



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2024] CSIH 11
XA41/23

Lord President
Lord Pentland
Lord Boyd of Duncansby

OPINION OF THE COURT

delivered by LORD BOYD OF DUNCANSBY

in the appeal under section 239 of the Town and Country Planning (Scotland) Act 1997

in the cause

MILLER HOMES LTD

Appellants

against

THE SCOTTISH MINISTERS

Respondents

Appellants: J de C Findlay KC, Garrity; Shepherd & Wedderburn LLP
Respondents: Crawford KC, Way; Scottish Government Legal Directorate

3 May 2024

Introduction

[1] Miller Homes appeal against the Scottish Ministers' refusal of their application for planning permission for a residential development of 250 houses on farmland north of the B792 at Mossend, West Calder. The Ministers' principal basis for refusing planning

permission was that the development was incompatible with Policy 16(f) of the Fourth National Planning Framework (NPF4). NPF4 was adopted on 13 February 2023. The West Lothian Local Development Plan has not yet been updated to introduce some of the changes brought about by NPF4. The appellants contend that until such time as a new LDP is issued by West Lothian Council, Policy 16(f) cannot take effect. Instead, they seek to rely on Policy HOU 2 of the LDP. The Ministers' position is that Policy 16(f) supersedes and prevails over the terms of HOU 2. The relationship between the newly implemented NPF4 and existing LDPs is at the heart of this appeal.

Background

[2] The appellants sought planning permission from West Lothian Council for the development on 7 March 2022. West Lothian Council failed to determine the application timeously. On 1 August 2022 the appellants appealed to the Ministers against that failure. The Ministers appointed a planning reporter. The reporter held a hearing on the application in December 2022.

[3] On 26 April 2023, the Ministers called in the appeal in order to determine it themselves, on the basis that it raised national issues in terms of the application of NPF4. The reporter issued a report on 11 May 2023 in which he recommended that the Ministers refuse planning permission. On 19 July 2023, the Ministers issued a decision notice dismissing the appeal and refusing planning permission.

Relevant provisions of the Town and Country Planning (Scotland) Act 1997

[4] The Planning (Scotland) Act 2019 made significant changes to the planning system in Scotland by amending the Town and Country Planning (Scotland) Act 1997.

[5] Section 1 of the 2019 Act inserts a new section 3ZA into the 1997 Act which specifies that the purpose of planning is to manage the development and use of land in the long-term public interest, defined as (a) contributing to sustainable development, or (b) achieving the national outcomes within the meaning of Part 1 of the Community Empowerment (Scotland) Act 2015. The national outcomes are measures across a range of government activity and supporting United Nations Sustainable Development Goals.

[6] Section 2 of the 2019 Act amended section 3A of the 1997 Act making new provisions for the National Planning Framework. So far as relevant it is now in the following terms:

“3A National Planning Framework

- (1) There is to be a spatial plan for Scotland to be known as *the ‘National Planning Framework’*.
- (2) The National Planning Framework is to set out the Scottish Ministers’ policies and proposals for the development and use of land.
- (3) The National Planning Framework must contain—
 - (a) a strategy for Scotland’s spatial development,
 - (b) a statement of what the Scottish Ministers consider to be priorities for that development,
 - (c) a statement about how the Scottish Ministers consider that development will contribute to each of the outcomes listed in subsection (3A),
 - (d) targets for the use of land in different areas of Scotland for housing, and
 - (e) an assessment of the likely impact of each proposed national development’s lifecycle greenhouse gas emissions on achieving national greenhouse gas emissions reduction targets (within the meaning given in the Climate Change (Scotland) Act 2009).
- (3A) The outcomes are—
 - (a) meeting the housing needs of people living in Scotland including, in particular, the housing needs for older people and disabled people,

- (b) improving the health and wellbeing of people living in Scotland,
- (c) increasing the population of rural areas of Scotland,
- (d) improving equality and eliminating discrimination,
- (e) meeting any targets relating to the reduction of emissions of greenhouse gases, within the meaning of the Climate Change (Scotland) Act 2009, contained in or set by virtue of that Act, and
- (f) securing positive effects for biodiversity.”

[7] New section 3CA provides that the Scottish Ministers may not adopt a revised National Planning Framework until a draft of it has been approved by the Scottish Parliament. As senior counsel for the Scottish Ministers pointed out, the new NPF4 has a democratic mandate. It was adopted by the Scottish Ministers and published in terms of section 3CA(7), following approval of the Scottish Parliament on 13 February 2023.

[8] Section 6 of the 2019 Act removes the requirement to prepare strategic development plans. LDPs are dealt with in section 7 amending various provisions of the 1997 Act.

Section 15 of the 1997 Act now reads so far as relevant:

“15 Form and content of local development plans

(1) A local development plan is a plan in which is set out, for land in the part of the district to which it relates—

- (a) a spatial strategy, being a detailed statement of the planning authority’s policies and proposals as to the development and use of the land taking account of the matters mentioned in subsection (5),
- (b) such other matters as may be prescribed, and
- (c) any other matter which the planning authority consider it appropriate to include.

(1A) The local development plan must also include targets for meeting the housing needs of people living in the part of the district to which it relates.

...

(5) The matters referred to in subsection (1)(a) are—

...

- (ca) the housing needs of the population of the area, including, in particular, the needs of persons undertaking further and higher education, older people and disabled people,
- (cb) the availability of land in the district for housing, including for older people and disabled people,

...”.

[9] Section 21 deals with delivery programmes. These replace action programmes. So far as relevant it provides:

“(2) A planning authority who prepare a local development plan are to prepare a delivery programme for the plan.

...

(9) The authority must keep the delivery programme under review and must update and re-publish it—

- (a) whenever required to do so by the Scottish Ministers, and
- (b) (subject to paragraph (a)) whenever they think it appropriate to do so but in any event within 2 years after last publishing (or re-publishing) it.”

[10] Section 24(1) of the 1997 Act defines a development plan as the National Planning Framework, any strategic development plan which applies to the area, and any LDP which applies to the area. Section 24(3) provides for the situation where a conflict arises between any of the policies within the different plans:

“(3) In the event of any incompatibility between a provision of the National Planning Framework and a provision of a local development plan, whichever of them is the later in date is to prevail.”

[11] Section 25(1) provides that where a determination is to be made under planning legislation, it is to be made in accordance with the development plan unless material considerations indicate otherwise.

[12] In the course of this appeal counsel have referred to “new-style LDPs” as those to be adopted following the adoption of NPF4. “Old-style LDPs” refers to those adopted before that date. We shall adopt the same terminology.

Subordinate Legislation and Transitional Arrangements

[13] The new provisions in primary legislation have been accompanied by the enactment of new Regulations, in particular The Town and Country Planning (Development Planning) (Scotland) Regulations 2023 (SSI 2023/101) (the 2023 Regulations). Regulation 24 sets out the form and content of delivery programmes. The Planning (Scotland) Act 2019 (Commencement No. 12 and Saving and Transitional Provisions) Regulations 2023 (SSI 2023/100) (the Transitional Provisions Regulations) makes certain savings in relation to local development plans and transitional provisions in respect of action programmes under “old-style” LDPs. An action programme is a document which sets out how a planning authority proposes to implement its local development plan (s 21(6)), 1997 Act). It contains a list of actions that require to be fulfilled in order to deliver each of the policies and proposals in the relevant development plan and the timescale for conclusion of each action (reg 26, The Town and Country Planning (Development Planning) (Scotland) Regulations 2008) (the 2008 Regulations). Regulation 5 of the Transitional Provisions Regulations provides that when an action programme is reviewed, updated and republished, it must be republished as a delivery programme. Delivery programmes operate in broadly the same manner as action programmes, but in addition they must contain the expected sequencing of, and timescales for, delivery of housing on sites allocated by the LDP (reg 24, 2023 Regulations).

NPF4 Housing Policy

[14] The section on housing is headed “Quality Homes” and the policy intent is stated to be:

“To encourage promote and facilitate the delivery of more high quality, affordable and sustainable homes, in the right locations, providing choice across tenures that meet the diverse housing needs of people and communities across Scotland.”

The policy outcomes include the provision of land in the right locations to accommodate future needs and demand for new homes supported by the appropriate infrastructure.

[15] Policy 16 is the relevant housing policy. So far as relevant it is in the following terms:

“a) Development proposals for new homes on land allocated for housing in LDPs will be supported.

...

f) Development proposals for new homes on land not allocated for housing in the LDP will only be supported in limited circumstances where:

- i the proposal is supported by an agreed timescale for build-out; and
- ii the proposal is otherwise consistent with the plan spatial strategy and other relevant policies including local living and 20 minute neighbourhoods;
- iii and...either;
 - delivery of sites is happening earlier than identified in the deliverable housing land pipeline. This will be determined by reference to two consecutive years of the Housing Land Audit evidencing substantial delivery earlier than pipeline timescales and that general trend being sustained;
 - the proposal is consistent with policy on rural homes; or
 - the proposal is for smaller scale opportunities within an existing settlement boundary; or
 - the proposal is for the delivery of less than 50 affordable homes as part of a local authority supported affordable housing plan.”

[16] The LDPs are expected to identify a Local Housing Land Requirement (LHLR) for their area. This is the amount of land which is required to meet the housing target. This is expected to exceed the 10 year Minimum All-Tenure Housing Land Requirement (MATHLR). The MATHLR for each planning authority is the minimum amount of land that is to be provided for development by each planning authority in a ten-year period. It is expressed in terms of the number of housing units and is set by NPF4 (in Annex E). As already explained the LDP delivery programme is expected to establish a deliverable housing land pipeline for the LHLR. The purpose of the pipeline is to provide a transparent view of the phasing of housing allocations so that interventions, including infrastructure,

that enable delivery can be planned: it is not to stage permissions. Representing when land will be brought forward, phasing is expected across the short (1-3 years), medium (4-6 years) and long-term (7-10 years). Where sites earlier in the deliverable housing land pipeline are not delivering as programmed, and alternative delivery mechanisms identified in the delivery programme are not practical, measures should be considered to enable earlier delivery of long-term deliverable sites (7-10 years) or areas identified for new homes beyond 10 years. De-allocations should be considered where sites are no longer deliverable. The annual Housing Land Audit will monitor the delivery of housing land to inform the pipeline and the actions to be taken in the delivery programme.

[17] There are a range of other NPF4 policies which are relevant for the purposes of housing policy. These include Policy 2, - "Climate Change and Impact". Policy 9 covers "Brownfield, vacant and derelict land and empty buildings." Policy 13 concerns "Sustainable Transport". Policy 15 supports "Local Living and 20 Minute Neighbourhoods". Its aim is to create neighbourhoods where people can meet the majority of their daily needs within a reasonable distance of their home, preferably by walking, wheeling or cycling or using sustainable transport options. Development proposals should meet this aim, and in assessing a proposal, consideration will be given to whether there is local access to public transport, shopping, and employment, among other things.

Relevant West Lothian LDP policies

Policy HOU 2

[18] Policy HOU 2, "Maintaining an effective housing land supply", requires the council to maintain, at all times during the life of the development plan, a minimum of a five year effective housing land supply. The supply needed is worked out by an annual audit, which

is agreed with housing providers. HOU 2 allows the development of greenfield land where there is a shortfall in the supply, provided that: (a) the proposed development will be in keeping with the character of the settlement and local area; (b) any additional infrastructure required as a result of the development is either committed or to be funded by the developer; (c) the development will contribute to sustainable development; and (d) the development is expected to deliver new housing within five years.

Other relevant policies

[19] Policy NRG 1 aims to promote a series of principles concerning climate change and sustainability. These are: the reduction of greenhouse gas emissions, promoted by enforcing the statutory requirements of the Climate Change (Scotland) Act 2009; sustainable land use; and sustainable design and development. Development proposals are expected to have regard to the principles.

[20] Policy TRAN 1 concerns "Transport infrastructure". The transport impact of a development will require to be assessed, and development will only be permitted where that assessment indicates that transport impacts are acceptable. The assessment must cover all modes of transport and be approved by the council. Policy ENV 2 provides for "Housing development in the countryside". Such development will only be permitted where it falls into one of five categories: (a) the restoration of a brownfield site where there is no realistic prospect of the site being returned to agriculture or woodland use and it has no significant natural heritage value in its current condition; (b) the replacement of an existing house in the countryside which is of a poor design or in a poor structural condition; (c) infill development within the curtilage of an existing building group or infilling of gaps between existing houses of a single plot width; (d) the conversion or rehabilitation of existing rural

buildings which the council deems worthy of retention because of their architectural or historic merit; or (e) the proposal is supported by the council's lowland crofting policy.

ENV 7 covers "countryside belts and settlement setting". Again, a development requires to meet certain criteria in order to be permitted under ENV 7, one of which is that it must comply with policies ENV 1 – 6. Therefore, if a development does not comply with ENV 2, it does not comply with ENV 7.

The reporter's recommendations

[21] The proposed development would be contrary to Policy 16(f) of NPF4. The policy took effect from the time of NPF4's publication. It represented a new policy approach to exceptional release of unallocated land. It deliberately intended to limit the use of unallocated land, except where certain criteria were met. The proposed development did not meet criteria (ii) or (iii) and so the policy restricted the proposed development.

[22] Regarding the appellants' argument that Policy HOU 2 was to be applied over Policy 16(f), on a straightforward reading of NPF4, Policy 16(f) applied from the time of its publication. The policymakers would have been aware that there would be a transitional period during which the first bullet point of Policy 16(f)(iii), as a result of its reference to the deliverable housing land pipeline, would not allow for exceptional release. They published the policy notwithstanding. If it were otherwise, it would cause difficulties for coherence and comprehensibility of the development plan. Given that Policy 16(f) covered the same subject matter as HOU 2, but would produce a different effect, the two policies were incompatible. Policy 16(f) prevailed over HOU 2. The requirement set out in HOU 2 to maintain a five year effective housing land supply and the Housing Land Requirement fixed

by the West Lothian LDP had no residual role. Consequently, there was no support in the development plan for development of an unallocated greenfield site.

[23] In any event, the proposed development did not comply with HOU 2, because it would not be sustainable on account of its lack of integration with public transport and the likely reliance on private cars that it would cause. It was further from the nearest railway station and bus stops than was recommended by the relevant planning guidance (PAN 75). For the same reasons, it did not comply with NRG 1 and TRAN 1. Due to the level and quality of interconnectivity proposed, it was also contrary to NPF4 policy 15, which required local living and 20-minute neighbourhoods, and to Policy 13(b), which required direct, easy, segregated and safe links to local facilities via walking, wheeling and cycling networks. As a result of these issues, it was contrary to polices 1 and 2(a), which required, respectively, that significant weight be given to the global climate crisis, and that development should be sited to minimise lifecycle greenhouse-gas emissions.

[24] Since HOU 2 did not support the proposed development, it was contrary to Policy 9(b), because that provided that development of greenfield sites would only be supported where it was explicitly supported by policies in the LDP. It did not comply with ENV 2 and ENV 7 of the LDP either. Planning permission ought to be refused.

The Ministers' decision notice

[25] The Ministers agreed with the reporter that the proposed development was contrary to Policies 2, 9, 13, 15 and 16(f) of NPF4 and policies HOU 2, NRG 1, TRAN 1, ENV 2 and ENV 7 of the LDP, and that planning permission ought to be refused.

[26] Section 24(3) of 1997 Act provided that in the event of any incompatibility between a provision of the NPF and a provision of a LDP, whichever was the later in date would

prevail. Policy 16(f) therefore prevailed. That policy could be read quite straightforwardly; if there was no pipeline, then the exception permitting development on unallocated sites in the first bullet point of 16(f)(iii) was not engaged. Until a pipeline was established in the LDP, there would be a policy restriction on housing developments on unallocated sites, other than those listed in the second, third and fourth bullet points of Policy 16(f)(iii).

[27] Even if HOU 2 had applied, it would not have supported the development. The new MATHLR target was the most up to date target for housing land within the development, and ought to be applied. The projected housing delivery was substantially in excess of the annualised MATHLR figure. As to the rest of the policies, the proposed development lacked connectivity in terms of public transport and was likely to increase reliance on private cars. For these reasons, the proposed development did not accord with the development plan and there were no material considerations which would justify granting planning permission despite this.

The appellants' submissions

[28] The Ministers erred in their interpretation of Policy 16(f). Policy 16(f) was inoperable because it depended on the existence of tools and concepts which would only come into existence once a new-style LDP had been implemented. The clear intention of Policy 16(f) was to set out a mechanism whereby sites not allocated in a new-style LDP, would only be supported for development in limited circumstances. There was nothing in the policy that explained how it was intended to relate to the existing and current requirements of an old-style LDP. There was nothing in the material that accompanied NPF4, or in its consultation draft, to suggest that Policy 16(f) was intended to apply before new-style LDPs were prepared and adopted. There had been no consideration of or justification for the

implications of such a policy approach. The Ministers contended that Policy 16(f) could apply where the development was for up to 50 affordable homes, but the appellants' concern was about the application of the policy in relation to mainstream housing. If the policy could not be applied rationally, including because there was no deliverable housing land pipeline in place yet, it was of no relevance to the determination of a particular planning application. The pre-existing policies of the West Lothian LDP, including HOU 2, would remain unaffected and applicable until a new-style LDP was implemented. It was not that Policy 16(f) was incompatible with the policies in the current, old-style LDP; it was that 16(f) was simply inoperable at this time. Section 24(3) of the 1997 Act therefore did not apply.

[29] It followed that the requirement to maintain a minimum five-year effective housing land supply remained applicable. The Ministers' conclusion that it had no residual role was erroneous. Allocation of land in the existing West Lothian LDP was based on the Housing Land Requirement. If that concept were redundant, the justification for those land allocations would also fall away.

[30] The Ministers' interpretation was irrational and contradictory to the overall purpose of the development plan. The established purpose of the existing LDP and HOU 2 was to enable development to ensure that the housing need in the area was met, including through exceptional release of land for development (*West Lothian Council v The Scottish Ministers* [2023] CSIH 3; 2023 SLT 175 at para [28]). NPF4 had not altered that purpose. Policy 16(f) fell to be read and construed in that context. The Ministers' interpretation had the opposite effect, namely of restricting or preventing those demands and needs being met, in circumstances where housing targets had been significantly missed. Such a reading would be consistent with Policy 16(f) itself and with NPF4 generally. The latest audit figures

showed that West Lothian Council was nearly 8,000 units short of meeting their Housing Land Requirement target. The Ministers' approach would lead to an inexplicable inconsistency between old-style LDPs which were adopted before NPF4, and old-style LDPs which were adopted *after* its implementation. An exceptional housing release policy would be permissible under the former, but not the latter.

[31] The Ministers had erred in their interpretation and application of the Transitional Provisions Regulations, and the 2023 Regulations. Regulation 27 of the 2023 Regulations stated that LDPs published in accordance with the 2008 Regulations before 12 February 2023 would continue to apply. The Transitional Provisions Regulations did provide that action programmes were to be republished as delivery programmes on their next update. However, in the absence of a new LDP, a programme would relate to the pre-NPF4 statutory regime and LDP. In those circumstances, the only effect of the Transitional Provisions Regulations was to rename action programmes, "delivery programmes". They would not affect their content. The new Aberdeen City Council delivery programme did not provide an example of a delivery programme being produced alongside a republished, old-style LDP. The Scottish Ministers had required Aberdeen City Council to make amendments to their old-style LDP to make it compliant with NPF4, because it was to be republished after the publication of NPF4. The result was a pragmatic hybrid, neither old nor new. West Lothian Council remained under a duty under the 2008 Regulations to set out a list of actions required to deliver each of its LDP policies and proposals, including HOU 2. Such a duty was inconsistent with the Ministers' conclusion that the LDP and effective housing land supply had no residual role. The appellants had not been given the opportunity to make representations on either set of 2023 Regulations. This was a breach of Regulations 13

and 16 of the Town and Country Planning (Appeals) (Scotland) Regulations 2013 and of natural justice.

[32] The Ministers had erred in their conclusion that, in any event, HOU 2 did not support exceptional release of the land for residential development. They had interpreted HOU 2 by reference to NPF4 terms and concepts which were applicable only to new-style LDPs. Those terms and concepts were not the applicable targets within the development plan; rather they represented the minimum provision to be made in future LDPs. They were merely the starting point. The Ministers ought to have had regard to the five year effective housing land supply and made a broad assessment of the seriousness of the shortage (*Gladman Developments Ltd v The Scottish Ministers* [2020] CSIH 28; 2020 SLT 898 at paragraph [49]; *Hallam Land Management Ltd v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1808; [2019] JPL 63, Lindblom LJ at paragraph [52]). They had failed to do so.

[33] The Ministers erred in their conclusion that it was not possible to calculate a five year shortfall because there were fewer than five years remaining on the development plan. The requirement to maintain a five year supply continued throughout the lifetime of the plan. That conclusion was inconsistent with the approach the Ministers had taken in *West Lothian Council v The Scottish Ministers* [2023] CSIH 3; 2023 SLT 175, wherein they had adopted a different methodology to calculate shortfall and had ultimately supported, and defended their support, of the grant of exceptional release. In that appeal, the Ministers had indicated that policies ENV 2 and ENV 7 had to be read as consistent with HOU 2. In determining the present appeal on a different basis, the Ministers had erred in law and acted irrationally. They were bound to adopt consistent decision-making unless circumstances indicated otherwise (*North Wiltshire DC v Secretary of State for the Environment* [1992] 65 P & CR 137, at

145); *Hallam Land Management Ltd v Scottish Ministers* [2014] CSIH 110A, at paragraphs [32]-[34]; *Gladman Developments Ltd v Scottish Ministers* [2019] CSIH 34, at paragraph [29]). They had not provided any proper, adequate or intelligible reasons for this difference in approach, or for their decision generally.

Submissions for the Scottish Ministers

[34] All matters of planning judgement and the weight to be attached to any material consideration fell within the exclusive jurisdiction of the decision-maker. The grounds of appeal amounted to a disagreement with matters of planning judgement. Policy 16(f) did form part of the development plan. It prevailed over HOU 2. In any event there was no error in the interpretation and application of HOU 2, nor was there any error in the calculation of effective housing land supply. The decision was a proper exercise of the Ministers' planning judgement. Their reasons were adequate and intelligible.

[35] Section 25 of the 1997 Act provided that applications for planning permission shall be determined in accordance with the development plan unless material considerations justified otherwise. Section 24(3) provided that insofar as there was an incompatibility between a provision of the NPF and a provision of a LDP, the later in date would prevail. The provisions in NPF4 relative to housing represent a change in policy to those in the now redundant Scottish Planning Policy. The focus of the SPP had been the requirement to maintain a five year supply of effective housing land at all times. Any shortfall in the required five year effective housing land supply resulted in the application of a tilted balance and the exceptional release of unallocated housing land. SPP provided that LDPs were expected to allocate a range of sites which were, or were expected to become, apt for development during the plan period. The SPP policy focussed on whether or not such

targets had been met and not on whether homes were in fact being built. That policy was reflected in HOU 2 which supported release of additional sites on greenfield land to maintain the five year effective housing land supply.

[36] There was an obvious incompatibility between that approach and Policy 16(f), which set out three circumstances which must be satisfied for unallocated land to be released. These included that land may be released if delivery of sites happened earlier than anticipated in the deliverable housing land pipeline; unlike under HOU 2, a failure to meet targets would not result in exceptional release. The clear intent of this new approach to exceptional land release is to encourage and prioritise the delivery of allocated housing. The new policy rewarded success, for beating targets, rather than rewarding failure to meet them. This was calculated by reference to a minimum amount of land to accommodate the target number of housing units which were to be provided by each planning authority over a ten year period (the MATHLR).

[37] The fact that the appellants were unable to derive support from Policy 16(f) for their proposed development did not mean that the policy was incapable of rational application. Policy 16(f) was capable of operating to permit release of unallocated land for housing in the context of old-style LDPs, including the West Lothian LDP. Its application was not confined to, or dependent on, new-style plans. For example, if a proposal for new homes on unallocated land were: (i) supported by an agreed timescale for build-out; (ii) otherwise consistent with the plan spatial strategy and other relevant policies including local living and 20 minute neighbourhoods; and (iii) for the delivery of fewer than 50 affordable homes as part of a local authority supported affordable housing plan, then it would receive support from Policy 16(f). There were other means by which the gap could be plugged. As Aberdeen City Council had done, an old style LDP could be adopted and a delivery

programme published alongside it. The delivery programme would be required to contain the delivery pipeline (the Transitional Provisions) Regulations, Reg 5 and the 2023 Regulations, Reg 24(c)). Alternatively, the fact that a planning authority had not yet published a delivery pipeline could be presented as a material consideration to justify derogation from the development plan (s 25(1), 1997 Act).

[38] The appellants' arguments were a disagreement with the application of Policy 16(f) to the facts and with the conclusion that there was no policy support for the proposed development. If a proposed development did not accord with a particular policy, the result was that the development did not have that particular policy support; the result was not that the policy did not form part of the development plan and required to be left out of account. It was a matter of planning judgement whether a proposed development would accord with a particular policy in the development plan, or with the development plan as a whole.

[39] The assessment of a five year effective housing land supply was a matter of planning judgement (*West Lothian Council v Scottish Ministers* at [28]). There was no housing land supply target beyond 31 March 2024. The Ministers were entitled to conclude that the MATHLR formed part of the development plan and take it into account when addressing the five year effective housing land supply. They were entitled to conclude that HOU 2 provided no support for exceptional release of unallocated release at the proposed development site. They were also entitled, in the exercise of their planning judgement, to conclude that the proposal was contrary to NPF4 policies 2, 9, 13 and 15 and LDP policies NRG 1, TRAN 1, ENV 2 and ENV 7. The reporter and the Ministers had provided perfectly acceptable and rational reasoning for their decisions.

Decision

[40] It is important to understand the changes that NPF4 has brought to the planning system in Scotland, in particular in relation to housing. For the first time the national plan forms part of the development plan. The housing policies in the old Scottish Planning Policy (SPP) have been largely swept away. Gone is the requirement to maintain an effective five year housing land supply. Gone is the focus on whether targets have been met and whether land allocated for housing was in fact being developed to meet any shortfall in supply. The operation of the “tilted balance”, analysed by this court in *Gladman v Scottish Ministers* 2020 SLT 898, is now a thing of the past. These changes to the development plan move housing policy away from disputes over numbers to an approach which seeks to provide housing in suitable locations, for example in 20 minute neighbourhoods. Looking at the policies as a whole there is an emphasis on quality, diversity and sustainability. That is clear from the Policy Intent:

“To encourage, promote and facilitate the delivery of more high quality, affordable and sustainable homes, in the right locations, providing choice across tenures that meet the diverse housing needs of people and communities across Scotland.”

These changes in policy have not swept away housing targets. Policy 16 establishes the MATHLR, which is the minimum amount of land by reference to the number of housing units to be provided by each planning authority in Scotland for a 10 year period. That figure is specified in Annex E of NPF4. For West Lothian the figure is 9850. The LHLR is expected to exceed the MATHLR. It is not however a requirement of the development plan that the LHLR exceed the MATHLR.

[41] It is not the case, as asserted in the grounds of appeal, that the court has determined that the overall purpose of the development plan is to stipulate that the housing need in the area is to be met. This court has not previously considered the content of NPF4 in relation to

housing policies. Even reading WLLDP and NPF4 together there is no support for the view that the overall purpose of the plan is so constrained. As senior counsel for the Scottish Ministers pointed out, Annex A of NPF4 describes the purpose of planning as being “to manage the development and use of land in the long term public interest” and that, “A plan led approach is central to supporting the delivery of Scotland’s national outcomes and broader sustainable development goals”.

[42] Policy 16 states that development proposals for new homes on land allocated for housing in LDPs will be supported. Development proposals for new homes on land not allocated for housing in the LDP will only be supported in limited circumstances. So far as relevant here these are where the proposal is supported by an agreed timescale for build-out, the proposal is in accordance with other relevant policies and where delivery of sites is happening earlier than identified in the deliverable housing land pipeline. This is to be determined by reference to two consecutive years of the Housing Land Audit evidencing substantial delivery earlier than pipeline timescales and that the general trend is being sustained. In other words the policy is designed to bring forward more land where the supply of land to meet the target is being met more quickly than envisaged in the delivery programme. That policy is the antithesis of HOU 2, which allows for exceptional release to maintain a five year effective land supply. HOU 2 requires that there be an annual audit of housing land to monitor and review the land supply in accordance with the SPP and the Strategic Development Plan. Strategic development plans have been abolished and the SPP has been superseded by NPF4. For these reasons HOU 2 is inconsistent with NPF4 policy 16. Applying section 24(3) of the 1997 Act it follows that HOU 2 is not part of the development plan.

[43] Counsel for the appellants submit that there is nothing in NPF4 or elsewhere to suggest that policy 16(f) is intended to apply before the preparation and adoption of new style LDPs. That analysis is untenable and inverts the proper approach to interpretation of the policy. There is nothing in statute, policy or guidance to suggest that the operation of policy 16, or any part of it, is postponed to a point where “new-style” LDPs are in place.

[44] Nor is it the case that there is no provision for the development of a pipeline in old-style LDPs. While the provisions of the Regulations continue to apply to “old-style” LDPs (Reg 27, 2023 Regulations), the effect of Regulation 5 of the Transitional Provisions Regulations is that the requirement under s 21(9) of the 1997 Act to review, update and re-publish the action programme is to be treated as a requirement to review the action programme and to update and publish it as a delivery programme. We do not accept senior counsel for the appellants’ submission that this is merely a change of label. We can see no reason why Parliament would merely change the name. That would simply add confusion resulting in two types of delivery programmes; those under “old-style” LDPs which are actually action programmes and those under “new-style” LDPs. It is notable that there is already a delivery programme in place for the Aberdeen LDP. That plan was adopted in 2023 as an old-style LDP but at the direction of the Scottish Ministers the action programme was published as a delivery programme. The delivery programme establishes, in accordance with NPF4, a deliverable housing land pipeline. We do not accept senior counsel for the appellants’ submission that the Aberdeen LDP was a “pragmatic hybrid”. There is no provision in either statute or subordinate legislation for hybrid LDPs or hybrid delivery programmes.

[45] It is of course true that policy 16(f)(iii)(first bullet) cannot operate without the provision of a pipeline and that can only be established with a delivery programme. That

does not mean that policy 16 cannot operate at all in the absence of a pipeline, or that it is irrational not to postpone the operation of the policy until such time as a “new-style” LDP is in place. That may be some considerable time away. As the reporter noted (para 32) this does represent a transitional issue but the transition need not take a long time. The Transitional Provisions Regulations make clear that a delivery programme may be provided under old style LDPs. Section 21(9) of the 1997 Act provides that planning authorities must keep the delivery plan under review. It must be updated and re-published when required by Scottish Ministers, and when they think it appropriate to do so, but in any event within two years of the publication of the last programme.

[46] It is important to keep in mind the difference between development planning and development control. An application for planning permission is to be determined in accordance with the development plan unless material considerations indicate otherwise; section 25 of the 1997 Act. One material consideration might arise if there was a perceived lacuna in the development plan, or if the development plan was out of date or the planning authority had failed to update the delivery programme.

[47] Turning to the other grounds of appeal on the hypothesis that HOU 2 still applies the appellants submit HOU 2 supports the exceptional release of land for residential development. The first issue is whether or not there is a “target” and if so whether it has been met. That again depends on whether the MATHLR is part of the development plan or not. The appellants submit that it is not part of the development plan as the MATHLR is only of relevance for “new-style” LDPs, it is not mentioned in NPF4, policy 16, and in any event the MATHLR is not a target but a minimum.

[48] The MATHLR is appended as Annex E to NPF4. The introduction explains that it sets out the MATHLR for each planning authority in Scotland. It continues, “This is to meet

the requirement of section 3A(3)(d) of the Town and Country Planning (Scotland) Act 1997, as amended.” That section states that the NPF will contain targets for the use of land in different areas of Scotland. The use of the word “target” in the section demonstrates that, contrary to counsel’s submissions, the MATHLR is a target. It is right to observe that there is an expectation that the MATHLR will be exceeded in each LHLR, but it is nonetheless the target. Moreover section 3A(3)(d) is in effect. It is not subject to any transitional arrangements. There is no statement in the NPF or anywhere else to suggest that the MATHLR is not to apply until “new-style” LDPs are in place. The Scottish Ministers’ decision letter states at paragraph 19 that the LHLR is expected to exceed the MATHLR. “In the meantime the MATHLR represents the most up to date target for housing land within the development plan.” There is no error of law in the Ministers’ approach.

[49] The effective housing land supply identified by West Lothian Council to 2028 in the 2022 housing land audit is 12,383, which is more than the 9850 in the MATHLR. On that basis the housing requirement is adequately met. The appellants nevertheless submit that it was necessary for the reporter to make a broad assessment of the seriousness of the shortage, and that he failed to do so. Whether there is a shortfall in any housing land supply in any LDP area is a matter of planning judgement; *West Lothian Council v Scottish Ministers* and another [2023] CSIH 3, per Lord Carloway LP at para 28. The Reporter sets out at length the difficulties in calculating the effective five year land supply (paras 57 to 63). He concludes that in the absence of a finding that a five year effective housing land requirement is not being maintained HOU 2 is not engaged. These reasons include the fact that the plan period ended on 31 March 2024 and that at the present stage of the plan period the HLR is so out of date that no five year requirement for effective housing land, or even a requirement for an adequate supply can sensibly be calculated. The Ministers nevertheless calculated

that the projected housing delivery is substantially in excess of annualised MATHLR figure (para 24 of the decision letter). There is no error of law in that approach, which is adequately reasoned.

[50] The appellants also submit that the Scottish Ministers were wrong to conclude that, even if all of the appellants' other submissions were correct they would have rejected the application on the basis that it conflicted with ENV 2 and ENV 7. The appellants submit that the Ministers have failed to provide any reason for departing from the approach they took in the appeal for Hens Nest Road, East Whitburn dated 1 February 2022. Senior counsel for the appellants submitted that the respondents were bound to adopt consistent decision-making unless circumstances dictate otherwise; *Hallam Land Management Ltd v Scottish Ministers* [2014] CSIH 110A, per Lord Drummond Young paras 32 -34.

[51] In passing it should be noted that the Hens Nest Road appeal engaged the tilted balance where exceptional release of land could justify granting permission even where there was a conflict with other policies. That is clear from the reporter's finding at paragraph 24 of the Hens Nest Road decision letter. Secondly, the issue in *Hallam* was consistency in the findings of a shortfall of the five year land supply. That was a generic issue which was not site specific. ENV 2 and ENV 7 are environmental policies which require the application of planning judgement to the particular locations. Thirdly the appellants' application was found to be not only contrary to NPF4 Policy 16(f) but also policies 2, 9, 13 and 15 and WLLDP policies NRG 1, TRAN 1 as well as ENV 2 and ENV 7. There is no lack of consistency.

[52] Finally there is no merit in the submission that the Ministers failed to provide any proper, adequate or intelligible reasons for their decision. No separate submissions were

made in support of this contention. We find both the reporter's letter of recommendation and the Scottish Ministers' decision letter to be comprehensive and well-reasoned.

[53] The appeal is refused.