



OUTER HOUSE, COURT OF SESSION

[2022] CSOH 79

P1040/21

OPINION OF LORD RICHARDSON

in the cause

EDINBURGH CREMATORIUM LIMITED

Petitioner

against

EAST LoTHIAN COUNCIL

Respondent

and

CREMATORIA MANAGEMENT LIMITED

Interested Party

Petitioner: Findlay KC; Brown; Shepherd and Wedderburn LLP

Respondent: Thomson KC; Anderson Strathern LLP

Interested Party: Armstrong KC; Gillespie MacAndrew LLP

21 October 2022

Introduction

[1] On 5 October 2021, the Planning Committee of the respondent, East Lothian Council, passed a resolution to grant an application for planning permission made by the interested party for the erection of a crematorium building and associated works at land at Old Craighall, Musselburgh, East Lothian. The reasons for the grant of permission were contained in the Report to the Planning Committee which was prepared by the first

respondent's Executive Director of Place. Also on 5 October 2021, the respondent issued its Decision Notice granting planning permission.

[2] In the present proceedings, the petitioner seeks the reduction of the respondent's resolution and decision on a number of grounds.

The application process

[3] On 28 April 2021, the interested party submitted an application for planning permission to the respondent. In support of the application, the interested party also produced a planning statement dated April 2021. Paragraph 3.4 of the Planning Statement provides as follows:

"The [East Lothian Local Development Plan] contains no specific policies relating to crematoria. However, from discussions with the Council we are aware that there is generally considered to be a need for a facility in East Lothian. Indeed, the Crematorium Need Report submitted with this application confirms that to be so."

Paragraph 3.7 provides further:

"Given that there is no site specifically allocated for a crematorium in East Lothian, the Council indicated during pre-application discussions that it required a Crematorium Needs Report."

The Planning Statement goes on to summarise the conclusions of the Need Report which was submitted along with the Planning Statement.

[4] The Planning Statement concluded (at paragraph 3.42) that the proposals were supported by the Development Plan.

[5] In its pleadings, on the basis of paragraph 3.7 of the Planning Statement, the petitioner contended that during pre-application discussions the respondent had indicated to the interested party that it required to submit the Need Report with its application. This was disputed by both the respondent and the interested party. Having considered the email

correspondence between those representing the interested party and the respondent's senior planner dealing with the application, I can find no reference to a Need Report ever having been formally requested by the respondent. In this regard, I consider that it was notable that the respondent made no reference to a Need Report in its lengthy reply, sent on 25 September 2020, to the interested party responding to the latter's pre-application enquiry.

This email concluded as follows:

"In conclusion the proposed development may be able to be supported subject to you taking into consideration all the above points and being able to satisfy the Council that the proposed crematorium would meet the objectives of Proposal MH3 in relation to job creation and economic benefit...

You will appreciate that the content of this email is an expression of officer opinion only which is based on a desktop study and is given without prejudice to any decision taken by the Council in respect of any future application for planning permission."

[6] Equally, it was also apparent to me that during the pre-application correspondence, the issue of the need for a crematorium had formed part of the discussion between the interested party and the respondent. In the event, as senior counsel developed the petitioner's submissions, I understood that the petitioner did not rely, for its argument, upon the Need Report having been formally required by the respondent.

[7] The Need Report submitted by the interested party was entitled "The Need for a Crematorium to Serve East Lothian and the Surrounding Communities". The Need Report proceeded on the basis that in demonstrating the need for a new crematorium it was necessary to consider both quantitative and qualitative factors. Section 2 of the report then set out the considerations said to be used to assess these factors. Section 3 of the report assessed these factors against the current crematoria provision in neighbouring council areas namely: Mortonhall Crematorium, Warriston Crematorium, Seafeld Crematorium and Houndwood Crematorium. Warriston and Seafeld are owned and operated by the

petitioner. Mortonhall is owned and operated by the City of Edinburgh Council. Section 4 of the report considered the interested party's proposal and Section 5 set out the report's conclusions.

[8] Along with the Need Report, the interested party also submitted an Employment Land Review and Economics Benefits Assessment prepared by Savills.

[9] On 11 June 2021, the petitioner lodged with the respondent an Objection Statement in respect of the interested party's application. Within the Objection Statement, the petitioner set out a series of criticisms of the Need Report and the factors, both quantitative and qualitative, referred to by it (see Sections 2 and 3). The petitioner also set out in the Objection Statement reasons why it contended that the application was not compliant with the policies contained in the Local Development Plan.

[10] The City of Edinburgh Council also provided the respondent with a detailed commentary dated 8 June 2021 of both the Need Report and the Economic Benefits Assessment. In particular, the Council responded to 45 statements made in the Need Report. The Council's commentary highlighted what were said to be errors in both of these documents together with setting out reasons why certain contentions advanced within them were wrong.

The report to the Planning Committee

[11] The report to the respondent's Planning Committee in respect of the interested party's application comprises 17 pages. For present purposes, the material parts of the report are as follows. The report begins with a section summarising the application. That section finishes with a consideration of The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017 and concludes as follows (on page 3):

“On 23 April 2021 the Council issued a formal screening opinion to the applicant. The screening opinion concludes that it is East Lothian Council’s view that the proposed development is not likely to have a significant effect on the environment such that consideration of environmental information is required before any grant of planning permission. It is therefore the opinion of East Lothian Council as Planning Authority that there is no requirement for the proposed development to be the subject of an EIA.”

The report then, at page 4, notes that 13 written objections have been received to the application. The report goes on to summarise the main grounds of opposition. This summary includes the following:

- “● there are other crematorium [sic] within 5 miles and therefore there is no need for this one;
- ...
- current crematoria in Edinburgh and the Lothians have sufficient capacity and facilities to meet need and demand;
- the location for the proposed crematorium is not the best or most convenient for East Lothian residents, would not be sustainable development and had been chosen for commercial benefit...”

The report does not contain any reference either to the petitioner’s Objection Statement or, in particular, to the detailed criticisms it made of the Need Report. In both its pleadings and in submissions, the respondent stated that all of 13 written objections (including the petitioner’s Objection Statement) were available to the members of the Planning Committee. Although this was not admitted by the petitioner, I did not understand it to be disputed.

[12] On pages 4 and 5, the report sets out a planning assessment containing the relevant policies of the respondent’s Local Development Plan which were considered to be applicable to the application.

“The application site is allocated for employment uses by Proposal MH3 of the adopted East Lothian Local Development Plan 2018. Proposal MH3 states:

‘Approximately 5ha of land at Old Craighall Junction South West is allocated for employment uses. A design solution for this site that conforms to the Council’s Development Brief will be required. Any development here is subject to the mitigation of any development related impacts, including on a proportionate basis

for any cumulative impacts with other proposals including on the transport network and on air quality as appropriate. Policy EMP1 applies.'

Policy EMP1 states that within areas allocated for business and employment, uses within Use Classes 4, 5 and 6 of the Town and Country Planning (Use Classes) (Scotland) Order 1997 are supported. Other employment generating uses may also be supported in these locations subject to the town centre first principle (policy TC1) and provided there would be no amenity conflicts or other unacceptable impacts. Proposals to redevelop employment sites or premises for other employment generating uses will only be supported where the uses proposed do not prejudice or inhibit the activities of a nearby employment use.

Proposals must not adversely affect amenity and must be able to co-exist satisfactorily with existing or proposed uses on the site and in the surrounding area.

Policy TC1 of the adopted East Lothian Local Development Plan 2018 states that a sequential 'town centre first' approach will be applied where appropriate to retail, commercial leisure, office and other development proposals that would attract significant footfall."

[13] On pages 5 and 6, the report refers to the Need Report submitted by the interested party and set out a summary of it together with extensively quoting the conclusions of that report. The Planning Committee report also makes reference at this point to what is described as "crude example of sustainability" which has also been taken from the Need Report. Thereafter, the report refers to the Economic Benefits Assessment submitted by the interested party.

[14] On page 6, the report also refers to the comments submitted by the City of Edinburgh Council as follows:

"In their response, CEC question the conclusions in the applicant's submitted The Need for a Crematorium to Serve East Lothian and the Surrounding Communities' report, informing that that the proposed crematorium may have a negative impact on Edinburgh's crematoria in terms of jobs and revenue. Their response also questions the findings of the applicant's submitted Economic Benefits Assessment.

It should be noted that commercial competition is not a material consideration in the determination of a planning application."

[15] The report then continues on pages 6 and 7 as follows:

“The use of the site as a crematorium would not be anticipated to attract significant footfall. It is aimed at people attending the building for scheduled services and would not have an active frontage or regular incidental visitors. The site was identified by the applicant as a preferable location due to the size, location and ability to run the crematorium to full requirements. The crematorium use of it would not prejudice or inhibit the activities of any nearby employment use.

The use of the site as a crematorium would not be of such a scale as to result in a significant depletion of the Council's supply of allocated sites for 4, 5 and 6 uses to the detriment of the economy of East Lothian.

The Council's Economic Development Team Manager advises that the East Lothian Community Planning Economic Development Strategy 2012-22 was adopted by East Lothian Council on 9 October 2012 and the mid-term refresh was concluded December 2018. Economic development is a key priority for East Lothian and is at the forefront of The East Lothian Partnership Plan 2017-27. The Economic Development Strategy 2012 to 2022 is a reflection of the priority placed on economic development and acts as a guiding framework for future activities.

The Economic Development Team Manager raises no objection to the proposed development. He notes that the applicant's submitted information informs that the proposed development could result in additional capital investment in East Lothian, supporting some 57 construction jobs and 6 permanent jobs once operational and that it could be likely to support other local businesses within its supply chain, e.g. grounds maintenance and horticulture and florists. The Economic Development Team Manager advises that the proposal supports the goals and objectives of the Economic Development Strategy 2012- 2022 to increase the proportion of East Lothian residents working in and contributing to East Lothian's economy and to provide high quality employment pathways for East Lothian's workforce.

On the above considerations and that the proposed crematorium would be an employment generating use, the proposed development would not be contrary to Proposal MH3 or Policy EMP1 of the adopted East Lothian Local Development Plan 2018.”

[16] Finally, for present purposes, on page 13 the report said the following:

“At its meeting on Tuesday 27 August 2019 the Council approved a motion declaring a Climate Emergency. Thereafter, at its meeting on Tuesday 3 September 2019 the Council's Planning Committee decided that a report on the actions to be taken to reduce the carbon emissions from the building and from the completed development should be required on relevant applications for planning permission.

The applicant has submitted a Sustainability Statement report advising that the proposed crematorium building would meet the requirements of section 6 of the Scottish Building Regulations with suitable LZCGT (Low and Zero Carbon Generating Technologies) deployed to provide 15% reduction in emissions via

LZCGT. This includes placing an emphasis on passive design strategies at site and building level to minimise the proposed development's overall energy demands. A low carbon and renewable technologies appraisal has been completed and it is anticipated that solar photovoltaics would be the most suitable for delivering low carbon solutions for the building. The effective measures required to reduce carbon emissions will be secured through the subsequent building warrant process. In order to further reduce carbon emissions, it would also be prudent to require proposals for the provision of new car electric charging points and infrastructure for them. This could be secured by a condition imposed on a grant of planning permission for this proposed development.”

Thereafter, the report recommends the grant of planning permission subject to certain conditions.

The further objection

[17] By email dated 4 October 2021, the petitioner’s representatives circulated a note of further objection to the members of the Planning Committee together with a copy of the petitioner’s original Objection Statement. The reason that the petitioner did this is set out in the email itself – namely, that the Committee Report did not properly explain petitioner’s objection or the planning policies that apply to the application.

Submissions for the petitioner

[18] Senior counsel for the petitioner moved me to uphold the petitioner’s first plea in law and to reduce the resolution of the respondent’s Planning Committee and the Decision. The petitioner challenged the decision on three grounds all arising from the report to the Planning Committee.

[19] He submitted (on the basis of *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314, [2018] JPL 176 at paragraph 42) that unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's

recommendation, they did so on the basis of the advice that he or she gave. In this case, he did not understand there to be any such evidence. By reference to the same authority, he submitted further that the report should not be approached with undue rigour, but with reasonable benevolence bearing in mind that they are written for councillors with local knowledge. It was important to appreciate that there was no evidence of any other advice having been given to the Planning Committee such as how to approach the Need Report.

[20] Turning to the report itself, Mr Findlay submitted that it was apparent that the author had structured the section entitled "Planning Assessment" on page 4 by setting out each policy, reaching a conclusion and then moving on to the next policy. Reading the report in this way, it was apparent that the author, having set out Proposal MH3, Policies EMP1 and TC1 at the bottom of page 4 (quoted at paragraph [12] above), had then discussed the issues arising in respect of these policies before reaching a conclusion in relation to these policies at the top of page 7 of the report (quoted at paragraph [15] above). It followed, Mr Findlay submitted, that on a fair reading, the author of the report had taken account of the Need Report. After all, the reference to the Need Report made up a page and a half of a 13 page document. Further, there was no suggestion from the report, Mr Findlay noted, that either the issue of need or the Need Report itself was an immaterial consideration.

[21] Thereafter, the author of the report turned to the adopted Development Brief MH3 and considered issues relating to various design policies before reaching a conclusion in respect of those policies on page 8 using, Mr Findlay pointed out, the same "On the above considerations..." formulation. The author of the report then adopted the same approach in respect of a number of other issues including Public Health and Environmental Protection; Transport; Infrastructure and Flooding; and Coal Mining. There was no section drawing everything together, the report simply moved immediately after the Planning Assessment to

its Recommendation section which was that the planning permission be granted subjected to certain undernoted conditions.

[22] On this basis, Mr Findlay submitted that the author had taken the Need Report into account. He acknowledged that the report did not set out why this had been done.

However, he suggested that one explanation for this might be found in the wording of Policy EMP1 (quoted above at paragraph [12]). A crematorium did not fall within Use Classes 4, 5, and 6. Accordingly, such an employment generating use could be supported provided it was consistent with the town centre first principle (policy TC1) and “provided there would be no amenity conflicts or other unacceptable impacts. Proposals to redevelop employment sites or premises for other employment generating uses will only be supported where the uses proposed do not prejudice or inhibit the activities of a nearby employment use.” Mr Findlay argued that the fact that the policy required consideration of whether other nearby employment uses were prejudiced might explain why the author of the report had considered the issue of need and the Need Report. In other words, if it was necessary to consider whether any additional employment arising from a proposed development was effectively cancelled out by job losses resulting elsewhere, that could explain consideration of the need for crematoria. This was, he argued, a perfectly sensible approach.

[23] Mr Findlay accepted that this was suggestion was conjecture. In this regard, Mr Findlay was careful to make clear that he was not arguing that the issue of need was a “necessary material consideration” in the sense discussed, for example, in *R (on the application of Samuel Smith Old Brewery Tadcaster) v North Yorkshire County Council* [2020] UKSC 3, paragraphs 29 to 32. Rather, he was contending that it was a consideration to which regard was had because it arose in the context of the particular planning application. As such, it was not essential for the success of its argument for the petitioner to be correct

that the reason the issue of need was referred to in the report was the possible connection to the wording of EMP1.

[24] However, he accepted that it was critical for both the first and second ground of challenge advanced by the petitioner that the Need Report had been considered by the author of the report to the Planning Committee. The court should ask itself why there was a reference to the Need Report in the report.

[25] Mr Findlay then turned to the detail of the Need Report itself. He acknowledged that at paragraph 1.4 the document stated:

“The application site is an allocated employment site, and the proposed use is therefore compliant with planning policy, notwithstanding that, this needs reports sets out further justification as to the need for a new crematorium, in addition the need for a new crematorium has been acknowledge by representatives of East Lothian Council.” (Emphasis added).

This was unsurprising given this was the approach adopted in the application. What was important was how the Need Report was treated in the report to the Planning Committee. He highlighted that the Need Report considered both quantitative and qualitative factors. He also drew my attention to the conclusions in section 5 the majority of which had been copied at pages 5 and 6 of the report to the Planning Committee. In this regard, Mr Findlay also noted the reference at paragraph 4.15 of the Need Report to a “crude example of sustainability” which had also been copied into the Planning Committee report.

[26] Mr Findlay accepted that there was neither reference to nor engagement with the wording of Policy EMP1 which he had referred to as a suggested explanation for the reference to the Need Report in the Planning Committee report.

[27] Next, Mr Findlay drew my attention to the Planning Statement which had been submitted by the interested party. This made reference to the Need Report which had been

submitted with it. In particular, Mr Findlay highlighted paragraphs 3.4 and 3.7 of the Planning Statement (which are quoted above at paragraph [3]).

[28] Again, Mr Findlay accepted that these references to the Need Report did not appear to be in the context of Policy EMP1.

[29] Overall, he submitted that the Planning Statement seemed to be somewhat confused in that when one looked at the conclusions in Section 4, it was contended that the proposed development was supported by the development plan (paragraph 4.1). But, even in this section there was further reference to the Need Report (at paragraph 4.6). In any event, Mr Findlay's submission was that the Planning Statement represented background and context to subsequent the treatment of the Need Report by the Planning Committee.

[30] Mr Findlay also referred to the Economic Benefits Analysis which had also been submitted by the interested party. He emphasised that both the petitioner and the City of Edinburgh Council had taken issue with details of that analysis.

[31] In relation to the City of Edinburgh Council, he drew my attention to the response which the council had submitted. This contained, Mr Findlay submitted, a very detailed paragraph by paragraph rebuttal of the Need Report together with a similar exercise in the respect of the Economic Benefits Assessment. Mr Findlay drew my attention to the way in which this response had been dealt with in the report to the Planning Committee (quoted above at paragraph [14]). Mr Findlay submitted that this was not an accurate summary: the Council's response went beyond questioning the conclusions of the Need Report on the basis of the negative impact on Edinburgh's crematoria. However, having thus characterised the Council's response, the author of the report had then dismissed it on the basis that commercial consideration is not a material consideration in the determination of a planning application.

[32] Mr Findlay also drew my attention to the Objection Statement which had been submitted on behalf of the petitioner. He highlighted that the document contained detailed challenges to both the qualitative and quantitative assessments contained in the Need Report.

[33] He highlighted one point in respect of paragraph 3.10 of the Objection Statement. This paragraph set out a criticism of the claim made in the Need Report that the proposed crematorium would be more environmentally friendly than the existing crematoria. This paragraph contended that when the additional gas used to heat the furnaces at the proposed new crematoria was considered, additional CO₂ of the order of 840 to 1188 tonnes per week would be used. Mr Findlay advised me that it had come to his attention in preparation for the hearing that this calculation was in error and the correct figure should be much lower - of the order of 1 tonne per week.

[34] He accepted that the Objection Statement had challenged the contention that the proposed development was supported by the Local Development Plan and that this challenge had been based on the applicability of the town centre first principle (Policy TC1).

[35] As to the Further Objection submitted by the petitioner, this had been sent around lunchtime the day before the meeting of the Planning Committee. It contained a summary critique of the report. There was no express averment by the respondent that it had been taken into account. Mr Findlay drew my attention to it for two reasons. First, it highlighted the petitioner's dissatisfaction of the treatment of issue of need and the Need Report. Second, it pointed up the absence of any advice from the respondent's planning officer on the issue of need. If, as was now being contended by the respondent, irrelevant, one might have expected the committee to be informed of this.

[36] Turning to the approved minutes of the Planning Committee meeting on 5 October 2021, Mr Findlay drew my attention to the fact that a number of the members of the committee are recorded as having referred, in general terms, to the need for a crematorium in East Lothian. Mr Findlay was careful to be clear that he was not seeking to make much of the discussion of need at the committee meeting. He was highlighting it as consistent with the submissions which he had made in relation to the report.

[37] As to the law, Mr Findlay doubted that there would be any significant disagreement as to the legal principles to be applied to the challenges the petitioner raised.

[38] He referred to paragraph [42] of the judgment of Lord Justice Lindblom in *Mansell* (above at [19]) as to the correct approach to be taken to challenges, as in the present case, based on a planning officer's report. On this basis, he submitted that the question for the court was whether, on a fair reading of the report as a whole, the officer had materially misled the members on a matter bearing upon their decision, and the error had gone uncorrected before the decision was made. In this regard, he highlighted following passage:

“Where the line is drawn between an officer's advice that is significantly or seriously misleading – misleading in a material way – and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example *R. (on the application of Loader) v Rother District Council* [2016] EWCA Civ 795), or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, *Watermead Parish Council v Aylesbury Vale District Council* [2017] EWCA Civ 152). There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law (see, for example, *R. (on the application of Williams) v Powys County Council* [2017] EWCA Civ 427). But unless there is some distinct and material defect in the officer's advice, the court will not interfere.”

[39] In particular, he drew my attention to the penultimate sentence of the passage. He submitted that although it was not directly analogous, it represented a similar situation to

the present case. Here, the report had dealt with the Need Report. However, it had given no guidance on the disputes surrounding the Need Report and, to that extent, the Planning Committee were unguided. By way of illustration of this type of situation, albeit in a different (and much more complex) factual situation, Mr Findlay also referred to *R (on the application of Midcounties Co-Operative Limited) v Forest of Dean District Council & Ors* 2015 EWHC 1251 at [96], [99] and [101]. In relation to the approach to reports, Mr Findlay also referred to *Regina (Morge) v Hampshire County Council* [2011] 1 WLR 268 at paragraph [36].

[40] Finally, Mr Findlay referred to the judgment of Mr Justice Dyson (as he then was) in *R v Hambleton District Council Ex parte Somerfield Stores Limited* (1999) 77 PCR 475. He did so because of observations made on the issue of need:

“The starting point is that it is a fundamental general principle within the planning process that an applicant does not have to justify an unobjectionable proposal. The purpose of the planning process is to regulate development in the public interest, so as to prevent, as far as possible, harm to interests of acknowledge importance. It is not part of the planning process to prevent development which does not harm those interests. I did not understand Mr Newberry to take issue with any of these broad propositions. They find clear expression in paragraph 36 of PPG 1 (1997), viz.: "owners of land and property expect to be able to use or develop their land as they judge best unless the consequences for the environment or the community would be unacceptable"

That is not to say that, as a general proposition, need is never a material consideration. An applicant may raise need as an issue in order to outweigh some planning objection to his proposal, and to justify a departure from the Development Plan.”

[41] Against this background, Mr Findlay was able to set out the petitioner’s three grounds of challenge relatively shortly.

[42] First, Mr Findlay submitted that it was apparent from the report to the Planning Committee that the issue of need and the Need Report (and to a lesser extent the Economic Benefit Assessment) had been treated as a material consideration. Or, at least, that was how it had been presented to the Planning Committee. The Planning Committee had never been

told that need was not a material consideration. However, the way in which the issue had been presented to the Planning Committee was unlawful because a wholly one-sided picture of it had been presented to the committee.

[43] Second, the petitioner challenged the treatment of the response of the City of Edinburgh Council in the report to the Planning Committee. Despite the detailed commentary that was provided by the Council in relation to both the Need Report and the Economic Benefits Assessment, the sole point made in the report was:

“It should be noted that commercial competition is not a material consideration in the determination of a planning application.”

[44] There was no dispute that this was correct as a statement of law. The point made by the petitioner was that, left in isolation, this created a misleading impression. As such, this second ground of challenge reinforced the first.

[45] The third ground was that the report to the Planning Committee had simply failed to deal with the points raised by the petitioner concerning CO₂ emissions – in particular at paragraph 3.10 of the Note of Objections and in the Further Objections. As was noted above (at paragraph [33]), Mr Findlay had identified that there was an error in this paragraph and that the CO₂ which it was estimated would be generated the proposed development was greatly overstated by the petitioner. However, Mr Findlay submitted that the fact that this error had apparently gone undetected by the respondent highlighted his point. In other words, the fact that the respondent had not noticed this emphasised that the respondent had simply had no regard to the points made by the petitioner in relation to emissions.

[46] Mr Findlay submitted that, as such, the report to the Planning Committee was again misleading and in error. It was apparent from the report (at page 13) that the issue of

emissions was of significance. However, the Planning Committee had been misled by the report failing to mention let alone address the issues raised by the petitioner.

[47] For each of these grounds, Mr Findlay moved me to reduce the grant of planning permission.

Submissions for the respondent

[48] Senior Counsel for the respondent moved me to dismiss the petition.

[49] He began by setting out what he described as the planning context to the respondent's decision.

[50] The interested party's application was for a crematorium. The Local Development Plan did not contain any specific policies relating to crematoria. Accordingly, the first question which arose was – what is the allocated use of the site? The answer to this question could be found in Proposal MH3 which, in turn, referred to Policy EMP1. Policy EMP1 specified that the site was allocated for employment uses (quoted above at paragraph [12]). Crematoria did not fall within Use Classes 4, 5 or 6 of the Town and Country Planning (Use Classes) (Scotland) Order 1997. The next two sentences of the policy are as follows:

“Other employment generating uses may also be supported in these locations subject to the town centre first principle (policy TC1) and provided there would be no amenity conflicts or other unacceptable impacts. Proposals to redevelop employment sites or premises for other employment generating uses will only be supported where the uses proposed do not prejudice or inhibit the activities of a nearby employment use.”

[51] Mr Thomson submitted, contrary to the petitioner's argument, that only the first of these sentences was relevant. The second sentence had no application in the present case because the proposed development was not a proposal to redevelop. The proposal was for the crematorium to be built in a green field site.

[52] On this basis, Mr Thomson submitted that the initial planning issues in determining whether Policy EMP1 supported the development were: – first, did the proposed development generate sufficient employment; and second, was it struck at by either policy TC1 or were there other amenity impacts or other unacceptable impacts. If those issues were addressed satisfactorily in respect of the proposal, then a presumption in its favour arose from the Local Development Plan. If the two issues were not addressed, then the application would not accord with Policy EMP1, it would be contrary to the Local Development Plan and the interested party would require to identify other material considerations to justify the application.

[53] Approaching matters on this basis, one could see, Mr Thomson suggested, why applicants might, at the outset of an application, pursue two avenues of attack: first, seeking to argue that their proposed development was supported by the Local Development Plan; and, second, suggesting, in the alternative, that there was some other compelling need for the development of the site in question. Until an applicant discovered the local authority's view as to whether or not the proposed development was supported by the Local Development Plan, it was prudent to have a fall-back position. He submitted that it was apparent from the documents submitted that the interested party had adopted this type of approach in the present case. It was for this reason that the interested party had prepared and submitted both the Need Report and the Economic Benefits Assessment. At this stage, the interested party did not know whether or not the respondent considered that the proposal was supported by the Local Development Plan.

[54] Mr Thomson submitted that the planning context was underpinned by the primary applicable statutory provisions. In this regard, Mr Thomson drew my attention to sections

25 and 37 of the Town and Country Planning (Scotland) Act 1997. First, section 37(2)

provided:

“37. Determination of applications: general considerations.

(1) Where an application is made to a planning authority for planning permission—
(a) subject to [sections 27B(2) and 59(1)(b)] 1 , they may grant planning permission, either unconditionally or subject to such conditions as they think fit, or (b) they may refuse planning permission.

(2) In dealing with such an application 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.

...” (Emphasis added)

[55] This section then set the context for section 25(1) which provided:

“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— (a) to be made in accordance with that plan,...” (Emphasis added)

[56] Mr Thomson also drew my attention to paragraph 32 of the Scottish Planning Policy which provides:

“Development Management

32. The presumption in favour of sustainable development does not change the statutory status of the development plan as the starting point for decision-making. The 1997 Act requires planning applications to be determined in accordance with the development plan unless material considerations indicate otherwise. Proposals that accord with development plans should be considered acceptable in principle and consideration should focus on the detailed matters arising.”

[57] Against the background of these statutory provisions, Mr Thomson then turned to the decision of the House of Lords in *City of Edinburgh Council v Secretary of State for Scotland* 1998 SC(HL) 33 and, in particular, the speeches of Lord Hope (at 35G to 36G) and Lord Clyde (at 43D to 45F). This case had considered the statutory predecessors of sections 25 and 37 and discussed how the provisions should be approach. In this regard,

Mr Thomson drew my attention to a passage of Lord Clyde's speech (at 36C to G) where he said the following:

"Counsel for the Secretary of State suggested in the course of his submissions that in the practical application of the section two distinct stages should be identified. In the first the decision-maker should decide whether the development plan should or should not be accorded its statutory priority; and in the second, if he decides that it should not be given that priority it should be put aside and attention concentrated upon the material factors which remain for consideration. But in my view it is undesirable to devise any universal prescription for the method to be adopted by the decision-maker, provided always of course that he does not act outwith his powers. Different cases will invite different methods in the detail of the approach to be taken and it should be left to the good sense of the decision-maker, acting within his powers, to decide how to go about the task before him in the particular circumstances of each case. In the particular circumstances of the present case the ground on which the reporter decided to make an exception to the development plan was the existence of more recent policy statements which he considered had overtaken the policy in the plan. In such a case as that it may well be appropriate to adopt the two-stage approach suggested by counsel. But even there that should not be taken to be the only proper course. In many cases it would be perfectly proper for the decision maker to assemble all the relevant material including the provisions of the development plan and proceed at once to the process of assessment, paying of course all due regard to the priority of the latter, but reaching his decision after a general study of all the material before him. The precise procedure followed by any decision-maker is so much a matter of personal preference or inclination in light of the nature and detail of the particular case that neither universal prescription nor even general guidance are useful or appropriate."

[58] Mr Thomson also made reference to the decision of the Extra Division in *Aberdeenshire Council v Scottish Ministers* 2008 SC 485. His reason for referring to this case was that it dealt with the issue of so-called "double-counting" of material considerations. In other words, the situation in which a factor is considered both in the context of determining whether the proposed development accords with the Development Plan and also, thereafter, in deciding whether there are material considerations which nonetheless justify the proposal. Addressing this issue, the court noted at paragraph [40]:

"Having considered all that was said in the House of Lords and the submissions advanced to us by counsel for the parties we have to say that, while we do not think that a material consideration justifying departure from the development plan has necessarily to take the form of some later planning guidance, we nonetheless think

that there is much force in all that has been said in the argument for the appellants. It appears to us that a material consideration such as to override the presumption, or enhanced status, given to the development plan by sec 25 of the Act must normally be external to the factors included in the overall ponderation of matters in the elaboration of the development plan policy. In essence, were the decision-taker entitled to effect a personal selection of a factor, or some factors, in that overall ponderation while ignoring others and treat that selection as the basis for a 'material consideration' which elided the responsibility placed upon him by sec 25 of the Act, the provisions of sec 25 would be much weakened, if not emasculated, and would be in effect little more than a mere statutory exhortation."

[59] Mr Thomson also referred to a number of authorities concerning challenges to reports to Planning Committees. First, he referred to a passage from *R v Mendip District Council Ex parte Fabre* (2000) 80 P&CR 500 at 58:

"Whilst planning officers' reports should not be equated with inspectors' decision letters, it is well established that, in construing the latter, it has to be remembered that they are addressed to the parties who will be well aware of the issues that have been raised in the appeal. They are thus addressed to a knowledgeable readership and the adequacy of their reasoning must be considered against that background. That approach applies with particular force to a planning officer's report to a committee. Its purpose is not to decide the issue, but to inform the members of the relevant considerations relating to the application. It is not addressed to the world at large but to council members who, by virtue of that membership, may be expected to have substantial local and background knowledge. There would be no point in a planning officer's report setting out in great detail background material, for example, in respect of local topography, development planning policies or matters of planning history if the members were only too familiar with that material. Part of a planning officer's expert function in reporting to the committee must be to make an assessment of how much information needs to be included in his or her report in order to avoid burdening a busy committee with excessive and unnecessary detail."

[60] Mr Thomson also referred to the decision of the Court of Appeal in *R v Selby District Council, Ex parte Oxtons Farms and another* [2017] PTSR 1103. In particular, he drew my attention to the following passages from, respectively, the judgments of Lord Justices Pill and Judge (as he then was):

"It is important that those who make determinations under the planning Acts are familiar with sections 70(2) and 54A of the 1990 Act and apply the test imposed by Parliament. It follows that a planning officer reporting to and advising council members who are to make a relevant decision must keep the test in mind in the information and advice he provides and in the manner in which he provides it.

Clear-mindedness and clarity of expression are obviously important. However that is not to say that a report is to be construed as if it were a statute or that defects of presentation can often render a decision made following its submission to the council liable to be quashed. The overall fairness of the report, in the context of the statutory test, must be considered" (at page 1110) and

"From time to time there will no doubt be cases when judicial review is granted on the basis of what is or is not contained in the planning officer's report. This reflects no more than the court's conclusion in the particular circumstances of the case before it. In my judgment an application for judicial review based on criticisms on the planning officer's report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken" (at page 1111)

[61] The subsequent decision in *Mansell* (above) referred to by Mr Findlay did not dilute the significance of these passages. In this regard, Mr Thomson referred to a passage from the judgment of the Chancellor of the High Court, Sir Geoffrey Vos at paragraph [63]:

"An appeal will only succeed, as Lindblom L.J. has said, if there is some distinct and material defect in the report. Such reports are not, and should not be, written for lawyers, but for councillors who are well versed in local affairs and local factors. Planning committees approach such reports utilising that local knowledge and much common-sense. They should be allowed to make their judgments freely and fairly without undue interference by courts or judges who have picked apart the planning officer's advice on which they relied."

[62] Mr Thomson also submitted that care needed to be taken in relation to those authorities which had been referred to by Mr Findlay which arose out of retail cases – such as *Midcounties* (above at paragraph [39]). The reference to need in retail cases had to be seen in the particular context of those cases where it was relevant because the proposed development was not supported by the Local Development Plan.

[63] Considering the chronology of documents leading up to the Decision, Mr Thomson drew my attention to the email from the respondent's Senior Planner to the interested party's representative dated 25 September 2019. This email made reference to the respondent's approval of a motion declaring a climate emergency on 27 August 2019.

Mr Thomson emphasised that this declaration did not override the grant of a planning application. Rather this motion required developers to submit, with their applications, details of the steps to be taken to minimise and reduce carbon emissions.

[64] In relation to the Further Objections, Mr Thomson advised that this document had not been sent to the Planning Officer who had prepared the report to the Planning Committee. He further informed me, and I did not understand it to be in dispute, that the Planning Officer only became aware of the Further Objections when the present proceedings were raised by the petitioner.

[65] As to the meeting of the Planning Committee itself, Mr Thomson submitted that it was important to distinguish between, on the one hand, the general, high level, awareness of the lack of a crematorium in East Lothian and, on the other, the issue for a need for a crematorium at the particular site with which this application was concerned. In respect of the first of these, it was apparent that the respondent's officers had been aware of this for some time and, indeed, had had, at one time, their own proposal to address this. This general awareness formed part of the background knowledge of the members of the respondent's Planning Committee.

[66] As to the second, Mr Thomson submitted that this would only have arisen in the event that the proposed development did not accord with Policy EMP1. However, in preparing the report to the Planning Committee, the Planning Officer had concluded that the proposed development was consistent with Policy EMP1.

[67] In terms of the background knowledge of the committee, Mr Thomson highlighted that the members of the Planning Committee would also have been aware that the population of East Lothian across all age groups was predicted to increase which would

increase demand for all community services. This was apparent from paragraph 1.22 of the Local Development Plan.

[68] Turning to the report to the Planning Committee itself, Mr Thomson noted that the author begins with a section setting out the details of the proposed development. The next section, starting on page 3, is headed "Development Plan". Mr Thomson noted that the author commences this section by correctly identifying section 25 of the 1997 Act (quoted above at paragraph [55]) and then setting out the relevant policies. The author also identifies two material considerations at the foot of page 3 – the first being the respondent's Development Briefs Supplementary Planning Guidance and the respondent's Sustainable Drainage Systems Supplementary Planning Guidance. The author then summarises the issues identified in the written objections received.

[69] The next section is entitled "Planning Assessment", this begins with the author setting out Policy EMP1 and Policy TC1. At this stage, the author refers to the Need Report and the Economic Benefit Assessment. Mr Thomson highlighted two points in relation to this reference. First, it was apparently out of context. It had no obvious place in this section. What was said about neither the Need Report nor the Economic Benefit Assessment appeared to be relevant to the two planning policies set out at the beginning of the section. Second, the author of the report to the Planning Committee had made no assessment of or comment on these documents. This contrasted with the approach of the author in other parts of the report where he considered it necessary to give advice to the Planning Committee.

[70] Mr Thomson accepted that the author's treatment of the Need Report and the Economic Benefit Assessment was an oddity but no more than that. The fact remained that, because the author concluded that the proposed development was supported by Policy

EMP1, neither the Need Report nor the Economic Benefit Assessment was relevant. Had that conclusion not been reached, the position would have been very different. But, as Mr Thomson put it, that tipping point had never been reached.

[71] Turning back to the report, the author then addressed two consultation responses (from the City of Edinburgh Council and the respondent's Economic Development Team Manager) before coming to the conclusion in respect of Proposal MH3 and Policy EMP1. In relation to the treatment of the first response, Mr Thomson submitted that the author had provided advice in respect of the treatment of commercial competition. The author of the report had then gone on to consider issues arising from Policy EMP1, namely the question of footfall (which related to Policy TC1) and the issue of prejudice or inhibition of nearby employment uses (which related to the second sentence of Policy EMP1).

[72] The remainder of the report was in Mr Thomson's submission uncontroversial. Mr Thomson pointed out that the presumption is that unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave. This was also stated expressly in the Decision notice itself.

[73] On this basis, Mr Thomson's submissions in respect of the three grounds of appeal were as follows.

[74] In respect of Ground 1, this was materially unfounded. The respondent had never called for the Need Report albeit one could understand why the interested party have prepared one as a "Plan B". More importantly, in light of the conclusion that the proposed development was supported by Policy EMP1, need was not a material consideration and was not relevant either to Policy EMP1 or to the planning assessment. Properly construed, there was no basis in the report to the Planning Committee for the assertion which lay at the

heart of this ground: namely, that need had been treated as a material consideration.

Accordingly, there had been no requirement for the report to address the disputes in respect of the issue of need.

[75] As to Mr Findlay's argument that the issue of need was relevant to a consideration of Policy EMP1, Mr Thomson noted that this argument had not been set out by the petitioner in either its pleadings or its Note of Argument. However, Mr Thomson submitted that this argument straightforwardly failed because, despite what he described as the petitioner's valiant efforts, need was simply not relevant to Policy EMP1. As he had submitted, the second sentence of Policy EMP1 simply did not apply because the Proposed Development was not a re-development.

[76] In respect of the second ground, Mr Thomson dealt with it in passing. The respondent's answer to the first ground applied equally to this ground.

[77] In respect of the third ground of appeal, Mr Thomson submitted that the issues of CO₂ emissions had been dealt with adequately in the final paragraph of the Planning Assessment on page 13 of the report to the Planning Committee (quoted above at paragraph 16). The declaration made by the respondent on 27 August 2019 was not intended to be and did not constitute an over-ride of the planning process. Mr Thomson pointed out that, at present, there are no policies which regulate the primary uses of land in respect of the CO₂ emissions. Within the present planning framework, there was no power to refuse planning permission because CO₂ was being produced. Accordingly, from a planning perspective, the way in which the report dealt with the issue was appropriate.

[78] Accordingly, for these reasons, Mr Thomson submitted that there was nothing materially wrong with the report to the Planning Committee and that the tests provided for in *Selby* (above at paragraph [60]) and *Mansell* (above at paragraph [19]) for such challenges

were not nearly met. He invited me to conclude both that the report did not materially mislead the Planning Committee and that neither the Resolution nor the Decision should be reduced.

Submissions for the interested party

[79] Senior counsel for the interested party, in a short submission, also moved me to dismiss the petition. He formally adopted the submissions made by Mr Thomson on behalf of the respondent. The only issue which he addressed me on at any length was the issue of the genesis of the Need Report. He emphasised that, as was apparent from the terms of the Need Report (at paragraph 1.4), it had been prepared as fall-back position with the primary position being that the proposed development was consistent with the Local Development Plan. This position was also set out in the Planning Statement prepared by the interested party.

[80] In summary, the interested party did not consider that, in the event that the proposed development was supported by the Local Development Plan, need was a material consideration. The interested party had never advanced this position. Mr Armstrong was at pains to make clear that the interested party had at no point made the connection between the Need Report and Policy EMP1 which had been put forward by Mr Findlay.

Reply by the petitioner

[81] In a short reply, Mr Findlay contended that the respondent's analysis, while coherent in itself, did not address the "oddity" of the reference to the Need Report in the report to the Planning Committee. He pointed out that the author of the report appeared not to have taken the same approach as Mr Thomson to the second sentence of Policy EMP1 because, far

from being irrelevant (as Mr Thomson contended), the author had chosen to include a conclusion that “The crematorium use of it would not prejudice or inhibit the activities of any nearby employment use.” Accordingly, Mr Findlay submitted further that the author may have considered the Need Report. This was not just in relation to the second sentence of EMP1 but could have been relevant to EMP1 more generally. The issue of need, while not necessarily a material consideration, could still have been relevant to Policy EMP1 in the context of employment generation.

Decision

[82] Having had the benefit of lengthy and detailed submissions from the parties, I consider that the dispute before me essentially turns on the relatively narrow issues of whether the report to Planning Committee materially misled the committee in respect of the two matters highlighted in the three grounds of appeal: namely, first in its treatment of the Need Report and the Economic Benefits Analysis (including the comments on those documents provided by the City of Edinburgh Council); and, secondly, in relation to the issue of CO₂ emissions.

[83] In the case of both of these matters, the petitioner’s complaint is that the author of the report set out a one-sided view. First, the content of the Need Report and Economic Benefits Analysis were referred to in the report but the committee was not provided with the detail of the criticisms of those documents provided both by the petitioner and the City of Edinburgh Council. Second, the report simply did not deal with the points raised by the petitioner in respect of the emission of CO₂.

[84] The parties were agreed that the approach to be taken challenges based on the content of a planning officer’s report was set out in the cases of *Selby* (above at paragraph 60)

and *Mansell* (above at paragraph 19). For present purposes, I derive the following propositions from those cases:

- Planning officers' reports to planning committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (*Mansell* at [42](2)).
- Planning officers require to keep in mind the test imposed by Parliament in terms of sections 25(1) and 37(2) of the Town and Country Planning (Scotland) Act 1997 in the information and advice provided and in the manner in which it is provided (*Selby* at page 1110).
- The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. (*Mansell* at [42](2))
- Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (*Mansell* at [42](2))

[85] On this basis, it follows that in order for the report to the Planning Committee to have been materially misleading, it would need to have misled the committee on a matter which bore upon their decision. As there is no evidence to suggest otherwise, I proceed on the basis that the members of the Planning Committee reached their decision on the basis of the advice they received in the report.

[86] Further, the assessment of the matters which bore upon the decision of the Committee has to be seen through the prism of the test imposed by Parliament by sections 25(1) and 37(2) of the Town and Country Planning (Scotland) Act 1997. In other

words, applications are to be determined in accordance with the Development Plan unless material considerations indicate otherwise. In the case of this proposed development, the author of the report concluded that it was accordance with Policy EMP1 of the Local Development Plan. This was the basis for the recommendation reached in the report that permission be granted subject to conditions.

[87] Adopting this approach, it is apparent to me that neither of the two matters highlighted in the grounds of appeal did in fact bear upon the decision that the Planning Committee reached.

[88] In the case of the Need Report and the Economic Benefits Assessment (together with the City of Edinburgh's comments on those documents), these simply did not, either in law or in fact, bear upon what was the critical question: namely, whether the proposed development was in accordance with the Local Development Plan.

[89] As a matter of law, the issues raised by the Need Report and the Economic Benefit Analysis did not bear on the question of whether the proposed development was in accordance with the Local Development Plan. As the report correctly identified, that question fell to be determined by a consideration of Policy EMP1. Neither the Need Report nor the Economic Benefits Analysis were directed towards or addressed the issues raised by Policy EMP1.

[90] In this regard, I was not persuaded by Mr Findlay's suggestion that the Need Report and the Economic Benefits Analysis might bear upon the final sentence of Policy EMP1 – "Proposals to redevelop employment sites or premises for other employment generating uses will only be supported where the uses proposed do not prejudice or inhibit the activities of a nearby employment use." I agree with Mr Thomson that as it involves a green field site, this sentence simply does not apply to the proposed development. Furthermore, I

consider that it is significant, as Mr Findlay conceded, neither the Need Report nor the Economic Benefits Assessment make any direct reference either to Policy EMP1 or the issues raised by that policy. Furthermore, neither document was deployed in that context by the interested party in the course of the application process.

[91] Notwithstanding this legal analysis, I accept that it would have been open to the author to attach significance to the Need Report and the Economic Benefits Analysis in the context of the recommendation he was making. Accordingly, it is necessary also to consider the report from this perspective. Albeit, in doing so, I continue to bear in mind the statutory test arising from the 1997 Act as the authorities noted above indicate that both the author of the report and its readers should.

[92] Approaching the report on this basis, I consider that, as a matter of fact, read with reasonable benevolence, as the authorities require me to, it cannot be said that either the Need Report or the Economic Benefits Analysis were treated by the author as bearing upon the Planning Committee's decision. In reaching this conclusion, I acknowledge that the author of the report has devoted some space to setting out and summarising, in particular the Need Report, and to a lesser extent, the Economic Benefits Assessment.

[93] However, I consider that it is important to see the reference to the Need Report and the Economic Benefits Analysis within the context of the section of the report in which they are made. The reference to these documents is contained in the section entitled "Planning Assessment" and immediately follows the author having identified the relevant parts of the Development Plan: namely, Proposal MH3 and Policies EMP1 and TC1 which required to be considered in accordance with section 25(1) of the 1997 Act. Thereafter, that section contains reference to the Need Report, the Economic Benefits Analysis, the responses from the City of Edinburgh Council and the respondent's Economic Development Team manager before

reaching the conclusion that the proposed development would be an employment generating use and, therefore, not contrary to the Local Development Plan.

[94] In this context, it is significant that within this section the analysis of the author is confined solely to the issues raised in relation to the question of the compatibility of the proposed development with the Local Development Plan. Notably, the author provides neither analysis of nor advice in respect of either the Need Report or the accompanying Economic Benefits Analysis.

[95] In light of these considerations, ultimately, I do not consider that, properly construed, the report does link either the Need Report or the Economic Benefits Analysis to its conclusion that the proposed development was not be contrary to the Local Development Plan and, hence, the overall recommendation of the report. It follows that I do not consider that the report materially misled the Planning Committee in respect of the matters raised in the first two grounds of appeal.

[96] In relation to the third Ground of Appeal, again, the principal difficulty for the petitioner in seeking to argue that the report is materially misleading is demonstrating that the author's failure to highlight or address the point made by the petitioner concerning CO₂ emissions was a matter bearing on the decision of the Planning Committee.

[97] In the event, I consider that this difficulty is insuperable for the petitioner. I do not consider that the report was materially misleading in failing to mention or address this point precisely because it did not bear upon the Committee's decision.

[98] As the report noted, on 23 April 2021, the respondent had issued a screening opinion to the interested party setting out the respondent's view that the proposed development was not likely to have a significant effect on the environment such that consideration of environmental information was required before any grant of planning permission.

[99] The report also notes the respondent's declaration of a climate emergency on 27 August 2019 which decided that a report on the actions to be taken to reduce carbon emissions from the building and the completed development should be required on relevant applications for planning permission. The report then goes on to record that the interested party had submitted a Sustainability Statement report which complied with that requirement. This was a reasonable exercise of planning judgment by the respondent.

[100] Against this background, in the context of a proposed development which accorded with the Development Plan, I agree with the respondent that no further information or advice required to be given to the Planning Committee.

Order

[101] Accordingly, in these circumstances, I will repel the petitioner's pleas in law and dismiss the petition. I will reserve all questions of expenses in the meantime.