OUTER HOUSE, COURT OF SESSION

[2021] CSOH 116

P356/21

OPINION OF LORD TYRE

In the Petition

COSMOPOLITAN HOTELS LIMITED

Petitioner

against

RENFREWSHIRE COUNCIL

Respondent

Petitioner: Armstrong QC; Shepherd & Wedderburn LLP
Respondent: Burnet QC; CMS Cameron McKenna Nabarro Olswang LLP

9 November 2021

Introduction

[1] The petitioner is the owner of part of an area of land ("the site") adjacent to the Erskine Bridge Hotel in Renfrewshire. In the current Adopted Local Plan (2014), the site is identified as part of a wider Transitional Area whose acceptable uses include residential use. The petitioner has applied for planning permission in principle for residential development of the site.

[2] The respondent ("the Council") is in the final stages leading to adoption of a proposed new Renfrewshire Local Development Plan ("the proposed LDP"). On 9 March 2021, the Council's Communities, Housing and Planning Policy Board resolved to authorise

the Council's Head of Economy and Development to modify the proposed LDP in line with various recommendations by reporters appointed by the Scottish Ministers to consider representations in relation to the proposed plan. The effect of one of the modifications was to remove the site from the list of sites allocated for residential development under the Housing Land Supply policy.

[3] In these proceedings the petitioner seeks reduction of that decision, on the ground that it was taken by the Board without having been informed by the Council's officials that the reporter's recommendation contained a material error, being based upon a conclusion that the reporter could not reasonably have reached on the evidence considered in the course of their examination. The Council denies that the Board's decision was based on any error of fact or law, and as a preliminary issue contends that the petition is incompetent because any challenge to the decision must be made by way of the statutory appeal procedure.

The procedure for adoption of a local development plan

[4] In terms of sections 18-20 of the Town and Country Planning (Scotland) Act 1997 ("the 1997 Act"), when a planning authority publishes its proposed local development plan, it must specify a deadline at least six weeks later for the making of representations in relation to the proposed plan. After expiry of the deadline, the planning authority may make modifications to the plan to take account of any timeous representations. If it decides not to make modifications, it must submit the plan to the Scottish Ministers with a request to appoint a reporter to examine the plan, which examination will include consideration of the representations that have been made. After such investigation as he sees fit, the reporter must prepare and submit to the planning authority an Examination Report, setting out and

giving reasons for his conclusions and recommendations, which may include recommendations for modifications to the proposed plan.

[5] On receipt of the Examination Report, the scope of actions available to the planning authority is limited. It must make the modifications recommended by the reporter, except if it declines to do so on certain grounds prescribed in the Town and Country Planning (Grounds for Declining to Follow Recommendations) (Scotland) Regulations 2009 ("the 2009 Regulations"). The only ground relevant for present purposes is in regulation 2(c), namely that

> "the recommendation in respect of the modification is based on conclusions that the appointed person could not reasonably have reached based on the evidence considered in the course of the examination under section 19(3) of the Act".

[6] The planning authority must then publish the proposed plan (whether or not modified) and advertise their intention to adopt it. Unless the Scottish Ministers direct otherwise, the planning authority will be free to adopt the plan when 28 days have elapsed from the date of advertisement. On adoption, the plan is constituted as the local development plan.

Challenge to the validity of a local development plan

[7] Section 237(1) of the 1997 Act, so far as material, provides:

> "Except as provided by this Part, the validity of
>
> (a) a strategic development plan or local development plan or any alteration, repeal or replacement of any such plan, whether before or after the plan, alteration, repeal or replacement has been approved or adopted,
>
> …
>
> shall not be questioned in any legal proceedings whatsoever."

[8] Section 238(1) (as amended) states:

> "If any person aggrieved by a strategic development plan or local development plan desires to question the validity of the plan on the ground—
>
> (a) that it is not within the powers conferred by Part II, or
> (b) that any relevant requirement of that Part or of any regulations made under that Part has not been complied with,
>
> he may make an application to the Court of Session under this section."

Factual background

[9] In the proposed LDP, the site was allocated for residential development. Various representations were submitted seeking modifications in relation to the site, including an objection to its allocation for housing. The allocation accordingly fell to be considered by the reporter (in fact one of four reporters) appointed by the Scottish Ministers to examine the plan. In its response to the objection to allocation of the site for housing, the Council stated:

> "The site is included as a development site in the Adopted Local Development Plan and although an area of open space is associated with the linear walkway alongside the river, the entire site is not considered to be an area of formal open space. It is accepted that areas of woodland, SINCs and open space are present in this area.
>
> Detailed considerations including impact on local infrastructure and amenities and loss of trees are currently being considered by the Council in the assessment of a detailed Planning Application submitted by Persimmon Homes AD065 and a planning permission in principle application submitted by the owner of the Erskine Bridge Hotel AD066. A Developer Contribution will be required to address capacity constraints at St John Bosco Primary.
>
> While there are constraints to the development of this site, it is considered that these require to be addressed by an appropriate layout and other development considerations. The site should remain allocated for residential use within the Renfrewshire Local Development Plan."

[10] In the Examination Report dated 29 January 2021, however, the reporter recommended modification. The reporter noted that the concerns raised over the principle of developing the site for housing were made on the grounds of open space and loss of trees

together with the capacity of local roads and pressure on services to support the development, and that although a significant part of the proposed allocated housing site was identified as a Site of Interest for Nature Conservation (SINC) and continued to be so in the proposed plan, the walk along the riverside would not be impeded by the allocation and extensive open space was also identified and safeguarded by the proposed plan nearby the site and throughout the Erskine area. He continued:

> "…
>
> 8. The council has forwarded a copy of its decision notice for planning application 19/0184 (dated 13 November 2020). That planning application directly relates to the site allocated in the proposed plan. The application was refused by the council because of the impacts on the SINC, biodiversity and protected species. The development of this particular site was also seen by the council as breaking an existing wildlife corridor and removing valued woodland. In addition, part of the site is considered to be adjacent to uses that may be noisy.
>
> 9. Given the nature of the reasons for refusal, I take the decision notice to be the council's considered and up-to-date view on the principle of housing development on the site. The reasons for refusal clearly conclude that an allocation of housing of the scale proposed is not considered suitable.
>
> 10. … (F)or the reasons set out above I find that the shortcomings in developing this site, taken together with the council's latest view on the site, are such that it should not be allocated for residential development. Its removal from the proposed plan would not have a significant impact on the overall supply of land necessary to meet these requirements. This is because our recommendations on all sites allow for a sufficient land supply. Therefore, I recommend a modification which would remove the site from the plan."

[11] On 9 March 2021, Mr Colin Campbell, the petitioner's planning consultant, sent an email to Ms Sharon Marklow, a member of the Council's Development Plans and Local Housing Strategy Team, stating:

> "As you know I represent Cosmopolitan Hotels who have an interest in the Erskine Riverfront site (RFRF1003) that the Reporter has recommended should be deleted.
>
> My clients can't see how the Reporter could possibly reach the conclusions he did based on the evidence to the Examination.

> His recommendation is based on flawed conclusions in paragraphs 8 to 10 on page 228 of the Examination Report and must be rejected by the Council."

[12] The Examination Report was considered at two meetings of the Council's Communities, Housing and Planning Policy Board. On each occasion the Board was provided with a report by the Council's chief executive, recommending acceptance of the recommendations in the Examination Report. At the first meeting, on 16 March 2021, the Board voted to reject the report. The matter was called in by the Council's Leadership Board who sent it back to the Communities, Housing and Planning Policy Board with an instruction to state clearly which of the reporter's modifications they agreed with and which, if any, they did not wish to accept and why. In his report dated 14 April 2021, the chief executive advised the Board that:

> "… The planning authority … can only decline to make the recommended modifications to the proposed LDP in the exceptional circumstances where there are specific reasons for not doing so, as set out in [the 1997 Act and the 2009 Regulations]".

Board members were provided with a table listing the reporter's recommended modifications, including the recommendation to remove the site from Policy P2 Housing Land Supply Sites. The Examination Report itself was one of the background papers for the meeting. No reference was made in the chief executive's report to any representations received by the Council's officials in relation to the reporter's recommendations. In particular, no reference was made to Mr Campbell's email.

[13] At its meeting on 14 April 2021, the Board decided to accept all but three of the reporter's recommended modifications and authorised the Head of Economy and Development to notify the Scottish Ministers of the Council's intention to adopt the Local Development Plan as so modified. In the course of the meeting there was discussion of various representations that had been submitted directly to members of the Board. There

was no discussion of the reporter's recommendation in relation to the site. It was not one of the three that the Board resolved not to accept. Mr Campbell's email was not drawn to the Board's attention.

The petitioner's contention

[14] The petitioner's contention is that the reporter's conclusions at paragraphs 8 to 10 (above) were flawed. A decision on a planning application could not change the settled view of the Council on a development plan allocation. Different factors required to be considered and a different process required to be followed when deciding whether to remove a site from a proposed local development plan. A change in the settled view could not be made by implication. The petitioner was entitled to expect the Council's officials to consider the email sent to them and to direct the Board's attention to the issue raised. If the Board had considered paragraphs 8 to 10 properly, it would have realised that the basis for the recommended modification was flawed. The failure to consider them and to reconsider the modification was irrational and unreasonable. The decision of the Council was outwith its powers.

Competency of the application for judicial review

[15] On behalf of the Council it was submitted that the present application was incompetent, being precluded by the terms of section 237(1) of the 1997 Act. The decision under challenge related to the Council's actings in the context of section 19(10). The petitioner's primary grievance appeared to be with the reporter's recommendation in relation to the site. The Board's decision to accept the recommendation was a step in the procedure required by section 19(10). As such, the statutory appeal procedure provided by

section 238 was applicable, and challenges by other means were excluded. The statutory procedure provided the petitioner with an appropriate remedy; there was no substantive difference from the remedy that could be obtained by judicial review. In either case, a decision by the court in favour of the petitioner would result in the allocation of the site being returned to the Board for further consideration. There were sound policy reasons why challenges to the validity of a local development plan were prohibited until after it had been adopted.

[16] On behalf of the petitioner, it was submitted that the present application was competent. The petitioner was not challenging the validity of the plan, but rather the validity of the Council's actions and decision. Section 238 did not provide a remedy. It could not add the site to the list of Housing Land Supply sites. Quashing the plan or part of it would not be appropriate as that would remove the site from being designated as a transitional area. There was no further opportunity for the matter complained of to be considered by the Council. The judicial review procedure would not cause substantial delay in the adoption of the plan.

[17] In my opinion the present application is precluded by the prohibition in section 237. The purpose of the application is to challenge the validity of the proposed local development plan in so far as it applies to the site, and it therefore falls squarely within section 237(1)(a). The basis of the challenge is that there was a flaw in the decision-making process, but the challenge is to the validity of that part of the plan. Equally, the petitioner's complaint falls clearly within the scope of section 238(1), which permits an application to the Court of Session by any person aggrieved by a local development plan on the ground that it is not within the powers conferred by Part II of the 1997 Act. The petitioner's contention is that the decision of the Board to accept the reporter's recommended modification in relation

to the site was not within the Council's powers because it had failed to give proper consideration to the allegedly flawed basis of the recommendation. That is in substance an objection to the validity of the plan, as regards the site, on a ground permitted by section 238.

[18] I find support for this view in the decision of the Inner House in *Eadie Cairns Ltd* v *Fife Council* 2013 CSIH 109. That case concerned an application under section 238 for an order quashing a sentence in a recently adopted local development plan which provided in relation to a particular site that, should an extant outline planning permission remain unimplemented and expire, the site should remain undeveloped and revert thereafter to greenspace. The applicants successfully challenged the Council's failure to give reasons for its refusal to modify the proposed plan by removing this proviso prior to adoption and the failure of reporters in an Examination Report to give intelligible reasons for supporting the Council's proposal. It was suggested by the Council (without being pressed as an issue of competency) that the application came too late in the planning process because the applicants could have challenged the lack of reasons by judicial review when they became known to them. On this point Lord Justice Clerk Carloway observed (at paragraph 45):

> "Whether such a review would have been competent, in the absence of exceptional circumstances, may be doubted. The issue of reasons by both the respondents and the reporters formed part of the process leading up to the adoption of the local plan. It is that adoption which can be made the subject of a statutory application under section 238 of the 1997 Act. Prior to such adoption, there would at least be a question of whether judicial review was open to the applicants given the existence of an alternative statutory remedy. What is certainly established is that, in terms of the statute, a challenge at this stage on the grounds of procedural irregularity, by means of a section 238 application, is competent."

These observations may be applied mutatis mutandis to the present case. The making of recommended modifications by the reporter and the presentation of those recommendations to the Board formed part of the process leading up to the intended adoption of the proposed

LDP, and it is that adoption that can be made the subject of a statutory application under section 238. I find no exceptional circumstances in which judicial review lies open as an alternative.

[19] The petitioners contended that the present case was analogous to well-known authorities such as *Lafarge Redland Aggregates Ltd* v *Scottish Ministers* 2000 SLT 1361 and *Lakin Ltd* v *Secretary of State for Scotland* 1988 SLT 780, in which challenges proceeded by way of judicial review. In my view those authorities are distinguishable. *Lafarge Redland* concerned a failure to determine a planning application within a reasonable time, as well as issues of procedural impropriety. *Lakin* concerned breach of legitimate expectation and procedural impropriety. In each case no effective remedy was provided by the statutory application procedure.

[20] In contrast, section 238 provides an effective remedy for the petitioner. Following upon adoption of the new plan, it will be open to the petitioner to apply for an order quashing the relevant part of the plan. In the circumstances of the present case that may mean quashing the designation on a map of the site for transitional use. That does not, of course, as the petitioner pointed out, achieve its goal of restoring the pre-modification allocation for residential development, but that would not have been the effect of reduction of the Board's decision either: the matter would simply have returned to the Board for reconsideration. The effect of quashing part of the plan was described in *Eadie Cairns* at paragraph 44 as leaving the site as "white space" in the development plan, but subject to the planning background leading up to the (on this hypothesis) flawed decision. A fuller explanation of the effect was given by Lord Malcolm in *Hallam Land Management Ltd* v *City of Edinburgh Council* 2011 SLT 965 (approved in *Tesco Stores Ltd* v *Aberdeen City Council* 2013 SCLR 71 at paragraph 33). Declining to follow English authority that the process had to be

started afresh in relation to the quashed part of the plan, Lord Malcolm explained (at paragraph 26):

> "… This ignores the alternative possibility that the court can quash the final step and leave what follows to the discretion of the authority, to be exercised in accordance with the circumstances of the case. In particular the authority can consider any representations from the parties and then decide whether it is necessary to start again from the beginning or from some later stage in procedure, including simply a fresh reconsideration of the inquiry report. In other words the authority can rewind to the logical position …"

In the present case, the logical position, if the petitioner were to present a successful application under section 238, would appear to be to rewind to the Board's consideration of the reporter's recommendations in relation to the site, which is, in effect, the result that the petitioner is attempting to obtain by its application for judicial review. However, as Lord Malcolm observed, it would be a matter for the discretion of the Council.

[21] I should add that this outcome appears to me to be in accordance with sound public policy. It allows the Council to proceed to adopt the proposed LDP. That is a matter of importance to the many persons with an interest, financial or otherwise, in other land within the area covered by the plan. The petitioner's entitlement to challenge the particular aspect of the plan by which it is aggrieved is preserved. If, on the other hand, the Board's decision were to be reduced, the process of adoption of the plan as a whole would be delayed. Although in the circumstances of the present case the delay might not be lengthy, that may not always be so if the complaint related to a procedural flaw that had occurred early in the adoption process.

[22] For these reasons the petition is incompetent and must be dismissed.

The merits of the petitioner's challenge

[23] As I have held that the petition is incompetent, it is not strictly necessary for me to address the merits of the petitioner's challenge to the Board's decision. If after adoption of the plan by the Council the petitioner presents an application under section 238, any view that I express in these proceedings will be of no consequence. However, and only in case the present application is taken further, I shall express my view briefly.

[24] It is implicit in the petitioner's challenge to the Board's decision (a) that the reporter's recommendation was flawed, and (b) that the Board might have reached a different decision if it had been advised in the chief executive's report that it was open to the Board, in terms of the 2009 Regulations, to decline to make the recommended modification because it was based on conclusions that the reporter could not reasonably have reached based on the evidence considered in the course of his examination.

[25] In an affidavit produced for the purposes of these proceedings, Ms Marklow, who participated in the drafting of the report prepared for the Board meeting on 14 April 2021, stated that after publication of the Examination Report the Council received over 200 emails containing enquiries and representations in relation to the proposed LDP. Some of these were also sent directly to Board members. The Council officials took the view that none of these communications, including Mr Campbell's email, contained any evidence that raised grounds to challenge the reporters' recommendations, and therefore that there was no need to report any of it to the Board. The officials were moreover satisfied, in relation to each of the recommendations and conclusions in the Examination Report, that the findings were acceptable and that no substantive evidence had been presented that the reporters had made an error or reached an unreasonable conclusion that would justify a decision to decline to follow them.

[26] As regards the recommended modification with which these proceedings are concerned, the officials were, in my opinion, entitled to reach that conclusion. The reporter's decision to remove the site from allocation for residential development, with the effect of leaving it as part of a transitional area with housing as one possible use, was in substance an exercise of planning judgement. It was expressly based on three considerations: shortcomings in developing the site, the reporter's perception of the Council's up to date view as evidenced by its refusal of the Persimmon Homes planning application, and the adequacy of land supply at other sites. Only the second of these considerations is challenged. Whilst I accept the petitioner's contention that different considerations apply to deciding a planning application and a local plan allocation respectively, it does not necessarily follow that the reporter was wrong to conclude that the refusal of this application, details of which had been provided to the reporter by the Council, was indicative of the Council's up to date thinking with regard to the site more generally. The words "an allocation of housing of the scale proposed", while clearly referring to the particular application that had been refused, could reasonably be taken as an indication that the Council would not be minded to grant permission for other proposed developments of similar scale, thereby limiting the contribution that the site could make to housing land supply. Although Planning Circular 6/2013 sets out (at paragraphs 72 and 78) the Scottish Ministers' expectation that a proposed plan should represent the planning authority's settled view as to what the final adopted content of the plan should be, this cannot of itself preclude a change of view on the part of the Council in the course of the adoption process.

[27] In any event, the Council was best placed to judge whether the reporter had made a factual error in concluding that the decision notice was indicative of its own considered and up-to-date view on the principle of housing development on the site. If that had been

wrong, one would have expected the Council officials to draw the matter to the Board's attention. Having regard also to the confirmation in Ms Marklow's affidavit that the officials regarded the reporter's findings as acceptable, I conclude that no error on the part of the reporter that would have entitled the Board to decline to make the recommended modification has been demonstrated. It follows that no unfairness or procedural impropriety was caused by the officials' decision not to draw the petitioner's representation to the attention of the Board.

[28] I do not regard it as material that Board members took account of other representations submitted directly to them. It is hard to see how they could have been prevented from doing so, provided that their decision-making process remained compliant with the 1997 Act and the 2009 Regulations. The issue is simply whether a possibility of declining to make the recommended modification in relation to the site required to be drawn to their attention. For the above reasons, it did not.

Disposal

[29] I shall sustain the respondent's first plea in law (a plea to competency), repel the petitioner's pleas, and dismiss the petition.