



OUTER HOUSE, COURT OF SESSION

[2026] CSOH 95

P535/26

OPINION OF LORD SANDISON

in the Petition of

TESCO STORES LIMITED

Petitioner

for Judicial Review of a decision of

DUMFRIES AND GALLOWAY COUNCIL

Respondent

SAINSBURY'S SUPERMARKETS LIMITED

Interested Party

Petitioner: Crawford KC; DWF LLP

Respondent: Armstrong KC; Harper Macleod LLP

Interested Party: Mure KC; TLT LLP

2 October 2026

Introduction

[1] By this petition for judicial review, Tesco Stores Limited challenges a decision of Dumfries and Galloway Council to grant planning permission, consequent upon an application by Sainsbury's Supermarkets Limited in terms of section 42 of the Town and Country Planning (Scotland) Act 1997, to allow a unit at Cuckoo Bridge Retail Park,

Dumfries, to be used as a retail supermarket selling primarily convenience goods rather than merely for the previous approved use of the sale of bulky goods.

Background

[2] Cuckoo Bridge Retail Park is an out of centre location, for which planning permission was granted in 2000. The permission was for Class 1 retail (now Class 1a) and permitted the erection of seven non-food retail units and a garden centre. Condition 9 of the planning permission restricted the use and goods which could be sold, stating:

“The primary use of each of the retail units shall be the sale of bulky goods (e.g., DIY, hardware, furniture, carpets, electrical and gardening goods) and not the sale of clothing, footwear, toys, sports goods/sportswear, pets/pet products, books, or newspapers/magazines. The net retail floorspace of any electrical unit shall not exceed 910 sqm and no more than one such unit should be permitted within the development.”

[3] In 2015, Condition 9 was varied in respect of the unit in question. It became Condition 1 and provided:

“The primary use of Unit 1 (the retail unit subject to this permission) shall be for the sale of bulky goods e.g. DIY, hardware, furniture, carpets, electrical and gardening goods, and not the sale of clothing, footwear, toys, sports goods/sportswear, pets/pet products, books or newspapers/magazines. The sale of electrical goods shall only take place as part of a wider bulky goods offer from this Unit and it shall not be operated solely for electrical retailing. Notwithstanding the above, the sale and display of any Class 1 non-food goods will be permitted from up to 185 square metres of the existing Unit 1 (the retail unit subject to this permission) sales area only if occupied by a Catalogue Showroom Retailer. For the avoidance of doubt, a Catalogue Showroom Retailer is defined as a retailer selling a wide selection of non-food goods selected by the visiting public from a catalogue or digital browser and supplied to them fully packaged. Reason: In order to define the terms of this permission and to ensure that the sale of non-bulky goods is limited so as not to have an adverse impact on the vitality and viability of more sequentially preferable locations.”

[4] In 2025 Sainsbury's applied to vary Condition 1 to permit the use of the unit as a supermarket.

Relevant statutory provisions

[5] The Town and Country Planning (Scotland) Act 1997 contains the following provisions:

“24 Meaning of ‘*development plan*’

- (1) For the purposes of this Act, any other enactment relating to town and country planning and the Land Compensation (Scotland) Act 1963, the development plan for an area is to be taken as consisting of the provisions of—
 - (a) the National Planning Framework,
 - (b) any strategic development plan for the time being applicable to the area, together with—
 - (i) the Scottish Ministers' notice of approval of that plan, and
 - (ii) any supplementary guidance issued in connection with that plan, and
 - (c) any local development plan for the time being applicable to the area.

...

- (3) In the event of any incompatibility between a provision of the National Planning Framework and a provision of a local development plan, whichever of them is the later in date is to prevail.

...

25 Status of development plan

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

...

37 Determination of applications: general considerations.

...

- (2) In dealing with [an application made to a planning authority for planning permission] ... the authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations.
- (2A) The notice of the planning authority's decision on an application must include a statement as to whether the authority consider that the application is for a

development that is in accordance with the development plan for the time being applicable to the area to which the application relates together with an explanation of why the authority have reached that view.

...

42 Determination of applications to develop land without compliance with conditions previously attached.

- (1) This section applies, subject to subsection (4), to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.
- (2) On such an application the planning authority shall consider only the question of the conditions subject to which planning permission should be granted, and —
 - (a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, they shall grant planning permission accordingly;
 - (b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application.

....”

Relevant planning policies

[6] The Dumfries and Galloway Local Development Plan 2 provides:

“Retail Strategy

3.23 There is a clear network of centres within Dumfries and Galloway which takes the form of a hierarchy. The network comprises the following centres:

Table 1: Network of Centres

Regional Centre: Dumfries

Larger Town Centres: Stranraer, Annan, Castle Douglas, Newton Stewart

Town Centres: Dalbeattie, Gretna, Kirkconnel/Kelloholm, Kirkcudbright, Langholm, Lochmaben, Lockerbie, Moffat, Sanquhar, Thornhill, Whithorn, Wigtown

Commercial Centre: Gretna Gateway Outlet Centre

There is also a network of centres within Dumfries:

Town Centre: Dumfries

Commercial Centres: Cuckoo Bridge, bulky goods
 Dumfries Retail Park, bulky goods
 Peel Centre: comparison goods

Neighbourhood Centres: Calside, Georgetown, Heathhall, Lincluden, Locharbriggs,
 Lochside, Troqueer

...

Policy ED6: A Sequential Approach to Town Centres

Proposals for uses which generate significant numbers of people including new or expanded retail development, commercial leisure development, offices, community and cultural facilities and, where appropriate, other public buildings such as libraries and education and healthcare facilities, must demonstrate that a sequential assessment has been made of the following locations:

- town centre;
- edge of town centre;
- other identified commercial centre; and
- out of centre locations.

Proposals outwith the town centre must also demonstrate to the satisfaction of the Council:

- why sequentially preferable sites (including brownfield) have been discounted as being unsuitable or unavailable;
- that there will be no significant individual or cumulative adverse effect on the vitality and viability of the town centre where the development is proposed or of any centre within the catchment area;
- that the proposal will address an identified qualitative or quantitative deficiency in provision;
- that the development is of a scale appropriate to the centre; and
- that it can be easily accessed by a range of transport modes.

Applications to vary existing restrictions, such as the sale of bulky goods, will be assessed under this policy."

[7] National Planning Framework 4 provides:

“City, town, local and commercial centres

Policy Principles

Policy Intent:

To encourage, promote and facilitate development in our city and town centres, recognising they are a national asset. This will be achieved by applying the Town Centre First approach to help centres adapt positively to long-term economic, environmental and societal changes, and by encouraging town centre living.

Policy Outcomes:

- Centres are vibrant, healthy, creative, enterprising, accessible and resilient places for people to live, learn, work, enjoy and visit.
- Development is directed to the most sustainable locations that are accessible by a range of sustainable transport modes and provide communities with easy access to the goods, services and recreational opportunities they need.

...

Policy 27

a) Development proposals that enhance and improve the vitality and viability of city, town and local centres, including proposals that increase the mix of uses, will be supported.

b) Development proposals will be consistent with the town centre first approach. Proposals for uses which will generate significant footfall, including commercial, leisure, offices, community, sport and cultural facilities, public buildings such as libraries, education and healthcare facilities, and public spaces:

i. will be supported in existing city, town and local centres, and

ii. will not be supported outwith those centres unless a town centre first assessment demonstrates that:

- all centre and edge of centre options have been sequentially assessed and discounted as unsuitable or unavailable;
- the scale of development cannot reasonably be altered or reduced in scale to allow it to be accommodated in a centre; and

- the impacts on existing centres have been thoroughly assessed and there will be no significant adverse effect on the vitality and viability of the centres.

Town Centre First Assessment

For development proposals which are out of city/town centre and which will generate significant footfall a Town Centre First Assessment will be provided. Applicants should agree the data required with the planning authority before undertaking the assessment, and should present information on areas of dispute in a succinct and comparable form.

The town centre first assessment should:

- identify the potential relationship of the proposed development with the network of centres identified in the LDP;
- demonstrate the potential economic impact of the development and any possible displacement effects, including the net impact on jobs; and
- consider supply chains and whether local suppliers and workers will be a viable option; and
- the environmental impact of transporting goods and of staff and visitors travelling to the location.

The town centre first assessment should be applied flexibly and realistically for community, education, health and social care and sport and leisure facilities so that they are easily accessible to the communities they are intended to serve.

...

Retail

Policy Principles

Policy Intent:

To encourage, promote and facilitate retail investment to the most sustainable locations that are most accessible by a range of sustainable transport modes.

Policy Outcomes:

- Retail development and the location of shops support vibrant city, town and local centres.

- Communities can access the shops and goods they need by a range of sustainable transport modes including on foot, by bike, and by public transport, as part of local living.

...

Policy 28

- a) Development proposals for retail (including expansions and changes of use) will be consistent with the town centre first principle. This means that new retail proposals:
- will be supported in existing city, town and local centres, and
 - will be supported in edge-of-centre areas or in commercial centres if they are allocated as sites suitable for new retail development in the LDP.
 - will not be supported in out of centre locations (other than those meeting policy 28(c) or 28(d)).
- b) Development proposals for retail that are consistent with the sequential approach (set out in a) and click-and-collect locker pick up points, will be supported where the proposed development:
- is of an appropriate scale for the location;
 - will have an acceptable impact on the character and amenity of the area; and
 - is located to best channel footfall and activity, to benefit the place as a whole.

...

Town centre first

The Town Centre First Principle asks that government, local authorities, the wider public sector, businesses and communities put the health of town centres at the heart of decision making. It seeks to deliver the best local outcomes, align policies and target available resources to prioritise town centre sites, encouraging vibrancy, equality and diversity.”

Submissions for the petitioner

[8] On behalf of the petitioner, senior counsel submitted that the respondent had no lawful or rational basis to conclude that the Sainsbury application accorded with the Development Plan, and further that its expressed reasons for the decision were inadequate. The respondent had misdirected itself in law regarding the relevant development plan policies and in adopting a sequential approach to the evaluation of the application. Because

it had erred in those respects, it could not seek to characterise its decision as an unexceptionable exercise of planning judgment, and the decision complained of should be declared unlawful and reduced.

[9] Section 25 of the 1997 Act gave priority to the Development Plan. That was the case even though the application under consideration was one for the development of land without complying with conditions subject to which a previous planning permission was granted, in terms of section 42. In its decision, the respondent had stated that Sainsbury's application was in accordance with the Development Plan. A planning authority required to identify the relevant development plan, to consider and construe any provisions in it which were relevant to the application, and to apply them. It needed to consider whether the development proposal did or did not accord with the development plan. It also had to identify all the other material considerations which were relevant to the application and to which regard should be had. It had to decide whether there were considerations of such weight as to indicate that the development plan should not be accorded the priority which section 25 had given it: *City of Edinburgh Council v Secretary of State for Scotland* 1998 SC (HL) 33 at 44 - 45, 1998 SLT 120 at 127. The proper construction of planning policy was a question of law. The application of planning policy, if properly construed, was a matter of planning judgment for the planning authority: *Tesco Stores v Dundee City Council* [2012] UKSC 13, 2012 SC (UKSC) 278, 2012 SLT 739 at [17] to [19].

[10] The planning authority was required to give reasons for its decision. The reasons had to enable the reader to understand why the application was decided as it was and what conclusions were reached on the principal important controversial issues, disclosing how any issue of law or fact was resolved. Reasons could be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision.

The reasoning could not give rise to a substantial doubt as to whether the decision maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. The reasons required to refer only to the main issues in the dispute, not to every material consideration:

Wordie Property Co Ltd v Secretary of State for Scotland 1984 SLT 345 at 348; *South Bucks District Council v Porter* [2004] UKHL 33, [2004] 1 WLR 1953 at [36]. Where the planning authority followed and adopted the recommendation in a report prepared by its officers, it was a reasonable inference that it also followed the reasoning of the report: *Horada v Secretary of State for Communities and Local Government* [2016] EWCA Civ 169, [2016] PTSR 1271 at [36]; *Patton v East Renfrewshire Council* [2017] CSOH 158 at [8].

[11] The relevant Development Plan comprised the Dumfries and Galloway Local Development Plan 2 (“LDP2”) adopted in October 2019 and the National Planning Framework (“NPF4”). NPF4 was approved by the Scottish Parliament on 11 January 2023 and subsequently adopted on 13 February 2023. Insofar as there was an incompatibility between a provision in LDP2 and NPF4, the latter would prevail. Cuckoo Bridge Retail Park was not allocated in the LDP2 as suitable for new retail development.

[12] A Planning Applications Committee Report was prepared by one of the respondent’s case officers. In section 4 it listed what were described as “Relevant development plan policies”. These included NPF4, policies 27 and 28 and LDP2 Policy ED6. The Report addressed NPF4 Policy 27 and LDP2 Policy ED6, but contained no assessment of NPF4 Policy 28. It stated at paragraph 4.5 that “NPF4 through Policy 27 will only support a proposal of this nature and scale at this location if it can be demonstrated ...” and then proceeded to carry out a sequential assessment.

[13] When the report properly addressed at section 4 the “Principle of Development”, between paragraphs 4.4 and 4.11, it ignored that the application for retail development had no support in principle from the relevant retail development policy in the Development Plan. Instead, it addressed at some length NPF4 Policy 27 and LDP2 Policy ED6. The former was not a retail policy. LDP2 Policy ED6 set out a sequential approach for, *inter alia*, new or expanded retail development, and had provided the basis for the assessment provided to the respondent by the planning consultants retained by Sainsbury’s. Insofar as it did so for retail development not in out of centre locations, it was incompatible with NPF4 Policy 28, which prevailed. Accordingly, the report’s consideration of the impact on the town centre used a sequential approach which was outdated and irrelevant. The only potentially appropriate sequential approach would have been that set out in NPF4 Policy 28 a).

[14] Nonetheless the report provided at paragraphs 4.11 and 4.15:

“4.11 Taking into account the above matters, in principle the variation of the restriction on this unit to allow a development of this nature and scale would be considered to accord with the relevant policies of the Development Plan.

...

4.15 Taking all the relevant planning considerations into account, it is considered that the variation to the restriction on this unit has been accompanied by sufficient justification. A sequential analysis has found no suitable alternative units or sites within Dumfries Town Centre, a retail impact assessment has found no significantly adverse impact on the vitality and viability of the Town Centre and a development of the nature and scale proposed has potential to address an identified qualitative deficiency ... Officers therefore consider that the proposal accords with the provisions of the Development Plan and recommend conditional approval”.

[15] Those statements were clear errors of law and misdirections. On 25 February 2026 the application for planning permission to vary Condition 1 was considered by the Planning

Applications Committee of the respondent. By decision letter dated 26 February 2026 the respondent granted the application. The decision provided the following reason:

“It is considered that the proposal is in accordance with the provisions of the development plan and that there were no material considerations of sufficient weight in this case to justify making a decision otherwise. Consequently, under Section 25 of the Town and Country Planning (Scotland) Act 1997, the application was approved subject to the condition listed above.”

[16] No explanation was provided in the decision for that view.

[17] On the hypothesis that the explanation for the decision was to be found in the report, that showed clear errors in law and misdirections. The respondent had failed properly to identify and construe the relevant development plan policies. There was no consideration by the respondent of NPF4 Policy 28. It was the relevant development plan policy for retail development: *Tesco Stores Ltd v Perth and Kinross Council* [2024] CSOH 46, 2024 SLT 484.

It should have been, but was not, taken into account. If the court accepted the affidavit evidence before it that the policy was taken into account, the respondent had erred in law in construing it. It seemed to have considered that NPF4 Policy 28 was not “appropriate” (the meaning of which was unclear) to a section 42 application to vary a retail condition. NPF4 Policy 28 applied to all retail development, including those for change of use.

[18] The respondent erred by taking into account development plan policies NPF4 Policy 27 and LDP2 Policy ED6. These were irrelevant for out of centre retail development. Therefore, it had erred in law in its assessment of whether the proposed development accorded with the development plan by failing to take account of a relevant policy and taking account of irrelevant policies. There was no lawful basis for concluding that the development accorded with the development plan.

[19] In any event, the respondent’s decision that the development accorded with the Development Plan was irrational. It made no assessment of the development proposal

against NPF4 Policy 28. There was no conclusion as to whether the proposal did or did not accord with that policy. The report's assessment of the principle of development and impact on Dumfries Town Centre was made taking account only of NPF4 Policy 27 and LDP2 Policy ED6. The respondent did not weigh those policies against NPF4 Policy 28. It was irrational not to take account of, and weigh, all relevant policies before coming to a view about overall accordance with the Development Plan.

[20] Separately, the decision failed to provide adequate reasons as to why the proposed development accorded with the Development Plan. The decision did not set out how and why the development plan policies had been applied to justify planning permission. There was no basis in the decision for the conclusion that the development accorded with the Development Plan. No explanation was provided in the decision itself. There were insufficient reasons in the report to enable the informed reader to know if the respondent had properly applied the development plan policies which it purported to have relied upon as a basis for overall accordance with the Development Plan. The decision failed to give proper, adequate and intelligible reasons. There was real and substantial doubt as to whether the respondent had properly directed itself in law, properly construed its development plan policies and, thereafter, properly applied its planning judgment to those policies. The decision was unlawful and should be reduced.

Submissions for the respondent

[21] On behalf of the respondent, senior counsel noted that the relevant report to the respondent's Planning Applications Committee identified that the Cuckoo Bridge Retail Park contained seven retail units laid out in an L-shaped formation, that the application

sought permission to use Unit 1 as a supermarket, which was at variance with Condition 1 attached to the existing retail permission, that the reason for that condition was

“In order to define the terms of this permission and to ensure that the sale of non-bulky goods is limited so as not to have an adverse impact on the vitality and viability of more sequentially preferable locations”,

and that the effect of a section 42 application was to grant a new planning permission.

[22] The report identified the key supporting documents produced by the applicant, and in particular noted that its Retail and Planning Statement identified that vacant units in Dumfries Town Centre were significantly below the floorspace required by the applicant, that the health checks carried out by the applicant and the respondent did not indicate that the vitality of the town centre was poor or that it was particularly vulnerable to convenience goods impacts or store closures, and that the retail appraisal did not predict a significant adverse quantitative impact, but did predict that the introduction of a supermarket of the type proposed would increase choice and competition into the existing convenience goods market at a destination where convenience retailing was already established, thereby resulting in a qualitative benefit to the local area.

[23] The Report went on to identify the relevant planning history, noting that since the original permission for Cuckoo Bridge had been granted some 25 years ago, a number of applications at the retail park had been made, with diversification reflective of wider changes to the retail industry, including a marked decline of premises required for bulky goods retailing. It went on to deal with the representations that had been made, identifying that it had been claimed that the development was contrary to the use restriction in place in Cuckoo Bridge Retail Park and its purpose as defined by LDP2, and that a supermarket there would be contrary to the Development Plan, but also that other opinion considered that reuse of a vacant unit and local investment would be welcomed at a unit which was

unlikely to be used by an alternative retailer, that retail choice would be improved and travel times for shopping reduced, that further development and regeneration of the park might be attracted, and that the site had the benefit of excellent access.

[24] Section 4 of the report identified the relevant development plan policies and the key issues in relation to the determination of the application. It identified NPF4 policies 27 and 28 and LDP2 policies ED5 and ED6 as relevant such policies. It identified the respondent's duties under sections 24(3) and 25 of the 1997 Act. It set out the key considerations in the assessment of the application and provided an analysis of them. In particular, paragraphs 4.4 to 4.11 considered the "Principle of Development/Impact on Dumfries Town Centre" and noted that an overarching aim of the spatial strategy of the Development Plan was to deliver sustainable economic growth and for development to make a positive contribution to the local economy; that the importance of retail development was recognised with new proposals that could generate significant footfall, like supermarkets, having implications on the vitality and viability of cities, towns and local centres; that NPF4 and LDP2 were aligned in promoting a "Town Centre First" approach as a means of enhancing and improving established commercial centres; that the site was within an existing retail park forming part of the existing network of centres, but not within the town centre boundary; that there were no other sequentially preferable sites within, or adjoining, Dumfries Town Centre that were suitable or available for a development of the nature and scale in question; that officers agreed that the proposed store would increase competition to existing operations and provide qualitative benefit; that the council's appointed specialist had agreed that the assessment provided, which argued that the impact on the town centre as a whole was low, was robust; that the town centre was not particularly vulnerable to a development of the nature and scale proposed, and the impact

on vitality and viability would not be significantly adverse, such that the kind of impact on the town centre that would mean that the development would be contrary to the Development Plan was absent; and that accordingly, in principle, the variation of the restriction on this unit to allow a development of this nature and scale was considered to accord with the relevant policies of the Development Plan.

[25] In the section entitled “Transportation/Road Safety” the report identified that the site was within one of the commercial centres of Dumfries, that in addition to good vehicular access and car parking, it was also well served by a nearby bus route and good cycle and pedestrian linkage, and concluded that it would be easily accessible by a variety of means and would deliver development that did not conflict with development plan policies which promoted road safety and sustainable travel.

[26] The overall conclusion of the Report was to be found in paragraph 4.15 (the terms of which have already been set out).

[27] Policy 27 of NPF4 was identified as the NPF4 policy for “City, town, local and commercial centres.” It supported a Town Centre First approach. That was also identified in its policy intent and policy outcomes. The application site was in a commercial centre and Condition 1 was imposed to protect the town centre. The policy was clearly an important one for consideration of the application. The Policy 27 “key policy connections” identified Policy 28. The policy principles for NPF4 Policy 28 identified that its intent was “To encourage, promote and facilitate retail investment to the most sustainable locations that are most accessible by a range of sustainable transport”. The policy outcomes for Policy 28 identified that retail development and the location of shops supported vibrant city, town and local centres and that “communities can access the shops and goods they need by a

range of sustainable transport modes including on foot, by bike, and by public transport, as part of local living.” The key policy connections of that policy in turn referenced Policy 27.

[28] The local Development Plan identified Cuckoo Bridge Retail Park as a commercial centre. Policy ED6 of LDP2 set out a sequential approach. It was not incompatible with NPF4 policies 27 and 28.

[29] In its decision notice, the respondent adopted the recommendations and conclusions of the report and granted the permission. The Decision Notice set out that full details of the assessment of the proposal and the resultant decision could be found in the Statutory Report on Handling relative to the case, a copy of which was published on the council’s website.

[30] In addition to receiving and considering the report, the Planning Applications Committee was addressed by the Planning and Development Manager of the council at that time.

[31] Turning to the relevant law, a matter of planning judgment was within the exclusive province of the decision maker: *Tesco Stores Limited v Secretary of State for the Environment* [1995] 1 WLR 759 at 780 F-H and 784 B-D. It was for the decision maker to decide the determining issues that arose, the evidence that was material to these issues and the conclusions to be drawn from the evidence: *Moray Council v Scottish Ministers* [2006] CSIH 41, 2006 SC 691 at [28] to [32]. Subject to any overriding issue of irrationality in the *Wednesbury* sense, the weight to be attached to the main determining issues was a question of planning judgment, which was entirely a matter for the planning authority: *Tesco Stores Ltd v Secretary of State for the Environment* at 764 G - H and 780 F - H. The threshold of irrationality was a high one, and was a particular obstacle in planning cases: *R (Newsmith Stainless Ltd) v Secretary of State for the Environment* [2001] EWHC Admin 74, [2017] PTSR 1126 at [6] and [7]; *City of Edinburgh Council v Secretary of State for Scotland*.

[32] Planning officers' reports to committee were not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they were written for councillors with local knowledge. The question for the court would always be whether, on a fair reading of the report as a whole, the officer had materially misled the committee members on a matter bearing upon their decision. Minor or inconsequential errors might be excused. It was only if the advice in the officer's report was such as to misdirect the members in a material way - so that, but for the flawed advice, the committee's decision would or might have been different - that the court would be able to conclude that the decision itself was rendered unlawful by that advice. Unless there was evidence to suggest otherwise, it might reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice given: *Mansell v Tonbridge and Malling BC* [2017] EWCA Civ 1314, [2019] PTSR 1452 at [42]. The function of a planning officer when producing a report to the committee responsible for deciding whether planning permission should be granted was not to decide the fate of the proposal, but to provide to the members his or her own planning judgment and advice to help them in making the decision: *R (Whitley Parish Council) v North Yorkshire County Council* [2023] EWCA Civ 92, [2023] JPL 1081 at [35] to [37]. The court should focus on the substance of a report to see whether it had sufficiently drawn councillors' attention to the proper approach required by the law and material considerations, rather than to insist upon an elaborate citation of underlying background material. Otherwise, there would be a danger that officers would draft reports with excessive defensiveness, lengthening them and over-burdening them with quotations of materials. The assessment of how much and what information should go into a report to enable it to perform its function itself was a matter for the officers, exercising their expert judgment: *R (on the application of Buxton) v Cambridge CC* [2021] EWHC 2028 (Admin), [2022]

JPL 487 at [42] and [43]. Applications for judicial review based on criticism of the report to committee would not normally begin to merit consideration unless the overall effect of the report significantly misled the committee about material matters which thereafter were left uncorrected at the meeting of the planning committee: *R (Oxton Farms) v Selby District Council* [2017] PTSR 1103 at 1111.

[33] The Scottish Government Advice on determining a section 42 application in Circular 3/2022, Annex H, identified that, in determining such an application, authorities might consider only the issue of conditions to be attached to any resulting permission, and that the effect of granting permission to a section 42 application was such that a new and separate permission would exist for the development. The exercise contemplated in the consideration and determination of such an application was narrower than that which would pertain to applications for entirely new development, and that was the context in which its relationship to the development plan had to be viewed. That was why, in this case, NPF4 Policy 27 and LDP 2 Policy ED6 had been identified as key; they were the policies which provided the criteria for determining the effect of a proposed development on the town centre, which was the reason for the existence of the condition which the application sought to have removed. NPF4 Policy 28 did not assist in the assessment of the impact of a proposed development on the town centre. The planning authority had to refuse the application if it decided that planning permission should be subject to the same conditions as the previous planning permission. The previous planning permission remained unaltered by, and was not varied by, the decision on the section 42 application: *Powergen UK plc v Leicester City Council* [2001] 81 P&CR 5 at [25] to [27] and *City of Edinburgh Council v Scottish Ministers* [2020] CSIH 13, [2020] CSIH 13 at [36] to [39].

[34] A decision maker had to give proper and adequate reasons for his decision. The reasons had to deal with the main or determining issues in an intelligible way. So long as the reasons were intelligible and adequate, they could be expressed concisely. The guiding principle was that the decision must leave the informed reader in no substantial doubt as to the decision-maker's findings in fact and conclusions on the main determining issues: *South Bucks DC v Porter* at [35] and [36], and *Moray Council v Scottish Ministers* at [28] to [30].

[35] The petitioner argued that it was not known whether the respondent adopted the reasoning in the report, that it did not consider NPF4 Policy 28 and that it took account of NPF4 Policy 27 and LDP2 policy ED6, which the petitioner maintained were irrelevant. On that basis the petitioner argued that the respondent erred in law. Its fallback position was that if it was lawful to take account of these policies, the decision that the development accorded with the Development Plan was irrational as there were no conclusions on NPF4 Policy 28 and the assessment only took account of NPF4 Policy 27 and LDP2 Policy ED6.

[36] Dealing with those arguments in turn, firstly, it was clear from the decision notice that the respondent adopted the reasoning set out in the report. The notice referred to full details of the assessment of the proposal and the resultant decision as being to be found in the Statutory Report on Handling relative to the case. There was no hint in the documentation produced that the respondent disagreed with the report and its conclusions. The report identified NPF4 Policy 28 as a relevant policy and it concluded that the proposal accorded with the provisions of the Development Plan. The report identified a key consideration as "Principles of development/impact on Dumfries Town Centre" and noted the policy intents and outcomes of NPF4 Policy 28. There was no basis for concluding that the respondent did not consider NPF4 Policy 28. Both NPF4 Policy 27 and LDP2 Policy ED6 were relevant to the consideration of the application. As the report identified, the reason for

Condition 1 was to protect more sequentially preferable locations. The petitioner did not argue that the “Principle of Development/Impact on Dumfries Town Centre” was other than a key issue, or that the matters relevant to that issue were not relevant to the assessment of the proposal and whether it accorded with NPF4 Policy 28. LDP2 Policy ED6 was not incompatible with NPF4. Policy LDP2 ED6 and NPF4 policies 27 and 28 were all “town centre first approach” policies. The report set that out. The proposal was not considered by the respondent as a proposal on an “out of centre” site. The application was for retail development on a site with an existing retail use, within a Development Plan-recognised commercial centre. The reason for the existing restriction on the type of retail use for the site was to protect the vitality and viability of the town centre. In those circumstances it was rational for the respondent to identify the Principle of Development/Impact on Dumfries Town Centre as a key consideration. It concluded that (i) there were no suitable or available sites within or adjoining the town centre, (ii) the proposal would increase competition and provide qualitative benefits, and (iii) the impact of the proposal on the town centre would be low, as it was not particularly vulnerable to a development of the nature and scale proposed and the impact on vitality and viability would not be significantly adverse. None of these conclusions was challenged. In the circumstances it was reasonable for the respondent to conclude that the proposal accorded with the relevant policies of the Development Plan.

[37] The report identified the relevant policies and the key issues and thereafter set out conclusions on the key issues and on development plan compliance. A reasonably well-informed reader would understand why the respondent took the decision it did and what conclusions were reached on the principal important issues.

Submissions for the interested party

[38] On behalf of the interested party, Sainsbury's Supermarkets Limited, senior counsel submitted that the petition simply raised a disagreement with the respondent's rational exercise of the discretion afforded to it by the 1997 Act. The respondent was entitled to decide what the key issues and policies for the determination of the application were and to conclude that the proposed development accorded with the development plan, and it gave adequate and intelligible reasons for its decision.

[39] Cuckoo Bridge Retail Park was an existing retail park forming part of the existing network of centres. Although not within the town centre boundary, it was an established commercial centre in terms of the local development plan LDP2. The petitioner operated a food retail superstore at or near the south side of the retail park. Planning permission was first granted for the retail park in 2000. That planning permission was for Class 1 retail and permitted the erection of seven non-food retail units and a garden centre. Condition 9 of the planning permission restricted use and the goods which could be sold, and covered all of the units. The reason given for the imposition of the condition was "to enable the planning authority to exercise proper control over the nature of the development", ie, to prevent the development evolving into a trading position in conflict with policy aimed to protect Dumfries Town Centre. The petitioner's store was granted permission in 2004. Since then, several applications had been made to allow development within the retail park without the restriction imposed by Condition 9. Some of those applications had been successful and some had not.

[40] In 2014 an application was made under section 42 of the 1997 Act for planning permission to develop Unit 1 without compliance with conditions attached to the original grant of permission. As a result of the grant of that section 42 application in 2015, a new and

separate planning permission was created which allowed development of Unit 1 without compliance with Condition 9 of the previous permission granted in 2000, but subject to the new Condition 1 already described.

[41] In 2025 the interested party submitted a separate application for development in terms of section 42 of the 1997 Act. The application was accompanied *inter alia* by a Retail and Planning Statement. On 26 February 2026 the respondent's Planning Applications Committee considered a report and statement by its Planning and Development Manager, and resolved to grant a separate planning permission in relation to Unit 1. That was the decision challenged in the petition.

[42] As a result of the grant of a section 42 application, a new and separate planning permission was created which allowed development without compliance with a condition of a previous permission. It was independent from, and did not vary the condition attached to the previous permission, which remained extant: *City of Edinburgh Council v Scottish Ministers*. The scope of consideration of a section 42 application was generally restricted to considering the effect of allowing development without the relevant condition (or with a different condition), not whether development in principle should be permitted.

[43] In considering a challenge to a planning authority's decision, the court ought only to be concerned with the legality of the decision, not its merits: *Tesco Stores v Secretary of State for the Environment* at 780. The ultimate decision whether or not to approve a planning application was a discretionary decision for the planning authority: section 37(1) of the 1997 Act. A planning authority had to have regard to the provisions of the development plan so far as material to the application (section 37(2) of the 1997 Act) and, unless material considerations indicated otherwise, determine it in accordance with that plan: section 25(1) of the 1997 Act. The development plan in this case consisted of the National Planning

Framework (NPF 4) and the local development plan, the Dumfries and Galloway Local Development Plan 2019 (LDP2). In the event of any incompatibility, whichever was the later (in this case, NPF4) prevailed: section 24 of the 1997 Act.

[44] What constituted a material consideration was a matter of law, but the weight to be given to such a consideration was a matter of planning judgment: *R (Trashorfield Ltd) v Bristol City Council* [2014] EWHC 757 (Admin) at [13]. The question of whether or not a development proposal accorded overall with the development plan was a matter of planning judgment for the planning authority, as was the question of whether or not material considerations justified departure from it. Matters of planning judgment were within the exclusive province of the decision-maker: *City of Edinburgh Council v Secretary of State for Scotland*. As with any other decision in relation to the grant of planning permission, a decision in relation to a section 42 application would be *ultra vires* if the decision-taker had taken into account irrelevant considerations or had failed to take account of relevant and material considerations which ought to have been taken into account: *Wordie Property Co Ltd v Secretary of State for Scotland*.

[45] The proper interpretation of policies within the development plan was a matter of law for the court, but the application of policies to a given set of facts was a matter of planning judgment for the planning authority alone. The exercise of that planning judgment could only be challenged on the ground that it was irrational or perverse: *Tesco Stores v Dundee City Council* at [18] - [19]. When determining an application for planning consent, it was for the decision-maker to decide the key determining issues and it might confine the terms of the decision to the consideration of those issues: *Moray Council v Scottish Ministers* at [28] - [31].

[46] The purpose of the officers' report was not to decide the issue, but to inform the members of relevant considerations, allowing for the fact that the intended recipients already had substantial local and background knowledge. Part of the officers' expert function in reporting to a committee was to assess how much information needed to be included in a report, in order to avoid over-burdening busy members with material and undermining their ability to read and digest it effectively. A court should therefore focus upon the substance of the report, which should be read as a whole and in a common-sense manner, not legalistically: *R (Plant) v Lambeth LBC* [2016] EWHC 3324 (Admin) at [72] - [73]; *R (Trashorfield) v Bristol City Council* at [13]. An officer's report had to be sufficiently clear and full to enable councillors to understand the important issues and the material considerations that bore upon them, but also concise and focused. A decision based on the contents of an officer's report was only challengeable if the material included in the report was insufficient or misleading: *Trashorfield Ltd* at [13]; *R (Oxton Farms) v Selby District Council* at 1110 and 1111.

[47] In considering the legal adequacy of any reasons given, the question was whether they left the informed reader in real and substantial doubt as to the reasons why a decision was taken: *Wordie Property Co Ltd* at 348. Reasons could be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision, and needed to refer only to the main issues in the dispute, not to every material consideration. Decisions had to be read as a whole and in a straightforward manner, recognising that they were addressed to parties well aware of the issues involved and the arguments advanced: *South Bucks DC v Porter* at [36]. A petitioner could only succeed if the court was satisfied that it had been substantially prejudiced by the failure to provide an adequately reasoned decision: *South Bucks* at [30] and [36]. In the absence of any other indication to the contrary,

where members of a planning committee followed the reasoning of a report to it, particularly where a recommendation was adopted, it was a reasonable inference that it followed the reasoning in the report: *Horada* at [36] and *Patton* at [8].

[48] In essence, the petitioner's grounds of appeal all focussed on an alleged failure adequately to address the terms of NPF4 Policy 28 in determining the application. It alleged that Policy 28 was the relevant development plan policy for retail development, but was not taken into account, and that policies NPF4 Policy 27 and LDP2 Policy ED6 were irrelevant. That was clearly not the case. The allegation was made under reference to *Tesco Stores Limited v Perth and Kinross Council*. The issue in that case was not whether Policy 28 was the only relevant policy; it was, rather, the proper interpretation of the terms of that policy.

[49] NPF4 Policy 27 related to "City, Town and Local Commercial Centres"; its intention was to promote a "town centre first approach" and required an assessment on that basis for development proposals outwith designated centres. In those circumstances it was entirely rational to regard the issue of the potential impact of the removal of the restriction on the town centre as the key determining issue for the respondent to consider. That was a matter of planning judgment for the respondent as the relevant planning authority.

[50] The petitioner further complained that even if NPF4 Policy 27 and LDP2 Policy ED6 were relevant, the conclusion that the development was in accordance with the development plan was irrational because there was no explicit conclusion or explanation of the weight given to the proposal's compliance, or otherwise, with NPF4 Policy 28. Separately, it was suggested that the reasons given for the decision were inadequate. There was no proper basis for those allegations either. The informed reader was left in no real doubt as to the reasons for the decision.

[51] The Committee Report was provided by one of the respondent's case officers. It set out the relevant planning history of the site and noted that

“since the original planning permission for Cuckoo Bridge was granted some 25 years ago, a number of applications at the retail park have been made, with diversification reflective of wider changes to the retail industry, including a marked decline of premises required for bulky goods retailing”

and that most recently permission had been granted to allow Argos to operate from Unit 1.

It assessed the development against *inter alia* NPF4 Policy 27 and LDP2 Policy ED6. The petitioner's written representation dated 24 June 2025 made submissions in relation to the proposal's compliance with those policies. The report identified NPF4 Policy 27 and Policy 28 and LDP2 policies ED5 and ED6 as relevant policies. It also identified section 25 and section 24(3) of the 1997 Act. It set out the key considerations in the assessment of the application which included “Principle of development/Impact on Dumfries Town Centre”. The identification of that issue as a key issue was a matter of planning judgment which the author of the report and the respondent were entitled to make.

[52] Paragraphs 4.4 to 4.10 of the report analysed the potential effects of the imposition of the new condition on the town centre of Dumfries. It noted that:

“4.7 ... a Retail and Planning Statement has been submitted in support of the application which has sought to demonstrate the retail implications of the development. During the course of the application, officers appointed an independent external consultant with extensive commercial expertise and experience to review this supporting information. A number of queries were raised with respect to the sequential analysis, qualitative and quantitative deficiencies in retail supply and impact on the town centre impacts. The applicant subsequently provided updated information in order to provide further clarity on the impact

...

4.8 The appointed consultant acknowledged that the vacant units identified in the town centre are too small and unsuitable for a larger supermarket, and lack surface car parking ... In the circumstances, there is agreement that there are no other sequentially preferable sites within, or adjoining, Dumfries Town Centre that are suitable or available for a development of this nature and scale

...

4.10 With respect to retail impact, the Council's appointed specialist agreed that the assessment provided, which argues that the impact on the Town Centre as a whole is low, is robust. The updated assessment aligns with the Council's health checks that the town centre is not particularly vulnerable to a development of the nature and scale proposed, and the impact on vitality and viability would not be significantly adverse. As such, officers consider that the retail impact has been thorough and has not found the kind of impact on the town centre that would mean that the development would be contrary to the Development Plan."

[53] The report then concluded at paragraph 4.11 (the terms of which have already been set out) that in principle the application was consistent with the relevant policies of the Development Plan.

[54] At the meeting on 26 February 2026, the members of the Planning Applications Committee were also provided with an oral statement by the respondent's Planning and Development Manager in response to the petitioner's representative's letter dated 20 February 2026 and his email to the members of the Committee on 23 February 2026. The statement informed the members of the Committee that the respondent's planning department did not consider that the case officer had incorrectly assessed the application. It noted that the report referred to NPF4 Policy 28 as being a relevant development plan policy; that there were notable differences between the current application and *Tesco Stores Limited v Perth and Kinross Council* relied on by the petitioner's representative; and that in the application before the Committee, the case officer had used his professional judgment and come to the conclusion that NPF4 Policy 27 was the most appropriate policy. It also noted that the application related to an existing building with Class 1 consent within an existing retail park where the bulky goods condition was originally attached in order to protect the vitality and viability of the town centre. It noted that, accordingly, the professional planning opinion of the case officer was that the key determining policies were

NPF4 Policy 27 and LDP2 Policy ED6. Overall, the statement informed the members of the Committee that NPF4 Policy 28 was taken into account, but was not considered to be a key determining factor in the specific application and that the case officer was available to answer further questions on this and any other aspect of the report that members may have had.

[55] Read as a whole, the decision and the accompanying Report of Handling, the recommendations of which were adopted in the decision, provided proper, adequate and intelligible reasons for the decision. An informed reader was not left in any real or substantial doubt as to what the reasons for the respondent's decision were, or what matters they did or did not take into account. The respondent gave consideration to the terms of all the relevant policies within the development plan. It was entitled as a matter of planning judgment to regard NPF4 Policy 27 and LDP2 Policy ED6 as the most relevant policies within the development plan that were of relevance to the application and the author of the report was entitled to concentrate on addressing those policies. The respondent was entitled to conclude that, following a detailed analysis of the supporting documents and with the input of specialist independent expert consultants, the proposal overall was in compliance with NPF4 and the development plan as a whole. That was the overall conclusion that the respondent reached, and, in the circumstances, it was entitled to do so in the exercise of its planning judgment.

Decision

[56] It is appropriate to bear in mind from the outset that the application which has given rise to this dispute is one made in terms of section 42 of the 1997 Act, that is to say for the grant of planning permission for the development of land without complying with

conditions subject to which a previous planning permission was granted. In the present context, what was requested entailed a continuation of the existing retail use of the unit in question with the only desired change being the removal of the condition essentially restricting that use to the sale of bulky goods, a condition which was expressly imposed so as to avoid an adverse impact on the vitality and viability of more sequentially preferable locations. As section 42(2) makes clear, in dealing with such an application the planning authority is to consider only the question of the conditions subject to which planning permission should be granted. The relative Scottish Government Circular, naturally enough, neither adds to nor detracts from that provision. None of that takes away from the fact that the appropriate framework for the decision that required to be made was the development plan, but the decision that had to be made within that framework was the relatively narrow one of whether the existing retail use of the unit in question should continue subject to the existing condition, whether different conditions should be imposed, or whether the established permission for the retail use of the unit should in future be unconditional as to the type of goods to be sold. In such circumstances it is natural and appropriate to seek out from the relevant development plan, and apply, the policies most apt to inform how a planning decision may best avoid adverse impacts on the vitality and viability of more sequentially preferable locations.

[57] Subject to those initial observations, the subject of which did not feature prominently in the petitioner's submissions, but which may have been implicit in them, there was no material difference amongst the parties as to the law to be applied by the court in assessing the merits or otherwise of the petition.

[58] Against that background, one turns to consider the relevant elements of the Development Plan. LDP2 Policy ED6 is the element of the Plan which most specifically

deals with the type of application under consideration, in that it pertains generally to proposals for uses which would generate significant numbers of people and is expressed specifically to pertain to applications to vary existing restrictions, such as the sale of bulky goods. It requires a sequential assessment with a preferred hierarchy of town centre, edge of town centre, other identified commercial centres, and finally out of centre locations.

[59] Cuckoo Bridge Retail Park is identified as a commercial centre outwith the town centre in the Table appended to paragraph 3.23 of LDP2 and thus forms part of the third tier of the hierarchy. A proposal for a change of use (or variation of restrictions) there requires, in terms of the policy, to demonstrate to the satisfaction of the respondent why sequentially preferable sites had been discounted, that there would be no significant individual or cumulative adverse effect on the vitality and viability of the town centre or other established centres (this issue being particularly pertinent given the stated rationale for the condition which the application sought to discharge), that the proposal would address an identified qualitative or quantitative deficiency in provision, that the development would be of a scale appropriate to the centre, and that it could be easily accessed by a range of transport modes.

[60] The exercise of addressing those requirements was that undertaken by the applicants and in turn by the respondent's officers. That exercise was thorough and robust, and is beyond proper criticism in this process unless it was the wrong exercise to undertake in the first place. That is effectively the claim made by the petitioner, based on the suggestion that NPF4 Policy 28 takes precedence over LDP2 Policy ED6 because it is later in date and because the two policies are incompatible.

[61] It is therefore necessary to examine closely NPF4 Policy 28 with a view to determining whether it is indeed incompatible with LDP2 Policy ED6. Both NPF4 Policy 28 and NPF4 Policy 27, which are expressed as linked policies, embody the "Town Centre

First” principle, that is in essence to say, the prioritisation of the health of town centres in delivering the best local outcomes. The specific stated policy intent of NPF4 Policy 28 is to “encourage, promote and facilitate retail investment to the most sustainable locations that are most accessible by a range of sustainable transport modes” and the policy outcomes are that retail developments and the location of shops should support vibrant city, town and local centres, and that communities may access shops and goods they need by a range of sustainable transport means. In the context of a document like NPF4, which is necessarily pitched at the level of generality appropriate for national planning policy, the stated policy intent and required policy outcomes are powerful means of construction of the lower-level detailed policy statements which follow. Neither the stated intent nor the policy outcomes of NPF4 Policy 28 seem obviously in conflict with the implicit intent or desired outcomes of LDP2 Policy ED6.

[62] It is one of the lower-level policy statements in NPF4 Policy 28 which is relied upon by the petitioner in its claim that it is at odds with, and thus trounces, LDP2 Policy ED6. That is paragraph a) ii, which provides that development proposals for retail (including expansions and changes of use) are to be consistent with the town centre first principle, and says that that means that new retail proposals will be supported in commercial centres if they are allocated as sites suitable for new retail development in the LDP. Assuming (without deciding, since the question seems to me to be an open one, but not one requiring determination in this context) that the application now under consideration is for “new” retail, the question is thus raised, whether the commercial centre at Cuckoo Bridge is allocated as a site suitable for new retail development in LDP2. The answer is that LDP2 Policy ED6 recognises that Cuckoo Bridge (as well as the other sites in Dumfries recognised as commercial centres in LDP2, Dumfries Retail Park and the Peel Centre) may be regarded

as suitable for new retail development so long as the sequential approach there set out has been properly addressed and the other factors there listed resolved to the satisfaction of the respondent. I stress again that none of those matters is remotely inconsistent with the policy intent and outcomes of NPF4 Policy 28. It follows that paragraph a) of that policy does not stand in the way of the grant of the application so long as the requirements of LDP2 Policy ED6 are, in the reasonable view of the respondent, met, which they were. Put in the language of section 24(3) of the 1997 Act, there is no incompatibility between NPF4 Policy 28 and LDP2 Policy ED6.

[63] The report made by the respondent's officers to its relevant committee correctly identified NPF4 Policy 28 as a policy within the Development Plan which was relevant to the determination of the section 42 application before the respondent. Since that policy would support the grant of the application so long as the criteria set out in LDP2 Policy ED6 were addressed and in the reasonable opinion of the respondent met, the report also correctly identified that that policy was so relevant. Further, given that NPF4 Policy 27 is the policy in NPF4 which sets out in the most extensive manner how the "town centre first" approach to various kinds of development proposal (including for retail uses which will generate significant footfall, as here) should be applied, it was also correctly identified as a relevant development plan policy. As NPF4 Policy 28 requires retail development proposals to conform to the town centre first principle but only sets out at a very high level the considerations which would enable a decision to be made as to whether any particular proposal is in accordance with that principle, it was appropriate for the respondent's officers to concentrate on the more granular expressions of that principle to be found in LDP2 Policy ED6 and NPF4 Policy 27 in considering and determining whether the proposal at hand would satisfactorily avoid adverse impacts on the vitality and viability of the town

centre. The petitioner's criticisms that these policies were irrelevant, and the NPF4 Policy 28 was relevant but ignored, are not valid. Having identified the relevant policies without evident error in their construction, it was a matter of planning judgment for the respondent to determine what weight to give to each such policy and its constituent parts, and the approach taken to that exercise was well within the bounds of rationality which it required to respect. The statement in the report to the respondent's committee and in its decision letter, that the Sainsbury's proposal could properly be regarded as in accordance with the Development Plan, was accordingly one not capable of being effectively challenged in law.

[64] As to the challenge advanced in relation to the adequacy of the reasons given for the respondent's decision, I proceed, in accordance with the decisions in *Horvada* and *Patton*, on the basis that the reasoning of the respondent may be taken to be that advanced in the report which its officers submitted to it. That reasoning deals with the principal issues informing the decision made in a manner that amply exceeds the requirements imposed by the authorities cited by all parties. The reasons challenge made by the petitioner was in reality a challenge to the substantive reasons which moved the respondent to make the decision it did, not a challenge to the adequacy of their expression. Once it is appreciated that the respondent was entitled to view the application in the light it did, the reasons it gave can be seen to be entirely adequate, even though they are not the reasons which the petitioner wrongly considered to be those which should have been adopted in dealing with the application.

Disposal

[65] I shall sustain the third, fourth and fifth pleas-in-law for the respondent and interested party, repel the petitioner's pleas, and refuse the prayer of the petition. The petitioner shall be found liable to the other parties in the expenses of process.