OUTER HOUSE, COURT OF SESSION

[2025] CSOH 105

P1046/24

OPINION OF LORD ERICHT

In the Petition of

HELENSBURGH COMMUNITY COUNCIL

Petitioner

for

Judicial Review

Petitioner: Dean of Faculty KC, Middleton; Gilson Gray LLP
Respondent: D Thomson KC, Blair; Brodies LLP

19 November 2025

Introduction

[1] In the heyday of steamers, steam ships plied their trade between Helensburgh and Glasgow from a pier jutting out from the beach at Helensburgh. Adjoining the pier, and also jutting out into the sea, was a block of land. The pier is no longer used for shipping, but the pier and the block of land remain. The land is in a sensitive site in the middle of the waterfront. Until recently, the part of the block nearest the beach had been occupied by swimming baths. The swimming baths were demolished, and new swimming baths were built on the part of the block nearest the sea. The new swimming baths were completed in late 2022.

[2] That left an area of land on the landward side of the block on which the swimming pool used to be situated, namely the Helensburgh Waterfront Development (Commercial Area) ("the Area").

[3] The question of what is to be done with the Area is a matter of great local controversy. The respondent, who is the local authority and who owns the site, is proposing to sell it to be used for a supermarket. On 15 August 2024, the respondent's Policy and Resources Committee made a decision to select a preferred developer for the Area. The preferred developer wishes to build a supermarket on the site.

[4] The petitioner, who is the Community Council, take a different view. They are not in favour of the Area being used as a supermarket. They would prefer a community use.

The decision challenged in this judicial review

[5] The minutes of the respondent's Policy and Resources Committee of 15 August 2024 record the following decision as having been made:

> **"19. HELENSBURGH WATERFRONT DEVELOPMENT (COMMERCIAL AREA) - UPDATE & SELECTION OF PREFERRED DEVELOPER**
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> The Committee gave consideration to a report providing an update on the Helensburgh Waterfront Development Commercial Area and the selection of a preferred developer.
>
> **Decision**
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> The Policy and Resources Committee agreed the recommendations as per the submitted report. (Reference: Report by Executive Director with responsibility for Commercial Services dated 23 July 2024, submitted)."

[6] The recommendations in the report by the executive director were:

> **"RECOMMENDATIONS**
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> 1.4 That the Policy and Resources Committee:
>
> 1.4.1 Note representatives of the Property Development Working Group (PDWG) interviewed the two selected developers on 23rd April 2024 to assess their proposals with [F] being recommended as the selected preferred developer as outlined in Appendix A. In addition, commercial consultant, Avison Young's review of the final proposals is attached as Appendix B, which also supports this recommendation.
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> 1.4.2 Authorise officers to proceed with negotiations to agree detailed Heads of Terms with [F] for the sale of the Helensburgh Waterfront commercial area with the provisionally agreed terms to be reported to a future Policy and Resources Committee."

Parties' positions

[7] The petitioner sought declarator that the respondent's decision of 15 August 2024 to select a preferred developer for the Helensburgh Waterfront Development (Commercial Area) was made unlawfully, and reduction of the decision. It did so on the grounds that, (1) the public consultation was not carried out fairly, (2) the product of the consultation was not taken into account by the decision-maker, (3) no adequate reasons were given, (4) the respondent had misdirected itself as to the decisions that were open to be made by the council on 15 August. The respondent opposed the petition on all of these grounds, and also argued that the petition was incompetent and time-barred and that the petitioner lacked interest.

The nature of the decision

[8] It is helpful to set out at the outset the nature of the decision which the committee was being asked to make. This was set out in an affidavit by the respondent's executive director Mr Hendry, who stated:

> "16 The Members at the Committee Meeting on 15 August 2024 had sufficient information to make an informed decision on the issue that was presented to them to decide, namely whether the recommendation on a preferred bidder should be supported. Members may not agree with the recommendations of the report in front of them. My experience is that in the vast majority of cases they do. Equally, if they are unhappy or do not agree with the recommendation, or need more information, it is open to them to submit a formal motion for agreement by the Council or Committee, seeking to reject the recommendations, putting forward a competent alternative proposition. They are not obliged to follow an officer recommendation unless the alternative that they are looking for is not competent in some way or not lawful. They would have been entitled to have the matter continued for further consideration or more information. My expectation is that the Members of the Committee would be well aware that they were not bound to accept any particular recommendation.
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> …
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> 21 … It was not the case that the Committee were given any advice to the effect that they were compelled to accept a recommendation or were bound by earlier decision making. Members of the Committee expressed no view to the effect that they considered themselves legally bound to accept either of the two shortleeted proposals. As I have explained that is not how a Committee works. … if I had had any concerns arising from the discussion which took place I would have advised the Committee that they had a complete discretion to accept neither bid or to continue matters if they wished for further discussion or information."

Distinction between planning decisions and decisions relating to sale of property

[9] It is important to bear in mind that the respondent has two separate and distinct roles in relation to the Area. As planning authority, it is required to make a decision on any planning applications that may be made in respect of the Area. As heritable proprietor of the Area it may make a decision to dispose of the Area. The challenge taken in this judicial

review is against the decision, taken as heritable proprietor as part of the process of selling its property, to appoint a preferred bidder for the purchase of the Area.

[10] If the sale to the preferred bidder goes ahead, the proposed heads of terms make clear that the sale will be subject to obtaining planning permission. So even if the respondent sells the property to a preferred bidder who wishes to build a supermarket, then that is not the end of the matter. Another committee of the respondent, this time in its role as planning authority, will have to decide whether to grant planning permission. As part of the normal planning process, there will be consultation and objections can be made. The decision of the respondent's Policy and Resources Committee as to whom to sell the respondent's property, and the decision of the respondents' planning committee as to whether the buyer will receive planning permission, are separate and distinct decisions. This judicial review is concerned only with the sale of the heritable property.

History of the respondent's decision-making in respect of the sale of the area

[11] After the opening of the new swimming baths, the respondent's focus moved to development of the site where the old swimming pool had previously stood. The respondent's Head of Commercial Services, Mr McLaughlin explains in an affidavit that the respondent was uncertain of what the retail environment was in 2022, post Covid, so it proposed to cast a net out wide for all expressions of interest. It was conscious that a retail option might not be an option, and it was important that expressions of interest from a range of quarters be sought.

[12] On 13 December 2022 a paper entitled "Helensburgh Waterfront Development Update" was presented to the Helensburgh and Lomond Area Committee. The paper stated:

"3.6 The Full Business Case for the Leisure Centre was approved by the Business Continuity Committee (main Council Committee during COVID Pandemic) on 25th June 2020 as part of the contract award for the development of the leisure centre. The Business Case approval was also underpinned by forecast future income / capital receipt from commercially developing the remaining plot abutting West Clyde Street.

MARKETING

3.7 It is worth noting that there are, and always have been, mixed views on the proposed development of the site. This site fronting West Clyde Street is a small component (1/4 to 1/3) of this larger regeneration scheme and is part of the designated Town Centre of Helensburgh where a mix of different uses are permitted - subject to normal satisfaction of planning requirements. In the current market where there has been much change in society and development sector (cost of construction, consumer habits, financial lending) it is not in the Council's interest to speculatively develop the site until there is greater clarity on sustainable end use. As stated above, the planning designations that MAY be suitable for the site are diverse and there is scope to attract inward investment, multiple uses or range of facilities. All of this would be subject to individual or collective Planning Applications and community consultation however until we understand the level and type of demand for the location it is premature to judge what will ultimately be developed on the site. To be clear, and to dispel speculation there is no 'done deal' or proposition to build at the site at this stage as currently there is no favoured end user that is proved to be sustainable. Furthermore, we are not solely seeking expressions from interest from retailers – other uses for example leisure restaurants, office, professional services or café may also be compatible either in isolation or as a mix of activity. Accordingly commencing the marketing process and seeking expressions of interest will allow some reality to be brought into the process and give an indication of what is viable. This stage will also give the opportunity for all types of operators to consider the site and make a proposition that is economically sustainable and befitting of the site.

3.8 The Council has recently appointed Avison Young surveyors … to assist with the marketing of Helensburgh Waterfront. This will allow the site to be marketed to a much wider audience and for all potential options to be considered which may include operators or developers looking to invest in Helensburgh. The marketing stage will also help to clarify how the site could be delivered. The general preference is for the council to generate a long term income from the site to support the ongoing delivery of services however this will be determined in part by the proposals received. Generating income from the site is consistent with the financial justification case that part funded the new swimming pool.

3.9 As part of the wider development of the waterfront site a 265 space car park has been developed to service the Leisure Centre, commercial area and the general town centre of Helensburgh. The car park will be operated and managed by Roads & Infrastructure and it was agreed at the council meeting on 29th September 2022 that parking would be free for the first 2 hours with a Traffic Regulation Order in consultation to manage this."

[13] The conclusions of the report were:

> **"4. CONCLUSIONS**
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> 4.1 The waterfront retail site is of strategic importance to the council and to Helensburgh and therefore the development options require to be carefully considered.
>
> 4.2 The initial marketing stage commencing from December 2022 will allow operators and developers of all types of proposed use to make their proposals which will help to establish the real market demand for the location.
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> 4.3 It is understandable there is wide interest in future use of the site due to its prominent location and historically there has been varied views on what form and function would serve the town best. It is important to consider this within the context of the long term strategy for the waterfront including the approved masterplan, local development plan and business case for the waterfront development and move from theoretical land use debate to identify real world opportunities in the current economic climate through this marketing exercise."

[14] The minutes record the following decision as having been made:

> **"Decision**
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> The Helensburgh and Lomond Area Committee:
>
> 1. noted the successful delivery of the new Helensburgh Leisure Centre, car parking, public realm and landscaping as it nears completion along with improvements to the pier;
> 2. noted that the skatepark equipment will be reinstated as part of the current works and that further discussions will be undertaken with the group regarding incorporating the skatepark into the next phase of the development;
> 3. noted the adopted planning policy position that permits a range of uses including leisure, retail, open space or other commercial uses and that any proposal will be subject to a separate planning application and community consultation;
> 4. noted the challenges around construction costs and the importance of financial sustainability in terms of future use and Business Case associated with Helensburgh Leisure Centre; and
> 5. agreed to marketing the site of the former pool for all expressions of interest with outcomes to be brought to a future meeting of the Area Committee."

[15] The minutes also record that Dr Peter Brown, the current convener of the petitioner, asked various questions about the waterfront development. In response to one of

Dr Brown's questions, Ross McLaughlin, head of commercial services for the respondents, stated:

> "Mr McLaughlin advised that the community would be consulted once the marketing exercise has been completed and there is an idea in terms of what the propositions for the site might be. This would give a degree of reason and move things forward."

[16] The respondent then proceeded to market the site. The marketing process had two stages. First, interested parties were invited to submit initial proposals. These proposals were expected to be high level – the council were seeking to understand which parties were interested in what use and, in general terms, what they proposed for the site. The respondent did not ask for financial details at that stage. The second stage was for preferred bidders to submit full financial offers for the respondent's consideration.

[17] At stage one, the respondent received nine expressions of interest. There were bidders across a wide range of activities and proposed land uses, including restaurants, drive-throughs and hotels. The petitioner was one of the bidders. Its bid was for a skate park, car park, coach park and events space. If that bid had been successful a community trust would have been set up to own the site and an application for funding would have been made to the Scottish Land Fund for funding to buy and run the site. The petitioner's bid was unsuccessful and they are no longer interested in bidding.

[18] The respondent engaged Ryder Architecture Limited to conduct a public engagement exercise. As Ryder explained in their report, "this activity was not a form of public consultation, but was targeted engagement to help achieve an inclusive approach".

[19] The thinking behind the engagement exercise was explained by Mr McLaughlin in his affidavit:

> "We were very clear that there was no statutory requirement to undertake any sort of community engagement when assessing the bids. The Council was using its powers

to consider a disposal of land as a landowner. At this stage all that was contemplated was a process which would lead to a final decision on who the preferred bidder might be, as opposed to a final and definite decision on disposal. In this case, though, the PDWG [ie the respondent's Property Development Working Group] agreed at the outset that it would seek feedback from the community on the proposals. This was partly because of the nature of the site, being in the town centre and a focal point of Helensburgh. We also wanted to ensure that the councillors making the decision on which bids should be taken forward to a final decision on the preferred bidder had all the information relevant to making that decision. We felt that the councillors would want to know what the community thought about the proposals. As I have explained, this was within the context of the principles established through earlier statutory consultation leading to Local Development Plan 2 and the necessity to have statutory consultation and mandatory pre-consultation on any subsequent planning application …

As this was an additional step, there was no process as defined by statute. There was no requirement for disposals of this nature, including any minimum time for holding these workshops. The intensive week was deemed to be an efficient and cost-conscious use of public sector resources, particularly as a specialist community consultation firm from England were instructed. Efficiency was also a commercial choice, as large organisations who had expressed interest could go elsewhere in a competitive market. In Argyll, being more rural and on the periphery, we wanted to move with a pace which would give confidence to the private sector."

[20] The engagement exercise was held over the course of a week from 17 – 23 June 2023. It included drop-in sessions and targeted sessions to cover a variety of age groups and interests. Invites were sent to 63 community groups, eight Community Councils and publicised on social media. No invitation was sent to the petitioners as they were bidders. In total 83 people participated in the engagement event. The methodology was set out in the Ryder Report as follows:

"With the exception of the schools engagement, at each session attendees were shown five sets of images to aid discussion. These sets were grouped to represent the range of options currently being put forward for the Waterfront site, in terms of broad function or type. It was explained to all attendees upon arrival that the images were for illustrative purposes only, and were not intended to represent any particular brands, size or design of building.

Attendees were invited to identify any images they particularly liked or disliked, and discuss the pros and cons of each option (or individual parts thereof).

> At the schools engagement, pupils were invited to talk about what they would like to see in their town, and draw their ideas for the Waterfront site."

[21] Ryder sought feedback on various options:

- Convenience retail/fast food
- Open space/community use
- Multi-storey retail/residential/exhibition space
- Multi-storey retail/hotel
- Retail/community space

[22] At the engagement meeting those attending were given red and green dot stickers and were shown five visual boards with various images on them. The images were generic images relating to the options, and were not representative of the particular bids. Those attending were asked to stick either a red or green sticker on the images depending on whether they liked them or not. Although the petitioner had not been invited to take part, community councillors were not excluded from the engagement event. Professor McNally attended and provided an affidavit describing what happened at the event. Data as to the number of red or green dots on each particular image was not included in the Ryder Report. When Professor McNally subsequently asked Ryder Architecture for this data, he was referred to the respondent and the respondent's David Allan explained to him that the data was not available as the consultation had been a qualitative rather than quantitative engagement for ingathering numbers. The Ryder Report concluded: "There was no single consensus on any of the five options, with each generating a range of pros and cons".

[23] At stage one of the marketing process there were nine expressions of interest including a mix of international, national and local bidders ranging in use from community, infrastructure, retail, hotel and food retail. Having received and considered the Ryder

Report, the PDWG assessed the bids in August 2023. They prepared a shortlist of seven of the nine bidders that they thought should be invited to submit full financial offers. The majority of these were not supermarket options.

[24] The Helensburgh and Lomond Area Committee met again on 12 September 2023. The minutes of the meeting record the following:

> "13. HELENSBURGH WATERFRONT DEVELOPMENT (COMMERCIAL AREA) - UPDATE & SHORTLISTING OF OFFERS
>
> The development of Helensburgh Waterfront has been a long term project and following completion of the construction of the leisure centre focus has moved to the site of the old swimming pool which is proposed primarily for commercial development. Consideration was given to a report which sought agreement for the shortlisted candidates to move onto the final stage, the report also provided an update on the outcomes of the associated public engagement exercise.
>
> **Decision**
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> The Helensburgh and Lomond Area Committee:
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> 1. noted the outcomes of the public engagement exercise undertaken by Ryder Architecture contained at Appendix A and that this report would be made available to the public;
> 2. noted the varied interest in the site and the summary of the nine proposals received as outlined paragraph 3.4 and in Appendix B within the report;
> 3. noted the Property Development Working Group had met in August 2023 to score and assess the 9 proposals with 7 being shortlisted to proceed to next stage for full financial offers as outlined in Appendix C within the report;
> 4. noted Appendices B and C are publicly restricted given commercially and financially sensitive nature of the live bidding process; and
> 5. agreed that for the second stage of full financial offers would be assessed against criteria outlined at paragraph 5.2 and Appendix C within the report.
>
> (Reference: Report by Executive Director with responsibility for Commercial Services, dated 9 August 2023, submitted)"

[25] The report considered by the council included the following:

> "2.0 RECOMMENDATIONS
>
> 2.1 That the H&L Area Committee:

2.1.1 Note the outcomes of the public engagement exercise undertaken by Ryder Architecture contained at Appendix A and that this report will be made available to the public.
2.1.2 Note the varied interest in the site and the summary of the nine proposals received as outlined paragraph 3.4 below and in Appendix B.
2.1.3 Note the Property Development Working Group (PDWG) have met in August 2023 to score and assess the 9 proposals with 7 being shortlisted to proceed to next stage for full financial offers as outlined in Appendix C.
2.1.4 Note Appendices B and C are publicly restricted given commercially and financially sensitive nature of the live bidding process;
2.1.5 Agree that for the second stage of full financial offers will be assessed against criteria outlined at paragraph 5.2 below and Appendix C.

3.0 BACKGROUND & SUMMARY OF OFFERS

3.1 The development of Helensburgh Waterfront is a key project for the council. Following completion of the Leisure Centre and car park in early 2023 the focus has now moved onto the commercial area.
3.2 Given the public interest in the site and taking cognisance of Helensburgh Community Council's (HCC) representations it was agreed to undertake a 2 stage marketing process to allow for a public engagement exercise to be undertaken after the first stage. It should be noted that this engagement processes [sic] focussed at local groups and businesses is additional to formal community consolation [sic]that will come once a firm proposal is formed and planning application submitted. It was also recommended by our commercial agent to undertake a 2 stage process as it allows a shortlist of most credible proposals to be worked up to more developed business cases and financial modelling.
3.3 The first stage (non-financial) marketing exercise had a closing date of 3rd May 2023 and the 9 proposals received are summarised in Appendix B. This Appendix is restricted as it contains commercially sensitive information.
3.4 The 9 expressions of interest are a mix of international, national and local bidders ranging in use from community, infrastructure, retail, hotel and food retail. The proposals also range in scale from open space through small scale buildings to multi storey developments.
3.5 Some proposals have been fairly detailed whereas others are submitted in summary at this stage. Additional detail from all will be required to be formally assessed as part of Stage 2.

4.0 PUBLIC ENGAGEMENT EXERCISE

4.1 Given the public interest in the site a public engagement exercise was undertaken in June 2023. There will be a statutory period of community consultation when a formal planning application has been submitted or pre-application consultation takes place. However, the intention was to engage more widely than statutory obligations to help shape the assessment process of Stage 1 offers. The aim is also to try to engage with a wide range of groups –

some of which may not tend to feedback to traditional public meetings, statutory consultations or harder to reach groups.

4.2 The public engagement exercise was managed by Ryder Architecture's engagement specialist team and invites were sent to 63 community groups, 8 community councils and widely advertised on social media. In total 83 people participated in the events and separate sessions were undertaken with the local schools. Helensburgh Community Council were unable to take part in the public engagement exercise as they submitted a proposal for the site which created a potential conflict of interest.

4.3 As noted within the report at Appendix A, there was no single consensus on any of the options which were presented with each generating pros and cons. However some key themes which came out of the sessions were as follows:

- Several attendees felt strongly that anything much higher than a single storey building would not be desirable, as it would block the views across the water. The site is felt to be a prime spot to attract visitors and enjoy the open aspect so, whilst many are not averse to some kind of building or units on the site, they would like an attractive design that is in keeping with the existing leisure centre.
- Overall there was a strong preference for an option with at least some outdoor recreation space, ideally with seating and activities suitable for locals and visitors. Whilst some liked the idea of event space, others pointed out that there is already plenty of provision such as Civic Centre indoor / outdoor event area, Colquhoun Square event area, Hermitage Park event area, Kidston Park, Helensburgh Pier car park pop up events facilities.
- Several attendees acknowledged that a fully open, non-commercial public space would struggle to secure funding and was therefore unlikely. Many also commented that the town lacks indoor attractions, and an open air space would not be particularly useful in poor weather for much of the year, therefore a combined indoor / outdoor offer might be preferable.
- The prospect of retail / fast food was of considerable concern to some attendees, who are worried that it will have a damaging impact on local businesses which are already struggling. Concerns included an overprovision of certain types of retail or food offerings, creating more competition, and a concentration of business in the centre of town which could detract from those businesses based further along the promenade. However, younger people were particularly interested in high street chains such as Starbucks.
- Others would welcome a retail or hospitality option, provided it is in keeping with the needs of the town. For some, this could be a supermarket. For others, a clothes shop would be desirable since the recent loss of clothing retailers in the town. Some noted the setting would be ideal for a bar or restaurant looking out over the water to create a destination with a real wow factor.
- The lack of indoor recreation space in Helensburgh was a recurring theme across most sessions, and this was felt to be lacking in the current

options for the site. Many people would like to see something that appeals to both locals and visitors, perhaps with a flexible, multi-use space that could change uses throughout the year. Suggestions ranged from indoor sports courts to activities such as bowling and climbing walls, as well as some kind of art space or museum dedicated to local history, such as John Logie Baird.

- The option including a general community space received mixed feedback. People were generally positive about such a space in theory, however some pointed out that there are already many such spaces available in Helensburgh in church halls and private buildings. There was positive feedback for an event / exhibition space, if perhaps it could be combined for community use.
- Likewise, the prospect of a hotel received mixed feedback. It was considered by some attendees to be a real need in Helensburgh, as they struggle to find rooms for friends and family. The Waterfront site could provide a very attractive spot for visitors to enjoy the view, perhaps with associated restaurants and bars. For others, there is sufficient existing provision and they were concerned a new hotel would take away customers from local businesses
- The issue of a skate park was discussed at every session, and is clearly a subject close to the hearts of many Helensburgh residents. There are strong feelings both for and against having the skate park at the Waterfront site, but most agree a park would be an asset.
- Coach parking was also a hot topic, with many people observing the need for Helensburgh to maintain its visitor numbers to support local businesses - with more coach parking a necessity. Whilst some could see the value of having coach parking on the Waterfront site, most however thought it should go elsewhere, with perhaps only a drop off and pick up point at the Waterfront.

4.4 Officers have also instructed a retail assessment to be undertaken to assess the potential impact of any retail / commercial development and to assess if it would be beneficial in retaining spend which is currently lost to other surrounding towns. While this isn’t required for a town centre development site it will hopefully assist to address some of the concerns raised in the community engagement process.

5.0 ASSESSMENT OF OFFERS FRAMEWORK AND SHORTLISTING

5.1 The Property Development Working Group (PDWG) consists of officers from a wide range of services to ensure that a spread of factors are taken into account when assessing the proposal received. For this exercise officers from Estates, Economic Development, Communities & Partnerships, Planning, Roads, Legal and Finance were represented.

5.2 The group assessed the proposals based on the following criteria which will also be the format for consideration of offers at Stage 2:

1. Economic development
   - Potential Economic Benefits (e.g. local employment and recruitment, salaries, level of investment, town centre economic compatibility, seasonality)
   - Potential Indirect and Induced Benefits (e.g. purchase of local goods and services, leakage of expenditure to other areas)
2. Planning / Transport Considerations
   - Consistency with Development Plan and deliverability in terms of parking, access and transport requirements
   - Potential deliverability in terms of scale and mass based on information currently available
3. Legal Considerations / Governance / Risk
4. Community Feedback
   - Based on Community Engagement Process (June 2023)
5. Financial outcomes
   - Potential capital or revenue income or ongoing revenue burden

5.3 For the initial proposals all criteria were weighted the same to give a fair reflection on varying degree of detail submitted at this initial stage. However it should be noted that for the second stage of full financial offers (i.e. once more detail has been submitted) the Economic Development benefits and Financial Outcomes will be weighted higher due to the requirement to obtain a material contribution to the cost of construction of the new Leisure Centre (which was part of the business case for its construction) and the aims of the project overall to be a mixed use and regeneration opportunity for the town centre.

5.4 The PDWG summary assessment of the offers and assessment criteria is attached as Appendix C which is publicly restricted due to the commercially sensitive information contained within it. From this exercise it was decided to proceed with 7 of the proposals being asked to submit full financial offers. This leaves 2 proposals which will not proceed further in the process.

5.5 Avison Young, commercial consultants who marketed the site on behalf of the council also assisted in the assessment of the applications. They have assessed them at a high level based on quality, compliance, financial covenant, experience, jobs created and NDR revenue. Avison Young have advised that they are satisfied that a number of the parties are capable of delivering a quality development of the site and moving to the second stage.

6.0 NEXT STEPS

6.1 Avison Young will now be instructed to commence the second stage of the marketing process seeking full financial offers from the remaining parties who have been selected from the engagement process.

6.2 This will require detailed information to be issued to allow competent offers to be submitted including confirmation of titles, site investigation reports, services information, parking / access arrangements and planning considerations.

6.3 Officers have also instructed a retail assessment to be undertaken to assess the potential impact of any retail / commercial development and to assess if it would be beneficial in retaining spend which is currently lost to other surrounding towns. While this isn’t required for a town centre development site it will respond to some of the issues raised in the community engagement process relating to retail capacity, leakage of spend and market.

6.4 An order has been placed to repair or replace temporary Skatepark equipment at the site to satisfy planning conditions attached to the Leisure Centre. Expectation is that it will be installed during autumn 2023. £80,000 has also been allocated by Council as part of Place Based Investment (PBI) fund to support a long term solution for the skatepark. A report focussed on skatepark matters will be considered separately H&L Area Committee.

6.5 On receipt of the full financial offers a further assessment will be undertaken as there may be a variety of tenures proposed to deliver the site and specialist advice may be required depending on the details received.

7.0 CONCLUSIONS

7.1 The initial marketing of the site has generated a strong level of interest and it is important to make the most of this interest to generate strong full financial offers. The assessment of the initial proposals has been undertaken with a number of good proposals progressing to the next stage.

7.2 The community engagement exercise was well received and generated a wide variety of views along with some general themes for members to consider as the project progresses. Concerns around the impact of retail / commercial development of the site will be addressed by a retail study which has been instructed.

7.3 The next steps are outlined within the report but it is important to note that the Economic Development and Financial Outcomes will become more important when the second stage offers are received.”

[26] Five full financial offers were received at stage two. Having scored the bids, the PDWG decided to recommend the two best scoring proposals be shortlisted for the next stage. Although both options were retail, the community engagement exercise formed part of the two-stage process, narrowing down the original nine bidders.

[27] The Helensburgh and Lomond Area Committee met again on 12 March 2024. The minutes of the meeting record the following:

“12. HELENSBURGH WATERFRONT DEVELOPMENT (COMMERCIAL AREA) - UPDATE & SHORTLISTING OF FINAL OFFERS

The Committee gave consideration to a report which highlighted the assessment of the final propositions and candidates selected as preferred bidders to move into the interview process and detailed negotiations. The report also noted the completion of the retail study, which supports commercial development of the site.

…

Decision

The Helensburgh and Lomond Area Committee:

1. noted and considered the content of the retail study completed by Colliers Surveyors at Appendix A, which supports commercial development of the site to support the long-term viability of the town centre;

2. noted and considered the varied interest in the site and the summary of the five proposals received as outlined in paragraph 4.4 and in Appendix B;

3. noted and considered, commercial consultant, Avison Young's review of the proposals attached as Appendix D;

4. noted and approved the Property Development Working Group's assessment on 19th January 2024 of the 5 proposals with 2 being selected as preferred bidders as outlined in Appendix C;

5. noted appendices B, C & D are publicly restricted given commercially and financially sensitive nature of the live bidding process; and

6. agreed that a Business Day be held following the interview process and before the final report is presented to the Policy and Resources Committee.

(Reference: Report by Executive Director with responsibility for Commercial Services, dated 12 February 2024, submitted)"

[28] The report considered by the council included the following:

"3.0 RECOMMENDATIONS

3.1 That the H&L Area Committee:

3.1.1 Note and consider the content of the retail study completed by Colliers Surveyors at Appendix A, which supports commercial development of the site to support the long-term viability of the town centre.
3.1.2 Note and consider the varied interest in the site and the summary of the five proposals received as outlined in paragraph 4.4 below and in Appendix B.
3.1.3 Note and consider, commercial consultant, Avison Young's review of the proposals attached as Appendix D.
3.1.4 Note and approve the Property Development Working Group's (PDWG) assessment on 19th January 2024 of the 5 proposals with 2 being selected as preferred bidders as outlined in Appendix C.

3.1.5 Note appendices B, C & D are publicly restricted given commercially and financially sensitive nature of the live bidding process.

4.0 BACKGROUND & SUMMARY OF OFFERS

4.1 The development of Helensburgh Waterfront is a key project for the council. Following completion of the Leisure Centre and car park in early 2023 the focus has now moved onto the commercial area.

4.2 Given the public interest in the site and taking cognisance of Helensburgh Community Council's representations it was agreed to undertake a 2 stage marketing process to allow for a public engagement exercise to be undertaken after the first stage. It should be noted that this engagement processes [sic], focussed at local groups and businesses, was additional to formal community consolation [sic] that will come once a firm proposal is formed and planning application submitted. It was also recommended by our commercial agent to undertake a 2 stage process as it allows a shortlist of most credible proposals to be worked up to more developed business cases and financial modelling.

4.3 The second stage marketing exercise had a closing date of 6th December 2023 and the 5 proposals received are summarised in Appendix B. This Appendix is restricted as it contains commercially sensitive information.

4.4 The 5 propositions are from a mix of international, national and local bidders ranging in use from community, infrastructure, retail, hotel, restaurant and food retail. The proposals also range in scale from community space through small scale buildings to multi storey developments.

4.5 As agreed at the Area Committee on 12th December 2023, officers have commenced further investigations into the option of developing a new skatepark at Kidston Park. DB3 Architects are supporting this work and will be undertaking topographical surveys of the park and initial design work to be discussed with the Helensburgh Skatepark Group.

5.0 RETAIL ASSESSMENT

5.1 Officers also instructed a retail assessment to be undertaken to assess the potential impact of any retail / commercial development and to assess if it would be beneficial in retaining spend which is currently lost to other surrounding towns. While this is not required for a town centre development site, it will hopefully assist to address some of the concerns raised in the community engagement process. It is notable that adjacent towns such as Dumbarton and Alexandria are progressing with town centre commercial developments and there is a risk that Helensburgh may see further expenditure leaking to these centres if no action is taken.

5.2 The study was undertaken by Colliers Surveyors and the full report is available at Appendix A. The report followed the same format as the previous studies undertaken in 2007 and 2011 and examined 2 scenarios. Firstly, where Helensburgh retains its current retail market share and secondly where the town claws back a proportion of the expenditure leakage from competing towns.

5.3 Under Scenario 2, Helensburgh could improve its market share of expenditure within the survey area, which would justify additional comparison (non-food) of circa 3,000sqm to 5,000sqm gross floor space over the next 5 to 10 years. It is similarly noted there is also opportunity to further improve Helensburgh's market share to justify the provision of an additional convenience (food) of circa 2,000 – 2,500sqm gross floor space over the next 5 to 10-year period.

5.4 Accordingly, the study supports the council's wider development strategy for the waterfront site as a multi-use space with the £22m phase of leisure development, car parking and public amenity space already completed. The development of the commercial area will compliment this with the retail element a critical component of promoting the long-term viability of the town centre. The study concludes that the commercial development of the Helensburgh Waterfront site will:

- assist in ensuring the town becomes as self-sufficient as possible for retail provision,
- reclaim leaked comparison and convenience retail expenditure,
- complement the existing retail offer in Helensburgh town centre through increased footfall,
- support the wider range of existing services within the town centre,
- promote a mixed use redevelopment of the waterfront site to increase shared trips for shopping and leisure anchoring further the waterfront site into the shopping and leisure fabric of the town centre to safeguard its current and future role as an important shopping and service centre,
- support Helensburgh as a public Transport Hub for rail and bus. Developing this site provides the required retail floor space in an accessible location well served by public transport to not only promote sustainable development, but also ensure access is available to members of the community who do not own a car.

6.0 ASSESSMENT OF OFFERS FRAMEWORK AND SHORTLISTING

6.1 The Property Development Working Group (PDWG) consists of officers from a wide range of services to ensure that a spread of factors are taken into account when assessing the proposal received. For this exercise officers from Estates, Economic Development, Communities & Partnerships, Planning, Roads, Legal and Finance were represented.

6.2 The group assessed the proposals based on the following criteria as was agreed by the area committee on 12th September 2023. This was similar to the criteria from Stage 1 but the offers at Stage 2 included financial proposals from the parties to be included in the assessment.

<u>1. Economic development</u>

- Potential Economic Benefits (e.g. local employment and recruitment, salaries, level of investment, town centre economic compatibility, seasonality)
- Potential Indirect and Induced Benefits (e.g. purchase of local goods and services, leakage of expenditure to other areas)

2. Planning / Transport Considerations

- Consistency with Development Plan and deliverability in terms of parking, access and transport requirements
- Potential deliverability in terms of scale and mass based on information currently available

3. Legal Considerations / Governance / Risk

4. Community Feedback

- Based on Community Engagement Process (June 2023) and general community feedback.

5. Financial outcomes

- Potential capital or revenue income or ongoing revenue burden

6.3 The PDWG summary assessment of the offers and assessment criteria is attached as Appendix C, which is publicly restricted due to the commercially sensitive information contained within it. From this exercise, two candidates were selected as preferred bidders as outlined in Appendix C.

6.4 Avison Young, commercial consultants who marketed the site on behalf of the council, have also reviewed the proposals and their report is attached as Appendix D which is publicly restricted due to the commercially sensitive information contained within it. They have assessed them at a high level based on quality, compliance, financial covenant, experience, jobs created and NDR revenue. Avison Young have advised that they are satisfied that the two preferred bidders selected represent the best value to the council.

7.0 NEXT STEPS

7.1 The intention is to undertake interviews with the 2 preferred candidates, supported by our commercial consultants Avison Young, to crystallise their proposals and work towards concluding terms for the development of the site to deliver the best economic position for the council. This will be the subject of a future report to the area committee and thereafter the Policy & Resources Committee for approval.

7.2 As agreed at the area committee on 12th December 2023, officers have commenced further investigations into the option of developing a new skatepark at Kidston Park.

8.0 CONCLUSIONS

8.1 The two-stage marketing of the site has generated a strong level of interest and it is important to make the most of this interest as the development market is challenging at present.

8.2 Concerns around the impact of retail / commercial development of the site have been addressed by a retail study, which was completed in January 2024.”

[29] The two preferred bidders were interviewed on 23 April 2024. The PDWG took the view that the offer from F was the best offer both financially but also from a qualitative point of view as their offer was the strongest on the other criteria. The proposed development by F included a 1700 square foot supermarket and smaller retail unit. The PDWG made a recommendation to that effect to the respondent's Policy and Resources Committee at its meeting on 15 August 2024.

[30] At that meeting on 15 August the respondent made the decision challenged in this judicial review and set out at paragraph [5] above.

[31] The report to the committee included the following:

> "3.0 BACKGROUND
>
> 3.1 The development of Helensburgh Waterfront is a key project for the council. Following completion of the Leisure Centre and car park in early 2023, the focus has now moved onto the commercial area.
>
> 3.2 Given the public interest in the site and taking cognisance of Helensburgh Community Council's representations it was agreed to undertake a two stage marketing process to allow a public engagement exercise to be undertaken after the first stage. It should be noted that this engagement processes [sic], focussed at local groups and businesses, was additional to formal community consolation [sic] that will come once a firm proposal is formed and planning application submitted. It was also recommended by our commercial agent to undertake a 2 stage process as it allows a shortlist of most credible proposals to be worked up to more developed business cases and financial modelling.
>
> 3.3 The second stage marketing exercise had a closing date of 6th December 2023 and 5 proposals were received which were then assessed by the Property Development Working Group (PDWG) and reduced to two preferred developers following a report to the Helensburgh & Lomond Area Committee on 12th March 2024. The two preferred developers were Westquarter Developments Limited and Forrest Developments Limited.
>
> 3.4 The two preferred developers were then interviewed by officers from the PDWG on 23rd April 2024, following which they were each asked to provide some further clarifications of their proposals. As agreed by the Helensburgh & Lomond Area Committee a further update was then provided at the Business Day on 26th June 2024."

[32] The report then proceeded to undertake a detailed assessment of the two final propositions, the details of which are commercially sensitive and which is it not necessary to set out in this opinion.

[33] A detailed assessment from the PDWG was attached as an appendix. The assessment was against the five criteria identified in the previous reports above. The assessment in relation to the criteria of "Community Engagement Outcomes" included a statement that "The community view was that retail development was less preferable".

[34] Also attached as an appendix was the assessment of Avison Young, who assessed the proposals in more financial detail and agreed with the officer's selection of the preferred developer. The report concluded:

> **"5.0 CONCLUSIONS**
>
> 5.1 The two-stage marketing of the site generated a strong level of interest and it is important to make the most of this interest as the development market is challenging at present.
>
> 5.2 The selection of [F] as the preferred developer will allow officers to progress detailed negotiations and provisionally agree Heads of Terms for the proposed disposal of the Helensburgh Waterfront commercial area to allow for its development and completion of this long-term regeneration project."

[35] The petitioner organised a petition opposing the decision. They asked members of the public to sign the petition to let the respondent know that they did not want a supermarket on Helensburgh's waterfront. As at 22 August 2024, 4067 signatures had been appended to the petition.

[36] When the Helensburgh and Lomond Area Committee met on 10 September 2024, a number of members of the public asked questions of the councillors. According to a transcript prepared by the petitioner, Councillor Campbell-Sturgess stated:

> "As elected members we are voted in to make decisions that are in front of us. When I was elected two years ago now, the decision to build a supermarket on that site had

been taken as Councillor Mulvaney outlined probably a decade before that. Eight or ten years ago that land had been raised.

So no one said 'Hey Math what do you think should go on there?', they said, 'Hey Math here's two proposals for a supermarket - which is the preferred bid? This is the one the officers suggest is the most prudent, this is the one that's not suggested as most prudent, but it's your decision to vote on'. That's the decision that's put in front of me - I don't get the vote on, you know, do I want to build something else there; do I want to, you know, turn it into a playpark. I get the decision that's put in front of me - that is through that ratified process based on hundreds of previous decisions that have gone through these committees, have come to the Area Committee. I can't go back, and change what happened 10 or 12 years ago, I can only vote on the things that are put in front of me today'

[…]

'I might not agree with all the decisions that his [Councillor Mulvaney]'s administration made 10 years ago but… the representatives elected at the time made those decisions democratically. They're the decisions they made and they stand. We can do different things in future but we can't change the past and that site was outlined to be a supermarket 10 years ago. So, with respect, I understand a lot of people are angry right now but the decision was taken 10 years ago in in [sic] public. This isn't something that suddenly happened overnight. This was going to happen. The latest decision is simply the final sort of selection of a preferred bidder.'"

[37] On 5 October 2024, Councillor Campbell-Sturgess, in an email to a recipient whose name has been redacted by the petitioner, stated:

"With regards your concerns about the waterfront development, sadly I'm afraid, the decision to locate a commercial development at the site was taken several years ago, and the financial burden associated with not doing so would be infeasible to consider reversal - to put it bluntly, the decision was already made before I entered office, and to reverse this would cost the council several million pounds in addition to opening up the council to a potential massive legal challenge from the successful bidders.

The recent decision was the culmination of the process set in place when the initial decision to pay for the leisure centre in part by selling off the site for commercial development was made. That process decided on the form of such development, set in place a commercial bidding process and finally, quite recently, picked the successful bid - that was all that was decided at this final point.

As a Cllr I have a duty not just to listen to constituents (which I absolutely do) and represent their interests, but I also have a duty to represent their interests even when doing so will not directly align with what they wish - to attempt to reverse this entire chain of events and do something different with the site would be irresponsible of me, as it would leave the council open to legal challenge and likely cost several

> million, as previously stated, which would then need to be found, probably by increasing taxes - so whilst I absolutely sympathise with your position and understand it's not a popular decision, at this late stage, coming into office only 2 years ago when the decision was effectively already made some years before that, all I can do at this point is vote on the best outcomes that are in front of me, and protect the interests of my constituents and the council, per my duty as a councillor."

Competence

Submissions for the respondent

[38] Senior counsel for the respondent submitted that the petition was incompetent. There was no relevant tripartite relationship which could render the decision amenable to judicial review. It was simply an exercise by a heritable proprietor deciding to treat someone as the preferred bidders. There was no exercise of a relevant jurisdiction in the sense it recognised in *West* v *Secretary of State for Scotland* 1992 SC 385 at 412 – 413. It was a commercial decision made by the respondent as heritable proprietor in their own interests to decide which bid should be accepted to go forward to further negotiation (*Stannifer Developments Limited* v *Glasgow Development Agency* (No 2) 1998 SCLR 870 at 890D – E, 1999 SC 156 at 164 c/f). There was no element of the respondent acting in a quasi-judicial nature (*Gray* v *Braid Logistics (UK) Limited* [2014] CSIH 81 2015 SC 2022 at paras [23] – [26], [30]).

[39] Counsel further submitted that no decision was made in the exercise of a statutory power. The decision was not caught by section 74(1) of the 1973 Act. Even if it was, there was nothing in the general law to support the view that decisions taken by a public authority to dispose of land attract any duty to give reasons or act fairly save where there may be an additional underlying statutory framework such as section 74(2). The petitioner had not identified any aim or purpose underlying the decision in relation to which the respondent might be said to have abused or exceeded any powers in the context of disposal of land, there was no duty to act fairly in the exercise of relevant statutory powers (*Stannifer*

Developments Limited at p 164C – F). The petitioner did not aver that any relevant rights had been determined by the decision, nor that the process afforded them the legitimate expectation as to their procedural entitlements or substantive outcome (c/f *R* v *Barnet LBC, ex parte Pardes House School* [1989] COD 512). *Stannifer Developments* was a case where there was a clear decision to dispose of land, as opposed to entering into negotiations over heads of terms. In the present case, the petitioner had failed to set out any proper basis for the view that section 74 created any right to reasons or importing of a specific duty of fairness. The examples given in *Stannifer* at 888F – G and their absence from the incident case highlighted the lack of relevancy. There were no circumstances averred from which a duty to act fairly might be inferred. The petitioner by the time the decision was made was no longer a bidder, and there was no general duty to act fairly when deciding on disposals of land (*Stannifer* at 164C – F, *Redcroft Care Homes Limited* v *Edinburgh City Council* 2025 SC 103, *Abundance Investments Ltd* v *Scottish Ministers* [2020] CSOH 12)

Submissions for the petitioner

[40] The Dean of Faculty submitted that the petition engaged the supervisory jurisdiction of the courts. The respondent had only those powers afforded to it by statute and was required to exercise its powers lawfully and rationally. The respondent was a body to which a jurisdiction power authority had been delegated or entrusted by statute and the petition was brought in order to ensure that the respondent did not exceed or abuse that jurisdiction or authority or fail to do what the jurisdiction, power or authority require. This petition did not fall within the contractual carve out in *West* which removed from the scope of the supervisory jurisdiction the vindication of bilateral rights.

Decision

[41] The applicability of the supervisory jurisdiction of the Court of Session in respect of contractual matters entered into by a local authority, and the application of the tripartite test in *West* in these circumstances, was reviewed by the Inner House in *Redcroft Care Homes Limited* v *Edinburgh City Council.* The Lord President (Carloway) stated:

> **"Supervisory Jurisdiction**
>
> [30] In *Abundance Investment v Scottish Ministers* 2020 SLT 163, Lord Clark carried out an extensive review of the authorities on the scope of judicial review. Under reference to dicta in *West v Secretary of State for Scotland* 1992 SC 385, *Crocket v Tantallon Golf Club* 2005 SLT 663and *Wightman v Secretary of State for Exiting the EU* 2019 SC 111, Lord Clark said (at para [42]) that
>
> > 'it is clear that the tripartite relationship test [in *West*] cannot stand in the way of the proper enforcement of the rule of law. In judging whether or not the supervisory jurisdiction is competently invoked, it is necessary to examine the act or decision under challenge and the basis of that act or decision ...'
>
> The court agrees with that analysis.
>
> [31] Specifically in relation to the situation in which a decision is made in the context of a contractual relationship, Lord Clark explored the authorities (*West, Watt v Strathclyde Regional Council* 1992 SLT 324; *Blair v Lochaber District Council* 1995 SLT 407; and *Dryburgh v NHS Fife* [2016] CSOH 116) and determined (at para [46]) that:
>
> > 'There are therefore several judgments, including from the Inner House, which support the proposition that decisions made by a contracting party in relation to rights and obligations under the contract are not, as such, amenable to judicial review by the other contracting party. If the decision could also be characterised as one taken in the exercise of a statutory power or in the implement of a statutory duty, which, by its nature, was bound to affect all of those in respect of whom the jurisdiction conferred by the statute was to be exercised, then (as observed in *West*) that is a different matter. Similarly (as also observed in *West*) if the party whose decision is challenged was, in making the decision, performing any function independent of its position as the other contracting party, that is again a different matter. Thus, decisions made by the other contracting party on these wider grounds can be amenable to judicial review.'
>
> The court agrees with that statement. The question is how it applies in this case"

[42] How, then does that authority apply in this case?

[43] The decision challenged in this petition is a decision taken as part of the process of a council selling heritable property owned by it. It is a decision on who is to be the preferred bidder. The proposed sale to the preferred bidder is conditional on obtaining planning permission.

[44] The sale of the property is being undertaken in the exercise of a statutory power. The process of sale of heritable property by a local authority is governed by section 74 of the Local Government (Scotland) Act 1973 which states:

> **"74.— Disposal of land.**
>
> (1) Subject to Part II of the Town and Country Planning (Scotland) Act 1959 and to subsection (2) below, **a local authority may dispose of land held by them in any manner they wish.**
> (2) … a local authority shall not dispose of land under subsection (1) above for a consideration less than the best that can reasonably be obtained.
> (2A) Subsection (2) does not extend to a disposal where—
> (a) the best consideration that can reasonably be obtained is less than the threshold amount; or
> (b) the difference between that consideration and the proposed consideration is less than the marginal amount." (emphasis added)

[45] A similar statutory provision which applied to the sale of heritable property by enterprise companies was considered by the Inner House in *Stannifer Developments* v *Glasgow Development Agency*. Section 8(1)(g) of the Enterprise and New Towns (Scotland) Act 1990 gave Scottish Enterprise and Highlands and Islands Enterprise the power of:

> "holding land acquired by it and disposing of or otherwise dealing with such land, so however that [under certain exceptions not relevant here] neither body shall dispose of the land.. for a consideration less than the best that reasonably can be obtained".

[46] In that case an unsuccessful bidder brought judicial review proceedings seeking reduction of a decision to recommend the sale to the successful company. The petition was

dismissed, and the Lord Justice Clerk (Cullen), giving the opinion of the court, stated (p164D-F):

> "The Lord Ordinary rejected the proposition that the respondents were, by reason of the proposal to exercise the statutory power of sale, under a duty to act fairly and, in our opinion, he was correct in that conclusion. **No doubt there are cases in which it falls to a body exercising statutory powers to act fairly having regard to the interests of those affected by the exercise of those powers.** An obvious example is when the body requires to reach a quasi-judicial decision as between such persons. Another may be where the exercise of the power would deprive persons of some existing right or benefit. An example of the latter situation may be found in *R. v. Barnet London Borough Council ex parte Pardes House School Ltd.* [1989] C.O.D. 512, which was concerned with consultation prior to the disposal of land held for educational purposes. **There is, however, no general rule that a body seeking to exercise a statutory power is under a duty to act fairly, and accordingly that its exercise of that power is not valid unless it has done so. So far as concerns the power conferred by section 8(1)(g) of the 1990 Act, it was accepted that there was no legal restriction as to the manner in which a body could arrive at a decision as to the exercise of that power. In these circumstances we are unable to infer that it imposes a general duty to act fairly. As counsel for the respondents pointed out, the respondents were concerned with a proposed transaction in essentially the same way as any commercial body, and hence were subject to the same contractual and delictual responsibilities that might affect such a body".** (emphasis added)

[47] I am bound by that decision, which is equally applicable to the current circumstances. This is not a situation where the respondents required to reach a quasi-judicial decision as between the interests of the petitioner and others affected by the decision such as the other bidders. It is not a situation where the exercise of the right to dispose of the land would deprive persons of an existing right or benefit, such as the disposal of land held for an educational purpose (*Barnet London Borough Council*), or the disposal of common good land (*Grahame* v *(Magistrates of Kirkcaldy* [1882] 9 R (HL) 91). It is a commercial transaction with which the council as seller is concerned in essentially the same way as a commercial body who is the seller of land. The proposed sale is subject to planning permission. Just as with many other sales of a development site by a commercial body, the sale will go ahead only if the planning authority grants planning permission. Just as with

other sales of a development site by commercial bodies, there will be opportunities for those, such as the petitioner, who oppose the use which the preferred bidder proposes to make of the property, to make their opposition to a supermarket known to the planning authority as part of the planning process before a decision is made to grant or refuse planning permission. There is no suggestion that the respondent is failing in its statutory duty to obtain the best price under section 74(2). In my opinion, in the circumstances of this case, the decision made on 15 August 2024 to select a preferred bidder does not engage the common law duty of fairness.

Sufficient interest

Submissions for the respondent

[48] Senior counsel for the respondent submitted that the petitioner had been an interested party in the development of preferred bids but had not managed to get beyond the early stages of the process. He had no relevant rights, interests or legitimate expectations when he was a party and it could not be right that the respondent gave the petitioner greater interest after the rejection of the bid.

Submissions for the petitioner

[49] The petitioner submitted that the petitioner did have sufficient interest. That interest derived not from a previously unsuccessful bid, but from its statutory purpose as a local authority. As a result of the respondent's unlawful decision, the whole community in Helensburgh was affected. Where the excess or misuse of power affects the public generally, insistence upon a particular interest might disable the court from performing its function to protect the Rule of Law (*AXA General Insurance Company Limited* v *Lord*

Advocate 2012 SC (UKSC) 122 at paragraphs 62 and 170). The maintenance of the Rule of Law by ensuring that all actions by public authorities are carried out in accordance with the law was central to the supervisory jurisdiction and must be given precedence by the court (*Wightman* v *Secretary of State for the exiting the European Union* 2019 SC 111 at paragraphs 66 – 67). In any event the matter had been definitively determined by the granting of permission to proceed.

Decision

[50] In my opinion, the petitioner had sufficient interest to bring this judicial review.

[51] The law on interest to bring a judicial review is set out by Lord Reed in *AXA General Insurance Company Limited* v *Lord Advocate* as follows:

> "[169] …The essential function of the courts is however the preservation of the rule of law, which extends beyond the protection of individuals' legal rights. As Lord Hope, delivering the judgment of the court, said in *Eba v Advocate General for Scotland* (para 8):
>
> > '[T]he rule of law … is the basis on which the entire system of judicial review rests. Wherever there is an excess or abuse of power or jurisdiction which has been conferred on a decision-maker, the Court of Session has the power to correct it (*West v Secretary of State for Scotland*, p 395). This favours an unrestricted access to the process of judicial review where no other remedy is available.'
>
> There is thus a public interest involved in judicial review proceedings, whether or not private rights may also be affected. A public authority can violate the rule of law without infringing the rights of any individual: if, for example, the duty which it fails to perform is not owed to any specific person, or the powers which it exceeds do not trespass upon property or other private rights. A rights-based approach to standing is therefore incompatible with the performance of the courts' function of preserving the rule of law, so far as that function requires the court to go beyond the protection of private rights: in particular, so far as it requires the courts to exercise a supervisory jurisdiction. The exercise of that jurisdiction necessarily requires a different approach to standing
>
> [170] For the reasons I have explained, such an approach cannot be based upon the concept of rights, and must instead be based upon the concept of interests. A requirement that the applicant demonstrate an interest in the matter complained of will not however operate satisfactorily if it is applied in the same way in all contexts.

> In some contexts, it is appropriate to require an applicant for judicial review to demonstrate that he has a particular interest in the matter complained of: the type of interest which is relevant, and therefore required in order to have standing, will depend upon the particular context. In other situations, such as where the excess or misuse of power affects the public generally, insistence upon a particular interest could prevent the matter being brought before the court, and that in turn might disable the court from performing its function to protect the rule of law. I say 'might', because the protection of the rule of law does not require that every allegation of unlawful conduct by a public authority must be examined by a court, any more than it requires that every allegation of criminal conduct must be prosecuted. Even in a context of that kind, there must be considerations which lead the court to treat the applicant as having an interest which is sufficient to justify his bringing the application before the court. What is to be regarded as sufficient interest to justify a particular applicant's bringing a particular application before the court, and thus as conferring standing, depends therefore upon the context, and in particular upon what will best serve the purposes of judicial review in that context."

[52] Applying these principles to the current petition, the interest of the petitioners is greater than that of a bidder who has been unsuccessful and no longer wishes to purchase the property. They are a Community Council and have brought this judicial review in furtherance of their statutory purposes, which are set out in section 51 of the Local Government (Scotland) Act 1973 as:

> "In addition to any other purpose which a community council may pursue, the general purpose of a community council shall be to ascertain, co-ordinate and express to the local authorities for its area, and to public authorities, the views of the community which it represents, in relation to matters for which those authorities are responsible, and to take such action in the interests of that community as appears to it to be expedient and practicable."

[53] In my opinion, the statutory purpose of the petitioner to ascertain, co-ordinate and express to the respondents the views of the Helensburgh community, and take such action in the interests of the Helensburgh community as appears to it to be expedient and practicable, demonstrate that the petitioner has sufficient interest to bring this petition.

Time-bar and mora, taciturnity and acquiescence

Submissions for the respondent

[54] Senior counsel submitted that meeting the time limit under section 27A of the Court of Session Act 1988 did not preclude a plea at common law of mora, taciturnity and acquiescence. The petitioner did not raise any objection to the "consultation exercise" or the use of the Ryder Reports and so further substantial procedure followed thereupon. Counsel recognised that prejudice was not necessary for a plea (*Sommerville* v *Scottish Ministers* 2007 SC 140 at para [94]). It was submitted substantial expense was incurred and the reasonable interests of other bidders were also engaged. The respondent incurred fees of £48,759 in moving the process forward to 15 August 2024. The preferred bidder incurred expenses of around £30,760 before VAT. The specific criticisms directed at the Ryder Report and the engagement exercise were only articulated when the petition was served (*Bard* v *Secretary of State for Communities and Local Government* [2009] EWHC 308 (Admin) at [128]). The whole circumstances showed mora, taciturnity and acquiescence. The prejudice and detriment may be a bar to relief (*Maharaj* v *National Energy of Corporation of Trinidad and Tobago* [2019] UKPC 5 at [41]). Under Rule 58.13 of the Rules of the Court of Session the question of remedy was a discretionary one separate from the merits.

Submissions for the petitioner

[55] The Dean of Faculty submitted that in determining the opposed question of permission, the court had properly and fully considered the question of time-bar, as it was required to do (*Lauchlan and O'Neill* v *Scottish Ministers* 2022 SC 125 at paragraphs 16 – 18) and the matter been definitively determined.

[56] The Dean of Faculty further submitted that the respondent had mischaracterised mora as being a ground on which to reject certain grounds of review, whereas it was a quasi-equitable bar to the granting of a remedy (*Tehrani* v *Secretary of State for the Home Department* 2007 SC (HL) 1 at paragraph 56, *Greenpeace Ltd* v *Advocate General for Scotland* 2025 SLT 303). The three elements of mora, taciturnity and acquiescence were not present in the current case (*Kenman Holdings* v *Comhairle Nan Eilean Siar* 2017 SC 339 at paragraph 39). In any event since the introduction of the statutory time-bar, the relevance of a plea of mora in judicial review would be vanishingly rare (*John Paton & Sons Limited* v *Glasgow City Council* 2023 SLT 1288 at para [6]).

Decision

[57] As the court explained in, the question of time-bar ought to be decided at the time of the granting of permission (*Lauchlan and O'Neill* paras [16] - [18]). That was done in this case. After hearing oral argument, I noted my decision on this point in the minute of proceedings as follows:

> "This petition seeks reduction of a decision of 15 August 2024, which is within the 3 month time limit under sec 27A of the Court of Session Act 1988. The Respondent's position is that the grounds of appeal arose earlier than 15 August 2024. In my opinion the petition is not time-barred. The questions at issue at the substantive hearing will be about the decision of 15 August 2024. The history of events prior to 15 August 2024, and the relevance to the decision of 15 August 2024 of decisions made prior to that date, are matters for consideration at the substantive hearing, and not a preliminary issue of timebar."

[58] The question of time-bar having been decided by me at that stage, the respondent cannot re-open it at the substantive hearing.

[59] That leaves the respondent's argument on mora, taciturnity and acquiescence. It will only be in very rare circumstances where this plea will succeed when permission has been

granted (*John Paton & Sons Limited* v *Glasgow City Council*). This not one of these rare circumstances. Indeed the facts of the case are strongly against there having been mora, taciturnity and acquiescence. The petitioner was not fully aware of the various decisions made before 15 August 2024 as the respondent had exercised its right to keep aspects of these confidential on commercial grounds.

[60] The general position is that meetings of a local authority and its committees and subcommittees are open to the public, copies of any reports for the meeting are open to inspection to members of the public, and minutes are open to inspection to the public after the meeting (Local Government (Scotland) Act 1973 sections 50A - 50J). However, there are exemptions if it is likely that there would be disclosure to the public of "Any terms proposed or to be proposed by or to the authority in the course of negotiations for a contract for the acquisition or disposal of property or the supply of goods or services." (section 50A(4), 50B(2), 50D(4), 50J, Schedule 7A paragraph 9). In these circumstances, the authority may by resolution exclude the public from the meetings (section 50A(4)), the reports are not made publicly available (section 50B(2)) and the respondent makes available for inspection not the minutes but instead a written summary of the meeting which does not disclose the confidential information (section 50C).

[61] The respondent utilised these exemptions in relation to meetings and papers in relation to the sale of the Area up to and including the meeting of 15 August. The respondent was entitled to do so, and cannot be criticised in that regard. However, the practical effect of the respondent's decision to exclude the public from the meetings and from access to the reports was that it was only when the decision about the choice of the final preferred bidder on 15 August was made public that the petitioner became aware of the alleged defects in the procedures leading up to that. The petitioner cannot be criticised

for delay in challenging prior decisions the details of which were not publicly available. The respondent's plea of mora, taciturnity and acquiescence fails.

Ground one: the public consultation was not carried out fairly

Submissions for the petitioner

[62] The Dean of Faculty submitted that the respondent had carried out a public consultation, and had not done so in a proper, meaningful and lawful manner (*R (Coughlan)* v *North and East Devon Health Authority* [2001] QB 213; *R (Moseley)* v *Haringey LBC* [2014] 1 WLR 3947 at 25, *R (Gunning)* v *Brent LBC* [1985] 84 LGR 168, *R (Eisai Ltd)* v *National Institute for Health and Clinical Excellence* [2008] EWCA Civ 438 at paragraph 66). The respondent had adopted a highly secretive approach to the consideration of the development. A very small number of invitees were asked simply to comment on visual images of what the site might look like and this was done at very short notice. The only consultation that was carried out in order to inform the decision of 15 August 2024 was the Ryder Report. The decision of 15 August 2024 was the product of inadequate consultation and was unlawful.

Submissions for the respondent

[63] It was for the respondent to decide whose views were to be sought and the scope of engagement (*Vale of Glamorgan Council* v *Lord Chancellor* [2011] EWHC 1532 (Admin) at paragraph 25). Engagement with community groups and local business was rational. It was rational to consult about the range of bids presented at stage one to inform the process. It was rational to recognise the established background and the likely requirement for further extensive statutory consultation. The Ryder engagement exercise was not a form of public

consultation but a targeted engagement to help achieve an inclusive approach. It was not an exercise in seeking to establish and then recommend the most popular view, but was to invite general feedback on a range of emerging bids to assess in the wider assessment process where committee feedback was about one element. There were no proposals being put forward to which common law, or statutory, requirements for consultation applied. The exercise was one modest element in the wider process of engagement with the community, with a wider statutory consultation being afforded under the planning process on any bid that might ultimately be adopted. There were no full details of proposals to disclose. The Ryder Report did highlight that there was some concern about a retail option and that concern was placed before and understood by the committee. The petitioner, as the bidder, was quite properly not invited to make representations in the process. Even if the exercise fell to be regarded as a consultation, nothing had gone wrong such that the process was so unfair as to be unlawful in relation to those to whom the exercise was directed (*R(Bloomsbury Institute Limited)* v *Office for Students* [2020] EWCA Civ 1074 at paragraph 69). Not all engagements are consultations (*Trustees for the Eastgate Unit Trust* v *Highland Council* [2024] CSOH 80, *R (National Council for Civil Liberties)* v *Secretary of State for the Home Department* [2025] EWCA Civ 571). A consultation must have the character of a formal process involving a range of affected parties. The Ryder exercise was not one of inviting views of a sufficiently crystallised proposal but was seeking views on a range of first stage bids, none of which had been identified by the council as a favourite or formative proposal. There was no sufficiently crystallised proposal in play (*R (Secretary of State for Work and Pensions* v *Eveleigh* [2023] EWCA Civ 810). The nature and purpose of the exercise did not support the conclusion that there was a formal consultation process attracting the *Gunning* principles.

Decision

[64] The parties are in dispute about whether the consultation/public engagement exercise was conducted properly and in accordance with the *Gunning* principles, which set out the legal requirements for a properly conducted consultation.

[65] However, there is a prior question, which is whether the *Gunning* principles apply to the current situation, namely a sale by a local authority of its own heritable property under the statutory power in section 74 of the Local Government (Scotland) Act 1973.

[66] In my opinion, the *Gunning* principles do not apply. They arise out of the common law duty of fairness, and that duty of fairness does not apply to the sale of the respondent's own heritable property.

[67] It is clear from the decision of the Supreme Court in *R(Stirling)* v *Haringey LBC* that the *Gunning* principles arise out of the common law duty of fairness.

[68] Lord Wilson stated:

> "The Law
>
> [23] A public authority's duty to consult those interested before taking a decision can arise in a variety of ways. Most commonly, as here, the duty is generated by statute. Not infrequently, however, it is generated by the duty cast by the common law upon a public authority to act fairly. The search for the demands of fairness in this context is often illumined by the doctrine of legitimate expectation … But irrespective of how the duty to consult has been generated, that same common law duty of procedural fairness will inform the manner in which the consultation should be conducted.
>
> [24] Fairness is a protean concept, not susceptible of much generalised enlargement. But its requirements in this context must be linked to the purposes of consultation. In *R (Osborn) v Parole Board* [2013] UKSC 61, [2013] 3 WLR 1020, this court addressed the common law duty of procedural fairness in the determination of a person's legal rights. Nevertheless the first two of the purposes of procedural fairness in that somewhat different context, identified by Lord Reed in paras 67 and 68 of his judgment, equally underlie the requirement that a consultation should be fair. First, the requirement 'is liable to result in better decisions, by ensuring that

the decision-maker receives all relevant information and that it is properly tested' (para 67). Second, it avoids 'the sense of injustice which the person who is the subject of the decision will otherwise feel' (para 68). Such are two valuable practical consequences of fair consultation. But underlying it is also a third purpose, reflective of the democratic principle at the heart of our society. This third purpose is particularly relevant in a case like the present, in which the question was not 'Yes or no, should we close this particular care home, this particular school etc?' It was 'Required, as we are, to make a taxation-related scheme for application to all the inhabitants of our Borough, should we make one in the terms which we here propose?'

[25] In *R v Brent London Borough Council, ex p Gunning,* (1985) 84 LGR 168 Hodgson J quashed Brent's decision to close two schools on the ground that the manner of its prior consultation, particularly with the parents, had been unlawful. He said at p 189:

> 'Mr Sedley submits that these basic requirements are essential if the consultation process is to have a sensible content. First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third,… that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals.'

Clearly Hodgson J accepted Mr Sedley's submission. It is hard to see how any of his four suggested requirements could be rejected or indeed improved. The Court of Appeal expressly endorsed them, first in the *Baker* case, cited above (see pp 91 and 87), and then in *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 at para 108. In the *Coughlan* case, which concerned the closure of a home for the disabled, the Court of Appeal, in a judgment delivered by Lord Woolf MR, elaborated at para 112:

> 'It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this.'

The time has come for this court also to endorse the Sedley criteria. They are, as the Court of Appeal said in *R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472, 126 BMLR 134, at para 9, 'a prescription for fairness'."

[69] Lord Reed was generally in agreement with Lord Wilson, but in deciding the case before him placed less emphasis on the common law duty to act fairly, and more on the particular statutory duty to consult with which that case was concerned (para [34]). In the current petition, there was no statutory duty on the respondent to consult, so what is relevant is what Lord Reed said about cases where there was no such statutory duty. In relation to such cases he said:

> "The common law imposes a general duty of procedural fairness upon public authorities exercising a wide range of functions which affect the interests of individuals, but the content of that duty varies almost infinitely depending upon the circumstances. There is however no general common law duty to consult persons who may be affected by a measure before it is adopted. The reasons for the absence of such a duty were explained by Sedley LJ in *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139; [2008] ACD 20, paras 43-47. A duty of consultation will however exist in circumstances where there is a legitimate expectation of such consultation, usually arising from an interest which is held to be sufficient to found such an expectation, or from some promise or practice of consultation. The general approach of the common law is illustrated by the cases of *R v Devon County Council, Ex p Baker* [1995] 1 All ER 73 and *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213, cited by Lord Wilson, with which the BAPIO case might be contrasted."

[70] Lady Hale and Lord Clarke took the view that there was very little between Lord Wilson and Lord Reed and agreed with both judgments (para [44]).

[71] It is clear from *Stannifer* that the common law duty of fairness does not apply when the authority is disposing of its own heritable property. The Lord Justice Clerk accepted that there was no legal restriction as to the manner in which a body could arrive at a decision as to the exercise of its power to sell its heritable property, and was unable to infer that in such circumstances there was a general duty to act fairly (p 199F).

[72] As the requirement to comply with the *Gunning* principles arises out of the duty of fairness, but that duty of fairness does not apply in the circumstances of this petition, the inevitable conclusion is that this ground of judicial review fails.

Ground two: use of the Ryder Report

Submissions for the petitioner

[73] The Dean of Faculty submitted that neither the Avison Young report nor the council official's report contained any engagement with the content of the Ryder Report. The content of the Ryder Report had not been conscientiously taken into account (*R (Gunning)* v *Brent LBC* 84 LGR 168). The officer's report to the respondent did not contain all of the material necessary to make it lawful and the decision premised thereon was therefore unlawful. He further submitted that *esto* proper consideration had been given to the Ryder Report, then it had been presented in an ambiguous and misleading manner and failed properly to make clear that there was a consensus against having a supermarket on the site.

Submissions for the respondent

[74] Counsel for the respondent submitted that the purpose of the Ryder Report was to provide feedback on the community engagement exercise and was taken into account by the PDWG when considering the assessment criteria, and was actively engaged with by the respondent. The report did not report a consensus against retail options. The report was conscientiously taken into account by the PWDG and consciously taken into account by the Helensburgh and Lomond Area Committee when it made the decision to proceed to full financial offers on 12 September 2023. It was not necessary for that report to be revisited by the committee on 12 March 2024 or for the Policy and Resources Committee to do so on 15 August 2024. Had any committee had concerns over the information it was provided with, it could have asked for more information. The committee had been consulted in

relation to the local development plan. The matter could be put to the respondent if and when it considered any planning application.

Decision

[75] The petitioner's position is that the *Gunning* principles have been breached as the respondent did not conscientiously take into account the results of the consultation/public engagement as set out in the Ryder Report.

[76] However, for the reasons given in para [66]ff above, the *Gunning* principles do not apply to the sale by the respondent of its heritable property. Accordingly, this ground fails also.

[77] In any event, the respondent did conscientiously take into account the results of the consultation/public engagement. Contrary to what is said by the petitioner, the respondent did make clear that there was a consensus against having a supermarket on the site. The detailed assessment of the bids which was attached to the report to the 15 August 2024 meeting as Appendix A, assessed the results of the consultation/engagement exercise when considering the Community Engagement outcome and stated "The community view was that retail development was less preferable."

Ground three: no adequate reasons

Submissions for the petitioner

[78] The Dean of Faculty submitted that none of the documents that the respondent had relied upon had been released to the public, the decision had been narrated in only superficial terms, and the respondent had simply adopted the recommendations of a report which had been withheld from the public (*Wordie Property Co Limited* v *Secretary of State for*

Scotland 1984 SLT 345 at 348, *R (Institute of Dental Surgery)* v *Higher Funding Educational Funding Council* [1994] 1 WLR 242). No written summary had been produced under section 50C of the Local Government (Scotland) Act 1973 which adequately explained the reasons for the decision.

Submissions for the respondent

[79] Senior counsel for the respondent submitted that there was no obligation to provide reasons for a preliminary disposal of land. A record of the proceedings had been provided. The reasons could be inferred from the recommendation in the officer report (*R (Bates)* v *Maldon District Council* [2019] EWCA Civ 1272 at [19]). The report to committee gave a clear account of the scores allocated to each bid with relevant comments from officers. In any event only when an application for planning consent was made and approved would the respondent come under a duty to provide the *Wordie* reasons.

Decision

[80] Reasons require to be given where fairness calls for them to be given (*R* v *Higher Education Funding Council* p 258B-G). As the requirement to give reasons arises out of the common law duty of fairness, but that duty of fairness does not (for the reasons given above) apply in the circumstances of this petition, this ground of judicial review fails.

[81] In any event, adequate reasons were given. Where a planning decision is taken in line with an officer's report, there is an assumption that the reasons for the decision are set out in the report (*R (Bates)* v *Maldon District Council* at [19]). I see no reason why that principle should not also apply where a decision in relation to a preferred bidder is taken in line with an officer's report. The report sets out in detail the background to the decision and

the assessment made by the PDWG, and has attached to it the assessments made by the PDWG and the respondent's advisors Avison Young. It sets out the reasons for the officer's recommendation. The reasons in the report satisfy the *Wordie Property* test. As the recommendation was accepted by the committee, these reasons are the reasons for the decision.

Ground four: the respondent has misdirected itself

Submissions for the petitioner

[82] The Dean of Faculty submitted that the statements from Councillor Campbell-Sturgess demonstrated that one of two mis-directions had occurred, either of which resulted in the decision being unlawful and liable to reduction. Either the respondent had been mis-directed by its officials in terms of the decisions in which were open to the council to make at the meeting on 15 August 2024, or the respondent was generally resigned to there being only one option available to it so as to give at least the appearance of predetermination (*Electric Collar Manufacturers Association* v Secretary of State for the *Environment, Food and Rural Affairs* [2019] EWHC 2813 (Admin) at paragraph 140, *Miller* v *Health Service Commissioner for England* [2018] PTSR 801 at paragraphs 57 and 66).

Submissions for the respondent

[83] Senior counsel for the respondent submitted that it was not for the committee to revisit established planning policy or decision-making. The high hurdle for predetermination had not been passed (*Trustees for the Eastgate Unit Trust* v *Highland Council* (No 2) [2024] CSOH 80 at [42]; *John Paton & Sons Limited* v *Glasgow City Council* 2023 SLT 1288 at [64], citing re *Finucane* [2019] UKSC 7 at [77] – [78]). Comments from the

councillor simply reflected the established planning background. The reasons of one committee member are not to be taken as the reasons of a collective committee (*Ranaldi* v *City of Edinburgh Council* 2000 SCLR 368, *Piper* v *Kyle and Carrick District Council* 1988 SLT 267). The whole circumstances fell short of creating in the mind of a reasonable observer a relevant suspicion of bias, error of law or predetermination.

Decision

[84] The petitioner advanced two arguments

[85] The first argument was that the respondent had been mis-directed by its officials in terms of the decisions which were open to the council to have been made. I find that there was no misdirection. The report by officials contained a recommendation and there was no obligation on the committee to accept that recommendation. Nowhere in the report do the officials direct that the only course open to councillors was to accept the recommendation and proceed with one of the supermarket proposals as a preferred bidder. As with any recommendation from officials, it was open to the committee to reject the recommendation.

[86] The second argument was that the respondent was generally resigned to there being only one option available to it so as to give at least the impression of pre-determination. That argument is founded on two statements made by Councillor Campbell-Sturgess: at a meeting on 10 September 2024 and in an email dated 5 October 2024. His statement at the meeting does not come from a formal minute, but is a purported transcript lodged by the petitioner. There is no affidavit from the councillor confirming what he said at the meeting. In these circumstances I am not prepared to accept that the note of what he said is a sufficiently reliable factual account of what he actually said for much weight to be placed on it in considering this petition. That does not matter very much, as we do have his email

setting out his position in his own words. The statements are similar in terms, but for the purposes of this opinion I shall proceed on the basis that the councillor's views were as set out in the email written by him.

[87] The law on apparent pre-determination is summarised in *Electric Collar Manufacturer's Association* v *Secretary of State for the Environment, Food and Rural Affairs* [2019] EWHC 2813 (Admin) as:

> "Whilst actual pre-determination … involves a finding on the subjective attitude or state of mind of the decision-maker, a decision may be impugned on the grounds of an appearance of pre-determination. The question here is for the Court to consider whether a fair-minded and informed observer would think that the evidence gives rise to real possibility or risk that the decision-maker had predetermined the matter, in the sense of closing his mind to the merits of the issue to be decided: *R (British Homeopathic Association) v NHS Commissioning Board* [2018] EWHC 1359 (Admin) at §73. That risk falls to be assessed by the Court: *Lewis v Redcar* §§96-97. However this is not easy to prove, where the role of the decisionmaker in the statutory context is to put forward a proposal and/or his role is political: *Spurrier* §511 and *Franklin v Minister of Town and Country Planning* [1947] AC 87 at 104-105."

[88] Apparent pre-determination, like apparent bias, is an aspect of procedural fairness. As the duty of fairness does not (for the reasons given above) apply in the circumstances of this petition, this ground of judicial review fails.

[89] In any event, in this case a fair-minded and independent observer would not think that the evidence gives rise to a real possibility or risk that the decision-maker had predetermined the issue.

[90] Firstly, the views of Councillor Campbell-Sturgess cannot be taken to be the views of the committee. In *Piper* v *Kyle and Carrick District Council* the Second Division stated:

> "We would add that in general the court will not attempt to look into the minds of individual members of a committee which is exercising a discretion. What is in issue is the collective exercise of discretion by the committee."

In the current case, the reasons for the collective exercise of the discretion of the committee are the reasons set out in the report to the committee .The report sets out the background to the decision, and the steps taken to date in the marketing process previously agreed by the committee, which had involved assessing bids for both non-supermarket and supermarket use. There is nothing in that report which would lead a fair-minded and independent observer to think there was a real possibility or risk that the respondent had predetermined the issue.

[91] Secondly, when the words in the email are read in their context, they would not lead such an observer to think that there was a real possibility or risk that Councillor Campbell-Sturgess had pre-determined the issue. Proposals for regeneration of the Area had been under consideration for a number of years, and the councillor's comments reflect the history of that consideration. For example, his reference to the process set in place when the initial decision to pay for the leisure centre in part by selling off the site for commercial development was made, is not a predetermination but a summary of the factual position which can also be found in paragraph 3.7 of the report to the Helensburgh and Lomond Area Committee on 13 December 2022,which can be found in paragraph [12] above. The councillor's comments also reflect the outcome of the assessments of bidders in terms of the marketing exercise. The marketing exercise involved no predetermination that the site would be sold for supermarket use: the paper presented to the 13 December 2022 meeting of the Helensburgh and Lomond area committee stated:

> "3.7 …To be clear, and to dispel speculation there is no 'done deal' or proposition to build at the site at this stage as currently there is no favoured end user that is proved to be sustainable. Furthermore, we are not solely seeking expressions from interest from retailers – other uses for example leisure restaurants, office, professional services or café may also be compatible either in isolation or as a mix of activity. Accordingly commencing the marketing process and seeking expressions of interest will allow some reality to be brought into the process and give an indication of what is viable. This stage will also give the opportunity for all types of operators to consider the site and make a proposition that is economically sustainable and befitting of the site…

> 3.8 … The general preference is for the council to generate a long term income from the site to support the ongoing delivery of services however this will be determined in part by the proposals received. Generating income from the site is consistent with the financial justification case that part funded the new swimming pool."

Conclusion

[92] I shall uphold the respondent's pleas-in-law 1, 8, 9 and 10, repel the respondent's pleas-in-law 2 (mora taciturnity and acquiescence) and 3 (no sufficient interest), repel the petitioner's pleas-in-law, and dismiss the petition.