APPENDIX 5

WRITTEN PROCEDURE NOTICE AND PLANNING AUTHORITY AND APPLICANTS RESPONSES TO WRITTEN PROCEDURE NOTICE

Development Management Review Committee

DMRC – 31 January 2023

Written Procedure Notice

Decision by Development Management Review Committee (DMRC)

- Site Address: Land North East of Duntrune House, Duntrune
- Application for a Review – Refusal of Planning Permission for Erection of Crematorium Building and Associated Parking, Access, Turning Space, Landscaping and Boundary Enclosures at Land North East of Duntrune House, Duntrune
- Application No. 20/00830/FULL
- Date of DMRC – 31 January 2023

Date of Written Procedure Notice: 3 February 2023

Decision

The Development Management Review Committee requires the planning authority to provide further information by way of written submissions in respect of the following:

1. A statement on National Planning Framework 4, in particular Policies 1, 13 and 29, in respect of the proposed development.

The foregoing information is required to be submitted to the Director of Legal and Democratic Services, legdem@angus.gov.uk FAO Sarah Forsyth, by Friday 17 February 2023 (with a copy to be provided to the applicant, Duntrune Ltd, c/o Brodies LLP Solicitors, planning@brodies.com). A further 14 days will be given to the parties identified to comment on the submissions made. A further meeting of the DMRC will be held once the submissions and comments have been received.

3 February 2023

Signed [redacted]
Alison Watson
Service Leader - Legal and Democratic Services
Angus Council
Angus House
Forfar
DD8 1AN

STATEMENT ON NATIONAL PLANNING FRAMEWORK 4

Application Number:	20/00830/FULL
Description of Development:	Erection of Crematorium Building and associated Parking, Access, Turning Space, Landscaping and Boundary Enclosures
Site Address:	Land North East Of Duntrune House Duntrune
Grid Ref:	344924 : 735118
Applicant Name:	Duntrune Ltd

At its meeting on 3 February 2023 the Development Management Review Committee (DMRC) requested a statement on National Planning Framework 4, *in particular Policies 1, 13 and 29, in respect of the proposed development.*

Planning service statement

National Planning Framework 4 (NPF4) was adopted by the Scottish Ministers on 13 February 2023, following approval by the Scottish Parliament in January. At that date NPF4 became part of the statutory development plan. The development plan covering this part of Angus now comprises:

NPF4, 2023; and
Angus Local Development Plan (ALDP), 2016.

As a result of the introduction of NPF4, TAYplan no longer forms part of the development plan. NPF3 and Scottish Planning Policy (2014) are also replaced by NPF4.

This statement should be read alongside the Report of Handling for the application, which sets out relevant policies of the ALDP.

The undernoted policies of NPF4 are relevant to determination of the proposal: -

Sustainable Places
1. Tackling the climate and nature crises
2. Climate mitigation and adaptation
3. Biodiversity
4. Natural places
5. Soils
6. Forestry, woodland and trees
7. Historic assets and places
9. Brownfield, vacant and derelict land and empty buildings
13. Sustainable transport

Liveable Places
14. Design, quality and place
18. Infrastructure first
22. Flood risk and water management
23. Health and safety

Productive Places
29. Rural development

The full text of the relevant NPF4 policies can be viewed at Appendix 1 to this report.

Assessment

Sections 25 and 37(2) of the Town and Country Planning (Scotland) Act 1997 require that planning decisions be made in accordance with the development plan unless material considerations indicate otherwise.

The proposals compatibility with the ALDP is set out in the Report of Handling for the application and as indicated above, this statement must be read in conjunction with that document.

NPF4 now forms part of the statutory development plan and the policies it contains must be considered in the determination of the review.

The ALDP was adopted in September 2016 while NPF4 was adopted on 13 February 2023. Planning legislation indicates that where there is any incompatibility between the 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.

There are no policies in NPF4 which deal specifically with applications for crematorium developments. Crematorium developments can attract reasonably significant numbers of people attending funeral services and memorial gardens; they can generate employment and can provide an important and necessary service for the community. Policies relating to the general location of development, including the safeguarding of greenfield land, accessibility of the site, rural employment, and community facilities are therefore relevant as well as policies relating to design, the natural and built environment, amenity and infrastructure issues.

NPF4 Policy 1 indicates that *when considering all development proposals significant weight will be given to the global climate and nature crises*.

The suitability of the proposed location

The suitability of the proposed location in relation to ALDP policy is set out in the Report of Handling.

The NPF4 spatial principles seek (amongst other things) to: -

limit urban expansion so we can optimise the use of land to provide services and resources;
encourage sustainable development in rural areas, recognising the need to grow and support urban and rural communities together.

In respect of sustainable places, NPF4 indicates that *Scotland's Climate Change Plan, backed by legislation, has set our approach to achieving net zero emissions by 2045, and we must make significant progress towards this by 2030 including by reducing car kilometres travelled by 20% by reducing the need to travel and promoting more sustainable transport.*

Policy 2 relates to climate mitigation and adaptation and the policy intent is to encourage, promote and facilitate development that minimises emissions and adapts to the current and future impacts of climate

change. Policy 2 requires development proposals to be *sited and designed to minimise greenhouse gas emissions as far as possible*; and *to be sited and designed to adapt to current and future risks from climate change*.

Policy 5 relates to soils and indicates that development proposals will only be supported if they are (amongst other things) designed and constructed in accordance with the mitigation hierarchy by first avoiding and then minimising the amount of disturbance to soils on undeveloped land.

Policy 9 indicates that *proposals on greenfield sites will not be supported unless the site has been allocated for development or the proposal is **explicitly** supported by policies in the LDP.*

Policy 13 relates to sustainable transport. Its intent is to encourage, promote and facilitate developments that prioritise walking, wheeling, cycling and public transport for everyday travel and reduce the need to travel unsustainably. Policy 13 indicates development proposals will be supported where it can be demonstrated that the transport requirements generated have been considered in line with the sustainable travel and investment hierarchies and where appropriate they meet a number of criteria. Policy 13 also indicates that ***development proposals for significant travel generating uses will not be supported in locations which would increase reliance on the private car, taking into account the specific characteristics of the area*.**

Policy 14 design, quality and place indicates that development proposals will be supported where they are consistent with the six qualities of successful places. Those qualities include (amongst other things) *connected* – **supporting well connected networks that make moving around easy and reduce car dependency**. The policy indicates that *development proposals that are poorly designed, detrimental to the amenity of the surrounding area or inconsistent with the six qualities of successful places, will not be supported*.

Policy 29 rural development seeks to ensure that rural places are vibrant and sustainable and rural communities and businesses are supported. The policy offers support to proposals that contribute to the viability, sustainability and diversity of rural communities and local rural economy. It requires proposals to be suitably scaled, sited and designed to be in keeping with the character of the area; and **to take into account the transport needs of the development as appropriate for the rural location**.

NPF4 places increased emphasis on locating new development in locations which have good access for sustainable travel options and avoiding increased reliance on the private car. Officers have concluded in relation to the local development plan policies that the site has poor accessibility and information submitted in support of the application indicates that the majority of traffic visiting the site would do so via private car. As indicated in the Report of Handling, a Scottish Government Reporter refused planning permission for a crematorium facility located around 1.8km southeast of the application site because (amongst other things) it did not enjoy good accessibility, particularly for pedestrians, cyclists and public transport users. That proposal was in a location close to the current application site and with similar characteristics in terms of limited accessibility by sustainable modes of transport.

While the site is in a countryside location, it is likely to predominantly serve an urban area where access would be reliant on the private car. There is little evidence that it would encourage rural economic activity, support the service function of small towns, or that it could not be in a location which has better accessibility and supports the role of urban locations. A development of this nature in a location close to the urban fringe of a city would not be consistent with the NPF4 spatial priority of compact urban growth and limiting urban expansion.

This proposal is not consistent with those aspects of NPF4 which seek to ensure that development is directed to the most sustainable locations that are accessible by a range of sustainable transport modes and provide communities with easy access to services without increasing reliance on the private car.

The site is not allocated for development in the ALDP and would involve the use of greenfield land in circumstances where the proposal is not explicitly supported by the ALDP. The proposal is contrary to Policy 9 of NPF4. In addition, the proposal would involve disturbance of soils on undeveloped land in circumstances where that could be avoided, and as such it is not consistent with Policy 5 of NPF4.

Other development plan considerations

NPF4 Policy 23 relates to health and safety and requires consideration of matters relating to the impact of proposals on health, air quality and noise. Policy 14 design, quality and place indicates that development proposals that are poorly designed, detrimental to the amenity of the surrounding area or inconsistent with the six qualities of successful places, will not be supported. The requirement of Policy 14 for development to be connected and reduce car dependency is addressed earlier in relation to the suitability of the proposed location. Otherwise, these policies provide similar tests to those provided by ALDP policies in respect of impacts on amenity and the suitability of the proposed design. The conclusion relating to impacts on amenity and the suitability of the proposed design set out in the Report of Handling is not altered by the approach set out in NPF4.

NPF4 Policy 3 relates to biodiversity and requires proposals for local development to include appropriate measures to conserve, restore and enhance biodiversity. NPF4 Policy 4 relates to natural places and indicates development proposals which by virtue of type, location or scale will have an unacceptable impact on the natural environment, will not be supported. It requires consideration of impacts on designated sites and protected species. NPF4 Policy 6 relates to forestry, woodland and trees and offers support to development proposals that enhance, expand and improve woodland and tree cover. It indicates that proposals will not be supported where they result in adverse impacts on ancient woodlands, veteran trees, hedgerows or individual trees of high biodiversity value. These policies provide similar tests to those provided by ALDP in respect of protected sites and species, and impacts on woodland and trees. The conclusion relating to those matters set out in the Report of Handling is not altered by the approach set out in NPF4. Matters relating to biodiversity enhancement required by Policy 3 could be secured by planning condition.

NPF4 Policy 7 seeks to protect and enhance historic environment assets and places, and to enable positive change as a catalyst for the regeneration of places. This policy requires consideration of similar matters to those provided by ALDP policies and the conclusion relating to impacts on cultural heritage set out in the Report of Handling is not altered by the approach set out in NPF4.

NPF4 Policy 18 indicates that development proposals will only be supported where it can be demonstrated that provision is made to address impacts on infrastructure, which includes road infrastructure. It suggests where planning conditions, planning obligations, or other legal agreements are to be used, the relevant tests will apply. This policy requires consideration of similar matters to those provided by ALDP policies and the conclusion relating to impacts on the public road network (and the necessity to have suitable sightlines at junctions on the public road) set out in the Report of Handling is not altered by the approach set out in NPF4.

NPF4 Policy 22 relates to flood risk and water management and seeks to strengthen resilience to flood risk by promoting avoidance as a first principle and reducing the vulnerability of existing and future development to flooding. It requires proposals to not increase the risk of surface water flooding to others,

to manage rain and surface water through sustainable drainage and supports connections to the public water supply. This policy requires consideration of similar matters to those provided by ALDP policies and the conclusion relating to impacts on flooding, drainage and water supply set out in the Report of Handling is not altered by the approach set out in NPF4.

Conclusions

NPF4 places greater emphasis on addressing the twin global climate and nature crises. It indicates that Scotland's Climate Change Plan, backed by legislation, has set our approach to achieving net zero emissions by 2045, and we must make significant progress towards this by 2030 including by reducing car kilometres travelled by 20% by reducing the need to travel and promoting more sustainable transport. The overarching spatial strategy indicates that we will limit urban expansion so we can optimise the use of land and promote compact urban growth. The national planning policies place emphasis on locating development in locations that are accessible by means other than private car and directing new development to the right location. This is the most effective means the planning system has to contribute towards the overall goal of reducing car kilometres travelled.

While the proposal does not give rise to conflict with a number of detailed policies, the location is not consistent with the overarching aims of NPF4. The application proposes development on greenfield land on a site close to but outwith a major city. The development would rely predominantly on access by the private car, and it would generate significant vehicle movements in a location which is not accessible by a choice of sustainable transport modes. Accordingly, it is not a development which has been sited to minimise greenhouse gas emissions. The proposed development would not contribute to the target of reducing car kilometres travelled by 20%, and the disturbance of soils and the use of greenfield land in these circumstances is not explicitly supported by policies in the ALDP. The proposal would not support the spatial priority of compact urban growth.

NPF4 Policy 1 gives significant weight to the global climate and nature crises when considering development proposals. Policy 2 requires proposals to be sited and designed to minimise lifecycle greenhouse gas emissions as far as possible. The proposal does not attract support from NPF4 policies 1 and 2 for the reasons detailed above. The proposal is not consistent with the overarching spatial strategy that NPF4 promotes; it is not consistent with those policies that seek to encourage, promote and facilitate the reuse of brownfield, vacant and derelict land and empty buildings, and to help reduce the need for greenfield development; and it is not consistent with those policies that seek to encourage, promote and facilitate developments that prioritise walking, wheeling, cycling and public transport for everyday travel and reduce the need to travel unsustainably.

The proposal is contrary to NPF4 for the following reasons:

The proposal is contrary to the NPF4 Spatial Principle of sustainable development in rural areas and policies 13, 14 and 29 because the development would generate significant vehicle movements in a location which is not accessible by a choice of sustainable transport modes and would increase reliance on the private car.

The proposal is contrary to the NPF4 Spatial Principle of compact urban growth and limiting urban expansion, and policies 9 and 5 because the development is located on greenfield land where the site is not allocated for development and the proposal is not explicitly supported by policies of the ALDP; and by locating the development on undeveloped greenfield land, it does not avoid or minimise disturbance to soils.

The proposal is contrary to NPF4 policies 1 and 2 because the development would generate significant vehicle movements in a location which is not accessible by a choice of sustainable transport modes and would increase reliance on the private car and accordingly the development has not been sited to minimise greenhouse gas emissions and is not consistent with the need to address to global climate and nature crises.

Appendix 1 -

National Planning Framework 4– national planning policies

Policy 1 Tackling the climate and nature crises

When considering all development proposals significant weight will be given to the global climate and nature crises.

Policy 2 Climate mitigation and adaptation

a) Development proposals will be sited and designed to minimise lifecycle greenhouse gas emissions as far as possible.
b) Development proposals will be sited and designed to adapt to current and future risks from climate change.
c) Development proposals to retrofit measures to existing developments that reduce emissions or support adaptation to climate change will be supported.

Policy 3 Biodiversity

a) Development proposals will contribute to the enhancement of biodiversity, including where relevant, restoring degraded habitats and building and strengthening nature networks and the connections between them. Proposals should also integrate nature-based solutions, where possible.
b) Development proposals for national or major development, or for development that requires an Environmental Impact Assessment will only be supported where it can be demonstrated that the proposal will conserve, restore and enhance biodiversity, including nature networks so they are in a demonstrably better state than without intervention. This will include future management. To inform this, best practice assessment methods should be used. Proposals within these categories will demonstrate how they have met all of the following criteria:
i. the proposal is based on an understanding of the existing characteristics of the site and its local, regional and national ecological context prior to development, including the presence of any irreplaceable habitats;
ii. wherever feasible, nature-based solutions have been integrated and made best use of;
iii. an assessment of potential negative effects which should be fully mitigated in line with the mitigation hierarchy prior to identifying enhancements;
iv. significant biodiversity enhancements are provided, in addition to any proposed mitigation. This should include nature networks, linking to and strengthening habitat connectivity within and beyond the development, secured within a reasonable timescale and with reasonable certainty. Management arrangements for their long- term retention and monitoring should be included, wherever appropriate; and
v. local community benefits of the biodiversity and/or nature networks have been considered.

c) Proposals for local development will include appropriate measures to conserve, restore and enhance biodiversity, in accordance with national and local guidance. Measures should be proportionate to the nature and scale of development. Applications for individual householder development, or which fall within scope of (b) above, are excluded from this requirement.

d) Any potential adverse impacts, including cumulative impacts, of development proposals on biodiversity, nature networks and the natural environment will be minimised through careful planning and design. This will take into account the need to reverse biodiversity loss, safeguard the ecosystem services that the natural environment provides, and build resilience by enhancing nature networks and maximising the potential for restoration.

Policy 4 Natural places

a) Development proposals which by virtue of type, location or scale will have an unacceptable impact on the natural environment, will not be supported.

b) Development proposals that are likely to have a significant effect on an existing or proposed European site (Special Area of Conservation or Special Protection Areas) and are not directly connected with or necessary to their conservation management are required to be subject to an "appropriate assessment" of the implications for the conservation objectives.

c) Development proposals that will affect a National Park, National Scenic Area, Site of Special Scientific Interest or a National Nature Reserve will only be supported where:
i. The objectives of designation and the overall integrity of the areas will not be compromised; or
ii. Any significant adverse effects on the qualities for which the area has been designated are clearly outweighed by social, environmental or economic benefits of national importance.

All Ramsar sites are also European sites and/ or Sites of Special Scientific Interest and
are extended protection under the relevant statutory regimes.

d) Development proposals that affect a site designated as a local nature conservation site or landscape area in the LDP will only be supported where:
i. Development will not have significant adverse effects on the integrity of the area or the qualities for which it has been identified; or
ii. Any significant adverse effects on the integrity of the area are clearly outweighed by social, environmental or economic benefits of at least local importance.

e) The precautionary principle will be applied in accordance with relevant legislation and Scottish Government guidance.

f) Development proposals that are likely to have an adverse effect on species protected by legislation will only be supported where the proposal meets the relevant statutory tests. If there is reasonable evidence to suggest that a protected species is present on a site or may be affected by a proposed development, steps must be taken to establish its presence. The level of protection required by legislation must be factored into the planning and design of development, and potential impacts must be fully considered prior to the determination of any application.

g) Development proposals in areas identified as wild land in the Nature Scot Wild Land Areas map will only be supported where the proposal:
i) will support meeting renewable energy targets; or,

ii) is for small scale development directly linked to a rural business or croft, or is required to support a fragile community in a rural area.

All such proposals must be accompanied by a wild land impact assessment which sets out how design, siting, or other mitigation measures have been and will be used to minimise significant impacts on the qualities of the wild land, as well as any management and monitoring arrangements where appropriate. Buffer zones around wild land will not be applied, and effects of development outwith wild land areas will not be a significant consideration.

Policy 5 Soils

a) Development proposals will only be supported if they are designed and constructed:
i. In accordance with the mitigation hierarchy by first avoiding and then minimising the amount of disturbance to soils on undeveloped land; and
ii. In a manner that protects soil from damage including from compaction and erosion, and that minimises soil sealing.

b) Development proposals on prime agricultural land, or land of lesser quality that is culturally or locally important for primary use, as identified by the LDP, will only be supported where it is for:
i. Essential infrastructure and there is a specific locational need and no other suitable site;
ii. Small-scale development directly linked to a rural business, farm or croft or for essential workers for the rural business to be able to live onsite;
iii. The development of production and processing facilities associated with the land produce where no other local site is suitable;
iv. The generation of energy from renewable sources or the extraction of minerals and there is secure provision for restoration; and

In all of the above exceptions, the layout and design of the proposal minimises the amount of protected land that is required.

c) Development proposals on peatland, carbon- rich soils and priority peatland habitat will only be supported for:
i. Essential infrastructure and there is a specific locational need and no other suitable site;
ii. The generation of energy from renewable sources that optimises the contribution of the area to greenhouse gas emissions reductions targets;
iii. Small-scale development directly linked to a rural business, farm or croft;
iv. Supporting a fragile community in a rural or island area; or
v. Restoration of peatland habitats.

d) Where development on peatland, carbon-rich soils or priority peatland habitat is proposed, a detailed site specific assessment will be required to identify:
i. the baseline depth, habitat condition, quality and stability of carbon rich soils;
ii. the likely effects of the development on peatland, including on soil disturbance; and
iii. the likely net effects of the development on climate emissions and loss of carbon.

This assessment should inform careful project design and ensure, in accordance with relevant guidance and the mitigation hierarchy, that adverse impacts are first avoided and then minimised through best practice. A peat management plan will be required to demonstrate that this approach has been followed, alongside other appropriate plans required for restoring and/ or enhancing the site into a functioning peatland system capable of achieving carbon sequestration.

e) Development proposals for new commercial peat extraction, including extensions to existing sites, will only be supported where:

i. the extracted peat is supporting the Scottish whisky industry;

ii. there is no reasonable substitute;

iii. the area of extraction is the minimum necessary and the proposal retains an in-situ residual depth of part of at least 1 metre across the whole site, including

iv. the time period for extraction is the minimum necessary; and

v. there is an agreed comprehensive site restoration plan which will progressively restore, over a reasonable timescale, the area of extraction to a functioning peatland system capable of achieving carbon sequestration.

Policy 6 Forestry, woodland and trees

a) Development proposals that enhance, expand and improve woodland and tree cover will be supported.

b) Development proposals will not be supported where they will result in:

i. Any loss of ancient woodlands, ancient and veteran trees, or adverse impact on their ecological condition;

ii. Adverse impacts on native woodlands, hedgerows and individual trees of high biodiversity value, or identified for protection in the Forestry and Woodland Strategy;

iii. Fragmenting or severing woodland habitats, unless appropriate mitigation measures are identified and implemented in line with the mitigation hierarchy;

iv. Conflict with Restocking Direction, Remedial Notice or Registered Notice to Comply issued by Scottish Forestry.

c) Development proposals involving woodland removal will only be supported where they will achieve significant and clearly defined additional public benefits in accordance with relevant Scottish Government policy on woodland removal. Where woodland is removed, compensatory planting will most likely be expected to be delivered.

d) Development proposals on sites which include an area of existing woodland or land identified in the Forestry and Woodland Strategy as being suitable for woodland creation will only be supported where the enhancement and improvement of woodlands and the planting of new trees on the site (in accordance with the Forestry and Woodland Strategy) are integrated into the design.

Policy 7 Historic assets and places

a) Development proposals with a potentially significant impact on historic assets or places will be accompanied by an assessment which is based on an understanding of the cultural significance of the historic asset and/or place. The assessment should identify the likely visual or physical impact of any proposals for change, including cumulative effects and provide a sound basis for managing the impacts of change.

Proposals should also be informed by national policy and guidance on managing change in the historic environment, and information held within Historic Environment Records.

b) Development proposals for the demolition of listed buildings will not be supported unless it has been demonstrated that there are exceptional circumstances and that all reasonable efforts have been made to retain, reuse and/or adapt the listed building. Considerations include whether the:

i. building is no longer of special interest;

ii. building is incapable of physical repair and re-use as verified through a detailed structural condition survey report;

iii. repair of the building is not economically viable and there has been adequate marketing for existing and/or new uses at a price reflecting its location and condition for a reasonable period to attract interest from potential restoring purchasers; or

iv. demolition of the building is essential to delivering significant benefits to economic growth or the wider community.

c) Development proposals for the reuse, alteration or extension of a listed building will only be supported where they will preserve its character, special architectural or historic interest and setting. Development proposals affecting the setting of a listed building should preserve its character, and its special architectural or historic interest.

d) Development proposals in or affecting conservation areas will only be supported where the character and appearance of the conservation area and its setting is preserved or enhanced. Relevant considerations include the:

i. architectural and historic character of the area;

ii. existing density, built form and layout; and

iii. context and siting, quality of design and suitable materials.

e) Development proposals in conservation areas will ensure that existing natural and built features which contribute to the character of the conservation area and its setting, including structures, boundary walls, railings, trees and hedges, are retained.

f) Demolition of buildings in a conservation area which make a positive contribution to its character will only be supported where it has been demonstrated that:

i. reasonable efforts have been made to retain, repair and reuse the building;

ii. the building is of little townscape value;

iii. the structural condition of the building prevents its retention at a reasonable cost; or

iv. the form or location of the building makes its reuse extremely difficult.

g) Where demolition within a conservation area is to be followed by redevelopment, consent to demolish will only be supported when an acceptable design, layout and materials are being used for the replacement development.

h) Development proposals affecting scheduled monuments will only be supported where:

i. direct impacts on the scheduled monument are avoided;

ii. significant adverse impacts on the integrity of the setting of a scheduled monument are avoided; or

iii. exceptional circumstances have been demonstrated to justify the impact on a scheduled monument and its setting and impacts on the monument or its setting have been minimised.

i) Development proposals affecting nationally important Gardens and Designed Landscapes will be supported where they protect, preserve or enhance their cultural significance, character and integrity and where proposals will not significantly impact on important views to, from and within the site, or its setting.

j) Development proposals affecting nationally important Historic Battlefields will only be supported where they protect and, where appropriate, enhance their cultural significance, key landscape characteristics, physical remains and special qualities.

k) Development proposals at the coast edge or that extend offshore will only be supported where proposals do not significantly hinder the preservation objectives of Historic Marine Protected Areas.

l) Development proposals affecting a World Heritage Site or its setting will only be supported where their Outstanding Universal Value is protected and preserved.

m) Development proposals which sensitively repair, enhance and bring historic buildings, as identified as being at risk locally or on the national Buildings at Risk Register, back into beneficial use will be supported.

n) Enabling development for historic environment assets or places that would otherwise be unacceptable in planning terms, will only be supported when it has been demonstrated that the enabling development proposed is:
i. essential to secure the future of an historic environment asset or place which is at risk of serious deterioration or loss; and
ii. the minimum necessary to secure the restoration, adaptation and long-term future of the historic environment asset or place.

The beneficial outcomes for the historic environment asset or place should be secured early in the phasing of the development, and will be ensured through the use of conditions and/or legal agreements.

o) Non-designated historic environment assets, places and their setting should be protected and preserved in situ wherever feasible. Where there is potential for non-designated buried archaeological remains to exist below a site, developers will provide an evaluation of the archaeological resource at an early stage so that planning authorities can assess impacts. Historic buildings may also have archaeological significance which is not understood and may require assessment.

Where impacts cannot be avoided they should be minimised. Where it has been demonstrated that avoidance or retention is not possible, excavation, recording, analysis, archiving, publication and activities to provide public benefit may be required through the use of conditions or legal/planning obligations.

When new archaeological discoveries are made during the course of development works, they must be reported to the planning authority to enable agreement on appropriate inspection, recording and mitigation measures.

Policy 9 Brownfield, vacant and derelict land and empty buildings

a) Development proposals that will result in the sustainable reuse of brownfield land including vacant and derelict land and buildings, whether permanent or temporary, will be supported. In determining whether the reuse is sustainable, the biodiversity value of brownfield land which has naturalised should be taken into account.

b) Proposals on greenfield sites will not be supported unless the site has been allocated for development or the proposal is explicitly supported by policies in the LDP.

c) Where land is known or suspected to be unstable or contaminated, development proposals will demonstrate that the land is, or can be made, safe and suitable for the proposed new use.

d) Development proposals for the reuse of existing buildings will be supported, taking into account their suitability for conversion to other uses. Given the need to conserve
embodied energy, demolition will be regarded as the least preferred option.

Policy 13 Sustainable transport

a) Proposals to improve, enhance or provide active travel infrastructure, public transport infrastructure or multi-modal hubs will be supported. This includes proposals:
i. for electric vehicle charging infrastructure and electric vehicle forecourts, especially where fuelled by renewable energy.
ii. which support a mode shift of freight from road to more sustainable modes, including last-mile delivery.
iii. that build in resilience to the effects of climate change and where appropriate incorporate blue and green infrastructure and nature rich habitats (such as natural planting or water systems).

b) Development proposals will be supported where it can be demonstrated that the transport requirements generated have been considered in line with the sustainable travel and investment hierarchies and where appropriate they:
i. Provide direct, easy, segregated and safe links to local facilities via walking, wheeling and cycling networks before occupation;
ii. Will be accessible by public transport, ideally supporting the use of existing services;
iii. Integrate transport modes;
iv. Provide low or zero-emission vehicle and cycle charging points in safe and convenient locations, in alignment with building standards;
v. Supply safe, secure and convenient cycle parking to meet the needs of users and which is more conveniently located than car parking;
vi. Are designed to incorporate safety measures including safe crossings for walking and wheeling and reducing the number and speed of vehicles;
vii. Have taken into account, at the earliest stage of design, the transport needs of diverse groups including users with protected characteristics to ensure the safety, ease and needs of all users; and
viii. Adequately mitigate any impact on local public access routes.

c) Where a development proposal will generate a significant increase in the number of person trips, a transport assessment will be required to be undertaken in accordance with the relevant guidance.

d) Development proposals for significant travel generating uses will not be supported in locations which would increase reliance on the private car, taking into account the specific characteristics of the area.

e) Development proposals which are ambitious in terms of low/no car parking will be supported, particularly in urban locations that are well-served by sustainable transport modes and where they do not create barriers to access by disabled people.

f) Development proposals for significant travel generating uses, or smaller-scale developments where it is important to monitor travel patterns resulting from the development, will only be supported if they are accompanied by a Travel Plan with supporting planning conditions/obligations. Travel plans should set out clear arrangements for delivering against targets, as well as monitoring and evaluation.

g) Development proposals that have the potential to affect the operation and safety of the Strategic Transport Network will be fully assessed to determine their impact. Where it has been demonstrated that existing infrastructure does not have the capacity to accommodate a development without adverse impacts on safety or unacceptable impacts on operational performance, the cost of the mitigation measures required to ensure the continued safe and effective operation of the network should be met by the developer.

While new junctions on trunk roads are not normally acceptable, the case for a new junction will be considered by Transport Scotland where significant economic or regeneration benefits can be demonstrated. New junctions will only be considered if they are designed in accordance with relevant guidance and where there will be no adverse impact on road safety or operational performance.

Policy 14 Design, quality and place

a) Development proposals will be designed to improve the quality of an area whether in urban or rural locations and regardless of scale.

b) Development proposals will be supported where they are consistent with the six qualities of successful places:

Healthy: Supporting the prioritisation of women's safety and improving physical and mental health.

Pleasant: Supporting attractive natural and built spaces.

Connected: Supporting well connected networks that make moving around easy and reduce car dependency

Distinctive: Supporting attention to detail of local architectural styles and natural landscapes to be interpreted, literally or creatively, into designs to reinforce identity.

Sustainable: Supporting the efficient use of resources that will allow people to live, play, work and stay in their area, ensuring climate resilience, and integrating nature positive, biodiversity solutions.

Adaptable: Supporting commitment to investing in the long-term value of buildings, streets and spaces by allowing for flexibility so that they can be changed quickly to accommodate different uses as well as maintained over time.

Further details on delivering the six qualities of successful places are set out in Annex D.

c) Development proposals that are poorly designed, detrimental to the amenity of the surrounding area or inconsistent with the six qualities of successful places, will not be supported.

Policy 18 Infrastructure first

a) Development proposals which provide (or contribute to) infrastructure in line with that identified as necessary in LDPs and their delivery programmes will be supported.

b) The impacts of development proposals on infrastructure should be mitigated. Development proposals will only be supported where it can be demonstrated that provision is made to address the

impacts on infrastructure. Where planning conditions, planning obligations, or other legal agreements are to be used, the relevant tests will apply.

Where planning obligations are entered into, they should meet the following tests:
- be necessary to make the proposed development acceptable in planning terms
- serve a planning purpose
- relate to the impacts of the proposed development
- fairly and reasonably relate in scale and kind to the proposed development
- be reasonable in all other respects

Planning conditions should only be imposed where they meet all of the following tests. They should be:
- necessary
- relevant to planning
- relevant to the development to be permitted
- enforceable
- precise
- reasonable in all other respects

Policy 22 Flood risk and water management

a) Development proposals at risk of flooding or in a flood risk area will only be supported if they are for:
i. essential infrastructure where the location is required for operational reasons;
ii. water compatible uses;
iii. redevelopment of an existing building or site for an equal or less vulnerable use; or.
iv. redevelopment of previously used sites in built up areas where the LDP has identified a need to bring these into positive use and where proposals demonstrate that long- term safety and resilience can be secured in accordance with relevant SEPA advice.

The protection offered by an existing formal flood protection scheme or one under construction can be taken into account when determining flood risk.

In such cases, it will be demonstrated by the applicant that:
o all risks of flooding are understood and addressed;
o there is no reduction in floodplain capacity, increased risk for others, or a need for future flood protection schemes;
o the development remains safe and operational during floods;
o flood resistant and resilient materials and construction methods are used; and
o future adaptations can be made to accommodate the effects of climate change.

Additionally, for development proposals meeting criteria part iv), where flood risk is managed at the site rather than avoided these will also require:
o the first occupied/utilised floor, and the underside of the development if relevant, to be above the flood risk level and have an additional allowance for freeboard; and
o that the proposal does not create an island of development and that safe access/ egress can be achieved.

b) Small scale extensions and alterations to existing buildings will only be supported where they will not significantly increase flood risk.

c) Development proposals will:

i. not increase the risk of surface water flooding to others, or itself be at risk.

ii. manage all rain and surface water through sustainable urban drainage systems (SUDS), which should form part of and integrate with proposed and existing blue- green infrastructure. All proposals should presume no surface water connection to the combined sewer;

iii. seek to minimise the area of impermeable surface.

d) Development proposals will be supported if they can be connected to the public water mains. If connection is not feasible, the applicant will need to demonstrate that water for drinking water purposes will be sourced from a sustainable water source that is resilient to periods of water scarcity.

e) Development proposals which create, expand or enhance opportunities for natural flood risk management, including blue and green infrastructure, will be supported.

Policy 23 Health and safety

a) Development proposals that will have positive effects on health will be supported. This could include, for example, proposals that incorporate opportunities for exercise, community food growing or allotments.

b) Development proposals which are likely to have a significant adverse effect on health will not be supported. A Health Impact Assessment may be required.

c) Development proposals for health and social care facilities and infrastructure will be supported.

d) Development proposals that are likely to have significant adverse effects on air quality will not be supported. Development proposals will consider opportunities to improve air quality and reduce exposure to poor air quality. An air quality assessment may be required where the nature of the proposal or the air quality in the location suggest significant effects are likely.

e) Development proposals that are likely to raise unacceptable noise issues will not be supported. The agent of change principle applies to noise sensitive development. A Noise Impact Assessment may be required where the nature of the proposal or its location suggests that significant effects are likely.

f) Development proposals will be designed to take into account suicide risk.

g) Development proposals within the vicinity of a major accident hazard site or major accident hazard pipeline (because of the presence of toxic, highly reactive, explosive or inflammable substances) will consider the associated risks and potential impacts of the proposal and the major accident hazard site/pipeline of being located in proximity to one another.

h) Applications for hazardous substances consent will consider the likely potential impacts on surrounding populations and the environment.

i) Any advice from Health and Safety Executive, the Office of Nuclear Regulation or the Scottish Environment Protection Agency that planning permission or hazardous substances consent should be refused, or conditions to be attached to a grant of consent, should not be overridden by the decision maker without the most careful consideration.

j) Similar considerations apply in respect of development proposals either for or near licensed explosive sites (including military explosive storage sites).

Policy 29 Rural development

a) Development proposals that contribute to the viability, sustainability and diversity of rural communities and local rural economy will be supported, including:
i. farms, crofts, woodland crofts or other land use businesses, where use of good quality land for development is minimised and business viability is not adversely affected;
ii. diversification of existing businesses;
iii. production and processing facilities for local produce and materials, for example sawmills, or local food production;
iv. essential community services;
v. essential infrastructure;
vi. reuse of a redundant or unused building;
vii. appropriate use of a historic environment asset or is appropriate enabling development to secure the future of historic environment assets;
viii. reuse of brownfield land where a return to a natural state has not or will not happen without intervention;
ix. small scale developments that support new ways of working such as remote working, homeworking and community hubs; or
x. improvement or restoration of the natural environment.

b) Development proposals in rural areas should be suitably scaled, sited and designed
to be in keeping with the character of the area. They should also consider how the development will contribute towards local living and take into account the transport needs of the development as appropriate for the rural location.

c) Development proposals in remote rural areas, where new development can often help to sustain fragile communities, will be supported where the proposal:
i. will support local employment;
ii. supports and sustains existing communities, for example through provision of digital infrastructure; and
iii. is suitable in terms of location, access, siting, design and environmental impact.

d) Development proposals that support the resettlement of previously inhabited areas will be supported where the proposal:
i. is in an area identified in the LDP as suitable for resettlement;
ii. is designed to a high standard;
iii. responds to their rural location; and
iv. is designed to minimise greenhouse gas emissions as far as possible.

Duntrune Ltd

Application for review: Erection of Crematorium Building and associated Parking, Access, Turning Space, Landscaping and Boundary Enclosures at Land North-East of Duntrune House, Duntrune

Planning Application Ref: 20/00830/FULL: DMRC-4-22

Statement on National Planning Framework 4

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1 Introduction and Summary

1.1 At its meeting on 31 January 2023, the Development Management Review Committee (DMRC) deferred determination of the application by Duntrune Ltd (the Applicant) for a review of the refusal of planning permission for the Erection of Crematorium Building and Associated Parking, Access, Turning Space, Landscaping and Boundary Enclosures at Land North-East of Duntrune House, Duntrune pending receiving comments from both Angus Council ("the Council") and the Applicant on the proposed development's compliance with National Planning Framework 4 (NPF4) and Policies 1, 13 and 29 in particular.

1.2 A Procedure Notice was issued requiring the Council to provide its statement on NPF4 in the first instance and then providing the Applicant with the opportunity to make its statement and to respond to the Council's statement.

1.3 This is the Applicant's statement on NPF4. It demonstrates that when the correct interpretation and weight is given the terms of NPF4, read as a whole, the application accords with NPF4 and as such, there is a presumption in favour of granting consent. Should DMRC consider that the application offends NPF4, the Applicant submits that the material considerations which it has previously highlighted would justify departing from the development plan and granting consent.

1.4 This statement also highlights legal errors in the Council's assessment of the application against NPF4. The Council's assessment of the application as a significant traffic generating development, which underpins all of its grounds for concluding that the application breaches NPF4, is also at odds with the opinion of the DMRC's independent planning adviser and the Council's own Roads Department.

2 NPF 4 status

2.1 NPF4 was adopted on 13 February 2023 and as of that date, it became part of the development plan for Angus, along with the Angus Local Development Plan 2016. The strategic development plan (SDP), TAYplan ceased to have effect and all statutory supplementary guidance adopted pursuant to the SDP has also been superseded.

2.2 Section 25 of the Town and Country Planning (Scotland) Act 1997 requires planning applications to be determined in accordance with the development plan unless material considerations indicate otherwise.

2.3 When determining a planning application under Section 25, the decision maker is required to assess the proposal against potentially competing policies in the development plan and then "*decide whether in the light of the whole plan the proposal does or does not accord with it*" (*City of Edinburgh Council v Secretary of State for Scotland [1997] 1 W.L.R. 1447)* (Document D58). The court has also confirmed that "*As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another*" (*Tesco Stores Ltd. v Dundee City Council [2012] UKSC 13*) (Document D59).

2.4 That approach equally applies to NPF4 now that it forms part of the development plan. This is confirmed at page 98 which advises that the policies should be read as a whole and it is for the decision maker to determine what weight to attach to policies on a case by case basis.

2.5 Section 24(3) of the 1997 Act confirms that in the event of any incompatibility between a provision of NPF4 and a provision of a local development plan, whichever of them is later in date shall prevail. As NPF4 post-dates the Angus LDP, the provisions of NPF4 will prevail for the purposes of the current review. This is acknowledged by the Council in their Statement on NPF4. This legal approach was confirmed by the Chief Planner in her letter providing transitional guidance on NPF4.

2.6 It should be noted, however, that while the weight to be attached to policies is for the decision-maker, the interpretation of policies is a legal matter (*Tesco Stores Ltd, supra*).

3 Assessment of the Application against NPF4 and comments on the Council's Statement

3.1 As the Council's Statement notes, there are no specific policies in NPF4 on dealing with applications for crematorium developments. That is not unusual for a development plan. It cannot have policies for every different type of development or use.

3.2 The Council's Statement acknowledges that crematorium developments can generate employment and provide an important and necessary service for the community. NPF4's policies and strategy on economic development, particularly rural development, and community wellbeing are therefore particularly relevant to the Applicant's proposed development.

3.3 Part 1 of NPF highlights that people living in Scotland have very different life chances, at least partly as a result of where they live. Page 11 of NPF4 confirms that in rural areas the approach to local living will be shaped by local context. Page 13 of NPF4 advises that the Scottish Government's strategy and policies support development that helps to eliminate discrimination and promote equality. The spatial strategy must support a just transition with development tackling social, economic and health inequalities.

3.4 Page 16 confirms that planning will play a key role in creating a globally competitive, entrepreneurial, inclusive and sustainable economy, with thriving and innovative businesses, quality jobs and fair work for everyone. It stresses the need to be flexible to facilitate future business and employment that benefits communities and improves places.

3.5 The Scottish Government's strategy is to build a wellbeing economy that benefits everyone, and every place, in Scotland to create a society that is thriving across economic, social and environmental dimensions, and that delivers prosperity for all. Actively enabling rural development is seen as key in achieving rural revitalisation; a target of the national spatial strategy set out in NPF4.

3.6 In implementation of the strategy, Policy 25 supports development proposals which contribute to local or regional community wealth building, which can include improving community resilience, reducing inequalities and creating new local firms and jobs.

3.7 Despite acknowledging that crematorium developments provide employment and are a significant and important community service, the Council's Statement fails to assess the proposals against the underlying aims and strategies of NPF4 and fails to identify Policy 25 as relevant to the application. This is one of many flaws in the Council's approach and reflects a failure to consider NPF4 holistically, as a decision-maker is required to do.

3.8 The Applicant submits that Policy 25 and the Scottish Government's strategy should carry significant weight when determining its application. The inequality and different life chances depending on where you live, which NPF4 highlights and seeks to address, lies at the heart of the proposed development. Indeed, it could be said that in Angus it is a case of in death, as it is in life.

3.9 As the Applicant has already highlighted, Angus residents are faced with the highest cremation charges in the UK; with the costs in Dundee being joint third highest. The disparity between the costs of cremation in Friockheim and the rest of the UK was mentioned by the Sunday Times as recently as 13 February 2023 (Document D60). Those affected by the high cremation charges are also most likely to be those who are least able to travel further afield to access cheaper cremation services.

3.10 As highlighted in the Applicant's earlier submission, the CMA has identified the planning process as the biggest barrier to reducing cremation costs and inequality. Granting consent for the Applicant's proposed crematorium would help to address funeral poverty in the area and start to eliminate the discrimination which the Angus community currently experiences. Approving the development would also align with the Scottish Government's aim to tackle social and economic inequalities while encouraging a competitive and entrepreneurial, inclusive and sustainable economy.

3.11 It is submitted that the application is supported by Policy 25 and approving the application would send a strong message of intent by Angus Council to reduce the current inequalities which its constituents endure and that it welcomes and supports new local businesses.

3.12 The officer also, incorrectly in the Applicant's opinion, considers that the application is contrary to Policy 29 as it would generate significant vehicle movements. This focus on the proposals being a significant traffic generating development underpins all of the Council's assessment of the application against NPF4.

3.13 It must be borne in mind that Policy 29 encourages rural economic activity, innovation and diversification. It supports development that contributes to the local rural economy and provision of essential community services.

3.14 The Applicant would make two initial points in response to the Council's claim that Policy 29 is breached.

3.15 The first is that there is no reference in the policy to a breach occurring if a development generates significant traffic. Policy 29(b), which the officer quotes in bold type, requires consideration to be given as to how the development will contribute towards local living and take into account the transport needs of the development as appropriate for its rural location. It makes no reference to the significance of the traffic. It is submitted that this reflects the fact that it is inherent in rural development that there will be a greater reliance on vehicles than in an urban location.

3.16 As noted above, while the weight to be attached to policies is for the decision-maker, interpretation of policy is a legal matter, and open to review by the courts. It is submitted that a correct interpretation of the policy requires the DMRC to have regard to the transport needs of the development given its rural location. That has been done.

3.17 The proposal is intended to serve an existing, mainly rural, community. Those living, and dying, in rural communities still require the services of a crematorium. As such this proposal will not increase the community's demand for these services. The proposal will not lead to additional vehicles taking to the roads. Rural Angus mourners are already having to travel to attend cremations. Rather it will bring a crematorium closer to the existing rural community and thus reduce the mileage travelled.

3.18 The Roads officers accepted the transport needs of the development.

3.19 The second point is that the view on traffic generation set out in the Council's Statement is not shared by the DMRC's independent planning adviser who brought Policy 29 to the Committee's attention. She advised at the meeting on 31 January that the development was not a significant traffic generating development. That was also the view of the Council's Roads' officers when consulted on the application.

3.20 As mentioned above, the alleged significant traffic generation is a thread which runs throughout the Council's consideration of NPF4. The Council's Statement claims that because of the alleged significant vehicle movements which would be generated by the development and the alleged inaccessibility by a choice of sustainable transport modes, the development conflicts with Policies 13 and 14 of NPF4. Again, this is disputed by the Applicant.

3.21 As noted above, the Applicant's transport assessment has demonstrated that the development is not a significant travel generating use, which has been accepted by the Roads' officers and the DMRC's independent planning adviser.

3.22 The Policy Intent for Policy 13 is to encourage, promote and facilitate developments that prioritise walking, wheeling, cycling and public transport for everyday travel and reduce the need to travel unsustainably. The text makes it clear that consideration must be given to the type of development when considering sustainable transport requirements and the characteristics of the area.

3.23 Further, Policy 13 needs to be read along with the desire to encourage rural development under Policy 29 and the nature of the development.

3.24 Attending a cremation cannot be considered to be everyday travel which reduces the applicability of the policy to the development. As stated above, the rural community which will be served by the development is already having to travel to attend cremation services in Dundee or Friockheim or further afield. This proposal will provide many people with an alternative, more local, crematorium, which will provide greater accessibility and reduce travel time and thus CO2 emissions. The development will therefore also help in meeting the Scottish Government's decarbonisation target of reducing the number of kilometres travelled by car by 20% by 2030.

3.25 In addition, the Applicant has proposed measures consistent with Policy 13(b) in terms of extending the bus service; providing electric vehicles and charging points; and proposing improvements on the public road network.

3.26 It is submitted that when considered in the round, the proposal complies with the key aspects of Policy 13.

3.27 The Council's Statement seeks to draw similarities with the refusal of application 07/00160/OUT (Document D54). This is a decision which predates NPF4 by 15 years and as such its relevance in policy terms is extremely limited. Further, as set out in the Applicant's Review Statement, that development included not just to a crematorium, but a cemetery and associated licensed public house/restaurant with parking for 200 cars on Linlathen Estate in Dundee. It was also a very different site and size: extending to 12 hectares of prime agricultural land with two scheduled ancient monuments (SAMs) within the site and a listed building located nearby, all of which would be detrimentally affected.

3.28 It was not the lack of availability of bus transport for people attending funerals which was an issue for the Reporter in that appeal. It was the lack of a bus service for those people visiting the cemetery or memorials on a regular basis.

3.29 In these circumstances, it is submitted that the Linlathen decision cannot be used to justify refusal of the application on the grounds of a breach of NPF4.

3.30 It is the claimed dependency on cars and lack of sustainable transport options that forms the basis for the Council's claim that Policy 14 on design, quality and place is contravened. The Council has not refused the application on design grounds. The Applicant has explained the requirement for a rural location and designed the development to be sensitive to its required location, nature and size required.

3.31 The Council's Statement claims that the development is also contrary to Policy 5 on the grounds that the site is greenfield. This is another flaw in the Council's assessment. That is not a correct interpretation of Policy 5.

3.32 Policy 5 seeks to protect valued soils. As confirmed in the original Report of Handling, the development is not on prime agricultural land. Nor is it peatland. Nor is it on land of lesser quality that has been

identified in the LDP as culturally or locally important for primary use. None of the valued soils which are protected by NPF4 will be affected by the development.

3.33 The development has also been designed to minimise earth movement, making use of the existing contours on the site and locating the development as close to the existing road as possible to minimise the access requirements. That can be contrasted with the Linlathen development in Dundee to which the officer refers which proposed 750 metres of new road.

3.34 It is submitted that there is no breach of Policy 5.

3.35 The Council's Statement also claims a breach of Policy 9 as the application site is not brownfield land and has not been allocated for development, nor is it explicitly supported by policies in the LDP. Again, this conclusion is flawed.

3.36 Although the LDP predates NPF4, it still forms part of the development plan and requires to be read in conjunction with NPF4. Indeed, Policy 9 specifically directs the decision-maker to LDP policy which permits development on non-allocated greenfield land.

3.37 Policy DS1 of the current LDP permits development on greenfield land out with settlement boundaries where they are of a scale and nature appropriate to their location and where they are in accordance with relevant policies of the plan. Policy DS 1 supports development of greenfield land where there are no suitable and available brownfield sites capable of accommodating the development. The development must not result in adverse impacts on designated sites.

3.38 As mentioned in the original Application for Review, the Council accepts that the design of the building is of a scale and nature appropriate to the location and that there will be no adverse impacts on the natural, built or cultural environment. And the officer accepted that it is unlikely that there will be sites in a town centre or edge of centre location for the proposed use.

3.39 The Applicant provided a sequential assessment to show that there are no other suitable and available brownfield sites which should be preferred to the application site.

3.40 LDP Policy DS 1 therefore does explicitly support out of settlement development on greenfield land in specified circumstances with which the proposed development complies. The development therefore complies with NPF4 Policy 9.

3.41 The Council's Statement also claims that Policies 1 and 2 of NPF4 are breached.

3.42 Policy 1 is an over-arching policy which requires significant weight to be given to the global climate and nature crises. That does not mean that development in rural locations on greenfield sites cannot take place. The Policy Intent behind Policy 1 is to encourage, promote and facilitate development that addresses the climate emergency and nature crisis.

3.43 Policy 2 looks to minimise emissions from development.

3.44 As set out above, the Applicant does not agree with the Council's claim that the development will primarily serve an urban area. It will serve a primarily rural community who have an existing need for cremation services and are being charged the highest costs in the UK for that service.

3.45 As set out in this Statement and the Applicant's previous submissions, there is a pressing need for another cremation facility in South Angus. Although the Council focuses on the vehicles which would travel to the application site, as set out above regard also has to be had to the fact that providing another crematorium in Angus will reduce the distance that some people in Angus currently require to travel to access the crematoria in Friockheim or Dundee and will therefore reduce both carbon emissions and the cost of the service provision.

3.46 As noted in various places, Xplore Dundee has indicated that it is willing to facilitate a bus stop at the application site and the Applicant proposes to operate an electric bus for collecting mourners.

3.47 In terms of design and construction, the proposals will require to comply with the latest version of Section 6 of the Building Standards which came in to force on 1 February 2023. These revised standards cover energy performance; CO2 emissions; overheating; and ventilation. These are the most stringent building standards yet and require a 73% CO2 emission reduction from the 2014 values for commercial properties.

3.48 The development will reduce emissions through inter alia:

- demonstrating high thermal performance
- maximising storage of carbon through the predominance of timber in the construction of the building
- incorporating waste heat recovery to provide heating and hot water, reducing carbon emissions
- incorporating waste recycling
- incorporating provision for buses & coaches within the layout
- incorporating electric vehicle charging and electric vehicle collection service
- providing online viewing of live services, thus reducing the need to travel

3.49 The DMRC requires to take a holistic view of the development's contribution to reducing carbon emissions. If that approach is adopted, rather than the Council's narrow focus, it is evident that the objectives of Policies 1 and 2 are met.

3.50 The Council references other NPF policies under "*Other development plan considerations*". It is understood that this is an acknowledgement that the proposals comply with Policies 3, 4, 6, 7, 18, 22 and 23. The Applicant would concur.

3.51 Indeed, the Council's conclusion admits that the proposal doesn't give rise to conflict with a number of detailed policies in NPF4.

4 Conclusion

4.1 NPF4 places considerable emphasis on using planning as a powerful tool to deliver change and address the cost crisis and longstanding social, economic and health inequalities. This objective underpins the policies which guide development.

4.2 It has been long understood that policies within a development plan may conflict with each other and be irreconcilable. NPF4 requires to be read as a whole. The weight to be attached to the policies is a matter for the decision-maker.

4.3 The Council acknowledges that the proposal complies with many of the policies in NPF4, but only places weight on those which it considers are breached.

4.4 The Applicant has demonstrated that the Council's reasoning for concluding that certain policies are breached is flawed and in certain instances is not supported by the DMRC's independent planning adviser, nor the Council's Roads officers.

4.5 The Applicant has set out its reasoning for why the proposals are considered to comply with NPF4 and respectfully calls upon the DMRC to place considerable weight on the social, economic and community benefits which the development will bring (the same benefits that have already been acknowledged by the Council).

4.6 As set out in the Applicant's earlier submissions, material considerations also support the grant of consent.

4.7 The DMRC is respectfully invited to overturn the officer's decision and grant consent for the development.

5 Additional documents

5.1 The Applicant submits the additional documents listed below in support of this Statement on NPF4.

D58	City of Edinburgh Council v Secretary of State for Scotland [1997] 1 W.L.R. 1447
D59	Tesco Stores Ltd. v Dundee City Council [2012] UKSC 13
D60	Sunday Times article dated 13 February 2023

Brodies LLP
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21 February 2023

[HOUSE OF LORDS]

*CITY OF EDINBURGH COUNCIL . . . . RESPONDENTS

AND

SECRETARY OF STATE FOR SCOTLAND . . . RESPONDENT

AND

REVIVAL PROPERTIES LTD. . . . . APPELLANTS

CITY OF EDINBURGH COUNCIL . . . . RESPONDENTS

AND

SECRETARY OF STATE FOR SCOTLAND . . . APPELLANT

AND

REVIVAL PROPERTIES LTD. . . . . RESPONDENTS

[CONJOINED APPEALS]

1997 June 23, 24; Oct. 16

Lord Browne-Wilkinson, Lord Mackay of Clashfern, Lord Steyn, Lord Hope of Craighead and Lord Clyde

Town Planning—Development—Local authority's development plan—Development of local shopping facilities and demolition of listed building—Whether description of listed building inconsistent with name on list—Whether priority accorded to plan overcome by other material considerations—Town and Country Planning (Scotland) Act 1972 (c. 52), ss. 18A (as inserted by Planning and Compensation Act 1991 (c. 34), s. 58), 52

In 1993 the applicants sought outline planning permission for the development of a food store and petrol filling station and ancillary works, and listed building consent for the demolition of a former riding school building on the site. Both were refused by the local planning authority, and the applicants appealed to the Secretary of State. The list contained, under "Name of Building," "Redford Barracks ... (original buildings of 1909–15 only)." Under "Description," it referred to the riding school building, but the reporter found that that had probably been built after 1915. He held that precedence should be given to the entry under "Name of Building" and that accordingly the riding school building was excluded from the list and listed building consent was unnecessary. In relation to the application for planning permission, he held under section 18A of the Town and Country Planning (Scotland) Act 1972[1] that greater weight should be attached to other material considerations than to the local planning authority's development plan, which consisted of the 1985 structure plan and the 1993 local plan, namely expressions of policy and planning guidance more recent than the 1985 plan. He found that, while there was not a significant shortage of food stores or petrol filling stations in the area in question, other stores were performing at levels significantly higher than company averages and that, accordingly, there was an expenditure surplus and thus a quantitative deficiency in local shopping facilities within the meaning of the 1994 structure plan, not yet approved by the Secretary of State. He concluded that outline planning permission should be granted. The Second Division of the Court

[1] Town and Country Planning (Scotland) Act 1972, s. 18A, as inserted: see post, p. 1458A.

of Session, by a majority on the issue of planning permission, allowed an appeal by the local planning authority.

On appeals by the applicants and the Secretary of State:—

Held, (1) dismissing the applicants' appeal in respect of listed building consent, that the words "original buildings of 1909–15 only" under "Name of Building" in the list did not necessarily refer to buildings completed during the specified years but could be read as referring to the processes of planning, conception, design and the realisation of the architect's work and on that construction the riding school was consistently included under "Description" as a listed building (post, pp. 1449C–F, 1454E–G, 1456F–H).

(2) Allowing the appeals of the applicants and the Secretary of State in respect of planning permission, that the reporter had been entitled in principle to decide that the priority given to the development plan by section 18A of the Act of 1972 was overcome by other material considerations; that a quantitative deficiency in relation to consumer expenditure was most readily established by the fact that other stores were trading above the expected level; that there had been no obligation on the reporter to quantify the extent of the deficiency; and that he had been entitled to decide that a quantitative deficiency was established (post, pp. 1449C–F, 1450H, 1461A, 1463D–E, F–G, 1464A–D).

Decision of the Second Division of the Court of Session affirmed.

The following cases are referred to in the opinions of Lord Hope of Craighead and Lord Clyde:

Bolton Metropolitan District Council v. Secretary of State for the Environment (1995) 94 L.G.R. 387, H.L.(E.)

Hope v. Secretary of State for the Environment (1975) 31 P. & C.R. 120

Loup v. Secretary of State for the Environment (1995) 71 P. & C.R. 175, C.A.

Poyser and Mills' Arbitration, In re [1964] 2 Q.B. 467; [1963] 2 W.L.R. 1309; [1963] 1 All E.R. 612

Simpson v. Edinburgh Corporation, 1960 S.C. 313

Tesco Stores Ltd. v. Secretary of State for the Environment [1995] 1 W.L.R. 759; [1995] 2 All E.R. 636, H.L.(E.)

Wordie Property Co. Ltd. v. Secretary of State for Scotland, 1984 S.L.T. 345

The following additional cases were cited in argument:

Debenhams Plc. v. Westminster City Council [1987] A.C. 396; [1986] 3 W.L.R. 1063; [1987] 1 All E.R. 51, H.L.(E.)

Reg. v. Camden London Borough Council, Ex parte Bellamy, [1992] J.P.L. 255, D.C.

Reg. v. Hillingdon London Borough Council, Ex parte Puhlhofer [1986] A.C. 484; [1986] 2 W.L.R. 259; [1986] 1 All E.R. 467, H.L.(E.)

Save Britain's Heritage v. Number 1 Poultry Ltd. [1991] 1 W.L.R. 153; [1991] 2 All E.R. 10, H.L.(E.)

Shimizu (U.K.) Ltd. v. Westminster City Council [1997] 1 W.L.R. 168; [1997] 1 All E.R. 481, H.L.(E.)

CONJOINED APPEALS from the Second Division of the Court of Session.

These were conjoined appeals by the applicants, Revival Properties Ltd., and the Secretary of State for Scotland respectively from the Second Division of the Court of Session (Lord Ross, Lord Justice-Clerk, Lord Morison and Lord McCluskey) who on 16 January 1996 allowed an appeal by the local planning authority, the City of Edinburgh District Council, under sections 231 and 233 of the Town and Country Planning (Scotland) Act 1972 relating to listed building consent sought by the

A applicants and by a majority (Lord Morison dissenting) an appeal by the local planning authority under sections 231 and 233 relating to a planning application made by the applicants. The appeals had been brought against the decision of a senior reporter, Mr. John H. Henderson. The City of Edinburgh District Council was succeeded under the Local Government etc. (Scotland) Act 1994 by the City of Edinburgh Council.

The appeals were conjoined by order of the House of Lords dated
B 7 October 1996.

The facts are stated in the opinion of Lord Clyde.

C. M. Campbell Q.C. and *C. J. Tyre* (both of the Scottish Bar) for the Secretary of State.

R. L. Martin Q.C. and *P. S. Hodge Q.C.* (both of the Scottish Bar)
C for the applicants.

W. S. Gale Q.C. and *M. G. J. Upton* (both of the Scottish Bar) for the local planning authority, the City of Edinburgh Council.

Their Lordships took time for consideration.

D 16 October. LORD BROWNE-WILKINSON. My Lords, I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend, Lord Clyde. For the reasons he gives I would make the order which he proposes.

LORD MACKAY OF CLASHFERN. My Lords, I have had the advantage of reading in draft the speech to be delivered by my noble and learned
E friend, Lord Clyde. For the reasons he has given I would also make the order which he proposes.

LORD STEYN. My Lords, I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend Lord Clyde. For the reasons he has given I would also make the order which he
F proposes.

LORD HOPE OF CRAIGHEAD. My Lords, I have had the advantage of reading in draft the speech which has been prepared by my noble and learned friend, Lord Clyde. I agree with it, and for the reasons which he gives I also would allow the appeal on the planning law issue and dismiss the appeal on the issue about listed building consent.

G I should like however to add a few observations about the meaning and effect of section 18A of the Town and Country Planning (Scotland) Act 1972, and to say rather more about the listed building consent issue which has revealed some practical problems about the way buildings are listed for the purposes of the statute—as to which I am unable, with respect, to agree with the approach taken by the judges in the Second
H Division.

The planning issue

Section 18A of the Act of 1972, which was introduced by section 58 of the Planning and Compensation Act 1991, creates a presumption in favour of the development plan. That section has to be read together with section 26(1) of the Act of 1972. Under the previous law, prior to the introduction of section 18A into that Act, the presumption was in favour

of development. The development plan, so far as material to the application, was something to which the planning authority had to have regard, along with other material considerations. The weight to be attached to it was a matter for the judgment of the planning authority. That judgment was to be exercised in the light of all the material considerations for and against the application for planning permission. It is not in doubt that the purpose of the amendment introduced by section 18A was to enhance the status, in this exercise of judgment, of the development plan.

It requires to be emphasised, however, that the matter is nevertheless still one of judgment, and that this judgment is to be exercised by the decision-taker. The development plan does not, even with the benefit of section 18A, have absolute authority. The planning authority is not obliged, to adopt Lord Guest's words in *Simpson v. Edinburgh Corporation,* 1960 S.C. 313, 318, "slavishly to adhere to" it. It is at liberty to depart from the development plan if material considerations indicate otherwise. No doubt the enhanced status of the development plan will ensure that in most cases decisions about the control of development will be taken in accordance with what it has laid down. But some of its provisions may become outdated as national policies change, or circumstances may have occurred which show that they are no longer relevant. In such a case the decision where the balance lies between its provisions on the one hand and other material considerations on the other which favour the development, or which may provide more up-to-date guidance as to the tests which must be satisfied, will continue, as before, to be a matter for the planning authority.

The presumption which section 18A lays down is a statutory requirement. It has the force of law behind it. But it is, in essence, a presumption of fact, and it is with regard to the facts that the judgment has to be exercised. The primary responsibility thus lies with the decision-taker. The function of the court is, as before, a limited one. All the court can do is review the decision, as the only grounds on which it may be challenged in terms of the statute are those which section 233(1) of the Act lays down. I do not think that it is helpful in this context, therefore, to regard the presumption in favour of the development plan as a governing or paramount one. The only questions for the court are whether the decision-taker had regard to the presumption, whether the other considerations which he regarded as material were relevant considerations to which he was entitled to have regard and whether, looked at as a whole, his decision was irrational. It would be a mistake to think that the effect of section 18A was to increase the power of the court to intervene in decisions about planning control. That section, like section 26(1), is addressed primarily to the decision-taker. The function of the court is to see that the decision-taker had regard to the presumption, not to assess whether he gave enough weight to it where there were other material considerations indicating that the determination should not be made in accordance with the development plan.

As for the circumstances of the present case, I agree that the reporter was entitled in the light of the material which was before him to give priority to the more recent planning guidance in preference to the development plan, and that the reasons which he gave for his decision in the light of that guidance to grant planning permission were sufficient to explain the conclusions which he had reached.

The listed buildings issue

The applicants' argument was that the list of buildings of special or historic interest which the Secretary of State for Scotland has compiled under section 52 of the Act of 1972 did not include the former riding school at Redford Barracks and that the reporter was entitled to make a finding to this effect. Their approach was that the question whether the building was a listed building was a question of fact which the reporter was entitled to decide as part of the case which was before him in the appeal against the refusal of listed building consent. Yet it became clear in the course of counsel's argument that the issue which the applicants regard as one of fact depends upon the proper construction of the entries in the list. So it seems to me that the underlying question—if it is truly one of construction—is one of law.

The structure of the legislation which is contained in sections 52 to 54 of the Act is to this effect. It is the responsibility of the Secretary of State to compile or approve of the list. He may take account, in deciding whether or not to include a building in the list, of the building itself and its setting. Any respect in which its exterior contributes to the architectural or historic interest of any group of buildings of which it forms part may be taken into account. So also may be the desirability of preserving any feature of the building fixed to it or comprised within its curtilage on the ground of its architectural or historic interest. The building itself must be identified in the list, but section 52(7) also provides that, for the purposes of the Act, any object or structure fixed to the building or forming part of the land and comprised within the curtilage of the building shall be treated as part of it. Thus it is not necessary to do more than to identify the building—or, in cases such as the present, the principal buildings—in order to extend the statutory protection to these additional elements. The details of the procedure are set out in the Town and Country Planning (Listed Buildings and Buildings in Conservation Areas) (Scotland) Regulations 1975 (S.I. 1975 No. 2069 (S.277)) as amended by the Town and Country Planning (Listed Buildings and Buildings in Conservation Areas) (Scotland) Amendment Regulations 1977 (S.I. 1977 No. 255 (S.35)).

The control which the Act lays down of works for the demolition of a listed building, or its alteration or extension in a manner which would affect its character as a building of special architectural or historic interest, is the prohibition of any such works which have not been authorised. The question whether works of alteration or extension should be authorised can be dealt with as part of an application for planning permission. Section 54(2) provides that, where planning permission is granted for such works, that permission shall operate as listed building consent in respect of those works. But in this case what the applicants wish to do is to demolish the building, so a separate application for listed building consent under Schedule 10 to the Act of 1972 was required. Paragraph 7(2) of that Schedule provides that a person appealing against a decision by the local planning authority to refuse consent may include in his notice as the ground or one of the grounds of his appeal a claim that the building is not of special architectural or historic interest and ought to be removed from the list. But there is no provision in that Schedule or elsewhere in the Act which enables a person aggrieved to include as one of his grounds of appeal that the building to which his application for consent relates is not included in the list as a listed building. The Act assumes, in regard to

the statutory procedures, that the question whether or not a building is a listed building can be determined simply by inspecting the list which the Secretary of State has prepared.

The list itself is not the subject of any prescribed form. The only prescribed form for which the Act of 1972 provides is that for the form of notice which is to be served on every owner, lessee and occupier of the building under section 52(5) stating that the building has been included in, or excluded from, the list as the case may be. The prescribed form of notice is set out in Schedule 5 to the Regulations of 1975. It is in these terms:

> "Notice is hereby given that the building known as.....
> situated in the.....
> has been included in the list of buildings of special architectural or historic interest in that area compiled by the Secretary of State under section 52 of the Town and Country Planning (Scotland) Act 1972 on ..... 19 .....
> Dated ..... 19 .....
>
> (Signature of Authorised Officer)."

It can be seen from this form of notice that the only information which is communicated to the owner, lessee and occupier to indicate the identity of the listed building is the name by which the building is known and the place where it is situated. The effect of section 52(7), as I have said, is to require any object or structure fixed to that building or forming part of the land and comprised within the curtilage of the building to be treated as part of the building for the purposes of the provisions in the Act relating to listed buildings. But the form of notice does not require a description of the building to be given. The assumption is that the name of the building will be sufficient to identify what is in the list.

The list which is available for public inspection under section 52(6) is a more elaborate document, and it is this aspect of the matter which appears to have given rise to some confusion in the present case. It comprises six columns, headed respectively "Map reference," "Name of Building," "Description," "References," "Category" and "Notes." In the column headed "Name of Building" there appears this entry: "REDFORD BARRACKS Colinton Road and Colinton Mains Road [sic] (original buildings of 1909–15 only)." The column headed "Description" contains a very detailed description of the premises. It begins by naming the architect, who is said to have been Harry B. Measures, Director of Barrack Construction, 1909–15. There then follows a comprehensive description of the barracks and the various buildings comprised therein, together with references to various features of architectural or historic interest. In the middle of this description, which occupies nearly four pages on the list, there appears this passage: "Other buildings to S. with large riding school at extreme S.E., all tall single-storey, simple treatment." The column headed "References" contains this entry: "Information courtesy Buildings of Scotland Research Unit."

My impression is that the list which I have been attempting to describe was intended to serve several functions. First, it was intended to identify the listed building. It did this by stating its name and its location. That was all it needed to do in order to record the information which had been given in the prescribed notice to the owner, lessee and occupier. Then it was intended to provide a description of the building. There is no

requirement for this—nor is there space—in the prescribed form of notice. But a description is a useful thing to include in the list, as decisions may have to be taken from time to time as to whether authorisation should be given under section 53(2)(*a*) of the Act of 1972 to a proposal to demolish, alter or extend the listed building. Both the decision-taker and the developer will, no doubt, find it helpful to know what the features were which persuaded the Secretary of State that the building should be listed as being of special architectural or historic interest. Lastly, it was intended to provide a list of references to the sources of information, if any, which had been used in compiling the description. On this analysis I would regard the columns headed "Description" and "References," while informative, as subservient to the column headed "Name of Building." In my opinion it is the latter column which serves the statutory function of identifying the listed building in the list which the Secretary of State is required to keep available for public inspection under section 52(6) of the Act of 1972. In their printed case the applicants state that the inclusion of the words of limitation in this column reflects a practice of compiling the list so that the "Name of Building" column is the official entry which defines the scope of the listing. That observation is consistent with my understanding of the list.

The Lord Justice-Clerk mentioned in his opinion that counsel for the Secretary of State had pointed out in the course of the hearing before the Second Division that it has been the practice for some time now for the list of buildings of special architectural or historic interest to be set forth in a different form from that which has been used in this case. A specimen form was produced in the course of that hearing from which it appeared that the list now contained eight columns. The first, which was entitled "Name of Building and/or Address," was headed as being the "Statutory List." The remaining seven columns contained information under various headings not dissimilar to those used in the present case, including "Description," "Reference" and "Notes." They were the subject of a separate heading which read: "The information (cols. 2–8) has no legal significance, nor do errors or omissions nullify or otherwise affect statutory listing." We were not shown a copy of this form, as the Secretary of State did not appeal against the decision of the Second Division on this point. But the applicants refer to this passage in the Lord Justice-Clerk's opinion in their printed case, in order to make the point that the modern form of list has merely formalised the practice that it is the "Name of Building" column which defines the scope of the listing. The description which we have been given is sufficient to indicate that the more modern form is an improvement on the previous form, as it removes the possibility of a misunderstanding about the function which the columns headed "Description" and "References" were intended to serve.

It is plain from the way in which the judges of the Second Division approached this issue that they regarded all the columns on the list which was before them in this case as forming part of the statutory listing. For my part—although counsel for the applicants was content to adopt this approach in presenting his argument—I think that they were in error in taking this view. It does not seem to me that there is any real difficulty in understanding the functions of each of the columns, if the list is read in the context of the legislation which it was designed to serve. But my conclusion that the only column which sets out the statutory listing is that which is headed "Name of Building" does not solve all the problems which have arisen in this case.

The listing of Redford Barracks was in itself sufficient, with the benefit of section 52(7) of the Act of 1972, to include within the statutory listing all objects or structures forming part of the land and comprised within the curtilage. Unless some words of limitation were included every building within the curtilage, however modest or unimportant, would be the subject of the statutory controls. It was no doubt for this reason that the words "(original buildings 1909–15 only)" were included in the column headed "Name of Building." But this was not an entirely satisfactory method of distinguishing between those buildings which were intended to be included in the statutory listing and those which were not. The words which were selected were ambiguous. The dates 1909–15 are the same as those mentioned in the next column as being those between which Harry B. Measures was the Director of Barrack Construction. But it is not clear whether they were intended to refer to the period of design of the buildings or the period of their construction, and if the latter whether the buildings had to be completed by 1915 in order to qualify or it was sufficient that they were commenced before or during that year. In this situation I think that it is permissible to examine the contents of the column headed "Description" in order to see whether it can help to resolve the ambiguity. Phrases are used in various parts of the description such as "some lesser buildings" and "other buildings" which suggest that this was not intended to be a definitive description of the entire premises comprised within the curtilage. But the fact that the riding school is mentioned in the description is sufficient, in view of the ambiguity, to put in issue the question whether that building was included in the statutory listing.

The reporter concluded, on the evidence which was before him, that the riding school was one of the last buildings to be erected, and that this took place after 1915. It was for this reason that he held that the riding school was not covered by the statutory listing and that listed building consent was not required for its demolition. He noted that the view of all the experts who gave evidence at the inquiry was that, if the riding school was built after 1915, it was not covered by the barracks listing. It seems to me however that this evidence was insufficient to resolve the difficulty which had been created by the ambiguity in the list. That evidence did not address the possibility that the riding school was part of the original design for which Harry B. Measures was responsible. Unless it could be asserted that this structure had no part to play in the original design it would not be safe to assume that it was not included in the statutory listing. I would therefore hold, albeit for different reasons, that the result at which the Second Division arrived was the right one, as the reporter had insufficient information before him in the evidence to entitle him to resolve this issue in favour of the developer.

I should like, finally, to add this further observation in regard to the ambiguity in the list. The problem which has arisen in this case suggests that the list, even in its new form, may require some reconsideration in order to remove such ambiguities. It is important that words of limitation which are used to exclude parts of a building from the statutory listing are sufficiently clear to enable those who are interested to identify what parts of the building are subject to the statutory controls and what are not. The fact that the controls are the subject of criminal sanctions provides an added reason for seeking greater clarity in the composition of the list than has been exhibited in this case.

LORD CLYDE. My Lords, in 1993 the applicants who are the second appellants in this appeal sought outline planning permission for the

development of a food store, petrol filling station and ancillary works at a site in Colinton Mains Drive in Edinburgh. They also sought listed building consent for the demolition of a former riding school building which was on the site. The City of Edinburgh District Council refused planning permission and also refused listed building consent. The applicants then appealed to the Secretary of State. A senior reporter was appointed to determine the appeal. He held a public local inquiry and thereafter issued a decision letter dated 7 March 1995. He decided that listed building consent was not required for the demolition of the former riding school building. On the matter of planning permission he allowed the appeal and granted outline planning permission subject to certain conditions. The council then appealed to the Court of Session both on the matter of the listed building consent and on the matter of planning permission. After hearing the appeal the Second Division of the Court of Session by a majority allowed the appeal on both of those matters. The Secretary of State and the applicants have now appealed to this House.

The matter of listed building consent can conveniently be dealt with at the outset. It has been seen and treated as a distinct and separate issue from that of the planning permission. The reporter considered a preliminary question whether listed building consent was required for the demolition of the former riding school building. It has not been suggested that he was not entitled to explore that question and I express no view on the propriety of his doing so. Section 52 of the Town and Country Planning (Scotland) Act 1972 provided for the compilation of lists of buildings of special architectural or historic interest. The provisions of that Act have now been superseded by the recent consolidating statute, the Town and Country Planning (Scotland) Act 1997, but it will be convenient for the purposes of the present case to refer to the legislation in force at the time of the appeal processes. In terms of section 52(1) the lists may be compiled by the Secretary of State or by others with his approval. Section 52(5) provides for notice to be given to the owner, lessee and occupier of a building of its inclusion in or exclusion from the list. That notice is to be given in a prescribed form. But there does not appear to have been any prescribed form for the lists themselves.

There was produced to the reporter a document relating to the City of Edinburgh District headed "List of Buildings of Architectural or Historic Interest." The list was set out in six columns. The first and the last three are not of importance. The second was headed "Name of Building" and the third was headed "Description." In the second column there was entered:

> "REDFORD BARRACKS Colinton Road and Colinton Mains Road [sic] (original buildings of 1909-15 only)."

The third column commenced with the words:

> "Harry B. Measures, Director of Barrack Construction, 1909–15. Two large complexes of building on exceptionally spacious layout . . . comprising chiefly . . ."

There then followed descriptions of a variety of buildings with some architectural detail. Included here, under the subheading "Farriers' Shops and Riding School", were the words "other buildings to S. with large riding school at extreme S.E. . . ." The view taken by the reporter was that in the light of the evidence the building in question had probably been erected after 1915, that precedence should be given to the entry in

the second column, and that on account of the reference to "original buildings of 1909–15 only" the riding school building was excluded from the list notwithstanding its specific mention in the third column. Having taken the view that listed building consent was unnecessary the reporter did not address the question whether the demolition of a listed building should be permitted.

The judges of the Second Division unanimously held that the reporter was not entitled to hold as he had done that the building was not covered by the entry for Redford Barracks in the list. An appeal against that decision was taken only by the applicants. Counsel for the Secretary of State did not address the issue. It should be observed that it would have been useful to have had more evidence about the form used for the compiling of such lists and the relative significance of the respective columns. Plainly it is desirable to compile the list with sufficient clarity and precision to avoid the kind of question which has arisen here. The insertion of a complex of buildings as one entry in a list may well give rise to problems. Even the provision of section 52(7) of the Act which extends the identification to buildings within the curtilage of a building may not produce sufficient clarity, particularly in a case such as the present where the building in question had passed into the separate ownership and occupation of the local authority and had in some way at least become separated from the barracks and other buildings still in military occupation. The argument, however, which was presented in the appeal was essentially that the matter was one of fact for the reporter, or at least was not one which could be open to review. But the critical question here is one of the interpretation of the list and if the reporter has misconstrued it and so misdirected himself that is undoubtedly a matter on which he may be corrected on appeal to a court of law.

On the face of the list there is no evident problem. It was agreed by counsel for the applicants that the whole document with its six columns comprised the "list" and his argument was presented on that basis. The building in issue is specifically mentioned in the document and can readily be taken to be entered on the list. The dates in the second column can be seen to echo the dates in the third column, indicating that it is the work of Harry Measures which is to be listed, and the riding school is noted in the description of the buildings for which he was presumably responsible.

A problem may be thought to arise when it is found that the riding school was built after 1915. But it also appears that the barracks were not completed until the end of 1916. Ambiguity only arises if the words in the brackets are read, as the reporter read them, as if they were intended to refer to buildings built during the specified years. But that is not what is stated and that is not the only possible construction. Even if there was a conflict between the two parts of the list it would be proper to find a construction which would make sense of the whole and that can be readily done by accepting that the period of years to which the passage in brackets refers is a period not of the completion of the building but of the processes of planning, conception, design and, at least to an extent, the realisation of Harry Measures's work. In that way there is no difficulty in recognising that the riding school may consistently with the text in the second column be entered in the third column as a listed building. In my view the judges of the Second Division reached the correct view on this matter and I would refuse the appeal on the matter of the listed building consent.

I turn next to the appeal on the matter of the planning permission. The first point raised on behalf of the Secretary of State in opening his appeal concerned the meaning and effect of section 18A of the Act of 1972. It was stated on his behalf that this was the principal purpose of his appeal. The section had excited some controversy and guidance was required. Neither of the other parties however was concerned to challenge the submission advanced by counsel for the Secretary of State. The views which I would adopt on this part of the appeal accord with his submission and at least in the absence of any contradiction seem to me to be sound.

Ever since the introduction of a comprehensive system for the control of land development in Scotland by the Town and Country Planning (Scotland) Act 1947 planning authorities have been required to prepare a plan which was to serve as a guide for the development of their respective areas. These plans required to be submitted to the Secretary of State for his approval. Following on the reorganisation of local government introduced by the Local Government (Scotland) Act 1973 planning functions became divided between the regions, who were required to prepare "structure plans," and the districts, who were required to prepare "local plans." For the purposes of the present case the structure plan was the Lothian Regional Structure Plan 1985 and the local plan was the South West Edinburgh Local Plan ("S.W.E.L.P."). But the old terminology was also preserved. Section 17 of the Act of 1972 provided that for the purposes of the planning statutes the development plan shall be taken to consist of the structure plan approved by the Secretary of State with any approved alterations and the provisions of the approved local plan with any adopted or approved alterations. In and after the Act of 1947 provision was made for the recognition of the development plan in relation to determinations of applications for planning permission. Section 26(1) of the Act of 1972, echoing the language of section 12(1) of the Act of 1947, required a planning authority in dealing with the application to

> "have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations . . ."

The meaning of this formulation in the context of section 12(1) of the Act of 1947 was set out in a decision in the Outer House of the Court of Session by Lord Guest in *Simpson v. Edinburgh Corporation*, 1960 S.C. 313. His Lordship stated, at pp. 318–319:

> "It was argued for the pursuer that this section required the planning authority to adhere strictly to the development plan. I do not so read this section. 'To have regard to' does not, in my view, mean 'slavishly to adhere to.' It requires the planning authority to consider the development plan, but does not oblige them to follow it. . . . If Parliament had intended the planning authority to adhere to the development plan, it would have been simple so to express it. . . . In my opinion, the meaning of section 12(1) is plain. The planning authority are to consider all the material considerations, of which the development plan is one."

Section 18A was introduced into the Act of 1972 by section 58 of the Planning and Compensation Act 1991. A corresponding provision was introduced into the English legislation by section 26 of the Act of 1991, in the form of a new section 54A to the Town and Country Planning Act

1990. The provisions of section 18A, and of the equivalent section 54A of the English Act, were:

> "*Status of development plans.* Where, in making any determination under the planning Acts, regard is to be had to the development plan, the determination shall be made in accordance with the plan unless material considerations indicate otherwise."

Section 18A has introduced a priority to be given to the development plan in the determination of planning matters. It applies where regard has to be had to the development plan. So the cases to which section 26(1) of the Act of 1972 applies are affected. By virtue of section 33(5) of the Act of 1972 section 26(1) is to apply in relation to an appeal to the Secretary of State. Thus it comes to apply to the present case.

By virtue of section 18A the development plan is no longer simply one of the material considerations. Its provisions, provided that they are relevant to the particular application, are to govern the decision unless there are material considerations which indicate that in the particular case the provisions of the plan should not be followed. If it is thought to be useful to talk of presumptions in this field, it can be said that there is now a presumption that the development plan is to govern the decision on an application for planning permission. It is distinct from what has been referred to in some of the planning guidance, such as for example in paragraph 15 of the Planning Policy Guidance Notes PPG1 (January 1988), as a presumption but what is truly an indication of a policy to be taken into account in decision-making. By virtue of section 18A if the application accords with the development plan and there are no material considerations indicating that it should be refused, permission should be granted. If the application does not accord with the development plan it will be refused unless there are material considerations indicating that it should be granted. One example of such a case may be where a particular policy in the plan can be seen to be outdated and superseded by more recent guidance. Thus the priority given to the development plan is not a mere mechanical preference for it. There remains a valuable element of flexibility. If there are material considerations indicating that it should not be followed then a decision contrary to its provisions can properly be given.

Moreover the section has not touched the well-established distinction in principle between those matters which are properly within the jurisdiction of the decision-maker and those matters in which the court can properly intervene. It has introduced a requirement with which the decision-maker must comply, namely the recognition of the priority to be given to the development plan. It has thus introduced a potential ground on which the decision-maker could be faulted were he to fail to give effect to that requirement. But beyond that it still leaves the assessment of the facts and the weighing of the considerations in the hands of the decision-maker. It is for him to assess the relative weight to be given to all the material considerations. It is for him to decide what weight is to be given to the development plan, recognising the priority to be given to it. As Glidewell L.J. observed in *Loup v. Secretary of State for the Environment* (1995) 71 P. & C.R. 175, 186:

> "What section 54A does not do is to tell the decision-maker what weight to accord either to the development plan or to other material considerations."

Those matters are left to the decision-maker to determine in the light of the whole material before him both in the factual circumstances and in any guidance in policy which is relevant to the particular issues.

Correspondingly the power of the court to intervene remains in principle the same as ever. That power is a power to challenge the validity of the decision. The grounds in the context of planning decisions are contained in section 233 of the Act of 1972, namely that the action is not within the powers of the Act, or that there has been a failure to comply with some relevant requirement. The substance of the former of these grounds is too well-established to require repetition here. Reference may be made to the often quoted formulation by Lord President Emslie in *Wordie Property Co. Ltd. v. Secretary of State for Scotland,* 1984 S.L.T. 345, 347-348. Section 18A has not innovated upon the principle that the court is concerned only with the legality of the decision-making process. As Lord Hoffmann observed in *Tesco Stores Ltd. v. Secretary of State for the Environment* [1995] 1 W.L.R. 759, 780:

> "If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State."

In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse.

Counsel for the Secretary of State suggested in the course of his submissions that in the practical application of the section two distinct stages should be identified. In the first the decision-maker should decide whether the development plan should or should not be accorded its statutory priority; and in the second, if he decides that it should not be given that priority it should be put aside and attention concentrated upon the material factors which remain for consideration. But in my view it is undesirable to devise any universal prescription for the method to be

adopted by the decision-maker, provided always of course that he does not act outwith his powers. Different cases will invite different methods in the detail of the approach to be taken and it should be left to the good sense of the decision-maker, acting within his powers, to decide how to go about the task before him in the particular circumstances of each case. In the particular circumstances of the present case the ground on which the reporter decided to make an exception to the development plan was the existence of more recent policy statements which he considered had overtaken the policy in the plan. In such a case as that it may well be appropriate to adopt the two-stage approach suggested by counsel. But even there that should not be taken to be the only proper course. In many cases it would be perfectly proper for the decision-maker to assemble all the relevant material including the provisions of the development plan and proceed at once to the process of assessment, paying of course all due regard to the priority of the latter, but reaching his decision after a general study of all the material before him. The precise procedure followed by any decision-maker is so much a matter of personal preference or inclination in light of the nature and detail of the particular case that neither universal prescription nor even general guidance are useful or appropriate.

This chapter in the appeal was presented as a criticism of the approach adopted by the majority of the judges in the court below. But that criticism comes at the most to criticism of particular expressions rather than any allegation of error in principle. Lord McCluskey criticised the description given by the reporter in paragraph 181 of his decision letter of the effect of the section. His Lordship stated:

> "But section 18A did not simply 'enhance the status' of development plans; it made the development plan the governing or paramount consideration; and it was to remain so unless material considerations indicated otherwise."

But while the expression used by the reporter may have been somewhat imprecise in not stressing the priority inherent in the enhanced status it does not appear that the reporter fell into error in any misunderstanding of the effect of the section. The submission made by counsel for the Secretary of State on the construction of section 18A was correctly seen by the respondents as not constituting any serious attack on the decision which they sought to defend. The judges in the Second Division correctly recognised that it was competent for the reporter in principle to decide that the more recent material should overcome the priority given to the development plan. The issue was whether he was entitled to take that course on the material before him. The reference to paragraph 181 of the decision letter leads immediately to the substantial dispute in the appeal regarding the reporter's treatment of the problem of retail trade and impact.

In paragraph 181 the reporter begins to set out his conclusions on the chapter of the decision letter which concerns the issue of retail trade and impact. It should be observed at the outset that the structure plan of 1985 indicated a prohibition of developments such as that proposed by Revival except in existing or new shopping centres, and that S.W.E.L.P. expressed at least a presumption against out-of-centre shopping development. The reporter however stated:

> "Dealing first with the question of policy, I should say that, although there is no dispute that the statutory development plan consists of the 1985 structure plan and the S.W.E.L.P., and although recent

A legislation enhances the status of development plans, I believe that in this case it is appropriate to attach greater weight to other material considerations."

That he was entitled in principle to decide that the presumption in favour of the development plan had been overcome by other material considerations was recognised in the court below. The criticism of the B majority of the court was directed rather at his entitlement to take that course in the circumstances of this case. The other material considerations to which the reporter looked consisted of expressions of policy and planning guidance more recent in date than the structure plan of 1985. He noted that while the S.W.E.L.P. was only adopted as recently as 1993 it was required to conform generally with the provisions of the 1985 structure plan. The more recent material of which the reporter considered C account should be taken consisted of the National Planning Guidelines 1986, the Planning Policy Guidance Notes PPG6 (July 1993) and the latest version of the Lothian Region Structure Plan (1994) which had been finalised and sent to the Secretary of State but had not yet been approved. A view was expressed in the court below that it was not appropriate to have considered PPG6 because it applied to England and Wales and not D Scotland. No question was raised in that regard in the present appeal and I refrain from expressing any view about it. The new version of the structure plan represented in the view of the reporter the regional council's most recent thinking on the subject of retailing and it was to the policies set out in that document that he applied his mind.

Chapter 7 of the new structure plan deals with shopping. In paragraph 7.37 it was stated that free-standing developments, such as large E convenience stores, could generate unacceptable traffic levels and affect residential amenity. The paragraph later states that:

> "new stores can only be justified to provide consumer choice or where there will be significant local population increase . . . new developments outside existing or proposed centres should be permitted only if they meet strict criteria."

F

The plan then sets out a policy identified as "S17." That policy related to proposals for major retail developments not in or adjacent to existing or proposed strategic shopping centres. It is understood that the proposed development at Colinton Mains Drive is such a proposal. The policy provides that in considering such proposals "district councils should be satisfied that all of the following criteria are met. . . ." There are then set G out seven criteria of which only two need be quoted:

> "A. Local shopping facilities are deficient in either quantitative or qualitative terms . . . C. They would not, individually or cumulatively, prejudice the vitality and viability of any strategic shopping centre."

The strategic shopping centres are listed earlier in the document, but it H is unnecessary to refer to that in detail.

The reporter was satisfied that all of the seven criteria were met and it was on that basis that he granted the planning permission. It is with criterion A that the present dispute is concerned. The reporter dealt with the matter of quantitative deficiency in paragraph 184 of his letter as follows:

> "The first matter relates to quantitative or qualitative deficiencies in the area. It appears that there may be a slight increase in both population and expenditure per head on convenience goods in the

near future in the study area, but the most obvious indicator of an expenditure surplus is the calculation that certain stores (notably Safeway at Cameron Toll, Morningside and Hunter's Tryst) are performing at levels significantly higher than company averages. Even allowing for the opening of stores at e.g. Straiton (which may be in doubt) and for turnover levels at Colinton Mains substantially higher than would probably be achieved by Tesco in a relatively small store, there would appear to be a quantitative case."

In paragraph 185 he considered the matter of qualitative deficiency and took the view that the argument for such a deficiency was not strong. The case would accordingly have to rest on the basis of a quantitative deficiency. Finally in this part of his letter he added in paragraph 186:

"Many local residents and organisations claim that there is no need for either the proposed foodstore or the [petrol filling station]. I accept that there is not a significant shortage of either, such as might establish a strong presumption in their favour in the public interest which might outweigh relevant objections. However, planning approval does not have to be based on a case of need. I have explained why I consider the policies in the more recent version of the structure plan are to be preferred, and there remains a general presumption in favour of development unless demonstrable harm is shown to interests of acknowledged importance."

The majority of the judges in the Second Division held that the reporter had erred in this part of his decision. The Lord Justice-Clerk was satisfied that the reporter was entitled to regard the National Planning Guidelines and the draft structure plan as justifying a departure from the development plan but considered that the reporter had not had a proper factual basis for overcoming the presumption in section 18A. In particular he considered:

"merely to say that certain stores within the area are trading at exceptionally high levels does not justify the conclusion that there is a deficiency in local shopping facilities in the area in question."

He noted that of the three stores mentioned in paragraph 184 only one, Hunter's Tryst, was, as the reporter had recognised in paragraph 185, within the study area. He also noted that the reporter had accepted in paragraph 186 that there was not a significant shortage of food stores or petrol filling stations. Lord McCluskey questioned whether the reporter had properly addressed the problem of quantitative deficiency at all.

"If he has then he has not even begun to explain how a quantitative deficiency coexists with no significant shortage and a failure to make out any case of need."

He considered that even if a finding of a quantitative deficiency was justified the reporter had given no indication as to why that circumstance should overcome the presumption in favour of the terms of the development plan. Both the Lord Justice-Clerk and Lord McCluskey suggested that the final words of paragraph 184 lacked the conviction of a positive finding.

In my view it is critical to an understanding of the reporter's decision to have a clear understanding of the concept of "quantitative deficiency." This is a matter of the interpretation of the policy S17. It may well be that the point was not made sufficiently clear in the presentation of the

A appeal before the Second Division. Certainly it appears that, as the Lord Justice-Clerk records, counsel were not at one as to what was meant by the reference to quantitative terms and it was on his own initiative that reference was made to paragraph 7.9 of the draft structure plan for a clue to its meaning. That paragraph starts with the sentence "In quantitative terms, demand is determined by trends in consumer expenditure." This is far from providing a definition but it does, as Lord Morison appreciated, B point to the fact that it is consumer expenditure which is being considered as reflected in the turnover in the available shopping facilities. As I understand it from the helpful explanations given to us by counsel for the Secretary of State quantitative deficiency has to do with a comparison between the amount of shopping facility and the amount of customers. It seeks to express a situation where there is a shortage of shopping C floorspace as compared with the number of customers in the locality. It is measured by reference to consumer expenditure. Quantitative deficiency is a concept different from that of need, where what is meant is the kind of necessity which would, for example, justify the sacrifice of some amenity for the purpose of the development. There can be a quantitative deficiency even although there is no "need" for the development in so far as everyone in the area is able to do their shopping albeit with the delay and D inconvenience of a possibly overcrowded shop or of travelling some distance to get there. Once the definition is understood there is no discrepancy between paragraphs 184 and 186 of the decision letter.

The next question is how a quantitative deficiency should be established. Where the approach is one of considering consumer expenditure a quantitative deficiency is most readily established by the E discovery that other stores are trading at a level which is above what would be expected of them, the inference being that there is room to accommodate a further shopping facility. As Lord Morison observed:

> "No other way of demonstrating a quantitative deficiency in a particular area, determined only by consumer expenditure, was suggested to us, and none occurs to me."

F That was the kind of evidence which was led in the present case and it appears that while there was dispute about the reliability of the inferences to be drawn from the figures adduced there was no objection taken to the use of that material in principle as a method of establishing the alleged deficiency.

It was suggested that the reporter was not entitled to find some deficiency without going on to quantify the extent of the deficiency. I see G no obligation on him to do that. The policy S17(A) does not require the finding of any particular extent of the deficiency. If the deficiency is too slight to enable the whole of the proposed new shopping facility to be accommodated then the matter will be covered by criterion C. If the development is greater than can be absorbed by the deficiency then the result may well be to cause prejudice to the vitality and viability of H the existing strategic shopping centres. In that respect criterion C secures the adequacy of the extent of the deficiency identified for the purpose of criterion A. In the present case the reporter indeed went further in his assessment of the deficiency than he strictly needed to go. In the final sentence of paragraph 184 he takes into account not only the possible further store at Straiton but also higher levels at the development site at Colinton Mains than were likely to be achieved by the proposed Tesco store. Even taking these into account he finds that "there would appear

to be a quantitative case." It is evident from that passage that the deficiency was such as to enable the proposed store to be wholly accommodated within it and when account is taken of the hypothesis on which he is proceeding the passage indicates a very positive finding of a quantitative deficiency. What was suggested to be only a tentative finding is in reality clear and certain.

It was argued that the reporter was not entitled to draw the conclusion which he did from the evidence before him. Counsel for the respondents suggested a variety of reasons which might account for the expenditure surplus. He also sought to criticise the quality of the evidence on which the reporter had relied. But it was not suggested that there was no evidence before the reporter which could entitle him to discount such other explanations and to hold that there was an expenditure surplus which pointed to a quantitative deficiency. Whether the evidence did or did not so point was a matter wholly for him to determine. Provided that the evidence was there it was for him to assess it and draw his own conclusions from it. It is no part of the function of a reviewing court to re-examine the factual conclusions which he drew from the evidence in the absence of any suggestion that he acted improperly or irrationally. Nor is it the duty of a reviewing court to engage in a detailed analytic study of the precise words and phrases which have been used. That kind of exercise is quite inappropriate to an understanding of a planning decision.

Counsel for the respondents also sought to argue that the reporter had not given proper or adequate reasons for his decision. In part this point was related to matters to which I have already referred, such as a specification of the extent of the deficiency, the allegedly "tentative" nature of the conclusion on the critical issue, the finding of the quantitative deficiency in the face of the absence of need, and the link between the expenditure surplus and the quantitative deficiency. But in any event the pursuit of a full and detailed exposition of the reporter's whole process of reasoning is wholly inappropriate. It involves a misconception of the standard to be expected of a decision letter in a planning appeal of this kind. As Lord President Emslie observed in *Wordie Property Co. Ltd. v. Secretary of State for Scotland,* 1984 S.L.T. 345, 348:

> "The decision must, in short, leave the informed reader and the court in no real and substantial doubt as to what the reasons for it were and what were the material considerations which were taken into account in reaching it."

It is worth reiterating the observations made by Lord Lloyd of Berwick in *Bolton Metropolitan District Council v. Secretary of State for the Environment* (1995) 94 L.G.R. 387 in the context of the requirement on the Secretary of State to notify the reasons for his decision. His Lordship said, at p. 394:

> "There is nothing in the statutory language which requires him, in stating his reasons, to deal specifically with every material consideration. . . . He has to have *regard* to every material consideration; but he need not mention them all."

As to what should be mentioned his Lordship gave two quotations. In *In re Poyser and Mills' Arbitration* [1964] 2 Q.B. 467, 478 Megaw J. said:

> "Parliament provided that reasons shall be given, and in my view that must be read as meaning that proper, adequate reasons must be given. The reasons that are set out must be reasons which will not

A only be intelligible, but which deal with the substantial points that have been raised."

In *Hope v. Secretary of State for the Environment* (1975) 31 P. & C.R. 120, 123 Phillips J. said:

"It seems to me that the decision must be such that it enables the appellant to understand on what grounds the appeal has been decided and be in sufficient detail to enable him to know what conclusions the inspector has reached on the principal important controversial issues."

B

It is necessary that an account should be given of the reasoning on the main issues which were in dispute sufficient to enable the parties and the court to understand that reasoning. If that degree of explanation was not achieved the parties might well be prejudiced. But elaboration is not to C be looked for and a detailed consideration of every point which was raised is not to be expected. In the present case the reporter dealt concisely but clearly with the critical issues. Nothing more was to be expected of him.

The reporter satisfied himself as he was entitled to do that there was quantitative deficiency and that criterion A was met. He then went on to consider the other criteria. He gave careful consideration to criterion C, including in that an assessment of the effect of the development on D Hunter's Tryst and at some length its effect on the shopping centre at Wester Hailes. He was satisfied that criterion C was met and no challenge is made to that conclusion. His unchallenged finding on that matter affirms the adequacy of the deficiency which he found for the purpose of criterion A. He had already decided that the statutory presumption should be overcome by the more recent expressions of policy and in particular the draft structure plan. It was the existence of that recent E guidance, not his finding of a quantitative deficiency, which justified the overcoming of the presumption. It is not in dispute that if the seven criteria were met the reporter was then entitled to grant planning permission.

For the foregoing reasons I would refuse the appeal by the appellant Revival Properties Ltd. on the matter of the listed building consent and I would allow the appeal by both appellants on the matter of the planning permission.

F

The Secretary of State should be entitled to his costs from the council here and one-half of his expenses in the court below. Revival Properties Ltd. should be entitled to one-half of their costs from the council here and one-half of their expenses in the court below.

Appeal of applicants in respect of listed building consent dismissed.

G

Appeals of applicants and Secretary of State in respect of planning permission allowed.

Local planning authority to pay Secretary of State's costs in House of Lords and one-half of his expenses in Court of Session and one-half of applicants' costs in House of Lords and one-half of applicants' expenses in Court of Session.

H

Solicitors: Treasury Solicitor for Solicitor to Secretary of State for Scotland, Edinburgh; Berwin Leighton for Brodies W.S., Edinburgh; Rees and Freres for Solicitor, City of Edinburgh Council.

M. G.

D59

Hilary Term
[2012] UKSC 13
On appeal from: [2011] CSIH 9

JUDGMENT

Tesco Stores Limited (Appellants) *v* Dundee City Council (Respondents) (Scotland)

before

Lord Hope, Deputy President
Lord Brown
Lord Kerr
Lord Dyson
Lord Reed

JUDGMENT GIVEN ON

21 March 2012

Heard on 15 and 16 February 2012

Appellants
Martin Kingston QC
Jane Munro
(Instructed by Semple Fraser LLP)

Respondents
Douglas Armstrong QC
James Findlay QC
(Instructed by Gillespie Macandrew LLP)

Interveners (Asda Stores Limited and MacDonald Estates Group PLC)
Malcolm Thomson QC
Kenny McBrearty
(Instructed by Brodies LLP)

LORD REED (with whom Lord Brown, Lord Kerr and Lord Dyson agree)

1. If you drive into Dundee from the west along the A90 (T), you will pass on your left a large industrial site. It was formerly occupied by NCR, one of Dundee's largest employers, but its factory complex closed some years ago and the site has lain derelict ever since. In 2009 Asda Stores Ltd and MacDonald Estates Group plc, the interveners in the present appeal, applied for planning permission to develop a superstore there. Dundee City Council, the respondents, concluded that a decision to grant planning permission would not be in accordance with the development plan, but was nevertheless justified by other material considerations. Their decision to grant the application is challenged in these proceedings by Tesco Stores Ltd, the appellants, on the basis that the respondents proceeded on a misunderstanding of one of the policies in the development plan: a misunderstanding which, it is argued, vitiated their assessment of whether a departure from the plan was justified. In particular, it is argued that the respondents misunderstood a requirement, in the policies concerned with out of centre retailing, that it must be established that no suitable site is available, in the first instance, within and thereafter on the edge of city, town or district centres.

The legislation

2. Section 37(2) of the Town and Country Planning (Scotland) Act 1997, as in force at the time of the relevant decision, provides:

> "In dealing with [an application for planning permission] the authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations."

Section 25 provides:

> "Where, in making any determination under the planning Acts, regard is to be had to the development plan, the determination is, unless material considerations indicate otherwise –
>
> (a) to be made in accordance with that plan..."

The development plan

3. The development plan in the present case is an "old development plan" within the meaning of paragraph 1 of Schedule 1 to the 1997 Act. As such, it is defined by section 24 of the 1997 Act, as that section applied before the coming into force of section 2 of the Planning Etc. (Scotland) Act 2006, as including the approved structure plan and the adopted or approved local plan. The relevant structure plan in the present case is the Dundee and Angus Structure Plan, which became operative in 2002, at a time when the NCR plant remained in operation. As is explained in the introduction to the structure plan, its purpose is to provide a long term vision for the area and to set out the broad land use planning strategy guiding development and change. It includes a number of strategic planning policies. It sets the context for local plans, which translate the strategy into greater detail. Its preparation took account of national planning policy guidelines.

4. The structure plan includes a chapter on town centres and retailing. The introduction explains that the relevant Government guidance is contained in National Planning Policy Guidance 8, *Town Centres and Retailing* (revised 1998). I note that that document (NPPG 8) was replaced in 2006 by *Scottish Planning Policy: Town Centres and Retailing* (SPP 8), which was in force at the time of the decision under challenge, and which was itself replaced in 2010 by *Scottish Planning Policy* (SPP). The relevant sections of all three documents are in generally similar terms. The structure plan continues, at para 5.2:

> "A fundamental principle of NPPG 8 is that of the sequential approach to site selection for new retail developments … On this basis, town centres should be the first choice for such developments, followed by edge of centre sites and, only after this, out of centre sites which are currently or potentially accessible by different means of transport."

In relation to out of centre developments, that approach is reflected in Town Centres and Retailing Policy 4: Out of Centre Retailing:

> "In keeping with the sequential approach to site selection for new retail developments, proposals for new or expanded out of centre retail developments in excess of 1000 sq m gross will only be acceptable where it can be established that:

- no suitable site is available, in the first instance, within and thereafter on the edge of city, town or district centres;

- individually or cumulatively it would not prejudice the vitality and viability of existing city, town or district centres;

- the proposal would address a deficiency in shopping provision which cannot be met within or on the edge of the above centres;

- the site is readily accessible by modes of transport other than the car;

- the proposal is consistent with other Structure Plan policies."

5. The relevant local plan is the Dundee Local Plan, which came into operation in 2005, prior to the closure of the NCR plant. Like the structure plan, it notes that national planning policy guidance emphasises the need to protect and enhance the vitality and viability of town centres. It continues, at para 52.2:

> "As part of this approach planning authorities should adopt a sequential approach to new shopping developments with first preference being town centres, which in Dundee's case are the City centre and the District Centres."

That approach is reflected in Policy 45: Location of New Retail Developments:

> "The City Centre and District Centres will be the locations of first choice for new or expanded retail developments not already identified in the Local Plan. Proposals for retail developments outwith these locations will only be acceptable where it can be established that:
>
> a) no suitable site is available, in the first instance, within and thereafter on the edge of the City Centre or District Centres; and

b) individually or cumulatively it would not prejudice the vitality and viability of the City Centre or District Centres; and

c) the proposal would address a deficiency in shopping provision which cannot be met within or on the edge of these centres; and

d) the site is readily accessible by modes of transport other than the car; and

e) the proposal is consistent with other Local Plan policies."

6. It is also relevant to note the guidance given in NPPG 8, as revised in 1998, to which the retailing sections of the structure plan and the local plan referred. Under the heading "Sequential Approach", the guidance stated:

"12. Planning authorities and developers should adopt a sequential approach to selecting sites for new retail, commercial leisure developments and other key town centre uses … First preference should be for town centre sites, where sites or buildings suitable for conversion are available, followed by edge-of-centre sites, and only then by out-of-centre sites in locations that are, or can be made easily accessible by a choice of means of transport …

13. In support of town centres as the first choice, the Government recognises that the application of the sequential approach requires flexibility and realism from developers and retailers as well as planning authorities. In preparing their proposals developers and retailers should have regard to the format, design, scale of the development, and the amount of car parking in relation to the circumstances of the particular town centre. In addition they should also address the need to identify and assemble sites which can meet not only their requirements, but in a manner sympathetic to the town setting. As part of such an approach, they should consider the scope for accommodating the proposed development in a different built form, and where appropriate adjusting or sub-dividing large proposals, in order that their scale might offer a better fit with existing development in the town centre …

14. Planning authorities should also be responsive to the needs of retailers and other town centre businesses. In consultation with the private sector, they should assist in identifying sites in the town

> centre which could be suitable and viable, for example, in terms of size and siting for the proposed use, and are likely to become available in a reasonable time …
>
> 15. Only if it can be demonstrated that all town centre options have been thoroughly addressed and a view taken on availability, should less central sites in out-of-centre locations be considered for key town centre uses. Where development proposals in such locations fall outwith the development plan framework, it is for developers to demonstrate that town centre and edge-of-centre options have been thoroughly assessed. Even where a developer, as part of a sequential approach, demonstrates an out-of-centre location to be the most appropriate, the impact on the vitality and viability of existing centres still has to be shown to be acceptable …"

The consideration of the application

7. The interveners' application was for planning permission to develop a foodstore, café and petrol filling station, with associated car parking, landscaping and infrastructure, including access roads. The proposals also involved improvements to the junction with the A90 (T), the upgrading of a pedestrian underpass, the provision of footpaths and cycle ways, and improvements to adjacent roadways. A significant proportion of the former NCR site lay outside the application site. It was envisaged that vehicular access to this land could be achieved using one of the proposed access roads.

8. In his report to the respondents, the Director of City Development advised that the application was contrary to certain aspects of the employment and retailing policies of the development plan. In relation to the employment policies, in particular, the proposal was contrary to policies which required the respondents to safeguard the NCR site for business use. The Director considered however that the application site was unlikely to be re-developed for business uses in the short term, and that its re-development as proposed would improve the development prospects of the remainder of the NCR site. In addition, the infrastructure improvements would provide improved access which would benefit all businesses in an adjacent industrial estate.

9. In relation to the retailing policies, the Director considered the application in the light of the criteria in Retailing Policy 4 of the structure plan. In relation to the first criterion he stated:

> "It must be demonstrated, in the first instance, that no suitable site is available for the development either within the city/district centres or, thereafter on the edge of these centres … While noting that the Lochee District Centre lies within the primary catchment area for the proposal, [the retail statement submitted on behalf of the interveners] examines the potential site opportunities in and on the edge of that centre and also at the Hilltown and Perth Road District Centres. The applicants conclude that there are no sites or premises available in or on the edge of existing centres capable of accommodating the development under consideration. Taking account of the applicant's argument it is accepted that at present there is no suitable site available to accommodate the proposed development."

In relation to the remaining criteria, the Director concluded that the proposed development was likely to have a detrimental effect on the vitality and viability of Lochee District Centre, and was therefore in conflict with the second criterion. The potential impact on Lochee could however be minimised by attaching conditions to any permission granted so as to restrict the size of the store, limit the type of goods for sale and prohibit the provision of concessionary units. The proposal was also considered to be in conflict with the third criterion: there was no deficiency in shopping provision which the proposal would address. The fourth criterion, concerned with accessibility by modes of transport other than the car, was considered to be met. Similar conclusions were reached in relation to the corresponding criteria in Policy 45 of the local plan.

10. In view of the conflict with the employment and retailing policies, the Director considered that the proposal did not fully comply with the provisions of the development plan. He identified however two other material considerations of particular significance. First, the proposed development would bring economic benefits to the city. The closure of the NCR factory had been a major blow to the economy, but the re-development of the application site would create more jobs than had been lost when the factory finally closed. The creation of additional employment opportunities within the city was considered to be a strong material consideration. Secondly, the development would also provide a number of planning benefits. There would be improvements to the strategic road network which would assist in the free flow of traffic along the A90 (T). The development would also assist in the re-development of the whole of the former NCR site through the provision of enhanced road access and the clearance of buildings from the site. The access improvements would also assist in the development of an economic development area to the west. These benefits were considered to be another strong material consideration.

11. The Director concluded that the proposal was not in accordance with the development plan, particularly with regard to the employment and retailing

policies. There were however other material considerations of sufficient weight to justify setting aside those policies and offering support for the development, subject to suitable conditions. He accordingly recommended that consent should be granted, subject to specified conditions.

12. The application was considered by the respondents' entire council sitting as the respondents' Development Quality Committee. After hearing submissions on behalf of the interveners and also on behalf of the appellants, the respondents decided to follow the Director's recommendation. The reasons which they gave for their decision repeated the Director's conclusions:

> "It is concluded that the proposal does not undermine the core land use and environmental strategies of the development plan. The planning and economic benefits that would accrue from the proposed development would be important to the future development and viability of the city as a regional centre. These benefits are considered to be of a significant weight and sufficient to set aside the relevant provisions of the development plan."

The present proceedings

13. The submissions on behalf of the appellants focused primarily upon an alleged error of interpretation of the first criterion in Retailing Policy 4 of the structure plan, and of the equivalent criterion in Policy 45 of the local plan. If there was a dispute about the meaning of a development plan policy which the planning authority was bound to take into account, it was for the court to determine what the words were capable of meaning. If the planning authority attached a meaning to the words which they were not properly capable of bearing, then it made an error of law, and failed properly to understand the policy. In the present case, the Director had interpreted "suitable" as meaning "suitable for the development proposed by the applicant"; and the respondents had proceeded on the same basis. That was not however a tenable meaning. Properly interpreted, "suitable" meant "suitable for meeting identified deficiencies in retail provision in the area". Since no such deficiency had been identified, it followed on a proper interpretation of the plan that the first criterion did not require to be considered: it was inappropriate to undertake the sequential approach. The Director's report had however implied that the first criterion was satisfied, and that the proposal was to that extent in conformity with the sequential approach. The respondents had proceeded on that erroneous basis. They had thus failed to identify correctly the extent of the conflict between the proposal and the development plan. In consequence, their assessment of whether other material considerations justified a departure from the plan was inherently flawed.

14. The respondents had compounded their error, it was submitted, by treating the proposed development as definitive when assessing whether a "suitable" site was available. That approach permitted developers to drive a coach and horses through the sequential approach: they could render the policy nugatory by the simple expedient of putting forward proposals which were so large that they could only be accommodated outside town and district centres. In the present case, there was a site available in Lochee which was suitable for food retailing and which was sequentially preferable to the application site. The Lochee site had been considered as part of the assessment of the proposal, but had been found to be unsuitable because it could not accommodate the scale of development to which the interveners aspired.

15. In response, counsel for the respondents submitted that it was for the planning authority to interpret the relevant policy, exercising its planning judgment. Counsel accepted that, if there was a dispute about the meaning of the words in a policy document, it was for the court to determine as a matter of law what the words were capable of meaning. The planning authority would only make an error of law if it attached a meaning to the words which they were not capable of bearing. In the present case, the relevant policies required all the specified criteria to be satisfied. The respondents had proceeded on the basis that the proposal failed to accord with the second and third criteria. In those circumstances, the respondents had correctly concluded that the proposal was contrary to the policies in question. How the proposal had been assessed against the first criterion was immaterial.

16. So far as concerned the assessment of "suitable" sites, the interveners' retail statement reflected a degree of flexibility. There had been a consideration of all sites of at least 2.5 ha, whereas the application site extended to 6.68 ha. The interveners had also examined sites which could accommodate only food retailing, whereas their application had been for both food and non-food retailing. The Lochee site extended to only 1.45 ha, and could accommodate a store of only half the size proposed. It also had inadequate car parking. The Director, and the respondents, had accepted that it was not a suitable site for these reasons.

Discussion

17. It has long been established that a planning authority must proceed upon a proper understanding of the development plan: see, for example, *Gransden & Co Ltd v Secretary of State for the Environment* (1985) 54 P & CR 86, 94 per Woolf J, affd (1986) 54 P & CR 361; *Horsham DC v Secretary of State for the Environment* (1991) 63 P & CR 219, 225-226 per Nolan LJ. The need for a proper understanding follows, in the first place, from the fact that the planning authority is required by statute to have regard to the provisions of the development plan: it

cannot have regard to the provisions of the plan if it fails to understand them. It also follows from the legal status given to the development plan by section 25 of the 1997 Act. The effect of the predecessor of section 25, namely section 18A of the Town and Country (Planning) Scotland Act 1972 (as inserted by section 58 of the Planning and Compensation Act 1991), was considered by the House of Lords in the case of *City of Edinburgh Council v Secretary of State for Scotland* 1998 SC (HL) 33, [1997] 1 WLR 1447. It is sufficient for present purposes to cite a passage from the speech of Lord Clyde, with which the other members of the House expressed their agreement. At p 44, 1459, his Lordship observed:

> "In the practical application of sec 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it."

18. In the present case, the planning authority was required by section 25 to consider whether the proposed development was in accordance with the development plan and, if not, whether material considerations justified departing from the plan. In order to carry out that exercise, the planning authority required to proceed on the basis of what Lord Clyde described as "a proper interpretation" of the relevant provisions of the plan. We were however referred by counsel to a number of judicial dicta which were said to support the proposition that the meaning of the development plan was a matter to be determined by the planning authority: the court, it was submitted, had no role in determining the meaning of the plan unless the view taken by the planning authority could be characterised as perverse or irrational. That submission, if correct, would deprive sections 25 and 37(2) of the 1997 Act of much of their effect, and would drain the need for a "proper interpretation" of the plan of much of its meaning and purpose. It would also make little practical sense. The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained. Those considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality. On the contrary, these considerations suggest that in principle, in this area of public administration as in others (as discussed, for example, in *R (Raissi) v Secretary of State for the Home Department* [2008] QB 836), policy statements should be interpreted

objectively in accordance with the language used, read as always in its proper context.

19. That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (*Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780 per Lord Hoffmann). Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean.

20. The principal authority referred to in relation to this matter was the judgment of Brooke LJ in *R v Derbyshire County Council, Ex p Woods* [1997] JPL 958 at 967. Properly understood, however, what was said there is not inconsistent with the approach which I have described. In the passage in question, Brooke LJ stated:

> "If there is a dispute about the meaning of the words included in a policy document which a planning authority is bound to take into account, it is of course for the court to determine as a matter of law what the words are capable of meaning. If the decision maker attaches a meaning to the words they are not properly capable of bearing, then it will have made an error of law, and it will have failed properly to understand the policy."

By way of illustration, Brooke LJ referred to the earlier case of *Northavon DC v Secretary of State for the Environment* [1993] JPL 761, which concerned a policy applicable to "institutions standing in extensive grounds". As was observed, the words spoke for themselves, but their application to particular factual situations would often be a matter of judgment for the planning authority. That exercise of judgment would only be susceptible to review in the event that it was unreasonable. The latter case might be contrasted with the case of *R (Heath and Hampstead Society) v Camden LBC* [2008] 2 P & CR 233, where a planning authority's decision that a replacement dwelling was not "materially larger" than its predecessor, within the meaning of a policy, was vitiated by its failure to understand the policy correctly: read in its context, the phrase "materially larger" referred to the size of the new building compared with its predecessor, rather than

requiring a broader comparison of their relative impact, as the planning authority had supposed. Similarly in *City of Edinburgh Council v Scottish Ministers* 2001 SC 957 the reporter's decision that a licensed restaurant constituted "similar licensed premises" to a public house, within the meaning of a policy, was vitiated by her misunderstanding of the policy: the context was one in which a distinction was drawn between public houses, wine bars and the like, on the one hand, and restaurants, on the other.

21. A provision in the development plan which requires an assessment of whether a site is "suitable" for a particular purpose calls for judgment in its application. But the question whether such a provision is concerned with suitability for one purpose or another is not a question of planning judgment: it is a question of textual interpretation, which can only be answered by construing the language used in its context. In the present case, in particular, the question whether the word "suitable", in the policies in question, means "suitable for the development proposed by the applicant", or "suitable for meeting identified deficiencies in retail provision in the area", is not a question which can be answered by the exercise of planning judgment: it is a logically prior question as to the issue to which planning judgment requires to be directed.

22. It is of course true, as counsel for the respondents submitted, that a planning authority might misconstrue part of a policy but nevertheless reach the same conclusion, on the question whether the proposal was in accordance with the policy, as it would have reached if it had construed the policy correctly. That is not however a complete answer to a challenge to the planning authority's decision. An error in relation to one part of a policy might affect the overall conclusion as to whether a proposal was in accordance with the development plan even if the question whether the proposal was in conformity with the policy would have been answered in the same way. The policy criteria with which the proposal was considered to be incompatible might, for example, be of less weight than the criteria which were mistakenly thought to be fulfilled. Equally, a planning authority might misconstrue part of a policy but nevertheless reach the same conclusion as it would otherwise have reached on the question whether the proposal was in accordance with the development plan. Again, however, that is not a complete answer. Where it is concluded that the proposal is not in accordance with the development plan, it is necessary to understand the nature and extent of the departure from the plan which the grant of consent would involve in order to consider on a proper basis whether such a departure is justified by other material considerations.

23. In the present case, the Lord Ordinary rejected the appellants' submissions on the basis that the interpretation of planning policy was always primarily a matter for the planning authority, whose assessment could be challenged only on the basis of unreasonableness: there was, in particular, more than one way in

which the sequential approach could reasonably be applied ([2010] CSOH 128, para 23). For the reasons I have explained, that approach does not correctly reflect the role which the court has to play in the determination of the meaning of the development plan. A different approach was adopted by the Second Division: since, it was said, the proposal was in head-on conflict with the retail and employment policies of the development plan, and the sequential approach offered no justification for it, a challenge based upon an alleged misapplication of the sequential approach was entirely beside the point (2011 SC 457, [2011] CSIH 9, para 38). For the reasons I have explained, however, even where a proposal is plainly in breach of policy and contrary to the development plan, a failure properly to understand the policy in question may result in a failure to appreciate the full extent or significance of the departure from the development plan which the grant of consent would involve, and may consequently vitiate the planning authority's determination. Whether there has in fact been a misunderstanding of the policy, and whether any such misunderstanding may have led to a flawed decision, has therefore to be considered.

24. I turn then to the question whether the respondents misconstrued the policies in question in the present case. As I have explained, the appellants' primary contention is that the word "suitable", in the first criterion of Retailing Policy 4 of the structure plan and the corresponding Policy 45 of the local plan, means "suitable for meeting identified deficiencies in retail provision in the area", whereas the respondents proceeded on the basis of the construction placed upon the word by the Director of City Development, namely "suitable for the development proposed by the applicant". I accept, subject to a qualification which I shall shortly explain, that the Director and the respondents proceeded on the latter basis. Subject to that qualification, it appears to me that they were correct to do so, for the following reasons.

25. First, that interpretation appears to me to be the natural reading of the policies in question. They have been set out in paras 4 and 5 above. Read short, Retailing Policy 4 of the structure plan states that proposals for new or expanded out of centre retail developments will only be acceptable where it can be established that a number of criteria are satisfied, the first of which is that "no suitable site is available" in a sequentially preferable location. Policy 45 of the local plan is expressed in slightly different language, but it was not suggested that the differences were of any significance in the present context. The natural reading of each policy is that the word "suitable", in the first criterion, refers to the suitability of sites for the proposed development: it is the proposed development which will only be acceptable at an out of centre location if no suitable site is available more centrally. That first reason for accepting the respondents' interpretation of the policy does not permit of further elaboration.

26. Secondly, the interpretation favoured by the appellants appears to me to conflate the first and third criteria of the policies in question. The first criterion concerns the availability of a "suitable" site in a sequentially preferable location. The third criterion is that the proposal would address a deficiency in shopping provision which cannot be met in a sequentially preferable location. If "suitable" meant "suitable for meeting identified deficiencies in retail provision", as the appellants contend, then there would be no distinction between those two criteria, and no purpose in their both being included.

27. Thirdly, since it is apparent from the structure and local plans that the policies in question were intended to implement the guidance given in NPPG 8 in relation to the sequential approach, that guidance forms part of the relevant context to which regard can be had when interpreting the policies. The material parts of the guidance are set out in para 6 above. They provide further support for the respondents' interpretation of the policies. Paragraph 13 refers to the need to identify sites which can meet the requirements of developers and retailers, and to the scope for accommodating the proposed development. Paragraph 14 advises planning authorities to assist the private sector in identifying sites which could be suitable for the proposed use. Throughout the relevant section of the guidance, the focus is upon the availability of sites which might accommodate the proposed development and the requirements of the developer, rather than upon addressing an identified deficiency in shopping provision. The latter is of course also relevant to retailing policy, but it is not the issue with which the specific question of the suitability of sites is concerned.

28. I said earlier that it was necessary to qualify the statement that the Director and the respondents proceeded, and were correct to proceed, on the basis that "suitable" meant "suitable for the development proposed by the applicant". As paragraph 13 of NPPG 8 makes clear, the application of the sequential approach requires flexibility and realism from developers and retailers as well as planning authorities. The need for flexibility and realism reflects an inbuilt difficulty about the sequential approach. On the one hand, the policy could be defeated by developers' and retailers' taking an inflexible approach to their requirements. On the other hand, as Sedley J remarked in *R v Teesside Development Corporation, Ex p William Morrison Supermarket plc and Redcar and Cleveland BC* [1998] JPL 23, 43, to refuse an out-of-centre planning consent on the ground that an admittedly smaller site is available within the town centre may be to take an entirely inappropriate business decision on behalf of the developer. The guidance seeks to address this problem. It advises that developers and retailers should have regard to the circumstances of the particular town centre when preparing their proposals, as regards the format, design and scale of the development. As part of such an approach, they are expected to consider the scope for accommodating the proposed development in a different built form, and where appropriate adjusting or sub-dividing large proposals, in order that their scale may fit better with existing

development in the town centre. The guidance also advises that planning authorities should be responsive to the needs of retailers. Where development proposals in out-of-centre locations fall outside the development plan framework, developers are expected to demonstrate that town centre and edge-of-centre options have been thoroughly assessed. That advice is not repeated in the structure plan or the local plan, but the same approach must be implicit: otherwise, the policies would in practice be inoperable.

29. It follows from the foregoing that it would be an over-simplification to say that the characteristics of the proposed development, such as its scale, are necessarily definitive for the purposes of the sequential test. That statement has to be qualified to the extent that the applicant is expected to have prepared his proposals in accordance with the recommended approach: he is, for example, expected to have had regard to the circumstances of the particular town centre, to have given consideration to the scope for accommodating the development in a different form, and to have thoroughly assessed sequentially preferable locations on that footing. Provided the applicant has done so, however, the question remains, as Lord Glennie observed in *Lidl UK GmbH v Scottish Ministers* [2006] CSOH 165, para 14, whether an alternative site is suitable for the proposed development, not whether the proposed development can be altered or reduced so that it can be made to fit an alternative site.

30. In the present case, it is apparent that a flexible approach was adopted. The interveners did not confine their assessment to sites which could accommodate the development in the precise form in which it had been designed, but examined sites which could accommodate a smaller development and a more restricted range of retailing. Even taking that approach, however, they did not regard the Lochee site vacated by the appellants as being suitable for their needs: it was far smaller than they required, and its car parking facilities were inadequate. In accepting that assessment, the respondents exercised their judgment as to how the policy should be applied to the facts: they did not proceed on an erroneous understanding of the policy.

31. Finally, I would observe that an error by the respondents in interpreting their policies would be material only if there was a real possibility that their determination might otherwise have been different. In the particular circumstances of the present case, I am not persuaded that there was any such possibility. The considerations in favour of the proposed development were very powerful. They were also specific to the particular development proposed: on the information before the respondents, there was no prospect of any other development of the application site, or of any development elsewhere which could deliver equivalent planning and economic benefits. Against that background, the argument that a different decision might have been taken if the respondents had been advised that

the first criterion in the policies in question did not arise, rather than that criterion had been met, appears to me to be implausible.

Conclusion

32. For these reasons, and those given by Lord Hope, with which I am in entire agreement, I would dismiss the appeal.

LORD HOPE

33. The question that lies at the heart of this case is whether the respondents acted unlawfully in their interpretation of the sequential approach which both the structure plan and the relevant local plan required them to adopt to new retail developments within their area. According to that approach, proposals for new or expanded out of centre developments of this kind are acceptable only where it can be established, among other things, that no suitable site is available, in the first instance, within and thereafter on the edge of city, town or district centres. Is the test as to whether no suitable site is available in these locations, when looked at sequentially, to be addressed by asking whether there is a site in each of them in turn which is suitable for the proposed development? Or does it direct attention to the question whether the proposed development could be altered or reduced so as to fit into a site which is available there as a location for this kind of development?

34. The sequential approach is described in National Planning Policy Guidance Policy 8, *Town Centres and Retailing*, para 5.2 as a fundamental principle of NPPG 8. In *R v Rochdale Metropolitan Borough Council, Ex p Milne*, 31 July 2000, not reported, paras 48-49, Sullivan J said that it was not unusual for development plan polices to pull in different directions and, having regard to what Lord Clyde said about the practical application of the statutory rule in *City of Edinburgh v Secretary of State for Scotland* 1998 SC (HL) 33 at p 44, that he regarded as untenable the proposition that if there was a breach of any one policy in a development plan a proposed development could not be said to be "in accordance with the plan". In para 52 he said that the relative importance of a given policy to the overall objectives of the development plan was essentially a matter for the judgment of the local planning authority and that a legalistic approach to the interpretation of development plan policies was to be avoided.

35. I see no reason to question these propositions, to which Mr Kingston QC for the appellants drew our attention in his reply to Mr Armstrong's submissions for the respondents. But I do not think that they are in point in this case. We are concerned here with a particular provision in the planning documents to which the

respondents are required to have regard by the statute. The meaning to be given to the crucial phrase is not a matter that can be left to the judgment of the planning authority. Nor, as the Lord Ordinary put it in his opinion at [2010] CSOH 128, para 23, is the interpretation of the policy which it sets out primarily a matter for the decision maker. As Mr Thomson for the interveners pointed out, the challenge to the respondents' decision to follow the Director's recommendation and approve the proposed development is not that it was *Wednesbury* unreasonable but that it was unlawful. I agree with Lord Reed that the issue is one of law, reading the words used objectively in their proper context.

36. In *Lidl UK GmbH v The Scottish Ministers* [2006] CSOH 165 the appellants appealed against a decision of the Scottish Ministers to refuse planning permission for a retail unit to be developed on a site outwith Irvine town centre. The relevant provision in the local plan required the sequential approach to be adopted to proposals for new retail development out with the town centre boundaries. Among the criteria that had to be satisfied was the requirement that no suitable sites were available, or could reasonably be made available, in or on the edge of existing town centres. In other words, town centre sites were to be considered first before edge of centre or out of town sites. The reporter held that the existing but soon to be vacated Lidl town centre site was suitable for the proposed development, although it was clear as a matter of fact that this site could not accommodate it. In para 13 Lord Glennie noted that counsel for the Scottish Ministers accepted that a site would be "suitable" in terms of the policy only if it was suitable for, or could accommodate, the development as proposed by the developer. In para 14 he said that the question was whether the alternative town centre site was suitable for the proposed development, not whether the proposed development could be altered or reduced so that it could fit in to it.

37. Mr Kingston submitted that Lord Glennie's approach would rob the sequential approach of all its force, and in the Inner House it was submitted that his decision proceeded on a concession by counsel which ought not to have been made: [2011] CSIH 9, 2011 SC 457, para 31. But I think that Lord Glennie's interpretation of the phrase was sound and that counsel was right to accept that it had the meaning which she was prepared to give to it. The wording of the relevant provision in the local plan in that case differed slightly from that with which we are concerned in this case, as it included the phrase "or can reasonably be made available". But the question to which it directs attention is the same. It is the proposal for which the developer seeks permission that has to be considered when the question is asked whether no suitable site is available within or on the edge of the town centre.

38. The context in which the word "suitable" appears supports this interpretation. It is identified by the opening words of the policy, which refer to "proposals for new or expanded out of centre retail developments" and then set out

the only circumstances in which developments outwith the specified locations will be acceptable. The words "the proposal" which appear in the third and fifth of the list of the criteria which must be satisfied serve to reinforce the point that the whole exercise is directed to what the developer is proposing, not some other proposal which the planning authority might seek to substitute for it which is for something less than that sought by the developer. It is worth noting too that the phrase "no suitable site is available" appears in Policy 46 of the local plan relating to commercial developments. Here too the context indicates that the issue of suitability is directed to the developer's proposals, not some alternative scheme which might be suggested by the planning authority. I do not think that this is in the least surprising, as developments of this kind are generated by the developer's assessment of the market that he seeks to serve. If they do not meet the sequential approach criteria, bearing in mind the need for flexibility and realism to which Lord Reed refers in para 28, above, they will be rejected. But these criteria are designed for use in the real world in which developers wish to operate, not some artificial world in which they have no interest doing so.

39. For these reasons which I add merely as a footnote I agree with Lord Reed, for all the reasons he gives, that this appeal should be dismissed. I would affirm the Second Division's interlocutor.

Cardboard coffin or full parade? How to plan for your funeral

thetimes.co.uk

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Highlight: The best way to get the goodbye you want, whether it's a woodland burial or traditional send-off, is to think ahead

Body

Kim Penfold's dad, John, died at home last September aged 79. Although he had heart issues, she had not been at all prepared for his death. "We were extremely close and did have conversations about what kind of funeral he wanted, but after he died I realised that we hadn't even scratched the surface," said Penfold, 45, who lives in North Lincolnshire.

"Small things suddenly become so emotional when you're planning a funeral. We couldn't remember a couple of the songs he wanted, which was upsetting. You end up guessing and hoping that he would have been happy."

Penfold and her family had to wait seven weeks for the funeral while a post-mortem was carried out. Her dad had been organised, leaving a spreadsheet with details of his wishes and setting aside money for a funeral, but she was still shocked by the cost.

"Dad was from a big East London dockyard family — there are traditions with food at East End funerals, it's not cheap. There was enough money to cover the funeral but that's just a tiny bit of that day. It was important to us to do it right, so we paid the extra," she said.

"The experience made me think about when I die, so I'm putting a financial plan in place. I believe that it's up to all of us to think about what we want and make sure that it's paid for."

Not many of us like to discuss our deaths and yet most of us would prefer to spare our loved ones the expense and stress of a funeral. This is not possible unless you have the chat — and make the financial arrangements. Only 0.3 per cent of the people questioned last year by the insurer SunLife knew all their loved one's funeral wishes and 18 per cent knew absolutely nothing.

How much is a funeral?

SunLife, which specialises in services for the over-50s, said that the average cost of dying last year was £9,200. Its research was based on interviews with 100 funeral directors and 1,500 people who organised a funeral last year.

It said that while 69 per cent of people had made some provision for their funeral, only 59 per cent put away enough

to cover the whole cost. Some 19 per cent of families said they had trouble paying for a funeral and had to find an average of an extra £1,870 to cover costs.

A YouGov survey of 3,749 adults in October found that 75 per cent had not planned any of their funeral while 5 per cent said they had planned it all.

Basic funeral costs, which include fees for a cremation or burial, the funeral director's fee, the cost of getting two doctors to sign the form needed for a cremation, and a minister or celebrant, have fallen 2.5 per cent since 2021, SunLife said, to an average of £3,953.

But average legal or financial fees for administering an estate have gone up 10.9 per cent to an average of £2,578. You do not have to hire a solicitor to administer an estate, but you will have to pay a £273 government fee when applying for probate on any estate worth more than £5,000.

In a year where inflation hit 11 per cent, it is no surprise that SunLife found that associated funeral costs such as venue hire and catering rose 7.4 per cent to £2,669, increasing the overall cost of a funeral 3.8 per cent.

The cheapest options are direct cremations, which happen without a service or mourners present. They cost an average of £1,511 last year. SunLife estimates that they now make up 18 per cent of all funerals, up from 2 per cent in 2018. Many people choosing this option arrange a separate celebration of life or memorial, however.

There are other basic options: Co-op's Essential funeral, for example, costs £1,750-£2,140 and includes help with arrangements and paperwork, a choice of dates and times offered by the funeral director, caring for and transporting the body, a basic coffin, service at a crematorium or graveside and collection of ashes.

A standard cremation with a service costs an average of £3,673 with burials costing £4,794, SunLife said.

There are regional variations with those in London, the South East and East of England paying the most. The £5,283 average cost of a funeral in London is 59 per cent higher than in Northern Ireland, for example, where you can expect to pay £3,317. The National Cremation Society of Great Britain said that the highest crematoria fees in 2022 were in Friockenheim, near Arbroath, at £1,100, while the cheapest were £392 in Belfast. Hour-long slots have become common, making up 38.54 per cent of bookings compared with 6.8 per cent in 2007.

Eco-friendly water cremation, also known as aquamation or alkaline hydrolysis, uses water and a strong alkali to process the remains instead of flame.

Woodland burials, where biodegradable coffins and urns are used, are a growing trend, acording to the Co-op. The Natural Death Centre lists natural burial grounds around the country on naturaldeath.org.uk.

The consumer website Comparethecoffin.com offers coffins made of a range of materials, from cardboard to steel with prices from £265.

Steven Mitchell, the site founder, said you don't have to use a funeral director. "If that's what people want then it's fine, but it is possible to make the arrangements yourselves," he said. "People don't have to buy a package with things they don't need, like certain types of funeral cars. The people who work at mortuaries are amazing and go the extra mile to help families. There can also be a mark-up on coffins bought though funeral directors so shop around as you would with anything else."

The Competition and Markets Authority (CMA), Age UK and the Money Advice Service say that you can save money by making arrangements directly with the cemeteries and crematorium department of your council. They said comparing at least two funeral directors could save you £1,000 and recommended getting a full cost breakdown and explanations of charges.

SunLife said that the biggest single funeral costs outside burial or cremation costs were for memorial headstones or plaques (£1,064 on average), catering (£467), car hire (£353), venue hire (£312), flowers (£210), orders of service (£105), funeral notices (£80) and death notices (£77).

While one in four people paying for funerals said the costs surprised them, 90 per cent of directors surveyed said people spent more than they needed to on flowers, coffins and funeral cars.

Terry Tennens from the National Society of Allied and Independent Funeral Directors said: “Technology has made it easier to shop around. A CMA order in 2021 requires businesses to display prices online and on shop fronts.”

Times Money Mentor’s top pick of prepaid funeral plans

How do you pay?

You can set aside savings or investments to cover the cost of your funeral, buy yourself a pre-paid funeral from companies such as Co-op, Dignity or Golden Charter, or use your life insurance — either through a special over-50s plan or by earmarking some of your standard life insurance payout.

Setting money aside through a savings account is the most straightforward option but remember that your money may not beat inflation, so funeral costs may outgrow your savings.

Banks and building societies should release funds ahead of the completion of probate and inheritance tax after being provided with a death certificate and bill from a funeral director. If you have the money in a joint account, your partner will be able to withdraw it.

A pre-paid funeral plan allows you to pay for your funeral in advance at today’s prices, either upfront or in instalments (the latter coming with fees and interest). You may have seen them advertised on daytime TV. The funds, held in trust or as what is known as a whole of life insurance policy, which pays out upon your death, are protected against inflation and not included as an asset when calculating inheritance tax. They are also not normally included in an assessment of savings for means-tested benefits or care costs.

Plans differ but typically include transport of the body to the funeral directors’ mortuary, care of the body, visits to the chapel of rest, coffin, hearse and funeral director personnel and some of the burial or cremation cost.

A plan can reduce distress for loved ones by keeping a record of your funeral wishes and having a funeral director pre-appointed. The body can be taken into the chosen funeral director’s care, usually a 24-hour service, and they will give guidance on what happens next.

Since July 2022 firms offering pre-paid funeral plans have been regulated by the Financial Conduct Authority (FCA) after allegations of misselling.

Cold calling and commission payments to intermediaries such as funeral directors have been banned and firms now have to provide a funeral unless the customer dies within two years of taking out the plan, in which case a full refund will be offered. Authorised firms, such as Low Cost Funeral Limited, Freeman Brothers and Open Prepaid Funerals Limited, can be found on

fca.org.uk, which also has a list of unauthorised firms.

Customers can now complain to the Financial Ombudsman Service and are protected by the Financial Services Compensation Scheme (FSCS) if their funeral firm fails.

Several firms have stopped trading since the new regulations came in, which has left some customers waiting to find out how much of their money will be returned. If your company has gone bust you should have been contacted by the administrator and told if your plan has been transferred to another firm or whether you will get a refund.

Over-50s life insurance pays out a lump sum that can go to funeral costs. The sum does not usually rise in line with inflation. In contrast with funeral plans, which return money subject to a fee on cancellation, most over-50s plans do not return money if cancelled.

Some employers offer a death in service benefit of three to four times a worker's salary, while some trade unions and professional bodies also pay a benefit on death.

If you are getting government benefits your family may be able to get a Funeral Expenses Payment in England and Wales or a Funeral Support Payment in Scotland.

What to remember

Before buying any kind of financial product check that the firm you are considering is on the Financial Services Register on the FCA website and thus authorised to offer a funeral plan contract. Shop around, and check for any extra commission and fees.

Most standard plans won't cover all the costs of a funeral. The cheaper the plan the more restrictive it will be, with less choice of funeral director, dates and times.

In areas where cremations and burials are expensive it is worth ensuring that the full cost of cremation or burial is covered when choosing a plan. Tell your funeral plan company if you move and need to change funeral director. This may incur a fee.

Keep your paperwork safe, give copies to executors and tell anyone who will need to know that it exists.

There are still some plans for sale that offer a fixed amount when you die, or turn 90. These usually work out as more expensive than other options.

Mike Forsyth from Co-op Funeralcare said: "Getting the financial side set up for your family is great, but it's also so important to consider your wishes so that your family doesn't have to think about things like what your favourite pair of shoes are and what music you'd like. The need to get those wishes down is equally, if not more important than the financial side. The emotional part is where the real heart of funeral plans is."

Funeral plan prices — what you can expect to pay, and what you get

Co-op

Simple

(£3,225) includes £850 for third-party fees, basic coffin, fixed cortege route, restricted date, time and location for the funeral and Co-op's choice of car.

Bronze

(£3,735) includes £1,000 towards fees, wood-effect coffin, a hearse and pallbearers.

Silver

(£4,150) covers all third-party fees. Hearse, pallbearers, one limousine.

Gold

(£4,460) as above plus wood veneer coffin, two limousines and memorial canvas.

Golden Charter

Basic

(£1,749 or monthly from £18.62) includes unattended cremation with no choice of location, date or time, coffin selected by funeral director, transportation of deceased to the funeral director's premises within 25 miles (within working hours), £500 for third-party costs

Value

(£2,895 or from £23.30 a month) — as above with basic coffin, £800 for third-party costs.

Standard

(£3,495 or from £28.11 a month) — as above with simple coffin, £1,100 for third-party costs, choice of time and date of funeral, procession to funeral.

Select

(£3,850 or from £30.96 a month) — as above with high quality coffin and transportation of the deceased to the funeral director's premises at any time, £1,100 for third-party costs, one limousine.

Premier

(£4,099 or from £32.95 a month) — as above with superior coffin, £1,100 allowance towards third-party costs, two limousines, a list provided to the family of mourners of who sent flowers.

goldencharter.co.uk

Dignity

Offers bespoke funeral plans. The average attended funeral service costs about £3,600.

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