EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2015] CSIH 73

XA52/13

Lord Menzies

Lady Smith

Lady Clark of Calton

OPINION OF THE COURT

delivered by LORD MENZIES

in the cause

SALLY CARROLL

Appellant and reclaimer;

against

SCOTTISH BORDERS COUNCIL

Respondents:

and

THE FIRM OF SR FINDLAY

Interested party

against a decision of a Local Review Body of Scottish Borders Council dated 21 March 2013

Appellant and reclaimer: Poole QC, Irving; Kennedys

Respondents: Burnet; bto

Interested party; Martin QC, Van der Westhuizen; CMS Cameron McKenna LLP

Lord Advocate; Wilson QC; Scottish Government Legal Directorate

7 October 2015

Introduction

[1] The interested party wishes to erect two wind turbines together with ancillary equipment on land south west of Neuk Farm, Cockburnspath. The turbines will be 110 metres high to blade tip. The site is in coastal farmland proximate to a coastal margin which is considered to be highly sensitive. It is within two kilometres of the Berwickshire Coast Special Landscape Area, four kilometres of the Lammermuir Hills Special Landscape Area, one kilometre of the Dunglass historic garden, two kilometres of the Southern Upland Way, and is close to the two conservation areas of Oldhamstocks and Cockburnspath and the Berwickshire Coastal Path.

[2] Planning permission for the erection of wind turbines on this site was refused on 15 September 2010, and was refused again by a Local Review Body ("LRB") of the respondents on 7 March 2011 on the basis that the proposal was contrary to the Development Plan. The interested party resubmitted the application for planning permission, and on 2 October 2012 the respondents' planning officer refused the application, again on the basis that it was contrary to the Development Plan. The interested party sought review of this decision, and on 21 March 2013 an LRB of the respondents concluded that the development was consistent with the Development Plan and granted planning permission for the development, subject to conditions.

[3] The appellant resides in Cockburnspath and objected to the grant of planning permission. She is aggrieved by the decision of the LRB dated 21 March 2013. She appealed to the Court of Session on the basis that the decision was not within the powers of the Town and Country Planning (Scotland) Act 1997 ("the 1997 Act") and that the relevant requirements of that Act have not been complied with. On 12 July 2013 the court granted the appellant's motion to remit the appeal to the Outer House to be heard by the Lord Ordinary in the first instance. On the same day the court made a Protective Expenses Order in favour of the appellant and suspended *ad interim* the grant of planning permission. Having heard the appeal, on 17 January 2014 the

Lord Ordinary held that the decision of the LRB dated 21 March 2013 was within the powers of the 1997 Act, and refused the appeal. It is against that decision that the reclaimer reclaims to this court.

[4] We were told that this is the first case in which a decision of an LRB has been challenged in this court. Accordingly it may be helpful to set out to the salient provisions of the statutory regime which was introduced by the Planning etc (Scotland) Act 2006 ("the 2006 Act"), together with the relevant regulations and EU directive.

The relevant legislative provisions

The Town and Country Planning (Scotland) Act 1997 (as amended)

"**43A Local developments: schemes of delegation**

(1) A planning authority are –

(a) as soon as practicable after the coming into force of section 17 of the Planning etc (Scotland) Act 2006 … to prepare a scheme (to be known as a 'scheme of delegation') by which any application for planning permission for a development within the category of local developments or any application for consent, agreement or approval required by a condition imposed on a grant of planning permission for a development within that category is to be determined by a person appointed by them for the purposes of this section instead of by them, and

(b) to keep under review the scheme so prepared.

…

(8) Where a person so appointed –

(a) refuses an application for planning permission or for consent, agreement or approval,

(b) grants it subject to conditions, or

(c) has not determined it within such period as may be prescribed by regulations or a development order [or within such extended period as may at any time be agreed upon in writing between the applicant and the person so appointed],

the applicant may require the planning authority to review the case.

…

(10) Regulations or a development order may make provision as to the form and procedures of any review conducted by virtue of subsection (8).

(11) Without prejudice to the generality of subsection (10), the regulations or order may –

(a) make different provision for different cases or classes of case,

(b) make different provision for different stages of a case,

(c) make provision in relation to oral or written submissions and to documents in support of such submissions,

(d) make provision in relation to time limits (including a time limit for requiring the review), and

(e) require the planning authority to give to the person who has required the review such notice as may be prescribed by the regulations or the order as to the manner in which that review has been dealt with.

(12) Any notice given by virtue of paragraph (e) of subsection (11) –

(a) is to include a statement of –

(i) the terms in which the planning authority have decided the case reviewed, and

(ii) the reasons on which the authority based that decision, and

(b) may include such other information as may be prescribed by the regulations or the order.

(13) The provision which may be made by virtue of subsections (10) and (11) includes provision as to –

(a) the making of oral submissions, or as to any failure to make such submissions or to lodge documents in support of such submissions, or

(b) the lodging of, or as to any failure to lodge, written submissions or documents in support of such submissions,

and, subject to section 43B, as to what matters may be raised in the course of the review.

(14) The provision which may be made by virtue of subsections (10) and (11) includes provision that the manner in which the review, or any stage of the review, is to be conducted (as for example whether oral submissions are to be made or written submissions lodged) is to be at the discretion of the planning authority.

(15) The planning authority may uphold, reverse or vary a determination reviewed by them by virtue of subsection (8)

43B Matters which may be raised in a review under section 43A(8)

(1) In a review under section 43A(8), a party to the proceedings is not to raise any matter which was not before the appointed person at the time the determination reviewed was made unless that party can demonstrate –

(a) that the matter could not have been raised before that time, or

(b) that its not being raised before that time was a consequence of exceptional circumstances

(2) Nothing in subsection (1) affects any requirement or entitlement to have regard to –

(a) the provisions of the development plan, or

(b) any other material consideration.

239. – Proceedings for questioning the validity of other orders, decisions and directions.

(1) If any person –

(a) is aggrieved by any order to which this section applies and wishes to question the validity of that order on the grounds –

(i) that the order is not within the powers of this Act, or

(ii) that any of the relevant requirements have not been complied with in relation to that order. …

he may make an application to the Court of Session under this section."

The Town and Country Planning (Schemes of Delegation and Local Review Procedure) (Scotland) Regulations 2008

"**Interpretation**

2. In these Regulations –

…

'review documents' means notice of the decision in respect of the application to which the review relates, the Report on Handling and any documents referred to in that Report, the notice of review given in accordance with regulation 9, all documents accompanying the notice of review in accordance with regulation 9(4) and any representations or comments made under regulation 10(4) or (6) in relation to the review;

…

Determination without further procedure

12. Where the local review body consider that the review documents provide sufficient information to enable them to determine the review, they may determine the review without further procedure.

Decision as to procedure to be followed

13.–(1) Where the local review body do not determine the review without further procedure, the local review body may determine the manner in which the review is to be conducted and are to do so in accordance with this regulation.

(2) The local review body may determine at any stage of the review that further representations should be made or further information should be provided to enable them to determine the review.

(3) Where the local review body so determine, the review or a stage of the review is to be conducted by one of or by a combination of the procedures mentioned in paragraph (4).

(4) The procedures are –

(a) by means of written submissions;

(b) by the holding of one or more hearing sessions; and

(c) by means of an inspection of the land to which the review relates.

…

Decision Notice

21.–(1) The local review body must –

(a) give notice ('a decision notice') of their decision to the applicant; and

(b) notify every person who has made (and not subsequently withdrawn) representations in respect of the review that a decision on the review has been made and where a copy of the decision notice is available for inspection.

(2) A decision notice must, in addition to the matters required by section 43A(12)(a) of the Act –

(a) in the case of an application for planning permission –

(i) include the reference number of the application;

(ii) include a description of the location of the proposed development, including where applicable, a postal address;

(iii) include a description of the proposed development (including identification of the plans and drawings showing the proposed development) for which planning permission has been granted, or as the case may be, refused;

(iv) include a description of any variation made to the application in accordance with section 32A of the Act;

(v) specify any conditions to which the decision is subject;

(vi) include a statement as to the effect of section 58(2) or 59(4) of the Act, as the case may be, or where the planning authority have made a direction under section 58(2) or 59(5) of the Act, give details of that direction;

(vii) if any obligation is to be entered into under section 75 of the Act in connection with the application state where the terms of such obligation or a summary of such terms may be inspected; and

(viii) include details of the provisions of the development plan and any other material considerations to which the local review body had regard in determining the application;

…"

Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment

"Whereas:

…

(16) Effective public participation in the taking of decisions enables the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing the accountability

and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken.

(17) Participation, including participation by associations, organisations and groups, in particular non-governmental organisations promoting environmental protection, should accordingly be fostered, including, *inter alia*, by promoting environmental education of the public.

(18) The European Community signed the UN/ECE Convention on Access to Justice in Environmental Matters (the Aarhus Convention) on 25 June 1998 and ratified it on 17 February 2005.

(19) Among the objectives of the Aarhus Convention is the desire to guarantee rights of the public participation in decision-making in environmental matters in order to contribute to the protection of the right to live in an environment which is adequate for personal health and well-being.

(20) Article 6 of the Aarhus Convention provides for public participation in decisions on the specific activities listed in Annex I thereto and on activities not so listed which may have a significant effect on the environment.

(21) Article 9(2) and (4) of the Aarhus Convention provides for access to judicial or other procedures for challenging the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of Article 6 of that Convention.

…

Article 1

1. This Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.

…

Article 11

1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

(a) having a sufficient interest, or alternatively;

(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

2. Member States shall determine at what stage the decisions, acts or omissions may be challenged.

3. What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To that end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2) shall be deemed sufficient for the purpose of point (a) of paragraph 1 of this

Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of point (b) of paragraph 1 of this Article.

4. The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive."

Submissions for the parties

[5] All parties helpfully submitted very full and detailed notes of argument for this court. These form part of the court process, and, while we have of course given full consideration to each of them, we do not consider that any purpose would be served by seeking to repeat them here. The following is intended to be merely a summary of the salient points in the submissions for each party, both written and presented at the bar.

Submissions for the appellant and reclaimer

[6] Senior counsel for the reclaimer began by pointing out that the statutory scheme provided by sections 43A and 43B of the 1997 Act (as amended), and the 2008 Regulations, for challenge to the decision of an appointed person is by way of review by an LRB. Unlike the previous procedure in which a challenge to a planning decision by a planning authority would usually be determined by a professional reporter with planning expertise, the new regime provides for the challenge to be determined by elected members of the local authority, who may have no planning expertise or experience. An appeal from the decision of an LRB lies to this court in terms of section 239 of the 1997 Act. Neither the term "review" nor the term "appeal"

are defined in the legislation and section 239 does not specify the scope of such an appeal. It is therefore a matter for the court to interpret these terms against the statutory background, the background of EU law and parties' convention rights. She drew our attention to regulation 21 of the 2008 Regulations, which describes what the LRB's decision notice must contain, and in particular to paragraph (2)(viii) thereof.

[7] It is common ground between the parties to these proceedings that, because of the height of the turbines in the proposed development, the development was subject to the Public Participation Directive (Directive 2011/92/EU) ("the PPD"). She drew our attention to paragraphs (16) to (21) or the recital to that directive, and to paragraph 1 of article 11. Three important points arose from article 11:

(i) The structure which is required is a review of a decision. It must therefore be available after the decision of the appointed person.

(ii) What is required is review by an independent and impartial body. An LRB is neither independent nor impartial.

(iii) The court is independent and impartial, but it does not carry out a full substantive and procedural review. In these circumstances, in order to comply with the requirements of article 11, the LRB must carry out a full substantive and procedural review.

[8] In this regard senior counsel drew our attention to the decision of the court of appeal in *R (Garner)* v *Elmbridge Borough Council* [2012] PTSR 250, particularly at paragraphs 32 and 39; articles 47, 51.1, 52.3 and 52.7 of the Charter of Fundamental Rights of the European Union, and *R (Alconbury Ltd)* v *Environment Secretary* [2003] 2AC 295, at paragraphs 24, 29, 33/35 and 152. In order to comply with these, it is important that safeguards are maintained at the stage of the LRB review, and when this court on appeal considers the LRB's decision it must bear these safeguards in mind. These safeguards include a full opportunity to present any relevant evidence, an opportunity for submissions, fair procedure, and a decision which contains findings in fact, a summary of the evidence on which these findings in fact are based, details of the LRB's assessment of the findings in fact and the planning issues involved, and the reasons for the decision.

[9] In the present case, there were no verbatim records of the LRB's proceeding on 18 February 2013, but the agenda for the meeting indicated what documentation was before the LRB, and there was a summary of the LRB's discussion taken by the clerk attending the meeting. Under reference to *County Properties Ltd* v *The Scottish Ministers* 2002 SC 79 (paragraphs [18] and [19]) senior counsel emphasised that there must be safeguards in the decision making process that is eventually considered by the court, and these safeguards must be met. An example of a procedure which meets the necessary safeguards was a decision be a reporter appointed by the Scottish Ministers in a different application for the erection of two wind turbines dated 17 July 2014 (PPA-170-2090), which demonstrates that the safeguards can easily be met and that they do not amount to an overly exacting standard. Senior counsel observed that the court's appellate jurisdiction can in principle be wide enough for the system to be compatible with the requirements of article 11, but only if an intense degree of scrutiny is exercised by the court hearing the appeal. This intense scrutiny must require the LRB to meet the safeguards already identified. The court must look very carefully at the LRB's findings in fact. Although not binding on this court, the findings and recommendations of The Aarhus Convention Compliance Committee with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom were of persuasive authority. Senior counsel drew our attention in particular to paragraphs 3 and 125 of that document. The views of the Aarhus Convention Compliance Committee were considered by the Court of Appeal in England in *R (Evans)* v *Secretary of State for Communities and Local Government* [2013] EWCA Civ 114 at paragraph 37. This makes the point that there can be varying intensities of review in Judicial Review proceedings – a point which is also made by the UK Supreme Court in *Kennedy* v *Charity Commission* [2014] 2WLR 808 at paragraphs 51 - 54. The court requires to apply an intense level of review and to subject the decision of the LRB to a more rigorous examination. The Lord Ordinary did not do this in the present case and, in the circumstances, he erred in failing to do so.

[10] Senior counsel referred to 10 circumstances which she submitted pointed to the need for an intense level of scrutiny by the court:

(i) The LRB was not independent and impartial. Both it and the appointed person are part of the same council. Both the respondent and the Lord Advocate concede that the LRB is not independent and impartial for article 6 purposes.

(ii) The LRB is composed of local politicians, not adjudicators or judicial office holders.

(iii) There is no requirement of planning expertise for election as a councillor (in contrast to reporters who are expert planning officials).

(iv) The LRB was overturning a fully reasoned decision of a planning officer who had planning expertise.

(v) The LRB's decision affected fundamental rights, including homes of nearby residents, the interested party's possessions and rights to fairness. Proportionality of energy yield, landscape impact, and the effect of the local community were an issue.

(vi) The scale of the development – two very large turbines.

(vii) The time period of the development – a minimum of 25 years.

(viii) The sensitive nature of the site.

(ix) The planning history of the site. There had been three previous refusals of this type of development in that location, and the LRB's decision was contrary to these.

(x) The policy memorandum for the 2006 Act indicated that three important aims of the LRB system were transparency, openness and accountability. This required a robust level of review.

In light of all these circumstances, the LRB must conduct a full, substantive review to the standards discussed in *County Properties* v *Scottish Ministers*. Moreover, this court must apply a high intensity of review, and consider whether the Lord Ordinary adopted the correct approach. The LRB did not conduct a *de novo* review. It set out its entire reasoning in the first four paragraphs of page 3 of its decision letter. The LRB ignored some relevant policies and did not look at all matters as if raised at first instance. The proceedings did not have the necessary *quasi*-judicial character – approval was given after a 3:2 vote of local politicians, after brief consideration in the

course of a busy meeting which had a lot of other business to consider. There was no site visit, and the LRB heard from nobody except the council's planning adviser and legal adviser. As discussed further below, a full opportunity was not provided to all parties to present relevant evidence and submissions. There were no findings in fact, no summary of evidence and no assessment of findings in fact. The necessary foundations or "building blocks" for the decision were not present. Senior counsel compared the decision letter of the LRB with that of the planning officer's decision letter dated 3 October 2012 in the present case, and with several decision letters by reporters appointed by the Scottish Ministers in other wind turbine applications, and observed that a more detailed and rigorous approach was taken in those decision letters than that taken by the LRB in the present case. The Lord Ordinary's conclusion that the LRB's decision was lawful arose from his view (at paragraphs [44] – [46] of his opinion) that the LRB was conducting a more limited review than the exercise carried out by a reporter. The Lord Ordinary erred in his interpretation of the statute in this respect, and did not have regard to EU law.

[11] Senior counsel submitted that the statutory regime governing LRBs is capable of being interpreted compatibly with the convention and with EU law, provided that such an interpretation allows for a *de novo* review by the LRB and compliance with the requirements already discussed. The problem in this case arises from the Lord Ordinary's error in interpretation, not in the legislation itself. However, if this submission is wrong, and the legislation cannot be interpreted so as to be compatible with EU and convention rights obligations, sections 43A and 43B, 47(1A), 237(A) of the 1997 Act, and the 2008 Regulations, the 2013 Regulations of the same name and certain other more recent regulation would all be outwith legislative competence by reason of section 29(1) and (2)(d) of the Scotland Act 1998, and this raises a devolution issue in terms of schedule 6 part 1 to that Act. If the interpretation which she urged on the court was correct, no such devolution issue arises.

[12] Next, senior counsel turned to look at the several grounds of appeal against the LRB's decision, which are set out more fully at pages 20-38 of her note of arguments (at paragraphs 33-61). These were as follows:

(1) The council failed to take into account a material consideration, namely its own technical guidance note ("TGN") which indicated that there was no scope for medium or large turbines in this location. The Lord Ordinary erred in law in failing to find that the TGN was a material consideration, and further in assessing whether it would have made a difference to the decision. In terms of section 24 of the 1997 Act, supplementary planning guidance becomes part of the Development Plan. When the TGN became supplementary planning guidance, it was therefore part of the Development Plan. It was a material consideration before it became supplementary planning guidance. At the time that the LRB was reaching its decision, the TGN was being used by planners as an aid, it was being used by the council, and was publicly available on its website. It became part of the Development Plan in December 2013. Senior counsel referred to Regulation 21 (2) of the 2008 Regulations, to Scottish Planning Series Circular 4 2009: *Development Management Procedures*, and to *Tesco Stores Ltd* v *Secretary of State for the Environment* [1995] 1 WLR 759 per Lord Hoffmann at 780. The TGN addressed a particular problem associated with the sensitivity of particular sites to particular heights of turbines. This was an issue which had not been covered in any previous documents; it was not addressed in the Report on Handling nor was it otherwise before the LRB. This was a matter which had been taken into account by reporters in other applications; the fact that the TGN addressed issues of the height of turbine blades in areas of varying sensitivities was material, was not dealt with anywhere else and ought to have been taken into account by the LRB. The Lord Ordinary fell into error in three respects in paragraph [47] of his opinion – (i) in accepting that the TGN was not a policy document at that time, (ii) in accepting that although it had been used by planning officers and had been found to be useful, that was as part of a trial process, and (iii) that the LRB took account of the various matters contained in the TGN, and in failing to appreciate that the TGN goes further than any other documentation available at the time. In all these circumstances, the decision of the LRB was *ultra vires* for not having had regard to a material consideration.

(2) Cumulative impacts.

The LRB made no findings on cumulative impacts and accordingly did not apply Policy I20 of the Scottish Borders Structure Plan, which was part of the Development Plan. The LRB were required to have regard to this (sections 25 and 37(2) of the 1997 Act). Policy I20 provided that proposals for wind energy developments will be assessed against six specified criteria. The last of these was "any unacceptable cumulative impacts". The LRB required to assess the issue of cumulative impacts and explain their reasoning on this matter (*Moray Council* v *Scottish Ministers* 2006 SC 691 at paragraph [36]), but they did neither. They did not make any reference to, or findings about, cumulative impacts, which are a different consideration from "visual and landscape impacts". The first of the criteria listed in Policy I20 relates to impact on the landscape character of the area; the last of the listed criteria is "any unacceptable cumulative impacts". The respondents' own supplementary planning guidance on wind energy dated May 2011 emphasises (at paragraph 7.15) that the assessment of cumulative impacts is particularly relevant to small scale wind energy developments, and that cumulative impact is a different criterion from visual and landscape impact. Senior counsel referred to examples of decisions by reporters appointed by the Scottish Ministers in which cumulative impact has been assessed separately from impact on landscape character. In the present case, the LRB decision notes (but does not adopt) the appointed person's findings and does not contradict his assessment of landscape and visual impact, but makes no conclusion about cumulative impact. This is despite the recommendation in the appointed person's report that the proposed development was contrary to *inter alia* Policy I20 and that the potential cumulative landscape and visual impact of the development with other approved schemes and those pending decision would give rise to a poorly planned, piecemeal form of wind energy development which would prejudice the integrity of nearby landscapes. In light of this, the LRB required to explain why it reached a different view, and did not consider

that Policy I20 was breached. There is a lack of assessment and a lack of reasons.

The Lord Ordinary erred in law in his treatment of this issue at paragraph [48] of his opinion. Although Policy I20 is referred to in the LRB decision letter, it is not the subject of any reasoned assessment. The Lord Ordinary also erred in stating in that paragraph that

> "since the LRB agreed with the ultimate findings of the appointed person in relation to adverse impact, it was, in my view, unnecessary for the LRB, in that regard, to make separate findings of its own".

The appointed person rejected the application for permission because of his findings on adverse impact; the LRB did not agree with him in this respect, but did not explain why.

(3) Residential amenity and the presumption of a two kilometre separation distance from residential settlements.

Policy H2 of the Local Plan provides that development that is judged to have an adverse impact on the amenity of existing or proposed residential areas will not be permitted. Scottish Planning Policy 2010 recommends (at paragraph 190) a separation distance of up to two kilometres between areas of search and the edge of cities, towns and villages. The respondents' supplementary planning guidance on wind energy dated May 2011 provides (at point 10 on page 37) that there would be an initial presumption against any turbine within this distance from any residence, unless an applicant can confirm factors such as scale, location and intervening landform can allow support. The reclaimer lives about one kilometre from this site, and there are about 300 houses within two kilometres of it. Despite this, there is no discussion of residential amenity nor of the two kilometre presumption in the LRB decision letter. Although Policy H2 is mentioned, there are no findings as to the numbers of properties within two kilometres of the site nor why the presumption is overcome – despite the fact that the appointed person records that one turbine would be

approximately 1200 metres from the fringe of Cockburnspath village and the second turbine would be 1050 metres from that fringe, and that he concludes that the height and scale of the development render it disproportionate to the scale and nature of the local landscape and the local topography is not capable of successfully containing the development from a high number of visual receptors.

The Lord Ordinary erred in his consideration of this issue in paragraph [49] of his opinion. Although he stated that the appointed person dealt fully with the issue, there is no mention in the Report on Handling of the presumption against such development within two kilometres from any residence, despite this being included in the supplementary planning guidance and accordingly forming part of the Development Plan. The Lord Ordinary was also in error in the last sentence of paragraph [49] in stating that it is not incumbent on a decision maker to refer in its reasons to every material consideration –

Regulation 21(2)(a)(viii) requires the LRB to include details of the provisions of the Development Plan and any other material considerations to which it had regard in determining the application. This is a more stringent requirement than that which applies to other decision makers. The reason for this is to make the LRB procedure more open and accountable and to make allowance for the fact that the professional reporter has been removed from the system. The LRB failed to address residential amenity or policy H2 at all.

(4) Economic benefit.

Policy D4 of the Local Plan deals with renewable energy development. The final sentence of that policy states that

> "if there are judged to be significant adverse impacts that cannot be mitigated, the development will only be approved if the Council is satisfied that the contribution to wider economic and environmental benefits outweighs the potential damage to the environment or to tourism and recreation."

This requires the decision maker to make findings as to what significant adverse impacts arise from the proposal, what the overall economic benefits are, and to proceed to carry out a balancing exercise (and to go on to balance and apply this policy with other relevant policies). The LRB failed to interpret and apply this policy in several respects. Its findings on economic benefit are in a total of six sentences, which contain two material errors of fact – (a) they stated that the turbines would assist the business in reducing its energy requirements, which it would not, and (b) they stated that "members were also aware that the quarry had permission for a major expansion of its extraction operations", but there has been no approved application for Kinegar Quarry which is the quarry situated on Neuk Farm. Moreover, the LRB made inadequate findings on adverse impact, and inadequate findings on economic benefit. The LRB did not specify which business they were satisfied that the proposed turbines would help to sustain, nor the size of the business, nor the number of people it employed, nor what were its expansion plans. There were no findings as to the use of energy by that business, nor as to how that use related to what would be generated (it being noteworthy that the environmental statement indicated that no new jobs would be created and only 6% of the energy generated would be used by the business in the first instance). Moreover, the LRB did not attempt to assess any adverse economic effects arising from the proposal, including reduced house prices in the residential areas close to the development. By failing to make adequate findings on adverse impacts and economic benefit, by taking into account incorrect facts, and by failing to take into account economic disbenefits, the LRB was unable to carry out a proper balancing exercise as required by Policy D4. Without the necessary findings in fact, the court cannot properly carry out its function; it cannot know what was on each side of the equation in order to decide if the inferences drawn by the LRB are acceptable.

The Lord Ordinary erred in relation to this ground of appeal in his treatment of it at paragraph [50] of his opinion. An informed reader would not be able to understand the reasoning of the LRB on economic benefits because of the inadequacies of findings in that regard. The Report on Handling made no

findings as to economic benefits or disbenefits. An informed reader should not be required to research more widely, otherwise the system is not EU and convention compliant. The Lord Ordinary also erred in his findings in respect of the absence of a site visit (on which see further below).

(5) Proportionality.

This was raised by the reclaimer in her original letter of objection, and so was before the LRB, but the LRB did not consider this matter at all. The environmental statement submitted in support of the proposed development indicated that only 6% of the energy to be generated by the development was required for Kinegar Quarry's current energy usage; why were turbines as high as 110 metres necessary or proportionate in this site, when the TGN had identified many other possible sites for wind energy development? Senior Counsel submitted that whether a measure is proportionate

> "depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less inclusive measure could have been used; (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interest of the community " – *Bank Mellat* v *HM Treasury* [2014] AC 700 at paragraphs 20 and 74.

In the present case, how can such an intrusive development be justified if only 6% of the energy generated will be used in the quarry? Why could smaller, less intrusive turbines not be used, which would have less impact on residential amenity? It is impossible to ascertain from the LRB's decision letter how it reached its conclusion on proportionality. Senior counsel referred to Reed and Murdoch, *Human Rights Law in Scotland*, *(Third Edition)* at paragraph 6.51, to the effect that the European Court of Human Rights expects domestic decision-

makers to show that they have addressed the test of proportionality in assessing whether the relationship between the action taken and the aim of the intervention is acceptable. Whilst it may not be necessary for the LRB to carry out a separate proportionality exercise (*Lough and ors* v *First Secretary of State [2004] EWCA Civ 905*) it still had to show that it had properly addressed the issue of proportionality. It failed to do so, and accordingly the Lord Ordinary erred in his consideration of this issue at paragraph [51] of his opinion.

(6) Natural justice.

This fell into two parts – (a) no fair hearing or reasonable opportunity for the appellant to make representations, and (b) no site visit. On these matters the court must determine for itself whether a fair procedure was followed – its function is not merely to review the reasonableness of the decision maker's judgement of what fairness required – *In Re Reilly* [2013] 3 WLR 1020 per Lord Reed JSC at paragraph 65 *et seq*. Senior counsel did not suggest that there had to be an oral hearing before the LRB, but there must be a proper opportunity for parties to make their case before the LRB. In support of this senior counsel referred to *R (Khatun)* v *London Borough of Newham* [2005] QB 37 at [30] per Laws LJ:

> "a right to be heard can be inserted or implied into the statutory scheme not by virtue of the statute's words, but by force of our public law standards of fairness",

and *Pairc Crofters* v *Scottish Ministers* 2013 SLT 308 per Lord President Gill:

> "The specific duties that the Act lays upon (the decision maker) in their consideration of an application are in a sense minimum requirements. They have other more general duties under administrative law. At common law, any public body that makes a decision affecting an individual must follow the procedure prescribed by statute and must observe such additional procedural safeguards as are necessary to attain fairness."

Senior counsel referred to paragraph [19] of *County Properties Limited* v *The Scottish Ministers*, and submitted that the whole thrust of the PPD was to enable the public to present a case. The letter from the clerk to the reclaimer dated 8 January 2013 did not give the reclaimer a reasonable right to be heard before the LRB. It stated *inter alia* as follows:

> "The meeting will be held in public and any person can attend and listen to the review. However, there is no right to be heard at this meeting… The Local Review will be considered on the basis of the information and documentation submitted with the Notice of Review. There is no opportunity to raise matters or submit further documents unless the review body request further written evidence, or information is requested as part of a hearing session, or where by virtue of section 43B of the Act it can be proven that the matter could not be legitimately raised before that time or that it is a consequence of exceptional circumstances."

This letter was liable to confuse a lay person; the natural inference was that the reclaimer could not make any further representations. She had no reasonable opportunity to comment on the review documentation, including the new evidence about noise referred to in the decision letter, nor to raise matters such as the TGN.

It was also a breach of natural justice for the LRB not to carry out a site visit, particularly because the issue of visual and cumulative landscape impact was so important in this decision. A site visit is valuable in giving a factual underpinning to findings – *Moray Council* v *Scottish Ministers* 2006 SC 691 at paragraph 36. A previous application for two wind turbines on this site had been considered by an LRB and refused on 7 March 2011. On that occasion the LRB held an unaccompanied site visit and following their return from this they determined to refuse permission. It was clear that the site visit was central to their assessment. It is normal for reporters to hold a site visit. The LRB on this

occasion gave no reason for deciding not to hold a site visit. The Lord Ordinary erred in law in his treatment of these breaches of natural justice at paragraph [52] of his opinion.

(7) Reasons

Senior Counsel submitted that there was an absence of proper and adequate reasons from the LRB on all of the foregoing grounds. It was not acceptable to have to glean matters from other documents (unless the LRB adopted particular findings as being equivalent to making their own findings in fact). The LRB was under a statutory duty to give reasons – section 43A(12)(a) of the 1997 Act and Regulation 21(2)(a)(viii) of the 2008 Regulations. Because this is a decision *de novo*, the decision notice should contain findings on visual impact, economic benefits, and reasons for conclusions. The appointed person in his Report on Handling concluded that several Development Plan policies were breached; there is no explanation given by the LRB as to why they concluded that these policies were not breached. The LRB failed to comply with the requirements of the legislation; accordingly, their decision is not within the powers of the 1997 Act, and it should be quashed in terms of section 239. The standard of reasons in this decision letter is so inadequate as to raise a real and substantial doubt as to what the reasons for it were and what were the material considerations which were taken into account in reaching it – *Di Ciacca* v *The Scottish Ministers* 2003 SLT 1031 at paragraph [16].

For all these reasons senior counsel for the reclaimer submitted that the multiple errors and failures by the LRB were not trivial, and that the LRB's decision should be quashed.

Submissions for the respondents

[13] In moving for refusal of the reclaiming motion counsel for the respondents began by reminding us that the court is concerned only with the legality of the LRBs' decision, not with the planning merits; matters of planning judgment are "within the

exclusive province" of the decision maker – *Tesco Stores Limited* v *Secretary of State for the Environment* [1995] 1 WLR 759 per Lord Hoffmann at 780.

[14] Counsel submitted that the criticisms levelled at the LRBs' decision by the reclaimer amount to a challenge to the reasons given; there was no need for this court to examine the issue of compatibility with EU or ECHR law. Moreover, the argument that section 43A(12) imposed a particularly stringent obligation on the LRB to give reasons proceeded on the basis of a misapprehension as to the notice to which that sub-section applied. The term "review documents" was defined in Regulation 2 of the 2008 Regulations; these are the documents which the LRB must consider, and which must be made publicly available. There was no requirement for the LRB to state all its reasons – the Lord Ordinary, as an informed reader, was entitled to go beyond the decision itself to ascertain from the documents referred to the details of the LRB's reasoning. It was clear from the paragraph on page 1 of the LRB's decision letter headed "Preliminary Matters" what documentation was considered by the LRB. This complied with the requirements of the 2008 Regulations, and no further documents or procedure were required; it was a matter for the LRB to decide how much information they needed to enable them to assess and decide upon this application, this being a question of planning judgement – *Simson* v *Aberdeenshire Council* 2007 SC 366 at paragraph [23]. The LRB were entitled to reach the view that there was adequate economic justification for the development in the review documents – particularly in the February 2012 Environmental Statement at paragraphs 3.1.1 – 3.1.18, and in the Notice of Review dated December 2012, at paragraphs 3.7.1 – 3.7.6.

[15] In responding to the reclaimer's specific criticisms of the LRB's decision, counsel addressed first the TGN. He submitted that the Lord Ordinary was correct in holding that the TGN did not count as policy at the time of the LRB's decision, and further that it was not in itself a material consideration. It did not amount to supplementary guidance in terms of section 22 of the 1997 Act. This was made abundantly clear by planning Circular 1 of 2009, particularly at Policies 93 and 99. It was only adopted as council policy in December 2013. At the time of the LRB's decision it was internal guidance, and was only being worked up towards being a

material consideration. It was, however, available to the public and the reclaimer could – had she sought to rely on it as relevant new material - have placed it before the LRB but did not so. It was not placed before the LRB and was not considered by them.

[16] Moreover, the Lord Ordinary was correct to consider whether, even if the TGN was a material consideration, what difference it would have made to the LRB's decision if it had been before them. The information in the TGN was available elsewhere (the Borders Landscape Assessment compiled by ASH Consulting Group in 1998 at page 137). The TGN only comprised illustrative guidance and did not amount to a prohibition of development on this site. Counsel referred us to the observations of Glidewell LJ in *Bolton Metropolitan Borough Council* v *Secretary of State for the Environment* [1991] 61 P & CR 343 at 352, and the decision of this court in *Bova* v *The Highland Council* 2013 SC 510. The Lord Ordinary was correct to consider this, and moreover his conclusion on this was sound.

[17] With regard to cumulative impact, the LRB stated that they had taken into account Structure Plan Policy I20, and also Scottish Planning Policy (paragraphs 182-195), in which cumulative impact was expressly dealt with. It was clear from this, and from the reference to the Report on Handling, that the LRB were aware of the difference between landscape and visual impact on the one hand and cumulative impact on the other. That these were separate issues was made clear in the report by the appointed person at page 9. The LRB accepted the appointed person's findings and conclusions on adverse impact, but in their judgment the economic benefits in terms of Local Plan Policy D4 outweighed these.

[18] With regard to residential amenity and the "presumption" for a separation distance of up to two kilometres between areas of search and the edge of cities, towns and villages, this is not mentioned anywhere in Policy H2 of the Local Plan. It is a recommendation in paragraph 190 of Scottish Planning Policy 2010, but this is in relation to guidance in identifying areas of search. It was expressly stated not to impose a blanket restriction on development, and was giving guidance to the drafters of the Development Plan. The Local Plan in this case was adopted after the Scottish Planning Policy and, understandably, did not repeat this guidance. The

respondents' supplementary planning guidance on wind energy published in May 2011 was the non-statutory type of supplementary guidance, and did not form part of the Development Plan. It is clear from the site description in the Report on Handling that information as to the distance between the turbines and the village was before the appointed person and before the LRB.

[19] Turning to economic benefit and the LRB's assessment under Local Plan Policy D4, neither of the complaints made by the reclaimer as to errors of fact stand up to scrutiny. The criticism that the turbines would not in fact assist the business in reducing its energy requirements was a matter of semantics – it was clear what the LRB meant by this. With regard to the assertion that the quarry did not have permission for a major expansion of its extraction operations, this was a misunderstanding on the part of the reclaimer. Counsel referred us to the reference in the Report on Handling to the planning history, which stated that there were three items relevant to the current application. One of these was 09/00125/MIN, which was an application for extraction of sand and gravel and formation of an access track at the nearby Fulfordlees Quarry. This was owned by the same quarry business, and it had been approved and development had commenced. It was therefore wrong to suggest that the LRB had made an error of fact.

[20] Turning to the issue of proportionality, counsel began by referring us to Scottish Planning Series Circular 4/2009, and to paragraph 6 of this which states:

> "The planning system operates in the long term public interest. It does not exist to protect the interests of one person or business against the activities of another. In distinguishing between public and private interests, the basic question is whether the proposal would unacceptably affect the amenity and existing use of land and buildings which ought to be protected in the public interest, not whether owners or occupiers of neighbouring or other existing properties would experience financial or other loss from a particular development."

Counsel also relied on the decision of the Court of Appeal in *Lough* v *First Secretary of State* [2004] 1 WLR 2557, and particularly the observations of Pill LJ at

paragraphs 45/46 and 49-51. Possible diminution in the value of the reclaimer's home – which she said, at the protective expenses hearing, was not her property but that of her husband - or in the value of the properties of other residents, is not relevant in this context.

[21] With regard to the reclaimer's complaints about breach of natural justice, it was important to bear in mind that she was not the applicant in these proceedings, but an objector. In terms of the statute, if the planning officer had granted permission for this development, she would have had no right to go to the LRB; her only remedy would have been to seek judicial review in this court. She did have a right to be heard, but this right was fulfilled by the proceedings before the planning officer, and the letter from the clerk to the LRB to her dated 8 January 2013, which complied with section 43B of the 1997 Act and paragraph 12 of the 2008 Regulations. There was no great factual dispute between the parties; it was reasonable for the LRB not to ask for further written representations and not to hold a hearing. A site visit is not required in every case (*Simson* v *Aberdeenshire Council*) and this was accepted on behalf of the reclaimer. Moreover, it was the developer, not the reclaimer, who requested the LRB to go on a site visit. The LRB relied on photographic slides, and on their own knowledge of the area as local councillors (in which respect they differ from reporters, who are not generally familiar with the locality and so are more likely to require a site visit). In any event, the LRB agreed with and adopted the findings of the planning officer on visual matters, so a site visit would have made no difference to their decision.

[22] Turning to the reclaimer's attack on the LRB's reasons, and the approach of the Lord Ordinary to the adequacy of these, the same considerations apply to this case as apply to any other planning appeal. Senior counsel for the reclaimer suggested that when the Lord Ordinary referred in his opinion to review rather than appeal, he was taking a more limited view of the requirement for reasons, but it is clear from his opinion that he referred to the usual authorities in relation to adequacy of reasons. As this was the first scrutiny of the court of a decision of an LRB, the Lord Ordinary was simply using the term to describe that body.

[23] The reclaimer's argument is really a challenge to the adequacy of reasons. The Lord Ordinary looked at the LRB's decision, but he considered that he was able to go behind that decision to the facts which were before the LRB. He did not apply any lesser standard. He accepted the submission by the respondents and the interested party that the LRB had undertaken the decision making process *de novo*, but he was entitled to look to the Report on Handling and the other review documents to find the LRB's findings in fact. It is clear that the LRB examined the facts and came to a different view from that taken by the planning officer; they did not state much by way of findings in fact because there was no disagreement with the planning officer and no dispute on the evidence. They simply reached a different view on the balancing exercise which they required to carry out.

[24] Senior counsel for the reclaimer had submitted that the Lord Ordinary and this court should apply a high degree of scrutiny. Counsel accepted that there must be sufficient scrutiny, but the intensity of review does depend on the individual context – *Kennedy* v *Charity Commission* at paragraphs 53/54. In the present case there was no requirement for a higher degree of scrutiny than in any other judicial review of planning appeals of this nature. As already discussed, matters of planning judgement are not for the court to examine, but matters of procedure are. The Lord Ordinary applied the necessary intensity of scrutiny, which was not different from the level of scrutiny of procedures in other planning appeals.

[25] With regard to the potential devolution issue, senior counsel for the reclaimer maintained that the LRB procedures and system can be interpreted as being compatible if the LRB takes a *de novo* approach and examines issues with a sufficient degree of scrutiny; the first instance decision and the review would be compatible if the safeguards referred to in paragraph [19] of *County Properties Ltd* v *The Scottish Ministers* were present. It was accepted on behalf of the reclaimer that the procedures would be compatible if the Report on Handling and the LRB decision notice complied with these safeguards. Counsel submitted that the issue does not arise, because matters can be dealt with by the normal principles of judicial review. In any event, as the reclaimer was not the applicant in the relevant proceedings but an objector, she had no right to seek a review by the LRB. If the LRB had refused to review, the

applicant might perhaps be able to argue a case of a lack of impartial and independent review. That is however not the situation here. This court does not need to undertake an academic exercise of looking at the whole system and assessing its compatibility with EU or ECHR law. The devolution issue does not arise.

[26] What the reclaimer's position amounts to is that the LRB decision notice was inadequate for not specifying which part of the planning officer's report it disagreed with. That is a challenge to the adequacy of its reasons. It does not require a high intensity of scrutiny to consider this issue.

Submissions for the interested party

[27] Senior counsel for the interested party adopted the submissions for the respondents. His primary submission was that this case was concerned with a challenge to the adequacy of reasons – nothing more and nothing less. That arises in the traditional judicial review context. In that context, only two questions arise –

(1) Within the arrangements for the functioning of LRBs, is one entitled to have regard to both the reasoning of the LRB and the reasoning in the Report on Handling? The Lord Ordinary answered this question in the affirmative, and senior counsel submitted that he was correct to do so.

(2) Were the reasons given by the planning authority adequate to render the decision to grant planning permission for this development lawful?

Properly understood, senior counsel submitted that the reasons given were adequate, and the reclaiming motion must fail.

[28] Senior counsel considered the correct approach to the function of an LRB. Under the traditional system, applications for planning permission were considered by a planning officer, who prepared a report with recommendations for the planning committee. The committee would then decide whether to grant permission or not. The decision of the committee was that of the planning authority. If planning permission was granted, the only remedy for an aggrieved objector was judicial review – a statutory appeal was only available to the applicant. This system was the same in other parts of the United Kingdom, and it had never been suggested that there should be a greater intensity of review; the normal grounds for seeking judicial

review applied. Since the creation of LRBs, there remains this two-stage process, but with an additional opportunity to the applicant. Because this is a local development, the planning officer is empowered to determine the application, and that becomes the decision of the planning authority. If the planning officer refuses permission, the applicant (and only the applicant) is entitled to seek a review before the LRB, which makes the decision. There is therefore the same two-stage process; if the LRB grants planning permission, there is no mechanism for review on the merits. In another case, the issue may arise about the removal of the applicant's ability to appeal to the Secretary of State/ Scottish Ministers, but this issue does not arise in the present case.

[29] An application for a major development is still made in exactly the same way as before. It has never been suggested that this gives rise to a requirement for an enhanced level of scrutiny. If the argument for the reclaimer is correct, this would have the perverse result that there would be a higher level of scrutiny for local developments that for major developments. An objector has always had a right to seek judicial review, and it has never been suggested that this requires some enhanced level of scrutiny. Such a suggestion is not justified in relation to decisions of LRBs.

[30] The Lord Ordinary, in determining the reasons challenges raised by the reclaimer, required to consider the statutory context in which an LRB operates. He did this at paragraphs [44] to [46] of his opinion. He was correct to observe that there is no provision in section 43A of the 1997 Act to the effect that the LRB must not take into account the reasons given in the Report on Handling by the appointed person, or that these reasons cannot form part of the reasons on which an LRB bases its decision. The Lord Ordinary was also correct to find that, having regard to the statutory context by which the previous decision and the matters taken into account are easily accessible, it is unnecessary for an LRB to restate aspects of the decision of the appointed person which it accepts. An informed reader looking at the decision letter of the LRB would have regard to the conclusions and other material within the Report on Handling, and the documents referred to in the Report on Handling, as well as to the LRB decision itself.

[31] The purported devolution issue does not arise. The characterisation of the functions of an LRB was not material to the approach taken by the Lord Ordinary to the statutory context in which an LRB operates, nor to his acceptance that the reasons for a decision by an LRB can be found in the reviewed documents. This court can determine the reclaiming motion on the normal basis of an "adequacy of reasons" appeal. In any event, there has been no breach of convention rights or EU Law in the LRB's determination. It did in fact determine the application for planning permission *de novo*. For a devolution issue to arise, the person raising it must be a victim. An objector to an application for planning permission is not a victim, as an objector did not have a right to appeal to a reporter against the grant of planning permission. That has been the position since the introduction of the modern planning system in the Town and Country Planning (Scotland) Act 1947, and in the equivalent regime in England and Wales. The reclaimer's argument (which was not raised before the Lord Ordinary) is to claim that the very existence of this system results in a breach of her convention rights. The reclaimer is not a victim; it might be argued that the situation was different for an aggrieved applicant. There is no scope for a devolution issue to arise in this case.

[32] Turning to the reclaimer's argument based on the PPD and the requirement that an intense degree of scrutiny is required, senior counsel observed that the decision of the LRB in this case was based on balancing visual/landscape and other adverse impacts on the one hand with economic benefit on the other. This is a familiar exercise for those charged with making such decisions. It is not an exercise for the courts. The decision of the LRB is subject to appeal to the Court of Session under section 239 of the 1997 Act. Scrutiny by the courts on the familiar grounds under that section, or in terms of judicial review procedure, is sufficient to satisfy the requirements of the PPD – *R (Evans)* v *The Secretary of State for Communities and Local Government* at paragraphs 32 – 43. No issue under the PPD arises in this case. Senior Counsel also observed that neither *Alconbury* nor *County Properties* were in point. The comments made by the Inner House in paragraph 19 of *County Properties*

required to be read in the context of that case, which was presented by a disappointed applicant (not an objector) who challenged the independence and impartiality of a system which permitted ministers to make decisions on the basis of a reporter's report. Proportionality is achieved in our planning system if the decision maker properly takes account of the public interest and the rights of the individual. Neither EU nor Convention law adds to this – the question remains, have the decision makers done what they ought to have done?

[33] In turning to the specific grounds of appeal argued for the reclaimer, senior counsel reminded the court (under reference to *Wordie Property Co Ltd* v *Secretary of State for Scotland* 1984 SLT 345 at 348) that the decision maker must only give proper and adequate reasons for the decision which deal with the substantial questions in issue in an intelligible way: reasons are not required for every issue, however minor. Moreover, the LRB decision letter must not be read as a contractual or conveyancing document, and it must be read through the eyes of an informed reader, aware of all the background facts and with access to all the relevant documents. It is necessary to look at the decision as a whole. By reason of section 25(1) of the 1997 Act, Development Plan policies have a rôle in the decision making process over and above other material considerations.

[34] This case is principally concerned with the Development Plan and the application of its policies. Structure Plan Policy E16 was not prohibitory but was subject to a caveat in relation to the Plan's other policies; the planning authority should therefore take account of the positive aspects of a development proposal. Policy I19 supports the development of renewable energy sources that can be developed in an environmentally acceptable manner; it too is not prohibitive. Policy I20 neither supports nor prohibits wind energy developments, but provides criteria for assessment. Local Plan H2 with regard to protection of residential amenity is however a prohibitory policy, as development that is judged to have an adverse impact on the amenity of existing or proposed residential areas will not be permitted. Senior counsel accepted that the current development has been judged to have an adverse impact on residential amenity by the planning officer. Local Plan Policy D4 was supportive of renewable energy development, if there are no

unacceptable adverse impacts on the specified categories, or that any adverse impacts can be satisfactorily mitigated. The last sentence of the policy deals with the situation where it is judged that there are significant adverse impacts that cannot be mitigated. In such a situation the development will only be approved if the council is satisfied that the contribution to the wider economic and environmental benefits outweighs the potential damage to the environment or to tourism and recreation.

[35] This then is a case about the Development Plan, not about material considerations. The policy provides for a balance to be struck. This is a matter for planning judgement.

[36] It was clear from the paragraph at the foot of page 2 of the LRB's decision letter that the LRB were making their decision *de novo*. They considered all the review documentation listed at the foot of page 1 of the decision letter, and commented on the Report on Handling. They focussed on those areas in respect of which they reached a different conclusion from the appointed person. They were therefore reading into the decision letter what was said on the Report on Handling, and where they accepted a conclusion in the Report on Handling, they took this into account (as they were entitled to) but did not need to refer to it. Although they considered the matter *de novo*, they did not require to give reasons in respect of aspects in which they agreed with the appointed person's conclusions. The balancing exercise under Local Plan Policy D4 was critical to their decision. Any reasonable informed reader would understand that the LRB accepted the planning officer's view that there would be significant landscape and visual impact; this makes sense, as this is one of the factors that triggers the balancing exercise in terms of Policy D4. The LRB then set out why they disagreed with the appointed person in the striking of the balance. They were entitled to reach a different conclusion on this balancing exercise from that which the appointed person reached. They did this in the fourth paragraph of page 3 of their decision letter, and they gave an adequate explanation for doing so. This does not leave the informed reader in any substantial doubt as to why they decided the matter in the way they did. They stated what they took into account,

and they reached a different conclusion on the balancing exercise required by Policy D4 from the conclusion reached by the planning officer. That was all that was required.

[37] Turning to the individual criticisms raised by the reclaimer, senior counsel considered first the TGN. He submitted that it was not a material consideration. What the court had to assess was what the impact and significance of this material might have been. The planning officer in his Report on Handling took into account the sensitivity of this area, and found that the proposal would have a significant landscape and visual impact. The LRB agreed with this. The TGN adds nothing to this; the result reached by the planning officer and the LRB is exactly the result which would have been reached if the TGN had indeed been a material consideration. The planning officer found in the Report on Handling the fact "that the turbines would still become the single most dominant component of the Coastal Farmland (Cockburnspath) landscape character area". Moreover, the Borders Landscape Assessment carried out by Ash Consulting Group in 1998 dealt with this (at pages 39 and 137/8) and assessed internal intervisibility, external intervisibility and visual sensitivity in this area as high. Both the 1998 assessment and the Report on Handling were taken into account by the LRB. The material consideration was not the TGN document, but the significance of high sensitivity for a development of this nature in this area. This was clearly flagged up in both the Ash report and the Report on Handling.

[38] Senior counsel adopted the submissions on behalf of the respondents in respect of many of the other criticisms levelled at the LRB decision letter by the reclaimer. It was clear from both the Report on Handling and the LRB's decision letter that they considered cumulative impact and found that it was a significant adverse factor. Similarly with regard to residential amenity, the Report on Handling found a significant adverse impact. The LRB took this into account, and expressly took account of paragraphs 182 – 195 of Scottish Planning Policy. They agreed with the appointed person. Senior counsel adopted the submissions for the respondents with regard to proportionality; the LRB were entitled to

reach the conclusion which they did, the UK planning system struck the balance correctly, and we are not involved in the present case in convention rights.

[39] With regard to natural justice, it was within the discretion of the LRB not to hold a hearing. They stated that they had sufficient information before them to enable them to reach a conclusion. There is no requirement for a hearing in every case – reporters too have a wide discretion as to the procedure which they wish to adopt. There was nothing in the point about a site visit. Again, the decision as to whether to hold a site visit was properly within the LRB's decision. In any event, they found that there was a high level of adverse visual and other impacts and agreed with the appointed person's conclusions in the Report on Handling; it cannot therefore be argued that the reclaimer suffered prejudice as a result of the LRB's decision not to hold a site visit. With regard to reasons, as already submitted, this reclaiming motion was entirely about adequacy of reasons, on which senior counsel had no additional submissions to make.

[40] The information about the economic benefits of the proposal was all to be found in the materials referred to in the LRB decision letter and the Report on Handling. There is no suggestion that the LRB made any error of fact. Senior counsel adopted the submissions with regard to economic benefit made on behalf of the respondents. All the information can be found in the environmental statement (in volume 1 at paragraphs 3.1.8 – 3.1.18 and in volume 3 at paragraphs 3.7.1 – 3.8.1 and 5.3.42. See also paragraphs 13.7.1 – 13.7.6, and paragraph 2.5.27 of volume 2). The LRB was also entitled to take account of the Notice of Review submitted to it by the interested party, and in particular the information contained at paragraphs 3.7.1 to 5.1.19. There was therefore a factual basis for everything contained in the fourth paragraph on page 3 of the LRB's decision letter.

[41] In answer to a question from the court as to how many jobs would be created by this development, senior counsel said that there was no information about this, but nobody had raised this as an issue at any stage. There was no contradictor. If there had been, the LRB would have had to give reasons for

preferring one body of evidence to another. However, the LRB stated what the evidence was before them, and what they relied on. Without any contradiction on the matter, they were entitled to do so.

[42] Senior counsel submitted that when it came to the critical matter of the balancing exercise in terms of Policy D4, the Lord Ordinary dealt with this correctly at paragraph [50] of his opinion. There was no error of law, and the reclaiming motion should be refused.

Submissions for the Lord Advocate

[43] Senior counsel explained that the Lord Advocate's interest in this matter was confined solely to the possible devolution issue. She began by asking what was the devolution issue before the court. The Lord Advocate accepted that the stating of a devolution issue in the grounds of appeal in proceedings such as these is equivalent to raising the matter in the principal writ, under reference to Rule of Court 25A.4.

[44] A question had arisen as to whether the devolution issue was specified in sufficient detail in the grounds of appeal. After a hearing on 24 June 2014, a joint minute (number 33 of process) was agreed between the reclaimer and the Lord Advocate as to the scope of the potential devolution issue. Read short, the reclaimer's position was that it is not part of the reclaimer's case that the system for the review of delegated decisions in relation to local development by LRBs is inevitably incompatible with convention rights or EU law, but rather that it is incompatible if the governing legislation is interpreted and given effect to in the way the Lord Ordinary did. The reclaimer's position before this court remained that the legislation was capable of being read as compatible with convention rights and EU law; on no view does the reclaimer's position amount to a challenge to the compatibility of LRB procedure with EU law and convention rights. The reclaimer does not seek a declarator of incompatibility; it was argued on her behalf that it was not necessary to do so, because under reference to section 29(1) of the Scotland Act 1998, if the statutory provisions are incompatible with any of the convention rights or with EU law they are simply not law.

However, senior counsel submitted that this was wrong – the onus rests on a party asserting incompatibility to set out the basis for such assertion and to seek a declarator to that effect, and the issue of compatibility should not be considered as an abstract or theoretical exercise but should be related to the factual matrix of the case under consideration – *BJ* v *Proudfoot* 2011 SC 201, particularly at paragraphs [30] and [35] – [37]. The reclaimer is not seeking a declarator but is raising a hypothetical issue, which the court should not entertain – see the remarks of Lord Justice Clerk Thomson in *McNaughton* v *McNaughton's Trustees* 1953 SC 387.

[45] Even if the court had some sympathy with the suggestion that the procedures may be incompatible, it should not grant declarator in the absence of any proper application and full argument. As discussed in *BJ* v *Proudfoot*, it is for the reclaimer to seek declarator in her written application to this court, and to persuade the court on the facts of the case that it should be granted. There has been no attempt to do so.

[46] Moreover, the reclaimer does not have victim status. If she were to be regarded as a victim, this would give third party objectives a right of appeal which they have never previously had. Victim status does not arise in this case, and the court does not need to consider this.

[47] Senior counsel drew our attention to the letter from the Scottish Government's chief planner to Heads of Planning dated 29 July 2011 which concluded that "the consideration of an application by an LRB is in effect consideration of an application by the planning authority and should be treated accordingly. The Scottish Government therefore considers that, based on the above argument, the "*de novo*" approach should be adopted in determining cases brought before LRBs. This approach is also consistent with the approach to appeals adopted by DPEA. Consistency of handling of cases regardless of whether they are determined by LRB or DPEA would, in our view, promote confidence in the planning process".

[48] It had been submitted on behalf of the reclaimer that in order to amount to a *de novo* review and to meet the standard identified in *County Properties*, with

an intense level of scrutiny, the LRB had to revisit every policy consideration and every material consideration, and that it could not take into account the Report on Handling. This would significantly increase the burden of giving reasons. The common law rules are well established by cases such as *Moray Council* v *Scottish Ministers* and *Uprichard* v *Scottish Ministers* [2013] UKSC 21 at 44 and 48. As Lord Reed observed in *Uprichard*, the approach to the requirement to give reasons in a decision must be proportionate. The argument advanced on behalf of the reclaimer does not allow a proportionate approach. It is a matter for the decision maker to consider what level of scrutiny is justified in a particular case – *Kennedy* v *Charity Commission*; *Alconbury*. The present application relates to a local development; it is towards the bottom of the hierarchy of developments. Part of the reason behind the changes to procedures was to increase efficiency and to ensure that such developments were considered at an appropriate level of decision making.

[49] The court should conclude that the Lord Ordinary did not decide that the LRB does not have to carry out a *de novo* approach, but rather that he was commenting on a two stage approach. Even if the Lord Ordinary did mistakenly believe that a *de novo* assessment was not required of the LRB, this court can properly interpret and apply the provisions of the 1997 Act and the 2008 regulations. The LRB is required to determine an application *de novo* under the review process; the respondents maintain that they did adopt a *de novo* approach in relation to this application and it is a matter for this court to determine whether that was the case.

Reply for the reclaimer

[50] Senior counsel for the reclaimer submitted that it was probably not necessary for the court to decide whether the reclaimer had victim status or not, as she relied on the PPD and the EU charter, so victim status is not necessary. However, the reclaimer obviously did have victim status; as an objector she has a right to have the process determined fairly and she is directly affected by the decision because her civil right to residential amenity is affected. If a person is

aggrieved and is directly affected, that person has victim status – *Axa General Insurance Company Ltd* v *Lord Advocate* [2012] 1 AC 868, per Lord Hope at paragraph [63] and Lord Reed at paragraph [111], *Walton* v *Scottish Ministers* 2013 SC UK 67 per Lord Reed at paragraphs [86] and [96], and Reed and Murdoch, *Human Rights Law in Scotland* (3rd edition) at paragraphs 2.64 – 2.68. It was clear from the reclaimer's affidavit that she is directly affected. It was not necessary for the reclaimer in these proceedings to conclude for declarator of incompatibility; it was sufficient for senior counsel to move for declarator in the course of her submissions.

[51] Turning to what was required by a "*de novo*" approach, and what this meant for the LRB, senior counsel observed that the procedure required to comply with article 11 of the PPD. It was clear from the terms of the letter from the Chief Planner to Heads of Planning, dated 29 July 2011, that the Scottish Government expected consistency of handling of cases regardless of whether they were determined by an LRB or by a reporter of DPEA. The review documents to which the LRB must have regard in terms of the 2008 Regulations are substantially the same as the appeal documents to which a reporter must have regard in terms of the Town and Country Planning (Appeals) (Scotland) Regulations 2008, and the scheme of paragraphs 11 and 12 of the 2008 Regulations applicable to LRB's are substantially the same as the provisions of the regulations of the same year applicable to reporters. The observations of the court in *County Properties* apply with equal force to proceedings before an LRB and the decision letter prepared by the LRB. Senior counsel accepted that an LRB can expressly adopt a specific finding of fact in the Report on Handling, but she did not accept that the LRB decision letter in the present case had this effect. Moreover, the reader cannot be forced to dig around amongst the material to find a justification for the LRB's reasoning or decision. Although the findings and recommendations of the Aarhus Convention Compliance Committee were not binding on this court, they were of persuasive authority; the court should take account of the concerns expressed by the Committee as to the ability of

members of the public to challenge the substantive legality of decisions (see paragraph 125 of the Committee's report).

[52] With regard to the intensity of review required in the present case, senior counsel accepted that this was an area in which some planning judgment was required, but the issue had to be assessed against the PPD and the observations of the Supreme Court in *Kennedy* v *Charity Commission*. For the reasons already articulated, a high intensity of review was required in this case.

[53] Finally, senior counsel submitted that this was not just a "reasons" challenge; she relied on all the factors listed in paragraph 8 of her note of argument. In particular, the LRB gave no reasons for deciding that the balancing exercise carried out in terms of Policy D4 resulted in the economic benefits outweighing all the adverse impacts. Senior counsel renewed her motion that the reclaiming motion should be granted.

Decision

[54] We begin by reminding the informed reader that the planning merits of this proposal, and issues of planning judgment, are not matters for this court. It is not for us to determine whether or not it is appropriate in planning terms to erect the wind turbines referred to in this planning application nor is the balancing exercise between adverse impacts and possible economic benefits one for this court. These are matters for the planning authority. In terms of section 239 of the 1997 Act, we are concerned only with whether the local authority's decision is within the powers of the 1997 Act or whether any of the relevant requirements have not been complied with. We are concerned with legal validity and procedural regularity, not planning judgment.

[55] We do not propose to attempt to give general guidance as to the scope or function of LRBs in every situation; such an exercise, even if possible, would be inappropriate, particularly as we consider that the provisions of sections 43A and 43B of the 1997 Act (as amended) and the 2008 Regulations are tolerably clear and free from ambiguity. The following points are however relevant to the present case:

(1) The system of schemes of delegation for local developments, and the review of decisions of an appointed person, which was introduced by the 2006 Act, was intended to increase efficiency and ensure that developments were considered at the appropriate level of decision making. We agree with the submissions for the interested party and the Lord Advocate that it would be curious if parliament had intended that a more rigorous and onerous procedure and scrutiny was required for local developments than for major developments.

(2) The effect of section 43B of the 1997 Act, together with the 2008 Regulations, is that a party to proceedings under the new scheme is expected to lodge all the materials on which that party wishes to rely at an early stage of the procedure, before the appointed person makes his determination (except where the matter could not have been raised before that time, or because of exceptional circumstances). To put it colloquially, the procedure is intended to be "front loaded". An LRB will normally be expected to conduct a review on the basis of the material before the appointed person, and (subject to the above exceptions) a party will not be able to introduce and rely on material not before the appointed person.

(3) Only an applicant may require an LRB to review a case where the appointed person has refused an application, granted it subject to conditions, or failed to determine it timeously – section 43A(8) of the 1997 Act and regulation 9 of the 2008 Regulations. An objector to the application has no such right. This reflects the position regarding the lack of right of objectors to appeal to reporters under the system which pre-dated the 2006 Act, and the present system for major developments.

(4) An LRB must have regard to the review documents (as defined in regulation 2 of the 2008 Regulations). Of course, in

terms of section 25 of the 1997 Act, its determination must be made in accordance with the Development Plan unless other material considerations indicate otherwise. However, where the LRB considers that the review documents provide sufficient information to enable them to determine the review, they may determine the review without further procedure – regulation 12 of the 2008 Regulations. That is a matter of planning judgment, for the LRB.

(5) If the LRB decide that further procedure is required, it is for the LRB to decide how the review is to be conducted (by written submissions, one or more hearing sessions, and/or a site visit), and whether it requires further information – regulation 13 of the 2008 Regulations. Again, a decision of this nature involves planning judgment and is for the LRB itself.

(6) In carrying out its review function, the LRB must approach the matter "*de novo*". All parties were agreed on this point, and it was explained in the letter dated 29 June 2011 from the Scottish Government's Chief Planner to Heads of Planning. What is meant by a "*de novo*" approach? Clearly, an LRB cannot simply "rubber stamp" the decision of the appointed person. What is required is that the LRB should apply its collective mind afresh to the materials which were before the appointed person, together with any further materials or information properly before it. It is not merely considering whether the appointed person's decision was reasonable in *Wednesbury* terms, but rather it is looking at the materials afresh. In this context, as discussed above, the materials must include the review documents. These include the Report on Handling, and any documents referred to in it. Not only is the LRB entitled to have regard to the Report on Handling and the documents referred to in it, it is obliged to do so.

(7) The LRB must give a notice of their decision to the applicant, containing the information contained in section 43A(12)(a) of the 1997 Act and regulation 21 of the 2008 Regulations. It must also give reasons. The well-known rules regarding the adequacy of reasons in similar decision letters apply to an LRB decision letter. The LRB must give proper and adequate reasons for its decision which deal with the substantial questions in issue in an intelligible way – *Wordie Property Co Ltd* v *Secretary of State for Scotland* per Lord President Emslie at 348. It must set out the process of reasoning by which it reaches its decision, but that does not require an elaborate philosophical exercise, nor does it require a consideration of every issue raised by the parties – the LRB is entitled to confine itself to the determining issues, and so long as its reasons are intelligible and accurate, it is entitled to express them concisely – *Moray Council* v *Scottish Ministers*, per Lord Justice Clerk Gill at [30]. It is important to maintain a sense of proportion when considering the duty to give reasons, and not to impose on decision-makers a burden which is unreasonable having regard to the purpose intended to be served – *Uprichard* v *Scottish Ministers* per Lord Reed JSC at [48]. The reasons are provided for the informed reader, who is aware of the procedural and evidential background and the issues. In a case where the LRB agrees with the findings and reasoning of the appointed person, generally it will not be necessary to set out or repeat at length those findings and reasons – it will be sufficient if it is apparent to the informed reader from the decision letter as a whole that the LRB agrees with and adopts them. The decision letter should not be subjected to microscopic analytical scrutiny as if it were a conveyancing document or a taxing statute; it will be sufficient if the informed reader is left in no real doubt as to why the LRB reached its decision on the determining issues.

[56] There is nothing in the Lord Ordinary's treatment of these matters (particularly at paragraphs [44]-[46] of his opinion) which suggests to us that he has fallen into error of law. When he referred to "review" rather than "appeal", we consider that he was simply reflecting the language of the 1997 Act and the 2008 Regulations. If he was suggesting that a lower level of scrutiny or consideration, or a lesser requirement for reasons, was appropriate for an LRB than would be appropriate for a reporter, we would disagree with him; however, we agree with senior counsel for the interested party that, properly understood, that is not what the Lord Ordinary was suggesting. The Lord Ordinary was correct in observing that it was necessary to consider the statutory context in which an LRB operates, and that the LRB was entitled to take account of the reasoning in the Report on Handling, that this reasoning may be included in the decision of the LRB by way of reference, that it may thereby form part of the reasons on which the LRB bases its decision, and that it is unnecessary for an LRB to restate aspects of the decision of the appointed person which it accepts.

[57] In the circumstances of the present case, we are persuaded that the LRB did indeed take a *de novo* approach to the material before it. It made its determination having had regard to the review documentation, as it was obliged to do. It identified what it considered to be the determining issues in the review, it listed the relevant policies in the Development Plan, and it listed the other material considerations which it took into account. It expressly stated that its consideration of the matter was *de novo.* We are satisfied that the LRB did carry out what senior counsel for the reclaimer described as a "full substantive and procedural review" and that its decision complied with the requirements of the 1997 Act and the 2008 Regulations. Taken together with the proceedings before the Lord Ordinary and in the reclaiming motion before this court, we are also satisfied that the procedures as a whole comply with the requirements of the PPD, and in particular Article 11 thereof.

[58] Turning to the reclaimer's position about a possible devolution issue, we are not persuaded that there is any devolution issue properly before us. None of

the parties has suggested that the provisions of the 1997 Act or the 2008 Regulations are incompatible with convention or EU Law. Senior counsel for the reclaimer expressly stated that the statutory regime governing LRBs is capable of being interpreted compatibly with the convention and with EU law, and that the problem in this case arises from the Lord Ordinary's error in interpretation, not in the legislation itself. The reclaimer's position is clearly stated in the last sentence of paragraph 2 of the joint minute between the reclaimer and the Lord Advocate (number 33 of process). This court will not normally address an issue which is not live in the contentious litigation before it – as Lord Justice Clerk Thomson famously observed in *Macnaughton* v *Macnaughton's Trustees* 1954 SC 387:

> "Our courts have consistently acted on the view that it is their function in the ordinary run of contentious litigation to decide only live, practical questions, and that they have no concern with hypothetical, premature or academic questions, nor do they exist to advise litigants as to the policy which they should adopt in the ordering of their affairs. The courts are neither a debating club nor an advisory bureau… each case as it arises must be considered on its merits, and the court must make up its mind as to the reality and the immediacy of the issue which the case seeks to raise… Unless the court is satisfied that this is made out, it should sustain the plea of incompetence, as it is only with live and practical issues that the court is concerned."

[59] Moreover, there is nothing in the application to this court in terms of section 239 of the 1997 Act, nor in the grounds of appeal in the reclaiming motion, which suggests that the reclaimer seeks a declarator of incompatibility or any equivalent thereto. Senior counsel submitted that this was not necessary, and that it was sufficient for her to move for declarator in the course of her submissions. We disagree. The means by which a declarator that the Scottish Parliament had acted outwith its legislative competence was an issue discussed by this court in *BJ* v *Proudfoot*. In that case the appellant sought to argue that a quite different Act of the Scottish Parliament was outwith its

legislative competence as it did not comply with the ECHR. It was submitted on behalf of the Lord Advocate that the appropriate remedy where an Act of the Scottish Parliament failed in some way to comply with the ECHR was a declarator that certain provisions of that Act were outside the legislative competence of the Scottish Parliament and accordingly were "not law". The court appears to have accepted that submission – as Lady Paton put it (at paragraph [30]):

> "It is in my view for the appellant to demonstrate to this court that, in the circumstances of her case, the application of the relevant legislation resulted in a breach or breaches of the ECHR. The appellant has not done so."

[60] Lord Hardie observed (at paragraph [35]) that the relevant factors necessarily include the factual situation, the statutory framework within which any particular statutory provision appears and, above all, the remedy sought on behalf of the minuter. He went on to state (at paragraph [37]):

> "Moreover, the issue of compatibility with the ECHR should not be considered as an abstract or theoretical exercise but should be related to the factual matrix of the case under consideration."

[61] In the present case, it is the reclaimer's position that the legislation is not incompatible. The remedies which she seeks do not include any declarator to that effect. We agree with counsel for the Lord Advocate that in these circumstances there is no devolution issue properly before us, and we should not entertain it.

[62] By way of brief observation, even if we had been prepared to entertain the reclaimer's submission that the legislation was incompatible with convention and EU law, we did not find it persuasive as we consider that the LRB was required to adopt a *de novo* approach, and we are satisfied that it did so. The Lord Ordinary gave a detailed and fully reasoned consideration in his opinion, which we consider amounted to a sufficiently intense scrutiny. Whilst of course the concerns of the Aarhus Convention Compliance Committee are entitled to

respect, the convention is not part of domestic law as such (except where incorporated through European directives) – *Walton* v *Scottish Ministers* 2013 SC [UKSC] 67 at [100], and the Committee does not appear to recognise that *Wednesbury* reviews within the United Kingdom may have different intensities of scrutiny appropriate to the particular circumstances of the case – *R(Evans)* v *The Secretary for Communities and Local Government*, particularly at paragraphs 37 and 38. We are not persuaded that, in the particular circumstances of the present case, the PPD adds anything to the well-known requirements of our domestic law. Looked at as a whole, and taking account of the proceedings before the appointed person, the LRB, the Lord Ordinary and this court, we consider that the requirements of the PPD, and particularly of Article 11 of that directive, have been satisfied.

[63] It does not appear to us that victim status is an issue which is relevant in this case. If it were relevant, we would have some hesitation in accepting that the reclaimer has victim status, standing the nature of her interest in the matter and her status as an objector which gives her no right to require a review of the decision of the appointed person. However, although the matter was touched on in submissions, standing our views as to the relevance of the point in this case we do not propose to elaborate on the matter. It is sufficient for us to conclude that there is no merit in the reclaimer's position on a potential devolution issue.

[64] We now turn to the various specific arguments advanced on behalf of the reclaimer as to what are said to be errors by the LRB and the Lord Ordinary.

(i) Failure to take account of the TGN as a material consideration

[65] At paragraph [47] of his opinion the Lord Ordinary held that the TGN had not achieved the status of supplementary planning guidance at the date of LPG's decision. He was correct in this view – it was only adopted as council policy in December 2013. Having regard to Planning Circular 1 of 2009, we do not consider that the TGN amounted to supplementary guidance in terms of section 22 of the 1997 Act. It was not of itself a material consideration.

[66] In any event, we agree with counsel for the respondents and the interested party that the material consideration was not the TGN document, but the significance of high sensitivity for a development of this nature in this area. This was a matter which was considered elsewhere, particularly in the Borders Landscape Assessment compiled by ASH Consulting Group in 1998, which was specified in the LRB's decision letter as one of the material considerations which it took into account. Furthermore the Lord Ordinary was correct to consider whether, if the TGN had been taken into account, a different outcome would have resulted – *Bova* v *The Highland Council*; *Bolton Metropolitan Borough Council* v *Secretary of State for the Environment* - and we agree with his conclusion that it would not. The substance of the material was already before the LRB. Moreover, the LRB agreed with the conclusion of the appointed person with regard to landscape and visual impact in an area of high sensitivity. We do not consider that their views on this matter would have been different if they had had the TGN before them.

(ii) Cumulative impacts

[67] This issue was dealt with by the Lord Ordinary at paragraph [48] of his opinion. We are in complete agreement with his views, and can find no error in his approach. The LRB took into consideration Policy I20 and paragraphs 182 – 195 of Scottish Planning Policy, as well as the Report on Handling, which included an assessment of cumulative impact in some detail. The LRB agreed with the appointed person in relation to adverse impact; the Lord Ordinary expressed the view that it was unnecessary for the LRB to make separate findings of its own in that regard, and we agree.

(iii) Residential amenity and the presumption of a two kilometre separation distance from residential settlements

[68] Again we are in complete agreement with the Lord Ordinary's treatment of this issue at paragraph [49] of his opinion. The "presumption" for a separation distance of up to two kilometres is not mentioned in policy H2. It is a

recommendation in paragraph 190 of Scottish Planning Policy 2010, but the purpose of this recommendation was to give guidance to the drafters of the Development Plan. The respondent's supplementary planning guidance on wind energy dated May 2011 was the non-statutory type of supplementary guidance, and did not form part of the Development Plan. In any event, as mentioned above, the LRB accepted the views of the appointed person as to the likely adverse impacts of the development, including the impact on the residents of the village of Cockburnspath. That being so, we do not consider that it was incumbent on the LRB to repeat the appointed person's findings or reasons.

(iv) Economic benefit

[69] Senior counsel for the reclaimer's first point in this regard was that the LRB's findings on economic benefit are contained in a total of six sentences. That may be so, but it does not follow from the fact that a decision maker states its reasons concisely that it has not given consideration to the point in issue, or that its reasons are inadequate. We deal further with adequacy of reasons below. However, the crucial test is whether the informed reader is left in real and substantial doubt as to what the reasons for the decision were and what were the material considerations which were taken into account in reaching it. Provided that this test is satisfied, we do not consider that it matters that the reasons are stated comparatively shortly.

[70] The next point which senior counsel for the reclaimer made was that the fourth paragraph of page 3 of the decision letter contained two errors of fact –

(a) that the turbines would assist the business in reducing its energy requirements and

(b) that the quarry had permission for a major expansion of its extraction operations.

There is no substance in either of these points. We agree with counsel for the respondents' description of the first of these as a matter of semantics – it was clear what the LRB meant by this. With regard to the second, we are satisfied that there was no error of fact – the LRB were referring to the development at

Fulfordlees Quarry, which was owned by the same quarry business, which had been approved and at which development had commenced. We are not persuaded that the LRB reached its decision under error of fact.

[71] Senior counsel for the reclaimer went on to submit that an informed reader would not be able to understand the reasoning of the LRB on economic benefits because of the inadequacies of findings in that regard. We disagree. It is clear from the third and fourth paragraphs on page 3 of the decision letter that the LRB applied its mind to the balancing exercise required under Policy D4. On one side of the scales, it is clear that they were persuaded that there would be adverse visual and landscape impact and that this may be significant. They noted that Policy D4 did not provide a complete prohibition on such developments, and that a development may be approved if the decision maker is satisfied that the contribution to wider economic and environmental benefits outweighs the potential damage to the environment. They considered this wider economic benefit in the fourth paragraph on page 3 of the decision letter; they noted that the turbines would bring price stability and security of supply to a large consumer of energy and would assist in reducing its carbon footprint. They were satisfied that the proposed turbines would help to sustain a business which - in their assessment as local councillors - is an important local employer, and help it to realise its expansion plans. Members concluded that the impact of the development was outweighed by the economic benefit that would accrue. This is essentially a decision about what weight is to be given to different considerations and the members are ultimately accountable to the electorate for their decision making.

[72] In light of the contents of these two paragraphs of the decision letter we do not consider that it can be said that the informed reader is left in any real or substantial doubt as to what the reasons for the decision were. It is clear that the LRB carried out the required balancing exercise and concluded that the economic benefit outweighed the adverse impact of the development. There is sufficient in the review documentation and the other material considerations listed by the LRB to provide a justification for this conclusion. We are unable to detect any

error of law in the approach of the Lord Ordinary at paragraph [50] of his opinion.

[73] The suggestion that the LRB ought to have taken into account reduced house prices in the residential areas close to the proposed development is in our view misconceived. In this regard we agree with the observations of Pill LJ in *Lough* v *First Secretary of State* (at paragraph 51).

(v) Proportionality

[74] The essence of senior counsel for the reclaimer's position on this issue was that only 6% of the energy to be generated by the development was required for Kinegar Quarry's current energy usage, and it was impossible to ascertain from the LRB's decision letter how it reached its conclusion on proportionality. However, Policy D4 is not only concerned with local economic and environmental benefits – it expressly refers to wider economic and environmental benefits. The fact that the quarry business itself may only utilise 6% of the output seems to us to be far from conclusive on this issue. There was evidence before the LRB of wider economic and environmental benefits. The LRB referred to the development bringing price stability and security of supply to a large consumer of energy and that this would assist in reducing its carbon footprint. The members of the LRB clearly applied their collective mind to the necessary balancing exercise, and clearly stated the result of that balancing exercise together with reasons for that result. We find ourselves in agreement with the observations of Pill LJ in *Lough* v *First Secretary of State*, particularly at paragraphs 45/46 and 49/50. As Dyson LJ (as he then was) stated in *Samaroo* [2001] UK HRR 1150, it is important to emphasise that the striking of a fair balance lies at the heart of proportionality. It does not follow that if the word "proportionality" does not appear in a decision letter, this renders the decision unsatisfactory or liable to be quashed. It is clear from the decision letter in the present case that the LRB carried out the balancing exercise required by Policy D4. They stated the result of that exercise, and their reasons for reaching that result. There was material before them to enable them to reach that result. This

was a matter for the planning judgment of the LRB, and this court will not interfere because the reclaimer does not agree with that judgment.

(vi) Natural justice

[75] The Lord Ordinary dealt with this issue at paragraph [52] of his opinion. We are in complete agreement with his reasoning and conclusions on this issue. The first respect in which it was argued that there was a breach of natural justice was that the letter from the clerk to the LRB to the reclaimer dated 8 January 2013 did not give the reclaimer a reasonable right to be heard before the LRB. However, that letter refers the reader to section 43B of the 1997 Act and accurately reflects the terms of that section. The reclaimer was advised in that letter that if she wished to make any further representations in respect of the review she should write direct to the Head of Legal Democratic Services of the respondents within 14 days from the receipt of the letter. It was for the LRB to decide whether any further procedure was required, and if so, what form that procedure should take. In this regard, the powers of the LRB are analogous to those of a reporter. This was not a case in which, for example, the LRB heard evidence from the applicant but refused to hear evidence from objectors such as the reclaimer. We do not consider that there was any breach of natural justice in this regard.

[76] With regard to the decision not to hold a site visit, it is worthy of note that it was the applicants who asked for a site visit, not any of the objectors. A site visit is not required in every case – *Simson* v *Aberdeenshire Council*. The members of the LRB may be taken to know the site, being local counsellors; in this respect they differ from reporters. In any event, as counsel for the respondents pointed out, the LRB agreed with and adopted the findings of the appointed person on visual matters, so a site visit would have made no difference to their decision.

[77] We are not persuaded that there is any force in the reclaimer's submissions on natural justice in this case.

(vii) Reasons

[78] We have touched on this issue already. The LRB is under the same duty to give adequate reasons for its decision as are other decision makers in different contexts. It was submitted to us that because this is a decision *de novo*, the decision notice should contain findings on visual impact and reasoning on all issues. We are unable to agree with this proposition. Where the LRB agrees with the reasoning of the appointed person and accepts his findings in fact, no purpose is served by requiring the LRB to repeat those findings and reasoning nor to recite them at length. It will be sufficient if the LRB makes it clear that they accept and adopt the findings and reasoning on a particular issue. In the present case the LRB stated that they "did not fundamentally contradict the appointed officer's assertion that there would be adverse visual and landscape impact and that this may be significant". In the circumstances of this case, where the appointed person has set out at length his findings and reasoning with regard to adverse impacts and the LRB has accepted these, there is no need for the LRB to rehearse or repeat these at length.

[79] The crux of this case was the balancing exercise carried out by the LRB in terms of Policy D4. The LRB required to balance the admittedly adverse impacts of the development against the potential economic and environmental benefits. The informed reader of the decision would be aware of the contents of all of the materials to which the LRB had regard. He would be aware of the procedural and evidential background. We cannot agree with senior counsel for the reclaimer that the informed reader would be left with a real and substantial doubt as to what the reasons for the decision were. It is tolerably clear that, having carried out the balancing exercise required by Policy D4, the LRB found that the balance favoured the granting of permission. Indeed, they state in terms:

> "members concluded that the impact of the development was outweighed by the economic benefit that would accrue."

[80] We agree with the Lord Ordinary's treatment of this issue at paragraph [53] of his opinion.

[81] For all these reasons, we are not persuaded that the Lord Ordinary has fallen into any error of law. Whilst the LRB's decision letter is not a model of clarity or an example of the best practice which might be achieved under the proceedings introduced by the 2006 Act - such practice could , for instance, aim at providing express assurance of consistency of handling regardless of whether a case is determined by an LRB or the DPEA and, here, could have included the provision of more detailed reasons why the LRB reached a different conclusion from the previous LRB and appointed persons - it says enough in its own terms and by its reference to other material to satisfy us that its decision is within the powers of the 1997 Act and that it complied with the relevant statutory requirements. We shall accordingly refuse this reclaiming motion.