Planning Law Update: Recent Cases |

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1. Introduction

The selection of recent cases I wish to talk about today have their main focus on housing. However, I conclude with a very recent case concerning development within the heart of Edinburgh's Old Town.

2. Housing: Effective Land Supply vs. Prematurity

*Angus Estates (Carnoustie) LLP v Angus Co*uncil [2016] CSOH 145

This is a case which concerned the tension between two parts of Scottish Planning Policy. On the one hand paragraph 123 of SPP requires local authorities to maintain an effective housing land supply for at least a five-year period: Where a local development plan fails to provide for such a supply, it may be deemed out of date. On the other hand, paragraph 34 requires local authorities to consider whether the granting of a substantial planning permission would prejudice an emerging local development plan by predetermining decisions about the scale, location or phasing of new developments that are central to that plan.

In this case, the petitioners obtained planning permission on appeal for the development of a business park in Carlogie in August 2014. At that time, the Angus Local Development Plan of 2009 was due to be replaced. A main issues report was published in November 2012. The consultation period for the replacement plan was due to commence in February 2015. The draft had identified a housing land shortfall of 285 units over the plan period, with an overall shortfall of 730-750 units over the period 2016-2026. Angus Council had considered the terms of the draft Local Plan on 11 December 2014, at which time certain changes had been authorised.

On 18 December 2014, a special meeting of the Council took place to consider four applications for housing and for a further business park and housing at Pitskellie. The latter had been recommended for refusal by the Director of Planning. At that meeting, it granted two applications, refused one and also granted permission for the Pitskellie site after a motion by one of the councillors. In total, the number of housing units thereby consented was 872, in addition to a further business park. The petitioners argued that the decision granted so close to the commencement of the consultation period was an excessive response to a shortfall of 285 units and prejudiced the emerging LDP by effectively pre-determining the allocation for housing. A prior grant of permission at Monifieth before the special meeting, it said, had already answered the identified shortfall.

The Court disagreed. It held that in the exercise of its discretion, the Council was entitled not only to disagree with the Director of Planning regarding the Pitskellie site but also to grant permission for the three applications despite the terms of paragraph 34 SPP, so long as it had had regard to both. Moreover, the councillors were entitled to have consideration to the fact that although the Carlogie site had been identified for employment land in the adopted Local Plan since 2009, nothing had been delivered since that time. This was the case even although it recognised that permission had recently been granted to the petitioners at Carlogie for that purpose.

Regarding the housing, the Council was also entitled to take account of the need to ensure an effective housing land supply and to treat the local plan as being out of date in accordance with paragraph 123 SPP. It was within its own knowledge that housing developments are often developed in phases so that granting all three applications at the same time was not an irrational use of its powers in order to achieve the necessary numbers. Further, they were entitled to the view that that the Monifieth application would not in fact address the shortfall and that there was room for an additional business park in the local plan area.

It is interesting that in the exercise of its discretion, Angus Council did not consider the grant of permission for such a large number of houses in any way prejudiced the emerging local plan when it was due to be consulted upon only a matter of three months later. This is stark contrast to the position taken recently by central government in the Edinburgh area (e.g. Cammo Road). But that is the nature of discretion: unless perverse, it may be applied either way, so long as the relevant considerations are taken into account. What this case also demonstrates is that while paragraph 123 SPP enjoins local authorities "to ensure a generous supply of land for house building" there is nothing to prevent local authorities from being very generous indeed if they so choose.

2.1 Housing: Effective Land Supply vs. Prematurity (No.2)

Taylor Wimpey UK Limited v Scottish Ministers [2016] CSIH 94

Like *Angus Estates (Carnoustie) LLP v Angus Council*, this case was also unsuccessful before the Court of Session on appeal in relation to the same issue but for opposite reasons.

Whereas the *Angus Estates* case challenged the grant of planning permission for 872 units by the local authority to a rival developer shortly before the adoption of the Fife Local Plan on the grounds of prematurity, Wimpey challenged the refusal of a development of up to 250 houses where prematurity was cited as the sole reason for refusal of its permission. The Wimpey site is 11ha to the west of Maybury Road within the West Edinburgh area which is eventually expected to deliver 2,700 units in terms of the applicable strategic policy (SESplan). It therefore would have made a relatively modest but important contribution to that shortfall.

A matter which must have been greatly frustrating for Wimpey is that the Reporter concluded that the proposed development accorded with the existing development plan, the proposed development plan and some provisions of Scottish Planning Policy. This was against a background of an established housing need, an accepted need to modify the green belt and an identified shortfall in the housing land supply in terms of SESplan. However, she also concluded that in light of the guidance contained within paragraph 34 of SPP, granting the permission sought would undermine the plan-making process which was well advanced, given that the target date for the submission of the local plan report of examination was 27 February 2016. The decision of the Reporter was 4 December 2015. By the time this application came before the Reporter, six months had passed since the Scottish Ministers' decision in relation to the Cammo site (for 670 units) which I mentioned above.

Therefore, the same tension as between the need for additional housing units and the maintenance of a five-year effective housing land supply on the one hand and the requirements of a plan-led system as arose in the Angus case also arose here. However, the approach taken by the decision maker in each case was diametrically opposite.

The legal challenge largely centred around the decision-making process. It was claimed that the Reporter's decision was partly influenced by factors which were either factually incorrect or which had not been properly canvassed by the parties to the appeal. These arguments were rejected by the Court. It was also claimed that the Reporter did not provide an adequate basis for the decision on prematurity. As with the *Angus* case, the Court emphasised that whether the grant of permission for the proposed development would undermine the emerging local plan process is ultimately a matter of planning judgment which is within the sole province of the decision maker. In relation to this the

Court noted that the Reporter set out her reasoning, noted outstanding issues regarding infrastructure requirements and also noted that the far larger Cammo site had been refused by the Scottish Ministers previously. In these circumstances, her discretion had been exercised reasonably, she reached a decision she was entitled to reach and therefore her decision was upheld.

Despite the opposite approach being taken on the question of prematurity as between the Reporter and Angus Council, in each case their respective decisions were upheld on the basis that they were valid exercises of planning judgment. Such decisions may only be challenged in very extreme instances where the reasoning is clearly irrational, and *Wednesbury* unreasonableness can be demonstrated.

2.3. Effective Housing Land Supply – the English perspective

Suffolk Coastal District Council v Hopkins Homes Ltd [2017] 1 WLR 1865 (Supreme Court)

The concepts of sustainable development and the requirement to maintain a five-year supply of housing land as found in paragraphs as found in paragraphs 28 and 123 of SPP respectively are also to be found in the English National Planning Policy Framework. Although the wording and structure are quite different, these are to be found in paragraphs 14 and 49 of the NPPF which were the subject of a Supreme Court decision on 10 May of this year.

Prior to that decision, there had been confusion on the correct application of those paragraphs when local planning authorities do not have a five-year deliverable land supply. The Supreme Court noted that in relation to paragraph 49, it had been considered by the Administrative Court on no fewer than seven separate occasions between October 2013 and April 2015 with varying results.

The case itself concerned two long running judicial reviews of decisions of planning inspectors in areas for which the relevant local planning authority did not have a five-year deliverable land supply. The question which arose in both cases is the correct interpretation of paragraphs 14 and 49 of the NPPF.

Paragraph 49 provides as follows:

> "Housing applications should be considered in the context of the presumption in favour of sustainable development. Relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites."

Paragraph 14 recites the presumption in favour of sustainable development, which is said to be "at the heart of" the NPPF and which should be seen as "a golden thread running through both plan-making and decision-taking" and then defines this to mean in the context of decision taking:

- approving development proposals that accord with the development plan without delay and
- where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:
    - any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole or
    - specific policies in this Framework indicate development should be restricted

As in Scotland, there is a presumption in favour of the development plan. Section 38(6) of the Planning and Compensation Act 2004 is in similar terms to section 25 of the Town and Country Planning (Scotland) Act 1997 and states:

"If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

The Supreme Court adopted a narrow interpretation of what is meant by 'policies for the supply of housing'. Namely, it is only housing supply policies that are to be considered 'out of date' in paragraph 49. The judges disagreed with the Court of Appeal that such term should be extended to other policies that 'affected' housing supply, such as green belt or countryside policies. The second issue was more simply a question of fact as to whether or not there was a five-year deliverable housing land supply. If there is no such five-year

supply then paragraph 14 is engaged. The Supreme Court noted that it mattered not what policies caused the lack of five-year supply.

Paragraph 14 provides for what was referred to in that case as the 'tilted balance' in favour of granting planning permission, or 'presumption in favour' as we would have it. Namely, planning permission should be granted unless adverse impacts of doing so would significantly and demonstrably outweigh the benefits when assessed against the policies in this Framework taken as a whole, or where specific policies in the Framework indicate that development should be restricted.

Two issues are important to understand in relation to paragraph 14. Firstly, the development plan (including the housing supply policies) retains its statutory force but the focus shifts to 'other material considerations'. The 'other material considerations' will then be determined in accordance with the national guidance in paragraph 14.

Secondly, where housing supply policies are to be considered out of date, for the 'other material considerations' assessment, planning weight may still be given to other policies in the development plan. However, such weight must be considered on the 'significantly and demonstrably outweigh the benefits' test founded on the golden thread of sustainable development. This 'tilted balance' test is a matter of planning judgement and the weight to be given to remaining local development plan policies is a matter for the decision maker (*Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759).

A guest appearance was made by Lord Gill who noted that the specific policies restricting development includes not only restrictive policies within the Framework itself but also development plan policies to which the Framework refers. The example given being greenbelt policies.

The Supreme Court also took the opportunity to re-enforce the role of the Courts in judicial challenges to planning decisions. On matters of planning judgment, the judges noted that the planning inspectorate (and by extension, the DPEA) should be considered analogous to that of expert tribunals and that Courts should be slow to intervene in policy judgements within their area of specialist competence.

This highlights the great difficulty applicants will face challenging planning judgement decisions solely on the *Wednesbury* reasonableness. Appellants require to be mindful of

the distinction between issues of interpretation of policy, appropriate for judicial analysis on the one hand, and issues of judgement in the application of that policy which are not; and not to elide the two (*Tesco Stores Ltd v Dundee City Council* 2012 SLT 739).

Decision makers in England and Wales may attach less weight to such policies (as they affect the supply of housing) in their planning judgement in the absence of an up to date five-year supply. Given that Supreme Court decisions affect the UK as a whole and the parallels between SPP and NPPF which exist, it might be expected that this decision will in future affect the way in which housing applications are treated where housing policies are not up to date in the local plan.

On the one hand, there will be greater pressure to grant planning permission for housing developments where there is a shortfall and the local plan is not up to date. On the other hand, there is still the tension with the issue of prematurity. Inevitably, if an application is to be refused because it will prejudice an emerging local plan, it follows that it is also highly likely that the housing land supply policies will be out of date. So, this potentially brings us fill circle with the issues in *Angus Estates* discussed above.

3. <u>Developer contributions</u>

Aberdeen City and Shire Strategic Development Planning Authority v Elsick Development Company Ltd [2017] UKSC 66

Another Supreme Court case, hot off the presses and a historic one to boot, as this was the first sitting of that august body in Scotland which took place in June of this year. The Court dismissed the appeal against a decision of the Inner House brought by Aberdeen City and Shire DPA.

The planning authority in this case adopted a Strategic Development Plan which included Supplementary Planning Guidance ("SPG") aimed at securing developer contributions to transport infrastructure for the area covered by the plan. The mechanism was to seek payment into a Strategic Transport Fund ("the STF") based upon the size of planning permissions granted in order to defray costs projected to be £86.6m up to the year 2023. An objection to the SPG was upheld by the Reporter who considered the Strategic Development Plan on the basis that contributions were not directly related to the development in question, contrary to the requirements of Circular 3/2012 on Planning Obligations. The planning authority nonetheless approved the SPG including the STF funding mechanism. A challenge was therefore brought by Elsick under section 238 of the

1997 Act seeking removal of reference to the STF from the proposed strategic development plan.

Before the Inner House, it was argued that the contributions sought in terms of the SPG were to be part of a pooled resource and were not therefore directly related to the proposed development, of a scale and kind appropriate to the development and in all other respects reasonable, contrary to the terms of the Circular. It was also asserted on behalf of Elsick that the contribution that it was required to pay was disproportionate to the infrastructure demands created by its proposed development. Data published by the SDA was produced in Court which showed that the impact of the Elsick's development on many of the proposed interventions to be funded by the STF was either zero or de minimis. Those submissions were upheld by the Inner House. In particular, the Inner House noted that there is a requirement that there be a clear link between the development and any mitigation offered as part of the developer's contribution in terms of paragraph 17 of the Circular. The Court stated:

"The STF, and the requirement in [the SPG] to contribute to it, may be regarded as a sound idea in political or general planning terms. It may be seen as an imaginative idea which allows advanced strategic planning objectives to be achieved in a structured manner, financed by new development. That does not, however, permit the imposition of an obligation on a developer to contribute to an intervention which is simply not related to the proposed development…In analysing the meaning of cumulative impact, upon which the respondents understandably place reliance, it is difficult to improve upon the reasoning of the reporter that there is a "distinction … between sharing costs among developments which cumulatively required a particular transport investment and the funding of a basket of measures, not all of which are relevant to every development". That is the essential flaw in the concept of contributions to the STF as a lawful planning obligation. The reality is that many of the planned developments in the designated zones have no impact at all on the interventions proposed as part of the STF's programme of improvements."

The SPG was accordingly quashed by the Inner House.

The planning authority did not, however, let matters lie and appealed to the Supreme Court. It argued *inter alia* that the policy tests in the Circular were not part of the legal tests for the validity of a planning obligation. The appeal was unanimously rejected with Lord Hodge giving the leading judgment with which all the other justices agreed.

The judgment examines the following issues:

1. The correct legal tests for the validity of planning obligations and planning conditions;

2. the extent to which planning authorities are obligated to comply with national policy in particular that contained in a Scottish Government Circular when formulating their own supplementary guidance; and

3. the extent of the supervisory jurisdiction of the courts when considering challenges to planning policies.

An approved strategic development plan is of central importance to planning decisions under the 1997 Act. Supplementary guidance deals with the provision of further information in respect of proposals set out in the plan.

Planning obligations in terms of s75 of the 1997 Act do not necessarily need to relate to a particular permitted development on the burdened land. A planning obligation may be entered into in circumstances which are not connected with any planning application. For instance, a planning authority may contract for the payment of financial contributions towards certain infrastructure necessitated by the cumulative effect of various developments, **so long as** the land which is subject to the obligation contributes to that cumulative effect.

However, it is not lawful to restrict the commencement of development by planning obligation until the developer undertakes to make a financial contribution towards infrastructure which is unconnected with the development of the site. If such a planning obligation were lawful, an authority could use an application to extract benefits which are unrelated to the proposed development. Moreover, it is not lawful to require contributions towards such infrastructure in a planning obligation which does not restrict the development of the site by means of a negative suspensive condition, as such a planning obligation would neither restrict nor regulate the development of the site in terms of section 75.

In determining a planning application, the authority must take into consideration material provisions of the development plan and other material considerations. For a planning obligation to be material it must have **some connection** with the proposed development which is not trivial. If a planning obligation, which is otherwise irrelevant to the application, is sought as a policy in the development plan, the policy seeking to impose such an obligation is an irrelevant consideration for determination of the planning application.

In the instant case, the scheme established in the supplementary guidance involved the pooling of payments which were not tied to a particular development. The opt-out did not make the scheme voluntary in any real sense. The 1997 Act does not allow for such a scheme. The supplementary guidance and the planning obligations which it promotes were unlawful for two reasons.

Firstly, the use of the developer's contribution to the pooled Fund on infrastructure with which its development has no more than a trivial connection means that the planning obligation is not imposed for a purpose related to the development and use of the burdened site as required by section 75, nor did the planning obligation restrict or regulate the development within the meaning of section 75.

Secondly, the planning obligation entered into by the Respondent was an irrelevant consideration in terms of a planning application because there was only a trivial connection between the development and the infrastructure intervention(s) which the proposed contribution would fund. An authority is not empowered to require a developer to enter into an obligation which would be irrelevant to an application for permission as a precondition of the grant of that permission.

What the decision does **not** state is that the scheme was unlawful because it did not comply with the Circular. The Circular was simply a material consideration which was required to be taken into account but not necessarily followed. It was, however, unlawful when the legal considerations which underlie the guidance are applied.

The effect of this decision is to provide a clear and robust ground for developers to resist paying contributions to planning authorities where they consider those demands to be excessive. Unless there is a clear link between the development proposed and the mitigation measures sought by way of infrastructure contributions from the local authority, any such demands are now clearly unlawful. It is perhaps a pity that such an innovative scheme proposed by Aberdeenshire Council has been definitively struck down. Any other attempts at such innovation will now require a change in primary legislation.

4. <u>Enabling Development</u>

Park of Keir Planning Appeal PPA-390-2042

This was an application made by the Park of Keir Partnership comprising Judy Murray, Colin Montgomerie and the King Group which was refused by Stirling Council. The proposed development which received a considerable amount of media coverage was for a Tennis Academy, an 18 hole golf course, starter golf courses, a 150-bed hotel and 19 houses in 110ha of the Green Belt between Bridge of Allan and Dunblane. I appeared for the objectors at a public inquiry which took place just over a year ago. The case had been called in by the Scottish Ministers because it raised matters of national interest, namely the effect on the Green Belt and its wider implications for leisure and tourism. The Reporter who heard the case recommended the application for refusal. This was overruled by the Ministers by decision dated 30 August 2017 because they considered that there were material considerations which indicate that planning permission in principle should be granted. In reaching this view Ministers attached more weight than the Reporter to the economic value of the proposed development and the regional and national importance of the sports facility

Leaving aside the merits of that decision, I would like to look at the question of enabling development which was raised in the course of that appeal. The phrase "enabling development" used to be a term of art applied to historic or listed buildings whereby a limited amount of commercial development would be permitted if there was no other way to safeguard the future of that cultural asset. However, it now appears that the potential scope of enabling development has gone much further.

To illustrate the prior position, SPP provides the following at paragraph 142:

> "Enabling development may be acceptable where it can be clearly shown to be the only means of preventing the loss of the asset and securing its long-term future. Any development should be the minimum necessary to achieve these aims. The resultant development should be designed and sited carefully to preserve or enhance the character and setting of the historic asset."

During the course of the inquiry, the appellants pointed to LP policies employed by Aberdeenshire, East Lothian and Inverclyde Councils who have adopted have policies which support housing led enabling development, particularly where its allocation in a development plan has not been foreseen. These have included the provision of 'enabling housing development' to fund the start-up of new employment, leisure or tourism uses in

exceptional cases, and as a one-off opportunity where the wider public benefits of securing enabling development significantly outweigh the disadvantages of the development.

The Reporter noted that there are also examples of planning permission being granted for residential enabling development which cross funds sport and tourism related investments by other planning authorities, namely, the Angus Golf Resort and the Inchmarlo Hotel and Spa. In those cases, the inclusion of new build housing as the necessary funding element for the wider sport and tourism uses was considered by the relevant local authorities to be acceptable on balance due to the significant economic benefits that would be delivered as a result of the enabling development.

He then went on to state:

> "I have already concluded that there is no policy support in the development plan for allowing enabling housing development to subsidise new build development. Similarly, SPP makes no suggestion that there should be an allowance for enabling development in these circumstances. The only reference to enabling development in SPP is in the context of development to fund the restoration of listed buildings.
>
> That means that this form of enabling development is not endorsed by SPP, but SPP is not comprehensive and it does not follow that a type of development which is not foreseen by SPP is necessarily contrary to it.
>
> It is notable that other planning authorities in Scotland have policies which allow for enabling housing development to fund the start-up of new businesses in exceptional cases, where the benefits significantly outweigh the disadvantages of the development. Moreover, planning permissions have been granted in Angus and Aberdeenshire for developments where new build housing has been accepted to help fund sport and tourism related developments.
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> Although there is no such policy in the Stirling Council area, I consider that there might be circumstances where enabling housing development is acceptable to cross-fund a business proposal, as envisaged in paragraph 28 of PAN73."

So, whilst Stirling Council (being the authority area in which the appeal site was located) had no such policies and despite enabling development of this kind not being envisaged

by SPP, the Reporter held that there was no reason in principle why enabling development of this sort should not be permitted.

It therefore appears that there is now new scope for housing development in areas hitherto considered sacrosanct, such as the countryside or Green Belt, where a legitimate case for cross-funding can be made. This is especially likely where funding is required for wider sports and tourism uses. Along with the *Suffolk Coastal DC* case discussed above, this potentially means ever more pressure on local authorities to permit housing development in sensitive areas.

5. Development within a World Heritage Site

Byrom v City of Edinburgh Council [2017] CSOH 135

This case concerned a challenge to a proposed development of a new 225-bedroom hotel with bar, restaurant, café and commercial units behind the Central Library on Victoria Street and the Cowgate. The Council granted permission in November 2016 but that decision was challenged on the basis that the setting of the Central Library, now an A listed building, had not been properly taken into account.

In particular, it was contended that the part of the setting which included the views from the Central Library had not been properly taken into account. Another argument was that the Council had not properly considered the recent change in status of the Central Library from Category B listed to Category A which had only occurred shortly prior to the Council's decision. A third issue that was raised was in relation to air quality.

The application was refused. Aside from the general considerations of discretion being a matter solely for the planning authority as discussed in *Suffolk Coastal DC*, a point was raised by reference to the case of *R (Leckhampton Green Land Action Group) v Tewkesbury BC* [2017] EWHC 198 (Admin). That is, that the court is not engaged in a theoretical exercise in a judicial review application. Common sense and realism are required and the court should have regard to the basis upon which the decision was reached. Reports to Committee require to be as concise and focused as may be possible in order not to make them too elaborate and unwieldy. They are addressed to a knowledgeable readership. The fact that a matter is not specifically referred to in the report to Committee does not mean that is was not considered: *R (Trashorfield) v Bristol CC* [2014] EWHC 757 (Admin) and *Oxton Farms v Selby District Council* [1997] E.G. 60 (C.S.).

Therefore, in terms of the views looking out from the Central Library, it could be taken from the ample information before the Council (and the withdrawal of opposition by HES following a revised scheme) that the matter had been considered and had not altered its view that permission should be granted. The same could be said of the air quality issue, which, according to technical reports before the Council, would only suffer a minor adverse impact. The change in listing category also made no difference, because the Council had determined that there would be no adverse impact on adjacent listed buildings. The category of the Central Library and any differentiation in the protection it might be afforded was therefore irrelevant. The re-listing was not even a material consideration, still less one that might have affected the decision reached by the Council.

Accordingly, each of the three grounds of challenge was rejected and the petition refused. In addition to the nearby G&V on George IV Bridge, the ibis and Motel One on the Grassmarket, or even the Carlton and Scotsman on North Bridge, visitors to Edinburgh will probably have yet another place to stay to choose from in the near future.

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