OUTER HOUSE, COURT OF SESSION

[2017] CSOH 135

P162/17

OPINION OF LADY WISE

In petition of

SIMON BYROM

Petitioner

for Judicial Review of a decision by Edinburgh City Council to grant an application for planning permission for a development at 1-15 Victoria Street, 18-20 Cowgate, Edinburgh under reference 15/04445/FUL

against

THE CITY OF EDINBURGH COUNCIL

Respondent

and

DREAMVALE PROPERTIES LIMITED

Interested Party

Petitioner: Cobb; Drummond Miller LLP
Respondent: Armstrong QC; City of Edinburgh Council Legal Services
Interested Party: Findlay, Burnett; DLA Piper Scotland LLP

20 October 2017

Introduction

[1] In this application for judicial review the petitioner seeks to reduce a planning decision taken by the City of Edinburgh Council ("the respondent") on 17 November 2016

when planning permission was granted in relation to an application for a development at Victoria Street and Cowgate, Edinburgh. The petitioner is resident within the Old Town Conservation area. The proposed development would be situated within the world heritage site and the Old Town Conservation area. There has been considerable public interest in the development and the potential impact on the surrounding area. The interested party, Dreamvale Properties Limited, is the developer applicant who sought the planning permission granted in the decision challenged by the petitioner.

[2] A focus of the current challenge relates to the possible effect of the development on the now A listed Central Library and other adjacent listed buildings. The Edinburgh Central Library was designed by George Washington Browne. Donations towards its construction included a substantial sum from Andrew Carnegie. The library opened in 1890 and it is a listed building. It achieved A listed status on 28 July 2016. The petitioner is a founding member of the "SAVE Edinburgh Central Library – Let there be Light and Land" campaign. He and his fellow campaigners are concerned about the impact on the library if the development proceeds. However, the current challenge is necessarily restricted to whether or not the decision taken by the respondent on 17 November 2016 was taken lawfully and properly. There are three main complaints. The first issue relates to the setting of the Central Library on George IV Bridge and whether the views from it were properly considered. The second challenge relates to how the listing of the Central Library came about and what the planning sub-committee was apparently not told about the change of listing from B listed status to A listed status. There is a third challenge to the way in which the sub-committee dealt with the matter of air quality. An issue raised in the petition about advertisement was not insisted upon. During the hearing before me a question arose as to whether the petitioner had raised in these proceedings the issue of restricted daylight to the

Central Library as a result of the development. Counsel for the petitioner conceded that the entire case was as set out in the petition and that it did not raise any issue relating to light. The issue of the views from the library, particularly towards Edinburgh Castle, were part of the argument about setting but it did not extend beyond that to the issue of the impact of ingress of light to the building, a matter that had been dealt with at an earlier stage.

The Report to the Development Management Sub Committee and the Decision under Challenge

[3] The development management sub-committee of the respondent met on 25 May 2016. The report considered by the committee (No 2/1 of process) sets out in full a description of the site of the proposed development, the assessment made, including the impact on listed buildings and their setting, design issues, neighbouring amenity, transport and road safety, air environmental factors including air quality and a number of other matters. The conclusion of the report was to the effect that the application should be granted subject to a number of conditions listed at paragraph 3.4. The report records also that there had been an original scheme (scheme 1) for the development which would have presented a greater mass to the new build elements to the rear elevation of the site. A revised scheme (scheme 2) had made a number of changes. The proposal ultimately comprised a mixed use development including a new 225 bedroom hotel with bar, restaurant, café, retail and commercial uses. The conclusion of the report on the revised scheme was in the following terms:

> "The proposed development is in accordance with local plan policies and introduces uses considered appropriate to the site's central location. The design of the new building is respectful and reflects the historic context and grain of this part of the city and the complicated site of varying characteristics. There will be no adverse impact on the character or appearance of the conservation area or the setting of the adjacent

> listed buildings. It will not significantly impact on the amenity of neighbouring residents and it will not introduce any implications in terms of road or pedestrian safety. The proposals are acceptable in terms of sustainability. There are no material considerations which outweigh this conclusion."

[4] The decision under challenge in this petition (No 1/1 of process) granted the application for the reasons contained in the conclusion of the report. A number of detailed conditions were attached to the planning consent.

The Arguments presented on behalf of the Petitioner

[5] Counsel for the petitioner first set out the background to the issues of the setting of the Central Library and its listing. Reference was made to the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997. Mr Cobb drew attention to section 1 which provides, amongst other things, that in considering whether to list a building account can be taken not only of the building itself but also its setting. Section 59 of the Act imposes a specific duty on planning authorities to have special regard to the desirability of preserving not just a building but also its setting in considering whether to grant planning permission for development. The report of 5 July 2016 refers to the Central Library as Category B listed. However, by that time the process of relisting it to Category A was already underway. Category B listed buildings include buildings of regional or national importance or major examples of some particular period, style or building type. Category A includes buildings of national or international importance, either architectural or historic, or a fine little altered examples of some particular period of style or building type. On 28 July 2016 a decision of Historic Environment Scotland (document 37) changed the category of listing of the Central Library in Edinburgh from B to A. An Annex to the decision sets out detailed assessment of the library against the listing criteria. Age and rarity of the building is referred to, together

with the donation of Andrew Carnegie, the history and setting of the building, its relative lack of alteration, its scale and architectural quality. A number of objections to the planned development had referred to the impact on the Central Library. Historic Environment Scotland had objected to scheme 1, the initial largest scheme on the basis that it would mask much of the visible rear elevations of India Buildings and the Central Library. While that issue was to some extent resolved by the second scheme, the objections to that second scheme, including those of the Old Town Community Council and Edinburgh World Heritage raised the issues of the view from the library and the loss of light.

[6] In support of the argument that relevant material on the setting of the library had not been properly considered, reference was made to Historic Scotland's guidance entitled "Setting" dated October 2010, (document 36), which was in effect at the material time. It provides an understanding of the key issues relating to setting in connection with the duties of planning authorities to take into account the setting of historic assets or places when drawing up development plans and in determining planning applications. Mr Cobb submitted that it was noteworthy that one of the key issues listed is that:

> "Setting often extends beyond the property boundary or, 'curtilage', of an individual historic asset into a broader landscape context. Less tangible elements can also be important in understanding the setting. These may include function, sensory perceptions or the historical, artistic, literary and scenic associations of places or landscapes."

Section 3 of the guidance records that the visual envelope incorporating views to, from and across the historic asset or place all contributes to setting.

[7] Counsel made reference also to a "Heritage Addendum" (document 14) which had been lodged by the developer and prepared by consultants which detailed the history of the gap site of the proposed development. A site to the rear of the Central Library was cleared and had lain empty since about 1950. Further, a townscape and visual impact appraisal

(document 15) which was before the committee included a number of viewpoints showing the impact of the proposed development but Mr Cobb contended that the impact on views from within the Central Library appear to have gone unconsidered. The issue of the impact of the development on views from within the library had been raised by Mr Simpson of the Edinburgh Old Town Development Trust in a presentation to the committee. He had lodged a number of slides, although as each objector had been given a limited amount of time to make their presentation he was unable to go through all of them. The slides (document 7) included images of the rear of the library as it currently stands and representations of the obstruction to the view from the library if the development proceeded. Mr Cobb contended that the committee had failed to consider that part of the setting of the library was the views from within it. The committee had failed to consider that aspect notwithstanding the duty under section 59 of the 1997 Act.

[8] Counsel's second contention was that the committee had been invited to assess the impact of the development on the Central Library as if the Library was a Category B building in the absence of any information about reclassification. He contended that the impression given in the application was that the library was Category B, and while there was considerable material before the committee about the issue of categorisation it was not addressed. Accordingly, the committee making the decision did not have sufficient information with which to decide on the impact of the proposal on the Central Library. The duty in section 59 of the 1997 Act required the respondent to have a "special regard" to a building such as the Central Library which is in an area of high sensitivity in a planning context. The issue of the re-listing of the library was not dealt with and assessed in reaching the conclusion that the impact on the building in result of the development would be minimal. The shortfall of sufficient information resulted in the respondent having

inadequately discharged their duty under section 59. The listing was a material consideration in terms of section 37(2) of the Town and Country Planning (Scotland) Act 1997 ("the 1997 Act"). From 28 July 2016 the re-listing to Central Library was official and had been notified and planning permission for the development had not yet been granted. However, there was nothing in the documentation to indicate that the change was drawn to the attention of those making the decision between July and November 2016. A local MP, Mr Sheppard, had written to the vice convenor of the planning committee on 31 August 2016 (document 34) raising concerns about proposed development and requesting an urgent review of decisions made prior to that date in light of the upgrading of the Central Library's listing Category B to A. The response sent on behalf of the convenors of the planning committee on 20 September 2016 (document 35) narrated that all listed buildings are treated equally in the planning system regardless of their category and that the categories do not have any legal weight. The letter records also that Historic Environment Scotland decided to amend the listing category at a time when it was not objecting to the development. Mr Cobb submitted that the letter illustrated a misunderstanding of the different listing categories imposed by Historic Environment Scotland. Section 1 of the 1997 Listed Buildings Act refers to lists in the plural and quite apart from whether the conveners of the planning committee were in error on the matter, there was no suggestion that Mr Sheppard's letter was ever put before the committee so that the issue could be reconsidered. It seemed that Mr Sheppard's request for an urgent suspension of the planning consent process pending a thorough reconsideration had simply been ignored. While the date of effective permission was November 2016 the decision was taken earlier but there was scope for additional information being considered between the decision meeting and the formal grant of consent. The new information in question related to a material

consideration and that must be taken into account. Authority for that proposition was said to be found in *John G Russell (Transport) Limited* v *Strathkelvin District Council* 1992 SLT 1001. A decision to re-list the building to the highest category provided an opportunity to consider this material matter and the respondent had failed to take it. Reference was made to the case of *R (Kides)* v *South Cambridgeshire District Council* [2002] EWCA Civ 1370 and the definition of material considerations therein at paragraph 121. The recategorisation of the Central Library from Category B to Category A listing satisfied the test for being a material consideration. Reliance was placed on paragraphs 122 – 127 of *Kides*. Counsel accepted that before any duty to reconsider arises there must be first a material consideration, secondly a new matter relative to that material consideration and thirdly, the new matter must be known to the planning authority. In the present case the re-listing was a material consideration which ought to have been considered or at least led to a reconsideration of a decision taken. It could not be said that the planning decision would have been the same if the re-listing of the Central Library had been brought to the attention of the sub-committee. It was anticipated that counsel for the respondent and interested party would point to cases where the courts have restricted the application of *Kides*, but in Mr Cobb's submission a question of whether there was a duty to reconsider always depends on the facts. On the basis of the available material the only reasonable conclusion that could be reached was that the respondent had failed to have regard to a material consideration in this case.

[9] So far as the third issue, that of the concern about air quality was concerned, it was noted that the Cowgate in Edinburgh lies within the boundaries of the air quality management area ("the AQMA") as so characterised by the respondent in terms of section 83(1) of the Environment Act 1995, the applicable legislation for the designation of AQMA's and for their practical operation. The report (document 2) included a section on air

quality in relation to the proposed development. Mr Cobb placed considerable reliance on the response from Environmental Services to the proposed development at pages 32 – 33 of the report. This noted concerns from an Environmental Assessment about local air quality. The new buildings on the Cowgate would extend the length of the existing street canyon which would have a detrimental impact on local air quality. Street canyons are formed where there are high rise buildings on either side of a narrow road which acts as a barrier to the air flow and causes localised air circulations that trap pollutants at street level. In the Cowgate, the heights of the buildings are considerably greater than the width of the street and so the canyon effects are significant. Environmental Services noted predictions made by the applicant that the proposal would have a minimal effect on those. However, as this prediction was based on data from 2013, Environmental Services was not confident that the air quality impact assessment had been carried out as a worst case scenario. Accordingly it recommended that the application be refused due to the potentially adverse impact it would have on the existing AQMA.

[10] It was accepted that there are many situations where decision makers have to decide between two positions, in this case the view of the applicant that there would be minimal impact on air quality as against the advice from Environmental Services, but Mr Cobb argued that this issue had to be seen in a wider perspective. Reference was made to the then Scottish Executive's Planning Advice Note PAN 51 (document 41) which confirms (at paragraph 49) that any consideration of the quality of land, air or water and potential impact thereon arising from a development, possibly leading to a proven impact on health, is capable of being a material consideration. In this case the chronology of events had been that an environmental assessment prepared on behalf of the applicant was seen and approved by the Scottish Environmental Protection Agency (SEPA) prior to the reservations

being expressed by Environmental Services. The reservations about the data relied on by the applicant not being accurate or relevant were not addressed properly by the respondent. In March 2017 a Freedom of Information request had been made to SEPA whose response, in a letter of 23 March 2017, forms document 43. It was clear from that response that SEPA had not taken into account the terms of the environmental assessment of February 2016.

[11] Mr Cobb submitted that planning judgment must be operated on a rational basis. Where concerns had been raised about the available information on the impact on air quality the respondent required to deal with those concerns. There was a clear duty not to permit the air quality in an AQMA to deteriorate. The danger of that happening as a result of this development was a concern raised by Environmental Services. It would not be reasonable for a decision maker to ignore that concern and accordingly the respondent's approach had been irrational. Counsel accepted that it was not inappropriate for the Environmental Services assessment to be summarised and then discounted. However there had been no acknowledgement that the SEPA report provided earlier was potentially flawed. Therefore the impact on the air quality had not been properly assessed. The reader might gain the impression that SEPA had considered the environmental assessment concerned when it had not. It was beyond the exercise of a proper planning judgment to leave this issue of air quality hanging without further investigation. Whether or not the same conclusion would have been reached is not determinative. The respondent had failed to resolve a significant question over the accuracy of the information before the Committee. Counsel referred again to the planning advice note PAN 51, at paragraphs 61 – 63 and submitted that a planning judgment required to be exercised with the local air quality management policy in mind. That policy noted that a study of air quality issues may be warranted, particularly for proposals which are likely to have a significant impact on air quality. The existence of the

AQMA meant that there was already a concern about the air quality in the Cowgate. The petitioner's concern was that the development would hinder the objectives of the existing AQMA. Environmental Policy 18 (document 40) made clear that planning permission would only be granted for a development where there would be no significant adverse effects on air, water or soil quality. As the proposed development is in an AQMA any potential adverse effect was enough to invoke that policy. While normally this would be a matter of planning judgment, information was before the respondent that there would be adverse impacts on air quality and that should have been explored further.

[12] Counsel submitted that the respondent's decision should be reduced as a result of the failure to discharge properly the duty in terms of section 59 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 or alternatively because the decision was irrational and perverse in the respects mentioned.

Submissions on behalf of the Respondent

[13] Mr Armstrong QC for the respondent addressed each of the challenges made by the petitioner to the decision in turn. The first issue was whether the council had complied with its duty under section 59 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997. Five propositions/observations were made in relation to this first challenge. First, the petitioner's case is not based on a failure to give adequate reasons or on *Wednesbury* unreasonableness; rather that it is said that the respondent did not properly consider setting and in particular the views of the castle from the library. However there was no evidence that the councillors "covered their ears and closed their eyes" to the evidence before them on this point. They reached a conclusion on that evidence which included a consideration of views from the library. Appropriate guidance on consideration

of setting had been given to them. Secondly, it was well established that judicial review does not give an open opportunity to look at the merits of a decision as it is only the legality of a decision that can be challenged. It was open to the respondent to give such weight to the various considerations now being mentioned as it saw fit. The issues of planning judgment were squarely within the domain of the councillors. Thirdly, the respondent had ample evidence before it to make an informed judgment on setting. It was a matter for the councillors whether they felt they had sufficient evidence or not. Fourthly, there was no requirement for a report to identify all pieces of evidence and their likely effect. What the report did was set out the key issues identified together with conclusions on those. The fact that a point was not mentioned does not mean that it was ignored. Fifthly, the councillors had been specifically addressed on the issue of setting; they had material before them and there was nothing to suggest it had been ignored.

[14] Turning to the decision notice (document 1) this had set out reasons in accordance with section 43(1)(a) of the 1997 Act. There were two critical points in the reasoning given. First, the proposal was in accordance with local planning polices and secondly, it was found to have no adverse impact on the character or appearance of the conservation area or the setting of the adjacent listed buildings. It was clear from the reasons themselves that the issue of setting was in the mind of the decision maker and had been addressed in accordance with the statutory obligation. Turning to the report (document 2), Mr Armstrong noted that appendix 1 contains a summary of all consultations and objections received. In section 2 under the heading "Determining Issues" the requirement to have special regard to setting is specifically recorded. Further, at pages 7-9 of the report the impact on setting is considered in a special section. There were two pages identifying seven important points in relation to setting, all of which would focus the committee's mind on

this significant topic. At page 9 of the report the impact of the setting of India Buildings and the Central Library in terms of long views from Greyfriars is considered, together with a comment that the revised scheme of the applicant had resulted in greater respect for the significance of the Central Library and its setting. While there was no specific reference in that section to views out of the library, it was obvious that there would be some effect on that given the impact on setting generally. In any event there is specific reference in section 2 at page 12 that the development "…will alter views from the building for visitors", as the objectors, including the petitioner, had specifically raised the concern of views from the library as had the planning officer. The reporter, using planning judgment, did not consider these views to be a key issue on the setting of the library. Neither did Historic Environment Scotland or even the petitioner in his notes of objections. So although there is mention elsewhere in the report to views from the library, it had not been worthy of mention in this specific paragraph on setting. It was incumbent upon the councillors to consider all of the evidence and reach conclusions on it. The Old Town Preservation Trust had presented evidence and document 3 was the minute of the meeting in question listing the various presentations made. Document 4 was a presentation with 57 slides by a planning department official. It was clear from that presentation that the impact on listed buildings was considered extensively. Setting was dealt with in slides 36 and 37 with particular reference to the Cowgate elevation and the Central Library at slides 38 and 49. A number of other slides were referred to involving the Central Library. Document 6 was the presentation of Neil Simpson referred to in Mr Cobb's submissions. Mr Simpson had been able to read to the end of slide 8 in document 6 and it was slides 5 and 8 of his presentation that specifically raised the Castle views issue. It was clear, therefore, that the councillors had the report, a presentation of a planning officer and the Edinburgh Old Town Development

Trust presentation all focusing on the issue of views to the Castle before them in reaching a decision on the application. In addition of course there was the evidence of the applicant including document 14, the Heritage Addendum prepared by Turley. This had been produced after a request for a further and more detailed assessment. Counsel for the petitioner had not drawn attention to Chapter 3 of that document which sets out in detail the evolution of the design of the proposed scheme. It was clear from that chapter that following feedback on the initial scheme a further revised scheme was prepared and ultimately submitted. Subsequently some further revisions were made to that second scheme. The consent that had ultimately been given was to a considerably revised scheme. Chapter 4 of the Turley document discusses the relationship between the proposed development and the Central Library. Setting is covered in detail at Chapter 4.7 and 4.8. It is noted at Chapter 4.10 that from an early stage it was anticipated that the library would be extended on its west elevation. There is further comment (at Chapter 4.18) that the development would have a neutral effect on the setting and special interest of the B listed building. It was also important to note that Historic Environment Scotland had withdrawn its objection on submission of the final revised scheme. This is dealt with in the report (document 2) at pages 38-42. The report also contained (at 2/39) the information in relation to the regrading of the building to Category A listing.

[15] In summary, the councillors had before them sufficient evidence to make an informed judgment on setting. The statutory duty had been identified, the advice of Historic Environment Scotland had been taken into account, the key issues for all sides had been identified and there is reference to the evidence of the objectors and the planning officials on the issue of views from the library. Ultimately it was for the councillors to take the final decision on this matter. The legal framework in which that was done was as set out

in *Oxton Farms* v *Selby District Council* 1997 WL 1106106. In that case Pill LJ had stated that a planning report should not be construed as if it was a statute and that any defect in it did not lead to there being a necessity to quash the decision. Importantly, a judicial review based purely on criticism of a planning report would not succeed unless it had misled the committee. Even then, such misleading had to be on a material issue. Reference was also made to the case of *R (Morge)* v *Hampshire County Council* [2011] WLR 268. In that case (at paragraph 36) Baroness Hale had emphasised that democratically elected bodies reach decisions in a different way from courts. With particular reference to the reports of professional advisors on which they rely, Lady Hale stated that

> "… the courts should not impose too demanding a standard upon such reports, for otherwise their whole purpose would be defeated: the councillors either will not read them or will not have a clear enough grasp of the issues to make a decision for themselves. It is their job, and not the court's, to weigh the competing public and private interests involved."

Mr Armstrong referred also to *R (Trashorfield Ltd)* v *Bristol City Council* [2014] EWHC 757 (Admin). The well-established principles in cases involving challenges to such decisions are set out there at paragraph 13 by Hickinbottom J. In particular, the need for a planning report to be concise and focused and the danger of such reports being too long and elaborate or defensive is emphasised. Further, in construing reports it must also be borne in mind that they are addressed to "a knowledgeable readership" who, including council members, may be expected to have substantial local and background knowledge. The legal position as narrated in the *Oxton Farms* case and in *Trashorfield* has been specifically referred to with approval in this court – *Petition of the Co-operative Group Ltd for Judicial Review* [2016] CSOH 88. The well-known authorities of *Moray Council* v *Scottish Ministers* 2006 SC 691 and *Simpson* v *Aberdeenshire Council* 2007 SC 366 were also referred to. In the latter case the Inner House had (at paragraph 23) under reference to earlier authorities, expressed the view that it

was for the planning authority to decide how much information they needed to enable them to assess and decide upon a planning application. Such a decision was a question of planning judgment and therefore entirely a matter for the planning authority. On the issue of material considerations, reference was made to *Tesco Stores Ltd* v S*ecretary of State for the Environment* [1995] 1 WLR 759, where, (at paragraph 13), it was made clear that in assessing whether something was a material consideration the court was not concerned with the merits of the case.

[16] The material referred to in the respondent's submissions illustrated that the councillors had addressed the question of setting in their decision. There was no evidence to suggest that they had not been open to considering any of that material. The key issues had been identified and the statutory obligation fulfilled.

[17] The second question that arose for consideration was whether the respondent was required to take a change in the listing category of the Central Library from B to A into account and to reconsider accordingly. Mr Armstrong submitted that where there is a change in circumstances during the period between the decision of the planning committee and the decision of the council to issue planning permission, the materiality of that change has to been seen in the context of the first decision. Against the known background of this application, the categorisation or listing of the Central Library and its reconsideration was not material. Counsel for the petitioner had submitted that the change in category from B to A of the Central Library recognised the importance of the building. However, the change in listing would only be material if there had been an earlier indication of an adverse effect of the planning proposal on that building. It was instructive to look again at the case of *Simpson* v *Aberdeenshire Council* 2007 SC 366 and in particular from paragraph 17 onwards. In that case it had been common ground between counsel that section 59(1) of the Planning

(Listed Buildings and Conservation Areas) (Scotland) Act 1997 provided for a two stage exercise by the planning authority in this context. The first stage was to decide if a development for which planning permission was sought would affect a listed building or its setting. It was only if the building or its setting were so affected that the duty to have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possessed arose. The problem with the submissions made for the petitioner was that they failed to take account of the absence of any adverse effect of the revised scheme on the Central Library. In the absence of such an adverse effect, the change from Category B to A could not be a material change. In any event, the council had endorsed the view that the building should be re-categorised. The information about the re-categorisation was all before the councillors who took the decision in this case. Reference was made again to the report and its conclusions, including pages 38 and 39 which make clear that the plan to upgrade the library to an A listing was before the committee as part of the Historic Environment Scotland response.

[18] So far as section 59(1) of the 1997 Act was concerned, it was important to note that that subsection did not distinguish between categories of listed buildings in that the duties on planning authorities apply to all listed buildings. In *Bova* v *Highland Council* 2013 SC 510 the Inner House had concluded that the question of whether a change was material and had to be taken into account in this context depended on the particular facts of the case. In *R (Dry)* v *West Oxfordshire District Council* [2010] EWCA Civ 1143 the Court of Appeal, referring to the guidance in the case of *Kides,* made clear that it was simply guidance as to what was advisable "erring on the side of caution". In the present case there was no reason for the application to go back to the committee simply because a building not adversely affected by the application was being relisted from B to A, a matter that was within the

knowledge of the committee at the time the decision was taken. In any event, the case of *Kides* was of little assistance to the petitioner. The conclusion in that case (at paragraph 129) had been that in the circumstances of that case there was no need to go back for reconsideration following the change. The situation was exactly the same in this case. Finally, on this matter, reference was made to *R (on the application of Leckhampton Green Land Action Group Ltd)* v *Tewkesbury Borough Council* [2017] EWHC 198 (Admin). In that recent decision of Holgate J, it was emphasised that the court is not engaged in a theoretical exercise in a judicial review application of this sort. Common sense and realism are required and the court should have regard to the basis on which the decision was reached. In all the circumstances Mr Armstrong submitted that it could not be said that the respondent had been required to take the change in the listing category of the Central Library into account and to reconsider on that basis.

[19] On the third and final issue of whether the respondent gave proper weight to the issue of air quality impact assessment in relation to the AQMA Mr Armstrong referred to the decision in *Tesco Stores Ltd* v S*ecretary of State for the Environment* [1995] 1 WLR 759 as authority for the proposition that it was entirely for the councillors to decide what weight to attach to material considerations (per Lord Hoffman at paragraph 13). It was submitted that counsel for the petitioner had seemed to move in this stage of his argument towards a suggestion that the respondent had shown *Wednesbury* unreasonableness, but the available material did not support such a contention. It was clear that the development was in accordance with local planning policies. Those policies included ENV 18, but that could only be a concern if there was a significant impact on the amenity of neighbouring residents. Turning to document 19, this was a report from Golder Associates who conducted an air quality impact assessment for the applicant. Page 4 of the report highlights the need for an

air quality assessment to determine whether a significant deterioration in air quality will occur as a consequence of the extension of the street canyon area on the Cowgate. The results of the assessment are contained at page 13 onwards of the report in section 6. The table there sets out the difference between the existing or baseline quality and that predicted after the development. The third column of the table illustrates that there is effectively no change predicted in the annual average NO_2 concentrations after completion of development. There would be a negligible change above first storey level. Similarly, for PM_{10} concentrations a similar exercise had been carried out and it also illustrated that no change was predicted at locations outside of the new section of canyon. Within the canyon, a small increase was predicted. The conclusion of the report at page 15 records that the study demonstrates that the changes in ambient NO_2 and PM_{10} concentrations as a consequence of the development would be minimal and would be unlikely to result in further exceedance of NAQS objectives. In answer to the reliance placed by counsel for the petitioner on the chronology of events when SEPA looked at the matter, the response to the Freedom of Information request in relation to this matter (document 43) make clear that SEPA had not considered the report of February 2016, that its response had been based on evidence provided in the air quality assessment and that it did not consider there was any requirement to consider further factors because of the lack of receptors within the vicinity of the proposed site. Further, the report from Environmental Services on which the petitioner bases this third argument is a memo. The concerns of the department are listed at paragraph 4 of page 1 of that memo (document 21). It is clear from that memo that Environmental Services do not suggest that the applicant's report on air quality is in some way defective. It did nothing more than highlight a concern that matters had not been looked at on a worst case scenario. The decision makers had both pieces of evidence

(Environmental Services concern and the Golder Associates report), together with the main report (document 2). The two positions are set out in the report that led to the decision at page 15. Ultimately, the fact that there would only be a minor impact on air quality seemed to be an insufficient basis to merit refusal of it. In any event the matter was one of planning judgment and so a decision that the councillors were entitled to reach on the evidence.

[20] So far as ENV 18 (document 40) was concerned, it was important to note that the policy in question requires there to be no **significant** adverse effect on air quality before the grant of planning permission might conflict with an AQMA - paragraphs 62 and 63 of document 30. All of the information relevant to the AQMA and possible impact on air quality of the development was before the committee. There was simply no basis upon which to argue that the decision taken should be interfered with.

[21] For the interested party Mr Findlay adopted his note of argument and all of Mr Armstrong's submissions, save for one issue in relation to ground two to which I will refer. He indicated that many of the points he would have taken had already been taken by Mr Armstrong in submissions and so confined his oral presentation to additional points and observations.

[22] So far as the first issue of setting was concerned Mr Findlay referred to one additional authority, that of *R (Plant*) v *Lambeth London Borough Council* [2016] EWHC 3324. In that case Holgate J puts in context the various legal principles relied on by Mr Armstrong. Particular reference was made to paragraphs 66 - 73. The relevant passages include reference to expert advice received by the local authority making the planning decision and confirms that it is a matter for those making planning decisions whether to follow such experts' advice or not unless it is obviously erroneous. Mr Findlay also noted that Historic Environment Scotland had not mentioned the issue of views from the library to the Castle in

their response. They had examined the building and any possible impact of the development on it very carefully and clearly had regarded the views as part of the setting. In any event, there was no material before the council that would have led them not to follow the advice of Historic Environment Scotland and the applicant's expert. In the absence of any obvious defects in the report to the committee the views from the library issue had to be seen in the context of there having been a lot of other information in relation to listed buildings in the area generally including George IV Bridge and the nearby church. There had been a full exposition and debate about the relevant issues.

[23] Mr Findlay contended that one way of analysing the petitioner's first complaint was that it suggested that every expert involved had ignored the issue of views from the Castle. If that was so it might be because no material issue arose from this. Turning to the then Historic Scotland guidance on setting (document 36) it is clear that setting varies from building to building and the guidance is not definitive. Professional judgment on issues such as setting is important. There was nothing relevant found by those who reported in relation to views from the rear of the Central Library. It could be deduced that setting in this particular case did not necessarily include views from inside the building. That said, the report from Turley on the revised scheme (document 17) did give express regard to the issue of views out of the library. Accordingly, there could be no suggestion that the applicant's team did not address the policy test on this. It was apparent from Chapter 5 of the Turley report that a considerable amount of attention had been paid to the site. The report listed the background, the consultation meetings and issues raised by Edinburgh World Heritage on the impact of the development on the Central Library. Prior assessment of this was made in the Turley Heritage Addendum (document 14). These two reports taken together show that the applicant had devoted considerable attention to the relationship between the

proposed development and the Central Library. Reference was also made to a production for the interested party, No 7/11 of the process, an LDN Architects report submitted to the City of Edinburgh Council in 2002. This was a very full report relating to the library and includes a statement of significance in relation to it. Despite the focus on the significance of the library there is no reference to views from within the building being important. The report includes the initial recommendation to upgrade to Category A listing. So an extensive, neutral and objective study not prepared for the purposes of the planning application had recognised the importance of the library but recorded no issue of the views from inside the building. The recommendation to relist the library had been adopted by the council in about 2008 but nothing had progressed until at least 2014. Returning to the Heritage Addendum prepared by Turley (document 14), that report noted (paragraph 4.14) that there had been a previous proposal to extend the library to seven or eight storeys high on the site of the current application, and that proposal had been given approval. The background was that there had been proposals in relation to this gap site for some time. Turning to the position of Historic Environment Scotland, Mr Findlay referred to that body's original objection to the application in October 2015. Those objections (document 23) had included a concern on behalf of Historic Environment Scotland about harm to the setting of individual buildings that add considerably to the character of the area. Page 2 of the objections made specific reference to the LDN report and the recommendation that the Central Library should be upgraded to Category A listing. Historic Environment Scotland noted that the council had endorsed that view and its merit was considered as part of the proposals. At that time the conclusion of Historic Environment Scotland was that some sort of development of the gap site was to be encouraged, but there was real concern about the scale and height of the proposed development. It was clear from the initial approach taken

by Historic Environment Scotland that the rear of the Central Library was never meant to be exposed, and to that extent the filling of the gap site was not a problem. Once the specific issues on scale and height had been addressed by the revised scheme Historic Environment Scotland dropped its opposition. In summary, Mr Findlay submitted that it was neither sensible nor reasonable of the petitioner to suggest that there had been any omission in relation to views from the Central Library. The first argument for the petitioner was simply an attempt to rerun the merits.

[24] In relation to the change in designation of the library from category B to category A listing, Mr Findlay referred to the decision in *R (on the application of Leckhampton Green Land Action Group Ltd)* v *Tewkesbury Borough Council* [2017] EWHC 198 (Admin), on which Mr Armstrong had relied. Mr Findlay sought to draw attention in particular to paragraph 76 of that decision where, under reference to *Wakil* v *Hammersmith & Fulham UBC* [2013] EWHC 2833 (Admin), the case law on the issue of whether a new factor ought to lead to a planning decision being reconsidered, made clear that such a new factor would have to be capable of affecting the outcome before it could be said that reconsideration was required. What is needed is not merely some obvious change in circumstances but a change that might have had a material effect on the council's deliberations. Applying that to the present case, the fact of the change from category B to category A listing, while an obvious change, would not have had any impact on the decision taken. It was a change in label only, everyone who provided material to the committee having accepted that the listed building in question had to be given special regard. All those involved were aware of the proposed category change and the reasons for it, so while it could in theory have been a material change, the fact of that change had already been considered. The analogy was with a new policy coming in after the committee stage but before planning is granted. Where the

anticipated new policy had already been taken into account, its coming into force at the effective date would not be a material change such as to require reconsideration. In *Bova* v *Highland Council* [2013] SC 510 the Inner House (at paragraph 57) had agreed with the observations of the Court of Appeal in *R (Dry)* v *West Oxfordshire District Council* that the guidance given in *R (Kides)* v *South Cambridgeshire District Council* must be applied with common sense and with regard to the facts of the particular case. The known facts here were that a change in listing was anticipated and it simply came into effect prior to the final consent being granted. If, contrary to what actually happened, Historic Environment Scotland had continued to object to the revised scheme and had argued that a change of the grading from B listing to A listing raised a new matter the situation would be different. In short, the respondent had exhaustively considered the impact of the proposed development on the Central Library as a listed building and concluded that there was no adverse impact on it. That conclusion would not have been altered by the change in designation of the building. There was no question of the report to the Committee being misleading. The information about re-listing was available and it was a matter for the respondent whether to refer to that expressly within the report when there was no requirement to do so. In those circumstances the respondent had complied with its statutory duty under section 59 of the Listed Buildings Act and sections 25 and 37 of the 1997 Act.

[25] In relation to the air quality argument Mr Findlay referred to policy ENV 18 (document 40) as others had done. In his submission, paragraph 4.35 thereof, on which Mr Cobb had relied was simply supportive text and could not qualify the policy itself. The relevant terms of the policy were that planning permission would only be granted for development where "*there will be no significant adverse effects on air, water or soil quality*". The policy did not go so far as to impose some sort of obligation to ensure that development

does not adversely affect air quality in an AQMA at all. Authority for the proposition that supportive text can be used to interpret a policy but not override it could be found in the case of *R (Cherkley Campaign Limited)* v *Mole Valley District Council* [2014] EWCA Civ 567. In the present case, the supportive text at paragraph 4.35, simply highlights that the local authority, having identified three areas within the city with poor air quality due to traffic congestion has set out an action plan for measures intended to reduce vehicle emissions within those areas. Nothing narrated therein affected the terms of the policy itself. The report to the committee in this case recorded that there were no relevant receptors in the site area and that the identified impact on the air quality was minor. It was a paradigm exercise of planning judgement to conclude, as the committee did, that the concerns raised by Environmental Services did not justify refusal of the application, particularly given the tentative nature of those concerns. It was hardly the most damning indictment of the proposed development that a possible worst case scenario had not been identified. It was entirely within planning judgement whether to seek more information and also what weight to give to the currently available information. Attaching particular weight to one part of the evidence rather than another could never constitute an error of law or be *Wednesbury* unreasonable. The different views are set out and adequate reasons given for the decision.

[26] As a fall-back position, Mr Findlay recorded that even if any errors could be identified in the decision making process, it could not be said that any errors were material and would be insufficient to interfere with the decision. However, he emphasised that was very much an *esto* argument based on his sixth plea-in-law and his primary submission was that there was no substance to any of the petitioner's arguments.

Reply on behalf of the Petitioner

[27] Mr Cobb sought to respond to one or two of the points made in his opponents' submissions. In relation to setting, he wished to emphasise that, given the vast volume of material before the planning committee, the absence of relevance to views from the castle in relation to setting was an exception to that. This must mean that there had been a conscious decision to omit reference to the views from the central library. On the issue of listing, there were frequent references in the documents before the committee to the library being a category B listed building. While there were also references to possible re-categorisation for a number years that proposal had not been implemented. The contrast was the explicit change in August 2016 whereby the category change had occurred. As assessment of the planning application had been on the basis that the central library was a category B building the change amounted to a material change. The conclusions could not be regarded as determinative where those were based on incomplete evidence. The complaint was not one of failure to assess the impact of the development on a listed building; it was a failure to assess the application properly on the basis of all available information. A change from category B to category A listing represented a material matter and one which could have changed the committee's views. The committee might be surprised not to be asked to reconsider matters on hearing that the Central Library had been upgraded in terms of its listing. The category of listing had consequences that amounted to more than a change of label. Historic Environment Scotland could have advised the Council that the recommendation for relisting to category A was in fact being implemented and they did not. The timing of the re-categorisation ought to have been brought to the Council's attention as it was a material alteration. While the caution urged in respect of the case of *R (Kides)* was accepted by Mr Cobb, he argued that the sensitivity of the area in which the proposed

development was to take place was such that any change of this sort should have resulted in reconsideration.

[28] On the issue of air quality management Mr Cobb accepted the difference between the terms of the policy ENV 18 and the supporting text. However the statutory provisions on AQMAs alluded to in the supportive text would be devoid of meaning if Mr Findlay's approach was followed. It was indisputable that AQMAs warrant a particular degree of consideration. The whole object of an AQMA was to make itself redundant by improving air quality in the relevant area. Any development that would hinder that cannot find favour with the planning authorities. Environmental Services were not seeking to state that the data relied on by the applicant was incorrect, simply that it had not been considered as the worst case scenario. The failure to take further action in light of that concern including reverting to SEPA was where the problem lay.

[29] The petitioner in this case was concerned to ensure that if a development regarded by him and many others as unacceptable is to go ahead, the law has scrutinised the decision making process sufficiently

Discussion

[30] There was no dispute in this case about the general principles applicable to cases where judicial review of planning decisions are sought The authorities were usefully summarised by Mr Armstrong in his submissions and I do not need to repeat them in any detail here. Importantly, reports to planning committees are prepared by professionals for what has been described as a "knowledgeable readership" with a substantial local and background knowledge. Accordingly, they require to be concise and focused as opposed to long, elaborate or defensive. This and the other relevant principles are well summarised in

R (Trashorfield Ltd) v *Bristol City Council* [2014] EWHC 757 (Admin). ("Trashorfield") by Hickinbottom J in paragraph 13 and it was not suggested that I do anything other than follow that approach. Although I have required to consider an extensive volume of material in this case the issues were ultimately well-focused and comprise the three challenges referred to in paragraph [2] above. I will refer to these issues as (i) setting, (ii) change in listing category and (iii) air quality and deal with each in turn.

(i) Setting

[31] There was agreement that the central library has been a listed building for many years. A listed building is a building which is included in a list compiled or approved by Historic Environment Scotland under section 1 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997. It is clear from section 1(1) of that Act that the legislation anticipates more than one list. Section 59(1) of the Act imposes the following duty in relation to listed buildings:

> "In considering whether to grant planning permission for development which affects a listed building or its setting, a planning authority or the Secretary of State, as the case may be, shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses."

[32] The contention of the petitioner is that the respondent's committee had failed to consider certain aspects of the setting of the central library in determining this planning application and had accordingly not complied with the duty under section 59. The conclusion of the planning report was that there would be no adverse impact on the character or appearance of the conservation area or the setting of the adjacent listed buildings. As indicated that reasoning was incorporated in the reasons for the decision under challenge. There is, therefore, specific reference to the setting of the adjacent listed

buildings in the decision. There are a number of documents that support a conclusion that the issue of the setting of listed buildings, including the Central Library, had been given special regard. First there is section 2 of the planning report itself which contains a special section on the impact of the proposed development on, amongst other buildings, the Central Library and its setting. Secondly, the committee had received presentations from the Old Town Preservation Trust and a planning department official in relation to this matter. There was also the presentation from Mr Simpson referred to in Mr Cobb's submissions. Further, there was the Heritage Addendum prepared by Turley on behalf of the applicant, chapter 4 of which discusses the relationship between the proposed development and the Central Library and contains important passages on the issue of setting. The focus of the petitioner's current argument is the impact of the development on views from within the library. This was one of a number of matters raised before the committee. In my view, the absence of specific reference to views from inside the library in the planning report and in the decision is an insufficient basis for a contention that the committee had failed to consider the matter. On the basis of the authorities referred to in *Trashorfield*, an approach that required planning reports to record each and every aspect of the submissions made in relation to an issue would be likely to result in lengthy, elaborate and defensive reports. At page 8 of the planning report in this case, the author chooses to cite a particular passage from Historic Scotland's guidance in relation to setting. Mr Cobb chose to cite a different passage, one that emphasises that less tangible elements than landscape can be important in understanding setting. The alternative to choosing a succinct passage from the guidance and reproducing it in the report would have been to either reproduce the whole document (or at least the key issues page) or summarise every part of the guidance in the report. To do that in relation to each of the issues covered would make the report unwieldly and difficult to read. In any

event, the appendices to the report include appropriate summaries of the various consultation responses including in this context the two responses of Historic Environment Scotland, that of the Old Town Community Council and that of Edinburgh World Heritage. The responses make clear that so far as the Central Library is concerned objections focused on the scale and height of the development in terms of impact on setting. A response from Schools and Lifelong Learning – Communities and Families specifically mentions the views from the building for visitors. The committee had that statement before it together with the presentations referred to. There was ample material on which the committee could make an informed judgement on setting. There is no suggestion that the committee was misled on the issue. At its highest this is a complaint of an absence of reference to one of a number of issues raised before the committee, but, as already indicated, there is no need for specific reference to every single matter raised. It seems to me that the petitioner's argument seeks to elevate one aspect of the discussion on setting beyond the focus given to it by those who presented material on this issue. I accept the submission made by Mr Armstrong for the respondent that, the key issues having been identified, what was required to fulfil the respondent's statutory obligation on this matter was to consider what the impact of the proposed development on the setting of the relevant listed buildings would be and to have special regard to the desirability of preserving that setting in determining the application. As the ultimate conclusion was that there would be no adverse impact on the central library and its setting by this proposed development, in the absence of any suggestion that the respondent has refused to consider any material presented to them on the question of views from the library, I cannot conclude that there has been any failure to do so. Accordingly, the first ground of challenge fails.

(ii) Change in Listing

[33] The issue of contention in relation to the relisting of the Central Library from category B to category A is whether that change was a material one such as to justify reconsideration of the decision. The history of the decision to relist for present purposes starts with LDN Architects' report No 7/11 of process referred to by Mr Findlay which includes the initial recommendation to upgrade the building to category A listing. While many years passed before that recommended change was implemented, the decision to grant planning in this case was made in the knowledge that there was a plan to upgrade. Reference to it was made in the Historic Environment Scotland response to the application which is appended to the Planning Report (document 2) at pages 38 and 39. I agree that the analogy suggested by Mr Findlay is apt, namely that of a known new planning policy coming into force after a committee stage but before planning is granted which would not be a material change such as to require reconsideration. In my view the decision to implement an existing recommendation to relist the Central Library is a relatively insignificant event, far less significant than a decision to list a building that was not listed at all at the planning committee stage or even a recommendation to upgrade the listing of a building where that had not been contemplated previously. This was simply the implementation of something already agreed on and therefore anticipated and so while the subject matter of listing or re-listing a building is capable of being a material consideration the facts relating to this application militate against it being characterised as such.

[34] Section 59(1) of the 1997 Act does not distinguish between categories of listed buildings in relation to the duties on planning authorities. However, that single provision does not mean that all listed buildings are treated equally in the planning system for all purposes and to that extent the response to Mr Shepherd MP's letter on behalf of the

convenors of the planning committee (document 35) appears to be inaccurate. The issue is not, however, about the treatment of listed buildings generally. The specific issue that the respondent required to address in terms of section 59(1) so far as the Central Library is concerned is what impact or effect the proposed development might have on the building or its setting. The clear conclusion of the planning report in this case, adopted in the reasons for the decision under challenge was that:

> "There will be no adverse on the character or appearance of the conservation area or the setting of the adjacent listed buildings."

In the case of *Simpson* v *Aberdeenshire Council* 2007 SC 366, the court records, (at paragraph 17) that it was common ground in that case that section 59(1) of the 1997 Act provides a two stage exercise by the planning authority. The first stage is to decide if a development for which planning permission is sought would affect a listed building or its setting. It was only if the building or its setting were so affected that the duty to have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses then arises. Of course, an application might affect a listed building without having an impact on it that could be described as adverse. Accordingly it is insufficient to analyse what happened in this case as having been resolved by the first stage in the two stage exercise of section 59(1). As Mr Findlay pointed out, there is ample material from which it can be concluded that special regard was had to both the setting and the architectural significance of the Central Library as part of the exercise. The legislation does not go quite so far as to require a planning authority to refuse an application whenever there is an adverse impact on a listed building. Much will depend on the nature and extent of that impact, although the requirement to have special regard to the desirability of preserving such a building clearly reduces the scope for

permitting development where adverse impact is established. It seems to me that there could be circumstances in which the category of listing would be a relevant fact in a discussion about an arguably adverse but otherwise acceptable impact as against one that is so clearly adverse that it must result in refusal of permission. In this particular case, the matter is far more clear cut. As indicated the decision under challenge states in terms that there will be no adverse impact on the adjacent listed buildings. That conclusion is not and cannot be challenged in these proceedings. In the absence of any adverse impact, the need to consider the category of listing does not come into play. In any event, not only was the plan to re-categorise the Central Library known to the committee, but Historic Environment Scotland, whose decision it was to implement the recommendation to relist, did not consider it necessary to highlight the timing of the implementation of that as it was ultimately satisfied that the developer's revised scheme would not have an adverse impact on the library or other adjacent buildings. In my view, while the category of a building may well have consequences that go beyond a change of label, whether those consequences are such to merit reconsideration must depend on the context. The situation that arose in the present case is that the information about the plan to relist the building was known but was not material because of the lack of adverse impact of the development on the Central Library.

[35] Turning to the authorities in relation to this matter, I have derived no assistance from the decision in *John G Russell (Transport) Ltd* v *Strathkelvin District Council* 1992 SLT 1001. The argument in that case was whether the respondents were bound to ignore certain new information if it added nothing to what had been known at the time of the grant of planning permission. The situation here is rather different. The question is whether the change to the listing of the Central Library from category B to category A is a material consideration so far as the grant or refusal of the planning permission is concerned. In *R (on the application of*

Kides) v *South Cambridgeshire District Council* [2002] EWCA Civ 1370, Parker LJ expressed the following review on when a consideration is material as follows:

> "In my judgement a consideration is 'material', in this context, if it is relevant to the question whether the application should be granted or refused; that is to say if it is a factor which, when placed in the decision-maker's scales, would tip the balance to some extent, one way or the other. In other words, it must be a factor which has some weight in the decision-making process, although plainly it may not be determinative. The test must, of course, be an objective one in the sense that the choice of material considerations must be a rational one, and the considerations chosen must be rationally related to land use issues."

Counsel for the petitioner in this case accepted that, before any duty to reconsider arises, there must first be a material consideration. Having regard to the circumstances of this case, which include the fact that the information about the proposal to relist the Library coupled with the conclusion in relation to the absence of adverse impact on the building by the proposed development, I conclude that the petitioner cannot meet the very first stage of showing that the respondent had a requirement to reconsider in this case, namely that the relisting was a material consideration. There is nothing in the documentation before me to support the contention that it could have made any difference at all to the planning decision if the implementation of the agreed proposal to relist the Central Library had been brought to the attention of the committee. It follows that any discussion about whether the respondent ought to have erred on the side of caution and referred the application back for reconsideration in light of the new factor is irrelevant because even on the authority of *Kides* (at paragraph 126), where it is clear that on any reconsideration the decision-maker would reach the same decision, there is no need to delay a decision pending reconsideration. I am not persuaded that on the particular facts of this case, any duty to reconsider following the implementation of a decision to relist the Library arose.

(iii) Air Quality

[36] The Cowgate in Edinburgh lies within the boundaries of an Air Quality Management Area ("AQMA"). That gave rise to anxious consideration of the question of any impact on local air quality by the proposed development. The committee had two competing views on whether this issue should lead to refusal of the application. However, the view of Environmental Services was not based on data that contradicted that provided by the applicant. The memo from Environmental Services expressed a concern that the available assessment of air quality had not been carried out on a worst case scenario. As against that, the committee required to consider the detailed assessment produced by Golder Associates (document 19) the conclusions of which were referred to in some detail by Mr Armstrong in his submissions. In essence, the conclusion of that report was to the effect that any changes in the NO_2 and PM_{10} concentrations as a consequence of the development would be minimal. Air quality was not considered to be a material concern for the development and as such no mitigation measures were proposed. In the absence of a competing assessment of the air quality impact of the proposed development, what the decision makers had to do was to balance a concern expressed by environmental services against a detailed report following scientific assessment. That was a matter that fell squarely within planning judgement and the decision reached, namely that there was no information about air quality that should result in refusal of the application, was one that the decision-makers were entitled to reach on the evidence.

[37] It cannot be said that the committee in this case did not have regard to the local policies on the management of air quality. The terms of the relevant Environmental Policy (ENV 18 document 40) are as follows:

> "Planning permission will only be granted for development where;

(a) there will be no significant adverse effects for health, the environment and amenity and either

(b) there will be no significant adverse effects on air, water or soil quality

(c) appropriate mitigation to minimise any adverse effects can be provided."

On the basis of the available material, a conclusion that there would be no significant adverse effects on air quality by this proposed development and so in accordance with policy was one that the decision-makers were entitled to reach. Counsel for the petitioner ultimately accepted that the narrative at paragraph 4.35 of ENV 18 is not part of the policy as such. There is no dispute that the Cowgate is part of the city centre areas for which an AMQA has been declared. Neither was it disputed that the supportive text to ENV 18 records that the respondent has prepared an action plan setting out measures intended to help reduce vehicle emissions within these city centre areas. None of that narrative can qualify the terms of the policy itself. There was simply no material before the committee to support a conclusion that there would be significant adverse effects on the air quality within the Cowgate if the proposed development took place. The existence of the AQMA was of course a relevant factor and careful consideration had to be given to the plans for the proposed development in that context. However, I cannot accept that the existence of the AQMA was sufficient to invoke policy ENV 18 such that the application had to be refused. It does seem to me that this third argument advanced on behalf of the petitioner strays into the merits of the decision made. It was for the respondent's planning committee to decide between the two conflicting views on this matter. Separately, there is nothing irrational or perverse in the decision to accept one view over the other on the issue of air quality. The third ground of challenge also fails.

Conclusion and Disposal

[38] For the reasons stated above, none of the three grounds of challenge made by the petitioner against the respondent's decision to grant planning permission for this development have been made out. I have no doubt that the petitioner and other residents within the Old Town conservation area are strongly and genuinely opposed to this proposed development. However, no errors in the decision-making process have been established and the approach taken by the respondent on the basis of the available material cannot be regarded as irrational or perverse. I will refuse to grant the orders sought by the petitioner. I will repel the pleas in law for the petitioner and sustain the pleas of the respondent and the interested party, reserving meantime all questions of expenses.