

[Redacted]

**From:** McNairney J (John)  
**Sent:** 25 June 2020 09:54  
**To:** [Redacted]  
**Cc:** Cackette PH (Paul); [Redacted]  
**Subject:** RE: For clearance - Gladman and the SPP

Thanks [Redacted], I'm content with the papers. I've tracked a couple of editing changes in the submission and one comment in the technical paper.

John

John McNairney | Chief Planner | Planning & Architecture | Scottish Government | 0131 244 7528  
     

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**From:** [Redacted]  
**Sent:** 25 June 2020 09:02  
**To:** McNairney J (John) <John.McNairney@gov.scot>  
**Cc:** Cackette PH (Paul) <Paul.Cackette@gov.scot>; [Redacted]  
**Subject:** For clearance - Gladman and the SPP  
**Importance:** High

John  
With many thanks to colleagues above for their input, please find links to the submission and draft consultation paper relating to the above.  
Grateful for any final comments / clearance before it goes to the Minister today.  
Thanks  
[Redacted]

[Redacted]

[Redacted]

From: [REDACTED]  
Planning and Architecture Division  
25 June 2020

Minister for Local Government, Housing and Planning

**PLANNING POLICY AND HOUSING - IMPLICATIONS OF GLADMAN DEVELOPMENTS LTD VS SCOTTISH MINISTERS**

**Purpose**

1. To seek your view on action to take in response to a recent Court decision in the case of Gladman Developments Ltd. vs Scottish Ministers.

**Priority**

2. Routine.

**Background**

3. Planning policy on housing is a complex and widely contested aspect of the Scottish Planning Policy (SPP). Over the years since the SPP was adopted different interpretations of the policy have emerged and there has been growing litigation in this area. We previously tried to address this by issuing draft planning advice, but subsequently withdrew it, given the lack of consensus on several aspects of the approach and our focus on the Planning Bill at that time.

4. More recently we had been planning to address the issues to a certain extent in correspondence with planning authorities. We wrote to encourage authorities to be flexible in preparing local development plans, given the impact of current restrictions from Covid-19 in a letter issued on 29 May. We also proposed writing a follow up letter to explain that, as more plans are likely to remain in place for more than 5 years, Ministers were minded to amend paragraph 33 of the Scottish Planning Policy, so that plans will not be unduly undermined by the presumption in favour of development that contributes to sustainable development ('the presumption') carrying significant weight. You decided to hold-off the issuing of this follow up letter, and this has given us an opportunity to reconsider our position given subsequent events as outlined below.

*Gladman Developments Ltd.*

5. On 3 June a Court decision was issued in response to an appeal against a decision by a Reporter to refuse an appeal for a housing development at Quarrier's Village in Inverclyde (Gladman vs Scottish Ministers). The Court found against the Scottish Ministers on both grounds. As previously discussed, we recommended not appealing the decision to the Supreme Court, given the uncertainty of a positive outcome, the lengthy period involved to achieve a decision, and because Ministers have the more effective option of altering the disputed policy.

6. The grounds of appeal focused on the issues of the housing land supply and the presumption. The Court's view was that where there is a shortfall in the 5 year effective land supply, the balance should be tilted in favour of granting permission for a housing proposal unless it can be proven that it will have adverse impacts that 'significantly and demonstrably' outweigh any positive impacts. Comments in the decision stated that a housing development which will remedy, to some extent, a housing shortage is something which almost inevitably contributes to sustainable development, and that where any shortfall is considerable, it may well carry very substantial weight in favour of granting consent for housing developments. The Court was also of the view that the Housing Land Requirement (rather than the Housing Supply Target) should be used as the basis of the calculation of the 5 year effective housing land supply and that a 'residual approach' (taking into account information on completions) to this calculation is appropriate.

7. The Court's view is at odds with our view of the meaning and application of several aspects of the SPP. We are concerned that the decision and its acceptance of a 'tilted balance' is based on the English system. We also disagree with the technical approach of calculating the 5 year land supply, and have concerns that the application of the 'residual approach', particularly at this time when completions are low, will result in many more development plans being viewed as out-of-date and the presumption (including a more heavily 'tilted balance') being used more frequently as a justification for granting consent for unsustainable housing developments.

8. As a result, we have set out options for action to address these issues below.

[REDACTED]

Planning and Architecture Division

[Redacted]

25 June 2020

Copy List:	For Action	For Comments	For Information		
			Portfolio Interest	Constit Interest	General Awareness
Cabinet Secretary for Communities and Local Government			X		

DG Education, Communities and Justice

[Redacted]



**Annex A DRAFT CONSULTATION PAPER**

**Attached separately**

[REDACTED]

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**From:** [REDACTED]  
**Sent:** 03 June 2020 11:46  
**To:** Minister for Local Government, Housing and Planning  
**Cc:** McNairney J (John); Cackette PH (Paul); [REDACTED]  
**Subject:** FW: Gladman Developments Ltd - appeal under section 239 of the Town and Country Planning (Scotland) Act 1997  
**Attachments:** Gladman Developments Ltd - XA104\_19 - submission to Lord Advocate - 3 June 2020.docx; 2020CSIH28.pdf

PS/ Minister for Local Government, Housing and Planning

This is to advise you that we have today received an adverse judgement from the court on the recent Gladman appeal. As set out in the attached briefing from SGLD colleagues to the Lord Advocate, the court has found in favour of the appellants on both grounds. The decision will be published by the court this afternoon.

We will reflect on the judgement and what this means for our policy and guidance and provide further advice in due course. In the meantime John and I would be happy to discuss this in more detail with you if it would be useful.

[REDACTED]

[REDACTED]





**FIRST DIVISION, INNER HOUSE, COURT OF SESSION**

**[2020] CSIH 28**  
XA104/19

Lord President  
Lord Menzies  
Lord Brodie

**OPINION OF THE COURT**

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the appeal by

**GLADMAN DEVELOPMENTS LIMITED**

against

**THE SCOTTISH MINISTERS**

Appellants

Respondents

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**Appellants: J dC Findlay QC, Burnet; Balfour & Manson**  
**Respondents: Mure QC, P Reid; Scottish Government Legal Directorate**

3 June 2020

**Introduction**

[1] This is an appeal under section 239 of the Town and Country Planning (Scotland) Act 1997. The appeal challenges the decision of the respondents' reporter to dismiss the appellants' appeal against Inverclyde Council's refusal to grant planning permission for a residential development at Carsemeadow, Quarriers Village, Kilmacolm. The site is within the Strategic Development Plan area for Glasgow and the Clyde Valley.

[2] The issues raised are: first, the correct construction and application of paragraph 33 of Scottish Planning Policy, notably the so called “tilted balance” in favour of development; and, secondly, the assessment of the quantity of effective housing land. The appellants also maintain, on both of these issues, that the reporter did not give adequate reasons for her decision.

[3] The following acronyms are occasionally used:

<b>GCV</b>	Glasgow and Clyde Valley
<b>HLA</b>	Housing Land Audit
<b>HLR</b>	Housing Land Requirement
<b>HLS</b>	Housing Land Supply
<b>HNDA</b>	Housing Need and Demand Assessment
<b>LDP</b>	Local Development Plan (Inverclyde (2014))
<b>NPPF</b>	National Planning Policy Framework (England)
<b>SDP</b>	Strategic Development Plan (Clydeplan (2017))
<b>SPP</b>	Scottish Planning Policy (2014)

### **Scottish Planning Policy**

[4] Section 25(1) of the 1997 Act provides that, in relation to a development such as the present, the decision on planning permission is to be made in accordance with the development plan “unless material considerations indicate otherwise”. Section 37(2) provides that regard must be had to the development plan and to any other material considerations.

[5] Under the heading of “Sustainability”, Scottish Planning Policy (2014) refers (para 24 *et seq*) to the Government’s commitment to the concept of sustainable development. This concept is a highly abstract one involving five guiding principles, which are set out in a United Kingdom shared framework for sustainable development (2005), *viz*: living within

the planet's environmental limits, ensuring a strong, healthy and just society, achieving a sustainable economy, promoting good governance, and using sound science responsibly. Emerging from this is a principal policy, which creates a "presumption in favour of development that contributes to sustainable development" (para 27).

[6] Thirteen principles (para 29) are set out to guide decision making in the assessment of a contribution to sustainable development. These are again very general in their terms. They include: giving due weight to net economic benefit; responding to economic issues, as outlined in local economic strategies; supporting good design and the six qualities of successful places; making efficient use of existing capacities of land; supporting delivery of accessible housing; supporting delivery of infrastructure; supporting climate change mitigation; improving health and wellbeing; protecting natural heritage, including green infrastructure, landscape and the wider environment; and avoiding over development.

[7] Under the heading "Enabling Delivery of New Homes", SPP narrates (para 109) that housing makes an important contribution to the economy. The policy principles (para 110) are that the system should identify a generous supply of land for each housing market area to ensure that the housing land requirement is met across all tenure types (private and affordable). A five year supply is to be maintained. LDPs are (para 115) to set out the housing supply target for each area, which is to be based on the housing need and demand assessment. The HLS target is a policy view of the number of houses which the local authority has agreed to deliver in each market area over the period of the development plan.

[8] Within the HLS target, LDPs should indicate (para 116) the number of new homes to be built over the plan period. This figure should be increased by a margin of 10 to 20% to establish the HLR in order to ensure that a generous supply of land for housing is provided. Strategic development plans (para 118) are to set out the HLS target and the HLR for the

plan area, each local authority area and each functioning housing market area. LDPs are to (para 119) allocate an effective range of sites to meet the HLR in the SDP. There should be a minimum of 5 years effective land supply. The range of sites allocated is to enable the housing supply target to be met.

[9] SPP continues:

“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.”

These paragraphs are under the heading “Development Management” in the “Sustainability” section. Paragraph 32 states that the presumption in favour of sustainable development does not change the status of the development plan as the starting point for decision making. Where a proposal does not accord with up-to-date plans, the primacy of the plan is maintained and SPP and the presumption in favour of development that contributes to sustainable development will be material considerations. SPP continues:

“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.”

[10] There is an equivalent paragraph (14) in the National Planning Policy Framework that applies in England. The presumption in favour of sustainable development is at the heart of the Framework. Where the development plan is silent or relevant policies are out-of-date, permission should be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in

this Framework or specific policies in the Framework indicate that development should be restricted.

[11] Section 2 of the respondents' Planning Advice Note 2/2010 *Affordable Housing and Housing Land Audits* provides advice on good practice in the preparation of housing land audits (para 40). It states (para 41) *inter alia* that, in accordance with SPP, a 5 year land supply is to be available. This involves the preparation of a housing land audit, which is to be carried out annually by the planning authority in conjunction with housing and infrastructure providers. The audits should demonstrate the availability of sufficient effective land to meet a continuous five-year supply and provide a snapshot of the land available for housing at any particular time.

### **The Development Plan**

[12] The Clydeplan SDP (July 2017) provides:

*"Policy 1*

*Placemaking*

New development should contribute towards the creation of high quality places across the city region. In support of the Vision and Spatial Development Strategy new development proposals should take account of the Placemaking Principle set out in Table 1."

One aspect in Table 1 is "Easy To Move Around", which means that a development should support high quality and convenient public transport with development concentrated along transport corridors in close proximity to public transport stops.

[13] The LDPs require (SDP para 6.66) to ensure, in accordance with Policy 8 and informed by up to date HLS data, that sufficient housing land is allocated in order to meet

the HLR for each Housing Sub-Market Area and each Local Authority. The policy is in the following terms:

*Policy 8*

*Housing Land Requirement*

In order to provide a generous supply of land for housing and assist in the delivery of the Housing Supply Targets in support of the Vision and Spatial Development Strategy, Local Authorities should:

- make provisions in [LDPs] for the all tenure [HLR] by Local Authority set out in Schedule 8, for the Private [HLR] by Housing Sub-Market Area set out in Schedule 9 and for the Private [HLR] by Local Authority set out in Schedule 10;
- allocate a range of sites which are effective or expected to become effective in the plan periods to meet the [HLR], for each Housing Sub-Market Area and for each Local Authority, of the SDP up to year 10 from the expected year of adoption;
- provide for a minimum of 5 years effective land supply at all times for each Housing Sub-Market Area and for each Local Authority; and,
- undertake annual monitoring of completions and land supply through Housing Land Audits.

Local Authorities should take steps to remedy any shortfalls in the five-year supply of effective housing land through the granting of planning permission for housing developments, on greenfield or brownfield sites, subject to satisfying each of the following criteria:

- the development will help to remedy the shortfall which has been identified;
- the development will contribute to sustainable development;
- the development will be in keeping with the character of the settlement and the local area;
- the development will not undermine Green Belt objectives; and,
- any additional infrastructure required as a result of the development is either committed or to be funded by the developer.”

[14] In its Sustainable Development Strategy section, the Inverclyde LDP (2014), provides (policy SDS2) for the integration of land use and sustainable transport to be promoted by enhancing the network of sustainable forms of transport (walking and cycling, public

transport, rail) and directing new developments to locations which are accessible by a choice of modes of transport. The area where the development is located is described as follows:

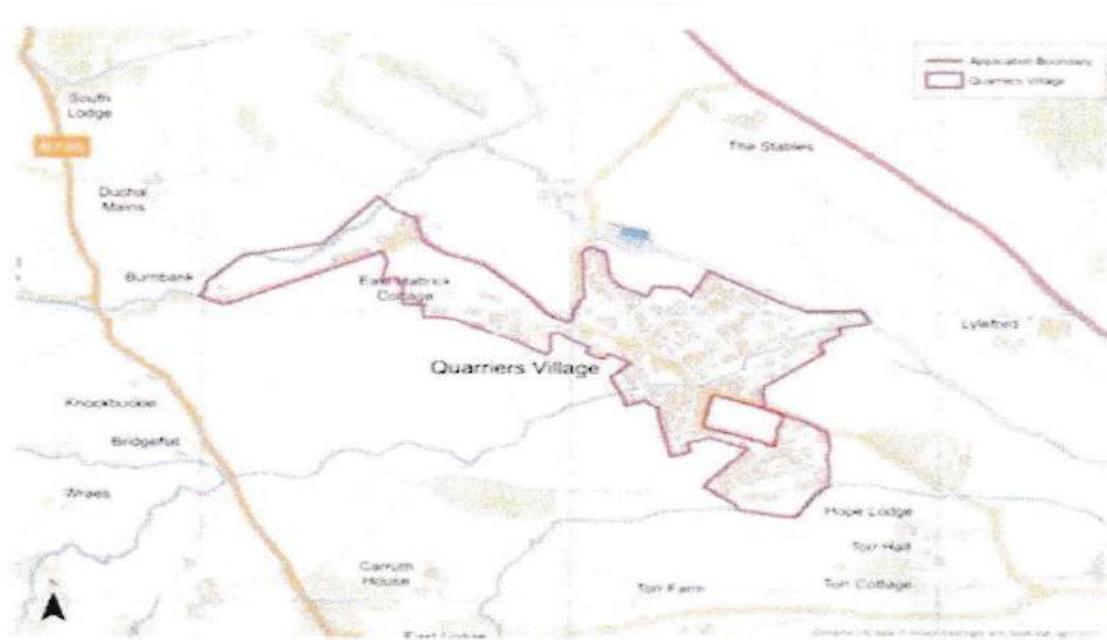
*“Kilmacolm and Quarrier’s Village*

2.50 The Renfrewshire Housing Market Area covering Kilmacolm and Quarrier’s Village remains an area with capacity limits to its growth. This is due in part to the landscape setting of these settlements and their environmental and built heritage constraints, but mainly due to the absence of sustainable public transport infrastructure to support major new development. As indicated, the GCV HNDA and GCV SDP demonstrate that there is no justification for major housing development in this Sub Housing Market Area.”

[15] Policy TRA2 provides that new major trip-generating developments will be directed to locations which are accessible by walking, cycling and public transport. Policy RES3 provides that residential development will be supported at the locations specified in schedule 6.1 and the Proposals Map.

### **The Planning Application**

[16] In June 2018, the appellants applied to Inverclyde Council for planning permission in principle for a residential development at Carsemeadow, Quarriers Village, Kilmacolm. The site is shown in the following map:



[17] In their Planning Statement, the appellants identified the key issue as being the requirement in the SPP for the Council to ensure the provision of a 5-year supply of effective housing land. The consequences, of failing to maintain the required five-year supply of effective housing land, meant that (para 125) “development plan policies for the supply of housing land will not be considered up-to-date”. Where the supply of effective housing land fell below the required five-year level, as was the case, and the plan did not contain policies relevant to the proposals, the presumption in favour of development that contributes to sustainable development would be a significant material consideration. The Council should favour development unless there were any adverse impacts which significantly and demonstrably outweigh the benefits of development.

[18] The appellants argued that the development contributed to sustainable development, in terms of SPP (para 29), in a number of ways. These included economic benefit. The development would create local employment and investment. An increased population would increase local services. The proceeds from the sale of the site would help to ensure that Quarriers, which was a charity dedicated to assist, *inter alios*, disadvantaged young

persons, remained a significant employer within Inverclyde and a key part of the local economy. The development would support good design and the qualities necessary to support a successful place. It would support the delivery of accessible housing, providing choice for the local housing market. It would support the delivery of the infrastructure that was needed to serve it. It had regard to sustainable land use as set out in the Land Use Strategy. Electric vehicle charge points would help to achieve the Government's commitment to near zero carbon emissions from road transport.

[19] On 15 January 2019, the Council's Head of Regeneration and Planning, in a Report of Handling, recommended refusing permission because the development would be contrary to the Clydeplan SDP and significantly contrary to both the existing and proposed Inverclyde LDPs. On 21 February 2019, the Council refused the application on the grounds that it was contrary to the various policies within the development plan under reference to the report. One important feature of the report was that it said (p 21) that "there is no need for additional housing land at this time".

[20] The appellants appealed. They submitted that the figures in the Council's 2018 HLA confirmed a shortfall in the 5-year supply of effective housing land. The delivery of additional sites through the policy mechanisms in SPP and Clydeplan policy 8 were essential to address the shortfall. The presumption in favour of sustainable development became a significant material consideration in the determination of the appeal. Any negative effects must not only outweigh but also significantly and demonstrably outweigh any benefits. The release of the site in the green belt was justified in order to address the existing housing need. It would not result in any negative impacts that significantly outweighed the benefits of the development.

**The reporter's decision**

[21] On 29 July 2019, the respondents' reporter dismissed the appeal and refused planning permission. The report began by noting that the appeal was to be determined in accordance with the development plan, unless material considerations indicated otherwise. The development plan consisted of the Clydeplan SDP and the Inverclyde LDP. The main issues were identified as: HLS; sustainability; impact on the character of the settlement and the local area; impact on the Green Belt; and the presumption in SPP in favour of sustainable development.

[22] On HLS, the reporter noted the importance of the provision of a 5-year effective land supply. Any shortfall was to be remedied by granting permission on green field or brown field sites. LDP policy RES3 indicated a need to increase the housing supply to maintain an effective 5-year supply. In order to establish whether these provided development plan policy support, the reporter considered that she required first to establish whether there was a shortfall in the 5-year effective supply.

[23] The Council's position was that: for 2018 to 2023, in the local authority area, there would be a surplus of 746 units in the effective 5-year all-tenure supply and 275 in the private supply. There was a surplus for the Inverclyde part of the Renfrewshire sub-market area. The appellants' position was that, for the 6-year period 2018 to 2024, there was a shortfall in the private supply in the local authority area of 1,186 units and within the sub-market area of 72 units. The appellants had not presented any all-tenure supply data.

[24] The appellants' methodology used the HLR figure from Clydeplan 2017, whereas the Council used the HLS target figure. The HLR included an element of generosity of 15%. Clydeplan policy 8 required a 5-year "effective land supply" to be provided at all times.

Based on the use of that terminology, the reporter agreed with the Council that the lower HLS target figure was the more relevant one.

[25] The annual HLA was the established means for monitoring housing land, by providing a snapshot of the amount of land available at any particular time (PAN 2/2010 *Affordable Housing and Housing Land Audits*, para 45). Where there were disputed sites, the effective land supply figures should be treated with caution. The appellants' approach, whereby the undisputed HLS figure was used, should be adopted. The methodologies favoured by the appellants and the Council differed in their treatment of past completions. The appellants identified a past shortfall in 2012 and 2018. They carried this forward into the future housing supply calculation. The appellants were correct. A past shortfall should not be disregarded. Clydeplan policy 8 required local authorities to take steps to remedy any shortfalls in the 5-year supply of effective housing land. Any evidence of a shortfall in the private or all-tenure supply in any of the relevant local authority or sub-market areas would engage policy 8. The 5-year effective supply in the sub-market area as a whole should be considered. The effective supply in the smaller geographic area relating to Kilmacolm and Quarriers village was not relevant. The reporter could not conclude with certainty that there was a shortfall in the effective private supply in the sub-market area.

[26] There was some uncertainty over the parties' conclusions about the supply within the Inverclyde local authority area. The appellants' data was limited to the private housing, whereas the Council considered the all-tenure and the private supplies. Policy 8 dictated that it was reasonable to consider the private or the all tenure supply figures. The appellants' methodology had identified a significant shortfall in the private supply which was equal to less than 2 years. Even if they had used the HLS target, rather than the HLR, or included all the disputed sites from the 2018 HLA, the resultant figure would not give the

minimum 5-year supply. There was, therefore, a probable shortfall in the private supply in the local authority area. Policy 8 and LDP policy RES3 were thus engaged.

[27] Policy 8 set out a number of other criteria that a development, which was supported by a shortfall calculation, must meet, *viz.*: helping to remedy the identified shortfall; contributing to sustainable development; be in keeping with the character of the settlement and the local area; not undermining Green Belt objectives; and additional infrastructure either committed or funded by the developer. The development would help in remedying a shortfall and provide additional infrastructure.

[28] The site of the development was not a sustainable location for development. The development would conflict with LDP policies SDS2 and TRA2 and Clydeplan policy 1. The LDP's approach to sustainable development and SPP (para 287) required new development to place greater emphasis on modes of transport other than the private car. This was underpinned by LDP policies, which (SDS2) sought to direct new developments to locations which were accessible by a choice of modes of transport and expected (TRA2) that new major trip-generating developments would be directed to locations which were accessible by walking, cycling and public transport. The third placemaking principle, "easy to move around" (Clydeplan policy 1) was also relevant.

[29] The LDP identified (para 2.5) that the area encompassing Kilmacolm and Quarriers Village had limited capacity for growth, "mainly due to the absence of sustainable public transport infrastructure to support major new development." There were suitable footpath and cycle connections to the site from the village. The appellants were proposing to upgrade bus infrastructure close to the appeal site and to produce a Travel Plan. This did not mitigate the problem of the infrequent bus service passing through Quarriers Village. Occupiers would be dependent on trips made by private car. The appellants had committed

to providing charging facilities for electric cars, but this would not offset the dependency on the private car. Quarriers Village provided a location for the headquarters of Quarriers and there were a number of small businesses. There was no primary school or convenience shopping. A range of services were available in Kilmacolm and Bridge of Weir, both of which were approximately 4 kilometres from the village. The issues concerning private and public transport undermined the ability of the site to offer a sustainable location for new housing.

[30] In respect of the presumption in favour of sustainable development, SPP provided that, where a development plan was more than five years old or where there was a shortfall in the 5-year effective HLS, development plan policies for the supply of housing land would not be considered to be up-to-date. In those circumstances the presumption in favour of sustainable development was a significant material consideration. It involved the assessment of the proposal against the principles set out in SPP (para 29). Because “in all probability there is a shortfall”, the SPP presumption in favour of sustainable development was a significant material consideration.

[31] The development had then to be considered against the 13 principles of sustainable development which were set out in SPP. Two of these principles were not met. First, the development would not address two of the six qualities of a successful place (Distinctive and Easy to Move Around and Beyond). Secondly, it would not provide accessible housing (in public transport terms). Consequently, the presumption in favour of sustainable development did not apply. Four other appeals, at Kilmacolm (PPA-280-2016), Symington (PPA-370-2073), Strathblane (PPA-390-2060) and Bridge of Weir (PPA-350-2021), were noted. Each appeal was distinguishable on various grounds.

[32] In conclusion, the reporter stated:

“84. I have given due consideration to the age of the 2014 local development plan and the probability that there is a shortfall in the current effective five year [HLS] in the local authority area. Clydeplan policy 8 is engaged and I find that the proposed development would not comply with three key policy criteria and the development would not constitute sustainable development in term of Scottish Planning Policy.

85. I have considered the emerging local development plan and the revisions to development plan policy arising from this but I do not find that there are any provisions in the emerging plan that would justify setting aside my conclusions on Clydeplan policy 8 and the SPP. The economic benefit to both the joint appellant, Quarriers and the area generally are important considerations but I do not find there is anything exceptional regarding these benefits that would justify approving this development that does not, in my opinion, constitute sustainable development.

86. I therefore conclude, for the reasons set out above, that the proposed development does not accord overall with the relevant provisions of the development plan and that there are no material considerations which would still justify granting planning permission. I have considered all the other matters raised, but there are none which would lead me to alter my conclusions.”

## **Submissions**

### *Appellants*

[33] The appellants maintained that the reporter failed to apply the “tilted balance” (*Hopkins Homes v Secretary of State for Communities and Local Government* [2017] 1 WLR 1865, paras 59 and 80) provided for in paragraph 33 of SPP. Its application did not depend upon an earlier finding that the development was sustainable. It assumed that there may be adverse impacts. The use of “also” in paragraph 33 denoted an additional consequence to that identified in the first part of that paragraph. The additional consequence required a change to the balancing exercise, albeit still in the context of section 25 of the 1997 Act. SPP placed importance on boosting the supply of housing, while the rigid enforcement of planning policies may prevent a planning authority from meeting its requirement to provide a five-year HLS (*Hopkins Homes (supra)*, paras 77 and 79). The tilted balance applied notwithstanding that a development was not a sustainable one, supporting a bi-partite

approach to paragraph 33 (*Gladman Developments v Scottish Ministers* [2019] CSIH 34; *Graham's The Family Dairy v Scottish Ministers* 2019 SLT 258, para [36]).

[34] The appellants' construction was consistent with a purposive approach; the encouragement of housing being a policy priority (*Gladman Developments v Scottish Ministers* [2018] CSIH 17, paras [5]-[8] and [56]). The application of the tilted balance, only where a housing shortfall existed and the development was sustainable, would seriously inhibit tackling the shortfall. This was supported by *Gladman Developments v Scottish Ministers* (*supra* [2019]), which had also been concerned with a development that was said not to be sustainable. Paragraph 33 of SPP had been of central importance to the court's conclusions. There was no basis for the suggestion by the respondents that it had been determined *per incuriam*. The appellants' approach was consistent with that in England, which sought to address the same housing policy imperative, albeit the policies were expressed in different terms. Another purposive basis for the appellant's construction was that, if a plan was out of date, there would be good reason for tilting the balance for all development, bearing in mind that the system was to be plan-led only when those plans were up to date.

[35] There was no indication in her conclusions that the Reporter had applied a tilted balance. She appeared to apply a normal balance which was similar to that which would have been used where no housing shortage had been identified. She did not consider whether the two adverse impacts, which she identified, significantly and demonstrably outweighed the benefits. She proceeded on the basis that, if a development failed to meet any of the criteria described in SPP (para 29), no further consideration, in particular of paragraph 33, was required. No adequate reasons for not applying the titled balance were given.

[36] The Reporter erred by assessing the supply of effective housing land against the HLS target figure rather than the HLR figure. This was contrary to the guidance in SPP and PAN2/2010 (paras 41, 51 and 58). She therefore underestimated the extent of the shortfall. SPP (para 116) referred to plans which indicated the number of homes to be built (the HLS target). That figure was to be increased by a margin of 10 to 20% to establish the HLR. SPP (paras 118 to 120) made it clear that SDPs should set out the HLS target and the HLR. LDPs were to allocate sites to meet the HLR of the SDP. The mechanism to ensure that the HLR was met was the maintenance of the 5 year supply of effective sites. The requirement was to meet the HLR in full. There was a difference of 15% in the two figures, amounting to 117 houses (827 - 710).

[37] The reporter required to make an assessment of the level of shortage in order to determine what weight to give it (*Hallam Land Management v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1808 at para 52; *Gladman Developments v Scottish Ministers* (*supra* [2019] at para 21). The reporter failed to provide proper, adequate and intelligible reasons to explain how she had determined the issues.

### ***Respondents***

[38] The respondents submitted that the reporter could not be faulted. She correctly identified that, as there was a housing supply shortfall, the presumption in favour of sustainable development became a significant material consideration. She then correctly identified that she had to assess the development against the thirteen principles of sustainable development, concluding that it did not meet two of those principles. She was correct to conclude that the presumption in favour of sustainable development did not apply. It was only if a developer succeeded in passing the gateway of sustainability that the

tilted balance came into play. This was how reporters had addressed matters in the appeals which had been cited to the reporter (*supra*). If there was no sustainability, the presumption did not apply.

[39] The tilted balance principle derived from that part of the English NPPF which explained the meaning of the presumption in favour of sustainable development. There were important distinctions between the NPPF (para 14) and SPP (para 33). In the NPPF the balance was tilted in favour of permission, unless that result was displaced by one or other of two specific grounds, namely significant and demonstrable adverse effects or policies in the NPPF. SPP referred to the presumption being a significant material consideration if the development plan was out of date. There was no direction to grant permission.

[40] The policy presumption in SPP (para 28) in favour of development contributing to sustainable development was elevated from a material consideration to a significant material consideration. That elevation only arose where the proposed development did in fact contribute to sustainable development. That was the reading of paragraph 33 that made sense. A single principle was provided and that applied only when a development was sustainable. Otherwise, a key component of the entire SPP would be seriously diluted. The appellant's reading would be close to "development at any cost", which SPP (para 28) was against. SPP (para 125) did not say that paragraph 33 was "engaged" where there was a shortfall; only that it was relevant. For it to be engaged, the development had to be sustainable. Had the intention been otherwise, stronger language would have been expected. Policy 8 of the Clydeplan supported this construction. It provided that shortfalls in the 5-year supply of effective housing land were to be remedied, subject to satisfying criteria which included that the development would be sustainable development.

[41] The origin of the “tilted balance” in Scotland was *Graham’s The Family Dairy v Scottish Ministers* (*supra*). There, the proposals had been found to contribute towards sustainable development. There was no issue about the relevance of the term in the Scottish context. Its use was adopted without analysis; in particular, none of the differences between the NPPF and the SPP were considered. The references to the tilted balance were in the context of the elevation of the sustainable development presumption from a material to a significant material consideration. Sustainability remained the underlying key characteristic. *Gladman Developments v Scottish Ministers* (*supra* [2019]) did not turn on paragraph 33 of SPP. Sustainability remained the underlying key characteristic. Only where the sustainable development presumption was elevated to a significant material consideration was the tilted balance engaged.

[42] The reporter had properly considered the issue of a housing land shortage. There was no universal method of calculating this. PAN 2/2010 proffered guidance in the preparation of HLAs. It was not directed at reporters. SPP (paras 118-120) was also directed to the preparation of development plans. It (para 120) only applied to urban areas, and this site was not in one. HLAs provided only a snapshot, which could change week by week. The generosity margin was designed to deal with uncertainties. Problems could appear in the first year of the plan. The reporter was looking at the matter from a different perspective. All that she had to determine was whether there was a shortfall based upon the material presented to her. That is what she did. She did not require to endorse a particular methodology or to fix the level of shortfall. She did consider the shortfall to be sufficiently serious to merit an exceptional circumstance for encroachment in the Greenbelt. She did not require to include a generosity margin, but to look at the position at the time of her decision.

## Decision

[43] There is no failure to state adequate reasons on the part of the reporter. She has set out her reasoning clearly and in some detail. The informed reader would have no difficulty in understanding what the reasons for the decision were and what factors were, or were not, taken into account in reaching that decision. The question is whether the reasoning is sound.

[44] In *Graham's The Family Dairy v Scottish Ministers* 2019 SLT 258 the court determined (LP (Carloway), delivering the opinion of the court, at para [36]) the effect of SPP paragraphs 33 and 125 where a shortage of housing land had been identified. This was that the shortage became a significant material consideration in favour of the grant of permission for housing development. The court appreciated that the precise wording of paragraph 33 was that it was the presumption in favour of development that became a significant material consideration. 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. The same reasoning is evident from *Gladman Developments v Scottish Ministers* [2019] CSIH 34 (Lord Menzies, delivering the opinion of the court, at para [44]).

[45] Once a housing land shortage is established, SPP paragraph 125 dictates that paragraphs 32 to 35 become relevant. Paragraph 33 provides that the effect of this is that the presumption in favour of development becomes a significant material consideration. The paragraph requires that the development contributes to sustainability. That is not a barrier

to the application of the tilted balance. *Graham's The Family Dairy v Scottish Ministers* (*supra*) determined that the tilted balance did apply, in much the same way as under the similar but by no means identical English provisions, for the reasons given in *Hopkins Homes v Secretary of State for Communities and Local Government* [2017] 1 WLR 1865. In *Hopkins Homes*, Lord Gill explained that:

"79. Among the obvious constraints on housing development are development plan policies for the preservation of the greenbelt, and environmental and amenity policies... The rigid enforcement of such policies may prevent a planning authority from meeting its requirement to provide a five years' supply.

...

83. If a planning authority that was in default of the requirement of a five years' supply were to continue to apply its environmental and amenity policies with full rigour, the objective of the Framework could be frustrated. The purpose... is to indicate a way in which the lack of a five years' supply of sites can be put right..."

[46] 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. In short, the existence of one or more adverse findings in relation to the thirteen guiding principles to

sustainability in terms of SPP (para 29) does not prevent the operation of the tilted balance, but it may result in the balance tilting back to a refusal.

[47] The parties were not in dispute that, if a tilted balance applied, the reporter did not apply it and the appeal should succeed. The court agrees with that assessment. The reporter understood that, since there was a housing shortage, the development plan policies relative to housing could not be considered to be up to date and that therefore the presumption in favour of sustainable development was a significant material consideration. The difficulty is in discovering how, in practical terms, that presumption was taken into account. Rather, the exercise undertaken by the reporter was the customary one of determining whether there were exceptional reasons, such as the economic benefits to both Quarriers and the area generally, that would justify approving a development that did not constitute sustainable development. 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.

[48] It follows from this that the appeal must be allowed and the decision of the reporter dated 29 July 2019 quashed. The matter will be remitted to the respondents to proceed as accords.

[49] The second issue in the appeal, namely the manner in which the housing shortage should be calculated, will be of some importance in any reconsideration of the appeal to the respondents. Although there is no need for the reporter to calculate the precise level of any shortage, it is necessary to make a broad assessment of the seriousness of the shortage. This

is to enable the reporter to give it due weight in the tilted balancing exercise; ie to determine the angle of the tilt before the adverse impacts are placed on the other side of the scale. The court agrees with the reasoning in that regard in *Hallam Land Management v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1808 (Lindblom LJ at para [52]).

[50] SPP (para 115) states that development plans should address the supply of land for housing. They require to set out the HLS target for each area, based on the HNDA. This is the number of houses which the planning authority has determined will be delivered over the period of the development plan. It represents the demand in the particular market sector. This number is (para 116) to be increased by a margin of 10 to 20% in order to ensure a generous supply of land for housing. It is this augmented figure which represents the housing land requirement. When the SPP is referring to a shortage in the “effective housing land supply”, it is to the figure identified in the development plan as increased by the percentage margin selected; ie the housing land requirement. It is to that figure that regard should be had by a reporter in order to determine the level of shortage. 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.

From: [REDACTED]  
SGLD Litigation Division  
3 June 2020

Lord Advocate  
cc copy list

**GLADMAN DEVELOPMENTS LIMITED V SCOTTISH MINISTERS  
APPEAL TO THE COURT OF SESSION UNDER SECTION 239 OF THE TOWN  
AND COUNTRY PLANNING (SCOTLAND) ACT AGAINST DECISION OF THE  
SCOTTISH MINISTERS DISMISSING AN APPEAL AND REFUSING  
PLANNING PERMISSION IN PRINCIPLE**

**Purpose**

1. To make you aware of the Opinion of the First Division issued today. A copy of the Opinion is attached.

**Priority**

2. Routine.

**Background**

3. This appeal relates to the Scottish Ministers' refusal of planning permission in principle for a development of approximately 45 residential units and related infrastructure on land at Carsemeadow, near Quarriers Homes, Kilmacolm. The appellants appealed to Scottish Ministers against a decision of Inverclyde Council to refuse the application and a DPEA reporter refused the appellants' appeal against the decision of Inverclyde Council which was to refuse the Appellants' planning application. A Summar Roll took place on 4 May 2020 following which the Court made avizandum. Counsel for Scottish Ministers were James Mure QC and Paul Reid.

4. The main ground of appeal related to the approach the reporter took to paragraph 33 of Scottish Planning Policy (SPP). Paragraph 33 provides that 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 is 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. This has been described in several mainly English cases as the "tilted balance" or "tilted balancing exercise" i.e.

there will be a presumption in favour of the development being granted planning permission unless there are any adverse impacts which would significantly and demonstrably outweigh the benefits of the development.

5. In this case (as in other appeals which SGLD are dealing with) the issue arises because there is a shortfall of housing land supply and developers want to build on sites which would otherwise be undesirable (typically green belt sites). Reporters including the present reporter have taken the approach that, if a particular development does not contribute to sustainable development, the presumption does not apply and in this case the reporter decided that the development did not contribute to sustainable development and therefore did not consider whether there were any adverse impacts which would significantly and demonstrably outweigh the benefits of the development. The Court therefore required to consider the proper interpretation of paragraph 33 of SPP.

6. A subsidiary Ground of Appeal concerned the approach taken by the Reporter to the extent of any shortfall in housing land supply. The appellants' argument was that the Reporter required to identify the extent of any shortfall and it was not sufficient to find that there was a shortfall.

#### The Opinion of the Court

7. The Court has found in favour of the appellants on both grounds. The Court's reasoning is at paragraph [43] of the Opinion onwards.

8. In relation to the interpretation of paragraph 33 of SPP, the Court has held that, once a housing land shortage is established, the effect of this is that the presumption in favour of development becomes a significant material consideration and, while the paragraph requires that the development contributes to sustainability, this is not a barrier to the application of the so called "tilted balance". The Court's view is that a housing development which will remedy to some extent a housing shortage is something which almost inevitably "contributes to sustainable development" in one degree or another and that determination of whether there are any adverse impacts will play a part overall in the determination of the question of whether the development is to be regarded as sustainable. The Court's view is that the existence of one or more adverse findings in relation to whether the development is sustainable does not prevent the operation of the "tilted balance" but may result in the balance tilting back to a refusal.

9. It was accepted that the reporter in the present case did not apply the "tilted balance" and that was sufficient for the appeal to succeed.

