

Gladman Developments v Scottish Ministers: Scotland and the tilted balance

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START TRANSCRIPT

**Tim – Cisco WebEx
producer**

Hello and welcome to today's webinar. My name is Tim, your WebEx producer, and I will be in the background answering any WebEx technical questions. We have a few house-keeping items before we get started. If you have a technical difficulty please send a message to the WebEx producer using the Q&A panel you may also dial 1 886 779 3239 and receive technical support and assistance.

During the presentation all participants will be in listen only mode and, as a reminder, this is being recorded for rebroadcast.

We will be holding a Q&A session at the conclusion of today's presentation. We encourage you to submit questions at any time during the presentation using the Q&A panel at the bottom right of your screen. Please type your question in the text field and hit send. I would now like to introduce your first speaker of today Craig Whelton.

Craig, you have the floor.

**Craig Whelton,
Burgess Salmon**

Thank you Tim and good morning everybody and welcome to this webinar hosted by Burgess Salmon on the recent case of Gladman Developments v Scottish Ministers, the Court's decision on which was issued at the beginning of June this year.

My name is Craig Whelton, I am a Partner in the Planning and Compulsory Purchase team at Burgess Salmon based in our Edinburgh Office and I am delighted to be joined this morning by James Findley Queens Counsel of Terra Firma Chambers.

James I am sure will be known to a lot of you already and is known as one of the leading Planning advocates in Scotland having appeared not only in this Gladman case but in the two other leading cases on the interpretation and application of Scottish Planning Policy. As well as appearing in planning judicial cases in both Scotland and England, James is also an active planning inquiry advocate.

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As Tim has mentioned we will have some time at the end to answer as many questions as we can and I am very pleased to say we will be joined for that part of the webinar by Catherine Wood. Catherine in her previous role at Gladman Scotland was closely involved in the original Quarrier's Village planning application and the subsequent judicial challenge and I am delighted that she is able to join us this morning in a personal capacity to give her views on what the decision may mean for the development industry going forward.

Before getting in to the detail of the case, and I am going to try hard to avoid any Alan Partridge type impressions, but it would be remiss not to highlight that we are coming to you this morning from the same boardroom in which James made his submissions in the Gladman case to the Inner House.

The case was one of the very first cases dealt with by video conference by the Inner House, and I think may well have been the first planning case. On the day itself we had their lordships projected on to the large boardroom TV screen which was no less daunting than facing them in person.

James and I were talking this morning about just how quickly things have progressed with virtual hearings in the planning world in such a short space of time.

James himself has now done five court hearings in virtual format and we were both involved, again in this boardroom, in the first planning hearing to take place in Scotland which was in mid-June, and colleagues in Bristol have just completed the first virtual DCO hearing and planning inquiries in England. Given the usual pace of planning reform, it's remarkable how quickly the virtual format has been embraced.

The second point I would like to make is that we delayed this webinar by a few days to let the dust to settle on any potential application to appeal to the Supreme Court. The date for any application has now expired and without any application having been made, we are able to take this forward now with confidence that we are not going to the Supreme Court.

So moving on to the webinar itself, the presentation from James and myself should take no more than 40 – 45 minutes and then leaving time for questions. As Tim said please do submit your questions as we go along and we will do our best to get through these in the time allotted. There will also be a very short questionnaire at the end and I would be very grateful if you could take the time to complete this. It shouldn't take more than 30 seconds or so and it's really helpful for us to understand just what other topics may be of interest.

So this morning I am going to cover the background to the planning case, I will hand over to James who will review the court decision and we will then look at what the decision means in the context of housing developments, for other forms of developments in Scotland including renewables, and will also look at what the future holds for the tilted balance in Scotland in light of the Ministers' defences to the judicial action and the ongoing policy reform in Scotland.

The Quarrier's Village application was for a residential development on a Green Belt site just outside Kilmacolm, and it was for approximately 45 houses.

The application was taken forward on the basis of the proposal being one that could help address the shortfall in the 5 year housing land supply. With the presumption in SPP being put forward as a "significant material consideration".

The council did not accept that it had a shortfall in its housing land supply and the application was refused in February 2019 with seven reasons of refusal given. These effectively were related to two issues; impact on the Green Belt and impact on the conservation area. As is common in applications for housing where land supply and SPP are in issue, there was very little discussion in the officer's report on the SPP presumption, and no assessment of the application against SPP itself.

Having been refused in February 2019, Gladman appealed in March 2019. The arguments put forward in the appeal were very similar to those presented in the application. There was a shortfall in the housing land supply, and that this site can make a useful contribution to address that shortfall and it was supported by and benefitted from the presumption in SPP para 33.

Touching briefly on the question of housing land supply there were a number of differences between Gladman and the council on this point, but the key one in terms of determining whether there was a shortfall or not was whether regard should be had to the number of past completions. The council said no. Gladman argued that past completions were relevant and ultimately the Reporter, in common I have to say with most reporters on appeal decisions now, agreed with Gladman in that past completions were relevant and on that basis found there to be a shortfall in the effective 5 year housing land supply.

From there the Reporter then assessed the application against the policies in the development plan that were engaged where a shortfall was identified. This is policy 8 of the SDP Clyde Plan and RES 3 of the LDP.

As the SDP Clyde Plan was much more up to date than the LDP which was on the cusp of getting to the 5 year mark, the reporter focused her assessment on policy 8.

Policy 8 has 5 criteria that sites being brought forward to address the shortfall in the housing land supply should be assessed against. The ones that are shown in green are the ones that the Reporter accepted that the site had met. The ones shown in red are the ones that the Reporter concluded that the site did not comply with. And she came to more or less the same conclusions on these points as the council, and on this basis this Reporter concluded that the proposal did not accord with the development plan and ultimately this reasoning would form the basis of the Reporter's refusal of the appeal.

Before going on with the decision itself I just wanted to put up for a moment paragraph 33 of SPP just to help put into context the Reporter's approach and I have spilt the paragraph up hopefully to make it easier to follow. The first and last parts of the paragraphs are what I would describe as the enabling or triggering elements to paragraph 33 and the middle two elements tell a decision maker what to do when paragraph 33 is indeed triggered. On the right hand side is my short form summary of that in essence



paragraph 33 tells us - that there is a presumption in favour of the grant of planning permission but that presumption can be outweighed by adverse impacts if these are shown to significantly and demonstrably outweigh the benefits.

So that's my understanding and interpretation of paragraph 33. However, it's not the approach that the Reporter took in Quarrier's. Having identified that there was a shortfall in the housing land supply and that the application did not accord with the development plan, the Reporter did not in fact apply paragraph 33.

Her approach was to say that because she had found the application contrary to 2 of the 13 sustainability principles at paragraph 29 of SPP, in effect the same reasons why she found the proposal contrary to policy 8 of the SDP, then paragraph 33 should not be applied at all.

I have included on that slide a separate quote from the same reporter in a later appeal, but one that was determined before the court issued its decision in this Gladman case (Reddingmuirhead in Falkirk).

I have done that because I think that usefully and starkly sets out the significance of the difference in approach and its potential consequences. In the Reddingmuirhead case, the reporter was explicit in saying that paragraph 33 was not relevant to her decision because she had already found that the site did not meet the sustainability criteria.

The consequence of this approach is that sites would have to have already got past the sustainability bouncer on the right hand side of the slide before they could take benefit from the presumption and this is what I would describe perhaps as the "gold star" approach to planning, because what it seems to me to mean is that you would already have needed to receive a pass mark in terms of sustainability, so that those proposals could then expect to get a gold star thanks to the presumption.

But planning is much more concerned with pass or fail than it is with gold stars, and when the Quarrier's decision was issued I have to say I was surprised, because I had understood it to be understood how the tilted balance in paragraph 33 was to be applied. I had taken this from comments made by the Inner House in the recent earlier cases of both Graham's Dairy and the Gladman case. And it's at this point that we sought counsel's opinion, which allows me to segue nicely to James to pick up on the actual court decision itself.

**James Findlay QC,
Terrafirma Chambers**

Thank you Craig and good morning everyone.

It is not only Gladman who have contributed to the jurisprudence in Scotland but Graham's the Family Dairy have too, and obviously there are other brands of milk available.

The two cases that Craig was referring to started off with Graham's the Family Dairy, which is a bit of a Dickensian saga in terms of time taken to get to court.

Many years ago now they got an officer's recommendation in their favour and they are still without determination. Anyway in this challenge they had a reporter saying there was a housing shortfall and if there had been a housing shortfall and that was the determining position, he might well have granted planning permission and that is implicit in his decision, but because the local development plan was just around the corner, he expected the shortfall to be dealt with by the LDP and therefore he wasn't going to grant planning permission or wasn't going to recommend that Ministers granted permission.

So that report was sent off to Ministers who dealt with it in their usual lively fashion and some months later the LDP came out, but because of an error by reporters, the LDP didn't deal with the shortfall. So the factual circumstances were at odds with the basis on which the reporter had assumed or the progress the reporter would have assumed would have taken place, i.e. that there would be no shortfall. Ministers simply failed to deal with that, and, notwithstanding the reporter's finding that the development was sustainable, refused permission.

Now the Inner House quashed that decision primarily because of the Ministers' failure to deal with the change of circumstances and indeed they went so far as to say it was unfair not to give the applicant a chance to comment on it, but towards the end of paragraph 36 of the Lord President's judgement, he introduced I think for the first time in Scotland, a reference to the tilted balance and said that in the position Ministers were in when there was a housing shortfall, they would have had to have applied the tilted balance and they set out (you can see on screen), the tilted balance is not just the benefits outweigh the advantages, but they significantly and demonstrably outweigh the disadvantages. In this case just to remind you of the last bullet point on the left hand side the development was considered sustainable so it didn't deal with Craig's gold star point directly, i.e. whether in order to get the advantage of the tilted balance you had to be found to be sustainable because that issue was concluded in the applicant's favour in this case.



That wasn't the case in the next case, which is, if you like, the first Gladman case in this scenario, not the first Gladman case in Scotland and certainly not the first Gladman case in England. In this case, again just dealing with it briefly, the reporter's decision was quashed primarily because she failed to grapple with a methodological dispute about whether a prior shortfall and a history of under completions against the housing targets should be taken into account.

There is no fixed policy position on that so one has to be aware that the courts judgment isn't an endorsement that you have to take the shortfall in to account, it's just saying that reporters have to deal with the issue and also have to deal with previous decisions which said that shortfall should be taken into account.

In my view it is fairly unassailable logic that if your aim of the housing policy is to provide a certain number of houses over the plan period you have to take into account the shortfall. But it is possible, tenable, to have a policy disregarding the shortfall and at some stage no doubt Scottish Ministers will tell us the correct approach, but at the moment Gladman 1 is certainly a force in favour of taking into account the shortfall.

The second point and the interesting point about this case is that the reporter concluded that the development was not sustainable, and so when it came to the court the Scottish Ministers argued that because of her finding that it wasn't sustainable, paragraph 33 wouldn't have applied and even if there had been a shortfall, well it wouldn't have made a difference because there would have been no need to apply the tilted balance.

Lord Malcolm gave the judgment of court which did include the Lord President and Lord Brodie, who also heard the Graham's Dairy case, and effectively disputed that argument and in essence, and I won't go through this case in detail, I'll put up a quote in the middle on the right hand side.

The latter requirement of SPP is applying the titled balance in favour of granting permission. That's the position that Craig was in when he looked at how the Reporter had determined this case notwithstanding there was a shortfall, as she found, she didn't apply the titled balance, and that was common ground between the parties.

Now before coming to the more detailed decision in Gladman 2, to my mind it's important to reflect on the structure of SPP and where para 33 falls within it, and you really need to go back to para 28 and the heading above it that the SPP introduces a presumption in favour of development that contributes to sustainable development. I'm just going to call that sustainable development in short, but that's a longer way of dealing with it, and paragraph 28 sets out that the planning system should support economically, environmentally and socially sustainable places by enabling the development that balances the costs and benefits of a proposal over the longer term. The aim is to achieve the right development in the right place; it is not to allow development at any cost, which is a phrase that is used in several windfarm decisions where quite often if there is a rejection the reporter says this is not the right development for the particular place.

And then paragraph 29 follows which sets out that the policies and decisions should be guided by the following principles, and there is 13 principles which is almost like a checklist about whether the proposal is sustainable or not and I will come back in a moment or two about how we should approach paragraph 29 because I think Gladman assists with that too, but in many windfarm cases there will be a refusal and the development will be found not sustainable simply because it conflicts with one of those principles, but to my mind there is no reason why you couldn't have a conflict with one of those principles and still be overall termed sustainable.

So that's the introductory part, you then have paragraph 32 and 33 and its worth just dwelling on 32 which again will be well known and I have sought to distinguish between the two, not in the colour coding that Craig has done, but with underlining in bold, so if your proposal accords to the development plan that's it, that's the underlining part, we focus on details and you should get your planning permission. It's where proposals don't accord with the up-to-date development plan, the primacy of the plan is maintained and this SPP and the presumption in favour of development that contributes to sustainable development will be material consideration. So that's effectively telling us or reiterating two points; firstly that we remain in the plan led system but that the presumption will be a material consideration and why might have planning permission granted where otherwise it should have been refused, notwithstanding it doesn't accord with the development plan you may still get planning permission. It is in that context that you then you have to consider para 33.

So moving on to paragraph 33, which is in Burges Salmon colours on the right hand side, where I've dealt with it, I've split it into two parts but Craig's analysis earlier I think is perhaps better.

So, where development plans or development policies are out of date or the plan doesn't contain relevant proposals, the presumption in favour of development that contributes to sustainable development

will be a significant material consideration. So that's saying when you are looking at the balancing exercise, if you've got a proposal that does not accord with the development plan, if you are nonetheless sustainable, that will be a significant material consideration in its favour. And then decision makers should also - and I might just like to place some emphasis on the word "also" because it formed part of the submissions in the case. In my view that is an added consequence of the development plan being out of date not a consequence upon it being sustainable - should also take into account any adverse impacts which would significantly and demonstrably outweigh the benefits when assessed against the wider policies in this SPP. So that's the tilted balance, and the same principle should be applied when a plan is more than five years old.

And then you have the trigger mechanism which is para 125 and looking at the background of the SPP, when SPP 2 came into existence it mirrored the English Framework by placing significant emphasis on production of houses, shortfall of houses and making sure that the correct number of houses were produced and having the mechanism of a five year effective housing land supply to do so, and then linking that to a enforcement mechanism, which is in effect what paragraph 33 is, to ensure that if your plan is out of date or even if it is up to date but it doesn't meet the five year land supply or it doesn't supply the number of sites to meet the five year land supply there will be a mechanism whereby it will be easier to get planning permission to reduce that housing shortfall.

So that's the policy background and then if we move on to Gladman itself, the decision is fairly short, the Court first of all set off explaining what it was doing in the Graham's Dairy case because the Scottish Ministers' submissions on that, although they varied over time, basically suggested that the Court hadn't really understood what it was doing and the Court not surprisingly refuted that approach, the Lord President saying that he was well aware what he was doing in Graham's Dairy.

The Lord President set out the tilted balance test, and to my mind this was the most important part of his decision because it gives us the clue about how we apply this in the future. He said that the titled balance test is part of the equation for determining whether a development is in overall terms sustainable, so that if you come back in your mind's eye to the principles under para 29, then you are applying those and weighing up whether in overall terms or not a development is sustainable. Instead of it being an ordinary balancing overall exercise you apply a tilted balance to that exercise, and that the counter balancing factors that would render the development unsustainable after significantly demonstrably outweighing those that would be in favour of it being sustainable. And that said, I would accept it doesn't leap out from the words of paragraph 33 itself, which I described elsewhere as somewhat Delphic in approach, but it is a very easy straightforward test to apply, significantly easier than that in the Framework which has become very complicated in its approach.

So that is the one message in my view that the Inner House wanted to get over, that the equation could determine whether development is in overall terms sustainable and can be affected by the titled balance. It then went on to deal in a bit more detail in terms of housing at paragraph 46 and it makes a rather bold statement, which may come as a surprise as I understand it to some planning officers and some planning authorities, that housing development which will remedy a housing shortfall inevitably contributes to sustainable development.

And to my mind that's not actually that bold a statement, because its self-evident, if one of your purposes of SPP is to encourage more housing and to avoid shortfalls, and sustainability is wide enough to incorporate both economic, environmental and social sustainability, then the fact that you are providing much needed housing will inevitably contribute to sustainable development. So I don't think that's the Court making a planning judgment its simply reflecting what's in SPP.

It then hits the second most important point in my view which is whether it is in overall terms a sustainable development which is another question. This is one for planning judgment but it involves use of the tilted balance.

So what the Court is saying is simply because you have a shortfall doesn't mean you get planning permission, and it doesn't mean that you are necessarily sustainable. That's a matter for planning judgment which the Scottish Courts in particular, but throughout the UK, have made clear they won't get involved in, but that decision process has to be made by use of the titled balance and that's where the difference arises. They have been doing that in England and Wales for years and the result isn't necessarily a free for all of planning permissions, although to begin with when it came in that may have been the case, but it does mean that the balance tilts in favour of the proposal more than it would otherwise have been.

On the right hand side the continuation of the paragraph, the shortage is not determinative, which really reiterates the point I have just made, and paragraph 33 goes on to provide, the Lord President says that where the tilted balance is in play the decision maker must take into account any adverse impacts and they will include factors such as greenbelt, environmental, transport policies etc. Each factor will play a



part in determination of whether overall the development is to be regarded as sustainable. So whether you are housing and, we will come on to windfarms in a moment, even if you are a windfarm that is otherwise sustainable or there is a development plan out of date, whatever, it is not necessarily going to get a tick in the box of sustainability - each factor will have to be taken into account.

And lastly on this point from the Inner House, the Court set out the starting point, the starting point refuting the Scottish Minister's argument, that there is a presumption in favour of the development because it provides a solution in part to the housing shortage. That to my mind is directly applicable when planning officers are writing reports, when committees are considering proposals and when reporters are dealing with them on appeal, there is no difference. Thereafter the question was whether the adverse impacts, notably the other policies and development plan, that's just notably, not restricting to that any other adverse impacts that are in play, significantly and demonstrably outweigh the benefits of the development in terms of the housing shortage and the economic gain. And if that test is applied you are likely to see more planning permissions granted.

Now Gladman didn't end there, there are three other important points that you need to bear in mind from Gladman, and I have put in quotes here because it really bolsters the point that I have just made that the Lord President finished his opinion with these words. *"The greater the shortage the heavier the weight which tilts the balance will be. If the appellants figures for the shortage are correct that weight may well be very substantial"*

So that's making it absolutely clear that it is not just a tick box exercise the greater the shortfall in housing terms the greater the angle of tilt to use another expression of the Lord President there will be.

Craig

The simplest and most straight forward application of the Gladman judgement will, of course, be in housing cases where there is an identified shortfall in the housing land supply, which should be measured against the housing land requirement.

The Court provided very clear guidance, as James has referred to, as to what decision makers (which includes local authorities as well as Reporters) should do in such cases. I hope that the judgement at the very least starts to see SPP move up the list of considerations in Council reports, and not being left as a postscript as is often the case. I would also like to see reporters hold councils to account in appeals where SPP has not been properly considered.

One topic I know has already generated a lot of discussion, is how the decision of Gladman raised the Scottish Ministers' Notice of Intention in the Edinburgh Garden District case. By way of a very quick overview, Garden District is a major residential led application of what was a greenbelt site. City of Edinburgh Council resolved to approve the application in 2015, but it was recovered by Scottish Ministers because of an outstanding objection from statutory consultees.

As fate would have it, the Ministers' Notice of Intention was issued about five weeks before the Gladman judgement came out.

The significance of this is that the reporter who undertook the inquiry, concluded that paragraph 33 of SPP applied because the SPP was over five years old. The reporter also concluded that because the SPP was over five years old, the housing figures in that document were out of date (in terms of paragraph 33 of the SPP) and the reporter was unable to say there was an effective five year housing land supply.

The Ministers' Notice of Intention is an interesting read, particularly in light of the Court decision in Gladman, and one may wonder if it had been written in the same terms had it followed on from the Court decision.

In particular, as I put in the right hand side of this slide, the reporter and the Scottish Ministers took a different view on the applicability and relevance of the term "tilted balance" compared to that of the Court. However, the Scottish Ministers agreed with their reporter that paragraph 33 applied in this case, albeit with slightly different reasoning.

The consequence of this decision is a very significant issue for development in the SESplan area (which is the Edinburgh City region). In particular, the terms of the Ministers' Notice of Intention would suggest that paragraph 33 and the tilted balance apply across the City region irrespective of the position at the local development plan level. It is interesting to note that whilst the Council had an LDP that was within the five year period, this did not change the approach of either the reporter or Scottish Ministers.

The other point to note, and picking up on what James highlighted about the scale of shortfall, is that the SPP sets the housing target against which supply is measured. In Garden District the reporter concluded that he could not just rely on the targets (against which Edinburgh had no shortfall – a point that was not contested) but he did not accept the use of alternative figures derived from the draft SDP. This does seem



to create something of a policy void.

I should say that the Garden District decision has yet to be issued pending conclusion of the s75 Agreement, and Ministers may well update their reasoning when issuing their final decision.

James

I want to spend two minutes talking about windfarm developments, and particularly Section 36 Applications and whether this decision will have a significant impact on those cases. To my mind, and this is probably an area where there will be a number of views, it probably won't, and that is for this reason. In *William Grant & Sons* back in 2012, Lord Malcolm made it clear that the Section 36 Code, that is the Electricity Act Code, for getting consent and the planning regime were separate regimes and to an extent that has been reinforced by Lord Carnworth, in *Trump v Scottish Ministers*. So I say that because in my mind a tilted balance is a concept which is meant to operate in a scheme which is development plan led, because it provides a counter-balancing weight to determining the case within the development plan. As *William Grant & Sons* made clear that determination in accordance with the development plan does not arise in Section 36 cases so the tilted balance should not arise in the Section 36 case, or not directly.

The way some reporters have looked at it is to see whether it can nevertheless be a material consideration. And I can completely understand that where there is something which is sustainable development the terms of SPP would be a material consideration in a Section 36 case. But even that to my mind is getting close to crossing the boundary between self-contained planning systems, which is development plan led where you have the concept of sustainability providing a presumption in favour of development put in the balance against lack of accordance with the development plan. In my mind first there is no direct impact on wind farm cases and secondly Section 36 cases, there would be on ordinary planning applications dealing with wind farms, it will apply directly there as it would in any other case and there is a considerable concern about how you would apply that even if it was the case.

Paragraph 33 comes into play in 3 instances: when the plan is 5 years old, when the policies are out of date and when there are no relevant policies. Now there are two helpful English cases which deal with those concepts in the context of the Framework but they are very similar concepts. The one to bear in mind is whether the plan has relevant policies or not is to my mind a fairly obvious matter of planning judgement, but a policy can become out of date quicker than 5 years and a good example of that would be if the SPP introduced a novel concept, a plan that was by then say 4 years old or even 1 year old may be out of date because it is not up to date with the new concept or new approach that SPP has brought forward so those are the circumstances where the plans could be irrelevant or out of date. I will pass back to Craig for the future of the tilted balance and hopefully we will have time to bring in Catherine.

Craig

Thanks James. I just wanted to touch briefly on, as James has said, the future of the tilted balance because what I was slightly surprised about, and James mentioned it briefly when talking about the defence to the challenge, Scottish Ministers effectively said to the Court it had got it wrong both in *Graham's Dairy* and also in *Gladman 1* in terms of referring to the tilted balance in the context of SPP.

It was quite clear that they had a different interpretation of what paragraph 33 meant and how it should be applied and you can see that to a degree in both the Reporter's Report and also the Notice of Intention in the *Garden District* case.

Now, as it is, the Court has told Scottish Ministers that their interpretation of SPP, and their reporters' interpretation of it, was not correct.

It is, I think, slightly unusual to find ourselves in a situation when Scottish Planning Policy, which is the expression of Scottish Government's position on planning policy, doesn't mean what ministers said they thought it meant.

Now, they've obviously accepted that or they seem to have accepted it in terms of not making an application to the Supreme Court, but I do wonder how much longer the current position might endure given that it's the Ministers policy, it's their ball and they are of course in the midst of drafting NPF4 and as part of that they are going to be re-drafting SPP, and it does seem to me that that would be an opportunity for Ministers to re-cast paragraph 33 to mean what they said in their defences to the *Gladman* case.

I don't know James what your thoughts are on that, how the tilted balance might survive?

James Well it might not survive long but one of the problems it seems to me, and this is not a legal point, but if Scottish Ministers wish to recast the tilted balance they run the risk of being cast as being anti the provision of sufficient housing to meet the demand. And there may be other ways of meeting demand, the 5-year housing land supply may denote a change of emphasis away from private supplier solutions, but there will be a significant issue there if the tilted balance test is taken away from housing, although there can be no proper mechanism to enforce ensuring a 5-year housing land supply because that is a significant social and political aim which does seem to be similar north and south of the border.

Craig It would be good to get Catherine's thoughts on this point in particular.

Catherine Wood Yes, good morning. Thank you very much. I personally don't think that SPP has necessarily been applied properly for some time and it's really for this reason that developers have been battling with this issue and taking challenges to the Court. These recent Court decisions certainly I think put into question what role SPP has in its current form and, more importantly, how SPP will be written or re-written and incorporated ultimately into NPF4, where obviously at that point it will form part of the development plan.

I mean ultimately to stand back from all of this, the point of SPP in my mind is to be delivering more homes at a time when we've got a housing crisis, we need to be building more homes and tied in with the SPP issue is the matter of Scottish government confirming their preferred methodology for calculating housing supply as well which I think would be very welcome.

Craig Catherine do you think that SPP, because it's very similar in terms of its words to the Framework, do you think more could be done to make it effective and if so how would that be done? Who would you like to see making the tilted balance actually function?

Catherine I think whether the wording 'tilted balance' ultimately is the word that's used, I think that SPP and NPF4 have to within the development plan process moving forward in Scotland have to be very clear so that all parties that are involved in the development process, and those looking to build more houses, can apply the same application, I think at the moment there's, dare I say it, there is a bit of a divide between local government, perhaps local planning officers' interpretations, and the development industry and I think some clarification from that moving forward would be very helpful.

James Yes, it seems to me that what the Inner House has done has taken a fairly clear view on how the SPP should apply and the tilted balance and paragraph 33 applies and how you make sense of that with sustainability and indeed, in comparison with England, it's a fairly straightforward approach - the tilted balance. You have a five year housing law, tilted balance applies, everything else in the mixture stays the same but you apply a different approach, it's much more straightforward than in England and frankly fairly easy to apply, you just need to rely on decision makers being intellectual in applying a tilted balance as opposed to an ordinary balance but that's the same with any planning sphere.

To my mind I agree with you, it doesn't matter if it's called a tilted balance or its some other mechanism but the important point is that if you're running behind in your housing supply there should be some way to enable you to deal with that or arise from it and the titled balance has proved effective in England to my mind, in doing that.

It's not, the floodgates haven't opened, they may have done to begin with, but I think people have got used to how it works now in England but you're certainly on a different playing field if you don't have a five year housing supply than if you do and I think in the greater social scheme of things people would consider that to be an appropriate position to be in.

Craig Yes it's not that the questions disappear or the issues disappear it's just how your approach changes. I think there's one last question if that's ok and we'll probably wrap this up. I think there's a question there about whether these principles apply to other forms of development for example retail and



office development rather than just housing. My thinking is that paragraph 33 is not just limited to housing, as we said housing is the most obvious and probably given that's what the judgment was about, the most straightforward way of applying it, but it does apply across the board of all forms of development.

James Yes absolutely, something that's interesting is if it's a mixed form of development but the tilted balance would only apply to the housing element. It's difficult but I can see it would and should apply to the whole decision but the fact again the way you would deal with that, the tilted balance would apply to the whole decision, the weight you give the various policies would vary if in fact what we're looking at is a mixed development rather than simply a housing one.

Craig And even more so if you've got debate about which policies are relevant or not relevant.

James I did notice one question about what the impact this will have on Graham's Dairy 2 but I don't think I should answer that. Safe to say it will have an impact because one of the same grounds of challenge was raised but what that impact will be will be we'll see, hopefully shortly.

Craig Thank you team, thank you Catherine, thank you everybody for bearing with us there with our technical differences. I hope you found that useful. As I said at the outset we will endeavour to go back through the questions if we haven't been able to answer them straightaway this morning and get back to you. As James has said the slides from the presentation will also be available both from the Terra Firma website and also the Burges Salmon website and we'll also be uploading hopefully a corrected version of this seminar shortly so thank you very much everybody and have a good morning.

END TRANSCRIPT