
Gladman Developments v Scottish Ministers

Scotland and the Tilted Balance

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What we will cover

- Background to the Planning Case
 - The Court Decision
 - Implications for housing development
 - What does it mean for other forms of development
 - Future of the Tilted Balance
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Quarrier's Village - Background



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- PPP application submitted June 2018 for residential development (circa 45 units)
- Stated shortfall in Inverclyde 5yr effective HLS
- Presumption put forward as a “significant material consideration”
- Refused February 2019
- 7 RfR – all based on Development Plan
- No reference to SPP in RfR



Quarrier's Village – Planning Appeal (1)



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- Appeal submitted March 2019
- Appeal refused July 2019
- Reporter agreed there was a shortfall in the 5yr effective HLS

I find there is, in all probability, a shortfall in the private supply in the local authority area at this time and Clydeplan policy 8 and LDP policy RES3 are therefore engaged.

- Two overarching themes in the reasons for refusal:-
 - (i) Access to facilities and reliance on private cars
 - (ii) Impact on landscape and greenbelt
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Quarrier's Village – Planning Appeal (2)



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- Clydeplan Policy 8
- Address shortfall
- Infrastructure can be delivered
- contributing to sustainable development;
- in keeping with the character of the settlement and the local area;
- not undermining Green Belt objectives.



Quarrier's Village – The Presumption



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SPP - Paragraph 33.

*“Where **relevant policies** in a development plan are **out-of-date or the plan does not contain policies relevant to the proposal**, then*

*the presumption in favour of development that contributes to sustainable development will be a **significant material consideration**.*

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.

The same principle should be applied where a development plan is more than five years old.”

- Presumption in favour of granting planning permission development that contributes to sustainable development. Can be outweighed by adverse impacts that *significantly and demonstrably outweigh*.
- “The Tilted Balance”

Quarrier's Village – Planning Appeal (3)



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- Presumption could apply, but:-

“I do not consider this proposed development would meet two of these principles...I do not consider that the presumption in favour of sustainable development would apply.”

Elsbeth Cook, Quarrier's, July 2019

*“On that basis **paragraph 33 of Scottish Planning Policy is not a relevant consideration** in this case and, under that paragraph, I need not consider whether any adverse impacts would significantly and demonstrably outweigh the benefits when assessed against the wider policies of SPP”*

Elsbeth Cook, Reddingmuirhead, March 2020



You're not contributing to sustainable development – you're not getting in.

Quarrier's Village – The Presumption



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- Previous Court Decisions
 - Graham's the Family Dairy v Scottish Ministers (2019)
 - Gladman v Scottish Ministers (2019) (Strathblane)
- These decisions referred to English case law and use of the term “tilted balance” – *Hopkins Homes*
- Court referred to the tilted balance applying in Scotland through SPP.





- Minister's decision to refuse planning permission for housing quashed on basis it did not consider the change of circumstances between the date of the Report, when the Reporter relied upon the soon to be adopted LDP alleviating any housing shortfall, and the date of Ministers' decision, by which time it was apparent there was still a shortfall.
- Development was considered "sustainable"

"They must, however, in this case address how they have approached the "tilted" balancing exercise which the housing land shortage requires. ... In particular, they must make it clear whether and how, in accordance with SPP (paras 33 and 125), they regarded the shortage as a "significant material consideration" and the extent to which they regarded the green belt as "significantly and demonstrably" outweighing or otherwise the benefits of the development." [36]

- Reporter's decision quashed for failing to grapple with issue as to whether or not there was a housing shortfall, and whether or not in calculating such shortfall regard should be had to prior history of under-completion.
- Although Reporter concluded development not sustainable the Court held that a different decision may have resulted from application of the tilted balance had she concluded there was a shortfall

“This latter requirement [SPP para 33] 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”

This SPP introduces a presumption in favour of development that contributes to sustainable development.

28. The planning system should support economically, environmentally and socially sustainable places **by enabling development that balances the costs and benefits of a proposal over the longer term.** The aim is to achieve the right development in the right place; it is not to allow development

at any cost.

29. This means that policies and decisions should be guided by the following principles: [There follows 13 principles]

32. The presumption in favour of sustainable development does not change the statutory status of the development plan as the starting point for decision-making. Proposals that accord with up-to-date plans should be considered acceptable in principle and consideration should focus on the detailed matters arising. **For proposals that do not accord with up-to-date development plans, the primacy of the plan is maintained and this SPP and the presumption in favour of development that contributes to sustainable development will be material considerations.**

“33. Where relevant policies in a development plan are out-of-date or the plan does not contain policies relevant to the proposal, then the presumption in favour of development that contributes to sustainable development will be a significant material consideration.

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.

The same principle should be applied where a development plan is more than five years old.”

“125. ... Where a shortfall in the 5-year effective [HLS] emerges, development plan policies for the supply of housing land will not be considered up-to-date, and paragraphs 32-35 will be relevant.”

“What the court was engaged in was an explanation of the practical import of the paragraph in terms of decision making. ...

In determining to refuse planning permission, the counterbalancing factors require to outweigh that consideration “significantly and demonstrably”.

This is part of the equation for determining whether a development is, in overall terms, sustainable.

It is not an exercise which is undertaken after a determination on sustainability has taken place. ...”

A housing development which will remedy, to some extent, a housing shortage is something which almost inevitably “contributes to sustainable development”, which is what paragraph 33 requires, in one degree or another. It will do so also in terms of the economic benefits of construction and in other ways too.

Whether it is, in overall terms, a sustainable development is another question. That is one for planning judgement, but it involves the use of the tilted balance.

The correct approach, in practical terms, where there is a housing shortage, is to regard that shortage as “a significant material consideration”. It is not determinative. Paragraph 33 goes on to provide that, in such a situation, where the tilted balance is thus in play, the decision maker must take into account any adverse impacts. These will include factors such as greenbelt, environmental and transport policies as set out in the otherwise “out of date” SDP or LDP. **Each factor will play a part in the determination of whether, overall, the development is to be regarded as sustainable.**

The new starting point [47]



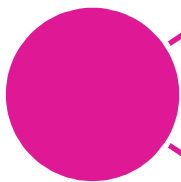
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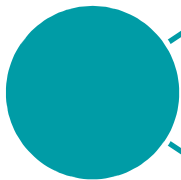
- The starting point ought, on the contrary, to have been that there was a presumption in favour of this development because, inter alia, it provided a solution, at least in part, to the housing shortage.
 - **Thereafter, the question was whether the adverse impacts, notably the other policies in the development plan, “significantly and demonstrably outweighed” the benefits of the development in terms of the housing shortage and the economic gain.**
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Gladman Development Ltd v the Scottish Ministers [2020] CSIH 28 – 3 further points

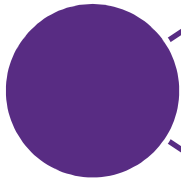
The greater the shortage, the heavier the weight which tilts the balance will be. If the appellants' figures for the shortage are correct, that weight may well be very substantial. [50]



Identify correct target – HLR not HLS (& give proper thought to methodology for past under delivery – see first Gladman)



Form a view as to broad extent of shortfall – “to determine the angle of the tilt before the adverse impacts are placed on the other side of the scale”.



Is the development in *overall* terms sustainable – i.e. every box in paragraph 29 SPP does not require a tick.

Points for Discussion

- Housing Development
 - SESplan
 - Other forms of development
 - “Relevant Policies”
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Housing Development

- Clearest (simplest) application of the tilted balance
- Shortfall triggers the Tilted Balance
- Addressing shortfall = contribution to sustainable development
- Edinburgh Garden District
- Residential led scheme in greenbelt
- Reporter's Report 13 January 2020
- Ministers' NoI 30 April 2020



- SESplan adopted 2013
- Reporter said para 33 applied because SESplan over 5 years old

There is however, a serious difficulty in deciding what conclusions to draw from the output of the housing land audit. As the applicant correctly states, the housing land supply target figures are taken from SESplan 1, approved more than five years ago, and its associated supplementary guidance. In accordance with paragraph 33 of SPP, there can be no dispute that the development plan is more than five years old and that consequently the presumption in favour of development that contributes to sustainable development is a significant material consideration in the determination of this application...

...I am unable to conclude with certainty that there is currently an effective 5-year housing land supply.

- **Ministers agreed that Paragraph 33 applied, but for different reasons**

Ministers agree with the Reporter’s conclusions in that, in terms of paragraph 33 of SPP, the ‘presumption in favour of development that represents sustainable development’ is a significant material consideration in the determination of this case, however for different reasons than those stated by the Reporter. Ministers do not agree that paragraph 33 applies solely because SESplan is more than 5 years old, considering instead that it applies because relevant housing policies are, in part, out of date.

Ministers have taken into account the Reporter’s consideration of the ‘tilted balance’ in para 9.13. The Reporter notes that the term ‘tilted balance’ is borrowed from case law in England or from a case interpreting policy documents applicable to England. The Reporter sets out that he is not convinced that this is correct or is the right interpretation of the Scottish cases when those cases use the term “tilted balance”. The Reporter concludes that he prefers to interpret SPP paragraph 33 in its own terms. Ministers agree with the Reporter’s conclusions in this regard.

- Tilted Balance across SESplan area?
- Role of SESplan and LDP Policies
- Is there a shortfall? See *Hallam Land v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1808

Other Forms of Development

- Not just housing
- Benefits v Impacts
- Section 36 applications – the “Code”
- *William Grant & Sons*



Relevant policies



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For a discussion of the approach to relevancy and out of date policies in England, see:

- Lindblom J in
 - *Bloor Homes v SOSCLG* [2014] EWHC 754 (Admin)

and further consideration in

- *Gladman Developments Ltd v Daventry CC & SOSCLG* [2016] EWCA Civ 1146
 - per Sales LJ in particular.
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The future of the Tilted Balance

- No Supreme Court Challenge
- Fundamental expression of Scottish Government Planning Policy
- NPF4 and SPP – will the tilt survive?

