



OUTER HOUSE, COURT OF SESSION

[2019] CSOH 19

P719/18

OPINION OF LORD TYRE

In the petition

NO KINGSFORD STADIUM LIMITED

Petitioner

against

ABERDEEN CITY COUNCIL

Respondent

and

ABERDEEN FOOTBALL CLUB PLC

Interested Party

**Petitioner: Wilson QC, Van Der Westhuizen; Gillespie MacAndrew LLP**

**Respondent: Crawford QC, Byrne; Morton Fraser LLP**

**Interested Party: Findlay QC, A Sutherland; Burness Paull LLP**

1 March 2019

**Introduction**

[1] On 23 April 2018, the respondent (“the Council”) granted planning permission for a proposed development at West Kingsford, Skene Road, Aberdeen, near Westhill, comprising “Proposed Community and Sports Facilities, Football Academy, (comprising outdoor pitches, pavilion, ancillary buildings), Stadium (20,000 capacity), ancillary uses, formation of access roads, parking and associated landscaping and engineering works”. The centre piece

of the proposed development is a new stadium for Aberdeen Football Club, which has participated in the current proceedings as an Interested Party.

[2] The petitioner is a company whose objects include benefiting the community of Westhill, Kingswells and West Aberdeen by *inter alia* (i) advancing environmental protection and/or improvement including preservation, sustainable development and conservation of the natural environment and landscape, and (ii) promoting the use, management and preservation of land within the community in a sustainable and environmentally friendly manner for the benefit of the community and the public in general which promotes, preserves and enhances the environment, heritage, amenity and culture of the community. It opposes the football stadium development. The petitioner made various written representations to the Council against the development and was represented at and participated in pre-determination hearings.

[3] The proposed development is located on an undeveloped and unallocated site within an area designated as green belt in the Aberdeen Local Development Plan ("ALDP"), which was adopted on 20 January 2017. In that regard, as is common ground, the development is contrary to the provisions of the development plan. The Council's officers concluded, however, that there were no other sites within Aberdeen that would be suitable, available and deliverable, and preferable in terms of environmental impacts. The Council in turn concluded, having assessed the development against various policies in the development plan, that the public benefits of the stadium outweighed the provisions of the development plan and that no material considerations had been identified that would weigh significantly to the contrary.

[4] In this application, the petitioner seeks reduction of the Council's decision to grant planning permission for the development. In summary, the petitioner contends, firstly, that

the Council made material errors of law in the interpretation and application of its own development policy and, secondly, that it failed to establish the necessary factual basis for the sequential approach that it adopted in concluding that there was no alternative available site.

### **The development plan**

[5] The principal, though not the only, component of the development plan is the ALDP which, as I have noted, was recently adopted. For the purposes of these proceedings, the following provisions are relevant:

*“NE2: Green Belt*

No development will be permitted in the Green Belt for purposes other than those essential for agriculture; woodland and forestry; recreational uses compatible with an agricultural or natural setting; mineral extraction/quarry restoration, or landscape renewal.”

[The policy goes on to list a number of exceptions, none of which is applicable to the proposed development. The abbreviation NE stands for “natural environment”.]

*“NC1: City Centre Development – Regional Centre*

Development within the city centre must contribute towards the delivery of the vision for the city centre as a major regional centre as expressed in the City Centre Masterplan and Delivery Programme. As such the city centre is the preferred location for retail, office, hotel, commercial leisure, community, cultural and other significant footfall generating development serving a city-wide or regional market.

Proposals for new retail, office, hotel, commercial leisure, community, cultural and other significant footfall generating development (unless on sites allocated for that use in this plan) shall be located in accordance with the sequential approach referred to in this section of the Plan and in Supplementary Guidance.

...

*Policy NC4 - Sequential Approach and Impact*

... All significant footfall generating development appropriate to town centres (unless on sites allocated for that use in this plan) should be located in accordance with the hierarchy and sequential approach as set out below and detailed in Supplementary Guidance:

- Tier 1: Regional Centre
- Tier 2: Town Centres
- Tier 3: District Centres
- Tier 4: Neighbourhood Centres
- Tier 5: Commercial Centres

In these circumstances, proposals serving a catchment area that is city-wide or larger shall be located in the city centre if possible. Retail proposals shall preferably be located in the City Centre Retail Core.

Proposals serving a catchment area of a size similar to that of a town centre or district centre shall be located in a town centre or a district centre if possible. They may also be located in the city centre...

*Policy NC5 - Out of Centre Proposals*

All significant footfall generating development appropriate to designated centres, when proposed on a site that is out-of-centre, will be refused planning permission if it does not satisfy all of the following requirements (unless on sites allocated for that use in this plan):

- 1 no other suitable site in a location that is acceptable in terms of Policy NC4 is available or likely to become available in a reasonable time.
- 2 there will be no adverse effect on the vitality or viability of any centre listed in Supplementary Guidance.
- 3 there is in qualitative and quantitative terms, a proven deficiency in provision of the kind of development that is proposed.
- 4 the proposed development would be easily and safely accessible by a choice of means of transport using a network of walking, cycling and public transport routes which link with the catchment population. In particular, the proposed development would be easily accessible by regular, frequent and convenient public transport services and would not be dependent solely on access by private car.
- 5 the proposed development would have no significantly adverse effect on travel patterns and air pollution.

[The abbreviation NC stands for “network of centres”.]

...

*Policy T2 - Managing the Transport Impact of Development*

Commensurate with the scale and anticipated impact, new developments must demonstrate that sufficient measures have been taken to minimise traffic generated and to maximise opportunities for sustainable and active travel.

Transport Assessments and Travel Plans will be required for developments which exceed the thresholds set out in Supplementary Guidance.

The development of new communities should be accompanied by an increase in local services and employment opportunities that reduce the need to travel and include integrated walking, cycling and public transport infrastructure to ensure that, where travel is necessary, sustainable modes are prioritised. Where sufficient sustainable transport links to and from new developments are not in place, developers will be required to provide such facilities or a suitable contribution towards implementation.

Further information is contained in the relevant Supplementary Guidance which should be read in conjunction with this policy.

*Policy T3 - Sustainable and Active Travel*

New developments must be accessible by a range of transport modes, with an emphasis on active and sustainable transport, and the internal layout of developments must prioritise walking, cycling and public transport penetration.

Links between residential, employment, recreation and other facilities must be protected or improved for non-motorised transport users, making it quick, convenient and safe for people to travel by walking and cycling.

Street layouts will reflect the principles of Designing Streets and meet the minimum distances to services as set out in the Supplementary Guidance.

Existing access rights, including core paths, rights of way and paths within the wider network will be protected and enhanced. Where development proposals impact on the access network, the principle of the access must be maintained at all times by the developer through provision of suitable alternative routes.

Recognising that there will still be instances in which people will require to travel by car, initiatives such as like car sharing, alternative fuel vehicles and Car Clubs will also be supported where appropriate.”

[The abbreviation T stands for “transport”.]

[6] The development plan also includes the Aberdeen City and Shire Strategic Development Plan (“SDP”), dated March 2014 and produced by the Aberdeen City and Shire Strategic Development Planning Authority (“ACSSDPA”). According to its introductory paragraphs, the purpose of the SDP is to set a clear direction for the future development of the North-East, a key part being the ACSSDPA’s vision and spatial strategy, supported by a series of objectives and targets. Among the proposals in Schedule 2 to the SDP is “a new community stadium – a regionally important facility which will bring economic, social and cultural benefits”. Two possible locations for the stadium are identified (paragraph 3.24 and related diagram): at or near the current stadium site at Pittodrie/King’s Links and at Loirston to the south of the city. Kingsford is not identified as a possible location.

### **The Council’s decision**

[7] The Council’s decision followed the recommendations made to it in a report (“Report on Handling”) dated 29 January 2018 prepared by its development management manager. The reasons given by the Council for its decision reproduce the reasons set out in the Report on Handling for recommending approval. It is convenient at this stage to set out those reasons, in so far as they address the issues with which the petitioner’s challenge is concerned.

[8] Under the heading “Reasons for Decision”, the Council stated *inter alia* as follows:

“The development proposed is contrary to the provisions of policy NE2 (Green Belt) on the basis of its location within an area designated as green belt in the ALDP. Whilst this policy would potentially allow for elements of the development it is nevertheless the case that, taken as a whole, the development represents a significant departure from policy NE2, particularly in terms of its encroachment onto a green

buffer which visually separates existing settlements of Kingswells and Westhill and contributes to maintaining their separate identities as well as the wider landscape setting of Aberdeen. Nevertheless, sufficient information is available to enable officers to conclude that there are no other sites with [sic] Aberdeen that would be suitable, available and deliverable that would be preferable in term of environmental impacts.

The proposed stadium use represents a 'significant footfall generating use' serving a City-wide or regional market for the purposes of assessment against local and national policy. Notwithstanding the shortcomings in the applicants' consideration of sequentially preferable alternatives, sufficient information has been submitted by the applicant or is otherwise available to enable officers to utilise a sequential approach to considering alternative sites on the basis of both co-location and disaggregation and in the light of planning policy including identified sites for such a stadium at Loirston and Kings Links. The conclusion reached is that there are no other sites with Aberdeen on which the stadium could be accommodated that would be both available and deliverable in a reasonable timescale. On that basis, it is accepted that the proposal accords with the requirements of policy NC1 (City Centre Development) and NC4 (Sequential Approach and Impact) by having fully explored options for providing the development within the City Centre and other sequentially preferable locations. Further, despite some areas of policy conflict relating to accessibility, which arise as a result of the site's peripheral location, it is concluded that the proposal has, on balance, satisfied the terms of policy NC5 (Out-of-Centre Proposals).

...

The site's location is such that it is not readily accessible by sustainable modes of transport. This would be mitigated to some extent by match-day shuttle buses that would run from the city centre to the site. However, this only addresses travel needs from the city centre, and travellers from outlying areas would have longer journey times to access the site via public transport or other sustainable means. The location is such that it would be largely separated from its catchment populations, reducing the potential for travel by walking or cycling. This, together with the provision of off-site car parking in addition to the on-site provision at the maximum levels permitted by policy, is considered to encourage car-borne travel, which runs contrary to the stated aims of ALDP Policies T2 and T3 in relation to minimising traffic generated by development and promoting sustainable travel.

Notwithstanding this tension with transport-related policies, the use of conditions to ensure the delivery of interventions such as a pedestrian overbridge (or other means of safe pedestrian crossing) and implementation of a Controlled Parking Zone within Westhill will go some way to mitigating the impacts of the development. An ongoing commitment to the delivery of a bus strategy, including provision for monitoring and review, can be secured through a planning agreement...

...

In terms of public benefits (economic and social) it is considered that approval and implementation of the proposal would result in potentially millions of pounds of additional GVA [ie gross added value] per annum for the region, in addition to a significant £50 million up front investment and would create additional short and long term jobs. It would give the potential for improved performance by the football team and of at least maintaining, if not increasing crowd numbers together with the attraction of additional major sporting events and concerts - all of which would bring visitors from outside the region along with associated spending which would benefit the local economy. This would be in accordance with planning policies in SPP and other relevant socio-economic policy document for the City. As well as the potential to provide further events infrastructure to the north east, the development has potential to promote the north-east as a sporting destination. If opportunities for additional sporting events can be realised, this offers potential to enhance the image of the city and promote Aberdeen as a destination for sporting events and associated event-related and overnight/weekend business. The new stadium would also enable the expansion of the work of the AFCCT to increase the number of people in the region who participate in sport and physical activity. These benefits are highly unlikely to occur if approval is not given for the current proposal and, given the availability and suitability of alternative sites, certainly not in the short to medium term future. These potential public benefits to the region represent a significant material consideration weighing in favour of approval of the application.

In conclusion, it is considered that the proposal would have significant public benefits for the region - both economic and social. A thorough evaluation of potential sites has been carried out and it is considered that there are no sequentially preferable sites in the City for the stadium (whether co-located or disaggregated) that are available and deliverable at this time or in a reasonable timescale. Given the lack of available or deliverable sites, it can be concluded that these public benefits will not be realised if approval is not given for the development on the site that is currently proposed. The proposal is unique – Aberdeen Football Club is the only sports club in the region with a region-wide fan base – that can potentially deliver the economic and social benefits envisaged – and as such approval of the stadium does not set an undesirable precedent for future applications for other sports stadia or other uses that would not deliver the same benefits or where land is specifically zoned for such uses. Whilst the proposal is considered to be contrary the Green Belt Policy NE2 of the ALDP there are significant elements of the proposal – notably the training pitches and car parking that would either be compatible with Green Belt Policy or accord with the general aims of policy to maintain the openness of the green belt and visual separation between settlements. There are tensions with transportation policy in that the proposal would not be readily accessible by sustainable means but these would be mitigated by a green travel plan incorporating the extensive use of shuttle buses from the City Centre and other accessible locations.

On balance, therefore, it is considered that the public benefits of the stadium outweigh the provisions of the development plan and no material considerations have been identified that would weigh significantly to the contrary. Having had



regard to the benefits that would be realised through the development and its limited environmental and ecological value over and above its basic function as part of a buffer between settlements, it is considered that Scottish Planning Policy (SPP) weighs in favour of approval of the application.”

The reference to AFCCT is to the Aberdeen FC Community Trust, which was the joint applicant along with Aberdeen Football Club for planning permission for the proposed development.

[9] The suitability and availability of other sites for the development was addressed in some detail in the Report on Handling. Having concluded that Aberdeen FC’s existing premises at Pittodrie were not realistically suitable for the development of a new stadium, the report considered the King’s Links site, located near Pittodrie, within walking distance of the city centre, and identified in the SDP as a potential location for stadium development. The difficulty identified was that a golf centre and driving range, held by a tenant on a long lease from the Council, occupied 6ha in the northern part of the site. The tenant had confirmed that it had no intention to break the lease early. The view of Aberdeen FC was that the remaining 4ha of land was not sufficient to accommodate either the stadium or the training facilities. While not accepting the club’s assertion that a minimum of 12.5ha was needed for either component of a disaggregated development, the report nevertheless acknowledged (paragraph 9.76) that there was no realistic prospect of either element being readily accommodated within a 4ha site.

[10] The report then turned to consider the Loirston site which was sequentially preferable by virtue of its allocation in the ALDP for a potential stadium development. That allocation had been an element in the development of a larger site extending to 119.2ha for uses including residential and commercial. The majority landholder at Loirston was Hermiston Securities Ltd (“Hermiston”), a developer. The Council also owned land there

and had a development agreement with Hermiston to pool resources. By the time of the report, certain landholdings had been sold to third parties, and a planning consent for housing had been granted. Aberdeen FC was of the view that the land remaining within the area originally allocated for a stadium development was no longer sufficient. Hermiston had indicated that it would seek full market value based on residential development for any land re-allocated for stadium development. Against that background, the report concluded (paragraph 9.88) that whilst there were areas within the Loirston site that might technically remain available, the residential zoning of the land, the commercial realities of its value, and the legal obligation for the Council to achieve best value in the disposal of land were such that there was no realistic prospect of a development there being financially viable for Aberdeen FC. It was observed that “if development is not viable due to prohibitive land cost, and the potential for significant public benefit would be lost, then land cost and development viability may represent a material consideration”.

[11] The report went on to assess whether there was any other environmentally preferable site which avoided or lessened harm. Having considered certain sites, including other green belt sites, the report concluded (paragraph 9.108) that there was no readily apparent site that was suitable and environmentally preferable to the proposed site at Kingsford.

### **The applicable law**

[12] The legal principles applicable to a court challenge to a decision of a planning authority were not in dispute. The parties helpfully lodged a joint statement of legal principles at the outset of the hearing. I need only set out a few of these:

*Statutory requirements*

- Applications for planning permission require to be determined in accordance with the development plan, unless material considerations indicate otherwise (Town and Country Planning (Scotland) Act 1997 (“the Act”), sections 25(1)(a) and 37; *City of Edinburgh Council v Secretary of State for Scotland* 1998 SC (HL) 33 at 36 and 43-44).

*Material considerations*

- A decision of a planning authority will be *ultra vires* if it has improperly exercised the discretion confided to it. In particular it will be *ultra vires* if it is based upon a material error of law going to the root of the question for determination. It will also be *ultra vires* if the planning authority has taken into account irrelevant considerations or has failed to take into account relevant and material considerations, including, if it is one for which a factual basis is required, where there is no proper basis in fact to support it (*Wordie Property Co Ltd v Secretary of State for Scotland* 1984 SLT 345 at 347-348).
- It is for the Court to determine what is a material consideration. However, the weight to be given to a material consideration is a matter of planning judgement, and whether or not material considerations outweigh or justify a departure from the development plan is a matter of planning judgement for the decision maker, provided that it does not lapse into *Wednesbury* irrationality (*Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 at 780).

*The decision-making process and the role of the court*

- The planning decision-maker must properly interpret and apply planning policy, which should be interpreted objectively in accordance with the language used, read in its proper context. The construction of a development plan policy can be a matter of law for the Court, and if the decision-maker errs regarding the interpretation of policy, it is for the Courts to substitute the correct interpretation. It is a question of textual interpretation that can only be answered by construing the language used in its context. The relative importance of a given policy (properly construed) to the overall objectives of the development plan is essentially a matter of judgement for the planning decision-maker and their exercise of their judgement can only be challenged on the ground that it is irrational or perverse, with the proviso that a planning authority “cannot make the development plan mean whatever they would like it to mean” (*Tesco Stores Limited v Dundee City Council* 2012 SC (UKSC) 278, Lord Reed at paragraphs 17-21 and 34-35).
- Issues of interpretation of policy, appropriate for judicial analysis, and issues of the application of planning judgement to policy which are within the province of the planning decision-maker, are distinct, and the two issues should not be elided (*Suffolk District Council v Hopkins Homes Ltd* [2017] 1 WLR 1865 at 26 and 73).
- The court will construe a planning officer’s report in a practical, reasonably flexible and common sense way in the knowledge that it is targeted at parties who are well aware of the facts and issues (*Waterstone Estates Ltd v Welsh Ministers and others* [2018] EWCA Civ 1572 at paragraph 11). The question for

the court is whether, on a fair reading of the report as a whole, the planning officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made (*Mansell v Tonbridge and Malling Borough Council* [2018] JPL 176 at 42 (CA)).

*Adequacy of reasons*

- A planning decision-maker is required to give proper and adequate reasons for its decision, which deal with the substantial questions in issue in an intelligible way. The decision must leave the informed reader in no real and substantial doubt as to what the reasons were, and the material considerations that were taken into account (*Wordie Property Co Ltd*, above at 348). Where the adequacy of reasons is challenged the Court should consider whether the informed reader would understand the basis for the decision complained of. In this regard decision letters must be read in a straightforward manner on the basis that they are addressed to persons who are familiar with the background and issues (*South Bucks District Council v Porter* (No 2) [2004] 1 WLR 1953 at paragraph 36; *Uprichard v Scottish Ministers* [2011] CSIH 59 at paragraph 26).

[13] In addition to these general principles, reference requires to be made to certain statutory provisions concerning the disposal of land by a local authority. Section 1(1) of the Local Government in Scotland Act 2003 states that “it is the duty of a local authority to make arrangements which secure best value”. “Best value” is defined in section 1(2) as “continuous improvement in the performance of the authority’s functions”. At a somewhat more specific level, section 74(2) of the Local Government (Scotland) Act 1973 provides that a local authority may not dispose of land for a consideration less than the best that can

reasonably be obtained, except in accordance with regulations made under section 74(2C).

Those regulations are the Disposal of Land by Local Authorities (Scotland) Regulations 2010 (SSI 2010/160). Regulation 4 states as follows:

- “(1) The circumstances in which a local authority may dispose of land for a consideration less than the best that can reasonably be obtained are that—
- (a) the local authority is satisfied that the disposal for that consideration is reasonable; and
  - (b) the disposal is likely to contribute to any of the purposes set out in paragraph (2), in respect of the whole or any part of the area of the local authority or any persons resident or present in that area.
- (2) Those purposes are the promotion or improvement of—
- (a) economic development or regeneration;
  - (b) health;
  - (c) social well-being; or
  - (d) environmental well-being...”

### **Arguments for the petitioner**

[14] On behalf of the petitioner, two principal arguments, containing within them a number of subsidiary arguments, were presented, as follows.

(i) *Material errors of law*

[15] The Council’s interpretation and application of development policy was significantly flawed. Policy NC5 stated that all significant footfall-generating development when proposed on an out-of-centre site “will be refused” planning permission if it did not satisfy all of the five specified criteria. The Council was obliged to assess the proposed development against these criteria and to refuse it if it failed to satisfy any one or more of them. A proper interpretation of Policy NC5 ought to have led to the conclusion that locating the proposed development at Kingsford was contrary to its terms. As regards the

fourth criterion, both the ACSSDPA and Aberdeenshire Council had objected on the basis that the location was not easily accessible; this conclusion was supported by the Council's roads management team. In relation to the fifth criterion, those authorities objected on the ground that the location of the development would give rise to unsustainable travel patterns contrary to the SDP. The Report on Handling failed to address the policy significance of these objections. The availability (or otherwise) of alternative suitable sites was a separate issue which should not have been taken into account in relation to the fourth and fifth criteria of Policy NC5. In relation to the first criterion, the Council did not have a sound factual basis upon which to reach the conclusion that there were no other suitable sites available or deliverable for the stadium.

[16] The approach taken to interpretation and application of Policy NC5 was flawed and constituted an error of law. It was not open to the Council to carry out a balancing exercise similar to that required by section 25 of the Act in reaching an overall conclusion as to whether or not the proposed location "would broadly accord with" the provisions of the policy. An objective consideration of the language of the policy and the aims and targets of the SDP that the policy was intended to support should have led the Council to conclude that in the event that any of the criteria were not met, the application had to be refused. It should have been concluded that the Kingsford location contravened the requirements of the policy and did not "broadly accord with it".

[17] The Council's decision was based also upon a flawed assessment against the requirements of Policies T2 and T3. As regards the former, it was recognised in the Report on Handling that there were "areas of tension with Policy T2", including deliverability of measures such as a controlled parking zone in Westhill and a footbridge over the A944 road to address the impacts of car-based travel to a peripheral location. Again the Council had

conflated an assessment against the terms of the policy with a balancing exercise under section 25 of the Act. The result was that the Council had understated the extent to which the proposed development contravened the development plan policies. In relation to Policy T3, it was accepted in the Report on Handling that the Kingsford site was not accessible by a range of transport modes, so the only reasonable conclusion was that the development was contrary to the policy. There was no proper basis to conclude that it “broadly accords” with Policy T3 on the basis of an assessment that it was the only viable location for the development.

[18] The conditions proposed to be attached to the grant of permission did not ensure the deliverability, prior to commencement of the development, of the mitigation measures regarded as essential for the purposes of complying with Policy T2. The extent of departure from the policy could not therefore be properly evaluated.

[19] The Council further erred in law by failing to take into account the following material considerations:

- The policy provisions of the SDP, which were not discussed in the Report on Handling;
- The objection by the ACSSDPA that a development at Kingsford was not in accordance with the SDP, in that it would result in the loss of 25ha of green belt land and coalescence of urban areas, gave rise to unsustainable travel patterns, and would have a negative impact on the city centre;
- The objection by Aberdeenshire Council; and
- The provisions of Scottish Planning Policy relating to sustainable development that underpinned Policies NC5, T2 and T3 in the ALDP.



[20] The Council's approach was perverse and irrational in that it left out of account specific policy objectives designed to achieve sustainable development. The primacy given by section 25 of the Act to the provisions of the development plan indicated that very weighty material considerations were required to overcome non-compliance with those policy objectives. Failure to give such primacy to the green belt Policy NE2 was perverse.

(ii) *Failure to establish the necessary factual basis for the sequential test*

[21] The Council carried out its own sequential approach to site selection and concluded that there were no alternative available or deliverable 25ha or 12.5ha sites in a sequentially preferable location. That exercise was significantly flawed. There was a failure to establish the necessary factual basis upon which to carry out the sequential assessment. Critically, the Council did not determine the minimum site area required for the proposed development, whether as a single site or as two disaggregated sites for the stadium and for training and other facilities respectively. Without this factual grounding, the Council was not in a position to reach a conclusion that there were no suitable alternative sites for the development.

[22] The Council also failed to establish a factual basis upon which it could be concluded that land sufficient for the development was not available at either King's Links or Loirston. It did not demonstrate that it had carried out a sufficiently thorough assessment to enable it to decide that it was not in a position, in its capacity as landlord of land at King's Links, to secure release of that land for a stadium development. As regards the land at Loirston, the Council failed to establish the legal basis upon which it contended that it was statutorily obliged to obtain "best value" for land in its ownership, or that this necessarily meant commercial or residential value. It had ignored its power under the 1973 Act and 2010

Regulations to take into account non-financial considerations. The Regulations contained exceptions to the duty to dispose of land for the best consideration that could reasonably be obtained. It was unclear which statutory provision the Council had relied upon in concluding that it had to realise best value. It was also unclear how much of the site was in Council ownership. The Council had accordingly failed to establish a factual basis for its conclusion that there was no alternative available other than in the green belt at a peripheral location. Reference was made to *St Andrews Environmental Protection Association Ltd v Fife Council* 2016 SLT 979, Lord Malcolm at paragraphs 33-43.

[23] Finally, it was submitted that the Council had given inadequate reasons for its conclusions that sufficient land for the development was not available at either King's Links or Loirston.

### **Arguments for the Council**

[24] On behalf of the Council it was submitted that the decision, on balance, to grant planning permission was a lawful exercise of proper planning judgement, as required by section 25 of the Act. It was acknowledged that the development would be contrary to Policy NE2 and a significant departure from the development plan. A sequential approach to availability of alternative sites was adopted and the conclusion reached that, on balance, there would be no breach of Policies NC5, T2 and T3. Those policies were framed in general terms and allowed scope for exercise of planning judgement. The petitioner's arguments were directed not to interpretation of the policies but to their application to the proposal, and demonstrated no error in approach to either interpretation or application. On a fair reading of the Report on Handling as a whole, a proper basis in fact had been demonstrated to enable the Council to reach a view as to whether or not there was a sequentially

preferable site. The question of what was or was not available was a matter of fact and planning judgement.

[25] As regards the petitioner's argument that the Council had made material errors of law, it was submitted that although Policy NC5 was clear that a development which did not satisfy all five criteria was to be refused, discretion and judgement were built into the criteria themselves. The Report on Handling considered each of the five criteria before concluding that, despite some areas of tension regarding accessibility, the proposal broadly accorded with the policy. The issue of accessibility was fully assessed at paragraphs 9.96-9.97 of the Report on Handling. The question whether the development would be contrary to Policy T2 was a matter of judgement, not arithmetical calculation. The Council was entitled to conclude that the proposed mitigation measures such as the provision of a shuttle bus on match days, which could be made the subject of conditions, rendered the proposal broadly acceptable in the context of the policy. The only relevant point in Policy T3 was the part of the first sentence that required new developments to be accessible by a range of transport modes, with an emphasis on active and sustainable transport. The policy did not exclude car travel. The Council was entitled to find that with the provision of shuttle buses and the upgrading of pedestrian and cycle routes, and with no other viable alternative, the proposal broadly accorded with the provisions of the policy.

[26] The petitioner's complaint that the conditions proposed to be attached to the grant of permission did not ensure the deliverability, prior to commencement of the development, of essential mitigation measures was unfounded. The relevant conditions (5, 6 and 7) envisaged a two-stage process whereby development would not take place unless a scheme had been approved by the Council, and the stadium would not be brought into use unless the scheme had been fully implemented.

[27] The Council had not failed to take into account, as material considerations, any of the matters identified by the petitioner. The concerns raised by the ACSSDPA and by Aberdeenshire Council had been set out in the Report on Handling and all had been addressed in the report's analysis. It was unnecessary to mention either body by name in the analysis, provided that the matters raised were fully dealt with. As regards the underlying strategy of sustainable development promoted by Scottish Planning Policy, the Report on Handling had addressed that strategy; it should be borne in mind that that concept took account of social and economic as well as environmental factors. On a proper application of the concept to the proposal, the Council had been entitled to conclude that SPP weighed in favour of it.

[28] There was no obligation incumbent upon the planning authority to determine the minimum site area available for a stadium development. The question was not whether there could be a different development elsewhere but rather whether there was a preferable alternative site for this development. Both the developer and the Council were expected to approach the question of adequacy of site size with realism and flexibility. In any event size had not been the focus of the Council's assessment: other possibilities had been rejected for reasons other than size. The only sites rejected on grounds of size were in the city centre.

[29] The Council had adopted a proper and realistic sequential approach to the question of availability of other sites and had been entitled, in the exercise of its judgement, to conclude that there was no preferable alternative available. As regards King's Links, it would not be reasonable to expect the Council to explore, in its capacity as landlord, the possibility of terminating an agreement such as a lease unilaterally, or to require the developer to do so. As regards Loirston, there were reasons that entitled the planning authority to find that there was no longer a realistic possibility of the stadium development

being located there. The concept of “best value”, in the context of Loirston, meant market value. Regulation 4 of the 2010 Regulations was not relevant to the Council’s sequential assessment. It was not for a planning authority to make inquiries about the availability of an alternative site. Nor was there any deficiency in the reasons given by the Council for its decision.

### **Arguments for the interested party**

[30] Senior counsel for Aberdeen FC adopted the arguments on behalf of the Council and made a number of additional submissions. It was observed that the planning policies in the ALDP fell into different categories: some, such as Policies T2 and T3 were aspirational and set targets; others, such as Policy NC5 specified an outcome; but both of these categories required the exercise of planning judgement, in contrast to others where the policy was stated in binary or absolute terms. The Council’s use of the word “tension” in relation to a policy represented a fair acknowledgment that the proposal did not pass that particular requirement with flying colours, but that did not mean that there was any breach.

[31] In relation to the petitioner’s argument that lack of an alternative site should have been regarded as irrelevant to the Council’s consideration of Policies NC5, T2 and T3, it was submitted that the policies had to be interpreted in the context of the development plan as a whole, including the acceptance that Aberdeen FC had to relocate from Pittodrie. What was required in relation to the policies was not judgement in the abstract but in the context of the development plan and the proposal put forward. The petitioner’s approach conflicted with this contextual approach and with common sense.

[32] It was not within the Council’s responsibility to decide what size of site was needed for the proposed development. It had adopted the reasonable approach of considering a

range and concluding, on the one hand, that 4ha was too small but, on the other hand, that it had not been proved that 12.5ha was the minimum needed for each element of a disaggregated development. As regards Loirston, it was clear from the Report on Handling (paragraph 9.87) that the Council had regarded market value as the starting point for assessment of best value, and not as the sole measure; accordingly no error of law had been demonstrated.

### **Decision**

[33] In my opinion the petitioner has not identified an error of law in the approach of the Council that would entitle this court to interfere with its decision to grant planning permission for the proposed development.

*(i) Material error of law*

[34] I deal first with the petitioner's criticisms of the Council's approach to Policy NC5. It is common ground among the parties that if any of the five criteria in Policy NC5 is not met in relation to a development, then a grant of planning permission would be contrary to the development plan. The question is therefore whether the Council misinterpreted the plan in finding that the proposed development "broadly accorded" with the provisions of Policy NC5. At paragraphs 9.91 to 9.100, the Report on Handling assessed whether each of the five criteria in turn was satisfied and concluded that all were. The first was that no other suitable site in a location acceptable in terms of Policy NC4 was available; I address this in the chapter below. The second and third criteria were found to be fulfilled and no challenge is made in this regard.

[35] The fourth criterion was that the proposed development would be easily and safely accessible by a choice of means of transport using a network of walking, cycling and public transport routes linking with the catchment population, and that it would in particular be easily accessible by regular, frequent and convenient public transport services and not dependent solely on access by private car. The Council's roads development management team raised a number of concerns which are set out at paragraph 9.96: accessibility of the site via public transport, especially from areas outwith the city centre; availability of buses to service the needs of the development; the provision of off-site car parking which seemed to undermine the requirements of the ALDP and SPP for the promotion of sustainable means of travel; and the ease with which the site could conveniently be reached by public transport on match days.

[36] The authors of the Report on Handling took the view (paragraph 9.97) that these concerns had to be considered alongside the assessment of sequentially preferable sites, the Council's acceptance that Aberdeen FC would relocate from Pittodrie, and the decision to allocate land for the purpose of a new stadium at Loirston. The petitioner argued that this approach amounted to an error of law, conflating the balancing exercise that required to be carried out under section 25 of the Act with the assessment of whether the proposed development was contrary to the terms of a particular policy. I accept that such conflation might amount to an error of law, and that the question that had to be addressed at this stage was whether the criterion in question was met. But I also accept the Council's submission that the addressing of that question required an exercise of planning judgement, and that it was not only legitimate but appropriate to address it against the background of other relevant policies in the development plan. The point made at paragraph 9.97 was that there was, on the one hand, firm support in the development plan for a new stadium

development but, on the other hand, no appropriate city centre or edge-of-centre location that was both suitable and available for such a development. That being so, the fourth criterion had to be considered in the context of a development sited at a peripheral location. In that context, the report identified aspects of the proposal which promoted the strategy articulated by Policy NC5: the availability of a match day shuttle bus, the proximity to an AWPR junction, and reduced congestion in the city centre with associated benefits to air quality. That, in my view, provided a sufficient basis for the report to recommend, and for the Council to accept, that on balance the fourth criterion was met.

[37] On the particular issue of shuttle buses, senior counsel for the petitioner drew attention in her reply to the fact that the Report on Handling envisaged (paragraph 9.6) that the stadium would also be used for “additional major sporting events and concerts”. Shuttle buses on match days, it was argued, would not assist in such circumstances. I note, however, that Condition 22 requires provision of shuttle buses when “a match or other major event” is taking place. The point is therefore addressed in the grant of permission.

[38] The fifth criterion in Policy NC5 was that a proposal would have no significantly adverse effect on travel patterns and air pollution. The issue of air quality was dealt with at paragraph 9.98, leading to the conclusion in paragraph 9.100 that there would be no significantly adverse effect. As regards travel patterns, the report acknowledged that the proposed development would clearly *alter* existing travel patterns. Again, however, the assessment of adverse effect was made against the background of there being no realistic prospect of development being accommodated at a city centre or edge-of-centre location or at the allocated Loirston site, whilst reiterating that the development plan supported a new stadium and training facilities development. For much the same reasons as I have stated above in relation to the fourth criterion, I consider that this approach represented an



appropriate exercise by the Council of planning judgement and not a misinterpretation of the development plan. The conclusion at paragraph 9.101 that the proposed location would “broadly accord” with the provisions of Policy NC5 does not, in my opinion, indicate that an inappropriate balancing exercise has been carried out. Rather, it demonstrates, as senior counsel for Aberdeen FC submitted, that the Council recognised that the matter was not clear cut, but nevertheless determined in the exercise of its judgement that all five criteria had been met.

[39] I turn now to the petitioner’s criticisms of the Council’s approach to transport Policies T2 and T3. Policy T2 requires a developer to demonstrate that sufficient measures have been taken to minimise traffic generated and to maximise opportunities for sustainable and active travel. The approach taken in the Report on Handling (at paragraph 9.120) is much the same as that taken in relation to Policy NC5: the assessment of compliance with Policy T2 is expressly stated to proceed on the basis of the absence of availability of any sequentially preferable site and the Council’s acceptance of the principle of Aberdeen FC relocating to a peripheral location. The petitioner’s complaints are also largely the same: that availability of an alternative ought not to have been taken into account when assessing whether the development accorded with a transport policy, and that the Council thus conflated the section 25 balancing exercise with assessment of accordance with the development plan.

[40] Again I consider that these criticisms are not well founded. In *City of Edinburgh Council v Secretary of State for Scotland* (above), Lord Clyde observed (at page 44) that the decision-maker had to consider whether the development proposed in the application before him did or did not accord with the development plan. Lord Clyde continued:

“There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. [The decision-maker] will require to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it.”

In my view this was the approach adopted by the Council when assessing accordance with Policy T2 against the background of the plan as a whole, where support was given to a stadium development which, in all the circumstances, was only likely to take place at a peripheral location. In that context, the Council noted the contribution of match day shuttle buses to the promotion of sustainable travel, and the benefits to the road network of siting the stadium near an AWPR junction. The references at the end of paragraph 9.120 to “areas of tension” and to the proposal being “broadly acceptable” do not, in my view, indicate that any error of law was made but rather that once again the Council concluded that although there were legitimate concerns, the proposed development came down on the side of accordance with the development plan policy.

[41] The relevant part of Policy T3 states that new developments must be accessible by a range of transport modes, with an emphasis on active and sustainable transport. At paragraph 9.121 of the report, it was noted that reliance on car borne travel and dedicated shuttle services were a direct result of there being found to be no alternative site in a highly sustainable, central location. The conclusion was that the proposal “would promote sustainable travel to the extent that it is realistically possible, and would make provision for the improvement of facilities where practicable”, including the upgrading of pedestrian/cycle routes. The point is the same as already discussed. In my opinion, for the reasons already given, the Council was entitled to exercise its planning judgement in relation to accordance with Policy T3 in the context of the plan as a whole, and did not

misinterpret the plan by concluding that the proposal would broadly accord with that policy.

[42] The next criticism was that the conditions proposed to be attached to the grant of permission did not ensure the deliverability, prior to commencement of the development, of the mitigation measures regarded as essential for the purposes of complying with Policy T2. I reject that submission. As regards the controlled parking zone (CPZ) in Westhill and the pedestrian crossing over the A944, the conditions provide for a phased approach whereby (i) no development may be undertaken unless (in the case of the CPZ) a traffic regulation order has been granted for its implementation and (in the case of the pedestrian crossing) a scheme has been submitted to and agreed in writing by the planning authority; and (ii) the stadium may not be brought into use unless the CPZ and agreed pedestrian crossing scheme have been fully implemented. As regards the shuttle buses, the stadium may not be brought into use unless a scheme for provision of match day shuttle buses has been submitted to and approved by the planning authority. At paragraph 9.114 of the Report on Handling the view is expressed that it would not be realistic at this stage to develop a detailed bus management plan (which would encompass both shuttle buses and increased frequency of existing bus services as described at paragraph 3.17). That in my opinion is a matter squarely within the scope of the Council's planning judgement.

[43] The petitioner's next criticism was that the Council had failed to take into account material considerations comprising the provisions of the SDP, the objections by the ACSSDPA and by Aberdeenshire Council, and the provisions of SPP relating to sustainable development. In my opinion there is no substance to this criticism. The points made by ACSSDPA and Aberdeenshire Council are narrated in part 4 of the Report on Handling, and the relevant provisions of the SDP and SPP are set out in parts 6 and 7 respectively. Without

going into unnecessary detail, it is in my view readily apparent that all of the points made and relevant provisions have been considered and addressed in the detailed evaluation in part 9 of the report. Reading the report as a whole leaves the informed reader in no substantial doubt as to the reasons why the Council did not regard any of these considerations, individually or cumulatively, as being of sufficient weight to lead to the conclusion that planning permission should not be granted. That being so, it was unnecessary to repeat the source of each matter in the course of the evaluation. The issues of strategic objectives and sustainability are addressed in the evaluation and in the reasons given for imposition of many of the conditions. It follows that no failure to take any material considerations into account has been demonstrated.

[44] Finally in this chapter it was submitted that the Council's conclusion was perverse in that it failed to attach sufficient weight to the development plan policies whose purpose was to protect the green belt from development. This amounts to no more than a disagreement with the Council's assessment and does not in my view provide any justification for a finding of perversity or irrationality.

(ii) *Factual basis for the sequential test*

[45] The first criticism made of the Council's application of the sequential test was that it had failed to determine the minimum site area required for the proposed development, whether as a single site or as two disaggregated sites. It may be noted in this connection that the Report on Handling made clear that a number of important submissions by the applicants had not been accepted, notably the assertion that the stadium and training facilities had to be co-located, and the assertion that at least a 25ha single site or two 12.5ha sites would be required. At paragraph 9.68, the view was expressed that the applicant had

not carried out the sequential approach with flexibility and realism in accordance with SPP, ALDP policy and case law (a reference to *Tesco Stores Ltd v Dundee City Council*, above).

Nevertheless, the report stated that there was sufficient information to enable the planning authority to carry out an evaluation of whether there were sequentially preferable sites in the ALDP area when assessed against local and national planning policies.

[46] In my opinion the petitioner's criticism runs counter to the guidance provided by the Supreme Court in the *Tesco Stores* case. At paragraph 28, Lord Reed observed, in the context of the then NPPG 8:

“... The application of the sequential approach requires flexibility and realism from developers and retailers as well as planning authorities. The need for flexibility and realism reflects an inbuilt difficulty about the sequential approach. On the one hand, the policy could be defeated by developers' and retailers' taking an inflexible approach to their requirements. On the other hand, ...to refuse an out-of-centre planning consent on the ground that an admittedly smaller site is available within the town centre may be to take an entirely inappropriate business decision on behalf of the developer.”

Lord Reed went on (at paragraph 29) to approve the observation of Lord Glennie in *Lidl UK GmbH v Scottish Ministers* [2006] CSOH 165 that the question for the planning authority was whether an alternative site was suitable for the proposed development, and not whether the proposed development could be altered or reduced so that it could be made to fit an alternative site. These dicta demonstrate that the developer and the planning authority are both expected to adopt a flexible and realistic approach to what is required for a development, but it is not for the planning authority to require the developer to restrict itself to something that amounts to a different development altogether.

[47] That being so, I consider that the duty incumbent upon the Council in the present case was to assess whether there was a sequentially preferable alternative site – or sites – which was – or were – realistically capable of accommodating the proposed development if

the necessary degree of flexibility was demonstrated by the applicant. That assessment was to be carried out against a factual background known to the Council; it did not in my opinion oblige the Council to make a finding in the abstract as to the minimum size of site or sites required for a stadium and training facilities development. It was sufficient for the Council to consider sites which would, in terms of the development plan, be regarded as sequentially preferable if suitable and available. That evaluation is set out at paragraphs 9.72 to 9.88 and 9.102 to 9.108 of the Report on Handling. The Council began by considering the city centre, and accepted as a matter of fact that the largest allocated site extended to only 1.9ha, so that there was no realistic prospect of the development being accommodated in the city centre. The Council then turned its attention to edge-of-centre sites, and accepted evidence provided by Aberdeen FC that the existing site at Pittodrie and the available land (extending to 4ha) at King's Links were both too small readily to accommodate either the new stadium or the training facilities. In my opinion it was entitled to do so in exercise of its planning judgement, without having to express a view as to what size of site it would, hypothetically, have regarded as sufficient. As regards Loirston, the Council's conclusion that there was no realistic prospect of a development being financially viable was not based upon site size but on the projected cost to Aberdeen FC of acquisition of land at a price representing residential market value. Again, therefore, it was unnecessary to make a finding about a hypothetical minimum size.

[48] At paragraphs 9.102 to 9.108, the Report on Handling considered whether there was any other suitable, deliverable and available site at a location that was sequentially preferable to Kingsford. Two sites (the existing Aberdeen Exhibition and Conference Centre site at Bridge of Don and the Rowett North site allocated in the ALDP for a new conference centre) were rejected for reasons that did not depend upon the size of the sites. Other green

belt sites were rejected not on the basis of size but because they were not environmentally preferable to Kingsford.

[49] In summary, therefore, the Council did not in my opinion err in law in failing to make a determination as to the minimum site size required for a single or disaggregated stadium and training facilities development. It fulfilled its duty to assess whether there was an available and sequentially preferable site for the development that had been proposed, adopting a flexible and realistic approach to what was needed for that development as opposed to a different, more restricted one. The petitioner's challenge accordingly fails.

[50] The next criticism was directed against the Council's reasons for rejection of land at King's Links as a suitable and sequentially preferable alternative site. The Report on Handling noted (at paragraph 9.76) that 6ha in the northern part of the site was occupied by a golf centre and driving range and held by a tenant on a long lease from the Council until 2040. A letter had been produced from the tenant stating that it had no intention to break the lease early. On behalf of the petitioner it was submitted that the Council as planning authority had erred in law in being satisfied with the letter from the tenant, when what it ought to have done was to investigate whether it, as landlord, could bring the tenancy to an end. I accept the Council's argument that no such duty was incumbent upon it as planning authority. The fact that it happened to be the landlord was fortuitous; as planning authority it was entitled to place weight on the position adopted by the tenant and not to investigate whether a lawful means could be found to terminate the lease against the tenant's wishes.

[51] The petitioner's next criticism related to the reasons given in the Report on Handling for rejecting Loirston as a viable and sequentially preferable site for the proposed development. Those reasons, it was submitted, demonstrated an approach by the Council's officials to the duty to obtain "best value" that was erroneous in law, and that the Council

had accordingly reached its decision on the basis of misinformation regarding the availability of land at Loirston. I have set out above the legislation that prohibits a local authority from disposing of land for a consideration less than the best that can reasonably be obtained, and the exceptions to that prohibition. Those statutory provisions were not addressed in any detail in the Report on Handling, although at paragraph 9.87 it is acknowledged that the market value of a site is “the starting point” for determining best value, rather than being synonymous. That, in my view, is a fair summary of the legislation, in a context where no party appears to have relied upon any particular exception in the 2010 Regulations.

[52] An important complication noted in the report was that the Council was not the majority landowner or lead developer of the Loirston site, and that Hermiston, the lead developer, had an obligation under the development agreement to achieve market value for any future development. The report also referred to data provided by property consultants as to land costs for residential, commercial/industrial and green belt land respectively. The point being made was that, regardless of the Council’s statutory obligation to achieve best value (which was nonetheless a material consideration), the cost to Aberdeen FC of acquiring a site at Loirston would involve paying at least Hermiston residential value. The critical issue identified was not, therefore, the possibility that the Council might be permitted by law, if it so chose, effectively to subsidise a stadium development at Loirston, but rather whether, from the point of view of Aberdeen FC as applicant, such a development was realistically viable at all. The report’s conclusion, on the basis of the material presented to it, that the development was not viable was one that it was reasonably entitled to reach. It follows, in my view, that the Council was not misled by incorrect information into rejecting the Loirston site as an available and preferable alternative.



[53] A further argument was presented that the Report on Handling failed to specify what area of land at Loirston was owned by the Council. That, in my view, would have been beside the point. The problem of land value arose in relation to Hermiston and another developer. At paragraph 9.84, the report noted, apparently without disagreement, the applicant's contention that land sales and planning consents had reduced the remaining land within Aberdeen FC's Loirston planning application boundary to 8.3ha which was not sufficient to accommodate either disaggregated element of the proposed development. It followed that additional land would be required, which land, at least in so far as in the ownership of Hermiston or the other developer, would have to be acquired at residential market value. There is nothing in any of the materials referred to in the report to suggest that there was land owned by the Council at Loirston which would of itself be available, suitable and sufficient for either disaggregated element.

[54] The last criticism made in this chapter was that the Council had given inadequate reasons for concluding (i) that sufficient land at King's Links could not be made available; and (ii) that its duty to obtain best value rendered the Loirston site unavailable for the development. This criticism adds little to what has gone before. For the reasons set out above I consider that the Council has given proper, adequate and intelligible reasons for its conclusions on both of these matters.

### **Disposal**

[55] For these reasons I shall sustain the first and second pleas in law for the Council and the first and third to seventh pleas in law for the interested party and refuse the petition.