

Case Name: Abbotswell Developments Limited v The Scottish Ministers

Case Ref No: XA62/24

Date, Time and Duration of Hearing: Thursday 4 June 2026 at 10.30 am (1 day)

Division and Senators (if known): First Division (Lord President, Lady Wise & Lord Clark)

Livestreamed Hearing?: Yes No**Agents and Counsel (if known):**Agents / Counsel for the Appellant:-

Agents: Burness Paull LLP

Counsel: Alasdair Sutherland, sol adv

Agents / Counsel for the Respondents:-

Agents: Scottish Government Legal Directorate

Counsel: Niall McLean, sol adv

Link to Judgment Reclaimed / Appealed (if available):[Scottish Government - DPEA - Document](#)**Case Description:****Overview**

[1] The appellant sought and obtained planning permission for residential housing in February 2020. As part of that planning permission it was agreed between the appellant and Edinburgh City Council that the appellant would provide 25% of the development for affordable housing.

[2] Due to the rising costs in the construction industry as a result of the Covid-19 pandemic, the appellant considers that the obligation to provide affordable housing now makes the development unviable. The predicted developer's return on gross development value had fallen from 14 - 19% in March 2021 to 1-6% in April 2022. It wishes to amend the condition to pay a sum of money for off-site affordable housing instead.

[3] This request was refused by the Council on 22 March 2022 as they did not accept the appellant's position that the development was unviable. The council considered that there had been no substantive change in policy or other material considerations to alter the existing planning obligation requiring on-site affordable accommodation. The appellant appealed to the respondents' reporter.

The Reporter's Decision

[4] The reporter considered that whilst he accepted the factual information that the development was not going to produce as great a return, this did not make the project unviable. The reporter considered that he had not been presented with any evidence to suggest that the development would not be completed nor that the appellant would be insolvent.

[5] The reporter considered it was not his function to protect the developer's return, but instead to strengthen the local authorities' ability to seek compliance with planning policies. He considered that taking the appellant's evidence at its highest he was not able to conclude that the project had become unviable.

[6] He also considered whether it was reasonable to keep the obligation having regard to all the circumstances. He considered that, from his site visits, the project was near completion, and he had not been presented with any evidence as to why the project could not be completed due to the obligation. Accordingly, he considered that the obligation was reasonable in all of the circumstances.

The appeal

[7] The appellant argues that the meaning of the word “unviable” was misinterpreted by the reporter. It considers that for a project to be unviable it does not have to demonstrate a loss, but it has to show that the project is no longer workable. They argue that it is no longer workable because the return falls below the industry accepted standard of return for developers at 17.5%. The appellant also argues that not enough weight was put on this figure by the reporter when he came to his decision.

[8] The respondents consider that the reporter had due consideration to the guidance on a viable development and did not err in his planning judgement in coming to the conclusion that the appellant required to provide on-site affordable housing. They consider that the onus was on the appellant to provide evidence that the development had become unviable, which it had not managed to do. The reporter had regard to the guidance at the time but noted that there was no set figure that made a developer’s return viable or unviable. The figure of 17.5% was a working figure and the reporter was permitted to use his planning judgement to consider whether this made the project unviable.

The First Division will hear this case on Thursday 4 June 2026 at 10.30am.