SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT DUNDEE

[2025] SC DUN 24

DUN-B140-24

JUDGMENT OF SHERIFF TIMOTHY NIVEN-SMITH

in the cause

FORTHTAY LIMITED EMPLOYEE TRUST,
Per Optimus Fiduciaries Limited as trustees of the said trust,
St Mary's, Castletown, Isle of Man.

Appellant

against

THE SCOTTISH MINISTERS,
Per the Agriculture and Rural Economy Directorate,
Community Land Team, Q Spur, Saughton House,
Broomhouse Drive, Edinburgh.

Respondent

Appellant: Mr Young, Advocate; MM Legal, Dundee
Respondent: Ms McKinlay, Advocate; Scottish Government, solicitors

DUNDEE, 14 April 2025

Introduction

[1] The Land Reform (Scotland) Act 2016 ("the 2016 Act") Part 5 introduced the "Right to buy land to further sustainable development". In essence Part 5 of the 2016 Act introduced a right which allows community bodies to apply to the Scottish Ministers for consent to exercise compulsory purchase of land or a building for the purposes of furthering the achievement of sustainable development.

[2] This is a Summary Application raised in terms of section 69(1) of the 2016 Act. The application is an appeal against the decision of the Scottish Ministers ("the respondent") who gave consent to Poet's Neuk (a community body) to exercise the right to buy land on

the west side of Greyfriars Gardens, opposite number 1 Greyfriars Gardens, St Andrews, KY16 9HG, (the "subjects") in terms of an application made in terms of Part 5 (section 54) of the 2016 Act. The appellants are the owner of the subjects.

Background

[3] The subjects comprise the former garden opposite number 1 Greyfriars Gardens, St Andrews. The private gardens in this street are located on the other side of the street from the houses they serve. It is understood that the houses are B-listed late Georgian town houses. The subjects have become detached from the ownership of the house it used to serve. At the time of the application under Part 5 of the 2016 Act the subjects had been neglected for many years and were an eyesore to residents and local businesses. The subjects are located on the site of the chapel of the Greyfriars monastery. A disposition of Mary, Queen of Scots, a few months before her abdication, transferred the land to the community of St Andrews in 1567. A decision of the Burgh council in 1836, transferred the community ownership to the Feuer's of each of the houses erected opposite. As a result of the subjects falling into disrepair various efforts have been made to secure the long-term future of the subjects.

[4] Poet's Neuk is a company limited by guarantee (SC582769) formed to benefit the community of St Andrews, centred on Greyfriars Garden and includes various post codes all as set out in their Articles of Association. Poet's Neuk propose the formation of a public garden. Poet's Neuk's stated objectives are:

> "(i) To remove the eyesore of the neglected garden, which for over 20 years, has troubled residents and visitors alike in the St. Andrews central conservation Area and which has been the location of frequent antisocial behaviour. (ii) Create an attractive public amenity in the form of a well laid out and fully planted garden, with ample seating and access and interpretation for people with disabilities, including visually

> impaired adults and children, offering a green place of rest and interest to residents and visitors in an area of the town where little such provision currently exists. (iii) provide educational material and displays on the historic significance of the site, in particular its association with the important, but now almost forgotten, Greyfriars monastery and the relatively unknown link with Mary, Queen of Scots, who gave the monastery land to the town. (iv) Establish arrangements for the maintenance of the garden."

[5] Poet's Neuk entered correspondence with the appellants to purchase the subjects from them. The appellants did not want to sell the subjects and in turn they seek to develop the site; the appellants seek planning permission to site a café on the subjects. At the time of the decision by the respondents and at the time of the appeal hearing no planning consent has been granted in that respect. Poet's Neuk have made a planning application to Fife Council under application reference 21/01087/FULL, said planning application for the formation of a public garden was granted as of 27 May 2021. In February 2023 the respondent received an application from Poet's Neuk to exercise the right to buy the subjects in terms of the 2016 Act. On 9 February 2023, the respondent sought the views of the appellant. Solicitors on behalf of the appellants set out their views by letter dated 7 April 2023. Views where then sought by the respondent from Poet's Neuk. The respondent made their decision on 25 January 2024.

Procedural history

[6] The respondent intimated their decision on the appellant and sent a notice in terms of section 60 of the 2016 Act on 29 January 2024. In terms of section 69(7) of the 2016 Act: "An appeal under this section must be lodged within 28 days of the date of the Scottish Minister's decision on an application made under section 54." The summary application here was lodged on 26 February 2024 accordingly, the application appeared *prima facie* to be lodged out of time. Following a diet of debate before a different Sheriff on 26 August 2024

the court held that the summary application was lodged out of time however, the court should exceptionally, exercise its discretion to allow the appeal to be received although late thereafter, *ex proprio motu* the court assigned the case to a procedural hearing for 26 September 2024. After further callings of the case on 31 October 2024 it was agreed by parties that the appeal should proceed by way of review with the Sheriff's function by way of review being broadly equivalent to that of the Court of Session on a petition for judicial review, the court acceded to that invitation and the hearing for the appeal was ultimately assigned for 17 February 2025.

Appeal by review

[7] The test for judicial review is set out in *Wordie Property Company Limited* v *Secretary of State for Scotland* 1984 SLT 345 as per the Lord President Emslie at pages 347 to 348 wherein he observes that:

> "A decision of the Secretary of State acting within his statutory remit is ultra vires if he has improperly exercised the decision confided to him. In particular it will be ultra vires if it is based upon a material error of law going to the root of the question for determination. It will be ultra vires, too, if the Secretary for State has taken into account irrelevant considerations or has failed to take account of relevant and material considerations which ought to have been taken into account. Similarly, it will fail to be quashed on that ground if, where it is one for which a factual basis is required, there is no proper basis in fact to support it. It will also fall to be quashed if it, or any condition imposed in relation to a grant of planning permission, is so unreasonable that no reasonable Secretary of State could have reached or imposed it. These propositions, and others which are not of relevance for the purposes of these appeals, are, it appears to me, amply vouched by many decided cases…"

Expressed another way, grounds of review by way of judicial review will be under one of Lord Diplock's tripartite classification namely, illegality, irrationality and procedural impropriety, as formulated in *Council of Civil Service Unions* v *Minister for the Civil Service* [1985] AC 374 at pages 410-411 (the GCHQ case).

[8] In this appeal the appellant seeks to review the decision of the respondent by reference to the first two of Lord Diplock's grounds *supra* at para [07], illegality and irrationality. Whilst parties agreed that the appeal should proceed as if judicial review proceedings the supervisory role of the court in judicial review is reserved solely to the Court of Session and is not exercisable in the Sheriff Court. By virtue of the court treating the appeal as if judicial review I am not substituting my own view for those of the decision maker nor am I reviewing the merits or otherwise of the decision. By contrast to the supervisory role of the Court of Session the remedies available to me in a successful appeal are limited in terms of section 69(10) of the 2016 Act which provides that:

> "(10) The decision of the sheriff in an appeal under this section-
> (a) may require rectification of the New Register,
> (b) may impose conditions upon the appellant,
> (c) is final."

[9] During the preliminary stages of this application the respondent raised a preliminary matter in respect of 'title to sue' of the appellant. I do not intend to rehearse that matter as it was resolved by the hearing of the appeal. In advance of the hearing of the appeal parties had lodged three affidavits from three individuals namely, Paul Sale, David Thomson and Brent Thomas. These affidavits sought to address the preliminary issue raised by the respondent. Whilst I had read and considered the terms of those affidavits in advance of the hearing of the appeal and I alluded to the contents of one in discussion with parties at the appeal hearing, I have **not** had regard to their contents in reaching my decision particularly because they may contain information not available at the time the decision in favour of Poet's Neuk was made by the respondent. Under judicial review it is generally inappropriate for a party to seek to rely upon documents (or to advance arguments based on those documents) which were not available to the decision maker: see Lord Reed at

para [65] in *Chief Constable of Lothian and Borders* v *Lothian and Borders Police Board* 2005 SLT 325.

Submissions for parties

[10] The court is indebted to the professionalism of counsel who appeared who had lodged detailed written submissions and highlighted authorities in advance of the hearing. This had the result of significantly reducing the reading time in preparation for the appeal having had no previous involvement in the case and significantly reduced the court time required for the appeal hearing itself. In setting out the submissions of parties *infra* I have set those out in greater detail than I would normally in a written judgement but I have done so in recognition that - as I understand it - this is the first appeal to a Sheriff from a decision of the Scottish Ministers under Part 5 of the 2016 Act accordingly, the case is novel.

Appellant

[11] Counsel for the appellant commenced by adopting his written submissions. These were amplified by oral submissions.

Eligible land

[12] At the hearing counsel for the appellant informed me that he did not intend to argue his first ground of appeal namely: "that the decision maker has failed to consider whether the land is eligible land in terms of the Land Reform (Scotland) Act 2016 or has failed to give reasons why it is eligible." He insisted upon his other grounds of appeal.

Failure to consider the benefit to "sustainable development"

[13] Counsel for the appellant submitted that the decision of the respondent was so flawed that it fell to be reduced. The decision maker had failed to ask whether allowing transfer of the land would be of greater or less benefit to the goal of "sustainable development" than the status quo. It was submitted that the respondent was not entitled to grant the application unless it was satisfied that the sustainable development criteria as per section 56 of the 2016 Act were met. The first criterion in section 56(2) provides that: "The sustainable development conditions are met if - (a) the transfer of land is likely to further the achievement of sustainable development in relation to the land."

[14] Counsel confirmed that the term "sustainable development" is not defined within the 2016 Act. He pointed to the bill for the Forestry and Land Management (Scotland) Act 2018 in particular the Scottish Parliaments Rural and Economy Connectivity committee stage 1 report on the bill wherein they observed that:

> "The Committee noted that no definition of sustainable development is provided in the bill or by the accompanying documents and that this is consistent with the Land Reform (Scotland) Act 2016 and the Community Empowerment (Scotland) Act 2015. Organisations such as the National Farmers Union for Scotland (NFUS) and the Institute of Chartered Foresters expressed concern at the lack of clarity on the new powers for sustainable development. NFUS stated that it is not against the concept of sustainable development. However, reassurance is required and examples of how land will be managed for sustainable development would be helpful. It expressed a fear that if there are no clear limits to how land will be managed there is a risk that the concept of sustainable development could become contested and divisive in the longer term."

Counsel submitted that "sustainable development" is an abstract concept. He submitted that there are five "guiding principles" having regard to para [5] in the case of *Gladman Developments Limited* v *Scottish Ministers* 2020 SLT 898 which cites the United Kingdom shared framework for sustainable development (2003) namely:

> "Living within the planet's environmental limits, ensuring a strong, healthy and just society, achieving a sustainable economy, promoting good governance, and using sound science responsibly."

He pointed in addition, to the court in *Gladman* referring to the Scottish Planning Policy (SPP). He submitted that in terms of page 75 of the SPP "sustainable development" is defined as: "Development that meets the needs of the present without compromising the ability of future generations to meet their own needs". Counsel also referred the court to the *Brundtland* definition in "Our common Future, The World commission on Environment and Development" 1987.

[15] Counsel submitted that the definition of "sustainable development" is not defined in statute and a definition requires to be drawn from looking at various sources. He submitted by reference to the observations of the Division in *Gladman* that "its abstract, even vaguely defined, nature means that it requires all the better an analysis from decision makers, in order to wrestle with its nebulous nature" and he submitted that was absent in this case. Counsel submitted that if the court considered the various definitions in particular the five guiding principles in *Gladman* specifically, "achieving a sustainable economy" and "promoting good governance" then this court would be drawn to the conclusion that the respondents failed to consider the issue of "sustainable development".

[16] It was submitted that applying a strict interpretation of the 2016 Act the transfer of land must have greater benefit for sustainable development than leaving the land in its current ownership. Counsel submitted that required the decision maker to carry out a comparative exercise or at the very least the respondents must ask themselves the question "how is the aim of sustainable development best achieved?" Counsel submitted that this exercise was not carried out and only one side of the coin was explored namely the benefits

of permitting the transfer. The appellant seeks to develop the site by erecting a café upon the subjects. It is submitted this would achieve the aim of furthering sustainable economy. The appellants wanted the court to take cognisance of the fact that this was not merely aspirational there is a planning application history.

[17] By reference to the section 60 Notice at pages 3 - 5 the appellants submit that the decision maker has outlined several purported advantages however, it is submitted that these advantages are not "sustainable development" as that term should be interpreted rather the decision maker has opted for a test of perceived advantages of transfer. Under the heading of "Economic sustainability" if the court scrutinises the language of the respondents at page 4 of the section 60 Notice it will note that the word "could" is used repeatedly:

> "It is ministers view that the transfer of the land and proposed garden **could** be a useful addition to St. Andrews for both the locals and the many visitors to the area…..", "This **could**, in turn, have positive economic benefits for tourism…", "In addition, the community body **could** charge a nominal fee…" (italicised and in bold my emphasis).

The appellants submit that the appropriate test in terms of section 56(2)(a) is that the transfer of land is likely to further the achievement of sustainable development. The use of "could" is indicative of the decision maker applying the wrong test.

[18] The appellants submitted that the error is further demonstrated at page 8 of the section 60 Notice where in relation to section 56(2)(c)(i) the notice states:

> "In relation to economic development the likely effects are an increase in trade for local retail and hospitality businesses as the increased attractiveness of the area leads to greater footfall, with larger numbers of visitors coming to that part of the town, or locals coming to this area of the town. This, in turn, should help to boost the local economy. The owner's view is that there is no economic development intrinsic in Poet's Neuk's proposals. Whilst the proposals do not directly involve commercial activity, Ministers' view is that the secondary, positive impact on local trade constitutes a benefit, and the transfer of the land is likely to result in this benefit."

The appellants submitted that the requirement of the legislation is that there is "a substantial benefit" not merely "a benefit" accordingly, the ministers have applied the wrong test, that is an error in law and separately is irrational.

[19] The appellants submitted that a bigger problem for the respondents was the fact that the decision maker did not consider the benefits of not transferring the land. A café being established on the site by the appellants would generate obvious economic activity by contrast a poetry garden would permit cultural activity. Had the decision maker compared the two options (transfer the land or not transfer the land) they would have held that not transferring the land would achieve a sustainable economy.

[20] The appellant submitted as a proposition that a decision maker will err if they fail to have regard to a material consideration which he/she was compelled to have regard to. If a material consideration is so obviously material to require a direct consideration a failure to have regard to it will constitute an error of law as per Lord Carnwath at paras [29-32] of *R (on the application of Samuel Smith Old Brewery (Tadcaster) and others)* v *North Yorkshire Council* [2020] UKSC 3**.** In this case the failure to consider the appellants proposal to site a café on site when considering the economic sustainability of the subjects was a failure to consider a material matter, which was so obviously material its failure to consider amounts to an error of law.

ECHR

[21] Counsel submitted that the European Convention on Human Rights: article 1 protocol 1 applied. Article 1 protocol 1 provides that:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest

> and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[22] Counsel submitted that the section 60 Notice states that: "regard has been had to guidance under section 44" of the 2016 Act. Section 44 of the 2016 Act provides that the Scottish Ministers must issue guidance on engaging communities in decisions relating to land. The appellant submits that the section came into force on 1 November 2016, but no such guidance has been issued so that a statement to the effect that the guidance has been considered is irrational. There must be an obligation upon the respondent to explain how the powers under the 2016 Act are ECHR compliant, the failure to consider benefits to sustainable development means that no proper analysis of the appellants article 1, protocol 1 rights have been made.

[23] By reference to various authorities the appellant submitted that there is a three-stage test and that in terms of *R* v *Shayler* 2003 1 AC 247 at para [61] the decision maker must make a serious examination of the three-stage test when proposing to take away a person's property rights. As per Lord Hope of Craighead wherein he stated that:

> "As these propositions indicate, it is not enough to assert that the decision that was taken was a reasonable one. A close and penetrating examination of the factual justification for the restriction is needed if the fundamental rights enshrined in the convention are to remain practical and effective for everyone who wishes to exercise them."

Counsel for the appellant submitted that scrutiny of the decision here falls far short of being close or penetrating there was no serious exercise in where the balance of benefit lies in respect of sustainable development. The ministers should have recognised the application for what it is namely a poetry garden with no economic benefit. Further, it was submitted that if this court carries out the necessary examination it will be satisfied that the

respondents have fallen seriously short of the high standard required when depriving a party of his property rights.

Undue influence

[24] The third ground of appeal is that the decision fails to properly consider the public interest, in that it has been unduly influenced by irrelevant considerations. Specifically, by reference to the section 60 Notice provided to the appellants at page 7 wherein it states that:

> "This is the first application of its kind in Scotland and, if granted, is likely to generate interest not only in St. Andrews but also further afield and therefore influence land use in Scotland more widely."

In addition, the appellant points to the reference at the same page which states:

> "Ministers have considered the likely effect of granting (or not granting) consent to transfer of land, on land use in Scotland and concluded that such a transfer is likely to have an impact on land use in Scotland through leading by example."

It is submitted this is a serious, fatal, failure of impartiality. Whilst the respondents are not judges they were carrying out a function which required them to be impartial. Instead, they have become invested in the success of the application.

[25] The appellants submit that the success or otherwise of the application is an immaterial consideration, it is unlawful to have regard to that factor. In addition, it was irrational, in that no decision maker, acting rationally, would be influenced by the novelty of their decision in deciding for one party or another accordingly, the decision has failed to properly consider the public interest instead adopting a position in favour of the Scottish ministers political or policy concerns. All of which has led to the position that the informed observer would discern that the decision reached is biased in favour of Poet's Neuk. In support of these contentions the court was referred to the following cases: *Bubbles & Wine*

Ltd v *Reshhat Lusha* [2018] EWCA Civ 468 and *Resolution Chemicals Ltd* v *H Lundbeck A/S* [2014] 1 WLR 1943.

Regeneration

[26] The appellants final ground of appeal is that the decision does not adequately consider the issue of regeneration. The respondents have failed to take proper account of a material consideration, namely regeneration. The error of their approach is demonstrated at page 8 of the section 60 Notice. The decision maker has entirely ignored that there are live proposals by the owners of the subjects to form a café and the appellants had been working towards that for some time. Further, it is submitted that the decision proceeds on the false assumption that the only way in which regeneration can be achieved is to grant the application. That approach is irrational.

[27] In all the circumstances the motion for the appellant is for its first plea-in-law to be upheld and thereafter, I am invited to grant the appeal in favour of the appellant and to remit to a different decision maker to consider.

Respondent

[28] Counsel for the respondent adopted her written submissions which were amplified in oral submissions.

Failure to consider the benefit to "sustainable development"

[29] Counsel for the respondent commenced by setting out the terms of section 56(2) of the 2016 Act namely:

"(2) The sustainable development conditions are met if-
(a) the transfer of land is likely to further the achievement of sustainable development in relation to the land
(b) the transfer of land is in the public interest,
(c) the transfer of land-
(i) is likely to result in significant benefit to the relevant community (see subsection (11)) to which the application relates, and
(ii) is the only practicable, or the most practicable, way of achieving that significant benefit, and
(d) not granting consent to the transfer of land is likely to result in harm to that community."

[30] Counsel submitted that in determining what constitutes significant benefit to the community (section 56(2)(c)(i) 2016 Act) or harm to the community (section 56(2)(d) 2016 Act) the Scottish Ministers must consider the terms of section 56(12) of the 2016 Act which is in the following terms:

"(12) In determining what constitutes significant benefit to the community for the purposes of subsection (2)(c) or harm to the community for the purposes of subsection (2)(d), the Scottish Ministers must consider the likely effect of granting (or not granting) consent to the transfer of land or tenant's interest on the lives of the persons comprising that community with reference to the following considerations-
(a) economic development,
(b) regeneration,
(c) public health,
(d) social wellbeing, and
(e) environmental wellbeing."

[31] It was submitted that having regard to the statutory provisions narrated *supra* paras [29] and [30] the respondent must be satisfied that the conditions are met in the event of transfer, that transfer is the only practical or the most practical way of achieving the significant benefit and to not consent to the transfer if it is likely to result in harm to the community. Against, that statutory framework it was argued for the respondent that the section 60 Notice addresses each of the matters referred to in section 56(2) and 56(12) between pages 3 and 13, when the Notice is considered in its totality.

[32] Counsel submitted that there is no requirement for each of the considerations in section 56(12) of the 2016 Act to amount to a significant benefit individually rather, what is required is that consideration be given to each of them when determining what constitutes significant benefit. Accordingly, there is no requirement for "economic development" to be significant or indeed to be given greater prominence than the other considerations. So that the question is not simply are you going to run a business from the subjects. The respondent criticised the submissions for the appellant as focussing solely on economic activity rather than sustainable development in the round.

[33] It was accepted that there is no statutory definition of "sustainable development", the legislature had consciously not defined the concept. The respondent was entitled to have regard to the quality of life or higher quality of life in considering the application and take an 'integrated approach' to sustainable development. It was not simply a competition of who could create economic use for the land. Counsel pointed to the fact that when the decision was made the only planning permission in place for the subjects was obtained by Poet's Neuk. As at the date of the decision and the hearing of the appeal the appellants did not have planning permission. The subjects were - at the time of the decision - not utilised by the appellants. The respondents had considered the chronology of failed planning applications by the appellants and had regard to the evidence regarding the current plight of the subjects which were having a negative impact on the surrounding businesses. On behalf of the respondent, it was submitted that it would not be relevant to assume that the appellants would run a café (or other business) from the subjects given the totality of evidence before the respondent. It was submitted that there was no error of approach taken by the respondent.

[34] It was submitted that the respondent had not applied the wrong legal test, all that was required by section 56(2)(c)(i) of the 2016 Act was the respondent to be satisfied that the transfer of land is likely to result in significant benefit to the relevant community. The section 60 Notice at page 10 under the heading "Summary on significant benefit" set out that:

> "Ministers view is that the provision of an attractive publicly accessible green space on this site is likely to result in significant benefit to the community and that the transfer of the land is likely to result in this benefit."

Accordingly, the respondent applied the correct test in law. As alluded to the respondent is not required to be satisfied of each of the considerations in section 56(12) to a "significance" threshold. Reading the Notice again in its totality the respondents considered each of the considerations before reaching a view as to whether there was a significant benefit in the transfer, that is entirely in keeping with the legislation, no error of law is disclosed.

[35] The respondent had set out the factors they took into account under three headings - "social sustainability; economic sustainability and environmental sustainability." It was submitted that it was clear that factors set out under those various heads had been considered in reaching the view that section 56(2)(a) had been met. There was no basis to conclude that the factors set out therein are irrelevant. The weight –importance - to be given to each matter is entirely within the scope of the decision maker. It was submitted for the respondent that evaluative judgements are a matter for the decision maker: citing *R (on the application for Daniels)* v *May* [2018] EWHC 1090 (Admin) at paragraph 33.

[36] In addition, it was submitted that there was no irrationality in the decision of the respondent. The legal test for irrationality it was submitted was a significant hurdle requiring the appellant to show "unreasonableness verging on absurdity" citing *M* v *The*

Scottish Ministers [2013] CSOH 112**.** That nothing turns on the use of the word "could" in the section 60 Notice.

[37] The submission that the respondent acted irrationally on the basis that it had regard to guidance when no such guidance had been issued is wholly without foundation given that the guidance does exist; see *infra.*

ECHR

[38] It was conceded that section 44 of the 2016 Act required the respondent to issue guidance however, it was submitted that "Guidance on Engaging Communities in Decisions Relating to Land" was issued in April 2018, the guidance is applicable to the appellants. The appellants when they submitted that there was no applicable guidance were in error. The guidance makes it clear that it is reasonable for local communities to expect engagement about land. That in terms of section 56(4) of the 2016 Act in determining an application the respondent may take account of the extent to which regard has been had to the guidance. The appellant as landowner must act in accordance with the guidance. In this case the respondent in the section 60 Notice states that the appellant provided no evidence that they engaged with the community. The respondent was entitled to have regard to that fact in determining the application.

[39] That having regard to the guidance issued and the respondent's consideration of the lack of consultation a close and penetrating examination of the facts here would lead the court to conclude that there was justification for the removal of the property rights of the appellants and the actings of the respondent were ECHR compliant.

Undue influence

[40] Counsel submitted that the public interest considerations are set out at pages 5 to 8 of the section 60 Notice. The Notice sets out the range of considerations considered in reaching the view that the transfer was in the public interest. The effect on land use in Scotland is but one example of those considerations, this is a matter that the respondent must consider. Counsel identified that in terms of public interest there are no restrictions on what may or may not be relevant, there is no fixed criteria. What requires to be considered may vary from application to application. As a fact this was the first application to be made which had been successful, accordingly, the application would widen public knowledge of Part 5 of the 2016 Act. The fact that it may not arise again, was relevant. Counsel submitted that all that the section of the Notice criticised by the appellant was doing was recognising that the application may generate an interest. It was submitted that in all the circumstances all the respondents were doing were having regard to material considerations and not taking account of irrelevant considerations. Counsel maintained that there was no factual basis set out in the grounds of appeal or submitted during the hearing which would support a finding that the decision maker had an attitude of mind which prevented an objective determination of the issues. Counsel submitted that there was an agreement as to the applicable law in this regard that there must be a real possibility of bias the test is not "any possibility". The mere fact that the respondent did not find in favour of the appellant is not a factor pointing towards bias, there simply was no real possibility of bias here having regard to the factual matrix.

[41] Esto the court were to conclude that an irrelevant consideration had been taken into account it is clear that the land use in Scotland is a small aspect of the wider public interest considerations set out in the section 60 Notice accordingly, the consideration if irrelevant is

not the determining factor and in that event there is no real possibility that the conclusion on the public interest would have been different.

Regeneration

[42] Counsel for the respondent highlighted that regeneration is one of the considerations of section 56(12) of the 2016 Act, *supra*. Counsel submitted that at page 8 and 11 of the section 60 Notice the respondent did consider the issue of regeneration. The Notice sets out in clear terms the basis upon which they have concluded that the transfer of the subjects will result in regeneration which is a significant benefit to the community. The respondent also concluded that if the subjects were not transferred the lack of regeneration proposed by Poet's Neuk could not constitute a harm to the community albeit it would amount to a missed opportunity. Counsel for the respondent submitted that section 56(12) of the 2016 Act does not require each factor therein to be met, it simply requires consideration of the matters listed therein, which she submitted were considered. The respondent criticises the appellants submissions by highlighting that the invitation of the appellant is to ignore the history of failed planning applications to site a café on the subjects, the well documented history of the poor conditions of the subjects all at the time the decision was taken, including testimony from surrounding businesses and information from the local planning department, including photographs, all of which she submitted are relevant in considering section 56(12)(c) public health and 56(12)(d) social wellbeing of the 2016 Act. The suggestion of the appellant that against that factual matrix the decision maker should have considered the two proposals and accordingly by failing to do so has erred should be rejected there being nothing either erroneous or irrational about the approach adopted by the respondent.

[43] Counsel for the respondent invited me to dismiss the appeal on the basis that there are no grounds upon which to interfere with the decision.

Discussion and decision

The relevant statutory framework

[44] Part 5 of the 2016 Act deals with the "Right to buy land to further sustainable development". Sections 45 to 51 sets out key terms used within Part 5 of the Act. Standing the abandonment of the first ground of appeal, it is accepted by the appellant that the subjects are "eligible land" as that term is defined in section 46 of the Act. Further, there is no suggestion that Poet's Neuk is not a relevant "community body" as that term is defined within section 49 of the Act. Nor is there any criticism of the application procedure by Poet's Neuk followed in terms of section 54 of the Act.

[45] The appeal here focusses entirely upon the Ministers decision made in terms of section 56 of the Act and intimated in accordance with section 60 of the Act. I pause to observe that there is no criticism that: either the section 60 Notice fails to comply with the terms of the section as regards to the legal requirements on its contents or that the Notice is inadequate in informing the reader as to the reasons for the decision. In my view commensurate with cases that do criticise the adequacy of reasons it is necessary for me in considering the application to consider the totality of the section 60 Notice in considering the competing submissions. In *South Buckinghamshire District Council* v *Porter (No.2)* [2004] 1 WLR 1953, Lord Brown of Eaton-Under Heywood observed at paragraph 36 that:

> "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 issues 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 falling 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."

In my view the section 60 Notice issued here is to be understood in terms of the legislative framework namely, as a decision letter intimated to the community body and the owner of the land, in other words to parties aware of the issues involved. It is not in my view to be read line by line as if it were a commercial banking contract or a conveyancing document rather it is to be considered having regard to the totality of its contents against the important background that the readers of it are well versed of the respective and competing arguments.

[46] The right to buy under Part 5 of the 2016 Act: Ministers decisions are governed by section 56 of the 2016 Act which provides that:

> "56(1) The Scottish Ministers must not consent to an application to buy land under section 54 unless they are satisfied that-
>
> (a) the sustainable development conditions mentioned in subsection (2) are met, and
>
> (b) the procedural requirements mentioned in subsection (3) have been complied with".

No issue arises in this appeal in respect of the procedural requirements of section 56 subsection 1(b). The appeal focusses entirely on the decision made in respect of section 56(1)(a).

[47] Subsection (2) of section 56 of the 2016 Act provides that:

> "(2) The sustainable development conditions are met if-
> (a) the transfer of land is likely to further the achievement of sustainable development in relation to the land.
> (b) the transfer of land is in the public interest,
> (c) the transfer of land-
> (i) is likely to result in significant benefit to the relevant community (see subsection (11)) to which the application relates, and
> (ii) is the only practicable, or the most practicable, way of achieving that significant benefit, and
> (d) not granting consent to the transfer of land is likely to result in harm to that community".

Applying a strict interpretation to the statute requires the decision maker to consider each of the questions posed in section 56(2)(a)-(d) before reaching a decision.

[48] Subsection (4) of section 56 of the 2016 Act provides that:

> "In determining whether an application to buy land meets the sustainable development conditions mentioned in subsection (2), the Scottish Ministers may take into account the extent to which, in relation to the relevant community, regard has been had to guidance issued under section 44."

[49] Subsection (10) of section 56 of the 2016 Act provides that:

> "(10) In determining for the purposes of subsection (2)(b) whether a transfer of land or a tenant's interest is in the public interest, the Scottish Ministers must-
> (a) take into account, in particular, any information given under section 55(2)(a),
> (b) consider the likely effect of granting (or not granting) consent to the transfer of the land or tenant's interest on land use in Scotland."

[50] Subsection (11) of section 56 of the 2016 Act provides that:

> "For the purposes of subsections (2)(c)(i), (3)(g)(i), (4), (7)(g)(i) and (8)(b) 'relevant community' means the community as defined in subsection (9) of section 49(reading that subsection as if paragraph (b)(ii) were omitted)".

Section 49(9) of the 2016 Act provides that:

> "(9) A community
> (a) is defined for the purposes of subsection (2), (3), (4) and (5) by reference to a postcode unit or postcode units or a type of area as the Scottish Ministers may by regulations specify (or both such unit and type of area, and

(b) Comprise the persons from time to time-
(i) resident in that postcode unit or in one of those postcode units or in that specified type of area, and
(ii) entitled to vote, at a local government election, in a polling district which includes that postcode unit or those postcode units or that specified type of area (or part of it or them)."

[51] Subsection (12) of section 56 of the 2016 Act provides that:

"(12) In determining what constitutes significant benefit to the community for the purposes of subsection (2)(c) or harm to the community for the purposes of subsection (2)(d), the Scottish Ministers must consider the likely effect of granting (or not granting) consent to the transfer of land or tenant's interest on the lives of the persons comprising that community with reference to the following considerations-
(a) economic development,
(b) regeneration,
(c) public health,
(d) social wellbeing, and
(e) environmental wellbeing,"

Definition of sustainable development

[52] Any decision reached by the Scottish Ministers must be reached in compliance with the statutory framework outlined at paras [46] to [51] *supra.* Parties agree that the 2016 Act does not define the term "sustainable development". How then is that term to be interpreted? The United Kingdom Government on 7 March 2003 issued "The United Kingdom Government Sustainable Development Strategy" (CM6467). At chapter 1, page 16 the document sets out the "guiding principles" as follows:

> "The following is a set of shared UK principles that we will use to achieve our sustainable development purpose. These have been agreed by the UK Government, Scottish Executive, Welsh Assembly Government and the Northern Ireland Administration. They bring together and build on the various previously existing UK principles to set out an overarching approach, which the four separate strategies can share."

The strategy sets out five factors as follows:

> "Living within Environmental limits.
> Respecting the limits of the planet's environment, resources and biodiversity- to improve our environment and ensure that the natural resources needed for life are unimpaired and remain so for generations.
>
> Ensuring a strong, Healthy and Just Society.
> Meeting the diverse needs of all people in existing and future communities, promoting personal wellbeing, social cohesion and inclusion, and creating equal opportunity for all.
>
> Achieving a sustainable Economy.
> Building a strong, stable and sustainable economy which provides prosperity and opportunities for all, and in which environmental and social costs fall on those who impose them (polluter pays), and efficient resource use is incentivised.
>
> Promoting Good Governance.
> Actively promoting effective, participative systems of governance in all levels of society- engaging people's creativity, energy, and diversity.
>
> Using Sound Science Responsibly.
> Ensuring policy is developed and implemented on the basis of strong scientific evidence, whilst taking into account scientific uncertainty (through the precautionary principle) as well as public attitudes and values."

[53] Having regard to the opinion of the Lord President (Lord Carloway) in *Gladman Developments Ltd* v *Scottish Ministers* 2020 SLT 898 at para [5] I am satisfied that the Scottish Courts apply the five principles as enshrined in the UK Government Sustainable development strategy. When the Scottish Ministers consider applications in terms of section 54 and make a decision in terms of section 56 of the 2016 Act the concept of "sustainable development" is to be derived from the five principles expounded in the UK strategy document.

Section 56(2)(a) of the 2016 Act

[54] Counsel for the appellant submitted that of the five principles expounded in the UK strategy document only "achieving a sustainable economy" and "promoting good governance" are relevant to this appeal. I accept that those two principles are relevant to the owners of the subjects' proposals to site a café or similar business on the subjects. Firstly, erecting a café on the subjects may achieve a sustainable economy and secondly, allowing planning applications/appeal processes to be exhausted promotes good governance. I do not accept that those principles are the only relevant ones in so far as the appeal is concerned. I prefer the submissions of the respondent in this regard. Whilst the term "sustainable development" may be abstract in nature, it is difficult to understand why as an example "Ensuring a Strong, Healthy and just Society" as a principle should be excluded by the Scottish Ministers in their decision-making. Whilst the Ministers might - for various reasons - attach less importance to one or other principle there is no reason for ignoring one of the five principles altogether and to do so might suggest a failure to comprehend what is meant by "sustainable development". Having defined *supra* what is meant by "sustainable development" for the purposes of the 2016 Act it is clearly not simply interchangeable with the term "sustainable economy".

[55] In the section 60 Notice in dealing with section 56(2)(a) the Ministers record their reasons under the headings "Social sustainability", "Economic sustainability" and "Environmental sustainability". I see no obvious error in that approach. The appellant submitted that the decision merely records purported advantages under these headings, and it is not clear that these relate to "sustainable development" as that term should be understood.

[56] *In gremio* of the section 60 Notice the Ministers record under the heading of "Social sustainability" that:

> "The garden will promote social sustainability by creating a place where members of the local community can meet and interact…..Ministers note that the proposals give consideration to those with disabilities by providing wheelchair access, audio interpretation and tactile objects so that the features of the garden can be enjoyed by all."

Further the Notice records that: "(the garden) is likely to help promote social cohesion, reduce social isolation, and could contribute to an increased sense of pride in their community." In my view the Ministers under the heading "Social sustainability" are clearly considering one of the five guiding principles namely, the principle "Ensuring a Strong, Healthy and Just Society." The wording of the UK Government strategy document defines this principle as:

> "meeting the diverse needs of all people in existing and future communities, promoting personal wellbeing, social cohesion and inclusion, and creating equal opportunity for all"

and these are the exact issues addressed by the Ministers under the heading "Social sustainability".

[57] Under the heading of "Economic sustainability" counsel for the appellant is correct to submit that the Ministers have repeatedly (three occasions) used the word "could" to preface potential economic benefits. However, wherein he submits that "could" is not the test stating that the relevant test is "that the transfer of land is likely to further the achievement of sustainable development" he does not allow for the fact that is the test for the Minsters to apply considering all of the relevant principles of "sustainable development" it being for the decision maker to consider what weight if any to give to a particular principle. The use of "could" in relation to "Economic sustainability" is not indicative of the

Ministers applying the wrong legal test under section 56(2)(a) *per se*. Importantly, as is stated:

> "Ministers view is that the fact the community body do not propose to develop the land for commercial purposes does not mean the proposed development cannot have a positive economic effect on the local economy."

[58] Under the heading of "Environmental sustainability" the ministers are clearly considering the principle "Living within Environmental Limits" as set out in the UK strategy document quoted *supra.*

[59] Taking the three separate headings and considering what is recorded therein the Ministers provide a summary in which they say in terms: "Ministers consider that the transfer of the land to the community body is likely to further the achievement of sustainable development." I cannot accept the submission of the appellant that the section 60 Notice is indicative of the wrong legal test being applied in respect of the section 56(2)(a) provision, far from it, the structure of the decision at pages 3, 4 and 5 and importantly the content considered gives no indication of the wrong legal test being applied. What is apparent and can be deduced from the totality of the Notice is that less weight has been attached to the principle "Achieving a sustainable Economy" than "Living within Environmental Limits" and "Ensuring a strong Healthy and Just Society" in considering the concept of "sustainable development" but it is clear that the Ministers have been seized of the abstract concept of "sustainable development" and have correctly identified features having regard to the guiding principles and then applied the test of "likely" attaching the ordinary definition to that word, accordingly there is no error of approach.

Section 56(2)(b) of the 2016 Act

[60] The first thing to observe by reference to the statutory framework set out *supra* is that there is no definition in section 56(2)(b) of the 2016 Act as to what amounts to "public interest" in this regard the submissions for the respondent are correct, as set out *supra* subsection (10) of section 56 of the 2016 Act provides that:

> "(10) In determining for the purposes of subsection (2)(b) whether a transfer of land or a tenant's interest is in the public interest, the Scottish Ministers must-
> (a) take into account, in particular, any information given under section 55(2)(a),
> (b) consider the likely effect of granting (or not granting) consent to the transfer of the land or tenant's interest on land use in Scotland."

The first thing to observe vis-à-vis the statutory test set out in section 56(10) of the 2016 Act is that the legislature uses the word "must" accordingly, applying a strict interpretation to the provision the Minsters require to have regard to the matters set out in paragraphs (a) and (b), they cannot exercise a discretion as to whether they do or do not consider the matters set out therein.

[61] The matter set out at paragraph (a) is that the Ministers must have regard to the information provided under section 55(2)(a) which for simplicity is the information that was supplied by the appellants to the respondent prior to their decision. Under paragraph (b) the ministers must have regard to the likely effect of consent to the transfer of land, on land use in Scotland accordingly, it is part of the statutory test (section 56(10)(b)) that the Scottish Ministers consider the likely effect of granting an application on land use in Scotland.

[62] In the section 60 Notice at page 7 the Ministers observe that: "The owners say they do not consider that granting consent would have any positive effect on land use in Scotland as the site is small and has no national significance." That in my view is simply the respondent recognising that they must consider the information supplied by the appellant

and did have regard to the information supplied by the appellant in terms of section 56(10)(a). I n addition, the Ministers state that: "Whether it has national significance is not something that is specifically to be considered under this Act". The assertion there regarding 'national significance' is an accurate assessment of the statutory provisions by the respondent. The section 60 Notice then states:

> "Ministers agree that the site is small but the development of the garden could have an impact on both the local community and visitors in providing seating in the centre of St. Andrews and as a place of learning. This is the first application of its kind in Scotland and, if granted, is likely to generate interest not only in St. Andrews but also further afield and therefore influence land use in Scotland more widely".

The mere fact that the Ministers considered the effect on granting the application on land use in Scotland is not an error but a legal requirement under the statutory provision and inevitably arose based on the submissions of the appellant. The assertion that "this is the first application of its kind" is in my view simply a statement of fact and from what I was told is an accurate assertion, nothing turns on that assertion of fact.

[63] The section 60 Notice continued under the heading of public interest to observe that:

> "For instance, the granting of this application, in such a well known place of historical interest as St Andrews, could encourage other communities in Scotland, to consider whether there is land in their area which, if transferred to the community, could bring significant benefits to the community. Ministers have considered the likely effect of granting (or not granting) consent to the transfer of land on land use in Scotland, and concluded that such a transfer is likely to have an impact on land use in Scotland through leading by example."

What the appellant submits is that the language of the decision in that quote is indicative of a failure of the decision maker to act impartially or expressed another way the decision makers were biased against the appellant. The first thing to observe is again the section 60 Notice is not to be picked over line-by-line in isolation but must be read in its totality. When read in its totality the decision maker formed a view commensurate with the statutory framework of the subjects and their current use and the proposals of the community body's

application and the likely effect that would have on the subjects, with respect it is against that background that the phrase "leading by example" is to be understood in my view. Namely, a community presented with an area of land that has been left to fall into disarray becoming an eyesore and a problem for the residents and businesses alike coming up with a plan and making the appropriate application. It is not an example of the decision maker becoming invested in the success of the application to the detriment of the appellant as submitted for the appellant.

[64] The appropriate test of bias is expounded by Lord Hope of Craighead in the House of Lords case of *Porter* v *Magil* [2002] 2 AC 357 at page 494 at paragraph 103 wherein he states:

> "I respectfully suggest that your Lordships should now approve the modest adjustment of the test in R v Gough set out in that paragraph. It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias. It removes any possible conflict with the test which is now applied in most Commonwealth countries and in Scotland. I would however delete from it the reference to 'real danger'. Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg court. The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

It is against that test as expounded by Lord Hope that I said in para [60] *supra* that the comments submitted by the appellants to be indicative of bias must be read against the totality of the section 60 Notice and the decision reached. In my view Lord Hope's informed observer having considered the factual matrix, the relevant statutory framework and having considered the totality of the section 60 Notice could not conclude that there was a real possibility of bias here. It is also important to note again having regard to the totality of the section 60 Notice that the matter complained of by the appellant was not the only basis upon which the ministers concluded that the transfer was in the public interest. The respondent is

correct to submit that even absent the matter complained of there remained other grounds for granting the application in the public interest.

Section 56(2)(c) of the 2016 Act

[65] In terms of section 56(2)(c) the decision maker must consider that the transfer of land: "(i) is likely to result in significant benefit to the relevant community and (ii) is the only practicable, or the most practicable, way of achieving that significant benefit,". This requires the decision maker to consider subsection (12) of section 56 which requires the decision maker in determining "significant benefit" to have regard to the likely effect of granting (or not granting) the application regarding five separate categories namely, (a) economic development, (b) regeneration, (c) public health, (d) social wellbeing and environmental wellbeing". Clearly, those categories are not listed by the legislative draftsman alphabetically however, there is nothing intrinsic to the statutory provision to suggest that a decision maker should rank the five categories differently or that a particular category is more or less important than another. If the legislature had intended such an approach a *protasis apodosis* construction might have been deployed in the drafting of the subsection such as "if economic development is likely then consider whether there is X, Y or Z." A strict interpretation of section 56(12) requires the decision maker to consider each category but there is nothing to imply that each category must reach the threshold of "significant", all that is required is that the decision maker consider all five categories and that in totality they satisfy themselves that the transfer of land "is likely to result in significant benefit", in this regard I prefer the submissions of the respondent to the appellants. In my view whilst the appellant is correct that the word "significant" is missing at page 8 of the Notice under the

heading of "Economic development" preceding the word "benefit" the fact that the significant threshold was not met is not indicative of a failure to apply the correct legal test wherein the respondents state that:

> "Minister's view is that the secondary, positive impact on local trade constituters a **benefit**, and the transfer of the land is likely to result in this **benefit**. Ministers also consider that there is currently **no economic benefit** to the land remaining in the condition that it is." (italicised and bold my emphasis).

Again, the entire section dealing with section 56(2)(c)(i) needs to be considered in its totality, it being a matter entirely for the discretion of the decision maker what weight - if any - they apply to a particular category under section 56(12) of the 2016 Act.

[66] When the reader considers the structure of the Notice at pages 8 to 10 the Ministers are following the five categories set out at subsection (12) of section 56. In the Notice at page 10 the Ministers state that:

> "In determining what constitutes significant benefit to the community for the purposes of subsection (2)(c) Scottish Ministers must consider the likely effect of granting consent to the transfer of land or tenant's interest on the lives of the persons comprising that community with reference to five considerations, one of which is environmental wellbeing. There is no requirement for any of these considerations to be the primary focus of the community body's proposal in order for them to be considered relevant."

In my view the Ministers are entirely correct in what they observe. When a critical eye is drawn over pages 8 - 10 the Ministers concluded that issues of public health, Social Wellbeing and Environmental wellbeing would in their opinion give rise to a "significant benefit" accordingly, the absence of "significant" in relation to one category is not in my view fatal.

[67] Counsel for the appellant went further and submitted that in addition to the absence of the word "significant" preceding the word "benefit" under the heading of "Economic Development" indicating that the Ministers applied the wrong legal test, in addition, when

that passage was considered alongside references to the economic benefits or lack thereof under section 56(2)(a) the actings of the Ministers is irrational in the sense that they consider the lack of economic benefit might nevertheless create benefit. There was no dispute among parties that the test for irrationality is a high one. The respondent cited *M* v *The Scottish Ministers* [2013] CSOH 112**.**

[68] In *M* v *The Scottish Minsters (cited supra)* Lord Bannatyne in delivering his opinion at para [97] observed:

> "It is perhaps at this stage appropriate to consider what is meant by irrationality. In their book Judicial Review the learned authors the Right Honourable the Lord Clyde and Denis Edwards at p 572 conveniently set out a number of the leading definitions of irrationality: 'In modern times, the meaning of irrationality has been put in various ways. In the GCHQ case, where Lord Diplock first adopted irrationality as the term for 'Wednesbury unreasonableness', his Lordship defined the concept in strong terms: 'it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at.' 'In another case Lord Scarman considered that a decision vitiated by irrationality meant that it was 'so absurd that he (the minister) must have taken leave of his senses.' In R -v- Hillingdon London Borough Council, ex parte Pulhofer Lord Brightman considered that irrationality meant that the decision was 'perverse' and demonstrated 'unreasonableness verging on an absurdity.' Lord Lowry has given a possibly more restrained definition: 'so unreasonable that no statutory authority/public officer acting reasonably could have come to it.'"

[69] At para [98] in M Lord Bannatyne continued by stating:

> "it is clearly a substantial hurdle which the petitioner must overcome to satisfy the test of irrationality. In McRae -v- Parole Borad for Scotland Lord Weir observed at 1997 SLT, P.101 where there was a challenge to the reasonableness of the decision of the Parole Board and where fairness to the prisoner required to be balanced by the issue of Public safety: 'a very strong case has to be made out before intervention by judicial review is justified.'"

[70] Having regard to the section 60 Notice at page 4 dealing with the test under section 56(2)(a) under reference to "Economic sustainability" the Notice records that:

> "Ministers view is that the fact the community body do not propose to develop the land for commercial purposes does not mean the proposed development cannot have a positive economic effect on the local economy."

[71] The section 60 Notice at page 8 dealing with the test under section 56(2)(c)(i) under reference to "economic development" states:

> "In relation to economic development the likely effects are an increase in trade for local retail and hospitality businesses as the increased attractiveness of the area leads to greater footfall, with larger numbers of visitors coming to that part of the town, or locals coming to this area of town. This, in turn, should help to boost the local economy. The owner's view is that there is no economic development intrinsic in Poet's Neuk's proposals. Whilst the proposals do not directly involve commercial activity, Ministers view is that the secondary, positive impact on local trade constitutes a benefit, and the transfer of the land is likely to result in this benefit."

[72] Having regard to the comments of the Ministers at page 4 and 8 narrated *supra* it cannot be held that the decision of the Ministers was "so absurd that the Minister(s) must have taken leave of their senses" nor can it be held that their decision was "perverse" and demonstrated "unreasonableness verging on absurdity" considering Lord Bannatyne's helpful summary of the authorities on impartiality. As stated *supra* the section 60 Notice must be considered in its totality against a background where it is prepared for the informed observer. The informed observer is seized of the various competing arguments and the factual matrix. The Scottish Ministers were seized in the material before them (which included letters from local businesses and photographs of the subjects) of the fact that the subjects although private land were accessed regularly by the homeless who appeared to sleep rough on the subjects (photograph of tent pitched in vegetation). The Ministers were seized of the fact that people accessed the subjects to drink alcohol and take drugs (photographs of strewn empty beer cans). In addition, the subjects were overgrown and were used as a dumping ground for rubbish left behind by those sleeping rough, those abusing alcohol and drugs. There was material to suggest that thieves used the subjects to hide spoils of criminality. The subjects were even being used by some as a toilet and all these factors were unconducive to the local businesses and were not conducive to attracting

visitors to the area. Against that factual matrix the thought process of the Ministers that a Poetry Garden maintained by the community body for the community (having regard to the matters set out in the Notice) as opposed to the current state of the subjects can hardly be said to be absurd wherein, they consider that the proposal although not proposed for commercial development nonetheless: "does not mean the proposed development cannot have a positive economic effect on the local economy". Accordingly, there is no irrationality on the part of the Minister's as submitted by the appellant.

Section 56 (2)(c)(ii) and 56(2)(d) of the 2016 Act

[73] In addition, the Ministers require in terms of the statutory framework to consider section 56(2)(c)(ii) and 56(2)(d) of the 2016 Act in reaching their decision. Namely:

> "(c) the transfer of land-
>
> (ii) is the only practicable, or the most practicable, way of achieving that significant benefit, and
>
> (d) not granting consent to the transfer of land is likely to result in harm to that community".

The appellants submit that the Ministers failed to properly consider the benefits of not transferring the land and leaving it in the ownership of the appellants, the *status quo* and more specifically the Ministers failed to have regard to a material consideration namely, the intention of the appellants to obtain planning permission and create a café on the subjects. It was submitted for the appellant that failure to have regard to that was a failure to have regard to a material consideration such that the failure to have regard to it amounts to an error of law. By contrast the respondent submitted that against the factual matrix of the current use of the subjects and the history of failed planning applications it would not be relevant for the Ministers to assume that a café business was to be operated from the

subjects. In my view the parties having agreed that this appeal proceed as if it were judicial review proceedings or at least akin to judicial review proceedings I need to assess the decision of the Ministers at the time the decision was made based on the information before them at that time. As set out in the procedural history the decision of the Ministers was made on 25 January 2024 now subject to planning applications and any related appeal procedures much may have changed in relation to the subjects since that date (more than 15 months having passed) but the issue for me is whether the Ministers failed to have regard to a material consideration at the time of their decision, not on an evaluation of the information now available to the court.

[74] It is a well-established principle that failure of an administrative body or quasi-judicial body to fail to consider a material consideration will constitute an error of law: see the case of *Wordie supra*. In the case of *HK* v *Undergraduate Appeal Committee of the University of Dundee* [2025] CSOH 1 Lord Braid considered whether the University Appeal Committee had failed to have regard to evidence submitted by the petitioner regarding email notification of an examination. I pause to observe that caution must be exercised in comparing one reported case of Judicial review to another wholly unrelated case, as every case will depend upon its own unique facts and circumstances. Lord Braid outlines the facts in so far as they pertain to the email from the University regarding the examination at paragraphs 46, 47 and 48 of his opinion. As he observes at para 47: "There is ample material before me which shows that the committee did consider all evidence placed before it in relation to the sending of the email of 10 January 2023…." At Paragraph 48 he says:

> "Faced with that evidence, it was then for the committee to decide what to make of it. It was entirely a matter for it as to what weight to attach to the evidence submitted by the petitioner in support of his assertion that he had not received the email; and plainly it was entitled to conclude that the evidence was inconclusive."

[75] At page 7 of the section 60 Notice the Ministers state that:

> "Ministers acknowledge that the owner would no longer have the opportunity to develop the site if the land were transferred to the community body. However, the owner has applied for planning permission on more than one occasion and these applications have been refused, appealed and refused on appeal."

At page 8 the Notice states: "Ministers also consider that there is currently no economic benefit to the land remaining in the condition that it is." At page 11 it is recorded that:

> "A letter from Fife Council, Development Manager Jim Birrell, dated 21 June 2010 states that discussions and agreements regarding the land go back 15 years form the date of the letter as the condition of the garden has been a recurring issue Ministers acknowledge that there may be other ways to bring about significant benefit to the community, however the question here is whether the transfer of land is the only or most practicable way to achieve a significant benefit."

In my view reading the section 60 Notice in its totality the Ministers were very clearly seized of the evidence pertaining to the appellants attempts to obtain planning permission to commercially develop the subjects. The Ministers clearly seized of that evidence are wholly entitled to decide what - if any - weight they shall attach to that evidence. In my view it cannot be said that the Ministers ignored that evidence, an informed reader would conclude that the Ministers having carried out an evaluation of the material clearly decided that it was not a matter that precluded them making a decision in favour of the applicants since the lengthy history of planning applications meant that the Ministers should not assess the land remaining in the appellants ownership as if a café were to be sited on the subjects. The comparative exercise advocated by the appellant had to consider the reality of the factual matrix.

ECHR

[76] In terms of section 44(1) of the 2016 Act: "The Scottish Ministers must issue guidance about engaging communities in decisions relating to land which may affect communities."

Subsection (2) of section 44 states that: "In preparing guidance under subsection (1), the Scottish Ministers must have regard to the desirability of- (a) promoting respect for, and observance of, relevant human rights…" The Scottish Ministers have prepared relevant guidance entitled *"Guidance on Engaging Communities in Decisions Relating to Land"* dated April 2018.

[77] The issued guidance is intended to comply with section 44 of the 2016 Act and is informed by consideration of human rights (Introduction paragraph 7). The guidance is publicly available. The respondent is correct in submitting that the appellant is in error in submitting that no guidance under section 44 had been issued.

[78] In terms of section 56(4) of the 2016 Act the Ministers:

> "In determining whether an application to buy land meets the sustainable development conditions mentioned in subsection (2), the Scottish Ministers may take into account the extent to which, in relation to the relevant community, regard has been had to guidance issued under section 44."

[79] Having regard to paragraph 9 of Part 1 of the Guidance document it is intended for those:

> "with control over land, covering both rural and urban Scotland. It is for all private and public sector owners of land and buildings, including individuals, companies and trusts, non-government organisations, charities and community owners. It also applies to tenants, of any sort, where they have control over land."

Clearly, the guidance applies to the appellant.

[80] The Scottish Ministers in issuing their decision were entitled in terms of section 56(4) of the 2016 Act to have regard to the absence of any evidence relating to consultation by the appellants as envisaged by the guidance issued under section 44.

[81] This court in carrying out a review of the Ministers decision must be satisfied as submitted by the appellant after:

> "a close and penetrating examination of the factual justification for the restriction is needed if the fundamental rights enshrined in the Convention are to remain practical and effective for everyone who wishes to exercise them" per Lord Hope of Craighead at paragraph 61 in *causa R* v *Shayler* [2003] 1 AC 247.

[82] In considering the Ministers decision this court is entitled to take cognisance of the fact that the Ministers took account of the fact that the appellant did not consult with the community in reaching their decision in terms of section 56(2) of the 2016 Act, there is nothing wrong with that approach, the legislation permits that as a consideration.

[83] There was no suggestion that the 2016 Act or Part 5 *per se* were incompatible with the appellants article 1, protocol 1 rights, rather the Act sets out a stringent statutory framework in which Scottish Ministers may make decisions which may ultimately divest a landowner of their proprietorial rights. Having considered the totality of the section 60 Notice I am not persuaded that the Ministers failed to have regard to the appellants proprietorial rights or that the decision they reached was not proportionate in the circumstances accordingly, I am not satisfied that the decision of the Ministers has fallen seriously short of the standard required. The appellants appeal on this ground is therefore unsuccessful.

Regeneration

[84] The respondents were required in terms of section 56(2)(c)(i) of the 2016 Act to have regard to whether the transfer of the land is likely to result in "significant benefit to the relevant community": see para [65] *supra.* In addition, the respondents in determining what constitutes "significant benefit to the relevant community" for the purposes of section 56(2)(c) of the 2016 Act require to have regard to subsection (12) of section 56.

As stated *supra* I do not consider that each factor to be considered requires independently to meet the threshold of "significant" all that is required is that having considered each factor when taken as a whole the decision maker is satisfied that there is likely to be "significant benefit." A consideration of the totality of the notice informs the reader that the respondent did consider regeneration.

[85] No attempt was made by counsel for either party to submit what is meant by "regeneration" where it appears in section 56(12) of the 2016 Act, perhaps because they considered it trite. The phrase like "sustainable development" is not defined within the Act. In my view the word "regeneration" is to be understood by reference to its every day meaning. Chambers dictionary defines "regeneration" as: "The process of something being grown or renewed." The Oxford English dictionary defines "regeneration" as: "The process of being reborn or brought back into existence, or the process of being restored to a better state."

[86] Having regard to the ordinary meaning of the word "regeneration" I consider that in terms of land use it must mean the process of rebuilding or revitalizing an area often attempting to reverse physical, economic and social decline. I have considered the section 60 Notice at page 8 wherein it states that:

> "The proposals, should the land be transferred, are likely to lead to the transformation of an area, that is currently neglected, into an attractive place where members of the community and the public could use on a daily basis and, at the same time learn a bit more about their surroundings and the history of the area. The owner's view is that the proposals would involve removing overgrown vegetation but that is too modest to amount to regeneration. Ministers acknowledge that, on its own, removing overgrown vegetation from the site would not of itself amount to regeneration. However, the community body's proposals for the site include more than removing vegetation. They intend to make it a space for the local community and visitors to enjoy the fresh air, socialise, and learn about the history of the site. The creation of the garden, provision of outdoor seating and the educational elements of the project would transform the site from the somewhat neglected area

> that it has been for many years. It is Ministers' view that this does amount to regeneration."

[87] In my view the Ministers have properly considered the issue of regeneration. The conclusion which they reached applying the ordinary meaning to the word "regeneration" cannot be faulted set against the factual matrix. The weight that the Ministers attach to the distinct element of regeneration is a matter entirely for them commensurate with the tract of authority: *R (on the application for Daniels)* v *May* [2018] EWHC 1090 (Admin) being cited by the respondents. At paragraph 33 Lord Justice Bean in delivering the opinion of the court said this:

> "In the week leading up to the letter of 21 December 2017 the Prime Minister had been made well aware in correspondence from Mr Mansfield QC and Birnberg Peirce (and no doubt others) that many members of the local community in Kensington, in particular many residents of Grenfell Tower, wished the Inquiry panel to consist of members as well as the chairman. I am prepared to assume for the purposes of this application that the wishes of the survivors and of the families of those who died in the fire were a material consideration for her to have taken into account, in the legal as well as the political sense. But it is well established in public law that the weight to be attached to a material factor or consideration is one for the decision-maker. In Secretary of State for the Home Department -v- AP (no.1) [2011] 1 AC1. Lord Brown of Eaton-under-Heywood said that 'the weight to be given to the relevant consideration is, of course, always a question of fact and entirely a matter for the decision-maker subject only to challenge for irrationality which neither has nor could have been advanced.'"

[88] In this case counsel for the appellant submits that the actings of the Ministers in relation to their failure to consider as a material consideration the owner's intention to site a café or similar commercial business on the subjects is irrational. I have addressed that bold proposition *supra* what I have said therein equally applies to the criticism that the Ministers failed to take account of the proposed development of the owner under the heading of regeneration. Accordingly, I refuse the appeal on this ground.

[89] Having carefully considered the submissions and having reviewed the totality of the decision of the respondent I prefer the submissions of the respondent. I am satisfied that the

Ministers had regard to the legal framework and applied the correct test in law to the questions they required to answer. I am not satisfied that they failed to consider material considerations or that they acted irrationally in their decision making. I am not satisfied that there was any real possibility of bias accordingly, I refuse the appeal and sustain the respondents Plea-in-law 3.

Postscript

[01] Whilst this case was at avizandum, and the court was about to issue its judgement the appellant enrolled a motion dated 4 April 2025. Said motion was to allow a final inventory of productions (fourth inventory) for the appellant to be admitted into process. It was submitted that the fourth inventory of productions: *'a decision notice dated 31 March 2025 by Stuart West Reporter appointed by the Scottish Ministers in relation to a planning appeal by the appellant in relation to their planning application PPA-250-2413 relating to the subjects'* should be admitted into evidence. Counsel for the appellant produced written submissions in support of the motion which were tendered with the motion.

[02] The motion was objected to by the respondent accordingly, the court assigned a hearing for 9 April 2025.

[03] On 9 April 2025 having considered the written submissions of counsel for the appellant and the oral submissions of counsel for the respondent the court refused the motion. To allow the material tendered by the appellant would be for this court to consider material not before the respondent at the time of their decision. Parties having agreed that this application should proceed as if akin to judicial review I did not consider it appropriate in those circumstances for the court to consider material not available at the time of the Ministers decision, adopting the same approach as I did to the affidavits lodged in process: see paragraph [9] of the judgement and the authority cited there. The material sought to be placed before the court was material which I accepted might materialize given the passage of time between the decision of the ministers in January 2024 and this court considering matters in February, March and April 2025. As observed throughout the judgement I was not

considering the merits of the application by the community body and/or the merits of the appellant retaining ownership, I was reviewing the decision of the respondent having regard to the grounds of appeal advanced.