OUTER HOUSE, COURT OF SESSION

[2017] CSOH 158

P834/17

OPINION OF LORD GLENNIE

In the petition for

ELIZABETH COLETTE PATTON

Petitioner

against

EAST RENFREWSHIRE COUNCIL

Respondent

and

TAYLOR WIMPEY UK LIMITED
CALA HOMES (WEST) LIMITED
SCOTTISH WATER
TAYLOR WIMPEY PLC

Interested Parties

for

Judicial Review of a decision dated 31 July 2017 by East Renfrewshire Council to grant an application for planning permission under the Town and Country Planning (Scotland) Act 1997 (as amended) for a residential development at Land at Maidenhill, Newton Mearns

Petitioner: J Campbell QC, Middleton; Balfour + Manson LLP
Respondent: M McKay QC, N McLean (sol adv); Brodies LLP
Interested Parties (Taylor Wimpey and Cala Homes): Armstrong QC; Shepherd & Wedderburn LLP
Interested Party (Scottish Water): Van der Westhuizen; BLM

29 December 2017

[1] The petitioner lives in Anderson Drive, Newton Mearns. The respondent is the

planning authority for the East Renfrewshire Council area, an area which includes Newton Mearns. On 31 July 2017 the respondent, acting by its planning applications committee ("the committee"), granted planning permission for a residential development in the Maidenhill area of Newton Mearns. The petitioner challenges the lawfulness of that decision. Mr John Campbell QC appeared for the petitioner and Mr Marcus McKay QC for the respondent. The first two named interested parties - in name they are the first and third Interested Parties - are the developers, Taylor Wimpey and Cala Homes, who were represented by Mr Douglas Armstrong QC. Scottish Water, who are also named as an interested party (the fifth Interested Party), have appeared through Ms Van der Westhuizen to assist the court in relation to matters with which they were involved, but otherwise have adopted an entirely neutral stance.

Relevant Background

[2] The Maidenhill site is a greenfield site located to the south-west of Newton Mearns. It is bounded to the north by the Ayr Road, to the east by an existing residential development, to the south by the Glasgow Southern Orbital Road and to the west by the M77/Old Ayr Road. The proposed development is for a substantial number of residential properties together with associated infrastructure and includes sites for affordable housing, a primary school and a "religious facility", as well as access, landscaping SUDS (standing for Sustainable Urban Drainage Systems) and associated ancillary development. The overall site extends to approximately 75 ha of which some 40 ha are regarded as "developable". The original application was for something under 800 houses but, as consented, the total number of residential units is 828, of which 187 are to be affordable housing.

[3] It was not seriously in dispute that there is a well-recognised and long-standing risk of flooding in Newton Mearns, Mearns Village, and the surrounding area. The Scottish Environment Protection Agency ("SEPA") has designated Newton Mearns a Potentially Vulnerable Area as part of the wider White Cart Catchment (Potentially Vulnerable Area 11/13). This fact is a material part of the background to the dispute presently before the court.

[4] The planning application was submitted in November 2016. It was opposed by a number of parties including the Newton Mearns Residents Flood Prevention Group ("FPG") and the Mearns Village Community Association ("MVCA"). The petitioner is a member of both. She is secretary of the MVCA and in her capacity as secretary she signed the MVCA's objection to the development. However, it is the objection by the FPG which has assumed greater prominence in the present proceedings. It is a carefully crafted document, drafted and signed by Counsel and running to some 25 pages. It raises a concern that the planning application

> "… does not adequately address the current hydrology of the proposed development site, the specific Supplementary Planning Guidance (2015) related to the site and the flood risk both on the proposed development site and elsewhere."

It was submitted that the proposals had not been shown to provide "zero detriment" or "a neutral or better effect" in terms of flooding but would instead increase flood risk off site. The "General Proposition" advanced by the FPG is stated in paragraph 3 in the following terms:

> "The development of greenfield land for housing results in an increase in the rate at which rainwater will run off the land because of the reduced ability of hard surfaces (e.g. roofs and roads) to absorb and retain the water. Construction necessarily reduces the area of the absorbent surfaces. [FPG] accepts, and the applicant and local planning authority appear to agree, that development of the kind proposed has the potential to increase the flood risk to property along the receiving watercourse, unless the runoff is adequately managed by means of a Sustainable Drainage System

> (SuDS). Furthermore, there is the potential for adverse consequences associated with a flood, for human health and the environment, should the design of the existing foul sewer have insufficient capacity."

The submission then focused on aspects of Scottish Planning Policy ("SPP") with its insistence on a "precautionary approach" to flood risk from all sources, including both surface water and fresh and foul drainage systems and its requirement that a development should have a neutral or better effect on the risk of flooding both on and off the site. It moved on to refer to various documents relating to the relevant Flood Risk Strategy for the area and, separately, to Supplementary Planning Guidance ("SPG") which identified drainage and flooding as a "sensitive local issue". I shall refer to some of these points in more detail below.

[5] The committee met on 2 June 2017 to consider the application along with a number of other applications. In advance of that meeting members of the committee were provided with a Report of Handling ("the Report") relating to this application. The Report was dated 26 May 2017. It was prepared by a planning officer within the Planning Department. It was spoken to at the meeting by Gillian McCarney, currently the Strategic Services Manager for the Council's Environment Department, but who was then the Council's lead officer in relation to the production of the Council's Local Development Plan. I shall refer to her as the planning officer. She gave an initial presentation providing an overview of the proposed development, referred to the assessment of the application as detailed in the Report, and then answered questions from members of the planning committee. There were lodged in process both a formal Minute of the meeting and a *quasi-verbatim* Note of the relevant part of the meeting.

[6] The committee accepted the recommendation in the Report and granted the planning application subject to some 28 conditions. Condition 13, which had been recommended in the Report, provided as follows:

> "13. The principles of Sustainable Urban Drainage Systems (SUDS) for the surface water regime shall be incorporated into the development. Development shall not commence on each individual phase of the development until details of the surface water management and SUDS proposals, including specific details of each SUDS area, have been submitted to and approved in writing by the planning authority. For the avoidance of doubt the maximum discharge rate from the site shall be 6.5 litres per second per hectare. Thereafter the surface water management details shall fully be implemented as approved."

The Report had initially recommended 27 conditions to be attached to the grant of planning permission. However, as a result of discussion at the meeting, and in particular the questioning of the planning officer by members of the committee, condition 28 was added. It reads as follows:

> "28. Prior to the occupation of any residential unit hereby approved a scheme relating to connecting the development to Scottish Water's sewerage infrastructure shall be submitted for the approval in writing of the Planning Authority in conjunction with Scottish Water. The submitted scheme shall provide for detail/timescales of connection of the development to Scottish Water's sewerage infrastructure (including any temporary connection) as well as for the upgrade/augmentation of the sewerage infrastructure after 400 residential units. Thereafter the scheme shall be fully implemented as approved."

[7] I should note that the FPG was concerned that the Report did not adequately deal with the points raised by them in their original Objection. Accordingly they wrote a letter dated 1 June 2017 addressed to the respondent pointing out what they regarded as material errors and omissions in the Report. Although not addressed to members of the committee, it is clear that copies of this letter reached individual members before the meeting on 2 June 2017.

The Report of Handling

[8] Since the Report was the focus of some attention before me, I should briefly mention the function and status of such a Report as it appears from the decided cases. The purpose of such a Report is to summarise for the benefit of the committee members the material planning guidance, statutory and otherwise, to identify the important issues which they will have to decide, and to summarise the material and arguments on the basis of which their decision has to be made. In the absence of contrary evidence it is a reasonable inference that members of the planning committee will have followed the reasoning of the Report, at any rate where the recommendation contained in the Report is adopted. For this reason a Report of this kind has to be sufficiently clear and full to enable councillors to understand the important issues and the material considerations that bear upon them and decide those issues within the limits of planning judgment that the law allows them. But this does not mean that the Report has to cover every point in great detail. It should be focused and concise. If it is too long, too elaborate or too defensive, there is a danger that councillors will not read it or, if they do read it, will not understand it fully. A careful judgment has to be made by the planning officer as to how much detail to include in the Report. The assessment of how much and what information should go into the Report is a matter for the planning officer exercising his own expert judgement and that judgement is entitled to respect. If he gets it wrong to the extent that the Report contains insufficient information to enable the committee to perform its function, or is positively misleading, then a decision taken by the committee on the basis of that Report may be challengeable in the courts. But the court will not lightly interfere. It will not subject the Report to the same critical analysis as might be appropriate to the interpretation of a statute. The Report must be given a fair reading. It must be assumed that it is addressed to a knowledgeable readership, in other

words to councillors who, collectively, as a body, are broadly familiar with the relevant statutory tests and other relevant guidance and have some familiarity with the location with which the application is concerned. In addition, it must be borne in mind that any defect in the Report may have been corrected at the meeting of the committee by the planning officer either of his own initiative or in response to questions from members of the committee. An examination of the minutes of the meeting should enable it to be determined whether this has been done, failing which evidence from the planning officer may be required. These principles emerge from the following cases (and from others referred to in them): *R* v *Selby District Council, ex parte Oxton Farms* [2017] PTSR 1103 per Pill LJ at page 1110 and per Judge LJ at page 1111; *R (Morge* v *Hampshire County Council* [2011] 1 WLR 268 (UKSC) per Baroness Hale at paragraph 36; *Bova* v *Highland Council* 2013 SC 510 at paragraph [26]; *R (Trashorfield Limited)* v *Bristol City Council* [2014] EWHC 757 (Admin) per Hickinbottom J at paragraph 13(iii)-(vi); *R (Protectbath.org and Victims of Fullers Earth Limited)* v *Bath and North East Somerset Council* [2015] EWHC 537 (Admin) per Hickinbottom J at paragraph 4; *Cooperative Group Limited* v *Glasgow City Council* [2016] CSOH 88 per Lord Turnbull at paragraph [21](ii); and *Simon Byrom* v *City of Edinburgh Council* [2017] CSOH 135 at paragraph [32].

The Petitioner's Criticism of the Decision and Decision Making Process

(i) Petition

[9] The grounds upon which the decision to grant planning permission is challenged are set out in the petition. That document runs to some 17 statements of fact (not counting those dealing with permission to proceed and transfer to the Upper Tribunal). The following may serve as a summary of the main points.

[10] There is a well-recognised and long-standing risk of flooding in Newton Mearns, Mearns village and the surrounding area: statement 7. SEPA has determined that Newton Mearns must be covered by a surface water management plan or plans that set objectives for the management of surface water flood risk and identify the most sustainable actions to achieve these objectives: ibid. On a number of occasions in the recent past there has been flooding caused by overflowing of local watercourses and on several occasions raw sewage has flooded during heavy rainfall: ibid. Scottish Water has authorisation from SEPA to discharge over 20,000 tonnes of untreated sewage per day by way of Combined Sewer Outflows into the watercourses in Newton Mearns, including sewers passing through Mearns village: statement 8. On occasion during heavy rainfall, the effect of such flooding has been to deposit untreated sewage on streets, in surrounding gardens and even within residential properties: ibid. That represents a danger to public health: ibid. As a result of these issues, Scottish Water identified a number of possible ways in which sewage outflow from the development could be dealt with: ibid. It identified two of those options which it preferred: ibid. The Development Impact Assessment ("DIA") prepared by Scottish Water in connection with the development did not demonstrate that even 400 properties, the first stage of the proposed development, could be connected to the existing sewer without augmentation of its capacity: ibid.

[11] The planning committee was required to make its decision in accordance with *inter alia* sections 25 and 37 of the Town and Country Planning (Scotland) Act 1997 as amended: statement 10. It must also make its decision in accordance with the Local Development Plan ("LDP") unless material considerations indicate otherwise: ibid. It must have regard to and give appropriate weight to Central government policy and guidance published as Scottish Planning Policy (Second Edition, June 2014) ("SPP"): ibid. The

Maidenhill Supplementary Planning Guidance ("SPG") formed part of the adopted LDP: ibid. It was submitted that the decision to grant planning permission was not made in accordance with the LDP (incorporating the SPG), nor in accordance with SPP and the published Guidance referred to therein: ibid. There was no material consideration sufficient to justify a departure from the adopted LDP or the SPP: ibid. Insofar as some aspects of the failure to explain matters sufficiently were sought to be explained by the respondent as an exercise of planning judgment, and therefore immune from criticism, that did not excuse a failure to explain in the Report the reasoned objections of affected communities; nor could it justify ignoring published Guidance.

[12] At its meeting, the committee had before it the Report prepared by the planning officer responsible for the application: statement 11. Much of the Report contained material errors so that the committee was not in possession of all the material facts and necessary knowledge relevant to the application: ibid. The supplementary advice tendered at the meeting by the planning officer was materially inaccurate in certain respects: ibid. The Report and the supplementary advice omitted vital information and guidance which ought to have been before the members of the committee before they were invited to make a decision: ibid. Without that information, the exercise of planning judgement by the committee was necessarily incomplete and inevitably flawed: ibid.

[13] The committee attached a number of conditions to its decision to grant planning permission: statement 12. Condition 28 reflected the committee's decision that about 400 residential units could be accommodated within the existing sewer network without the need either to build a new sewer or augment the existing sewer capacity: ibid. That decision was flawed, because the assessment carried out by Scottish Water demonstrated that there was no capacity in the existing system for an additional 400 houses: ibid.

[14] The LDP and SPP required planning authorities to adopt a "precautionary approach" to flood risk in relation both to the application site and to the surrounding areas: statement 13. However the committee ignored the collected policy advice in respect of downstream watercourses and the requirement to refer to "Sewers for Scotland", and failed to undertake hydraulic modelling of the site: ibid.

[15] The decision to grant the application ran counter to that "precautionary approach": statement 15. The Maidenhill SPG recognised that there were certain "pinch points" where flooding was more likely than at other points, notably at Firwood Court, but there was nothing in the information provided to the committee (in particular in the Report) to show the effect of the proposed development on these pinch points: ibid. Further, the insistence on attaching condition 28 to the grant of permission demonstrated acceptance by the committee of the increased risk of flooding and in particular the increased risk of untreated sewage being discharged from the sewage system as a result of the proposed development: ibid. Having recognised that increased risk, the committee ought to have refused the application: ibid.

[16] The Report was inaccurate and incomplete in a number of respects: statement 16. It did not expressly address the objection letter submitted by the FPG, and therefore did not address the FPG's objection that the application did not deal with pinch points, in particular at Firwood Court: ibid. It stated that Scottish Water had only one preferred sewer option whereas in fact it had others: ibid. It stated that Scottish Water had indicated that temporary connection to the existing sewage system could be provided for about 400 residential units without any augmentation of the sewage system whereas in fact that had not been demonstrated: ibid. It stated that the maximum discharge rate from the site should be 8 litres per second per hectare whereas in fact the maximum discharge rate from

the development site in its greenfield condition was 6.5 litres per second per hectare: ibid. It did not deal with the results of a consultation undertaken in relation to land raising above the site boundary, indicative of a more general failure to conform to the requirements of the Aarhus Convention: ibid. Those errors in the Report were of such significance as to undermine the decision of the committee to grant planning permission: ibid.

[17] The supplementary advice tendered to the committee by the planning officer was inaccurate in material respects: statement 17. She advised the committee that the application accorded with local and national planning policies whereas in fact it failed to adopt the "precautionary approach" required by them: ibid. She advised the committee that insurance was not a relevant consideration in determining the application whereas in fact it was expressly mentioned in section 259 of SPP: ibid. She advised that independent reviews of the flood risk and drainage issues had been carried out by the respondent's Road Service Department and by SEPA whereas in fact that was not the case: ibid. She advised that it was not possible to verify the FPG's claim that the existing sewer connection flooded over 8000 tonnes of sewage during heavy rainfall, whereas that assertion was vouched by Scottish Water's DIA: ibid. She advised the committee that Scottish water had indicated it was possible to connect an additional 400 residential units to the existing sewer in Greenlaw Road without upgrade or augmentation of the existing sewer network whereas Scottish Water had provided no evidence that that was so: ibid. She advised the committee that SEPA had withdrawn its objection because it was satisfied with the information which it had received whereas it had in fact queried the accuracy of that information: ibid. She advised the committee that there would be no increase in flooding as a result of development of the site whereas in fact the run-off volume from the development will be greater than the run-off volume from the existing green field site and the water course will

rise faster: ibid. She advised that Scottish Water had only one preferred sewer option whereas in fact it had more than one: ibid. In this connection she advised that the planning committee could not compel Scottish Water to choose one option over another whereas in fact the committee would have been entitled to reject any solution on the ground of a failure to recognise the need for effective flood prevention measures: ibid. She advised the committee that the applicants themselves had no responsibility to address existing flooding problems in Newton Mearns away from the development site whereas in fact the committee was required to take existing problems into account in determining the application: ibid. These errors were individually and collectively material and sufficient to undermine the committee's decision based upon that Report: ibid.

(ii) Note of Argument

[18] These various criticisms were drawn together by Mr Campbell QC in his written Note of Argument, which he adopted in his oral submissions. Under reference to the opinion of Lord Turnbull in *Cooperative Group Limited* v *Glasgow City Council* (*supra*) at paragraph [11], he submitted that applications for planning permission had to be determined in accordance with the development plan unless material considerations indicated otherwise. But he accepted that the application of planning policy required the exercise of planning judgement and was a matter for the decision maker (*Tesco Stores Limited* v *Dundee City Council* 2012 SC (UKSC) 278); that whether or not material considerations could outweigh or justify departure from the development plan was a matter of planning judgement for the decision maker (*Edinburgh City Council* v *Secretary of State for Scotland* 1998 SC (HL) 33); and that the court was concerned only with the legality of the decision made, or of the decision making process, and not with the merits of the decision or

of the planning judgment exercised by the decision makers *(Tesco Stores Limited* v *Secretary of State for the Environment* [1995] 1 WLR 759). I should mention at this stage (to avoid repetition later) that these principles were not in dispute. In addition to these authorities, I was referred by Counsel for the respondent and for the developers to *Secretary of State for Communities and Local Government* v *Hopkins Homes Ltd* [2017] 1 WLR 1865 per Lord Gill at paragraphs 72 - 73 and to *Simson* v *Aberdeenshire Council* 2007 SC 366 at paragraph 23 to vouch two additional propositions: (i) that the application of planning policy to the individual case is exclusively a planning judgment for the planning authority; and (ii) that it is for the planning authority to decide how much information it needs to enable it to assess and decide upon the application.

[19] Mr Campbell submitted that the respondent could not hide behind the mantra of "planning judgement" when, in reality, the committee had omitted key policy considerations and determinants when they came to reach their decision. He submitted that the members of the committee had to know certain key facts and understand certain key policies before being asked to make a decision. That knowledge and understanding was to be gained from the Report, which should examine the application, examine the consultation responses, examine any objections made and weigh them in the balance, and should conclude with an informed recommendation.

[20] Mr Campbell emphasised the need for the respondent, through the committee, to comply with the LDP and SPG. SPP was also a material consideration. He noted that the respondent was also the regulator for flood prevention under the Flood Risk Management Act 2009, though that Act did not prescribe procedures to be followed. Both LPG and SPP required a precautionary approach to flood risks both on and off site. The precautionary approach was articulated in SPP at paragraph 255 (under the heading "Policy Principles");

at paragraphs 260 and 263 (under the heading "Development Planning"); and at paragraphs 264 - 267 (under the heading "Development Management").

[21] Against that background, three examples were identified of failures in the respondent's consideration of the application. I shall deal with each of them separately. But doing so I should deal briefly with the question of "standing".

Standing

[22] It was established in *Axa General Insurance Company Limited* v *Lord Advocate* 2012 SC (UKSC) 122 that the old terminology of "title and interest" as a means of determining whether an individual had a right to bring proceedings for judicial review should no longer be used. The courts should refer instead to "standing", based upon whether the individual or body had a "sufficient interest" in the subject matter of the proceedings: see per Lord Hope at paragraphs [62] - [63] and per Lord Reed at paragraphs [170] - [175]. In *Walton* v *Scottish Ministers* 2013 SC (UKSC) 67 Lord Reed emphasised the point that he had made in *Axa*, namely that the question of what constitutes sufficient interest has to be considered in the context of the issues raised: see paragraphs [93] - [94]. It would often be necessary for a person to demonstrate some particular interest to show that he was not a mere busybody; but there might also be cases in which any individual, acting as a citizen, would have sufficient interest to bring before the courts a public authority's violation of the law without having to demonstrate any greater impact upon himself than upon other members of the public.

[23] In the present case the petitioner's standing was specifically challenged by Mr Armstrong QC on behalf of the developers. He argued that she was not complaining that her house was directly affected by any flooding or any leakage of raw sewage. But that

is not the point. She lives in an area in which, if her concerns are well founded - and the matter obviously has to be addressed on the basis that her concerns are well founded - there will be additional flooding in the area in which she lives, including flooding by raw sewage. She has identified a number of places where sewage has leaked out in the past and, if she is right, may leak out again in the future. Those places are not immediately on her doorstep, but they are certainly in areas where she, as a resident of that part of Newton Mearns, is likely to walk. It seems to me to be plain that she has a genuine and sufficient interest in bringing this petition for judicial review based upon her concerns for the ambience of the place where she lives and the surrounding streets. In a relatively small community of this sort, I would find it difficult to see that any resident would not have standing to bring this petition, even if the flooding about which they were concerned was on the other side of Newton Mearns. The discharge of raw sewage onto the streets at particular points affects the whole community, and in principle it must be open to any member of that community to bring a legal challenge. I say "in principle" advisedly. If it were shown that the petitioner was a malcontent, or an isolated voice determined to hold up a development favoured by the remainder of the community, the result might be different. I only say "might" - I do not have to decide the point. But no such thing is suggested here. Indeed in this petition the petitioner is seeking to vindicate a position advanced initially by the FPG and the MVCA. Although those groups have not themselves advanced a legal challenge to the grant of planning permission, or sought to have made themselves parties to this challenge, I have seen nothing to indicate that they no longer oppose it. The fact that the petitioner is alone in bringing these proceedings does not indicate that her objections are not shared by others.

[24] I therefore reject this argument. I am satisfied that the petitioner has standing to bring this petition for judicial review.

The Three Examples

[25] I turn now to consider the three examples which Mr Campbell QC placed before the court in support of his arguments.

Example 1

[26] Example 1 is directed towards the perceived risk of flooding from the foul sewerage route in a number of locations broadly to the north east of the development site. The objection was premised on the hypothesis that Scottish Water proposed to connect the development site to an existing sewer in Langrig Road by a route known as "Option 2d". According to the petitioner, that would have connected the new houses to a foul sewer route which had flooded for at least 17 years, particularly as new developments had been connected to it. Scottish Water (and its predecessor organisation, West of Scotland Water) had been promising to upgrade the sewer but had not done so. Some 15 locations were identified where the sewer currently floods. It was said that the most recent flooding took place in August 2017, requiring disinfection of human excrement and harmful bacteria in Greenlaw Road.

[27] Against this background, the petitioner expressed concern that Scottish Water had indicated that a temporary connection could be provided for about 400 residential units in the new development without any augmentation of the sewerage capacity. As a matter of common sense, if the sewer was already flooding it was because it was full to capacity; it was difficult to understand how there could be scope for any connection for additional housing, whether temporary or otherwise, without works being carried out to increase the capacity of the sewerage system in that area. Scottish Water had not demonstrated that the

temporary connection could be provided for the initial phase of about 400 residential units without increasing the risk of off-site flooding. The Report provided to the committee had failed to point this out and, indeed, had misrepresented the position. Further, in response to questioning from one member of the committee, the planning officer had failed to provide the information which would have demonstrated an increased risk of flooding from the sewerage system to which the new development would be connected. She had been unable to verify certain information. Further, she had diverted the discussion away from a proper consideration of the problem of off-site flooding from the sewerage system by stating that the respondent, as the planning authority, could not tell Scottish Water what to do. The true position, which was never explained to members of the committee, was that the committee could indeed have refused permission on the basis that no augmentation of the sewerage system was planned to be in place before the initial connection, whether on a temporary basis or otherwise, of the first 400 houses, and that this would increase the flood risk off-site, including the risk of raw sewage flooding out at the identified locations.

[28] There is, to my mind, some force in this point. Members of the committee were right to have a concern that if additional housing were connected to a sewer which already overflowed on occasions then the likelihood of raw sewage overflowing into the streets of Newton Mearns would be increased. Insofar as the Report to the committee did not satisfy the members of the committee, the planning officer who spoke to the Report ought to have been in a position to answer the members' questions. And although the planning officer was correct to say that the respondent, as the planning authority, could not tell Scottish Water what to do in terms of its proposed connection of 400 houses without any augmentation of the capacity of the sewerage system in that area, she should have gone on to explain that the committee could have regard to the proposals of which they had been

made aware and take those into account in deciding whether or not to grant planning permission, bearing in mind, of course, the potential for Scottish Water to alter its proposals at any time between the grant of permission and the completion of the first stage of the development. The inclusion of condition 28, which dealt with the need for augmentation after the first 400 houses were connected, did not deal with the point which was of concern both to the objectors and to some of the members of the committee.

[29] However, I do not need to decide this matter finally. During the course of the hearing I was shown a revised DIA prepared by Scottish Water in August 2017, showing that the proposed connection was not by Route 2d to the north east of the development but by an altogether different route broadly to the north west. This was intended as a permanent connection for the whole of the new development and there would be no need for a temporary connection for any part of the development by the route to the north east. Counsel for the respondent and for the developers relied on this to show that, since the grant of planning permission, Scottish Water had revised their plans; so that, even if there had been something objectionable in the proposed temporary connection of 400 houses by means of Route 2d to the north east of the development site, that was no longer a live concern. However, Ms Van der Westhuizen, who appeared for Scottish Water, told me that Scottish Water had decided upon this alternative route before the meeting of the planning committee at which the planning application was consented.

[30] It was not in dispute that this route to the northwest avoided the potential flooding points with which the petitioner's objections, as outlined in Example 1, were concerned. There was no evidence before me of any concern that similar problems would be encountered as a result of a sewerage connection by this northwest route. In his reply, Mr Campbell QC expressly accepted that to be the case. In those circumstances the

substance of the point falls away. There is no need for me to determine whether the complaint about the process under this heading is justified. The fact is that, however legitimate the concern about the proposed temporary connection by the north east route of 400 houses without augmentation of the sewerage capacity in the relevant area, that proposed temporary connection by that route is not going to happen. A new route is proposed which does not give rise to those concerns. So even if the criticisms of this part of the process are justified, they are in the event irrelevant.

Example 2

[31] Example 2 raises the issue of off-site watercourses and the pre-existing flood risk. Under reference to SPG: Maidenhill Masterplan Area (2015) it was stressed that SPP places a clear requirement for any developer to have a neutral or better effect on the risk of flooding both on and off the site, which could be achieved by limiting the discharge to a rate lower than that of the existing greenfield site. An assessment of the capacity and condition of downstream culverts was required to ensure there was no increase in downstream flood risk. Reference was also made to Sewers for Scotland, Edition 3, which required hydraulic modelling of the downstream water course to be undertaken where there were existing problems of flooding from the receiving water course to locations downstream. It was said that there had not been an assessment of the capacity and condition of downstream culverts; and there had been no hydraulic modelling. Insofar as reliance had been placed on SEPA having considered the matter and removed its objection on flood risk grounds in May 2017, SEPA had in fact emphasised that the Council was still required to undertake its responsibilities as the Flood Prevention Authority. The volume of run-off from a developed site is many times in excess of the run-off volume from the same site in a greenfield state. It

was therefore necessary to control the run-off from the developed site to ensure no additional flooding risk downstream. However, no quantitative assessment of the downstream flood risk had been undertaken. The respondent's Roads Service in its report responding to the consultation process had assumed an allowable greenfield run-off rate of 8 litres per second per hectare and was satisfied that the development figure of 6.5 litres per second per hectare was within that limit. But the figure of 8 litres per second per hour was inaccurate. The actual greenfield run-off for the site was 6.5 litres per second per hectare and the proposed development did not improve on that.

[32] Mr McKay QC, who appeared for the respondent, submitted that an expert assessment of the capacity and condition of the downstream culverts had indeed been carried out. The planning authority in the exercise of its planning judgment was entitled to rely upon that and to take the view that the application conformed to the Maidenhill SPG. The issue of flooding downstream in way of the culverts had not been ignored. The Report to the members of the committee referred to the response from both SEPA and the Roads Service. SEPA had objected until clarification was provided on three points, including channel and culvert capacity. The respondent as planning authority was entitled to rely upon the opinions of bodies such as SEPA who had statutory responsibility in this area: cf *Bova* v *Highland Council* at paragraph [35]. The Roads Service had also indicated that it was content with the proposal. The criticism that the Roads Service had hit on a figure of 8 litres per second per hectare, even if justified, was irrelevant, since the condition attached to the grant of planning permission had reduced this to 6.5 litres per second per hectare: see condition 13 set out above. Mr Armstrong QC, for the developers, adopted these points. He also referred in this context to PAN 79 which made it clear that the planning authority was

entitled to take account of and place reliance on the views expressed by Scottish Water and SEPA.

[33] I am satisfied that there is nothing in this ground of complaint. It is of importance that the committee had before it responses both by SEPA and the Roads Service which had considered the question of flooding and had had particular regard to the culverts. Despite Mr Campbell's submission to the contrary, the issue of flooding at Firwood Court was specifically mentioned by the Roads Service and referred to in the Report. The advice from SEPA and the Roads Service was adequately summarised in the Report. The suggestion that full hydraulic modelling was required before a decision could be made is not supported by the material placed before me. Indeed it seems to me that, contrary to Mr Campbell's avowed disclaimer of entry into the merits of the decision, a criticism along these lines is doing precisely that. The question before the court on this application is whether, having regard to the material placed before it and in particular the Report prepared by the planning officer, it can be shown that the committee in granting planning permission proceeded on a false basis or on the basis of inadequate information. To my mind that case has not be made out.

Example 3

[34] Example 3 focuses on what it describes as an erroneous proposal to build on the water course and a functional floodplain. The argument relates to Watercourse C' (the apostrophe is part of its name). Under reference to the Maidenhill SPG, it was submitted that development should not take place within areas of medium to high risk of flooding from watercourses and that both SEPA and the respondent would oppose any proposals for development in the functional floodplain. Initially SEPA lodged an objection but in

May 2017 it withdrew its objection on the basis that the developer was proposing to undertake work outwith the functional floodplain so as to divert the surface water and dry out the watercourse. On that basis the development would comply with SPP in relation to flood risk. At the hearing before the committee, one member asked about the SEPA objection and was told simply that SEPA withdrew its objection because it was satisfied with the information received from the developer. It was not explained that SEPA was maintaining its position that this was a watercourse, nor that building on a watercourse was contrary to the LDP.

[35] On behalf of the respondent Mr McKay QC submitted that the advice of SEPA in respect of Watercourse C' was fully addressed in the Report to the members of the committee. It was plain from the letter from SEPA that any remaining points of difference were not important. The development met the requirements of SEPA.

[36] Mr Armstrong QC for the developers adopted those submissions but added that there were a number of reports and analyses submitted as part of the planning process which were before the committee. He referred me to a Hydrological Scoping Study carried out by Enviro Centre for the respondent. That study had informed the development of the Maidenhill SPG issued in June 2015. In April 2017 Enviro Centre, then acting for the developers, had written to SEPA to provide clarity and further evidence in support of the proposed residential development. Watercourse C', there referred to as Drainage Ditch C', was the subject of detailed analysis covering three full pages. It was described as a "small ephemeral ditch" located along the boundary between two fields and fed by a network of buried field drains and surface water run-off following heavy rainfall. It conveys run-off eastwards towards the site boundary before joining a larger ditch located outwith the site boundary and dropping steeply into Burn C. Reference was made to calculated run-off

rates, the results of hydrological modelling, sensitivity testing and the assessment of flood risk. The assessment of flood risk refers to the Drainage Assessment dated February 2017 which demonstrated that all run-off from the catchment of Ditch C' would be intercepted and re-rooted towards the SUDS ponds as part of the drainage strategy - removal of the ditch would not therefore remove any floodwater storage from the catchment and would not impact on flood risk within or downstream of the site. The overall conclusion in respect of Ditch C' was that the hydraulic modelling demonstrated that there was no "floodplain storage" associated with the ditch. In May 2017 Enviro Centre wrote to the respondent responding in detail to the points made by the FPG.

[37] These documents were before the planning authority at the time it made its decision on the planning application. So were the letters from SEPA. The Report to the committee summarised SEPA's position as regards Watercourse C', noting that the effect of the works to be carried out by the developers would be that Watercourse C' would cease to exist as a surface water feature. The Report remarked (correctly) that SEPA was satisfied with that. There was no complaint by the petitioner that the Report did not adequately summarise all relevant planning considerations. There was no basis on which to conclude that the committee had not taken all matters properly into account in reaching the decision.

[38] I agree with the submissions made on behalf of the respondent and of the developers. I am satisfied that the committee had before it all relevant material. The Report adequately summarised that material. I do not find it established that the committee was misled, either because the Report omitted relevant material or because it was misleading in any way. Nor was there decision irrational. On this example, as with the previous one, it seems to me that the case for the petitioner amounts, in substance, to a disagreement with the decision taken by the committee in granting the planning application. It is well-

established that the court cannot interfere on that basis. Provided that the committee is properly informed of the issues, of the material, and of the planning law and guidance to be followed, the court will not interfere simply because there is an argument, however honestly pursued, that it should have arrived at a different decision. I am far from persuaded that its decision was wrong, but even if it was wrong that would not be a basis for interfering.

Decision

[39] For these reasons the petitioner's challenge to the decision by the respondent to grant planning permission fails. I shall sustain the first three pleas-in-law for the respondent, sustain the third, fourth and fifth pleas-in-law for the developers (the first and third Interested Parties), repel the pleas-in-law for the petitioner, and refuse the petition. I shall reserve all questions of expenses.