

## **Glasgow and the Clyde Valley Strategic Development Planning Authority**

**To: Glasgow and the Clyde Valley Strategic Development Planning Authority  
Joint Committee**

**On: 11<sup>th</sup> June 2018**

**Report by  
Dorothy McDonald, Assistant Manager**

### **Clydeplan Legal Challenge Update**

#### **1. Summary**

- 1.1 The purpose of this report is for the Joint Committee to note the outcome of the legal challenge to Clydeplan and progress that is now being made with respect to the Local Development Plans.

#### **2. Recommendations**

- 2.1 It is recommended that the Joint Committee
- Note and consider the terms of the Court of Session decision, the associated costs and the progress now being made with respect to the Local Development Plans
  - Note the costs incurred thus far and ongoing proceedings to recover costs.

#### **3. Context**

- 3.1 Following Clydeplan's approval in July 2017, an appeal under section 238 of the Town and Country Planning (Scotland) Act 1997 against Scottish Ministers' decision to approve Clydeplan, was lodged at the Court of Session by Gladman Developments Ltd on 26th October 2017, with Clydeplan cited as an interested party. The central issues are: whether the reporter's findings, which led to the determination of the Housing Land Requirement, had any, or a sufficient, evidential base or conflicted with the SPP; and whether his decision was one which, having regard to the SPP, was adequately reasoned.
- 3.2 Proceedings were heard at Court One of the Court of Session on the 6th and 7th of February 2017. The matters were deliberated by three Law Lords, including the Lord President Lord Carloway who on the 20th March 2018, issued the Court's decision.

#### **4. Decision**

- 4.1 The challenge to Clydeplan was dismissed (see Appendix). I am advised by our legal advisers that the decision is regarded as emphatic and given even further weight as it was considered by three law lords and issued by the Lord President himself.

- 4.2 Both the decision making process and the Clydeplan Strategic Development Plan itself have withstood this further scrutiny. Furthermore, any suggestion within the grounds of the appellant's challenge that Clydeplan "misled" the Reporter during the examination proceedings, was rejected by the Lord President at paragraph 56 of the decision as follows:

*"The reporter was not deceived by anything said by the interested parties, given that he was aware of the fact that templates, which he did not have, would have been completed to produce the adjusted figures."*

- 4.3 Given the nature of the challenge and the terms of the decision, other matters to highlight include:

- a. future Housing Supply Target/Housing Land Requirement setting exercises should consider incorporating the views of wider stakeholders including Homes for Scotland;
- b. paragraph 50: *"Where policy is an expression of general principles (as the SPP is), it is not to be interpreted as if it were a statute .."*
- c. paragraph 51: *"In this case, the general policy (SPP para 109) is to provide for new homes in certain defined situations. This is to be done (para 110) by the identification of a generous supply of land which will "support the achievement" of the housing land requirement (HLR) across all tenures by maintaining a 5 year supply."*

- 4.4 Given the decision, our legal advisers are currently pursuing award of costs. A motion for costs was submitted by Ledingham Chalmers LLP acting for Clydeplan, however this has been opposed by the appellants. The opposed motion hearing for expenses will take place on 12th June 2018 in the Court of Session and a decision is expected shortly after.

- 4.5 Clydeplan's costs currently stand at approximately £20,000 and the costs to proceed given the contested motion, may extend to an additional £1,500. Provisions for the potential costs are covered within current budgetary provisions under earmarked balances.

- 4.6 This decision now enables the Local Development Plans to proceed without risk and good progress is being made with 6 of the 8 Plans progressing towards adoption within the expected two years following approval of Clydeplan.



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

**[2018] CSIH 17  
XA91/17**

Lord President  
Lord Menzies  
Lord Brodie

**OPINION OF THE COURT**

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Appeal by

GLADMAN DEVELOPMENTS LTD

Appellants

against

THE SCOTTISH MINISTERS

Respondents

and

GLASGOW AND THE CLYDE VALLEY STRATEGIC DEVELOPMENT PLANNING  
AUTHORITY

Interested Parties

**Appellants: Armstrong QC; Shepherd & Wedderburn LLP  
Respondents: Crawford QC, Burnet; Scottish Government Legal Directorate  
Interested Parties: GA Dunlop; Ledingham Chalmers LLP**

20 March 2018

**Introduction**

[1] This is an appeal against the respondents' decision, dated 24 July 2017, to approve the Glasgow and Clyde Valley Strategic Development Plan (the Clydeplan) as modified.

The Clydeplan was published following upon an examination by a reporter. The findings of his report were adopted by the respondents as their reasoning. The focus of the appeal is on the sub-sections of chapter 6 (City Region as a Successful, Sustainable Place) which set the Housing Land Requirement (HLR) across the whole of the plan area.

[2] The figures in the HLR are important to residential developers because, by a comparison with the annual land audits of sites actually available for development, they will determine whether the interested parties are complying with the Scottish Planning Policy (SPP) requirement (para 110) to identify a generous supply of land which will maintain at least a 5 year supply at all times. A failure to comply would, the appellants maintain, involve applications for planning permission being determined with less weight being placed on the Clydeplan and any local development plan and more on the general SPP (para 33) in favour of sustainable development.

[3] The central issues are: whether the reporter's findings, which led to the determination of the HLR, had any, or a sufficient, evidential base or conflicted with the SPP; and whether his decision was one which, having regard to the SPP, was adequately reasoned. There is a subsidiary point about whether the reporter or the respondents were misled in relation to the availability of evidence to support the Housing Supply Target (HST) figures presented by the interested parties.

[4] The following acronyms are used, although occasionally the full version is repeated to aid understanding:

CHMA	Centre for Housing Market Analysis
HNDA	Housing Need and Demand Assessment
HLR	Housing Land Requirement
HLS	Housing Land Supply

HST	Housing Supply Target
LDP	Local Development Plan
NPF	National Planning Framework
NRS	National Records of Scotland
SDP	Strategic Development Plan
SPP	Scottish Planning Policy
SR & BMR	Social Rented and Below Market Rent

## Policy

[5] The National Planning Framework (NPF) is a plan for the long-term spatial development in Scotland (Town and Country Planning (Scotland) Act 1997, s 3A). It sets out the Government's priorities for the next 20 to 30 years. Scottish Planning Policy (SPP) is intended to assist in the delivery of the NPF's objectives (para 109). NPF3 (*Scotland's Third National Planning Framework*; June 2014) commits (para 2.5) the Government to a significant increase in house building, to ensure that housing requirements are met across the country. More ambitious and imaginative planning is said to be needed to provide a "generous and effective supply of land for housing in a sustainable way" (*ibid* para 2.20).

[6] One of the SPP's stated aims (para 109) is to facilitate new housing development. Provision for new homes is to be made in areas where: economic development is planned; there is a need for regeneration; or where it is required to retain the local population. The "policy principle" (para 110) is that the planning system should:

"identify a generous supply of land for each housing market area ... to support the achievement of the housing land requirement across all tenures, maintaining at least a 5 year supply of effective housing land at all times."

[7] The mode of delivery is for local authorities to identify functional housing market areas; that is geographical areas where the demand for housing is relatively self-contained

(para 111). Planning should be undertaken through joint working by “housing market partnerships”, involving both housing and planning officials, co-operation between authorities, and engagement with social landlords, developers and others (para 112).

[8] Under the heading “Development Planning”, the SPP continues:

“113. Plans should be informed by a robust Housing Need and Demand Assessment (HNDA) prepared in line with the Scottish Government’s HNDA Guidance. This Assessment provides part of the evidence base to inform both local housing strategies and development plans ... It should produce results both at the level of the functional housing market area and at local authority level, and cover All Tenures. Where the Scottish Government is satisfied that the HNDA is robust and credible, the approach used will not normally be considered further at a development plan examination.

...

115. Plans should address the supply of land for all housing. They should set out the housing supply target (separated into affordable and market sector) for each functional housing market area, based on evidence from the HNDA. The housing supply target is a policy view of the number of homes the authority has agreed will be delivered in each housing market area over the periods of the development plan and local housing strategy, taking into account wider economic, social and environmental factors, issues of capacity, resource and deliverability, and other important requirements ... The target should be reasonable, should properly reflect the HNDA estimate of housing demand in the market sector, and should be supported by compelling evidence. The authority’s housing supply target should also be reflected in the Local Housing Strategy.

116. Within the overall housing supply target, plans should indicate 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 housing land requirement, in order to ensure that a generous supply of land for housing is provided. The exact extent of the margin will depend on local circumstances, but a robust explanation for it should be provided in the plan.

...

118. Strategic Development Plans should set out the housing supply target and the housing land requirement for the plan area, each local authority area, and each functional housing market area. They should also state the amount and broad locations of land which should be allocated in local development plans to meet the housing land requirement up to year 12 from the expected year of plan approval, making sure that the requirement for each housing market is met in full. ...”.

[9] The SPP repeats (para 123) the requirement to maintain a “generous supply of land for house building” through the provision “of enough effective land for at least five years”.

Housing Land Supply (HLS) is to be managed actively, with planning authorities working with developers to prepare annual housing land audits. Where a shortfall in the 5 year effective supply occurs, “development plan policies ... and will not be considered up-to-date” and the presumption in favour of development would become “a significant material consideration” (paras 125 and 33). This presumption has the potential to override any constraints produced where land identified in an application for residential development falls outwith areas earmarked in local development plans (LDPs) (see *Hopkins Homes v Communities Secretary* [2017] 1 WLR 1865, Lord Gill at para 77 *et seq*).

### **The Background Report**

[10] In January 2016 the interested parties published their proposed Clydeplan; the Strategic Development Plan (SDP) for the Glasgow and Clyde Valley area, covering 8 local authority areas, *viz.*: Inverclyde, Renfrewshire and East Renfrewshire, West and East Dunbartonshire, Glasgow and North and South Lanarkshire. Accompanying the Clydeplan was a Background Report entitled “*Beyond the Housing Need and Demand Assessment*” (HNDA). This was designed (para 1.1) to “describe the translation of the outputs” from an HNDA completed in May 2015. The translation exercise had been carried out under the auspices of the Glasgow and Clyde Valley Housing Market Partnership, which consists of housing and planning officials from each of the 8 authorities. One important matter flagged up *in limine* (para 3.3) was that the housing estimates of this HNDA differed significantly from the previous one (June 2011) as a result of: (i) up to date material from the National Records of Scotland (NRS) on population and household forecasts; (ii) a different HNDA Tool, which based its housing need and demand figures on factors including household formation, income and prices; and (iii) a different approach to “backlog” (existing) need to

reflect new house need only. The differences had resulted in lower estimates of both need and demand and a different balance between that in the “social and below market” sector and that in the private rented and owner occupied sector.

[11] The method adopted by the interested parties in the Background Report was: first, to collate HNDA estimates from the individual local authority areas; secondly, to adjust them; thirdly, to produce the Housing Supply Target (HST); fourthly, to add the SPP’s required generosity quotient (para 116); and, fifthly, to produce the Housing Land Requirement (HLR). This method reflected a diagrammatic scheme (Diagram 1) set out in the SPP. In reaching the HNDA figures, the interested parties considered three “demographic scenarios” predicting future growth. Having regard, *inter alia*, to material contained in an economic outlook report, a “Sustained Growth” model, being generally a mid-ground between High and Low Migration, was chosen. Once each local planning authority’s figures were totalled, the following was produced:

2012 - 2029 <sup>1</sup>		
SR & BMR <sup>2</sup>	Private <sup>3</sup>	Total <sup>4</sup>
39,318	52,535	91,853

[12] Second stage adjustments were made to “reflect how in reality the private sector operates, with home buyers moving house and exercising choice irrespective of local authority boundaries”. This involved, *inter alia*, an apportionment of 6,000 units from Glasgow to surrounding authorities and an overall increase in All-tenure figures. Adjusted figures submitted by each local authority produced the following totals:

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<sup>1</sup> Separate Figures for 2012-2024 and 2024-2029 were provided

<sup>2</sup> Social Rented and Below Market Rent

<sup>3</sup> Private Rented Sector plus Owner Occupied

<sup>4</sup> All-tenure



2012 - 2029		
SR & BMR	Private	Total
39,732	55,407	95,139

[13] In order to arrive at an HST, guidance is supplied by a Managers Guide. This stresses (para 9.1) that the HNDA is to provide the evidence upon which the HST will be based. The HNDA is the starting point, but “policy and practical considerations” are to be taken into account before reaching a view on the level of housing to be delivered. The Guide gives eight examples (para 13.4) of factors to be considered in setting realistic totals. These include: construction capacity; availability of resources; likely pace based on completion rates; planned demolitions; and renovations. The Background Report took these into account and added environmental and social factors.

[14] The local authorities had each been provided with a template to complete in reaching the HSTs (see Background Report para 9.1). Each could add or subtract from the stage 2 adjusted figures according to the weight given to the various factors. This exercise produced the following HST totals:

2012 - 2029		
SR & BMR	Private	Total
31,274	69,701	100,975

[15] The Background Report stated (para 10.1) that the various factors had resulted in a negative adjustment to the social sector:

“to adjust for the likely availability of resources, a more even spread of the social sector across the planning periods, positive adjustments to the private sector and a consequential positive adjustment to the overall all tenure housing supply targets.”

The drop in the social sector had reflected a general transfer of units to the private sector in anticipation of the latter delivering a significant amount of social housing. The increase in the private sector was because of a higher anticipated level of delivery, reflecting past completion rates, and anticipated population and economic growth. It was not thought that the generosity element should be added to the social HST, given “resource planning assumptions” (para 11.2). A 10% figure was applied to the private sector “mindful of the context which includes a generous existing all tenure land supply” (para 11.3). This provided a Housing Land Requirement (HLR) as follows:

2012 - 2029		
SR & BMR	Private	Total
31,274	76,671	107,945

[16] It was estimated that the Housing Land Supply figures were respectively: 17,873; 99,735; and 117,608. The private sector element was noted as being 43% above the HST. The All-tenure figure was higher than that produced by the High Migration scenario (*supra*) favoured by the developers.

### **The proposed Clydeplan**

[17] The proposed Clydeplan stated (para 6.23) that the interested parties were committed to supporting growth in the housing sector by creating high quality places which delivered the right type of homes in the right locations. The HLR would enable ambitious, yet realistic, levels of growth to be planned across the city region. It noted (para 6.27) that the “recent economic downturn” had impacted on the delivery of new housing. Nevertheless, in support of its vision and strategy, the Clydeplan aimed to meet the need

and demand for housing in full by setting a policy context which provided for a generous supply of land.

[18] Under the heading “Assessing housing need and demand in a city region context”, the Clydeplan recorded (para 6.37) that its long-term strategic planning had been informed by the HNDA which had provided the evidence base for identifying housing requirements (para 6.39). The HNDA had been signed off by the Government’s Centre for Housing Market Analysis (CHMA) as “robust and credible” in May 2015. The Clydeplan continued:

“6.42 The housing estimates produced from the HNDA (2015) are lower than the previous HNDA (2011) as a result of:

- the adoption of a different approach to backlog need to reflect only that need which requires an additional house which has significantly reduced backlog need from 85,000 units to 11,700;
- the use of the most up to date National Records of Scotland population and household projections which reflect recent trends in the economy and census figures; and
- the use of the CHMA’s HNDA tool which estimates future housing need and demand based on factors including household formation, income and house prices.

6.43 Although the housing estimates are lower than the previous HNDA, the housing land requirement set out in this Plan, along with continuing additions to the supply through local development plans and the granting of planning permissions, will enable Clydeplan to continue to plan for ambitious yet realistic growth.”

[19] In accepting the Sustained Growth model proposed in the Background Report, the Clydeplan noted that the economic and demographic drivers pointed towards more muted growth than under the previous SDP (May 2011). Adopting the adjusted housing estimates set out in the Background Report, the plan took account of both policy and practical considerations and again followed the Background Report. It produced HST figures for the period 2012 to 2029 rounded up or down from the Background Report of 100,990 (All-tenure) with 31,290 in the social sector and 69,700 in the private sector. The proposed

generosity level of 10% was applied to the private sector to produce the HLR, more precisely described in the Background Report, of 107,960 (31,290 and 76,670).

### **The Examination Report and Clydeplan Adjustments**

[20] A number of developers, including the appellants, made representations about, *inter alia*: the selection of the “Growth Scenario”; the setting of the HLR; the calculation of the HLS and the joint action on delivery. These became issues 10 to 13 which were heard by a reporter (David Liddell) in terms of section 12 of the 1997 Act. The reporter recorded the interested parties’ summary of the representations as including a contention that the Clydeplan’s selection of the Sustained Growth scenario, rather than the High Migration scenario, was planning for decline and would artificially constrain economic growth. The appellants had maintained that this was inconsistent with the Clydeplan’s overall vision. The HNDA had been based on data from a recessionary period, which would inevitably not lead to forward thinking. The significant reduction in the backlog was a measure used to suppress the overall HLR. The approach was reactive to the past, rather than visionary. The interested parties had replied that the plan was appropriately ambitious and rejected suggestions that a higher migration scenario ought to have been adopted or that the HNDA should have been re-run. A rational and evidence based approach had been taken. The evidence base had come from a variety of reports which had been referred to in the Background Report. The selection of the Sustained Growth scenario was based on the NRS household projections.

[21] The reporter noted (Issue 10, conclusions, para 4) that the Government’s CHMA had certified the HNDA as “robust and credible”. There was nothing which would justify examining the HNDA further. The nature of the NRS projections had to be borne in mind

(*ibid* para 5). They were based on past trends. Inward migration had, over the last 10 years, been higher on average than previously assumed. The rate of house completions had also been higher. In relation to the adjustments, the reporter explained that the (rounded up) HNDA figures had been augmented by 2,870 further private homes, taking into account an increase in non-effective stock, and a positive adjustment of 414 for Inverclyde, where the estimated decline in household numbers (at a negative of that figure) had been re-set at zero. He accepted the relevance of the re-assignment of demand from Glasgow, which had been identified in the Background Report.

[22] On the calculation of the HSTs from the adjusted figures, the reporter acknowledged (*ibid* para 11) the calculations in the Background Report, which took into account the likely available resources and past completion rates in the social sector and population and economic growth “ambitions” in the private sector. In relation to the decline in the social sector figure, he said:

“14. I have some difficulty in reconciling the approach taken ... with the stated desire of meeting all existing social sector need within ... either 5 or 10 years. Nor have I seen the kind of ‘compelling evidence’ for the adjustments which SPP says is required.”

[23] The reporter recorded (para 23) that he had asked the interested parties “for further evidence, quantitative if available, on the basis for the specific adjustments made to the HST for each local authority area”. In fact, he may have asked for “an explanation” rather than evidence (see response to a request dated 23 September 2016). In any event, he was informed that no further quantitative evidence was available. The Housing Market Partnership (see *supra*) had met over two days to agree the HSTs. They had started with the adjusted housing estimates and had applied their professional judgment to them. The interested parties had explained that the templates (*supra*), which had been used by the

authorities, illustrated the factors which had been taken into account. These had not been made available nor had there been “detailed evidence” on how, for each local authority, the final figures had been arrived at from the mix of positive and negative factors.

[24] The reporter was conscious (para 16) of the Government’s all Scotland target of 50,000 new affordable homes over a 5 year period, albeit that that target had been formalised after the HSTs had been calculated. The developers had pointed to increased figures for the social sector in the 8 authorities “Strategic Housing Investment Plans” (SHIPs), although these were intended to be “over-programmed” according to the Government guidance. The reporter was not persuaded that the figures in the SHIPs provided a sufficiently robust basis upon which to recommend specific changes to the social sector HST. He accepted that the plan could be assuming levels of delivery in the social sector which could be less than what could now, with the additional Government funding, be achieved in the period to 2021/22. He included additional text to that effect and altered Policy 8 (*infra*) to make it clear that local authorities could remedy any shortfalls in the 5 year supply through the grant of planning permission if certain criteria were met.

[25] The reporter dealt expressly with the significance of the “All-tenure HST” as follows:

“20. ... the all-tenure target is an important consideration ... Every house built and subsequently occupied would contribute to meeting housing need and demand. In setting the HSTs ... a significant proportion of the social sector need was, in effect, transferred to the private sector target. ... the private sector can ... contribute to meeting affordable housing need in a number of ways. It would in any event be for the subsequent LDPs [local development plan] to fix policy on the proportion of homes on new development sites which are to be for affordable housing ... I am satisfied that the Plan, subject to the modifications I recommend, would not act to constrain the provision of such housing should resources and opportunities allow greater levels of delivery than those in the HSTs.”

[26] On the private sector HST, the reporter noted that the HNDA had explained how the approach to the choice of scenarios in the HNDA had been determined. The reporter had

sympathy (para 25) for the view that the process, through which the HSTs had emerged, lacked transparency. He would have found more evidence supporting the figures “helpful”. The material, which he did have, did not amount to “compelling evidence” which the SPP said should underpin the HSTs. He continued:

“25. ... On the other hand, there is perhaps a danger in seeking spuriously precise, numerical justifications for decisions which inevitably rely on a degree of professional judgment.”

[27] The reporter observed (para 26) that the adjustments had taken the private sector HST to (a rounded down) 69,700, being an increase of about 26% on the adjusted estimate. The all-tenure HST of (a rounded down) 100,990 constituted a 6% increase. He continued:

“28. Despite my misgivings about the quality of evidence ..., the [interested parties have] taken into account the factors which SPP says it ought to. For private sector homes, the increase of 26% from the overall adjusted housing estimate is a significant one. As required by SPP, this reflects the HNDA estimate – in fact it significantly exceeds it.”

[28] The reporter acknowledged the inherent uncertainties in the use of projections. The interested parties had said that the background research had indicated little sign of significant economic improvement in the short to medium term. There was a range of views about what level the HSTs should be set at, based upon the most likely economic future. No alternative scenario was clearly more likely than that adopted by the interested parties. He did not consider that there was a fundamental problem with the level of ambition in the plan. The HNDA had been certified as robust and credible. The SPP stated that development plans should plan on the basis of the HNDA. The planning authority were entitled to proceed on the basis of the NRS projections. There was no case for recalculating the HSTs on the basis of the high migration scenario.

[29] In concluding on the HSTs, the reporter said:

“43. The proposed plan is predicated on lower levels of household growth (if not population growth) than was the case for the current SDP. ... I do not characterise this as planning for decline. ... the plan is based on adjusted housing estimates which show a projected growth of 5,600 new households per year, and it has an overall housing supply target of over 100,000 new homes in the period to 2029.

44. On the basis of a HNDA which is robust and credible, ... the HSTs arrived at are reasonable and appropriate. The authority has generally followed the approach advocated in SPP and the HNDA guidance and I see no compelling reason to depart from it.

45. I remain conscious though, of the lack of detailed evidence about how the HSTs were derived from the adjusted housing estimates, and of the potential that economic growth and the need and demand for new housing could still turn out to be higher than is being planned for.”

[30] In relation to the HLR, the reporter concluded that the generosity allowance should apply to the whole of the HST (All-tenure) and not just to the private sector. He did not find that he had strong evidence to support an allowance for generosity which was at the bottom end of the range (10 to 20%) stipulated in the SPP. Increasing the level of generosity would have a relatively modest effect, but it would go some way towards ensuring that there was sufficient land available if need and demand proved greater than projected, or the housing land supply proved to be slow in becoming effective. An allowance of 15% would strike an appropriate balance. This would give a private sector HLR of 80,160 (45% greater than the adjusted private sector estimate). It would be about 16% above the private sector estimate of 69,040 based upon the High Migration scenario. It would give an All-tenure HLR of 116,150. This would be about 22% greater than the adjusted All-tenure housing estimate and 8% greater than the unadjusted All-tenure estimate on the High Migration scenario. He recommended changes to the Clydeplan accordingly. This produced the following final table<sup>5</sup> in the Clydeplan (Sch 6):

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<sup>5</sup> figures rounded up or down



2012 - 2029			
	Social Sector	Private Sector	Total <sup>6</sup>
Sustained Growth Estimate	39,320	52,540	91,860
Adjusted	39,730	55,410	95,140
HST	31,290	69,700	100,990
HLR	35,990	80,160	116,150
HLS	17,870	99,730	117,600

[31] On HLS the reporter noted that the SPP did not task SDPs with fully establishing the HLS position. It was for the LDPs to ensure that sufficient land was identified to meet the HLRs and the HSTs. The land supply in the Clydeplan represented the position at a fixed point in time; some years in the past, by the time any LDP came to be adopted. The Clydeplan therefore went too far in concluding that the established housing supply was sufficient to deliver the HSTs and that no new strategic scale housing allocations were required. With that in mind, the reporter recommended a series of revisions. Both policies 7 and 8 aimed to show how, in addition to identification of the HLRs, the Clydeplan could support the delivery of new homes.

[32] In its revised form, Policy 7 (“Joint Action Towards the Delivery of New Homes”) encouraged local planning authorities to work together with developers to create innovative mechanisms to improve housing delivery across all sectors; focusing on the HLS and public sector estate whilst bringing forward new opportunities in accordance with Policy 8.

Policy 8 said that “In order to provide a generous supply of land for housing and assist in

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<sup>6</sup> All-tenure

the delivery of the [HSTs] in support of the Vision and Spatial Development Strategy” local authorities should make provision in their LDPs for: the All-tenure and the private sector HLRs, which were broken down into numbers for each local authority area; and the private sector HLR, which was divided into sub-market areas (eg different parts of the “central” and “eastern” conurbations). Local authorities required to provide the 5 years effective HLS for each sub-market and each local authority area. As specifically modified by the reporter,

Policy 8 continued:

“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.”

### **The respondents’ decision**

[33] The respondents were asked by officials to approve the Clydeplan, with the reporter’s modifications, by memorandum dated 13 June 2017. This drew (para 10) the respondents’ attention specifically to the housing issue; observing that the reporter’s view had been that: the HSTs had been reasonable and appropriate; and the interested parties had followed the approach in the SPP and the HNDA Guidance. The figures in the original proposed plan, and as proposed by the reporter, were tabulated. The memorandum drew (para 12 *et seq*) the respondents’ attention to the developers’ concerns about the HST for the social sector; specifically that the reduction from the HNDA figure had been “unevidenced”.

Reference was made to the reporter's comment about a lack of compelling evidence which "SPP indicates should support" it. Passages of the report, including the one mentioning "spuriously precise numerical justification", were quoted in an attempt to summarise the reporter's reasoning. The official expressed her satisfaction that the developers' concern had been adequately addressed by the reporter.

[34] By letter dated 24 July 2017, the interested parties were advised that the respondents had decided to approve the Clydeplan with modifications. They accepted the reasons set out in the examination report and adopted them as their own.

## **Submissions**

### *Appellants*

[35] The respondents' acceptance of the reporter's reasons was unreasonable. Accordingly, the Clydeplan was *ultra vires* and ought to be, in whole or in part, quashed (Town and Country Planning (Scotland) Act 1997, s 238). In terms of the SPP, the HSTs required to be supported by "compelling evidence" and properly justified. The reporter had said that he did not have compelling evidence for the HSTs. Accordingly, he had not had a proper evidential base for his findings. He had not insisted on an evidential base, in the form of the completed templates being provided, nor had he described an evidential base. He had not set out a basis for: not following the SPP (*Hopkins Homes v Communities Secretary* (*supra*), at para 22, following *Tesco Stores v Dundee City Council* 2012 SC (UKSC) 278, at para 18, and para 75); concluding that the HSTs were reasonable and appropriate; or determining that the interested parties had generally followed the SPP. His conclusion, that the HSTs were reasonable and appropriate, was inconsistent with those elsewhere. He had accepted that there was a lack of transparency in the process through which the HSTs had

emerged. He had no evidential base upon which to appraise the individual local authority area HSTs and the adjustments made to them. The appellants had subsequently recovered the completed templates. Had they been produced at the time, the appellants would have been able to comment on the accuracy of their content.

[36] The reporter had concluded that he did not have compelling evidence for the adjustments. The reporter had recognised that the Government targets had been formalised after the HSTs had been arrived at, but he did not recommend changing the HSTs. He had recognised that the proposed plan could be assuming levels of delivery of social sector housing, which could be less than what could now be achieved with the additional funding. He had recommended additional text to allow for extra land allocation, but this did not address the absence of evidence. He did not address the failure to comply with the SPP.

[37] The reporter's conclusions on social sector HSTs and All-tenure HSTs were inconsistent with his findings elsewhere and his recognition of the availability of additional funding. He had attempted to mitigate the inadequacies in the evidence by increasing the generosity allowance. This approach did not address whether the HSTs were justifiable. It was inconsistent with SPP and the reporter's own conclusions. The purpose of the generosity allowance was to ensure that a supply of land for housing was available to meet an HST that had been properly set. It was not to correct failings in the method by which the HST had been set in the first place. The reporter's reasoning in selecting 15% was inadequate.

[38] The interested parties had had evidence on the basis for the specific adjustments, but did not produce it to the reporter. The advice to the respondents had failed to set out the reporter's misgivings with the approach adopted by the interested parties and had not explained that they had not complied with the SPP.

[39] The appellants had suffered substantial prejudice (1997 Act, s 238(2)(b)). The whole Clydeplan should be quashed (see *Eadie Cairns v Fife Council* [2013] CSIH 109; *Scottish House Builders Association v Secretary of State for Scotland* 1995 SCLR 1039 at 1046). The effect would be that the matter would go back to the respondents for reconsideration and not to the earlier stage involving the interested parties.

### ***Respondents***

[40] The appeal ought to be refused. A lack of compelling evidence to support the HSTs did not result in the approval of the Clydeplan being outwith the powers of the 1997 Act (s 238) or amount to a failure to comply with its terms. The respondents and the reporter had correctly interpreted the SPP (paras 115 and 116). The basis for the HSTs did not require compelling evidence. The SPP had been applied to the facts using professional judgment; such issues being for the decision maker and not the court (*Simson v Aberdeenshire Council* 2007 SC 366). Even if the SPP had been departed from, the explanation for doing so had been adequate, when the report was read as a whole. If the approval had been *ultra vires*, it would be enough for the court to narrate the errors in relation to the HSTs. Alternatively, only that part of the plan relating to new housing should be quashed.

[41] The SPP contained broad statements to be read in the context of the whole policy (*Hopkins Homes v Communities Secretary (supra)* at paras 22, 26, 74 and 75; *Uprichard v Scottish Ministers* 2013 SC (UKSC) 21 at para [4]). That part of the SPP relating to the need for compelling evidence (para 115) was a “process policy” designed to achieve the principle of maintaining at least a 5 year supply of effective housing (para 110). Compelling evidence was one of several factors to be taken into account. It was intended to operate as a check that the principle was being complied with. The reporter used the phrase to mean that he

did not have the numerical justification, but he did have the explanatory factors in the Background Report. He had placed considerable weight on the fact that the All-tenure figure comfortably exceeded the adjusted HNDA amount.

[42] The reporter had been entitled: to reach the conclusion which he did on the basis of the evidence before him; to modify the Clydeplan to take account of the additional funding for the social sector; and to permit local development plans to allocate additional land in response. The amount of information required was one for planning judgment. The purpose of the report was to inform the respondents of the relevant considerations. The reasons given in it were proper, intelligible and adequate.

[43] The reporter had approached the issue of the HLR in a reasonable fashion. He had acknowledged and taken account of four factors, *viz.*: (1) the lack of an evidential base for the adjustments; (2) the concerns expressed about the effectiveness of HLS; (3) the additional funding available for affordable housing; and (4) the uncertainty of future housing need and demand. The purpose of the generosity margin was to try to ensure that sufficient land was allocated in LDPs. Its selection was one for planning judgment. The reporter had given proper and intelligent explanations for choosing the level of generosity which he did.

[44] The respondents had not been misled by any lack of information provided by the interested parties or the advice upon it given by officials. The reservations of the reporter had been reported to the respondents and advice given accordingly.

[45] Whether to quash the plan was a matter for the court's discretion. The appellants' complaints had been restricted to particular issues about housing growth strategy. The Clydeplan applied to eight local authority areas, each of which required to prepare, and keep under review, LDPs which were consistent with the Clydeplan. The appellants would have an opportunity to make representations to each authority about the appropriate

housing allocations within the LDPs in the light of any findings made by the court. The quashing of the Clydeplan would severely prejudice the local authorities which were at various stages in the preparation of their LDPs. The court should consider quashing only to a proportionate extent (see *Retail Property Holdings v Renfrewshire Council* [2015] CSIH 69 and *Hallam Land Management v City of Edinburgh Council* 2011 SLT 965).

### ***Interested parties***

[46] The reporter found support for the HSTs in a number of factors, including the HNDA. He had recommended additional text to enable land to be allocated to ensure that the estimates were met. He had correctly identified a concern, but, in weighing the evidence and applying his professional judgment, he had concluded that he was satisfied with the HSTs.

[47] The reporter had concluded that the All-tenure HST was an important consideration and could contribute to meeting housing need and demand. He had identified that affordable housing could be achieved in a number of ways. In particular, LDPs would require to make provision for the social sector. The reporter had considered the issue of qualitative evidence at a hearing session when the methodology of agreeing the HSTs had been discussed. He had been content to rely on the HSTs in the absence of further information. The assessment of the HSTs involved a process. The SPP did not require compelling evidence of every stage. The reporter did have evidence in the form of the Background Report. He had recognised that the information previously sought might be spuriously precise and ultimately relied on his professional judgment. The completed templates had been regarded as the private workings of the local authorities. They had not been necessary to the decision making process. Now that they had been recovered, it was

not clear what difference they might have made. The reporter had carried out an assessment of the generosity figure to address shortfalls. He had applied his judgment in selecting 15%. The information before him had not been misleading.

[48] If the Clydeplan required to be quashed, that should only be done in so far as relating to the new housing issue.

## Decision

[49] In terms of section 238(2)(b) of the Town and County Planning (Scotland) Act 1997, a development plan, such as the Clydeplan, may be quashed, in whole or in part, if it is wholly, or to any extent, outwith the powers conferred by the Act or if the interests of the applicant have been substantially prejudiced by a failure to comply with the Act or any regulations made thereunder. A plan will be regarded as outwith the powers of the respondents if they have improperly exercised the discretion confided in them, or made a material error of law going to the root of the question for determination. It will also be *ultra vires* if the respondents have taken into account an irrelevant consideration, failed to take account of relevant and material considerations, proceeded on a fact for which there was no evidential basis, or reached a decision which no reasonable Scottish Minister could have reached (*Wordie Property Co v Secretary of State for Scotland* 1984 SLT 345, LP (Emslie) at 347-348).

[50] At the heart of the appeal is the contention that, in setting the HSTs, the reporter (and hence the respondents) failed to apply the terms of the SPP, notably that part (para 115) which states that the housing supply target (HST) should not only properly reflect the HNDA in the particular sector but also be “supported by compelling evidence”. It is, first, important to reiterate what has been said before on the subject of planning policy. A



planning authority, including the interested parties, must have regard to the SPP (Town and Country Planning (Scotland) Act 1997, s 3E(3)). Where policy is an expression of general principles (as the SPP is), it is not to be interpreted as if it were a statute (*Hopkins Homes v Communities Secretary* [2017] 1 WLR 1865, Lord Gill at para 74 (having cited *Tesco Stores v Dundee City Council* 2012 SC (UKSC) 278, Lord Reed at para 18)). Secondly, the particular policy must be read in its context (*ibid*, para 72). Thirdly, if a planning authority departs from a policy, it may be regarded as acting unreasonably in the absence of at least some explanation for doing so (*Scottish House-Builders Association v Secretary of State for Scotland* 1995 SCLR 1039, Lord Sutherland, delivering the Opinion of the Court, at 1043).

[51] In this case, the general policy (SPP para 109) is to provide for new homes in certain defined situations. This is to be done (para 110) by the identification of a generous supply of land which will “support the achievement” of the housing land requirement (HLR) across all tenures by maintaining a 5 year supply. That then is the objective which is to be attained. The Clydeplan fully complies with this by, essentially, repeating it in Policy 8. The SPP continues by stipulating (para 115) how the objective is to be attained. This is the process of setting Housing Supply Targets (HSTs) for the social and private sectors based on (and reflecting) the housing need and demand assessment (HNDA). The HSTs are to be both reasonable and supported by compelling evidence. The policy does not require every figure in the HNDA, or the adjustments, to be so supported; only the HSTs themselves. In so far as the reporter may have thought otherwise (report para 14) he was mistaken, although he later stated (*ibid* para 25) matters correctly.

[52] The reporter did have detailed figures making up the original HNDA from each of the local authorities. The figures had been described as “robust and credible” by the Government’s Centre for Housing Market Analysis (CHMA) and, for that reason, they were

accepted by the reporter. This part of his decision is not challenged. The appellants' specific criticism is in relation to the absence of any reasoning for the original figures being adjusted by each authority up or down, or not at all. The extent of the adjustment was evident from the breakdown, of the totals noted above, into the eight separate local authority areas. The reporter knew of the existence of completed templates, since they were referred to in the Background Report (para 9.1) and mentioned in the response made by the interested parties to his request for "further evidence" or at least an explanation. The factors which ought to have been taken into account were also known.

[53] Whether the material before the reporter amounted to "compelling evidence" may be arguable, but the respondents did not seek to query the reporter's conclusion that it did not. The court will proceed upon that basis; the issue then becoming one of whether the reporter gave an adequate and reasonable explanation for proceeding in the absence of that evidence. After all, doing so would amount to a departure from what the policy requires. It is, however, important to note that the departure relates to a requirement of the process in arriving at the HSTs, rather than the policy principle to provide an adequate housing supply.

[54] The reporter did give such an explanation. He observed (para 20) that it was the All-tenure figure that was important. This was because not only did it include a social sector figure, but also the private sector would contribute to the social sector by reason of, amongst other things, each LDP fixing the proportion of affordable housing in any private development. Although there may have been a lack of transparency in arriving at the HSTs, the reporter explained (para 25) that he was not particularly concerned about this as there was a danger in seeking "spuriously precise, numerical justification for decisions which inevitably rely on a degree of professional judgment". Such judgments had produced an

HST which was 26% up on the adjusted estimate and an All-tenure HST some 6% higher. Because of this, the reporter had considered (at para 28) that any “misgivings” about the evidence had been allayed. He thus justified his conclusion (para 44) that the HSTs were reasonable and appropriate and that their calculation had “generally followed” the SPP and HNDA guidance. It is of some note, in that connection, that, having produced the completed templates and been able to pinpoint some anomalies, it was not demonstrated that their content would have led the reporter to a materially different result.

[55] There is no complaint about the application of the generosity factor to the All-tenure (ie including the social sector) HST. The criticism is that the reporter’s application of 15% was not adequately reasoned. The reporter explained that he had had some reservations about the adequacy of the HSTs, notably the social sector figure in light of increased Government funding. The generosity factor (SPP para 116) is a discretionary amount designed to ensure that the required housing supply is provided. The policy requires a robust explanation for it in the development plan. It is so provided (paras 6.61-6.62). The reporter recognised the reduction in the social sector caused by the re-allocation of the balance to the private sector. The generosity level was to provide flexibility. In selecting a higher percentage than that proposed, the reporter was not presuming that the HSTs were incorrect. He was building in that flexibility, which is there to avoid a shortfall in land supply, should the calculation of the HSTs prove to be an underestimate in the event of predictable changing conditions.

[56] The appellants’ concern is about the comparative Housing Land Requirement and Housing Land Supply figures. They are no doubt anxious to ensure that they have sufficient flexibility within the planning system to enable them to develop such land as they may already have or may seek to secure. The focus in the *Third National Planning Framework*

(para 2.20) and the Scottish Planning Policy (para 109) is on providing that flexibility. The reporter has increased the All-tenure HLR from 107,960 in the Background Report to 116,150 in the Clydeplan. It is well in excess of the adjusted Sustained Growth estimate. The figure for the All-tenure HLS is 117,600; ie the supply in the Clydeplan's snapshot exceeds demand even when the generosity factor is included. These figures indicate general compliance with the policy principle (*ibid* paras 110 and 123) of identifying a generous supply of housing land. The reporter was not deceived by anything said by the interested parties, given that he was aware of the fact that templates, which he did not have, would have been completed to produce the adjusted figures. The respondents were not misled by their official, who accurately summarised the examination report, which was, in any event, supplied to them.

[57] The approval of the Clydeplan by the respondents, for the reasons set out by the reporter, cannot be said to have been outwith the powers of the 1997 Act or to have amounted to a failure to comply with the provisions of the act. On the contrary, the reporter's reasoning expresses in clear terms why he did not consider that the absence of compelling evidence to justify the HSTs was material, given that produced in the Background Report and elsewhere. For these reasons the appeal must be refused.

[58] Had the court reached a contrary view, it would have been inclined to quash only that part of the Clydeplan which related to the provision of new housing; essentially paragraphs 6.22 (Enabling Delivery of New Homes) to 6.81 and including Policies 7, 8 and 9. While it is correct to say that a fundamental feature of an SDP is that its policies interlock and it may often not be possible to excise one part without affecting the whole (*Uprichard v Scottish Ministers* 2011 SC 172, LJC (Gill) at para [33], cf *Eadie Cairns v Fife Council* [2013] CSIH 109, LJC (Carloway) at para [46]), in this case the new housing section is severable. The effect of the partial quashing would not be to leave a permanent gap in the Clydeplan.

Rather, the matter would have to be returned to the Scottish Ministers for consideration of this section anew under section 13 of the 1997 Act.