Period				5594
				Years Supply	4.9	Gain/Shortfall Units		-55	Predicted Gain/Shortfall Units				-482

SPP requires that planning authorities maintain a 5 year supply of Effective Land at all times. The precise method of calculation is disputed, with varying approaches being demonstrated across Scotland at both the local and national level. At time of publication there was no finalised guidance from the Scottish Government in place. This audit presents both the previous approach used by this authority to calculate the supply and the approach utilised by the Scottish Government when reporting figures through the Planning Performance Framework (PPF).

Table's 9a and 9b highlight the significant differences in approach, with a full year's supply differing between the methods and leads to a shortfall of either 55 units or 580. In any event the Stirling Council is not maintaining a 5 year supply, albeit that the approach used by the PPF is extremely close to a 5 year supply. However, the Council has published a Proposed LDP which identifies further land for development. As outlined in section 3 many of these sites have not been included in this audit, it is therefore important to note that supply over the next 5 years is likely to increase and the Proposed Plan ensures a 5 year supply at adoption.

The calculation method used in Table 9a has been used for the current plan period. As the LDP 2014 is still in place as the adopted plan, this is the methodology that is used to assess compliance with SPP 2014. The calculation in Table 9b is provided for

information only at this point, pending updated guidance on this matter from the Scottish Government and the examination of the Proposed Plan.”

[23] It will be seen from the above that in their 2016 Housing Land Audit the calculation methodology used was that in Table 9a, which resulted in a shortfall of 580 units and an effective housing land supply of 3.9 years. In their 2017 Housing Land Audit the Council changed their methodology and effectively adopted the method of calculation shown in Table 9b. This method of calculation, which left out of account previous under supply, resulted in a figure of 5.3 years supply of effective land, and a surplus of 137 units. The justification which the Council provided in their 2017 Housing Land Audit was as follows:

“SPP requires that planning authorities maintain a 5 year supply of Effective Land at all times. The precise method of calculation is disputed, with varying approaches being demonstrated across Scotland at both local and national level, and the private sector. At the time of publication there was no finalised guidance from the Scottish Government in place. This audit utilises the calculation method as outlined in the Planning Performance Framework.

Table 9 demonstrates that Stirling Council is maintaining a 5 year supply of housing land as required by SPP, with evidence of a 5.3 year supply.”

No further explanation for the change in the Council’s methodology was given. The appellants disputed this methodology before the Reporter.

[24] There was therefore a stark dispute between the parties about methodology. The appellants’ calculation, as stated in their statement of appeal to the Reporter, and which took into account previous under delivery and past completions, resulted in 3.87 or 4.49 years of effective land supply, and the Council relied on its 2017 Housing Land Audit which gave a result of 5.3 years supply. The Reporter noted that there was a dispute as to the appropriate methodology but did not seek to resolve that dispute or determine the issue.

[25] We agree with the submission of the appellants that this was an issue with which the Reporter required to grapple, and to reach a determination. She had identified that the key issue in the appeal was whether there was a shortfall in the 5 years effective housing land supply. In order to decide this issue, we consider that she had to reach a view as to which of the competing methodologies she preferred, and to give reasons for her decision. There were alternative methods of calculation before her, and she was not bound to accept the calculation advanced by the Council in preference to that advanced by the appellants. Although she referred to Planning Advice Note 2/2010, nothing in that Advice Note obliged her to accept the methodology adopted by the Council. The appellants categorised the statement by the Reporter (in paragraph 16) that:

“In these circumstances I am not in a position to contradict the Council’s conclusion that its 2017 Annual Housing Land Audit confirms that the commitment to maintaining a 5 years effective housing land supply is currently being met”

as an abdication of her responsibility to determine the key issue. We agree with this categorisation.

[26] The respondents submitted that the Reporter was entitled to reach this conclusion, and that this was a matter of planning judgment. However, it does not appear to us that the Reporter exercised any planning judgment on this issue; instead, she considered herself bound by the Council’s methodology, and gave no adequate reasons for taking this view.

[227] We therefore consider that the appellants’ first ground of challenge must succeed.

[28] The appellants’ second ground of challenge was that the Reporter erred in law by failing to take account of the decisions of the reporters and the Scottish Ministers in other planning appeals, and of the Reporter in the examination of the proposed Stirling Council LDP in November 2017. Senior counsel for the appellants accepted that these were not binding precedents, and further accepted that the Reporter into the proposed LDP was

engaged in a different exercise from that facing the Reporter in the present appeal and that the conclusions with regard to the proposed LDP were not directly relevant. However, he submitted that the circumstances in these other proceedings were sufficiently similar that they amounted to material considerations to which the Reporter ought to have had regard.

[29] We emphasise that each planning application, and each appeal to the Scottish Ministers, requires to be considered on its own facts and circumstances; there is no question of previous decisions constituting a precedent by which reporters in further appeals will be bound. However, previous decisions of the Scottish Ministers or their reporters on planning appeals are capable of being material considerations – *DLA Delivery Limited v Secretary of State for Communities and Local Government* [2018] EWCA Civ 105 at paragraph 29; *North Wiltshire District Council v Secretary of State for the Environment* (1993) 65 P & Cr 137 at 145; *Hallam Land Management Limited v Scottish Ministers* [2014] CSIH 110A.

[30] Of course, in many planning appeals the issues will be site specific and the decision in one appeal may carry little, if any, significance in another appeal. It will always be open to a reporter to distinguish the circumstances of an earlier appeal, provided that adequate reasons are given for the distinction. As it was put by Mann LJ in *North Wiltshire District Council* (at 145):

"... It was not disputed in argument that a previous appeal decision is capable of being a material consideration. The proposition is in my judgment indisputable. One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest and it would be wrong to do so, that like cases *must* be decided alike. An inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision.

To state that like cases should be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect. If it is distinguishable then it usually will lack materiality by reference to consistency although it may be material in some other way. Where it is indistinguishable then ordinarily it must be a material consideration. A practical test for the inspector is to ask himself whether, if I decide this case in a particular way am I necessarily agreeing or disagreeing with some critical aspect of the decision in the previous case? The areas for possible agreement or disagreement cannot be defined but they would include interpretation of policies, aesthetic judgments and assessment of need. Where there is disagreement then the inspector must weigh the previous decision and give his reasons for departure from it. These can on occasion be short, for example in the case of disagreement on aesthetics. On other occasions they may have to be elaborate."

[31] In *R v Secretary of State for the Environment ex parte Baber* [1996] JPL 1034,

Glidewell LJ (at page 1040) suggested a slightly different question for the decision-maker, which was:

"'[A] previous decision having been drawn to my attention, do I take the view that it may well be sufficiently closely related to the matters in issue in my appeal that I ought to have regard to it and either follow it or distinguish it?'. Morritt L.J. (at p.1041) framed the question slightly differently again: 'May the earlier decision be sufficiently related to the decision I have to make? That is something that I should properly comment on either following or, if disagreeing, saying why'."

(See also Lindblom LJ in *DLA Delivery Limited (supra)* at paragraph 34.)

[32] These considerations apply with particular force in an appeal such as the present, in which the issue was agreed to relate to methodology rather than to particular site specific circumstances.

[33] The appellants in the present case placed before the Reporter three decisions of other reporters in other local authority areas, which grappled with the same issue. In each of these decisions one of the issues was the appropriate methodology to calculate the effective housing land supply, and whether past completions should be taken into account in calculating the 5 year requirement for the future. In other words, there was the same

dispute as to methodology as there was in the present case.

[34] The first of these decisions related to an appeal regarding an application for residential development at Murieston, Livingston. The decision by the reporter in that appeal was dated 16 August 2017. At paragraph 3.56 of his decision the reporter observed that:

“In determining the housing land requirement for the period to 2009/19, the Council takes no account of the number of completions achieved to date. Therefore, the annual requirement of 1142 units stays the same regardless of what development progress has been made to date, resulting in a 5 year requirement of 5710 units. The appellants’ housing land requirement is net of completions, providing a residual annual requirement of 2024 units resulting in a 5 year requirement of 10122 units.”

So the dispute as to methodology was the same as in the present case.

[35] At paragraph 3.58 the reporter in the Murieston appeal observed as follows:

“I consider the purpose of maintaining a 5-year effective supply is to make it more likely that the development plan’s overall housing land requirement is met. In doing so, it is clear that previous completions should be considered in the calculation. The only reason I can see why this would not be the case is for policy reasons.”

[36] At paragraph 3.66 he observed:

“Whether there needs to be a standard method for calculating the 5-year effective land supply and if so, what method, is largely a policy matter. My understanding is that Scottish Ministers intend to publish policy guidance and replace PAN 2/2010. However, at the time of submitting my report, no further actions have been made in this regard. Scottish Ministers are invited to consider my assessment and conclusions in this context.”

[37] In giving his conclusions on housing land supply, he stated at paragraph 3.93:

“The purpose of having a 5-year supply of effective housing land is to achieve a particular development plan based housing land requirement. In this regard, previous completions would need to be considered. However, the actual methodology that should be adopted to calculate a 5-year supply is essentially a policy matter.”

[38] The second decision on which the appellants relied before the Reporter was a Notice of Intention in relation to residential development at Wellhead Farm, Murieston Road, Livingston. The date of the Notice was 13 November 2017. The Reporter observed at paragraph 12 of the decision letter:

“Previous decisions on planning appeals are, of course, not binding upon me. However, conclusions on the interpretation of policy in those decisions are material considerations in this appeal. Where such conclusions have recently been endorsed by Ministers, that adds to their weight. Where relevant findings of fact are made, those findings are evidence in this appeal. I do not, of course, take them as incontrovertible evidence but consider them in the light of other evidence before me.”

The Reporter in that case identified the same dispute as to methodology (at paragraph 42), and then went on to record the similar methodological dispute before the reporter in the earlier Murieston appeal. He set out the reporter’s reasoning in that earlier appeal, including her decision that the appellant’s method best addressed the relevant principles, and that this conclusion was accepted by the Scottish Ministers. He accepted the reasoning in that decision, and considered that the appellant’s method should be applied to assessing land supply in the decision which he took.

[39] The third decision letter relied on by the appellants before the present Reporter was in relation to residential development at a site at Hornshill Farm Road, Stepps. The decision letter was dated 17 November 2017. The final decision was taken by the Scottish Ministers, who agreed with the Reporter’s reasoning. At paragraph 23 the Reporter gave the following reasoning:

“In circumstances where the annual average supply target is not being met, it follows that in the absence of any redress in the shortfall, the housing supply target over the course of the development plan period will not be met. As also noted in Pan 20/2010, if an audit is to provide an accurate picture of housing land supply, it is necessary to ensure that the annual completions are recorded accurately and shown in the audit.

I would agree with the appellants that it is essential that the land supply calculation takes into account the number of completions achieved to date in order to ensure that the supply target is achieved by the end of the development plan period. “

[40] Senior counsel for the appellants acknowledged that the exercise in which the Reporter on the proposed Stirling Local Development Plan was engaged was different from the exercise in which the Reporter in the present case was engaged. However, he drew our attention to some of the Reporter’s observations in that report which had some significance in the present appeal. The Reporter made the following observations:

“40 Following the hearing and closing submissions, and all other written evidence, I have concluded that the housing land calculation for this plan should be based on the 2010 evidence base of the HNDA 2011 and should include any surplus or shortfall of completions from the period 2010 to 2015 in the calculation.

50 The shortfall in delivery in the period 2010 to 2015 remains unaccounted for in the Council’s proposed method of calculation. While on one hand the calculation accepts the Housing Supply Target, it then appears to fail to take into account all the consequences of the same Housing Supply Target in terms of delivery of homes in Stirling.

51 The primary disagreement between the Council and all other parties on this issue is whether the shortfall in completions from 2010 to 2015 should be included, and for the reasons set out above, I conclude that any surplus/shortfall should be part of the calculation.

52 I find no compelling evidence as required by Scottish Planning Policy or convincing argument from the Council to support the omission of a shortfall in completions in Stirling in the period 2010 to 2015.

53 ... I find that Scottish Planning Policy at paragraph 115 clearly states that the Housing Supply Target is ‘a policy view of the number of homes the authority had agreed will be delivered over the periods of the development plan and local housing strategy’.

54 Omitting the shortfall in delivery does not appear to achieve any particular purpose other than to numerically achieve a lower target for this planned period. It does not address the fundamental issue of Scottish Planning Policy requiring the target and housing land requirement to be met in full, nor does it account for the

unmet yet identified need and demand for homes in the period 2010 to 2015.”

[41] We accept that the reporter who prepared the report on the proposed Stirling Local Development Plan was fulfilling a different role from the Reporter in the present case, but that report was published not long before the decision in the present appeal was issued, and the new LDP was adopted shortly after the decision letter in the present appeal. The issues regarding methodology, and the Reporter’s determination of them, were not identical to the issues in the present appeal, but they contained notable similarities.

[42] The respondents drew our attention to the fact that not all of the recent appeal decisions have been determined in the same way, and pointed to a decision of the Scottish Ministers in relation to a proposed residential development at Torrance, East Dunbartonshire. This decision was issued on 31 May 2017, before the Chief Planning Officer’s withdrawal of the draft guidance.

[43] The Reporter did refer to the conclusions of the Reporter who recently examined the proposed local development plan (see paragraph 17 of her report), and explained that she did not consider these conclusions to be of direct relevance to the determination of this planning application, because the task of assessing how much housing land should be allocated in the next LDP to cover the period to 2027 was different from that which was before her. We accept that difference, although we observe that the reasoning and conclusions of the Reporter on the new LDP have at least peripheral relevance to the methodological dispute in the present appeal. However, the Reporter did at least make reference to the report into the new LDP. She made no reference at all to the three previous decisions, nor to their reasoning as to the appropriate methodology to be used for assessing a 5-year supply of effective housing land. We consider that these were material

considerations to which she ought to have had regard. We do not suggest that she was bound to follow the same reasoning nor to adopt the same methodology for calculating effective housing land supply or shortfall. However, given that the same issue arose in those appeals, and that the decisions of the reporters (or, as the case may be, the Scottish Ministers) was to support the methodology favoured by the appellants, we consider that she was bound to make reference to these and to explain why in the circumstances she was not in a position to contradict the Council's conclusion. She made no reference to these decisions, nor did she make any attempt to distinguish them. In this respect also we consider that she erred in law, and the appellants' second challenge also succeeds.

[44] In summary, we consider that the Reporter has failed to address the key issue of the appropriate methodology for assessing whether there was a shortfall in effective housing land supply which might justify the "tilted" balancing exercise required by SPP paragraphs 33 and 125 – *Hopkins Homes v Communities Secretary (supra)*; *Grahams the Family Dairy Limited v The Scottish Ministers (supra)*. In failing to address this, she fell into error of law. She also fell into error of law in failing to have regard to material considerations, namely the three appeal decisions which considered the appropriate methodology for assessing the existence and extent of any such shortfall. She was not required to follow these as precedents; however, she required to make reference to them and, if departing from the reasoning in those appeals, to explain why she was doing so.

[45] Counsel for the respondents submitted that, even if we were against his primary submissions and found that the Reporter had fallen into error of law, this court should exercise its discretion not to quash the Reporter's decision. He submitted that there was no realistic prospect that the decision in relation to the appeal would have been different even if

the Reporter had preferred the appellants' methodology for calculating the 5-year effective land supply. The proposed development was clearly contrary to the housing policies of the 2014 LDP and the emerging LDP. The Reporter found that the proposed development was contrary to the purpose of the green belt policy in the area and also that it was contrary to the spacial strategy of the development plan. At paragraph 18 of her decision she concluded that the presumption in favour of development that contributes to sustainable development which was introduced by SPP did not apply. The appellants did not go so far as to submit that the Reporter was bound to find that there was a shortfall in the 5-year housing land supply; their complaint was merely that the Reporter did not give adequate reasons for her preferred methodology. Relying on *Hallam Land Management Limited v Scottish Ministers* (*supra*), counsel for the respondents submitted that the appeal was academic and should be refused.

[46] We do not agree. Because of her decision that she was not in a position to contradict the Council's conclusion that a 5-year effective housing land supply was currently being met, she did not address the "tilted" balancing exercise which she might (depending on how she determined the key issue) have been required to address. Her errors of law went to the root of the only key issue which she identified, and which both parties agreed was the key issue. We do not consider that it would be appropriate in the circumstances of this appeal to exercise our discretion not to quash the decision.

[47] For these reasons we shall allow the appeal, and quash the decision.