FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 3
XA32/22

Lord President
Lord Woolman
Lord Pentland

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

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

by

WEST LOTHIAN COUNCIL

Appellants

against

THE SCOTTISH MINISTERS

Respondents

and

OGILVIE HOMES LIMITED

Interested Parties

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Appellants: Armstrong KC; Morton Fraser LLP
Respondents: Way; Scottish Government Legal Directorate
Interested Parties: A O Sutherland (sol adv); Burness Paull LLP
20 January 2023

Introduction

[1] The appellants, as the local planning authority, refused an application by Ogilvie Homes for planning permission to construct around 104 homes on a greenfield site at Hen's Nest Road, East Whitburn, as outlined on the following plan:

Ogilvie Homes appealed that decision to the respondents, who appointed a reporter. The reporter granted planning permission on 8 April 2022.

[2] The planning authority now appeal that decision primarily on the basis that the reporter failed to apply the correct national and local planning policies for the release of greenfield land for housing. This issue involves a consideration of the correct trigger for that release; a shortfall in the 5-year supply of effective housing land. The following acronyms are occasionally used:

HLR	Housing Land Requirement
HLS	Housing Land Supply
HST	Housing Supply Target
LDP	Local Development Plan
PAN	Planning Advice Notice
SDP	Strategic Development Plan
SESplan	Edinburgh and South East Scotland Strategic Development Plan
SPP	Scottish Planning Policy

The relevant planning policies and plans

[3] The court has set out the Government's Scottish Planning Policy and several development plan provisions in relation to new housing in some detail in *Gladman Developments* v *Scottish Ministers* 2020 SLT 898, *Mactaggart and Mickel Homes* v *Inverclyde Council* 2021 SLT 19 and *Taylor Wimpey UK* v *Scottish Ministers* [2023] CSIH 2. In summary, the Town and Country Planning (Scotland) Act 1997 requires planning authorities to prepare a Strategic Development Plan and a Local Development Plan. Any application for planning permission must be determined in accordance with these plans unless material considerations indicate otherwise (s 25). The relevant plans for Whitburn comprise the SDP for Edinburgh and South East Scotland 2013, known as the SESplan, and the West Lothian LDP 2018.

[4] In terms of the SESplan, permission for housing development on greenfield sites can be granted where there is a shortfall in the 5-year supply of effective housing land (policy 7), but only if three criteria are satisfied. Those are that: (i) the development will be in keeping with the character of the settlement and local area; (ii) the development will not undermine green belt objectives; and (iii) any additional infrastructure will be funded by the developer.

[5] Policy HOU 2 of the LDP is in the same terms, except that it specifies four criteria. Criteria (i) and (iii) of SESplan policy 7 are reproduced as criteria (a) and (b) respectively. Criterion (c) is that the development will contribute to sustainable development and (d) is that the development is expected to deliver new housing within five years. There are therefore six criteria which require to be met. None is directly relevant to this appeal.

[6] Scottish Planning Policy 2014 is a material consideration when determining applications. There is a presumption in favour of sustainable development (para 28). Where a development plan contains no relevant policies, or they are out of date, the presumption

becomes a significant material consideration. It will be overcome only where adverse impacts demonstrably outweigh the benefits (para 33). This is known as the "tilted balance". SPP contains a section entitled "Enabling Delivery of New Homes". It provides that the planning system should "identify a generous supply of land … to support the achievement of the housing land requirement … maintaining at least a 5-year supply of effective housing" (para 110). LDPs must set out the housing supply target, based on need and demand (para 115). The HST is the number of houses which should be delivered over the plan period (para 115). This figure is increased by between 10 and 20% (the generosity margin) to establish the housing land requirement. Housing policies are deemed to be out of date if there is a shortfall in the required five-year effective housing land supply (para 125).

The Issues

[7] The development site was part of a larger area which had been considered during the consultation process which led to the adoption of the LDP. It had been rejected because it would have conjoined settlements; specifically East Whitburn and Whitburn. An application for permission for 250 houses was refused in May 2017 and an appeal against that decision was rejected in January 2019. In the present application the size of the site has been reduced in order to address the coalescence problem.

[8] A central issue before the reporter was whether there was a shortfall in the 5-year HLS. If so, the tilted balance would come into play. In their submission to the reporter, the local planning authority were critical of the way in which a shortfall is generally calculated. They described it as a mathematic equation which failed adequately to "capture the reality

and complexity of the development process, housing need and demand, and environmental and place based local considerations" (Hearing Statement para 3.3).

[9] It was accepted that the West Lothian HST for the years 2009-2024 was a minimum of 18,010, to which a generosity allowance added a further 10% to produce an HLR of 19,811 units. The number of completions from 2009 to 2020 had been 7,317; an average of 665 per annum. The planning authority noted that the court (a) had interpreted SPP as involving a tilted balance, and (b) quashed the Government's attempt to change the policies with SPP 2020 and PAN 1/2020 (see *Graham's The Family Dairy (Property)* v *Scottish Ministers* 2021 SCLR 569).

[10] Having set out their critique of the system, the planning authority nevertheless argued, in line with other local planning authorities, for the use of the average method of calculating whether there was a shortfall. This involves dividing the HLR by the number of years in the plan and then multiplying the result by five (19,811 ÷ 15 = 1,321 x 5). This produces a future five year requirement of 6,605. When set against the undisputed existing effective supply of 8,157 units, there is no shortfall; there is rather a 6.17 year supply available (8,157 ÷ 1,321).

[11] This method does not take into account the shortfall of 7,214 in HLR completions in the 11 years to 2020 (1,321 x 11 years less actual completions of 7,317). The housebuilding industry argue that the correct method of calculation (the residual approach) is for the annual HLR to be multiplied by 5 and any under delivery of completions ought to be added to that figure. This would produce a total of 14,531, which is well above the available effective supply. This, the planning authority argued, produces an unrealistic figure given the actual predicted demand.

The reporter

[12] The reporter first addressed whether the proposal complied with the provisions of the development plan. This was heavily dependent upon whether the "exceptional release" provisions applied; that is whether there was a shortfall in the 5-year HLS. The reporter noted the previous disputes about the average and residual methods and how these could produce radically different results. He determined that a debate about how to calculate an effective HLS for the next five years was unhelpful, as there were less than two and a half years of the development plan period left. A straightforward approach could be adopted. The SESplan had provided that about 18,000 homes were to be built and occupied by 31 March 2024. The 2020 housing land audit had concluded that only about 14,000 houses would be built by that date. There was therefore a significant shortfall in the HLS. On that basis, the exceptional release policies were engaged.

[13] In making his determination, the reporter took cognisance of the planning authority's arguments; describing them as "perfectly reasonable and logical". However, they were in part based on the contention that SPP 2020 and PAN1/2020 should be followed despite being quashed. They also failed to have regard to the fact that the adoption of planning policies, and their alteration, required to go through a formal planning process. It was not appropriate to argue the merits of existing policies in individual planning applications. The reporter had to apply the framework provided for in the approved development plan.

[14] The reporter then looked at each criterion, so far as applicable, in policies 7 and HOU 2 and made the following findings. First, the development would change the character of East Whitburn, but not in a manner which was sufficiently harmful. The development would be opposite other modern housing and was a proportionate expansion

of East Whitburn. Secondly, the proposal would contribute to sustainable development. Although the development would be located on the outer limits of pedestrian accessibility, it would help to meet the housing shortfall and might improve the natural habitat. The planning authority's concerns regarding the design and layout of the development were minor and could be resolved by means of appropriate conditions.

[15] Thirdly, in terms of the 1997 Act, the reporter looked at whether material considerations indicated otherwise than to grant. The proposal complied with the SPP. The tilted balance applied. There was no demonstrably harmful impact to justify refusal. As there was a shortfall and there were no such harmful impacts, that was a significant material consideration in favour of granting planning permission, which the reporter then did.

[16] In reaching his view on the shortfall, the reporter had regard to a decision by a different reporter on an application to develop 65 houses at *Mossend*, West Calder (PPA-400-2118), which involved similar considerations. Broadly, the same arguments were presented, and the same figures produced, using both the average and residual methods. The reporter considered that it was a matter for her discretion to decide which method to use. She noted that the reporter who had examined the LDP had concluded that there was a considerable shortfall. There was no evidence about how that shortfall had been addressed. The *Mossend* reporter (at para 25) considered that the residual method ought to be used and that a significant shortfall existed. The reporter in this case considered that this reinforced his view on the engagement of Policies 7 and HOU 2 (para 32).

Submissions

Planning authority

[17] The appellants maintained that the reporter failed to set out a proper basis for his

decision and reached unreasonable conclusions . A reporter must apply policy, but its interpretation was a matter of law for the court (*Tesco Stores* v *Dundee City Council* 2012 SC (UKSC) 278 at paras 17 to 23). According to the development plan, it was not an HST shortfall that was relevant, but whether there would be a shortfall in the next 5-years' supply. There was no penalty for not meeting the HST because it was envisaged that there would be a never-ending roll out of development plans. The reporter failed to consider whether there was a 5-year supply and how that should be calculated. He asked himself the wrong question.

[18] The trigger mechanism was intended to avoid developments which would impact on the delivery of planned sites, infrastructure and the environment It had not been suggested to the reporter that the failure to meet the HST operated as the trigger for the release of land. The reporter had identified the advantages of his approach, but not the disadvantages. He did not decide whether the average or residual approach should be adopted. He did not decide on which figure to use or what to do with the post 2024 supply. He did not decide on whether there was a significant shortfall in the 5-year supply.

[19] The *Mossend* reporter had asked the correct question and determined which approach to take. Had this reporter followed the same course, there was a real possibility that he would have reached a different view.

Scottish Ministers

[20] The respondents submitted that there was a distinction between questions of law, that is the identification of the correct question, and matters of planning judgement, that being how to answer that question (*Cairngorms Campaign* v *Cairngorms National Park Authority* [2012] CSOH 153 at para [75]). The reporter had directed himself to the correct

question; whether there was a shortfall in the 5-year supply. The answer was a matter for his planning judgement. There was no agreed or prescribed methodology. There was no guidance in the development plan policies or the SPP about how to deal with a situation in which there were no established 5-year targets. The reporter recognised that there were difficulties with applying either of the two customary methods of calculation in those circumstances. He was entitled to adopt a flexible and purposive approach (*West Dunbartonshire Council* v *Scottish Ministers* [2021] CSIH 49 at para [37]). He had not erred in his interpretation of the policies, which he had done in a pragmatic fashion.

[21] Even if the reporter had misinterpreted the policies, and ought to have applied one of the two recognised methods, there was no real possibility that his determination would have been different. It was clear that he did not consider that past shortfall ought to be left out of account. He was therefore unlikely to have adopted the average method of calculation, which did just that. He had used the *Mossend* decision as a cross check; it having used the residual approach.

Interested party

[22] Ogilvie Homes contended that the planning authority's grounds of challenge proceeded upon an inappropriately strict approach. It was wrong to address policies 7 and HOU 2 as though they were statutory or contractual provisions (*Hopkins Homes* v *Communities Secretary* [2017] PTSR 623). The rationale was that land, which would otherwise be protected, would be used to develop new housing to address any shortfall. Neither policy explained how to approach the issue of a possible shortfall where there were fewer than five years left of the plan period. There ought always to be a known target, but there was nothing beyond 2024. If the reporter had taken a literal approach to the policies, as

opposed to a flexible and purposive approach, he would have become stuck. He had to be pragmatic.

[23] The reporter had to apply the policy to the facts in order to calculate whether there was a shortfall. The methodology he used to calculate it was a matter of planning judgement within his exclusive province (*Tesco Stores* v *Environment Secretary* [1995] 1 WLR 759 at 780). It was wrong to say that he erred because he did not adopt either of the parties' methodologies. The ultimate aim was to ensure that housing demand was met throughout the plan period. For the policy to apply, there did not need to be a penalty for failing to meet the HST. The reporter was correct that the HLR was established through a formal process and could only be changed by that same process.

Decision

[24] In *NLEI* v *Scottish Ministers* [2022] CSIH 39 (LP (Carloway), delivering the opinion of the court, at paras [54]), the court emphasised the desirability of reporters expressing their decisions in an intelligible yet succinct manner. Reporters are not lawyers. Neither are many of those who have to read and implement their decisions. The reporter requires to identify the live issues and to frame a determination in a manner which leaves the reader in no doubt about what the reasons for the decision were and what considerations were taken into account. Within these bounds of legality, a reporter is generally free to apply his or her planning judgement to the live issues and to express the decision in a manner which will be easily understood by its potential readership.

[25] The report here readily meets that standard. It is both intelligible and succinct. The reporter asked himself the correct question of whether there was a shortfall in the 5-years' effective housing land supply (SESplan policy 7; LDP policy HOU 2; SPP para 125). It is

clear that he was well aware of the alternative methods of calculation, average or residual, which had customarily been advanced by, respectively, planning authorities and house builders. He was conscious also of the recent history of this topic, with changes in Government policy (ie SPP 2020 and PAN1/2020) and successful challenges to those changes in the court (see *Graham's The Family Dairy (Property)* v *Scottish Ministers* 2021 SCLR 569).

[26] Against that background, he made two decisions, neither of which can be faulted. First, no matter how unsatisfactory the planning system may be at present in relation to, for example, an up to date assessment of the demand for housing, he was legally bound to follow existing planning policy, including the figures which were contained in the development plans. Secondly, having been given a figure for the likely number of completions during the plan period to 2024, as a matter of fact there was a shortfall in the 5-year HLS. The court could only interfere with his finding on that matter if it amounted to an error in law; ie that there was no material before the reporter to support his view. It is apparent that there was such material.

[27] The reporter cut through the customary methodological debate by taking the number of houses, which ought, according to the development plans, to have been built during the plan period and subtracting the figure for the houses, which the housing land audit predicted would be built during that period. This produced a shortfall of 4,000 houses to 2024. His conclusion was not that the existence of this difference in numbers in itself triggered the exceptional release provisions, but that it demonstrated the existence of a significant shortfall in the effective HLS presently available. An adequate land supply should be available at all times. The figures before the reporter were more than sufficient to support his conclusion that the current supply was inadequate and that accordingly the trigger contained in the relevant policies was activated.

[28] Whether there is a shortfall in the effective HLS in any LDP area is a matter of planning judgement. Development plan policies, which provide a mechanism for the exceptional release of greenfield land, such as policies 7 and HOU 2, are a means to an end and not an end in themselves. That end is the fulfilment of the overall purpose of a development plan, which is to ensure that the housing need in the area is met. The policies do not provide a specific direction on how to check whether there is any shortfall once there are fewer than five years left of the plan period. The plan fixes no effective HST, and hence an HLR, to which the reporter could have had regard, beyond 2024. The reporter's approach in the circumstances was realistic and accorded with common sense. In that regard it is consistent with the recommended broad assessment approach (*Gladman Developments* v *Scottish Ministers* 2020 SLT 898, LP (Carloway), delivering the opinion of the court, at para [49]). It was clear from the level of disparity identified between the HST and the number of houses actually built, and estimated to be built, that the planning authority had fallen far behind the HLR. There is no error in the reporter's solution to that problem, which included a useful cross-check with the *Mossend* decision (see *Gladman Developments* v *Scottish Ministers* [2019] CSIH 34, Lord Menzies, delivering the opinion of the court, at para [29]). On the contrary, his reasoning is entirely coherent.

[29] The appeal is refused.