

**OUTER HOUSE, COURT OF SESSION**

**[2012] CSOH 009**

P500/11

**OPINION OF MORAG WISE QC  
(Sitting as a Temporary Judge)**

in the Petition

of

**MR GAVIN HAMILTON**

Petitioner;

for

Judicial Review of a decision of South  
Lanarkshire Council taken on  
25 February 2011

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**Petitioner: O'Carroll: Anderson Strathern  
Respondent: Sir Crispin Agnew QC: Biggart Baillie**

20 January 2012

Introduction

[1] This is a petition for judicial review of a decision of South Lanarkshire Council of 25 February 2011, to grant planning permission subject to conditions and the completion of a Section 75 agreement, for the erection of a Waste Management Facility at Dovesdale Farm, Carlisle Road, Stonehouse. The petitioner seeks reduction of that conditional planning permission. The petition and answers having being adjusted I heard full argument on the petition at the first hearing.

Submissions for Petitioner

[3] Mr O'Carroll stated at the outset that the gravamen of the petitioner's complaint raised two main issues. The first was whether the decision had involved a substantial variation from the local development plan. Secondly, an issue of whether the respondent had an interest in the outcome of the decision was raised. The factual background was set out. The first respondents' development strategy and relative policies were lodged at 7/6 and 7/7 of process. The area with which the decision complained of was concerned was west of the M74 near Stonehouse. Dovesdale Farm falls within a substantial area of Green Belt. An Environmental Impact Assessment was required and this was lodged at number 6/4 of process. Mr O'Carroll made clear that the petition did not represent an environmental challenge. However the scale of the proposed Waste Management Facility was said to be important. Various details about that were given. The capacity of the proposed facility would be 150,000 tonnes of waste resource per annum. It would operate for 24 hours a day, 7 days a week and the traffic to and from it would involve about 77 commercial vehicles per day. The petitioner's farm, Lochhead Farm, is situated close to the site of the proposed facility.

[4] The relevant planning application came before committee on 8 February 2011. The all important report to the planning committee was analysed in some detail. This was number 7/1 of process. Paragraphs 3.14 - 3.17 address the development plan issues. It is recorded that the Glasgow and Clyde Valley Joint Structure Plan 2006 covers South Lanarkshire. Schedule 9 of that plan defined waste management developments likely to be significant as those over 10 hectares in size. The proposed site in question covers an area of 4.9 hectares and is recorded as being well below the "significant" threshold. The adopted South Lanarkshire Local Plan 2009 (SLLP) identifies the site as being within the Green Belt and accordingly policy STRAT 3 (The Green Belt and Urban Settlement in the Green Belt) applies. Paragraph 3.15 lists 11 applicable policies that require to be considered when assessing the application. Paragraph 3.27 of the report confirms that the proposed development is classed as "Major" as a result of

its capacity. Reference was made to the Town and Country Planning (Hierarchy of Development) (Scotland) Regulations 2009. A schedule to the Regulations made clear that a Waste Management Facility with a capacity of 25,000 tonnes or more would be classified as a major development. At paragraph 5.4, the report deals with the representations made objecting to the application in question. Three MSP's had written letters objecting to it. In addition, 19,044 *pro forma* style letters of objection had been received. The main thrust of the representations was an objection to Green Belt development. In addition to the *pro forma* letters 188 individual letters had been received.

[5] In developing first the ground of attack that the respondents have an interest in the development, Mr O'Carroll referred to number 7/3 of process which is the grant of planning permission of 25 February 2011 itself. The grant is subject to certain conditions including a Section 75 agreement. Turning to a Scottish Government Circular Number 3 of 2009 entitled "Notification of Planning Applications" (No. 7/8 of process), this deals with the issue of when applications are "called in" by ministers. The 2009 circular, which replaces the 2007 version, reduces the number of applications in which ministers will intervene. There are three main categories for notification. Category one relates to developments in which planning authorities have an interest (7/8/8). The requirement to notify Scottish Ministers arises where a planning authority has some interest in a development proceedings and where the proposal involves a significant departure from the authority's own development plan. In an annex to the Circular (number 7/8/15) is the Town and Country Planning (Notification of Applications) (Scotland) Direction 2009. A schedule to that Direction describes the developments for which applications must be notified to Scottish Ministers. These include, at paragraph 1(b) of the schedule, developments "in respect of which the planning authority has a financial or other (e.g. partnership) interest".

[6] From these rules, it was argued, two questions arise. First, is this a development which would be significantly contrary to the development plan and secondly does the local authority have an interest in it? In this context reference was then made to Planning Advice Note (PAN) 82 issued by the then Scottish Executive relating to local authority interest developments. Under a section "When does a local authority have an interest" (7/19/7) the Note clarifies that there are different ways in which local authorities might have an interest in a development and therefore stand to benefit in some way from its proceeding. One of the examples given at paragraph 8 of the PAN is "Where the authority is likely, in future, to enter into a contract or be a future operator in relation to the development." Mr O'Carroll submitted on behalf of the petitioner that the interest being claimed is that the local authority will become customers of the company operating the facility because the council has responsibility for the disposal of waste in its area. Counsel noted that the first respondents dispute that they have any interest in the development and that the council's waste disposal contract was at the time of the decision being put out for competitive tender. It is also averred by the first respondents that there is a similar proposal for a plant in North Lanarkshire and that it was quite possible that the successful tenderer might use the North Lanarkshire plant rather than the plant proposed by Scotgen. Taking those averments in to account, Mr O'Carroll's position was that it could not be said that the local authority would not have a contract with the owners of the site in question in the future. One could easily envisage a situation where it would be likely that they would enter in to a contract with Scotgen. It had to be asked why the first respondents would go to North Lanarkshire for waste disposal if there was a site in South Lanarkshire. They would want to dispose of waste as close to the source as possible. Accordingly the council had an interest that fell within the terms of the guidance albeit that it could not be said to fall within the paradigm categories of interest. Counsel also referred to the Scottish Government's Scottish Planning Policy (number 7/13 of process). Paragraph 213 of that policy supports the

proximity principle for waste management. This requires waste to be dealt with as close as possible to where it is produced, thus taking local responsibility for the treatment and disposal of waste. It was submitted that one would have to query whether to proceed with a development of this magnitude without knowing where the customers would come from.

[7] Returning to the report to the planning committee number 7/1 of process Mr O'Carroll highlighted paragraph 2.26 where it is recorded that the southern part of South Lanarkshire had been discounted as a possible alternative site due to distance from the main sources of waste. This supported the contention that the local authority was likely to have an interest as a customer of the facility. The interest that was borne of statutory duty given their responsibilities for waste disposal. This had given them an interest in the outcome of the application complained of.

[8] Turning to the question of whether the proposal was a significant departure from the development plan, reference was then made again to the notification provisions of PAN 82. It was pointed out that in deciding whether to notify Scottish Ministers the local authority was not balancing the material considerations relative to the proposed development. The simple question was whether it was a significant departure from the development plan. The report number 7/1 of process at paragraph 6.5 acknowledged that because the proposed site was within the Green Belt it required to be assessed against STRAT 3. That is an overarching policy of strategy which states that there shall be a general presumption against all Green Belt development except where it can be shown to be necessary for the furtherance of agriculture, horticulture, forestry, recreation, establishments and institutions standing in extensive grounds or other use considered by the council to be appropriate to the Green Belt. It was submitted that the policy provides a strong statement against urban uses for the Green Belt. Paragraph 6.6 of the report number 7/1 of process acknowledges that the proposed Waste Management Facility is not principally associated to agriculture, horticulture, forestry, or recreation nor is it

an establishment or institution which will stand in extensive grounds. As the proposed facility would be primarily industrial in nature the report records that it must therefore be considered a departure from policy STRAT 3, requiring an assessment to establish whether it was appropriate. At paragraph 6.57 of the report there is specific reference to policy CRE 2: stimulating the rural economy, which states that for non-residential development within rural areas, development should respect the landscape, countryside amenity and nature conservation interests, complement the scale, design and character of the locality and promote environmental enhancement. The report goes on to note that the development proposal does not "fully accord" with the requirements of policy CRE 2 in terms of its scale, design and fit with the character of the local area. Mr O'Carroll took issue with the expression "does not fully accord" in paragraphs 6.57 and 6.63. He submitted that the proposal was clearly contrary to the two policies referred to in those paragraphs and thus could not be said to accord with it at all. Policy ENV 34 is set out in the South Lanarkshire Local Plan (volume 2, 7/7 of process). It is entitled "Development in the Countryside Policy". Mr O'Carroll submitted that a proposal must first comply with policy STRAT 3. Thereafter one looked at the list of types of development in the countryside that were permitted by ENV 34. According to Mr O'Carroll it could not be demonstrated to the council's satisfaction that the development fulfilled the criteria listed therein. Accordingly the proposal did not accord with the council's own local plan. The South Lanarkshire Local Plan also contained a Development Management Policy (DM1). This is set out at pages 70 - 72 of number 7/7 of process. Mr O'Carroll submitted that it could not be said that the application fulfilled the criteria of DM1. He anticipated that the respondents would argue that they had undertaken the classic balancing act between the various policies. There is effectively a statement to that effect in paragraph 6.66 of the report. However, he submitted that the scale and nature of the proposal hadn't really been taken into account in the report. Paragraph 6.66 lists six policies with which the proposal is said to be

compliant. Mr O'Carroll went through each of these and submitted that many of them had no real relevance or importance other than perhaps ENV 39 which is the council's Waste Management Site Assessment Policy (reproduced at 7/7 volume 2 page 66). That policy lists specific criteria to which the council must have regard in considering applications for the management of waste. Mr O'Carroll submitted that it was quite categoric in sub-paragraph (e) of ENV 39 that a development must have no significant adverse impact on any natural heritage feature including the Green Belt before it would be permissible. Further, sub-paragraph (m) was highly relevant because it provided a general rule that waste management facilities would be directed to industrial locations unless material considerations indicated otherwise. Attention was then drawn to paragraph 6.71 of the report number 7/1 of process. It was there acknowledged that the development was considered to represent a departure from the development plan in terms of its location in the Green Belt. However a distinction is drawn in the report between the acknowledged departure and a significant departure. For that reason it is recorded that there was thought to be no requirement to notify the Scottish Ministers. Paragraph 6.74 of the report provides the conclusion. It sets out why a departure from the development plan is justified. The reasons are listed there. Mr O'Carroll submitted that, notwithstanding the reasons stated there, on any rational view the proposal represented a significant departure from the local development plan, contrary to the terms of the report.

[9] In relation to the contention of the first respondents in Answer 7 relating to the Glasgow and Clyde Valley Structure Plan (2006), it was submitted that the relationship between the development plan, the Structure Plan and the local plan required to be understood. According to Mr O'Carroll, the Structure Plan was not relevant to the assessment of the proposal, it was only the local plan that was relevant. The first respondents referred to Schedule 9 of the Structure Plan where only waste management developments of over 10 hectares are listed as

likely to be significant in terms of scale of development. Counsel contended that it could hardly be said that a local authority could approve a 9.9 hectare plant next to a school without falling foul of the Structure Plan. He also pointed out that even within the Structure Plan itself there is protection of the Green Belt. Thus it could not be said that just because the size of the facility would be under 10 hectares it was not a departure from the Structure Plan. He submitted that the report number 7/1 of process misleads the committee and nudges them towards approval of something that they should not have approved.

[10] A number of authorities were cited in support of the Petitioner's argument. These included *Wordie Property Company Limited v Secretary of State for Scotland* [1984] SLT 345, *Council of Civil Service Unions v Minister for the Civil Services* [1985] AC 374, *City of Edinburgh Council v Secretary of State for Scotland* [1998] SC (HL) 33, *Campbell v City of Edinburgh Council* [1999] SLT 1009, *R v Canterbury City Council and Another* [1993] 3 PLR 58, *London and Clydeside Estates v Aberdeen District Council* [1980] SC (HL) 1 and *Jermon Limited v West Dunbartonshire Council* [2008] CSOH 76. It was submitted that the decision in the present case fulfilled the test of being so unreasonable that no reasonable local authority in the position of the respondents could have reached it. It was an irrational decision and fell to be reduced. It was established by the authorities that only material considerations could justify a departure from the local plan. Where proposal is not in accordance with the development plan it must be refused unless such material considerations justify it. The statutory basis for that is contained in the Town and Country Planning (Scotland) Act 1997 Section 25(1). Further, where as it was contended was the case here, the report is in error, there is a real risk that the committee will be misled and that itself is a basis for interfering with the decision. *R v Canterbury City Council and Another* (supra) was an example of that situation. It was clear that a statutory requirement such as Section 25 required to be obeyed down to the minutest detail. For a local authority to fail to comply with such statutory

requirements was a serious matter and justified reduction of the decision. It was accepted that the case of *Jermon Limited* (supra) was based on the 2007 direction which did not include the word significant for a departure requiring notification to ministers. However the principle that could be derived from it was that failure to notify founds an action in judicial review. By failing to classify the proposal in question as significantly contrary to the development plan the local authority had elided their statutory duty.

[11] In summary, the decision could be seen as perverse, the proposal was irrational bordering on absurd. The size, location in the Green Belt and strength of opposition were all such that no reasonable planning authority would have reached the decision that the council had in this case. The consequence of the decision that the council had reached included denial of the right to make representations before the committee in terms of Section 38A of the 1997 Act or at any possible future public enquiry should the Scottish Ministers have decided to call in the application in terms of Section 46 of that Act. In all the circumstances counsel submitted that the petition should be granted and the grant of conditional planning permission of 25 February 2011 be reduced.

#### Submissions for the first respondent

[12] The motion made by senior counsel for the first respondent was to sustain their second and third pleas-in-law and to dismiss or refuse the petition. He pointed out that in *Tesco Stores v Dundee City Council* [2011] CSIH 9 the Lord Justice Clerk expressed the view that the only decrees open to a Lord Ordinary in a petition process were to grant or refuse the petition. He agreed that there were two issues encapsulated in the petition which he required to answer. First there was the issue of whether the Council had an interest in the application in question. Secondly the issue of whether the decision was a significant departure from the Council's own development plan had to be addressed. Senior counsel's primary submission

was that both of those issues related to matters of planning judgement with which the court could only interfere if the decision was *Wednesbury* unreasonable. In his submission the decision fell within the range of decisions that the Council was entitled to take and could not, therefore, be reduced.

[13] It was accepted that Section 25 of the Town and Country Planning (Scotland) Act 1997 required the local authority to follow the local plan unless there were material considerations that would justify another course. It was submitted that it was clear that the local authority had followed that course by taking into account material considerations that justified some departure from the plan. On the correct approach to be taken to the report to committee No. 7/1 of process, three points were made. First, the report was not susceptible to a level of analysis that a statute might be given by a court. Secondly, an attack on such a report will not normally merit consideration unless the overall effect of the report significantly misleads the committee about material matters. Thirdly, it had to be understood that the report is directed to members who have local knowledge and are expected to be familiar with local planning policies. In *Sainsbury's Supermarkets Ltd v Perth & Kinross Council* [2009] CSOH 138 Lady Clark of Calton had summarised the authorities on how a planning report should be approached in judicial review petitions of this type. At paragraph 62 of her opinion, having reviewed those authorities her Ladyship noted that the petitioners require to satisfy a high threshold before the court could be persuaded to interfere as a result of criticisms of such reports. The dicta in *Campbell v City of Edinburgh Council* 1999 SLT 1009 cited by counsel for the petitioner required to be read subject to the various authorities listed in the *Sainsbury's Supermarkets* case, particularly *Oxton Farms & Another v Selby District Council & Another* (1997) EJJ 60 (CA). It was noteworthy that all the objectors in this particular case were able to make representations at the Council meeting. It was clear from No. 7/2 of process that the Committee had heard three people on behalf of the objectors. Mr Hamilton's own objections

were in a proforma letter (No. 7/11 of process). All of the points being made in the present petition and in argument could have been made at that time.

[14] Reference was made to *City of Edinburgh Council v Secretary of State for Scotland* 1998 SC (HL) 33. There, Lord Hope of Craighead had made clear that matters of planning judgement were to be exercised by the decision taker and that the function of the court was limited to see that the decision taker had regard to all relevant matters, not to assess whether or not sufficient weight had been given to those factors where there were other material considerations. The authorities repeatedly stated that matters of planning judgement are within the exclusive province of a local planning authority. Accordingly, where as here, a petitioner sought to make an assessment of the material considerations that could only be done on grounds that the way in which those material considerations were assessed by the Council was irrational or perverse. In *Bonnes v West Lothian District Council* 1997 SLT 398 Lord Osborne had approved dicta of Lord Brightman in *Puhlohfer v Hillingdon London Borough Council* [1986] 1 AC 484 at page 518 where the view was expressed that it is the duty of the court to leave matters left to the judgement and discretion of a public body to whom parliament has entrusted the decision making power to that body save in a case where it is obvious that the public body, consciously or unconsciously, was acting perversely.

[15] Turning to the report itself, No. 7/1 of process, the criticisms counsel for the petitioner had made of the report were linked to the issue of whether there was a significant departure from the development plan. Senior counsel referred to Circular 4 of 2009, No. 7/10 of process, and in particular the section on notification to Ministers. It confirms that planning authorities are best placed to decide whether or not something is a significant departure. It was important to note that a hearing under Section 38A only took place where departures from the plan were significant. This left local authorities with an element of planning authority judgement. It could not be said that just because a proposal was for a large facility

and in the green belt that it was contrary to the vision and wider spatial strategy of the plan.

The departure must be significant in a wider context.

[16] It was submitted further that reading Circular 4 of 2009 together with Circular 3 (No. 7/8 of process) together with the report to Committee No. 7/1 of process it had to be understood that unless any departure from the development plan was significant, no difficulty arose.

Taking the whole report together it was clear that the material available included detailed information about the extent of the proposed development. It was noteworthy that the site was really adjacent to a mini industrial site just off the M74. As flooding was an issue that had been considered it was normal that the flooding policy was mentioned as one of the material considerations. At paragraph 2.49 of the report it was noted that there would be no adverse effect on adjacent land uses from the proposal. The approach taken in the report was to list the policies relevant for the balancing exercise at paragraph 3.15 and then deal with each of those. Further, the issue of the alleged benefit that the Council would get from the facility was raised and dealt with in the report at paragraph 4.17. Section 6 of the report dealt with the assessment of the material considerations and the conclusions. It was clear that the reporter had looked at strategic policy 9 as a whole in paragraph 6.3 albeit that particular emphasis had been put on the size of the proposed development site being much smaller than those recorded as strategically significant. It was clear from paragraph 6.5 that the Committee had the wording of STRAT 3 before them. In paragraph 6.6, while it was easy to criticise expressions such as "not principally associated" and "primarily industrial" was necessary to look at the overall context of the application being dealt with. Similarly, using terms such as "fully accord" did not mislead when looking at the discussion as a whole. The policies being examined in the report were not "make weights"; they were listed because they were the material considerations that the report required to deal with. It could not be unreasonable to use the expression "not fully accord" when dealing with ENV 34 because the report had to

address both STRAT. 3 and ENV 34. The proposal complied with sub-paragraph (h) of ENV 34 in that it addressed sustainable development issues, in particular the recycling of waste material. However, as it was not directly in accordance with policy STRAT 3 it was a departure from that, thus the expression in paragraph 6.63 that the proposed development did not fully accord with the requirements of ENV 34 was accurate.

[17] So far as the Council having an interest in the development was concerned this was fully dealt with at paragraph 6.71 where it was stated in terms that the Council has no financial interest in the proposed development nor is the application site owned by the planning authority. It is then recorded that there is no agreement between the Council and the applicant in relation to the processing of municipal waste at the proposed facility. Senior counsel confirmed that was an accurate statement and the conclusion of the paragraph that there was no requirement to notify the application to the Scottish Ministers was then a matter of planning judgement which could only be attacked if it was perverse. The report addresses the question of whether the proposal is a significant departure from the development plan head on at paragraph 6.73. It is clear that the local situation or "immediate surroundings" of the proposed site was taken into account and its proximity to the M74 had a bearing on the conclusion. The proposal had to be understood in the context of the local authority's development strategy, in particular the local plan strategy set out in volume 1 of 7/6 of process. The local plan strategy included having a good waste management plant with the positive benefits for jobs, growth, and improving environmental quality. It is within the wider context of the overall vision of the local development plan that the proposal required to be considered. It could not be said that the planning officer had been perverse in recommending the proposal to the Committee.

[18] Senior counsel turned to the conclusion of the report at paragraph 6.74. It is clear from that, he submitted, that the Green Belt policies in the structure plan had been taken into

account. In this important paragraph it was clearly stated that the development was one which "does not accord with the terms and requirements ...." of the four policies listed. That statement was in clear terms and could not possibly be said to be in misleading or inappropriate language. The conclusion goes on to give other reasons as to why a departure from those policies was justified. The approach taken was accordingly correct. The report considered first whether there was a departure from any of the policies, narrated that there was and then went on to balance the material considerations. The question of whether the departure from the listed policies was significant was well within the judgement of the planning authority. Accordingly the decision ultimately taken was within the range of decisions that could be made by the authority without being perverse.

[19] Senior counsel then addressed the non-technical summary No. 6/4 of process, in particular at page 6 where the summary of environmental effects is dealt with. He noted that all of the environmental effects were found to be negligible or slight or even beneficial to the area. The only negative factor might be said to be the visual impact on some residential properties. However, the conclusion was that the overall effect of the proposal was negligible to minor adverse. That supported the contention that any departure from the development plan was not a significant one. For all the reasons stated the Council were entitled to hold that this was not a significant departure and there was nothing to suggest that the report was misleading in any material sense. The Committee was told clearly that the proposal did not accord with certain policies and that there were various considerations to be balanced. There was nothing to support the petitioners contentions that this was not within the range of decisions that the Committee was entitled to make.

[20] Reverting to the issue of the first respondents alleged interest in the outcome of the proposal it was disputed that because the Council has waste disposal obligations that gave them an interest for the purposes of notification to Scottish Ministers. It should be noted that

the Council must put the issue of waste disposal out to tender. It was up to the tenderer which site to use. There were two relevant tenders. Viridor had tendered with a proposal to use the proposed South Lanarkshire site in question. The other tenderer, Waste Recycling Group, wanted to use the North Lanarkshire site. The tendering process has been delayed by an interdict, secured by a third company who also wanted to tender. In these circumstances it was clear that the "customer" would be whichever company wins the tender. Looking at the definition of developments in which planning authorities have an interest, it was submitted that in terms of the planning circular of 2009 (No. 7/8 of process) there had to be both a significant departure from the authority's own development plan and an interest in the development by the planning authority before notification was necessary. The only possible category of those listed in the schedule that was relevant to this case was (1)(b) which categorised developments in respect of which the planning authority has a financial or other (eg partnership) interest as being those which, if there was also significant departure from the development, required to be notified. That sub-paragraph used the present tense in talking of interest. In this case, some possible future interest would not fall within the description. There was no relationship between the first respondents and the company Scotgen, the second respondents. It would only be if the local authority carried out waste management "in house" that they would be entering into a contract themselves. As there was no direct financial interest, the relationship would have to be rather more than substantial than be seen in this case for any issue of conflict to arise. It was important to understand the wide range of statutory functions that the local authority performs. It is a matter for local authority judgement and only if they were irrational or perverse not to notify could their decision be reduced. The petitioner's argument that the Council acted unreasonably could not stand alone. It must relate to either significant departure from the development plan or the issue of whether

they had an interest in the proposed development. For all the reasons stated senior counsel renewed his motion for refusal of the petition.

## **Discussion**

[21] It is well established that the test in applications of this sort is a stringent one. In *Bonnes v West Lothian District Council* [1997] SLT 398 Lord Osborne summarised the various legal principles relevant to the issue of when the court would interfere with such local authority decisions. In particular, reference was made to the following observation of Lord Diplock in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC at p1064:-

"The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred".

Counsel for the petitioner accepted that Petition could only succeed if the decision of the council in the present case was unreasonable that no reasonable local authority in their position could have reached it. The decision would require to be regarded as unreasonable in the *Wednesbury* sense, that is unreasonableness verging on an absurdity. Accordingly, I have approached this matter on this basis that it is not sufficient for the petitioner to succeed that a different decision might have been more appropriately reached on the basis of the material before the committee.

[22] Dealing first with the issue of whether the proposed development would be significantly contrary to the first respondents own local development plan , it was accepted by both sides that Section 25 of the Town and Country Planning (Scotland) Act 1997 required the first respondent to follow the local plan unless there were material considerations that would justify another course. It is not in dispute that the proposal to erect this Waste Management

Facility is a departure from the local plan, at least to some extent. In considering whether the first respondents erred in their approach or failed to take material considerations into account it is necessary to consider the terms of the report to the first respondent's Planning Committee number 7/1 of process. In doing so, I accept the submissions of senior counsel for the first respondent that such a report is not susceptible to the same level of textual analysis that a statute might be given by the court - *Oxton Farms and Another v Selby District Council and Another* (1997) AJJS 60. The report must be read as a whole to see whether its effect was to mislead the committee in a significant way.

[23] The following passages from the report seem to me to be the most pertinent in addressing the contention of the petitioner that the proposal represented a significant departure from the local development plan and that the committee was misled into thinking otherwise:-

"6.6 The proposed development is not principally associated with agriculture, horticulture, forestry, recreation, nor is it an establishment or institution which will stand in extensive grounds. The proposed facility would be primarily industrial in nature and must therefore be considered a departure from policy STRAT 3. An assessment of the proposed facility against other policies in the local plan is therefore required to establish whether a departure from the plan is appropriate.

6.57 Policy CRE 2: Stimulating the Rural Economy states that for non-residential development within rural areas, development should respect the landscape, countryside amenity and nature conservation interests, complement the scale, design and character of the locality and promote environmental enhancement. The aspects identified within this policy are discussed above. The development proposal does not fully accord with the requirements of policy CRE 2 in terms of its scale, design and fit with the character of the local area. Nevertheless, having considered the landscape and visual impact of the proposed development together with the mitigation measures

proposed by the applicant, I am satisfied that the development will not significantly detract from the local amenity.

6.63 Policy ENV 34: Development in the Countryside sets out a number of assessment criteria to be used when determining planning applications for development within rural areas. These assessment criteria include issues such as impact on the natural and build environment and landscape and visual impact. As discussed above, whilst the proposed development does not fully accord with the requirements of this policy in terms of its scale, design and fit with the character of the local area, taking account of the detailed design approach adopted and the conclusions of the landscape and visual impact I considered it to generally acceptable in relation to the issues covered by this policy.

6.66 In light of the above it is considered that the proposal is compliant with policies ENV 4, ENV 12, ENV 20, ENV 26, ENV 37 and ENV 39 of the adopted South Lanarkshire Local Plan 2009. In terms of policies CRE 2, DM 1, ENV 34 and ENV 30, whilst the development does not fully accord with the local scale and design of the locality, I am satisfied that the development will not significantly detract from the amenity of the area.

6.74 In conclusion, I consider therefore that the proposal is not significantly or materially at odds with the terms of the development plan. Nevertheless, having regard to the Green Belt policies in the Structure Plan, whilst the development is not strategically significant if it is assessed against Strategic Policy 9 or 10, it would accord with specific locational need given no alternative site outwith the Green Belt has been identified. With regard to policies STRAT 3(The Green Belt and Urban Settlements), CRE2, DM1, ENV34 and ENV30 in the local plan, the development is one which does not accord with the terms and requirements of the policies. However

having carefully considered the proposed development, the issues raised by consultees and objectors and the outcome of the applications assessment against other relevant policies, which is described above, I am of the view that a departure from the development plan can be justified..."

Paragraph 6.74 goes on to list 11 reasons justifying the departure from the development plan. These include the clear need for the facility, the lack of alternative sites, the convenient location of the proposed facility, the creation of jobs and the lack of objections from any key agencies.

[24] Having considered the report as a whole, but with particular reference to the passages cited above, it seems to me that the author of the report does not shirk from acknowledging that the proposal does represent a departure from the local development plan. Had the report then failed to balance the material considerations and give reasons for concluding that such a departure was justified, it may well have been open to attack. However Section 6 of the report makes a detailed assessment of the various policies and balances those in reaching the conclusion at paragraph 6.74. The controversial aspect of the application was its situation within the Green Belt. Accordingly, policy STRAT 3 gave rise to a general presumption against such development other than where it could be shown to be necessary for the furtherance of agricultural, horticulture, forestry, recreation, establishments and institutions standing in extensive grounds or other use considered by the council to be appropriate to the Green Belt. That is why such a detailed assessment was required before expressing any view on whether the particular proposal was appropriate. Counsel for the petitioner submitted that a proposal must first comply with policy STRAT 3 before one would consider the types of development in the countryside that were permitted by ENV 34. However, it seems to me that the wording of STRAT 3 itself involves an assessment of whether a particular use of the Green Belt is appropriate. Accordingly, there is an overlap between some of the

considerations that may be relevant to the question of whether a particular use is appropriate to the Green Belt and the reference to the list of types of development in the countryside permitted by ENV 34. In any event, it cannot be said that the committee was misled into believing that the erection of the proposed facility would not be a departure from policy STRAT 3. In the absence of any misleading statement on the principal issue, I consider that this is one of those situations where different decision-makers may have reached different views on whether the application should be granted having regard to the fact of departure from the local plan and the balancing of material considerations. It is not the function of the court to agree or disagree with the conclusions of such a report. It is a question of whether the approach taken and conclusions reached appear to be rational and I consider that they are. A judgment on the issue of the extent to which a departure from the local plan could be justified having regard to the various material considerations was for the Committee to make. The decision may be controversial but in my view it cannot be described as absurd or perverse, having regard to the available material.

[25] Turning to the question of whether or not the first respondent could be said to have an interest in the proposed development, it seems clear that if they had such an interest and the development was significantly contrary to the local development plan then they ought to have notified the Scottish Ministers. A failure to notify in such circumstances would be contrary to law and susceptible to review - *Jermon Limited v West Dunbartonshire Council* [2008]

CSOH 76. The issue in this case is whether or not the first respondent could be said to have an interest of the type referred to in Planning Advice Note (PAN) 82. Counsel for the petitioner submitted that the first respondent was likely, in future, to enter into a contract in relation to the development. It was suggested that given the proximity principle requiring waste to be dealt with as close as possible to where it was produced, one could easily envisage that the South Lanarkshire site would be favoured over the proposed North Lanarkshire Plant. There

are two reasons why I do not consider that there is any merit in the submissions for the petitioner on this point. First, the application would only fall to be referred to the Scottish Ministers if it was both a significant departure from the local development plan and the council had an interest in it. As I have concluded that there is no basis for looking behind the conclusion of the report number 7/1 of process that this proposal, while a departure from the local development plan is not a significant one, that itself would be justification for a decision not to notify Scottish Ministers. Secondly, on the material before me, I do not consider it can be said that the first respondent is **likely** to enter into a contract in relation to the development. There are two relevant tenderers in relation to the council's waste disposal obligations. One wishes to use the proposed South Lanarkshire site in question but the other would prefer to use a North Lanarkshire site. No decision has been made and a third company wishes to tender. I was not told what site that company would favour. In short, there is insufficient material to reach a conclusion that it is likely that the first respondents will enter into a contract that involves the proposed facility under discussion in this case to be used. I consider that the position can be stated no higher than that there is a possibility of such a contract in the future. In any event, I agree with the submission of senior counsel for the first respondent that it cannot be correct that the council's waste disposal obligations give rise of themselves to some obligation to notify Scottish Ministers each time a waste management facility is to be situated within their jurisdiction. Only if a proposal also involves a significant departure from a local authority's development plan will the issue of notification arise.

[26] In summary, I consider that, while this application appears to have been controversial, there is no sound basis for the argument that the report misled the committee. The judgment on whether the acknowledged departure from the local development plan was justified was for the discretion of the committee having regard to the detailed assessment and conclusions of the report. I am not persuaded that the exercise by the committee of its discretion was in any

way unreasonable or perverse. It seems to me that the petitioner's complaint is that, having balanced the material considerations, the committee should not have reached the decision that it did. That is a complaint about the merits of the decision rather than an issue of *Wednesbury* unreasonableness.

### **Decision**

[26] For the reasons stated above I consider that there is no basis to justify judicial review of the decision in question. I will therefore refuse the petition reserving meantime all questions of expenses.