EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 44
XA106/18

Lord Brodie
Lord Drummond Young
Lord Malcolm

OPINION OF THE COURT

delivered by LORD BRODIE

in the appeal under sections 237 and 239 of the Town and Country Planning (Scotland) Act 1997

by

MR AND MRS ALTAF AHMAD

Appellants

against

a decision of Glasgow City Council Planning Local Review Committee dated 17 October 2018 and communicated to the appellants on 18 October 2018

Appellants: Party
Respondent: Burnet; Morton Fraser LLP

13 August 2019

Introduction

[1] This is an appeal, brought in terms of chapter 41 of the Rules of the Court of Session, under sections 237(3A) and 239 of the Town and Country Planning (Scotland) Act 1997 against a decision of the Glasgow City Council Planning Local Review Committee, dated 17 October 2018 and communicated to the appellants on 18 October 2018, refusing an

application for change of the use class of a workshop at 423 Gallowgate, Glasgow to hotel and guesthouse (Class 7) and for associated alterations, including the downtaking of parts of existing buildings. The appellants are party litigants. The respondent to the appeal is Glasgow City Council.

[2] Section 239(1) of the 1997 Act provides that a person aggrieved by any action to which the section applies, and who wishes to question the validity of that action on the grounds that it is not within the powers of the Act, or that any relevant requirement has not been complied with, may make an application to the Court of Session. The Court of Session, if satisfied that the action is outwith the powers of the Act, or that the applicant's interests have been substantially prejudiced by any failure to comply with relevant requirements, may quash the relevant action. In terms of section 237(3A) a relevant action includes any decision or determination in a review conducted by a local planning authority by virtue of section 43A(8) of the 1997 Act, as amended. However, at the outset, it is important to have regard to the limitations on the extent of the jurisdiction conferred on the court by section 239. The planning merits of a proposal giving rise to an appeal are not for the court. These are matters for the planning authority and those to whom its powers are delegated. The court has no such power. Its concern is with legal validity and procedural regularity, not planning judgment: *Carroll* v *Scottish Borders Council* 2016 SC 377 Lord Menzies at para [54].

The proposed development

[3] The development site comprises vacant outbuildings and a yard to the rear of single-storey commercial premises fronting the north side of the Gallowgate, Glasgow. The commercial premises originally formed the ground floor of a traditional tenement building,

the other storeys of which have been taken down. Access to the development site is available through a pend onto the Gallowgate which is currently controlled by a roller shutter door. The commercial premises on either side of the pend include a public house to the east and vacant shop and café buildings to the west. There are recently built flats along the western boundary of the development site and in close proximity to the eastern boundary. The northern boundary backs onto a car parking area associated with the residential flats.

[4] On the site there is a two storey L-shaped building. Together with the other outbuildings it was formally used as an engineering workshop. It has been vacant for a number of years.

[5] The appellants' application sought permission to demolish some of the existing outbuildings and to convert both floors of the L-shaped building to create a number of small format, single aspect en-suite bedrooms, eight on the ground floor and nine on the first floor. Other proposed facilities within the building were two reception areas on the ground floor, one with a small dedicated snack and catering area, and a communal lounge on the first floor. The only changes proposed on the pend elevation to the Gallowgate was the removal of the existing roller shutter and its replacement with a security door.

[6] The application proposed that new window and door openings should be formed in the L-shaped building with all existing windows being replaced. Some of the new window openings would face west with lines of sight towards the existing residential flats on the western boundary of the development site.

[7] The application form accompanying the appellants' application for planning permission described their proposals as: "alterations to vacant engineering workshop to form hotel and guesthouse (17 bedrooms). Change of use and various downtakings and

additions." Based on that description and the format of the proposed development, the appellants' proposals would fall within Class 7, as specified in the Town and Country Planning Use Classes (Scotland) Order 1997, 1997 No 3061 (S 195). Use of the term "guesthouse" would imply that the proposals were for tourist accommodation. Accordingly, the supplementary guidance (SG10) in relation to short stay and tourist accommodation supporting policy CDP10: Meeting Housing Needs, of the Glasgow City Council Local Development Plan, was of relevance to the appellants' application.

Procedural history

[8] The decision under appeal is one made by the planning authority on review of a refusal of permission by an appointed person exercising delegated powers as is provided for by sections 43A and 43B of the 1997 Act, as amended (a procedure discussed by Lord Menzies in *Carroll* v *Scottish Borders Council*). Further provision for schemes of delegation is made in the Town and Country Planning (Schemes of Delegation and Local Review Procedure) (Scotland) Regulations 2013 ("the 2013 Regulations"). In terms of section 43A of the 1997 Act planning authorities are required to prepare schemes of delegation whereby the power under section 37 of the Act to determine applications for permission for local developments is delegated to an appointed person, subject to review by the planning authority. In terms of regulation 7 of the 2013 Regulations such a review is to be conducted by a committee of the planning authority comprising at least three members of the authority (to be known as the "local review body"). The respondent designates its local review body as the Local Review Committee ("the LRC").

[9] The appellants' application was considered by an appointed person in terms of the respondent's scheme of delegation under section 43A of the 1997 Act. One of the

respondent's planning officers prepared a Report of Handling for the application. On 27 June 2017 the respondent's Executive Director for Development and Regeneration Services issued a decision notice refusing the application and providing six reasons for doing so. The appellants sought a review of the refusal of planning permission in terms of section 43A(8) of the 1997 Act. The review was undertaken by the respondent's LRC. The LRC decided that, in accordance with regulation 12 of the 2013 Regulations, it should proceed to determine the review of the application without the need for any further procedure. The LRC was provided with documents and a presentation in relation to the application which was considered at a meeting of the LRC on 26 June 2018. On 17 October 2018 the LRC issued its decision notice refusing the application. The introduction to the decision explained that the LRC was satisfied that it had enough information to determine the review without further procedure. The decision notice included a description of the appellants' proposals at section 2. In sections 3 and 4 it identified the relevant policies of the Local Development Plan and the relevant material considerations which were considered. Section 5 explained the LRC's assessment of the proposal against the relevant planning policies and the material considerations. In section 6 the LRC gave its reasons for its decision to refuse the application. These are identical to the reasons given by the appointed person and are as follows:

> "01 The proposal was not considered to be in accordance with the Development Plan and there were no material considerations which outweighed the proposal's variance with the Development Plan.
>
> 02 The proposed development, by reason of the characteristics of the intended use including the high turnover of occupants, the high level of on-site servicing requirements to facilitate the use and the resultant opportunities for noise and disturbance in close proximity to established residential properties, would have an adverse impact on the character and amenity of the area. The proposals would therefore be contrary to Policy SG10: Meeting Housing Needs of the Glasgow City Development Plan 2017.

03 The proposed development, by reason of the configuration of the site and the introduction of hotel/guesthouse use, would result in the overlooking of established residential properties, to the detriment of the residential amenity. The proposals would therefore be contrary to policy SG10: Meeting Housing Needs of the Glasgow City Development Plan 2017.

04 By reason of the absence of an operational management plan setting out the maintenance, services delivery, waste disposal, laundry and on-site management arrangements, the applicant has failed to demonstrate that proposals can operate without adversely impacting on pedestrian and vehicular safety of surrounding residents, businesses and road users. The proposals would therefore be contrary to policy SG10: Meeting Housing Needs of the Glasgow City Development Plan 2017.

05 The proposed development, by reason of the absence of the on-site amenity provision, would result in substandard levels of amenity for intended short-stay occupants.

06 The proposed development, by reason of the absence of detailed drainage measures to ensure satisfactory sustainable management and safe disposal of surface water, would be contrary to policy SG8: Water Environment of the Glasgow City Development Plan 2017."

Grounds of appeal

[10] The appellants' grounds of appeal are set out in paras [2] to [11] in the following terms:

"[2] Glasgow City Council Local Review Committee (LRC called after) held a meeting on 26th June 2018 exactly after one year from the date of refusal (27th June 2017) by Glasgow city council Planning Department. LRC decision was made on only the informations / photos provided by the Planning officer and did not made any site/surrounding area visit which was necessary to get the right sense of change of use application and could have answered all the objections raised by Planning Officer.

[3] Planning Officer should have referred our review application to Scottish Executive instead of LRC. As LRC is made by most of the same councillors who already objected on our application. So, their decision cannot be on facts and good chances of injustice are present in their decision of refusal.

[4] According to Local Review Bodies Advice and Guidance forum it is strongly recommended that a site visit by the LRC under Regulation 16 will help to reach the fair and unbiased decision. And will be helpful in provision of

justice to application. But unfortunately, neither site visit was done, nor we were given a chance of representation.

[5] Glasgow City Council and LRC failed to understand the requirements/details of planning application and building warrant application. LRC also looked for information which were not required for change of use application but were required in building warrant stage. As a picture has been proved better than one thousand words a site visit (live picture) would have answered all the objections raised by case planning officer.

[6] LRC mentioned two relevant policies in their refusal decision. First CDP8/SG8 Water Environment and SG10 Meeting Housing Needs. Amazingly LRC tried to apply the SG8 policy on our change of use proposal when this policy applies to new developments only. Under this policy LRC mentioned safe disposal of surface water drainage but unfortunately, they forget that our proposal was not introducing or adding any new surface water. Our site is already connected to a public sewer line. This site historically was a tenement building and had 18 flats so all the sewer and drainage lines running from this building should be more than enough for 18 single/double use rooms? Few pages of that policy SG8 are attached here with our appeal. We have highlighted as well as circled the important words and relevant paragraphs. So, our proposal is not contrary to Policy SG8.

[7] The second reason of refusal was SG10 Policy. According to LRC there are residential properties in close proximity to our proposal and these would be overlooked by the proposed hotel/guest house. We are unable to understand how it would be possible when our proposed building is detached and surrounded by a boundary all around it. The concerned flat blocks are opposite to each other and all windows are at the same levels and the distance is lot less than what it would be from ours. So this overlooking objection is baseless and should not be considered valid reason of objection. To clarify this some site photos are attached here with, as well as an email from a well-established professional planning company. Please read their remarks regarding overlooking. This company visited my site and then commented on refusal reasons.

[8] The LRC said the concerns had been raised through representations that proposed use will result in an increase noise from guests arriving and leaving. At present this building is/was used as workshop and LRC failed to prove how a guest house will increase the noise level than a workshop. LRC also failed to produce noise concerns from representation to applicant? All objections were made that our proposal was, like the nearby Bellgrove Hotel. All objection letters are attached here with too.

[9] Then LRC objected on lack of information on our management plan. All details required by policy SG10 were provided. We believe initially these details would be sufficient and more details could have been provided in case

of any further queries by the planning officer. So, this is also a non-valid reason for refusal. Copy of those details is attached here.

[10] Lastly LRC noted provision of on-site amenities including every facility required by Hotel Quality Assurance Guide including provision of kitchen on site but still refused on meals provision. They LRC failed to recognise the difference of self-catering and meals providing accommodations. There are dozens of hotels in the Scotland which provide only packed breakfast and have no option of any cooked meals. For example, most of Travel Lodge hotels do not offer any meals and they accommodate lot more than our proposed number of guests?

[11] We have attached the relevant section of SG-10 policy and are really surprised how our proposal is not to be in accord with SG-10? Our site and application fill full all the requirements stated in section 4 of the SG10 policy. Which clearly says Tourist accommodation bring positive economic benefits to the city by providing a base for the hundred tourists that visit Glasgow every year. This building is lying empty from last 10 years and slowly deteriorating and causing bad impact on surrounding area. Planning officer and LRC failed to understand the importance and neediness of this building to bring back in life and save this building to become a derelict. On one side Scottish Government awarder £3M to refurbish derelict sites in Glasgow and on other side Glasgow City Council Planning Officers not working in line with the Sottish Govt and refusing planning applications on baseless objections and added another number to derelict site list. Lastly we humbly request to the honourable court to read all the objections and our response in the light of all the proofs and pictures provided for this site."

[11] In addition to the numbered grounds, the following points were raised by the appellants in their grounds of appeal:

"The question(s) of law for the opinion of the court are:

- LRC took one year to decide our appeal and kept us in wait, frustrated and in mental torture? This much time is against the Human Rights?

- Glasgow City Council Planning Department should have forwarded our appeal to Scottish Executive not the same people who objected on our planning application at the first place.

- LRC should have visited our site and we should have been given a chance of representation? LRC did not consider, even investigated our review appeal statement so their decision does not meet the justice criteria?

- LRC decided our appeal based on two (2) relevant policies SG8 and SG10. The first policy SG8 does not apply to our change of use application as this policy itself says, it only applies to new developments only.

- LRC decision is straightaway invalid?

- The second policy SG10 encourages Tourist accommodation and laid the key criteria in its section 4.5 and out site meets all the key criteria as following.

- Bellgrove train station is few minutes' walk from our site where train arrives to and from Glasgow city centre every 10 minutes. Bus stops right across the road from where 6 different routes buses come and go to city centre.

- Site has Laundry and two public houses just outside the building and super market Morrisons situated in next block.

- Detached building with surrounding walls all around so no adverse impact on the character and amenity of the area.

- Plenty of parking spaces around this building and three main roads run around our building Gallowgate A89 South of the building, Duke street at the north side and Bellgrove Steert East of the building so no Adverse impact on traffic congestion and parking. More over our site is not situates in the conservation areas of Crosshill; Dennistoun; Glasgow West; Park; St Vincent Crescent and Strathbungo where this kind of developments are discouraged according to section 4A of policy SG10?

- Lastly, this building lying empty from last 10 years, becoming a derelict and Council must do something to bring life in this building next to the city centre?

- Glasgow City Council stopping us to bring a positive impact on this rundown area and creating new jobs for the Locals?"

Submissions for the Parties

Appellants

[12] At the hearing on the Summar Roll, oral submissions were presented on behalf of the appellants by Mr Ahmad. At the outset of his submissions, he indicated that English is

not his first language. His presentation was nevertheless clear and, subject to some elaboration, in line with the grounds of appeal.

[13] He argued that the appellants' application had been determined according to political and local pressure.

[14] Mr Ahmad submitted that the respondent planning authority had skipped a step in the required procedure. The appellants' application ought to have been forwarded to the Scottish Ministers to determine the application on the "ground realities". Instead, the appellants had been forced to present an appeal to this court on a point of law only. The planning officer had delayed in reaching a decision, and then the LRC had taken over a year to determine the review. That had prevented the appellants from presenting their case to the Scottish Ministers, and left them searching for a "flaw in the law".

[15] The appellants had not been given the opportunity to meet with a duty planning officer from Glasgow City Council following upon the initial rejection of their application. They had a right to such a meeting. The respondent's own website stated that persons in the position of the appellants have such a right, with the purpose of the meeting being to discuss the options available going forward. The respondent's duty planning officer had refused to meet with the appellants, citing the appeal period as the reason for the refusal. The duty planning officer deviated from the respondent's own rules and guidance and the appellants had to wait a year for a decision. This was said to be against the appellants' human rights.

[16] Turning to the application itself, Mr Ahmad argued that there had been a lot of political pressure applied to the planning officer who dealt with the application. The appellants had requested meetings with local people and their MSPs in relation to the site, which had been lying empty for 10 or 12 years. It was becoming derelict. The Scottish

Government is paying out millions of pounds to remedy derelict sites all across the country, yet the respondent wishes to produce another derelict building in the middle of the city. The respondent was clearly acting contrary to Scottish Government policy.

[17] The application had been rejected on the basis of two main policies: SG8 and SG10. SG10 deals with the sorts of buildings that will attract a positive outcome for tourist accommodation. The appellants' application fulfilled all of the requirements of SG10: the site has a boundary wall all around it; the building is detached; and there are two bus stops right at the door and ample car parking. Further, the building is already there. The application was only for a change of use; it was not a "new dwelling". The proposal would not put pressure on existing amenities. The hotel/guest house would have only 18 rooms and with an anticipated occupancy level of around fifty percent it was unlikely that eight or nine guests would cause problems for local facilities.

[18] SG8 applies to "new developments" of five or more new dwellings. The appellants' application did not fall into this category. The appellants' proposal would in no way alter the surface water arrangements at the site. The building was originally a residential tenement. In any event, the application involved an element of demolition. Demolition would reduce, not increase, the surface water at the site. The planning officer had been wrong to apply SG8 to the application. Even if it were not the main reason for the refusal of the application, it demonstrated that the decision reached was not one hundred percent correct.

[19] The appellants had contacted local people and their MSPs and found that the locals had been misled. They had been told that the appellants were creating a hostel for homeless people, similar to the nearby Bellgrove Hotel. That objection was said to have originated from Molendinar Park Housing Association. Molendinar had wanted to

purchase the site at the same time as the appellants but for a price below market value. The appellants had been successful in acquiring the site and now Molendinar were trying to create problems for them. There was no evidence that the appellants were creating another Bellgrove Hotel. The respondent had the power to shut down any accommodation which was found to be substandard. The respondent has taken no such action in relation to Bellgrove Hotel; instead the appellants were suffering as a result of the negative impact of that property on the area. The appellants had confirmed that the respondent could come to the hotel at any time, without notice, to review the guest list and could do so as often as was thought necessary. The appellants have offered two or three short term lets at other locations in Glasgow for around 4 or 5 years now. Website links and reviews from previous guests had been provided to the respondent.

[20] The LRC ought to have visited the site; if it had done so, a different decision would have been reached. The respondent may argue that its LRC was not bound to do so, but it was necessary here because of the unique structure of the site. The application could not be understood without visiting the site. The LRC had objected to the application on the ground of "overlooking" but had the LRC visited the site it would have been obvious that no such problem existed. The windows on the gable wall facing onto the street were to be blocked up. There would therefore be no windows or doors with even an oblique view of the Molendinar building. There is housing to the west side of the building (comprising two blocks which face one another) but the distance between the windows on the appellants' building and the windows of the housing blocks is 22 metres. The distance between the windows on the two housing blocks themselves is only 11 metres and the minimum allowable distance is 9 metres. A site visit would have eliminated any concerns.

[21] As regards the LRC's objection on the grounds of the level of amenity offered by the proposed hotel, the appellants submitted that most guests would be individuals from Eastern Europe who had come to explore Glasgow. Ninety-nine percent of guests would arrive at 10 o'clock at night, go straight to bed and be on the road again in the morning. The proposed guest house would have a television in every room, a DVD player and WIFI. There was to be an open plan sitting room with computers and tea and coffee machines and the next phase of the development would see the installation of a gym. The appellants had looked into the facilities offered by many other three star hotels in Glasgow and could not say that any had those facilities on site. Larger hotel chains did not face these kinds of restrictions, even though they offered less in the way of amenity.

[22] Finally, the respondent was wrong to suggest that there was only one stage to planning permission. Every planning application has two stages: the application is made and thereafter the Council ask for more information to allow a building warrant to be obtained. Both stages are dealt with by the planning department. The respondent's own guidelines stated that the appellants had a right to sit down with the planning officer prior to seeking a review. The appellants had been refused that right by the duty planning officer. That would have saved time and money.

Respondent

[23] Counsel for the respondent moved the court to refuse the appeal, adopting the arguments set out in the respondent's note of argument and the points raised in the answers to the grounds of appeal.

[24] Counsel submitted that as this appeal had been brought under section 239 of the 1997 Act, the appellants had to show that the decision of the LRC was either not within its

powers, as set out in the Act, or that one of the requirements in either the Act, or any of the relevant regulations made thereunder, had not been complied with. The appellants' grounds of appeal did not conform to those requirements; they were not restricted to matters of law.

[25] With reference to the appellants' argument that the appeal should have been referred to the Scottish Executive, and the aligned point regarding delay, counsel referred to the 1997 Act, and to the 2013 Regulations. In terms of the legislation, and in particular section 43A of the 1997 Act, each planning authority had to set out a scheme of delegation and procedure for deciding local planning applications. The appellants' application fell to be dealt with according to such a scheme. No procedural step was skipped.

[26] In terms of the legislative framework, section 43A(1) requires each planning authority to prepare a scheme for delegation. Subsection (2) confirms that the decision of any person appointed to determine applications under subsection (1) is to be treated as that of the planning authority. Subsection (8)(a) sets out that where an appointed person refuses an application, then an applicant may seek a review of that decision. That is what happened in the appellants' case. In terms of subsection (8)(c), an applicant may also seek a review where the appointed person has not reached a decision within a prescribed period. That period is prescribed in regulation 8 of the 2013 Regulations, and is currently 2 months. That was not, however, the basis upon which the appellants sought a review in the present case.

[27] The only route to the Scottish Ministers for applicants such as the appellants is located within the provisions related to deemed refusals. Those provisions allow for an application, which would normally fall to be dealt with under the scheme of delegation, to be presented to the Scottish Ministers where: (i) the appointed person fails to make a

decision within the prescribed period of 2 months; (ii) the applicant seeks a review on the basis that the appointed person has so failed; and (iii) the local review body fails to determine the review within a period of 3 months. That is not what happened in this case. There is no general time limit on a review by a local review body. The policy reason for the difference might be that in the ordinary case the applicant has already had a decision in respect of the merits of his application, at least in the first instance. In the case of a deemed refusal, there has been no such determination. It is the double failure on the part of the local authority which opens up the pathway to the Scottish Ministers. There is, however, no provision in the 1997 Act which allows for an appeal to be made to the Scottish Ministers in the circumstances which prevailed in this case.

[28] As was partly explained in *Carroll* v *Scottish Borders Council*, the purpose of the introduction of schemes of delegation was to streamline the planning system by sending appeals for local developments to local review bodies and removing the right of appeal to the Scottish Ministers. The procedure is intended to be "front loaded" and a party to the proceedings under the new scheme is expected to lodge all the materials upon which they intend to rely at an early stage of the procedure, before the appointed person makes his decision. The local review body will normally be expected to conduct a review on the basis of the material before the appointed person. Generally, a party will not be able to introduce and rely upon material not before the appointed person, subject to certain exceptions.

[29] In relation to the site visit, regulation 12 of the 2013 Regulations answers the appellants' complaint. In terms of regulation 12, where the local review body considers there is sufficient information before it to determine the review without further procedure, it is entitled to so determine the review. The appellants appeared to accept that as a matter

of generality. The local review body must have regard to the "review documents" as defined in the 2013 Regulations and determine the review according to the Development Plan unless other material considerations indicate otherwise. Whether the review documents provide sufficient information for the local review body to determine the review is a matter of planning judgement for the local review body (*Carroll*, *supra* at paragraph 54, *Johnston* v *Scottish Ministers* [2016] CSIH 20 at paragraph 12 and *Simson* v *Aberdeenshire Council* 2007 SC 366 at paragraph 23). Whilst the appellants may claim that the site was in some way unique, they had not demonstrated that the decision of the LRC to the effect that they had sufficient information to decide not to undertake a site visit was wholly irrational or *Wednesbury* unreasonable, which is the standard required.

[30] In relation to SG8, it was important that the application was not merely an application for a change of use; it also involved associated alterations to the building and an element of demolition. Although not altering the entire building, there was an element of physical change proposed. The changes were not simply internal. The word development is being used in the policy to describe more than just "new developments". The reference in the decision notice is to paragraph 9.4 of SG8. The wording in paragraph 9.4 is mirrored in the final paragraph of section 5 of the decision notice. Section 9 refers to Scottish Water. This particular building had lain dormant, or at least had not been in full operational use, for 10 years. Changing a building from industrial use to a hotel or some other form of residential use could clearly involve matters with which parts of section 9 are concerned, such as foul drainage and public water connections. However, even if the LRC had been wrong to regard SG8 as relevant to its decision, that made no difference to the outcome of the review. This was clearly a subsidiary reason for

the refusal. The LRC would have found in any event that the proposal failed to comply with the Development Plan for the other reasons stated in the decision notice.

[31] The information referred to by the appellants in relation to window distances was, counsel submitted, likely taken from guidelines issued by other planning authorities on the issue of overlooking. Such guidelines are not required by statute, nor are planning authorities required to follow them. They are simply guidelines, and a decision maker has to make the decision using his or her planning judgement. Any guidance issued by another local authority would not apply in Glasgow; the issue was a matter for the planning judgement of the LRC.

[32] The remainder of the appellants' submissions also went to the planning merits of the application and accordingly were irrelevant to the question before this court.

Decision

The court's jurisdiction

[33] It is evident that the appellants feel frustrated at the refusal of what they consider to be a worthwhile proposal. However, we reiterate the point made at the beginning of this opinion: it is for the local planning authority to determine the merits of applications made in respect of their areas. Should they make an error as to the extent of their legal powers or should they fail to comply with a procedural requirement that has adverse consequences for an applicant, then this court may be applied to in order to provide a remedy. But if they make no such errors this court cannot interfere with their decisions; matters of planning judgment are for planning authorities, not for the court. The principle was authoritatively stated by Lord Hoffmann in his speech in *Tesco Stores* v *Environment*

Secretary [1995] 1 WLR 759 at 780. The passage is familiar and frequently cited in the context of appeals such as this one. It may nevertheless be useful to repeat it:

> "The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into *Wednesbury* irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process.
>
> This distinction between whether something is a material consideration and the weight which it should be given is only one aspect of a fundamental principle of British planning law, namely that the courts are concerned only with the legality of the decision-making process and not with the merits of the decision. 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."

[34] With Lord Hoffmann's statement of principle in mind we turn to consider the points made in the appellants' grounds of appeal in the order that we have summarised them.

Procedural error (grounds 2, 4 and 5)

[35] At paragraph 2 of their grounds of appeal the appellants complain that the LRC, as a local review body acting in terms of the 2013 Regulations, made its decision on the review documents and did not carry out a site inspection "which was necessary to get the right sense of change of use application and could have answered all the objections raised by Planning Officer". The complaint that there was no site inspection is repeated at paragraph 4 where the appellants add: "nor were we given a chance of representation".

[36] The context in which the appellants advance these criticisms of the procedure adopted by the LRC is that the LRC was conducting a review of a decision made on the

basis of information compiled by a planning officer and summarised in the Report on Handling dated 20 June 2017. As the appellants were advised in the notice of refusal of their application, that Report was available for inspection on-line. The notice advised them to view it. The notice included this further information which was applicable in the event that the appellants proposed to require a review (as they were entitled to do in terms of section 43A(8) of the 1997 Act and regulation 8 of the 2013 Regulations):

> "The notice of review must include a statement setting out your reasons for requiring the Planning Local Review Committee to review this case. You must state by what procedure (written representations, hearing session(s), inspection of application site) or combination of procedures you wish the review to be conducted. However, please note that the Planning Local Review Committee will decide on the review procedure to be followed."

The appellants wrote to the LRC on 18 September 2017 providing a response to each of the grounds upon which the appointed person had refused their application. They were critical of the planning officer, indicating that he refused to discuss any matter regarding the application. They also stated that many of the planning officer's points would have been clarified if he had carried out a site inspection. However, the appellants did not propose that the LRC carry out a site inspection, nor did they make any other proposals as to how they wished the review to be conducted.

[37] Critically, as far as the appellants' complaints in relation to the procedure followed by the LRC are concerned, is that, as the 2013 Regulations make clear, it is for the local review body to determine its own procedure: regulations 12 to 15. Determining the appropriate procedure in a particular case is a matter of planning judgement, for the local review body to exercise: *Carroll* at para [55]. It may at any time make an unaccompanied or accompanied site inspection, but it need not do so: regulation 16, and cf *Johnston* v *Scottish Ministers* at para [12]. At paragraph 4 of the appellants' grounds of appeal it is

asserted "An inspection is strongly recommended by the Local Review Body Forum". The appellants have lodged what appears to be an excerpt from a guidance document issued by the Local Review Body Forum. We do not read the excerpt as including any such recommendation. However, informal guidance of this sort is no more than guidance; a local review body exercising the relevant statutory powers has no obligation to follow it.

[38] A local review body must have regard to the review documents, which will include the material provided in support of the planning application and the Report on Handling but, as with matters of procedure, it is for the local review body, exercising their planning judgement, to determine whether the review documents provide sufficient information to enable them to determine the review: regulation 12, *Carroll* at para [55] (4), also *Simson* v *Aberdeen Council* at para [23].

[39] Accordingly, we do not find the respondent to have acted in excess of its powers or to have failed to comply with relevant requirements. We do not see the procedure which was adopted to have been unfair. We cannot therefore uphold grounds [2] [4] or [5].

Unfairness: referral to Scottish Executive (ground [3])

[40] A difficulty with the appellants' contention that the respondent should have referred their review application to Scottish Ministers is that there was no power to do so; rather the respondent was obliged by the terms of section 43A(8) of the 1997 Act and the 2013 Regulations to proceed as it did. In its note of argument the respondent states that none of the councillors who composed the LRC on 26 June 2018 and neither of the officials had objected to the appellants' application. The appellants do not suggest otherwise. We cannot uphold this ground of appeal.

Error as to relevance of SG8 (ground [6])

[41] As counsel submitted, the appellants' application was not simply for change of use; it involved some demolition and reconstruction of the buildings on the development site. The impact of that work on mechanisms of the drainage of surface water and the capacity of existing drains to contain surface water are matters of fact. In the circumstances it was open to the LRC to construe the Local Development Plan as requiring the appellants to comply with paragraph 9.4 of SG8 by providing evidence of consultation and approval in principle from Scottish Water for the surface water discharge prior to the determination of the application. However, even if the LRC were wrong in regarding SG8 as relevant, their error was not material; the appellants' failure to comply with the requirements of SG8 was not critical to the decision to refuse the application. We do not uphold this ground of appeal.

Error as to adverse effects and potential benefits in applying SG10 (grounds [7] to [11])

[42] Counsel for the respondent submitted that grounds [7] to [11] of the appellants' grounds of appeal are all, in essence, complaints about the respondent's conclusions in relation to the planning merits of the application. We agree. The appellants say that the LRC attached too much weight to the (perhaps limited) intrusion on the privacy of the neighbouring flats, the potential for noise and disturbance and the limited provision for cooked meals which were associated with the proposal, while attaching too little weight to the benefits which the proposal offered. From the planning perspective that may or may not be correct but, as was explained by Lord Hoffmann in *Tesco Stores Limited*, matters of planning judgement are for planning authorities to make and not the courts. Again, determining the adequacy of the appellants' management plan was a matter of planning

judgement. We cannot uphold any of these grounds of appeal. We would add this. The appellants' note of argument refers to alleged bias, "local and political pressure", and general injustice in respect of the decision. However, on the information before the court there is no good or sufficient reason to conclude that the procedure was tainted by bias or impropriety on the part of the members of the LRC or anyone else.

[43] The appeal must accordingly be refused. We reserve all questions of expenses.