OUTER HOUSE, COURT OF SESSION

[2025] CSOH 3

P608/24

OPINION OF LORD SANDISON

In the Petition of

(FIRST) JAMES WALKER; (SECOND) CHRISTINA WALKER; and (THIRD) DRUMBUIE RENEWABLES LIMITED

Petitioners

for

Judicial review of the decision of the Scottish Ministers dated 23 April 2024 to grant consent under section 37 of the Electricity Act 1989 and a direction under section 57(2) of the Town and Country Planning (Scotland) Act 1997 to install and keep installed approximately 9.3km of 123kV overhead line located in the planning authority area of Dumfries and Galloway

Petitioners: Dunlop; DWF LLP
Respondents (Scottish Ministers): McWhirter; SGLD
Interested Party (SP Transmission plc): Armstrong KC, McAndrew; Shepherd and Wedderburn LLP

10 January 2025

Introduction

[1] This petition for judicial review challenges a decision of the Scottish Ministers intimated by way of a decision letter dated 23 April 2024 to grant consent in terms of section 37 of the Electricity Act 1989 for the proposed installation of just over 9km of overhead line for the transmission of electricity between Glenmuckloch and Glenglass in Dumfries and Galloway. The petitioners seek declarator that the decision was unreasonable

and illogical, that it failed to take into account relevant material considerations, and that it failed to provide proper, adequate and intelligible reasons. They seek its reduction as *ultra vires* on any or all of those grounds. The Scottish Ministers are respondents to the petition and SP Transmission plc, on whose behalf the application for consent was made, also appear as an interested party to oppose the grant of its prayer. The matter came before the court for a substantive hearing to determine the dispute.

Background

[2] The first and second petitioners are spouses and own property known as Drumbuie Farm, near Sanquhar, which their family has farmed for about a hundred years. The third petitioner is Drumbuie Renewables Limited, a company associated with the family and which owns property known as Kelloholm there. It is intended to construct the development of which they complain on and over the petitioners' land, although any construction will be dependent on the outcome of an ongoing compulsory purchase process at the instance of the interested party.

[3] A consultation process took place in 2019, before any application for consent to the proposed development took place, with a view to establishing a preferred route and alignment for the planned overhead line. The first petitioner made various representations during the pre-application consultation, raising concerns over the environmental effects of the proposed development. No pre-application representations were made by the second or third petitioners. On 16 January 2023 an application was made to the respondents on behalf of the interested party for the grant of consent to install and keep installed approximately 9.3 kilometres of 132kV overhead line supported on new steel lattice towers, to be known as the Glenmuckloch to Glenglass Reinforcement Project. The project is part of an expansion of

the electricity transmission grid in Scotland aimed at facilitating the exploitation of renewable energy. The application was accompanied by an Environmental Impact Assessment report, in accordance with The Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017. Advertisements were placed in accordance with regulation 14 of those regulations in appropriate publications on 10, 21 and 23 February 2023 noting that the application had been made and inviting any party wishing to do so to make representations on it to the respondents by 31 March 2023. The advertisements noted that any representations made after that date might not be considered, rendering 31 March 2023 a "soft" deadline, in the sense that there was no guarantee that later representations would be taken into account, but no absolute bar on the respondents considering them if they chose to do so. Representations were submitted by the first and second petitioners around the end of April 2023. They raised the possibility of alternative routeing options, and noted issues around the environmental effects of the proposed development, including concerns over landscape, visual and ornithological impacts along similar lines to the concerns raised by the first petitioner during the pre-application consultation process. Although those representations were made somewhat after the timescale indicated by the advertisements, they were taken into consideration by the respondents. A total of 249 objections were made to the proposed development, on a variety of grounds. The objectors included the local planning authority, Dumfries and Galloway Council.

[4] The petitioners have in recent years diversified from their core farming activities. Some of their land has been developed as a windfarm known as Sanquhar I, which has been operating since 2017 and has nine turbines with a generating capacity of 30MW. Consent was granted on 31 August 2023 for the development of a further windfarm on another part of their land, to be known as Sanquhar II and intended to have 44 turbines with a generating

capacity of 308MW. It is intended to commence construction of Sanquhar II in the course of 2025. Part of the third petitioner's land is the subject of an application for planning consent for the development of a further wind farm, intended to be known as Herds Hill, with three turbines and a generating capacity of 10.35MW. That application is expected to be determined in early course by the local planning authority. Another part of the third petitioner's land is also in commercial use as a quarry owned and operated by it and producing 30,000 tonnes of materials annually. The existing planning consent for the operation of the quarry expires in February 2025, which would be before any work would take place in relation to the overhead line development. At some point the petitioners appear to have formed concerns that the proposed development would adversely affect their use of the single access road serving the Sanquhar I and II windfarms and the quarry, and consequently the profitable operation of those enterprises. They also conceive (and the interested party accepts) that implementation of the overhead line development would be incompatible with the operation of at least two of the three turbines at the proposed Herds Hill windfarm.

[5] A further representation to the respondents was made on the petitioners' behalf by way of a letter from their agents dated 14 March 2024. That was almost a year after the point by which the relevant advertisements had indicated that representations ought to be received. The letter raised for the first time the petitioners' concerns about the effect of the proposed development on their existing, consented and proposed windfarms and on the quarry. It asked for partial undergrounding of the proposed cable line, which (it maintained) would enable the Glenmuckloch to Glenglass Reinforcement Project to co-exist with the petitioners' various commercial uses of their land. It was sent by email to an address used by the respondents to deal with general enquiries and administrative issues

concerning consents for energy projects, but which was not the email address to which they had requested that representations in connection with applications for such consents should be made. The person monitoring the enquiries address forwarded the email to the more appropriate address, where it joined a queue formed by a considerable number of representations about various energy applications. On enquiring about the petitioners' representation, their agents were informed by email on 8 April 2024 from a Senior Case Officer in the respondents' Energy Consents Unit that the objections had been received and would be "processed accordingly" as a representation. In fact, the existence of the representations was not brought to the attention of anyone participating in the respondents' decision-making process on anything more than a clerical basis until after the decision had been made. Those dealing with the substance of the relevant application on behalf of the respondents made no positive decision not to entertain or consider the contents of the letter of March 2024, or as to whether to seek further information about any matter there set out; they were simply unaware that it had been sent to them until it was in practical terms too late to do anything about it.

Submissions for the petitioners

[6] In wide-ranging submissions on behalf of the petitioners, counsel set out the background to the dispute. Although the March 2024 objections were submitted late, the respondents had accepted the letter as a representation and had followed that up by a further communication from a senior case officer at the Energy Consents Unit on 8 April 2024, stating that the contents of the letter would be processed as a representation objecting to the proposed development. The respondents did not seek any further information from the petitioners in respect of any additional detail which might be required in respect of the

objections. Their eventual decision noted that the respondents understood the terms of all the objections that had been made. They were now barred from insisting that the petitioners' 2024 objections should be disregarded. The petitioners had relied upon what they conceived as the respondents' assurances that their representations would be taken into account. They would have acted differently by challenging at law a refusal to take into account the representations had matters been otherwise.

[7] At the very least, what was said on the respondents' behalf on 8 April 2024 gave rise to an enforceable legitimate expectation on the part of the petitioners that their March 2024 representations would be taken into account. In fact, the decision issued on 23 April 2024 had been taken without regard to the content of the petitioners' objections made in the previous month.

[8] The petitioners' challenge was founded principally upon two grounds. Firstly, that the decision failed to have regard to relevant material considerations, and secondly that it failed to provide proper, adequate and intelligible reasons.

[9] A decision was *ultra vires* where the decision maker had "failed to take into account relevant and material considerations": *Wordie Property Co Ltd* v *Secretary of State for Scotland* 1984 SLT 345 at pages 347 to 348. There was no statutory definition of "material consideration". Any consideration which related to the use and development of land was capable of being a material consideration. It had been held in *Westminster City Council* v *Great Portland Estates plc* [1985] AC 661, [1984] 3 WLR 1035 per Lord Scarman at [1985] AC 670, [1984] 3 WLR 1042 that:

> "The test, therefore, of what is a material 'consideration' in the preparation of plans or in the control of development … is whether it serves a planning purpose. … And a planning purpose is one which relates to the character of the use of land".

It was necessary that the consideration was material, which meant relevant: *Tesco Stores Ltd* v *Secretary of State for the Environment and Others* [1995] 1 WLR 759 per Lord Keith of Kinkel at 764G, (1995) 70 P & CR 184 at 190. Compatibility of a proposed development with existing uses of the development land and neighbouring land was a material consideration: *RMC Management Services Ltd* v *Secretary of State for the Environment* (1972) 222 EG 1593; *West Midlands Probation Committee* v *Secretary of State for the Environment, Transport and the Regions* (1998) 76 P & CR 589 at 597. Where a proposed use of land was incompatible with other land use, that could be a reason for refusing permission: *Ricketts and Fletcher* v *Secretary of State for the Environment and Salisbury DC* [1988] JPL 768 at 770 - 771. It was acknowledged by the petitioners that the existing uses of land should not automatically prevail, and that conflicts between uses had to be properly considered: *R* v *Exeter City Council ex parte JL Thomas & Co Ltd* [1991] 1 QB 471 at 483B - D, [1990] 3 WLR 100 at 110F - H. However, the decision in question failed to consider the existing uses and the issue of incompatibility. In *London Residuary Body* v *Lambeth LBC* [1990] 1 WLR 744 at 752, (1991) 61 P & CR 65 at 72 it was held that the desirability of preserving an existing use of land was a material consideration that required to be taken into account in the particular circumstances of that case. It followed that the desirability of future development of neighbouring land could be a material consideration, particularly where (as here, given the renewable energy generation capabilities of the windfarms) that development would be of indubitable public benefit. The respondents ought to have taken the existing land uses into account in arriving at their decision, whether or not the issue was properly and timeously raised with them. There was no indication that they had done so. There was no explanation in their decision as to why they considered it appropriate to sacrifice the petitioners' renewable energy generation for the overhead line.

[10] Reasons for a decision of the kind in question required to be proper, adequate and intelligible. Decision letters should leave an informed reader in no substantial doubt as to the conclusions on the main determining issues, and required to be intelligible and adequate, though they might be expressed concisely: *Moray Council* v *Scottish Ministers* [2006] CSIH 4, 2006 SC 691 at [30]. In providing reasons, a decision maker might find that short reasons would suffice, or that no reasoning was required where the point was not substantive: *Uprichard* v *Scottish Ministers* 2013 UKSC 21, 2013 SC (UKSC) 219, 2013 SLT 1218 at [47]. However, that did not detract from the need for the reasonable reader to understand what conclusions were reached. Accordingly, a decision should not give rise to a substantial doubt as to how a particular relevant issue was decided: *South Buckinghamshire DC* v *Porter* [2004] UKHL 33, [2004] 1 WLR 1953, [2005] 1 P & CR 6 at [36].

[11] Where a decision maker had erred, the court should consider whether there was a real possibility (not necessarily a probability) that consideration of the issue would have made a difference to the decision: *Bova* v *Highland Council* [2013] CSIH 41, 2013 SC 510 at [26(vii)] and [57]. The petitioners' concerns could not properly be dealt with as part of the consideration of the compulsory purchase order.

[12] The objections made on behalf of all three petitioners by the letter of March 2024 extended to four pages and set out that the application for the proposed development affected their land, including existing, consented and proposed uses. The existing uses comprised the Sanquhar I windfarm and the quarry, together with agricultural activities in the form of a working livestock farm. The consented and proposed uses comprised Sanquhar II windfarm and Herds Hill windfarm respectively. The impact of the proposed development on these uses was a material consideration that should have been taken into account by the respondents. This was particularly important given that the windfarms were

(to a significant extent) incompatible with the proposed development. The objections identified the specific contributions that the turbines currently made and would make to renewable energy production in Scotland. They also specified the particular difficulties caused by the route of the proposed development as it crossed the access track required to operate and maintain the turbines of all the wind farms. The route also crossed the area of consented siting of turbines. The access track and the impact of the proposed development on its practical use to access the existing, consented and proposed developments was a material consideration.

[13] The objections identified that sectional undergrounding would enable the petitioners' existing and planned enterprises to co-exist with the proposed development, and that the issue of undergrounding, together with the costs of carrying it out, had not been properly addressed by the interested party. That was a material consideration which the respondents' decision showed no sign of having taken into account.

[14] The respondents complained that the letter of March 2024 was inspecific about the petitioners' concerns, but objections should not be treated like conveyancing documents or court pleadings. There were no specific rules on the degree of detail required. The Scottish Government's guidance on how to object to energy developments stated that "representation requirements" need consist merely of the identification of the proposal and the grounds for the representation. The Energy Consents Unit's own good practice guidance stated that applicants should engage with relevant parties where issues or points of clarification required to be resolved. The interested party had not sought any engagement with the petitioners about the content of the letter.

[15] The decision failed to provide proper, adequate, and intelligible reasons. An informed reader would not understand the reasons for the decision, even having regard to

the references therein to the EIA report, recourse to which could not properly be used as a means to avoid the respondents having to have regard to relevant considerations or to provide proper reasons. The decision was relatively brief, despite there being hundreds of objectors. It appeared to recognise the importance of the material considerations raised by objectors such as the petitioners, and stated that the respondents were satisfied that the general public as well as statutory and other consultees had been afforded the opportunity to consider and make representations on the proposed development.

[16] The objectors' issues were dealt with very briefly in the decision letter, which noted that 249 representations of objection had been received, raising issues which included the suggestions that an alternative route should be considered, that there had been a failure to engage in any meaningful way with the local community to communicate reasons for the routeing, and that there were potentially significant environmental impacts on biodiversity, archaeology, landscape and visual amenity, loss of ancient woodland, ecology and ornithology, cultural heritage and traffic and transport. However, it was stated that the respondents were satisfied that the matters raised in the objections had been appropriately assessed and taken into account in the determination of the proposed development. None of the material considerations identified by the petitioners, relating to (i) partial undergrounding; (ii) the impacts caused in respect of the access track; (iii) the consequences for the continued operation and maintenance of operational turbines in Sanquhar I; (iv) the consented windfarm, namely Sanquhar II; (v) the Herds Hill pending determination; and (vi) the quarry had been addressed. The decision was *ultra vires* due to its failure to have regard to those material considerations.

[17] In any event, there were no proper, adequate or intelligible reasons showing why the respondents accepted that the proposed development should be preferred over the existing

land use, being the continued operation and expansion of a number of windfarms contributing to renewable energy and intended to offer greater contributions long before the proposed development might be delivered. The wind farms were not constrained by the significant hurdle that the proposed development faced in not holding the land rights which were required. The decision identified the importance of renewable energy generation, but there was no balancing of the loss of renewable energy caused by the proposed development. The decision failed properly to consider any of the affected developments. It recognised that renewable energy generation in the Sanquhar area was a material consideration but stopped short of considering the loss of existing and consented windfarms, observing only that in the absence of the development being installed, the renewable energy benefits of other developments would not be realised.

[18] The respondents and interested party relied on the EIA report in order to explain the absence of adequate reasons and the failure to have regard to relevant material considerations. It was not permissible for the respondents merely to indicate that their reasoning could be found in a document of the size and complexity of an EIA report such as that produced in the present case. In any event, the EIA report did not address the petitioners' considerations. That was not surprising. The function of an EIA report was set out in regulation 5 of the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017, which provided that significant effects on the environment should be listed along with the measures to be used to avoid, prevent, or reduce them. The factors to be considered were found in regulation 3, namely population, human health, biodiversity, soil, land, water, air, climate, material assets, cultural heritage and landscape. Accordingly not all material considerations in relation to land use were matters falling within the scope of an EIA assessment. In any event there was only scant reference to

Sanquhar I and Sanquhar II in the EIA report. The sections of the report relied upon by the respondents in this connection were restricted to traffic and transport issues during the construction of the proposed development and did not consider the issue of the access track discussed in the petitioners' objections. The concern about the access track was not a transient one, and would permanently affect the operation of the windfarms and quarry.

[19] The respondents had failed to take into account material considerations. Had they had regard to the impacts on the other windfarms and quarry, there would have been a real possibility that they might have reached different conclusions on the acceptability of the proposed development. Separately, the reasons in the decision were not proper, adequate or intelligible. There was no proper consideration of undergrounding and in particular sectional undergrounding. In all the circumstances, the decision was unreasonable and illogical. It was *ultra vires* and should be reduced.

[20] Counsel for the petitioners made other submissions which might best be regarded as variations on his principal themes and which it would be disproportionate to enumerate or summarise here, but which I have taken into account in arriving at my decision.

Submissions for the respondents

[21] On behalf of the respondents, counsel submitted that the court should refuse the petition. The application for consent to the proposed development was accompanied by an EIA report. In terms of regulation 3 of the EIA Regulations, the respondents had to take the information in that report into account in their decision. In terms of regulation 5, an EIA report had to include a description of the likely significant effects of the development on the environment, a description of any measures envisaged in order to avoid, prevent, reduce and offset the likely significant adverse effects, a description of the reasonable alternatives

studied by the developer, and an indication of the main reasons for the option chosen. The petitioners did not contend that the EIA report was deficient. It met the requirements of the EIA Regulations and was prepared by competent experts. The respondents had been satisfied with it and its conclusions on the determining matters for the application.

[22] Consent was granted by the respondents on 23 April 2024. They had taken into consideration the EIA report and the consultee responses and representations. They had considered the route along with associated traffic management and access issues, concluded that the project was compatible with the local development plan and with NPF4, and agreed with the assessments contained in the EIA report. They imposed a number of conditions, including in relation to micrositing (ie small variations in the precise location of installations) and a traffic management plan. The decision recognised the wider benefit to the national grid. The objections raised by the petitioners in the March 2024 letter related to the proposed route and to sectional undergrounding. Although the letter had not been seen by the respondents, those issues had in any event been addressed in the decision.

[23] When determining an application for consent, it was generally for the decision-maker alone to decide what the determining issues were, and how much information it needed to assess and decide upon those issues. It was also for the decision-maker to decide what lines of evidence were material to the determining issues and what conclusions were to be drawn from them: *Moray Council* v *Scottish Ministers* at [29]. It was not for the court to examine the evidence and to form its own view as to what were the material considerations to which the respondents should have had regard: *Wordie Property Co Ltd*. There had to be a legal obligation to take a consideration into account before failure to do so could sound in law: *R (ex parte Samuel Smith Old Brewery)* v *North Yorkshire County Council* [2020] UKSC 3, [2020] PTSR 221 at [30] - [31]. The test to be applied in

determining whether a consideration was so obviously material that it must be taken into account was "the familiar Wednesbury irrationality test": *R (on the application of Friends of the Earth Ltd)* v *Heathrow Airport Ltd* [2020] UKSC 52, [2021] PTSR 190 at [116] to [119]. It was not the role of the court to test the ecological and planning judgments made in the course of the decision-making process. Assessing the nature, extent and acceptability of the effects that a development would have on the environment was always - apart from the limited scope for review on public law grounds - exclusively a task for the planning decision-maker: *NLEI Ltd* v *Scottish Ministers* [2022] CSIH 39, 2023 SLT 149 at [63].

[24] In order to assess the petitioners' challenge, it was necessary to ascertain what they claimed were the material considerations which the respondents were supposedly irrational in not taking into account. The letter of March 2024 specifically referred to "insufficient consideration" being given to the avoidance of impacts, and to the potential for diversion of the route, including sectional undergrounding. The weight to be attached to a particular matter was for the respondents. The balancing of competing considerations was also a matter for the respondents. No material error had been identified by the petitioners which would allow the court to interfere with that discretionary decision.

[25] In relation to Herds Hill, an application for planning permission had been submitted in respect of a three-turbine windfarm. The application had not been determined and thus consent had not yet been granted. The existence of another planning application was not a material consideration that required to be taken into account: *R (Fiske)* v *Test Valley Borough Council* [2023] EWCA Civ 1495, [2024] JPL 783 at [46] - [53]; *Pilkington* v *Secretary of State for The Environment* [1973] 1 WLR 1527 at 1531, (1973) 26 P & CR 508 at 512.

[26] Undergrounding and routeing were considered by the respondents and dealt with in the decision. The respondents had explained that they took into account the terms of the

EIA report and agreed with its findings. That report addressed the route and undergrounding. The developer had identified, contacted and engaged with the relevant landowners, including the first and second petitioners. A reasoned basis was given in the EIA report for the choice of route and an overhead line method. Windfarm location had been considered in the report when siting towers. Cumulative impacts with Sanquhar I and II had likewise been considered. The respondents stated in their decision that they considered and agreed with that assessment. Furthermore, the existence of an "infrastructure location allowance", reflected in the micrositing condition, allowed towers to be sited within a 50m radius of the design. The EIA report specifically referred to making alterations requested by landowners.

[27] In relation to the access track, as the EIA report noted, it would require to be used to facilitate the construction of the overhead line. However, after that, it was observed that access would only require to be taken infrequently for maintenance, and would have little impact on the operation of neighbouring sites. The EIA report also dealt with the issue of construction access. The respondents considered and agreed with that assessment. The report contained a detailed traffic and transport plan. It specifically considered the Sanquhar I and II windfarms. The respondents had made the production of a construction traffic management plan a condition of the consent, which plan would require to consider the overlap in the construction of the overhead line and that of Sanquhar II.

[28] The petitioners failed to identify any impact on the quarry and why that might be a material consideration that had been left out of account. The respondents had addressed the question of access, and the infrastructure location allowance, enabling alignment to be refined post consent, could reflect minor alternations requested by landowners. In terms of the planning permission granted for the quarry, the third petitioner was required to submit

a plan for reinstatement and restoration of its workings by 31 December 2024, and the planning permission for it would expire on 28 February 2025. No application for planning permission to extend the quarry had been made at the date of the March 2024 letter. In any event, the planning system did not preclude concurrent applications for two developments: *Fiske*.

[29] The objection letter of March 2024 was vague and lacking in essential specification. It did not state how the project would impact on the petitioners, or why undergrounding or re-routeing would benefit the petitioners. The substance of an objection required to be clear: *Rhodes* v *Minister of Housing and Local Government* [1963] 1 WLR 208 at 213, (1963) 14 P & CR 122 at 127.

[30] A decision had to leave the informed reader and the court in no real and substantial doubt as to what the reasons for it were and what material considerations were taken into account in reaching it: *Wordie Property Co Ltd* at 348. Reasons were considered from the perspective of an informed reader, who would be familiar with the terms of the EIA report and the consenting process in general. An elaborate philosophical exercise was not required. Nor was a consideration of every issue raised by the parties. The decision-maker was entitled to confine himself to the determining issues. It was not necessary to refer to each and every line of evidence and give detailed views upon it. If the decision-maker failed to deal in detail with any particular line of evidence, it did not follow that he had overlooked or ignored it. In order to have a remedy, the petitioner had to be substantially prejudiced by any failure to give reasons: *Moray Council* v *Scottish Ministers* at [30] - [31].

[31] The decision letter had to be read as a whole. It set out the basis for the decision clearly. It referred to the EIA report and agreed with its conclusions. Reasons were given for doing so. The EIA report was a detailed document covering a wide variety of issues.

The respondents acknowledged the environmental impact of the development, but weighed that up with the proposed mitigations and the positive impact of the development as a whole, as they were entitled to do. That was a planning judgment to be made by the respondents. They imposed relevant conditions in order to mitigate impacts. The informed reader would be left in no doubt as to the reasons for the decision having regard to the decision letter itself and the EIA report. In any event, the petitioners did not state how they had genuinely been substantially prejudiced by the reasons given in the decision.

[32] In the event that the court was to find that the decision had been attended by some error of law, it was open to it to hold, on the information provided to it, that the outcome would have been no different had the error not been made. In making that assessment, it ought to take into account the seriousness of the defect and the extent to which it had deprived the public of guarantees designed to allow access to information and participation in decision-making: *Walton* v *Scottish Ministers* [2012] UKSC 44, 2013 SC (UKSC) 67, 2012 SLT 1211.

[33] In order to merit reduction of a decision, the error had to be a material one, in the sense that, had it not been made, the decision might have been different. Failure to afford a particular factor a particular level of weight was not *per se* an error which was susceptible to judicial review: *NLEI* at [59] - [62]. The petitioners had failed to identify any such error. They had been given ample opportunity to engage with the consultation process. They submitted late objections in the consultation process, with the March 2024 letter being sent approximately one year after the consultation closed. Even then, the letter failed to provide any specification as to their purported concerns. The decision placed significant emphasis on the public benefits of the proposed development and its support from Scottish Government energy policy (including the status of the proposed development as one of

"national importance" in terms of NPF 4). The respondents acknowledged its adverse effects, but considered that the mitigations and justification for the project outweighed them. That was a planning judgment that the respondents were entitled to make. Absent projects such as this, the electricity generated by renewable developments could not be transported to the grid. That was a material consideration to which the respondents were entitled to give weight: *Sinclair* v *Scottish Ministers* [2022] CSIH 49, 2023 SCLR 45 at [32] - [35]. The petitioners' challenge amounted only to a disagreement with a discretionary decision. In the circumstances, the petition was without merit and should be refused.

Submissions for the interested party

[34] On behalf of the interested party, senior counsel submitted that the court should refuse the orders sought, on the primary bases that the March 2024 letter raised no new material consideration for the respondents to consider when reaching their decision, and that the reasons given for the decision were adequate. Alternatively, it was submitted that the matters raised within the letter would have had no material effect on the outcome and, in any event, that the court should in the circumstances exercise its discretion to refuse the remedy of reduction.

[35] The application for consent to what was a project of national importance had come after a long and structured informal and formal consultation and investigation process designed to inform the content of the application and its determination. The letter of March 2024 had come nearly a year after the end of that process despite the petitioners having had many opportunities (of which the first and second petitioners had availed themselves) to participate in it. It was reasonable for the respondents to conclude that all

relevant and material issues had been brought to their attention before they made their decision.

[36] When determining an application, it was generally for the decision-maker to decide both (i) what the determining issues were, and (ii) how much information it needed to assess and consider in relation to those issues: *Simson* v *Aberdeenshire Council* 2007 SC 366, 2007 SLT 244 at [25]. In addition to that broad principle, for the decision-maker to be under a legal duty to consider any particular matter, (i) there had to be an express or implied statutory duty on him to take that matter into account or (ii) the matter had to be so obviously material that a failure to consider it would be irrational: *Samuel Smith Old Brewery* at [29] - [32]; *Friends of the Earth* at [119], [120]. This being an application for consent in terms of the Electricity Act 1989, the only matters which the statute specifically provided had to be taken into account were those specified in schedule 9, which were not engaged by the content of the petitioners' letter of March 2024.

[37] Further, the substance of an objection had to be sufficiently clear. It was not the decision-maker's role to "root around" to establish whether a vague objection raised something material: *Rhodes*. The planning system allowed for (i) planning applications to be submitted by parties who were not owners of the land in question and (ii) planning applications that were mutually inconsistent with one another: *Fiske*, applying *Pilkington*. Accordingly, the actual (or potential) alternative use that could be made of the same application site was not a material consideration: see *R (Mount Cook Land Ltd)* v *Westminster CC* [2003] EWCA Civ 1346, [2017] PTSR 1166, [2004] 2 P & CR 22 at [30]. The commercial interests of an objector were immaterial to the planning issue relating to the use of the land: see *Willis* v *Argyll and Bute Council* 2010 CSOH 122 at [14] & [31] and *Fiske* at [28].

[38] Applying those principles to the present case, the March 2024 letter did not raise any new material consideration for the respondents to address when reaching their decision. It was within their discretion to decide what were the main determining issues for their decision, which they had outlined. They were under no statutory duty to consider any new matters raised within the letter, nor was any failure to do so irrational. The letter was wholly lacking in specification so far as it concerned impacts on Sanquhar I, Sanquhar II and the quarry. The respondents were not obliged to "root around" to establish the nature of any incompatibility with those schemes, but rather were entitled to determine the application "on the balance of facts actually proved or otherwise known" to them: *Rhodes*. The interested party did not dispute that Herds Hill wind farm would, if consented, be incompatible with the proposed development. However, that merely potential alternative use of the subject land was not a material consideration: *Pilkington*. Moreover, the decision did not, of itself, entitle the interested party to implement the proposed development. It was necessary for it to acquire the necessary land rights from the petitioners (among other landowners). The function of the ongoing inquiry into the compulsory purchase order was to balance the public interests in the development project against the other public and private interests relating to the land, and would encompass the subject of any compensation that might be due to the petitioners. In respect of the quarry, Sanquhar I and Sanquhar II, the letter provided no information to indicate that, as a matter of fact, there would be an issue of incompatibility. In particular, no application for extension of the quarry's planning permission had been submitted as at the date of the letter, and the petitioners provided no basis for the contention that a future application was "expected to be successful" or how the quarry operations would conflict with the proposed development. On the information before the respondents, the project would not conflict with the quarry.

[39] In relation to Sanquhar I and Sanquhar II, the EIA report assessed the impact of the project on them, and there was no suggestion of adverse interaction between the turbine blades and the overhead line. The access track over the petitioners' land was identified and it was noted that the effects of shared use of the access track would be addressed through a construction traffic management plan. Conditions in the consent allowed for micrositing and the traffic management condition was not restricted to public roads. Sanquhar I was already fully operational, and could be anticipated to create only a very limited demand for use of the access track.

[40] Planning permission for the operation of the quarry ceased in February 2025, before construction of the project was scheduled to begin in September 2025. It was, in any event, relatively remote from the overhead line and the letter of March 2024 contained no explanation of what the supposed issue for the operation of the quarry arising out of the line might be. Again, the compulsory purchase order process could deal, by way of compensation, with the consequences of any valid issue that might arise.

[41] The March 2024 letter claimed that the interested party had failed to give proper consideration to the issue of undergrounding. No specification was given of the issues that undergrounding would alleviate, or what proper and sufficient consideration of them would have revealed. In any event, the issue of undergrounding and the interested party's policy on it was expressly addressed in the EIA report, in the interested party's routeing and consultation report, and in its August 2022 consultation summary. Some parties consulted during the process leading up to the application had suggested undergrounding, but the EIA report concluded that it was not justified. It was expressly addressed in the decision. In relation to Sanquhar I, Sanquhar II and the quarry, the ultimate substance of the objections

within the March 2024 letter concerned the petitioners' commercial interests in those schemes: cf *Willis* at [31].

[42] In considering the adequacy of reasons, it was necessary to take account of the nature of a decision, the context in which it was made, the purpose for which reasons were provided, and the context in which they were given. It was important to maintain a sense of proportion, and avoid the imposition of unreasonable burdens: *Uprichard* at [44] and [48]. In the present case, the decision provided adequate and intelligible reasons in respect of the determining issues. The proposal had been assessed against the development plan and NPF4, and had been determined to comply with each. It would have been an unrealistic burden on the respondents to expand on all 249 of the representations received.

[43] In order to merit reduction of a decision as a result of an error by a decision-maker, there had to be sufficient information to conclude that, absent the error, there was a real possibility that the decision might have been different: *NLEI* at [59]; *Bolton Metropolitan Borough Council* v *Secretary of State for the Environment* [2017] PTSR 1063 at 1072H, (1991) 61 P & CR 343 at 353. In the present case, there was insufficient evidence to draw such a conclusion, having regard to (i) the lack of specification within the letter, (ii) the lack of evidence of any incompatibility between the project and the developments for which the petitioners had consent, and (iii) the terms of the decision (including the effect of the micrositing and traffic management plan conditions).

[44] Where there had been a procedural irregularity (with the result that a decision was voidable), the court retained the residual discretion to withhold the equitable remedy of reduction: *Macpherson* v *City of Edinburgh Council* 2003 SLT 1112 at [19]. The present circumstances would merit that course of action. The petitioners had had ample opportunity, during consultations before and after submission of the application for consent,

to vouch their objections. Reference was made to the EIA report; the interested party's consultation process (and the first petitioners' related representations during 2021 and 2022); the respondents' consultation; and the first and second petitioners' 2023 objections (which, in the first petitioner's case, referenced his earlier representations to the interested party). Moreover, and in any event, no prejudice arose in circumstances where the petitioners were developing the same arguments as part of the inquiry into the compulsory purchase order, for consideration in that forum.

Decision

Were the respondents bound to take into account the contents of the letter of March 2024?

[45] A primary question in this dispute is whether the respondents were in law obliged to take into account the contents of the petitioners' March 2024 letter in considering the application for consent under section 37 of the Electricity Act 1989 to the Glenmuckloch to Glenglass Reinforcement Project. In accordance with regulation 14(2)(f) of the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017 the interested party had advertised that 31 March 2023 was to be the date by which representations should made to the respondents concerning the application, albeit that was a something of a soft deadline in the sense already set out. Whatever degree of leeway there may have been for the consideration of representations which were marginally late (or which were submitted on time but were on 31 March still making their way to the top of the queue in the email inbox maintained by the respondents for the making of representations on applications for energy consents), it would be grossly inimical to the interests of the efficient administration of public affairs to conclude that the respondents were bound, absent something more, to take into account representations made nearly a year after the advertised deadline, in the context

of a process intended to bring a matter of significant public and private interest to a reasonably prompt conclusion.

[46] The something more that could change that general conclusion might, for example, be the belated discovery of some matter of undoubted determinative force in the decision-making process, such that no reasonable person in the position of the respondents could sensibly ignore it, no matter how late in the process it emerged. In the present case, however, it is not contended that the content of the March 2024 letter falls into any such category, nor even that there is any particularly good reason for that content only being advanced, as it was, in *l'esprit de l'escalier*. Rather, the suggestion is that what was said by the respondents after the receipt of the letter bound them in law to consider its terms in determining the application for consent.

[47] The first way in which that contention was advanced was in the form of an argument that the respondents were personally barred from failing to take the letter's contents into account because they acknowledged its receipt and subsequently said that it would be processed as a representation, and the petitioners relied on those statements to their detriment so that it would be inequitable now to permit the respondents not to have regard to what was advanced in the letter. A principal difficulty with that analysis and argument lies in the need to demonstrate for the purposes of the application of the doctrine of personal bar that the petitioners are worse off by having relied on what they conceived they were told about what would happen to the representation than they would have been had they taken some action at the time to attempt to ensure that the contents of the letter would indeed be taken into account. Counsel suggested that, had the petitioners not conceived themselves to have been given an assurance that the contents of their letter would be considered as part of the decision-making process, they would at that point have launched judicial review

proceedings directed at what on this hypothesis would have been an anticipated failure on the part of the respondents to take the contents of the letter into account. While that may be so, the petitioners still require to demonstrate that not raising such proceedings has left them in a less advantageous position than that which they would otherwise occupy. Any such litigation would have had to proceed on the narrative that the petitioners had made a representation nearly a year after the indicative deadline which had been publicised, that the nature of the representation was not such as to render it undoubtedly determinative of the application, and that there was no good reason for its lateness, but that the respondents were nonetheless bound to consider it. That would have been a highly unpromising position for the petitioners. I doubt that a petition setting out that position would even have received permission to proceed, and its prospects of ultimate success would in my estimation have been negligible. I am unpersuaded that the petitioners have shown that they suffered any relevant detriment as a result of their supposed reliance on what was said by the respondents after the submission of the letter of March 2024.

[48] Perhaps mindful of the difficulties attending a personal bar argument, counsel for the petitioners ultimately suggested that the respondents' acknowledgement of receipt of the representations and their statement that they would be processed had given rise to a legitimate expectation on the part of the petitioners that account would be taken of them. In public law, such an expectation may *inter alia* arise from the making of an express promise on behalf of a public authority which is clear, unambiguous and devoid of relevant qualification. In that situation, the court will, absent some overriding countervailing consideration, require the promise to be fulfilled, so long as the frustration of the expectation would be so unfair as to amount to an abuse of power on the part of the public authority. Unlike the position in the law of personal bar, detrimental reliance on the representation

may not always be essential (*R* v *Secretary of State for Education, ex parte Begbie* [2000] 1 WLR 1115, per Peter Gibson LJ at 1124, cf Laws LJ at 1133; *R (Bancoult)* v *Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] 1 AC 453 at 60), although its absence may feed into the determination of whether frustration of the expectation would amount to an abuse of power. These principles, and the authorities from which they are derived, are usefully set out by Nicklin J in *R (ex parte RD)* v *Worcestershire County Council* [2019] EWHC 449 (Admin), [2020] ELR 183 at [75] - [83]. The representation said to amount to an express promise will be construed by asking how, on a fair reading, it would reasonably have been understood by those to whom it was made: *Paponette* v *Attorney General of Trinidad and Tobago* [2010] UKPC 32, [2012] 1 AC 1, [2011] 3 WLR 219 at [30]. It is that aspect of the doctrine of legitimate expectation which causes the petitioners difficulty in the present case. All that was said on behalf of the respondents was that the petitioners' letter had been received and would "be processed accordingly as a representation". Viewed in the context that what was being referred to was a representation made nearly a year after the expiry of the indicated period for the making of representations, that falls somewhat short of a clear and unambiguous promise that its contents would be taken into account and given whatever weight the respondents saw fit to accord to it in the decision-making process. One perfectly legitimate way of processing such a delayed representation - indeed, perhaps the most natural one - would simply be to disregard it as having come far too late. Even if one accepts that the petitioners thought they had been told that the contents of the letter would be taken into account, an objective view of what a reasonable person in the position of the petitioners would have thought about the import of what was said to them does not extend so far. On that view, all that the petitioners were told by the respondents was that their letter had been received and would be processed, nothing more. It follows

that there was no relevant representation giving rise to the kind of legitimate expectation upon which they seek to rely.

[49] Although the argument was presented in the ways already indicated, any discussion of the application of personal bar and legitimate expectation concepts to what happened in this case is somewhat unrealistic given that the respondents made no actual decision, one way or the other, as to whether to have regard to the contents of March 2024 in determining the application in question; rather, the system which they had instituted for dealing with representations on energy consent applications failed to bring the petitioners' letter to the attention of a decision-maker until the decision had already been made. In such circumstances, any criticism of what occurred might more properly take the form of a challenge to the lawfulness of the process set up and maintained by the respondents for dealing with such representations. However, since that was not the criticism advanced by the petitioners, nor that which the respondents came to meet, little of much value can be said about it. Although one can readily conceive of a workable system calculated to bring representations made on applications ripe for decision to the notice of decision-makers sooner than can be achieved by the present method of lumping together all representations on every pending energy consent application in Scotland into a single inbox to be sifted through and distributed in a somewhat leisurely manner on a "first come, first served" basis, there was certainly no material before the court suggesting that the existing system was such that representations made on time, or perhaps slightly out of time, would in any normal circumstances fail even to be brought to the attention of the relevant decision-maker at a point that would at least enable them to be considered. I conclude in these circumstances that it has not been shown that the present system is unlawful and that the petitioners' criticisms based on personal bar and legitimate expectation fail. It follows that the

respondents were under no legal obligation to consider the terms of the letter of March 2024 in coming to their decision on the relevant application. That conclusion takes much, but not all, of the wind from the sails of this petition.

Materiality of the content of the letter of March 2024

[50] Standing the decision I have reached on the absence of any duty on the respondents to take into account the contents of the letter of March 2024, the question of the materiality of those contents - in the sense of whether in substance they represented matters which the respondents were bound to take into account - is rather less weighty than might otherwise have been the case. However, there were two aspects to the materiality argument - firstly, were the matters raised in the letter of potential materiality by reason of their substance, and secondly, were they material whether or not the respondents were specifically made aware of them by way of representation (a conclusion which would render the fact that they were only advanced in the letter of March 2024 of far lesser significance than might otherwise be the case)?

[51] The answers to both questions are authoritatively indicated in *Friends of the Earth Ltd*, where Lord Hodge DPSC observed:

> "[116] … A useful summation of the law was given by Simon Brown LJ in *R v Somerset County Council, Ex p Fewings* [1995] 1 WLR 1037, 1049, in which he identified three categories of consideration, as follows:
>
> > 'the judge speaks of a 'decision-maker who fails to take account of all and only those considerations material to his task'. It is important to bear in mind, however … that there are in fact three categories of consideration. First, those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had. Second, those clearly identified by the statute as considerations to which regard must not be had. Third, those to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so. There is, in short, a margin of

> appreciation within which the decision maker may decide just what considerations should play a part in his reasoning process.'

[117] The three categories of consideration were identified by Cooke J in the New Zealand Court of Appeal in *CREEDNZ Inc v Governor General* [1981] NZLR 172, 183:

> 'What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the [relevant public authority] as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision.'

Cooke J further explained at p 183 in relation to the third category of consideration that, notwithstanding the silence of the statute:

> 'there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by [the public authority] … would not be in accordance with the intention of the Act.'

…

[119] As the Court of Appeal correctly held in *Baroness Cumberlege of Newick v Secretary of State for Communities and Local Government* [2018] PTSR 2063, paras 20–26, in line with these other authorities, the test whether a consideration falling within the third category is 'so obviously material' that it must be taken into account is the familiar Wednesbury irrationality test (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410–411, per Lord Diplock).

[120] It is possible to subdivide the third category of consideration into two types of case. First, a decision-maker may not advert at all to a particular consideration falling within that category. In such a case, unless the consideration is obviously material according to the *Wednesbury* irrationality test, the decision is not affected by any unlawfulness. Lord Bingham deals with such a case in *Corner House Research* at para 40. There is no obligation on a decision-maker to work through every consideration which might conceivably be regarded as potentially relevant to the decision they have to take and positively decide to discount it in the exercise of their discretion.

[121] Secondly, a decision-maker may in fact turn their mind to a particular consideration falling within the third category, but decide to give the consideration no weight. As we explain below, this is what happened in the present case. The question again is whether the decision-maker acts rationally in doing so. … This shades into a cognate principle of public law, that in normal circumstances the weight to be given to a particular consideration is a matter for the decision-maker, and this includes that a decision-maker might (subject to the test of rationality)

> lawfully decide to give a consideration no weight: see, in the planning context, *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780 (Lord Hoffmann)."

The decision complained of here was one made under section 37 of the Electricity Act 1989. Paragraph 3(2) of schedule 3 to that Act requires the respondents, in determining an application made in terms of that section, to have regard to the desirability of preserving natural beauty, of conserving flora, fauna and geological or physiographical features of special interest and of protecting sites, buildings and objects of architectural, historic or archaeological interest and also to the extent to which the proposal under consideration does what it reasonably can to mitigate any effect which the proposals would have on the natural beauty of the countryside or on any such flora, fauna, features, sites, buildings or objects. Paragraph 3(3) adds a requirement to have regard to the need to avoid, so far as possible, causing injury to fisheries or to the stock of fish in any waters. Beyond those specified matters, nothing is expressly identified by the statute as a consideration to which regard must be had. Nor does it forbid regard being had to any particular matter. There is in the 1989 Act no general provision which enjoins the respondents to have regard to any other material considerations in making their determination, in contrast to the more familiar position in relation to planning applications being dealt with under the provisions of the Town and Country Planning (Scotland) Act 1997, section 37(2) of which requires a planning authority, in deciding whether to grant planning permission, to have regard to the development plan, so far as material to the application, and to any other material considerations (with the default position being that the development plan should prevail unless material considerations indicate otherwise – section 25(1)).

[52] Absent any provision in the 1989 Act requiring material considerations other than those expressly identified in schedule 3 to be taken into account by the respondents, it is

difficult to see any room for the conclusion that the statute impliedly identifies any such other matters as considerations to which regard must be had. Any implication that some other matter required to be considered would have to come via the principle identified by Cooke J in *CREEDNZ Inc*, that some matters are so obviously material to a decision that the requirements of rationality indicate that the intention of the Act must have been that they should be considered. That in turn is difficult to distinguish from, and is effectively subsumed within, the principle set out in *Baroness Cumberlege of Newick*, that the test whether a consideration is "so obviously material" that it must be taken into account is simply the *Wednesbury* irrationality test. If the matters set out in the letter of March 2024 were material in the sense that the respondents were bound to take them into account, regardless of their own views on the question, that can be the only route in law by which such materiality may be conferred upon them. The authorities cited by the petitioners go no further than to establish that the effect of a proposed development on existing land use, either of the area proposed for development or neighbouring areas, may be a material consideration in a planning decision if the decision-maker reasonably takes the view that it is. They do not establish that such use is necessarily a material consideration, or, to put it another way, that a decision-maker would be acting irrationally in omitting it from his deliberations. To the extent that certain passages in *Exeter City Council* can be read as going further, they cannot be reconciled with the authority which that case bore to be following (*Ricketts and Fletcher*) and ought, in my view, to be read as intended to deal only with the situation where a decision-maker has indeed decided that existing land use is material, or with those very limited situations (an example of which might be *Stringer* v *Minister of Housing and Local Government and Others* [1970] 1 WLR 1281, (1971) 22 P & CR 255), where to decide that it was not material would be irrational.

[53] The position in relation to the petitioners' concerns about the effect of the proposed development on their plans for Herds Hill is even more clear; other possible but unconsented uses to which land might be put are not under any normal circumstances material considerations in a planning decision even if the proposed development under consideration would conflict with those unconsented uses: *Fiske*; *Pilkington*. A similar position pertains in relation to the quarrying operations for which the extant planning permission is about to expire.

[54] Those principles apply whether or not the matters in issue were positively brought to the attention of the decision-maker, there being no obligation on him to think of every consideration which might be possibly be relevant and make a decision as to whether it actually is or not - *Friends of the Earth* at [120], albeit failure to consider a matter of the obvious materiality figured in *CREEDNZ Inc* would constitute an error of law whether or not that matter had been specifically raised. None of the matters raised in the petitioners' letter of March 2024 is of such a character that no reasonable decision-maker could under any circumstances have failed to take it into account; rather, at best some of them represent matters which might have been brought into consideration had the decision-maker seen fit to do so. None of those matters was, accordingly, material in the sense being discussed.

[55] The respondents and interested party further complained about a lack of detail in the letter of March 2024 about the matters being raised there, especially in relation to the claimed impact of the proposed development on the petitioners' various existing and proposed operations. A discussion of the specification contained in a letter which was not actually read, which I have held the respondents were not in law obliged to read, and the contents of which were in any event not material, would be a metaphysical exercise akin to debating whether a tree which falls in the forest makes a noise even if no one is there to hear

it. It may suffice to observe that, had I concluded that the representations had been made timeously and that the respondents were bound to take into account the matters raised, I would not have regarded the observations of Paull J in *Rhodes* about there being no obligation on a planning authority to "rout round", made as they were in the specific context of a putative duty to consider whether there were other, more suitable sites for a proposed development, as absolving the respondents in the present context from seeking further information, in the first instance from the petitioners, in relation to any matter which the former considered might well inform the decision which they had to make. Since, however, that is not what I have concluded, the matter does not arise and nothing more need be said on the subject.

Sufficiency of reasons in the decision

[56] There was no dispute before me as to the applicable law on the question of the legal adequacy of the reasons for a decision such as that currently under examination. That was set out in *South Buckinghamshire District Council* v *Porter (No 2)* [2004] 1 WLR 1953, [2005] 1 P & CR 6, per Lord Brown of Eaton-under-Heywood:

> "36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must

> be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. ..."

The decision in the present case acknowledged that the proposed development constituted a major electricity transmission system reinforcement project which would facilitate increased power flows across the Scottish network. It correctly identified the relevant statutory background, including the need to have regard to the matters set out in schedule 9 to the 1989 Act, noted the respondents' view that the EIA report had been produced in accordance with the applicable regulations and that the general public as well as statutory and other consultees had been afforded the opportunity to consider and make representations on the proposal, and stated that the environmental impacts of the proposed development, including the EIA report and consultation responses, had been taken into consideration. It summarised the consultation responses from statutory consultees and other public stakeholders, and noted that there had been 249 objections from others, claiming that an alternative route should be considered and that there would be potentially significant environmental impacts on biodiversity, archaeology, landscape and visual amenity, loss of ancient woodland, ecology and ornithology, cultural heritage and traffic and transport. The respondents stated that they were satisfied that the matters raised in the objections had been appropriately assessed and taken into account, and that a public inquiry would add little to their understanding of parties' positions.

[57] The decision then went on to identify the main determining issues, which were stated to be the environmental impacts of the proposed development, the extent to which the development accorded with and was supported by Scottish Government policies, and the contribution it would make to realising the wider benefits of renewable electricity generation connection to the national grid. It considered each of those matters in turn,

noting *inter alia* in relation to routeing that various technically feasible routes had been identified and consulted upon, and that the final selected route minimised landscape and visual impacts so far as reasonably possible, taking into account technical and environmental constraints. It was acknowledged that there would be significant adverse landscape and visual effects which could not be further mitigated, but stated that these were considered to be acceptable in the context of the need for and benefits of the development. Objections from members of the public about biodiversity, archaeology, loss of ancient woodland, ecology and ornithology, cultural heritage and traffic and transport were briefly addressed, it being observed in the latter context that a detailed construction traffic management plan would require to be submitted prior to any works taking place. It was again observed that the development would make a significant contribution to realising the wider benefits of renewable electricity generation connection to the national grid, including from several renewable energy developments in the Sanquhar area which would otherwise not be realised. Reference was made to existing and draft Scottish Government energy policy and it was observed that the development would provide the resilience necessary to maintain secure and reliable supplies of energy to homes and businesses as the planned energy transition took place. The local development plan and NPF4 were considered and the development deemed compliant with them.

[58] The following passages then appear:

> "The Scottish Ministers' Conclusions Reasoned Conclusions on the Environment
>
> 83. The Scottish Ministers conclude that there will be some significant localised landscape and visual effects arising from the proposed Development. There are no other likely significant residual environmental effects. Mitigation measures are proposed, and Scottish Ministers have secured these by conditions attached to this consent. Scottish Ministers are satisfied having regard to current knowledge and methods of assessment that this reasoned conclusion is up to date.

> Acceptability of the proposed Development
>
> 84. Scotland faces a real challenge in building an electricity grid which will allow Scotland to harvest and export its vast resources of clean energy. The Scottish Ministers recognise that to achieve the dual aims of maintaining a resilient electricity network for businesses and consumers and enabling renewable ambitions to be realised, the need for new connections, and for grid reinforcement, is greater than ever. The installation, and the keeping installed, of the proposed overhead line and ancillary development would allow the Company to comply with its statutory duty to develop and maintain an efficient, coordinated, and economical system of electricity distribution and deliver a major electricity transmission system reinforcement. Significantly, the Development would allow a considerable volume of renewable electricity to connect to the national grid.
>
> 85. Scotland's energy policies and planning policies are all material considerations when weighing up the proposed Development. NPF4 makes it clear that low carbon 12 20/13 energy deployment, maintaining security of electricity supply, and electricity system resilience remain a priority of the Scottish Government. These are matters which should be afforded significant weight in favour of the proposed Development. The Scottish Ministers conclude, for the reasons set out above, that the proposed Development is supported by Scottish Government policies.
>
> 86. The Scottish Ministers have taken into account the Application, the EIA Report as well as consultee responses and representations and consider that the effects of the proposed Development are acceptable subject to the implementation of mitigation measures which are secured as conditions at Annex 2."

The decision finally notes that consent was granted subject to the special and general conditions set out.

[59] Against that background, the suggestion that a reasonably well-informed reader of the decision would not understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues is impossible to sustain. Those issues were set out and reasons given for the view of the respondents that the application should succeed - in essence, that the adverse environmental effects of the development could and would be mitigated and, to the extent that that was not possible, they were nonetheless acceptable given the importance of the project for a central plank of government energy policy. The petitioners evidently disagree with that assessment, but the

nature of what it is that they disagree with is in no way mysterious. It is true that the decision did not address the petitioners' concerns about the effect of the proposed development on their own existing and planned operations, but those concerns were, as I have held, not matters which the respondents were bound to take into consideration, given that they were advanced far too late in the day and were not in any event material in the sense already discussed. I do not regard the respondent's reasoning as manifested in their decision as depending in any way on the content of the EIA report beyond that it is accepted as providing an accurate account of the essential factual backdrop against which the decision on consent required to be taken. It was for the respondents to assess whether the report had been compiled in a manner adequate to play that role in the decision-making process. They decided that it did, and nothing capable of undermining that decision has been advanced by the petitioners. The challenge based on the adequacy of the reasons given for the respondents' decision fails.

Discretion to disregard errors of law

[60] Given that I have found the respondents to have acted entirely lawfully, the question of whether I should exercise a discretion to refuse to reduce any decision reached by way of legal error does not arise. However, since the court is now routinely asked to consider exercising such a discretion in the event that some error of law should be found to attend a planning decision (apparently in consequence of some encouragement in that regard perceived, in particular, from *NLEI*) it may be appropriate to say a few words on the subject. The court is almost invariably (and rightly) told in judicial reviews of the decisions of planning authorities that matters of planning judgment are for that authority to make, and not for it. What is less often acknowledged is that an assessment of whether an error on a

particular question of law might, once corrected, have made a difference to the challenged determination of the planning authority is very often itself wholly or partially a matter of such judgment and as such occupies a territory upon which the court should ordinarily be wary of treading.

[61] Various factors may inform the answer to the question of whether a different result might have been arrived at had an error not been made, obviously including the nature of the error itself (such as in *Rae* v *Glasgow City Council* [2024] CSOH 74, 2024 SLT 974) but extending also, for example, to the nature of the decision-making body. It might be very difficult for a court to decide that the determination of an organ of a democratically elected body, such as the planning committee of a local authority, or even the authority as a whole in plenary session, could have been no different had some apparently minor matter before it been otherwise. Even in cases where the decision-making body may be expected to have a more reliably predictable focus, the court should be very careful not to trench upon the wide bounds of its province. In the present case, for example, had I decided that the matters raised in the March 2024 letter were material and ought to have been taken into account by the respondents, it would have been quite impossible for me properly to determine (as I was invited to do by both the respondents and the interested party) that those matters could have made no difference to the outcome of the process because of some supposedly overwhelming interest in the promotion of the means of transmission of renewable energy. That would undoubtedly have been a matter of planning judgment for the respondents and not for me. Invitations to the court to exercise the discretion in question should be issued with rather more circumspection than experience would suggest is currently being deployed.

Disposal

[62] For the reasons stated, I shall sustain the second, third and fourth pleas-in-law for the respondents and the interested party respectively, repel the petitioners' pleas, and refuse the prayer of the petition.