



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 8
XA15/20

Lord President
Lord Menzies
Lord Doherty

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

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

OGILVIE HOMES LIMITED

Appellants

against

THE SCOTTISH MINISTERS

Respondents

Appellants: Armstrong QC; Davidson Chalmers Stewart LLP
Respondents: P Reid; Scottish Government Legal Directorate

29 January 2021

Introduction

[1] This is an appeal against the respondent's reporter's refusal of an appeal against a decision of North Lanarkshire Council which refused the appellant's application for planning permission for a proposed development consisting of nine detached two-storey houses on 0.99 hectares of land to the east of Dullatur Road in the Westerwood area of Cumbernauld. The issues are whether the reporter erred in: his interpretation of policy DSP4 of the North Lanarkshire Local Plan 2012; concluding that the development did not

comply with policy HCF1 part B; and failing to take proper account of previous planning decisions covering the same site.

The Local Development Plan

[2] North Lanarkshire LDP Development Strategy Policies are divided into four categories relative to a potential development, *viz*: Amount; Location; Impact; and Quality. DSP2 (Location of Development) states, under the sub-heading “Potential additions to planned land supplies”, that applications may be granted if they are consistent with certain locational criteria including “Environmental Assets ... safeguarding locations, habitats or species of recognised importance ...”.

[3] Policy DSP4 (Quality of Development) provides as follows:

“Development will only be permitted where high standards of site planning and sustainable design are achieved. Where appropriate, proposals will need to demonstrate that:

1. an appraisal has been carried out of the existing character and features of the site and its setting - including: ground stability and contamination, identity, connections, landscape, biodiversity, heritage or amenity value
2. existing rights of way or features of natural or historic environment interest (including stone buildings) will be safeguarded or enhanced - including: archaeological, historic environment, landscape features and wildlife interests
3. the proposed development takes account of the site appraisal and any evaluation of design options, and achieves a high quality development in terms of:
 - a) establishing a clear vision for the site with design principles which lead to the creation of a distinct, successful place addressing: siting; overall layout; density; form; scale; height; massing; proportion; detailing; colour; materials, and open space issues
 - b) providing a safe, inclusive, convenient and welcoming development addressing: ...integration with ... green networks and wider links...
 - c) addressing energy, resources and waste issues ...
 - d) mitigating any likely air quality, noise, or pollution impacts ...
 - e) ensuring that water body status is protected and, where possible, enhanced...
 - f) integrating successfully into the local area and avoiding harm to the neighbouring amenity by relating well to the existing context and avoiding adverse impact on existing or proposed properties through

overlooking, loss of privacy or amenity, overshadowing, or disturbance

4. adequate provision has been made for the development and maintenance of landscaped open space areas and for linking to and enhancing open spaces and green networks

Generally it will be appropriate to demonstrate compliance with the objectives of policy DSP4 through submission of design and access statements in line with relevant Scottish Government Planning Advice Notes. The Council will set out its expectations in Supplementary Planning Guidance”.

The planning authority had previously issued Supplementary Planning Guidance in relation to the former LDP. This was called the “Good Design Toolkit” and related to the quality of design. It is still applicable and contains a site appraisal checklist. It recommends that the site appraisal should be followed by a statement of the design objectives.

- [4] Housing and Community Facilities Policy 1 (HCF1 – Protecting Residential Amenity and Community Facilities) provides:

“A Residential Areas

There is a presumption against developments detrimental to residential amenity in primarily residential areas...

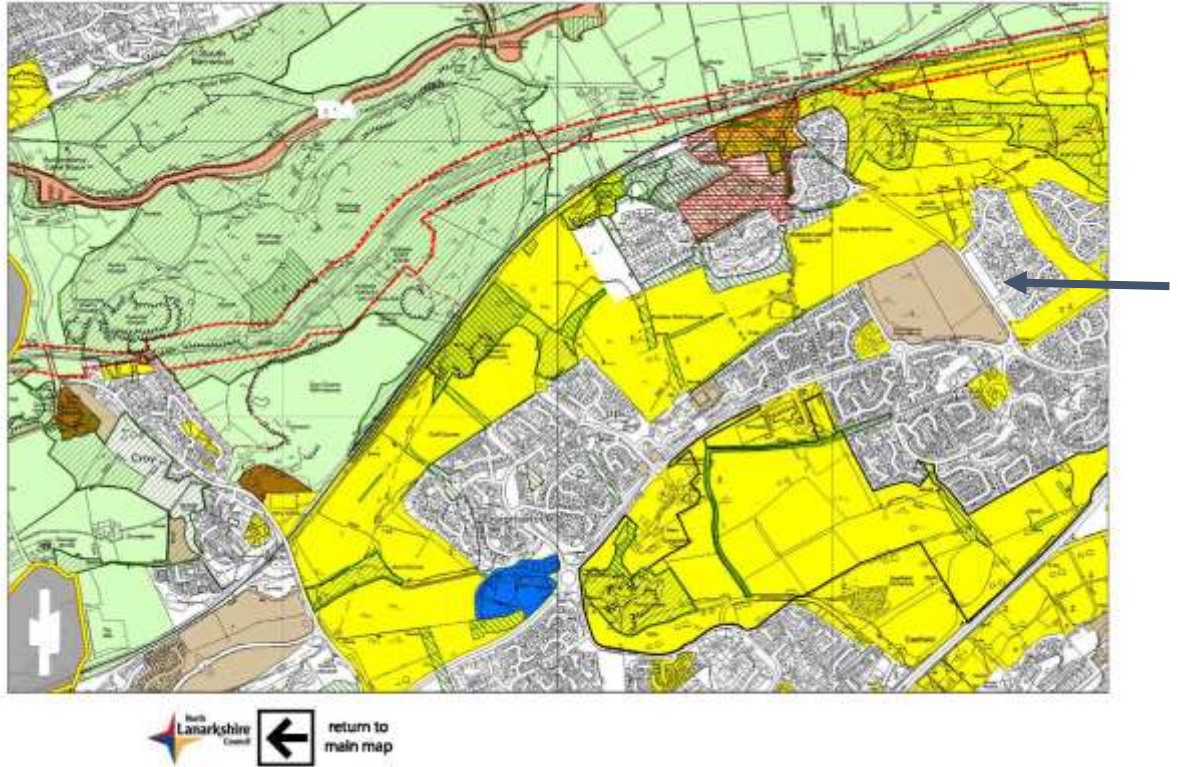
B Community Facilities

The Council will maintain community well-being in residential areas by protecting those community facilities shown on the proposals map.”

- [5] The accompanying text states (para 4.1.2):

“...Good places to live also need to have a mix of community facilities. The Local Plan not only needs to provide housing development opportunities but also protect valued community facilities and promote new facilities that communities need.”

- [6] The proposals map shows the community facilities in yellow as follows:



[7] The area, with which this case is concerned, is mostly on the white strip shown about 1 cm in from the right of the map to the right (east) of a light brown area. White signifies “Residential Area” on the proposals map. The area to the east of the development site is heavily residential. The area to the west is now developed for residential use. The area to the north is open space looking towards Dullatur golf course. On the south there is a wooded area which leads to a community facility marked in yellow.

The planning background

[8] The appellants are house builders. The proposed development is for the construction of 9 detached two storey houses in the predominantly white area as shown on this plan:



[9] The main part of the development (area 2) consists of seven houses to be constructed between Kings Drive to the north and Queens Drive, which forms the southern boundary. To the north of Kings Drive the proposal is to build a further two houses. This separate area (area 1) is the only part of the development which is in the yellow area on the proposals map.

[10] The appellants had twice previously asked for permission to develop the site. The first, in 2015, was to build 11 houses. These were essentially the same as was proposed in

the application under consideration but with the addition of two further houses to the south of Queens Drive (area 3). Access to the central section (area 2) was to be from a lane leading from Queens Drive to Kings Drive. The local planning authority refused consent on the basis that it was contrary to DSP4 parts 3 (a) and (f).

[11] In her decision on appeal dated 4 November 2016, the respondent's reporter (Sinéad Lynch) determined that:

"9. ... in terms of density, form, scale, height, massing, proportion, detailing, colour and materials, the proposal would be a suitable design response to the existing built form in the local environment. There is no evidence... to demonstrate that the infrastructure required to service the proposed development would be inadequate.

10. ...given the degree of separation and orientation between the proposal and the established homes at Kings Drive... and Queens Drive, no adverse impact on residential amenity would arise in terms of privacy, overlooking or overshadowing."

[12] The reporter concluded that the overall layout and design would not have an adverse impact on residential amenity and that the proposal was, contrary to the view of the local authority, "in accordance with the requirements of... DSP4 Part 3 (a) and (f)". In so concluding, she noted that the site could be used instead as informal space, but it had no formal designation and the only use which she had noticed was dog walking. There were substantial existing open areas in the vicinity to provide opportunities for informal recreation. Although some trees would have to be removed, the majority would be retained. The reporter found that the site did not form any part of a landscape scheme. It was "loosely maintained" and did not function as a buffer against adverse impacts. It was "unallocated land within the settlement [ie Cumbernauld] boundary".

[13] The reporter turned to access and road layout, which formed a second ground for refusal by the local authority. She found that, based on the road layout plan which had been lodged with the application, there was a risk that there would be "traffic conflicts" at the

entrances to Kings Drive and Queens Drive, with the required visibility splays not being achievable. A revised layout plan appeared capable of providing an acceptable solution, but it had not formed part of the appeal documents. What was needed was the use of land on the southern part of area 2 in order to provide a turning space. The appeal was refused solely upon traffic grounds.

[14] On 7 February 2017, the appellants lodged a new application, for the same eleven houses but with a turning circle to the south of area 2 and no access to or from that area to Queens Drive. By this time, construction of some 200 houses was already underway on the land to the west across Dullatur Road (mentioned above as marked "light brown" on the proposals map). Notwithstanding the decision of the previous reporter, the local authority again refused permission on the ground that it was contrary to DSP4 (amenity) in that the site was a valuable buffer whose removal would be to the detriment of the amenity, character and setting of the area.

[15] In his decision letter of 14 August 2017 on the appeal, the respondents' reporter (David Liddell), stated that he regarded the earlier appeal decision as a material consideration to which he had had due regard. He noted the reason for the earlier refusal and that the local authority were now satisfied on the road access issue. He had regard to the existence of a proposed new North Lanarkshire LDP, but placed little weight on it, in so far as the designation of the site as a part of a green network was concerned, because of the appellants' outstanding objection to that designation on the proposed plan.

[16] The reporter noted that most of the site was covered by part A of Policy HCF1 "which presumes only against developments detrimental to residential amenity." He did not consider that this meant that all (primarily residential) areas would, in principle, be suitable for residential development. Policy DSP4 still had to be applied. Part 3 of the latter

was “concerned with the detailed nature of development layout and design”, whereas part 2 required features of the environment landscape and wildlife to be protected.

[17] In relation to the issue that had caused the first application for permission to be refused, the reporter considered that, given the modest scale of the development, the proposal was acceptable on road safety grounds. On residential amenity, the reporter could “see nothing about the proposal which ought to cause significant impacts”. The relationships between the proposed and existing houses meant that there would be no material impact on privacy or overshadowing. The size of the houses and the density of the development were broadly in keeping with the existing neighbourhood where there was already a mixture of designs and materials. The development was consistent with policies DSP4 part 3 (f) and HCF1.

[18] The reporter thought that an area of trees on both sides of Queens Drive made a valuable contribution to the character and amenity of the area. He classified these as “landscape features” under DSP4 part 2. The plan to remove some of these trees meant that the wooded character and amenity would be diminished. An updated ecological report said that the larger of these trees, which were scheduled for felling, exhibited “the greatest potential for bats”. The reporter was not satisfied that this, apparently new, bat issue had been adequately explored. He was not satisfied, under DSP4 part 2, that all existing features of natural interest would be safeguarded. He refused the appeal on the basis that the loss of the mature trees and the potential impact on bats meant that the proposal did not comply with the relevant parts of DSP4 and was thus disconform to the LDP. He went on to repeat that he had noted the previous decision but that the new turning space, which had been introduced to solve the traffic problem, would mean the removal of more trees than had

previously been envisaged. The updated report on bats had not been available to the previous reporter.

The Application for Permission

[19] The new application was submitted on 22 July 2019. As already described, this was for a reduced number of nine houses; those in area 3 having been dropped from the plan. Otherwise, the scheme was much as before. On 26 September 2019, the local authority again refused planning permission. Notwithstanding the two previous appeal reports, the local authority repeated their view that the development would significantly erode the setting, character and visual amenity of the area and remove the site as an area of passive open space. This would be to the detriment of the existing amenity and sense of place. The development would have an unacceptable adverse impact on the established residential amenity of the area, which was contrary to the development plan policies.

[20] A third reporter (Chris Norman) refused the appeal on 22 January 2020. He identified the key issues as being whether the loss of open space would be contrary to: policies DSP4 parts 1 to 4 "Quality of Development"; policy HCF1A "Protecting Residential Amenity and Community Facilities -Residential Areas"; and the related policy HCF1B "Community Facilities". He interpreted DSP4 as meaning that development should only be permitted where high standards of site planning and sustainable design were achieved. The proposal required to be tested against its effect on the character and setting of the site. Existing features of natural and historic interest required to be safeguarded or enhanced. The development had to be one of high quality. It had to link to, and enhance, open spaces and green networks. Residential areas required community facilities which could include "informal open spaces, and open areas of grassland".

[21] The reporter looked at each aspect of policy DSP4. On part 1 he concluded that the site had an attractive, open, undeveloped appearance. It afforded a sense of identity and accorded with the description of a community facility as set out in the LDP. The site was in private ownership and had unfettered access across it. Its availability for exercising, walking and informal play, and the contribution which it made to views northwards, made it an important local facility for the nearby growing community, which would otherwise be lost. “As such, a high standard of site planning and sustainable design would not be achieved, contrary to... DSP4 (1)”.

[22] The ground cover flora and woodland soil were features of local natural interest “contrary to DSP4 (2)”. The reporter was satisfied that the development would not harm the residential amenity and that the architectural solution was of a particularly high standard. It was consistent with criteria (a) to (e) of DSP4 (3). The reporter acknowledged that the site was not designed or landscaped for use as an area of public open space. It was not, however, derelict and residents in the locality thought that it served an important function as “informal open grassed space”. It could function as a wildlife corridor and be an integral part of a green network. There was no adequate provision to enhance the open space and green networks, contrary to DSP4 part 4. Overall, the plan was contrary to DSP4.

[23] The reporter repeated that residential areas required community facilities which could include informal open spaces and open areas of grassland. Valued community facilities required to be protected. Area 1 was within a “community facility” and covered by HCF part 1B whereas area 2 was within policy HCF part 1A (residential areas). Policy HCF part 1B provided that the community facilities on the proposals map, including area 1, which provided the attractive entrance feature, had to be protected. Area 2 was not allocated as a community facility. There was “a lack of clarity why different policy coverage

applied to each part". The reporter held area 2 to be "an important asset for the community in its own right". In terms of para 4.1.2 of the text to the local plan's policies on housing and community facilities, this valued community facility needed to be protected.

[24] The reporter regarded the proposed new LDP as a material consideration, even if it had not been subjected to examination by the respondents. In the emerging plan, the site was not allocated for residential development but annotated as being part of a proposed green network. Notwithstanding the materiality of the consideration, the reporter said that he could place little weight upon it, given that the appellants had an outstanding objection to the new designation.

[25] The reporter stated that, although the planning history of the site was a material consideration, he had to reach his own view on the effects of the development "in the context of the site as it now appears". He continued:

"I find that both 'Area 1' and 'Area 2' are areas of informal open space and each constitute a community facility, as defined in the local plan."

The site's protection from development was consistent with the LDP's strategy. The previous appeals were refused for different reasons. Neither refusal referred to housing and community facilities or policies HCF1 parts A and B.

Submissions

Appellants

[26] The appellants submitted that the reporter failed to interpret the relevant policies properly. LDP policies DSP 1 to 4 covered respectively amount, location, impact and quality. The first part of DSP4, read with the introduction, required that the developer should demonstrate that an appraisal of the existing character and features of the site and its

setting had been carried out. That appraisal was to be used to assist in the assessment of the proposal under parts 2 to 4; all of which relate to the quality of the development and not to whether there ought to be development on the site. It was not sufficient simply to prepare an appraisal; it had to be an adequate one. That had been done by the appellants. As required by Good Design Toolkit, it demonstrated the quality of the development in its constructed state. The reporter assessed the proposal on the basis that DSP4 part 1 set out a series of criteria against which the proposal had to be assessed. He had interpreted the criteria on location and impact and applied strict protection to the area, irrespective of its value, as if it were a conservation area or one of special scientific interest rather than one within a residential settlement boundary. The correct interpretation was one which followed the language used. This was consistent with the final words of the policy. DSP4 was not a strategic policy for testing whether the site should be developed. That was the function of DSP 1, 2 and 3. The decision maker had to decide, first, whether it was appropriate that existing rights of way, or features of natural or historic environmental interest, should be safeguarded. The reporter had not done that. The decision maker then had to decide whether the provision of open space and links for open space and green networks were adequate. DSP4 was not a tool for assessing whether a site should remain open space or a green network.

[27] The reporter carried out his own assessment under DSP4 part 1 and used DSP parts 2 to 4 as a set of criteria which the developer was required to satisfy. Instead of concluding that the development met the requirements of DSP4 part 1, because an appraisal had been drawn up, he concluded that it did not. The reporter misinterpreted DSP4 part 2 in not considering whether it was appropriate in the context of the proposal to safeguard or enhance existing rights of way or features of natural or historic environmental interest.

Misinterpreting DSP4 part 4, he did not consider whether it was appropriate to consider these matters and whether adequate provision had been made for landscape open space and for linking to and enhancing open spaces and green networks. He had accepted that the appellant's architectural solution was of a "particularly high standard".

[28] Policy HCF1B required that the local authority "maintain community well-being in residential areas by protecting those community facilities shown on the proposals map." It protected only those community facilities identified on the map. Only area 1 was marked as such. The reporter concluded that area 2 was a community facility, as defined in the LDP plan, when it was not. This influenced his conclusions on compliance with the LDP.

[29] The previous planning decisions were material considerations which the reporter failed to take into account. A previous appeal decision can be a material consideration (*R (Fox Strategic Land and Property) v Secretary of State for Communities and Local Government* [2013] 1 P&CR 6 at paras 11 to 14 and 35; *Gladman Developments v Scottish Ministers* [2019] CSIH 34). The previous planning decisions had been made in the same policy context.

Community facilities had been considered in both the earlier decisions and HCF1 part B had been specifically considered in the 2017 decision. Had the reporter paid proper regard to the previous decisions, he would have realised that: the interpretation which he had applied to policies DSP4 and HCF1 part B were not the same as that adopted by the earlier reporters; and the earlier decisions had not found that the development was contrary to DSP4, other than in respect of road access, the loss of mature trees and a potential impact on bats. These were not issues in the current application. There was no LDP policy basis for refusing the proposal. Had the reporter had proper regard to those previous decisions he would not have discounted them and would have concluded that they supported the grant of

permission to the development. He had failed to explain why the previous decisions should not be followed and why his different approach was justified.

Respondents

[30] The respondents replied that the crux of this matter was whether it was open to the reporter to conclude that the need to preserve what he found to be a valued community facility outweighed the factors in favour of sanctioning the development. That was quintessentially a matter of planning judgment on which the reporter took a view that was reasonably open to him.

[31] DSP4 was not directed simply at the design of the development but at how it fitted into the surrounding community. DSP4 part 3 was not simply a check-list. It formed part of the overall assessment of compliance with DSP4. Assessment of quality included consideration of the extent to which the development fitted successfully into the local area and avoided harm to the neighbouring amenity. It required a proposed development to demonstrate that adequate provision had been made for open space areas and links to open spaces and green networks. The reporter had considered DSP4 part 3 (f) along with DSP4 part 4. The development would obliterate an area of open space which the reporter had found to be valued by the community. Given that the area would be taken away, the reporter had proper regard to what was required by DSP4 part 4.

[32] There was no dispute that area 1 was a community facility. It was wrong to suggest that, because area 2 lacked a formal designation, it did not merit protection. The reporter noted the strength of local opposition and concluded that area 2 was a valuable local asset. He was entitled to reach that view. In any event, that required an exercise of his judgment

and there were no grounds on which this court could interfere with that judgment. The reporter had exercised that judgment in favour of protecting a valuable local asset.

[33] It was open to the reporter to conclude that the proposed development was not consistent with the LDP. The two previous planning decisions had been refused on different grounds. The weight to be attached to the previous planning decisions was a matter for the reporter. He was entitled to place no weight (or very little weight) on them. The previous decisions had given no indication that consent would be forthcoming if the issues which they had identified were addressed.

Decision

[34] There are three problems with the reporter's decision. The first is that he misinterpreted DSP4 by using it as a means to determine that the site is unsuitable for development, at least in the manner proposed by the appellants but possibly also that it should not be developed at all other than as an open space available for the use of persons living in the surrounding residential areas. The structure of the development strategies of the North Lanarkshire LDP is in four parts. The first (DSP1) concerns itself with the amount of development. In relation to housing, it is linked to the minimum 5 year housing supply requirement. The second (DSP2) deals with the location of a development. It sets out certain "locational criteria" which include safeguarding locations, habitats or species "of recognised importance". The third (DSP3) considers the impact of development, principally on community facilities and infrastructure. The fourth (DSP4), with which this appeal is in part concerned, specifically states that it is about the "Quality of Development". It is not about whether there should be development in the particular location. It presupposes that development will occur and is designed to ensure that such development is of a particular

quality and has due regard to the character of the site and its setting, including its identity, connections, landscape and amenity value.

[35] DSP4 part 1 is a requirement that the developer must produce an appraisal of the specified matters. That has been done. Since part 1 has thereby been complied with, the reporter erred in holding that the development was contrary to that policy. Part 2 states that proposals should safeguard features of natural environment. That cannot be achieved, in the context of a policy which concerns “quality of development”, by finding that the proposal should not go ahead at all. Part 3 is a requirement that the development should take account of the site appraisal. The proposal must be a high quality development in terms of a series of factors, including (in f) integration into the local area and avoiding harm to the neighbourhood. None of these policies provide a basis for rejecting the proposal on the ground that development on the site is inappropriate because it would encroach on what persons in the local community regard as a facility for their enjoyment.

[36] The reporter erred in selecting as a key issue a question of whether the loss of open space would be contrary to policies DSP4 1 to 4. At the risk of unnecessary repetition, this is not a question which falls to be determined under reference to DSP4. This policy is concerned with the quality of a proposed development; not whether or not there should be any development on the site. The reporter erred similarly by interpreting DSP4 part 4 as meaning that the loss of the area as open space meant that the development could be refused on the basis that “high standards of site planning and sustainable design” were not achieved. The loss of the development site as open space is not a factor which falls to be taken into account when deciding whether the development meets the criteria of quality. As the reporter recognised, the site was not designated as public open space. It is not part of a green network.

[37] The reporter could have determined that the proposal fell to be refused because certain aspects of the design or layout did not sufficiently meet defined quality standards. If that had been a concern, the detail ought to have been discussed in the context of the planning process under reference to the relevant design criteria. In fact, the reporter regarded the architectural solution for the site to be one “of a particularly high standard”. Once again, what could not be done, either by the local authority or the reporter, was to use DSP4 part 4 to find that there ought to be no development at all.

[38] The second problem is that the reporter misinterpreted policy HCF1 as covering the whole of the development site. He recognised that only area 1 was designated as one of the “community facilities shown on the proposals map”. HCF1 B makes it clear that it is only these facilities which require to be maintained as part of the well-being of residential areas. The reporter erred in holding that there was a lack of clarity on why different policy coverage applied to “each part”. The policy is clear. The LDP proposals map sets out which areas are considered to be community facilities requiring protection. These will have been considered at the stage of the examination of the LDP and any objections could have been subjected to appropriate scrutiny. There is no room for holding that, because a particular area is regarded by the community, and accepted by the reporter, as “an important asset for the community in its own right” it should thereby be treated as if it were coloured yellow on the plan. Area 2 is not so coloured. It is not a community facility in terms of the LDP. It cannot be treated as such, as the reporter has found.

[39] Thirdly, and perhaps of the greatest concern in the general context of the planning process, there is the failure of the reporter to take proper account of the previous planning decisions and to explain why he reached a decision which differed from them. The interpretation of planning policies in a development plan is a matter of law. The application

of those policies to particular sites may require planning judgement. Planning authorities and reporters are not courts of law. They are not subject to a system of *stare decisis*. They are not bound by previous decisions, even when they relate to the same site and cover the same issues. Nevertheless, it is important for them to have regard to the principle of consistency in decision-making. If a reporter seeks to depart from the reasoning in an earlier decision relating to the same site and on the same issue, it is incumbent upon him to explain clearly why he is departing from it. It is not sufficient to recognise the existence of the earlier decision and to state that he or she must reconsider the proposal on its merits.

[40] A failure to have due regard to the principle of consistency can lead to the difficulties which are apparent in this application. The 2015 application was refused on traffic grounds. The local authority had objected on the basis of non-compliance with DSP4 part 3 (a) and (f). They did not refuse the application on the basis of DSP4 parts 1 or 4. The reporter found that the development complied with DSP4 parts 3(a) and (f). In that situation, the appellants might have expected to have had a reasonable prospect of receiving consent once the traffic issue was resolved. That did not happen.

[41] The next application was refused on grounds relating to DSP4 part 2 relative to trees and bats. The reporter did refer to the appellants having complied with DSP4 part 1 as they had submitted the "kind of appraisal" that it envisaged. The reporter considered DSP4 part 3 in general, as well as part 3 (f) in particular. He decided that the proposal was consistent with DSP4 part 3. This reporter did, contrary to the understanding of the reporter in the present appeal, refer to policies HCF1 parts A and B. Once again, it is not unreasonable to suppose that the appellants might reasonably have harboured hopes of obtaining consent, having overcome the traffic problem, if they were able to resolve the tree and bat issue. That did not happen.

[42] The decision, with which this appeal is concerned, reached the same conclusion on residential amenity (DSP4 part 3 (a) to (e)) as had been determined on the two previous occasions. It differed from these decisions in its reference to DSP4 parts 1, possibly 3 (f) and 4. It differed from the second decision on policy HCF1. As already observed, it is not enough for the reporter to acknowledge the existence of previous decisions on the same site and to state that they are material considerations without explaining how these considerations have been taken into account and, if departing from them, what the basis was upon which he has distinguished them. A statement that the previous applications were refused for different reasons is inadequate when the reasons given for the new refusal are substantially the same as those which had been considered and rejected by the previous reporters. Apart from the specific errors which have already been noted, the reporter has not adequately reasoned why he reached a different decision on these matters.

[43] For these reasons, the appeal must be allowed. The decision of the reporter dated 22 January 2020 must be quashed.