OUTER HOUSE, COURT OF SESSION

[2018] CSOH 11

P375/17

OPINION OF LADY WOLFFE

In the cause

JORDANHILL COMMUNITY COUNCIL

Petitioners

against

GLASGOW CITY COUNCIL

Respondents

for Judicial Review

Petitioner: Mr Sutherland; Morton Fraser LLP
Respondent: Mr Burnett; Glasgow City Council (Corporate Services)
First Interested Party: Armstrong QC; Shepherd & Wedderburn
Second Interested Party: Thomson QC, van der Westhuizen; Thorntons Law LLP

14 February 2018

Introduction

[1] Glasgow City Council ("the Council"), as the local planning authority, granted planning permission in principle ("the Decision") for a large residential development on the site of the Jordanhill College campus ("the site") of the University of Strathclyde ("the University") on 26 January 2017.

[2] The petitioners, a local community council, seek reduction of the Decision to grant planning permission in principle on the basis that there were significant and material changes

in the period between the resolution of the planning committee ("the Committee") to grant planning permission in 2013 ("the 2013 Resolution"), and the grant of the planning permission in principle in January 2017. Accordingly, the application for planning permission in principle should have been returned to Committee for reassessment as regards those changes. In failing to do so, it is argued, the Council failed to fulfil its statutory duty in terms of the Town and Country Planning (Scotland) Act 1997 ("the 1997 Act"), it proceeded on an incorrect factual basis and it failed to take into account material considerations.

[3] The two remaining significant material changes alleged are as follows:

1. Greenspace: that not all of the areas that were shown as green space in the original application in 2011 were designated in the subsequent agreements under section 75 of the Act (namely, the Pitches Agreement and the Greenspace Agreement, collectively "the section 75 Agreements") as green space; and this constituted a material change and the application for planning permission in principle should have been put back to the Committee before the Decision was made ("the Greenspace challenge"). In the context of this challenge, the petitioners advanced an ancillary argument concerning the *vires* of using conditions to control the development ("the *vires* argument").

2. Public transport provision: that prior to the grant of planning permission in principle the Council's Committee should have taken into account changes in the bus network since the 2011 Transport Assessment that had been undertaken, and which changes resulted in the development being less accessible and below the required baseline accessibility ("the Transport challenge").

The petitioners had also sought to challenge the Decision on the basis that, in relation to traffic impact, the Committee should have been given the opportunity to reconsider the application for planning permission in principle in light of the identification of increased traffic that was re-routed through the Southbrae Drive/Westbrae Drive junction ("the Junction"). This was in order to enable it to reconsider whether the proposed signalisation works in condition 4 of the planning permission in principle would continue to provide the necessary capacity ("the Traffic challenge"). However, at the start of his submissions, Mr Sutherland, appearing for the petitioners, explained that, having seen further documentation recently produced by the University, including a unilateral undertaking, he no longer advanced this as a free-standing ground of challenge. He relied on it to the limited extent as having a cumulative effect in combination with the other live grounds of challenge. He rested on his written submissions for the Transport and Traffic challenges. He also abandoned a challenge on environmental grounds.

Background

The site

[4] The site is a very large area, totalling 16.6 hectares. It comprises the former campus of Jordanhill College. In broad terms, the site is split between built and unbuilt areas. The built area mainly occupies the western part of the site and contains a variety of buildings, including a substantial three-storey listed building known as the David Stow Building ("the Listed Building"). The unbuilt area includes expansive and landscaped grassed areas and sport pitches, generally occupying the eastern part of the site, although a further two buildings and car park are situated on the north part of the site.

The Application

[5] The University submitted an application in 2011 (no 11/00794/DC) ("the Application"), which was advertised as being potentially contrary to development plan policy DEV 11 (concerning green space) of the development plan, and as affecting a listed building (ie the Listed Building referred to in the preceding para). The petitioners made representation to the Council about the 2011 application, albeit (it is said) not on the grounds now advanced in these proceedings.

The 2013 Resolution

[6] After consideration of a report of handling (detailed below), the Committee of the Council resolved in 2013 to grant the Application, subject to conditions and the entry into various agreements under section 75 of the Act. (This is the 2013 Resolution.)

The areas of concern to the petitioners

[7] The petitioners' Greenspace challenge is concerned with two areas. The first is the loss, it is said, of green space in the immediate vicinity to the east of the Listed Building. As it stood in 2011 and 2013, the Listed Building was situated in a semi-wooded area it had a substantial landscaped area along its eastern face. The semi-circular drive that curves away from the east face of the Listed Building, and which joins an access road to form a teardrop shaped area of lawn ("Area 1"), is the only part of hardstanding to the east of the Listed Building. Further east from Area 1 is a larger grassed area, and beyond that are sports pitches. The second area of concern, which Mr Sutherland frankly acknowledged on its own would not have justified a judicial review, is a smaller irregularly shaped green area ("the tail") which appears along the northern boundary of the site ("Area 2", and hereinafter

referred to collectively with Area 1 as "the Areas"). The Greenspace challenge did not otherwise distinguish between these two areas.

[8] The basis for the Greenspace challenge is the change in treatment of the two Areas. The petitioners rely on certain plans and documents, said to inform the Council's decision in 2013 to resolve to grant the Application, and in which the Areas are coloured green, indicating retention as unbuilt green space, or that their status as such was otherwise to be protected. However, the Decision does not, it is said, respect these designations in that not all of the areas that had hitherto been designated as open space were now of that status (or that status was insufficiently secured). To place this challenge in context, it is necessary to set out the "before" and "after" position, as it were, of what were the terms of the development plan policies and material considerations obtaining as at 2013 (at the time of the 2013 Resolution) and the subsequent changes by January 2017 (which the petitioners contend should have resulted in the matter being remitted back to Committee). It is also necessary to set out the relevant parts of the development plan (including the status of the several maps relied on by the parties). I do so in the following sections, setting out the policies and relevant passages from the development plan ("City Plan 2"), the passages in the report of handling to Committee dated 9 January 2013 (No 6/2 of process) ("the Report") as well as the plans referred to, and other documentation founded on. I start with Campus Plan 2, on which Mr Sutherland placed considerable reliance in his submissions.

Background and documentation relevant to the 2013 resolution

Campus Plan 1 and Campus Plan 2

[9] In the mid-2000s the University resolved to move to a single campus and to move the Jordanhill College departments from the site to its other campus. With a view to securing

the change in the principal land use of the site from tertiary education to residential and open space uses, the University prepared a document in 2007 known as Campus Plan. In February 2007, the Council noted this and the change in land use designation was reflected in the finalised draft City Plan 2 of the local plan.

[10] The University followed this up in 2008 with Campus Plan 2 (No 6/6 of process), providing a more detailed analysis of the site as, in effect, a form of development brief, setting out the key design and development principles for future development of the site: paragraph 1.1.3 of Campus Plan 2. The coloured plan at unnumbered page 3 of the Campus Plan 2 showed the Areas as unbuilt areas. The relevant parts of Campus Plan 2 are:

1) the description of the site location and its principal land uses of education and open space (section 2.1);
2) the site description and character and description of the qualities of the Listed Building (sections 2.2 and 2.3);
3) the description of the open space and landscape as making "a significant contribution to the high quality environment" (section 2.4, especially para 2.4.5);
4) the further discussion of this at paragraph 9.2.2 (noting that the open areas on the eastern part of the site and the areas of established woodland, including the area to the east of the Listed Building, added value and attractiveness to the site);
5) the many policies of the development plan, including DEV 11 (at para 3.3.7); and
6) the reference to the finalised draft City Plan 2, which, was acknowledged, technically not to form part of the development plan until its adoption but should be afforded significant weight (para 3.3.2).

City Plan 2: composition of its parts and how they function

[11] As noted above, there was reference in Campus Plan 2 and in the Report to the draft finalised City Plan 2. At the time of the 2013 Resolution, this had not been adopted and was therefore not yet formally part of the development plan. It was subsequently adopted on 7 December 2009, a point relied on by the University in submissions.

[12] The City Plan 2 has four parts headed, respectively:

(1) Development Strategy: Overview;

(2) Development Strategy: Priorities and Proposals;

(3) Development Policies and Design Guidance, and;

(4) Development Guides.

As the headings suggest, these progress from the general to the particular. This feature is important as, if there is an apparent inconsistency of the depiction of a land use in two maps (eg one map reflecting a more general policy and another reflecting more detailed treatment under the development plan), this has the potential to create uncertainty and it gives rise to the question: which more accurately records the applications of the policy protections? As will be seen, that question lies behind the petitioners' Greenspace challenge. To understand how that uncertainty has arisen and how (in terms of the development plan) that is resolved, it is necessary to set out the different parts of City Plan 2 and how they interrelate.

[13] Under the heading "How To Use The Plan" (at para 1.1), it explained that City Plan 2 consists of four inter-related parts that require to be read as a whole. Part 1 sets out an overview of the development strategy, which is set out in more detail in part 2 (para 1.2). Part 3 is described as the "Council's Development Management Manual", providing policy guidance about the acceptability of different forms of development in the City (para 1.6). This is described as having a "layered format" (at para 1.7) starting with 12 broad land use

Development Policy Principles (DPPs) against which development proposals are initially considered.

[14] The DPPs are also supported by five maps corresponding to the city centre and to the north, south, east and west quadrants (para 1.7). The site falls within the West Development Policy Principles Map ("the West DPP Map"). That map contains only two colours, seemingly corresponding to the land use for residential (peach) and also open space (green). Area 1 and Area 2 are both coloured green on this map. The petitioners rely on this plan. The explanation of the function of part 3 goes on to explain that the DPPs and related maps are followed by *inter alia* more specific topic policies (para 1.8).

[15] Part 3 of City Plan 2 contains the development and design policies that will be used when considering applications. Under the heading "Using The Plan's Development And Design Policies And Development Guides" (at para 9.6) it is explained that there are three main levels of guidance. Moving from the general to the more detailed, they are:

1. Development Policy Principles: DPPs are "12 broad designations of land within the City and these are shown" on the DPPs maps covering the City Centre and the North, East, South and West Quadrants. (I have already described the West DPP Map.) The explanation (at para 9.7) continues: the DPPs "indicate how the Council is likely to respond in broad terms to development proposals within a given area". The two relevant DPPs are DEV 11 (Green Space) and DEV 2 (Residential and Supporting Uses). It is noted (at the introductory section about DPPs at the beginning of part 3 of City Plan 2, at p 11) that many of the areas designated DEV 11 are also covered by "Environmental Policy Designations Maps" and on the "Glasgow Open Space Map", which is defined. (I note this below).

2. Development and Design Policies ("DD Policies"): DD Policies are explained as outlining aspects or principles of development that must be addressed if a proposal is acceptable to the Council, over and above the DPPs. There are six policy groups, including Transport and Parking. Policy ENV 1 (described in para [19] below) falls with part 3 of City Plan 2.

3. Development Guides ("DGs"): this is the most detailed level of guidance not found at the higher or more general levels of policy.

As the Application was only for planning permission in principle, then the relevant level of detail is that in part 3 of City Plan 2.

[16] The only other two passage in part 2 of City Plan 2 to which reference was made in submissions are, first, the generic description of a campus plan and its proposed function (at para 2.27) and a passage specifically addressing the site (at para 8.21). These two paragraphs are in the following terms:

> "2.27 Campus Plans – prepared in support of the development of larger sites, generally higher/further education or hospital campuses, these are intended to establish the scale, nature, timing and likely impacts of changes in the operation of these institutions."

and

> "8.21 Jordanhill Campus – The University of Strathclyde has taken the decision to focus its activities on the John Anderson Campus in the City Centre. This decision will result in the disposal of the Jordanhill Campus, and the construction of a purpose-built building to house the Faculty of Education within or adjacent to the John Anderson Campus. Revised Campus Plan proposals have been noted by the Council, and are reflected on the West Development Policy Principles Map."

City Plan 2: Development Policy Principle DEV 2

[17] DEV 2 is headed "Residential and Supporting Uses" ("DEV 2"). It includes the City's main housing districts and incorporates a wide range of supporting facilities, including schools, local shops, recreation facilities and green/open spaces. DEV 2 also states that the

Council will support proposals that enhance residential amenity and preserve *inter alia* landscape and green network provision. Proposals that impact on "green/open space, as defined in the Council's Glasgow Open Space map (see definition)", should be assessed in the context of polices DEV 11: Green Space and ENV1: Open Space Protection."

City Plan 2: Development Policy Principle DEV 11

[18] DEV 11, headed "Green Space", explains that the areas designated "Green Space" "generally represent the larger permanent green/open spaces" serving the City ("DEV 11"). There is reference to further smaller open spaces found within other DPPs, particularly DEV 2 (residential and supporting uses). DEV 11 continues:

> "All green/open spaces (regardless of their size or purpose) are functionally important elements of Glasgow's green infrastructure (see Environmental Designations Maps and the Councils Open Space Map (see Definition). There is a strong presumption in favour of the retention of all public and private green/open space (see policy ENV 1: Open Space Protection)".

The definition that follows, of the Glasgow Open Space Map ("Glasgow OSM"), is set out below.

City Plan 2: Development and Design Policy ENV 1

[19] Policy ENV 1 ("Open Space Protection") is more detailed than the DPPs (DEV 2 and DEV 11) already noted ("Policy ENV 1"). The stated aim is to protect areas of formal and informal open spaces from "inappropriate development". Policy ENV 1 is stated to be in accordance with DEV 11 and it is also stated that "there is a strong presumption in favour of the retention of all public and private green/open space". Under reference to the Glasgow OSM (and the same definition as used in Dev 11 is used, at the foot of the page 10) open space uses are identified. Under the heading "Areas of change", it is noted that areas of the city are subject to change (eg for key redevelopment) and it states that "some flexibility may

be required to permit the re-arrangement of land uses in the interest of designing sustainable neighbourhoods and places". It goes on to state that the Council will, in consultation with local community groups, ensure appropriate open space provision. "Any changes", it states, "to open space provision will be recorded on the Glasgow Open Space Map" and "the new spaces will be accorded the protection set out in this policy".

Glasgow Open Space Map

[20] The definition provided for the Glasgow OSM (which is provided immediately after DEV 2 is set out, at the foot of page 112 of City Plan 2) is as follows:

> "GLASGOW OPEN SPACE MAP - Under the provisions of Planning Advice Notice (PAN) 65- Planning and Open Space, local authorities are obliged to prepare an audit and map of all the areas and categories of open space within their areas. Together with other policies of the Plan, the Glasgow Open Space Map will form part of the policy protection for the City's open spaces and will be used to assess whether there would be scope to develop on any such space (see policy ENV1: Open Space Protection)".

An extract of the Glasgow OSM pertaining to the site is produced (at No 7/4 of process). There are about 21 different categories of open space uses (eg parks and gardens, sports areas, private grounds, cemeteries) which are each indicated by a combination of colour and other markings. On the Glasgow OSM the western part of the site (which has buildings and is proposed as that part of the site on which residential development will be built) has no colour or other marking designation. Similarly, Area 1 has no indicative marking or colour. In other words, in terms of this map, none of these parts of the site has a relevant open space or green space use or designation. The playing fields on the site are, by contrast, marked with the colour for sports playing fields. Area 2, the irregular tail of land at the top of the site, is marked as "natural/semi-natural greenspace-woodland". The Council and the

interested parties rely on the Glasgow OSM in response to the petitioners' Greenspace challenge.

The report of handling ("the Report")

[21] The Application was eventually subject to a report of handling to the Committee ie the Report already referred to. The Report indicated that the Application could only be supported in policy terms if development on green space could be prevented by conditions or by a section 75 agreement. The Committee resolved to grant permission on that basis (ie the 2013 Resolution). As part of the petitioners' challenge is that the section 75 Agreements or conditions contravene, or otherwise will be unable to secure, the land use anticipated in the 2013 Resolution, and as there was extensive reference to the Report in parties' written Notes of Argument and oral submissions, it is convenient to summarise the passages of the Report cited. I do so, under a number of topic headings in the following paragraphs. Passages underlined are those founded on by the petitioners. Passages in bold are those founded upon by the Council and the interested parties.

The Report: References to Campus Plan 2

[22] The Report followed the usual format of setting out the details of the Application, the substance of objections, the background, the site and its description, the planning history, representations/consultations, the proposal, the policies, specified matters (including a summary of the terms of any proposed section 75 agreement), the assessment and conclusion; and the conditions and reasons therefor. In the background section of the Report there is reference to Campus Plan and Campus Plan 2. The purpose of Campus Plan 2 was described as sitting "alongside the development plan and while it would be non-

statutory and carry less weight than the development plan it was intended to act as a material consideration on the determination of any application for the redevelopment of the 'site]": at page 4. It was further noted that:

> "Campus Plan 2 set out various broad principles for the design and layout of the future residential development on the campus site and also outlined how certain aspects of the site's redevelopment should be considered. Along with the broad principles of residential development two key factors were identified as being important in the redevelopment. These were the future retention of the sports pitches and how public transport would… serve any future development to reduce the number of car journey's [*sic*] being generated."

It noted that Campus Plan 2 had been presented to the Committee for noting in 2008 and that, thereafter, the designation of the site was changed in City Plan 2. The petitioners rely on the last sentence of this paragraph (page 4) that: "Accordingly, the western, developed portion of the site changed from Education to Residential while the eastern portion covering the landscaped area was changed from Education to Greenspace."

The Report: description of the proposal

[23] In the proposal section (at page 5), it was recorded that the University had applied for planning permission in principle for use of the site as residential with the stated intention of formalising the existing City 2 Plan designation. It was also noted that in their supporting documentation they state that the general approach does not deviate from Campus Plan 2 and that the intention would be "only for residential development to take place on the land already designated residential with <u>open space being left undeveloped</u>". It was further noted that as this was only an application for planning permission in principle of the proposed development, the only matters that required to be determined "at this stage" were the "description of the proposed development and details of where access is to be taken". It was also noted that the University "revisited" Campus Plan 2 detail and provided an

illustrative plan to detail the parameters to guide how the site should be developed ("the Illustrative Plan"). This included details of "density and mass treatment of open spaces as well as site access": page 5 of the Report. In the Illustrative Plan the Areas and most of the eastern part of the site are shown as unbuilt, with the proposed developed areas on the western half of the site, and on a further area in the north-east corner. Finally, it was noted that "in respect of open space" the University outlined their "intention to retain the existing open space, including the three pitches on the eastern portion of the site". The petitioners emphasise the passage I have underlined. The Council and the interested parties emphasise that the Application was only a permission in principle.

The Report: development plan policies and scope of section 75 agreement

[24] The policies cited include DEV 11 ("Greenspace"), and policy ENV 1 ("Open Space Protection"). The summary of the terms of any section 75 Agreement, contained in the specified matters section of the Report, stated (at page 6):

> "A legal agreement is required in relation to preventing any future development on the greenspace as defined in City Plan 2 **(subject to detailed analysis of the designation boundaries)** along with protection of the sports pitches. This will require that the pitches are retained and maintained in perpetuity …[there followed reference to the need to set up a management body]…." (Emphasis added)

The petitioners rely on the reference to a section 75 agreement and its stated purpose to prevent future development on green space (underlined); the Council and interested parties stress that this is all subject to further analysis and that this is by reference to City Plan 2 (see the passage in bold).

The Report: assessment and conclusions relative to Greenspace

[25] As would be expected in respect of a development of its prominence, importance and size, the assessment and conclusion of the Report are detailed. So far as relevant the assessment concluded, as follows (at page 7):

> "**ASSESSMENT AND CONCLUSIONS**
>
> Section 25 of the Town and Country Planning (Scotland) Act 1997 requires the determination of this application to be made in accordance with the provisions of the development plan, unless material considerations indicate otherwise.
>
> The application site falls within two Development Policy Principles within City Plan 2 as described above. The western and northern, developed portion of the site is designated as Residential and development proposals should be assessed against DPP DEV 2. The remaining undeveloped space, including the pitches, is Greenspace and should be assessed against DPP DEV 11.
>
> **As the proposal is for planning permission in principle, there is no defined layout to the development and as a result the scheme has been advertised as potentially contrary to the greenspace designation to recognise that there is the potential for development to be proposed upon greenspace.**
>
> DPP DEV 2 Residential and Supporting Uses explains that the Council will support proposals which enhance residential amenity; improve access to/from and within the areas; and preserve and enhance the integrity of the townscape, landscape and green network provision. The proposed development affecting the DEV 2 Principle area is entirely residential which is compatible with the designation. As the proposal is in principle there are no details of layout and it is not possible to consider how residential amenity will be affected both within the development and in relation to neighbouring housing. However, this can be controlled in any applications for matters specified by conditions (MSC). In respect of townscape the removal of the more recent College buildings is not considered to be problematic as these are considered to make a negative or at best neutral contribution to the site's setting. While the quality of what is proposed will need to be considered at a later stage the applicants do illustrate an attempt to control impacts via limiting the height and mass of the new build.
>
> The applicants have illustrated in their masterplan an aspiration to extend the parkland setting adjacent to the residential designation so that it permeates into the site and this illustrates efforts towards enhancing the landscape setting. Again, the full detail of impact will only be considered once an MSC application is submitted. Nevertheless, the broad principle of residential development on the site is considered to be compatible with the site's designation.

> DPP DEV 11 Greenspace outlines that all green/open space areas (regardless of their size or purpose) are functionally important elements of Glasgow's green infrastructure and that **there is a strong presumption in favour of the retention of all public and private green/open space. The applicants** have made it clear through Campus Plan 2, the illustrative masterplan submitted with the application and their supporting documents **that they do not propose any development upon the existing Greenspace within the site**. Given this position it is considered that any future application for MSC could be adequately controlled by conditions and or agreements attached to any grant of planning permission in principle to prevent any development on the Greenspace. **On this basis it** is considered that, subject to such restrictions, the proposal would not be contrary to the Greenspace DPP."

Report: assessment and conclusions on Policy ENV 1 Open Space Protection

[26] As noted above, DPP DEV 11 refers to Policy ENV 1 (Open Space). Both of these policies contain the presumption (quoted above) in favour of the retention of open space. This passage of the assessment in the Report, in particular, was founded on in submissions. So far as material, it provides (at the foot of page 9):

> "Policy ENV 1 Open Space Protection reinforces the Greenspace Development Policy Principle in protecting areas of formal and informal open space from inappropriate development. It also outlines that there is a strong presumption in favour of the retention of all public and private open/green space.
>
> From the details submitted, including the illustrative masterplan, the applicant's intention is clear in that they do not propose to develop any of the greenspace within the site. **Given that this application is merely covering the principle of development (as well as access) there is no detailed layout which can be used to control the extent of development. However, a condition attached to any approval can ensure that future applications for MSC do not show any development on greenspace.**
>
> One of the critical elements of the future development of the campus site is how the three sports pitches and associated training area contained within the Greenspace designation are dealt with. Campus Plan 2, as required by the Council, outlined the preparation of a Sports Pitch Management Plan which would see the land containing the pitches transferred to a charitable trust with the broad aim of ensuring the retention and safeguard of the pitches for the benefit of the wider community in perpetuity. At that time the Campus Plan identified Jordanhill School's Educational Amenities Trust as a potential body to own and operate the pitches." (Emphasis added.)

The petitioners emphasise the statement of the applicants' intention not to develop any of the green space within the site (the sentence underlined in the 2nd para). The Council and

interested parties rely on the next sentence (in bold), recording that the application is in principle only and that no detailed layout can be used to control the extent of development. The petitioners' ancillary *vires* challenge concerns the last sentence of that paragraph: namely, the use of a condition to preclude "any development" on green space.

[27] After dealing in a further extensive passage about pitches (which is not an issue in these proceedings), it was noted that (at page 10):

> "In terms of Policy ENV1 and the Greenspace DPP designation, the key criterion is the retention of the pitches and resisting any pressure to see them developed. It is considered that in order to deliver adequate control to achieve this, a legal agreement must be attached to any grant of Planning Permission in Principle. Such an agreement would contain wording ensuring that the pitches shall be retained, in accordance with agreed details, in perpetuity."

On this topic the Report concludes as follows:

> "Subject to the completion of such an agreement the proposal is considered to be in accordance with Policy ENV1."

The Council and interested parties emphasise that, consistently with representations made to the Council, the principal concern in relation to open or green space was to retain the pitches (not the Areas).

Report: assessment and conclusions relative to transport

[28] This section of the assessment is quite lengthy, dealing as it does with the transport and traffic issues, the prospects of infrastructure improvements or provision of a new railway station, population density and the site's base accessibility to public transport.

[29] As there was reference in the written submissions to base accessibility, I set out the relevant extract states. The key points are in italics:

> "Assuming that a new station is unlikely to happen and given that the next nearest station at Jordanhill is approximately a kilometre from the site it is considered reasonable to discount proximity to trains as contributing towards accessibility to the site. On this basis the site will need to rely on bus services in order to achieve its accessibility requirements. Base accessibility is defined as being within 400 metres of

a bus service which runs 6 or more times an hour at peak times. The current bus service to the city centre which stops on Southbrae Drive near the site entrance has a frequency that achieves at least base accessibility. A further bus service to the city centre stopping on Anniesland Road, to the north of the site, also achieves at least base frequency. *Based upon the illustrative layout, around 50 units would be within 400 metres of one of the two bus stops while more than half would be within 550 metres and virtually all would be within 600 metres walk of one of the bus stops.*

While the majority of the proposed units would be outwith the 400 metres accessibility threshold, in many cases this is marginal and the assessment against the relevant policies must acknowledge this. Furthermore, the site would present residents with an attractive pedestrian route to the bus stops and it is it considered reasonable to question whether the prospect of walking an additional 100-200 metres to get to a bus stop is likely to make residents significantly more likely to use a car."

[30] The conclusion at page 9 states:

"Taking these factors into account it is considered that it would be disproportionate to require the applicants to fund diverting the existing bus service to enter the site given that there is a real prospect such a move may not result in any significant reduction in the number of car journeys generated by future development. **Furthermore, it would be difficult to justify resisting the redevelopment of a brownfield site on the basis that residents need to walk for an extra 100 – 200 metres to get to a bus service.**

The proposal is considered as capable of satisfying the other criteria set out in Policy RES 1 and Policy Trans 2. On balance it is considered that the failure to achieve base accessibility for the full site as described above is not so significant an issue that it would warrant resisting the proposal." (Emphasis added)

The Council and the interested parties found on the passage in bold.

The Report: response to objections

[31] Parties highlighted a number of passages in the Report responding to representations.

It suffices to note the following, concerning green space (the responses are not numbered in the Report):

"• Proposal contrary to designation of site.

Responses: The application has been advertised as potentially contrary to the local plan. However, the development on greenspace can be prevented by making any permission subject to a legal agreement which protects greenspace.

- Proposal is contrary to various environmental designations.

  Responses: The proposal is for the principal of residential development and subject to the controls outlined for a legal agreement it is considered that this would not conflict with any of the environmental designations covering the site."

This section of the Report concludes as follows:

> "The points raised in the letters of representation are not considered to outweigh the policy position set out above. On this basis it is considered that the proposal recommended for approval subject to the completion of a Sec 75 Legal Agreement relative to protecting the greenspace and sports pitches within the site and subject to the conditions as set out below."

I turn now to record the relevant conditions.

The Report: conditions and reasons

[32] Parties referred to the following conditions:

> "02. The development shall not be begun until an application for the following matters has been submitted to and approved by the planning authority by the issuing of a decision notice:-
>
> 1. Landscaping of the site.
> Landscaping means the treatment of land (other than buildings) for the purpose of enhancing or protecting the amenities of the site and the area in which it is situated and includes screening by fences, walls or other means, the planting of trees, hedges, shrubs or grass, the formation of banks, terraces or other earthworks, the laying out or provision of gardens, courts or squares, water features, sculpture, or public art and the provision of other amenity features.
>
> 2. Means of access to the site.
> Access means inclusive access for pedestrians, cycles and motor vehicles.
>
> 3. Layout of the site and siting of buildings and other structures.
>
> 4. Design and external appearance of buildings and other structures.
>
> 5. Existing and proposed site levels, levels of all accesses and finished floor levels.

6. A flood rise assessment and a drainage impact assessment and a full drainage plan showing a separate drainage system with water discharging to a suitable outlet and details of proposed SUDS.

7. Should the number of residential units exceed 370 then a revised Transport Assessment prepared in accordance with Glasgow City Plan 2 development guide DG/TRANS 1 Transport Assessments. The transport assessment shall cover all transport considerations, including public transport, walking and cycling issues 1-21 of the development guide as appropriate to the development.

8. An ecological survey report covering protected species. This shall require investigation of whether a bat license will be required prior to any demolition works at the petroleum spirit store and all works will be subject to a method statement to be agreed in writing.

9. Detailed proposals for the upgrade of the internal development road network.

Reason: The application is in principle only and to comply with section 59(1) of the Town and Country Planning (Scotland) Act 1997 and regulations 12 and 28 of the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2008."

The conditions were imposed on the grant of planning permission in principle of the Decision. I need not repeat them here.

[33] For the purposes of the *vires* argument, Mr Sutherland founded on the fact that there were no express conditions precluding development on green space. The Council and interested parties argue that is misconceived. This is only about a grant in principle. As the Report makes clear, control is to be exercised under section 75 agreement.

Background and documentation relevant to the decision

The section 75 agreements

[34] On 20 January 2017 the Council concluded two minutes of agreement in terms of Section 75 of the 1997 Act relating to the Application ("the section 75 Agreements"). The first agreement was entered into between the Council and the University to regulate the use

of part of the Application site as sports pitches ("The Pitches Agreement"). The second was entered into amongst the Council, the University and the developer to "ensure that an appropriate level of open space is provided for in any development of the subjects" ("The Greenspace Agreement"). As the petitioners rely on the term of the Greenspace Agreement as one of the material changes, it is necessary to set out the passages referred to. These included:

1) Recital six: noting that City Plan 2 requires the development to accord with the standard in, *inter alia* DD Policy ENV 1 and DPP Dev 11, in which there is a strong presumption in favour of retention of all public and private green/open space;

2) Recital Eight: that the parties have entered into the Green Space Agreement to ensure "appropriate level of open space is provided";

3) Definitions of City Plan 2, DPP Dev 11, DD Policy ENV1, DD Policy ENV 2 (all of these policy definitions are from City Plan 2); and "Greenspace Areas", defined as the areas coloured pink on "Plan 1" to the Greenspace Agreement.

4) Plan 1: this discloses that Area 1 is bisected in a north south direction. The rectangle thereby created and which is that part of Area 1 immediately adjacent to the Listed Building is not designated as open space, albeit the remainder of Area 1 is. This part of Area 1 was of most concern to the petitioners;

5) Clause 3: Greenspace: this provides that the Greenspace Areas (ie as defined by reference to Plan 1), "shall be kept open and unbuilt on...." (clause 3.1), with a further prohibition on developing or building on them (clause 3.2).

[35] The principal fault of the Greenspace Agreement is that the area defined as green space (by reference to Plan 1) does not cover all of the areas shown as green on the

Illustrative Plan submitted with the application. Further, that even taken together, the two section 75 Agreements fail to secure policy protection for all of this green space (see para [38] below).

Legal Principles

[36] The legal principles were not in dispute and the parties' submissions may be summarised as follows:

(1) Applications for planning permission require to be determined in accordance with the development plan, unless material considerations indicate otherwise: sections 25(1)(a) and 37 of the 1997 Act.

(2) Whether or not material considerations outweigh or justify departure from the development plan is a matter of planning judgment for the decision maker. The Court is concerned only with the legality of the planning authority's decision, not with its merits or the planning judgment exercised: *Tesco Stores* v *Secretary of State for the Environment* [1995] 1 WLR 759, *per* Lord Hoffmann at 780H. A decision is unlawful only if it is one to which no reasonable body/authority could have come.

(3) A consideration is "material", in this context, if it is relevant to the question of whether the application should be granted or refused; that is to say if it is a factor which, when placed in the decision maker's scales, would tip the balance to some extent, one way or the other; it must be a factor which has some weight in the decision making process, although it may not be determinative: *R (Kides)* v *South Cambridgeshire DC* [2002] EWCA Civ 1370 *per* Jonathan Parker LJ at paragraphs [121] – [122].

(4) The amount of information required by a planning authority in order for it to determine an application is a matter of planning judgment for the authority: *Simson* v *Aberdeenshire* Council 2007 SC 366 at paragraph 23.

(5) If, after the passing of a resolution (in principle) by a planning committee to grant planning permission, but before the issue of the decision notice, some new factor has arisen of which the delegated officer is aware (or ought reasonably to have become aware), and which might rationally be regarded as a "material consideration", the delegated officer can only safely proceed to issue the decision notice without referring it back to the planning committee for their consideration if he is satisfied:

    (a) that the authority is aware of the new factor,

    (b) that it has considered it with the application in mind, and

    (c) that on a reconsideration the authority would reach (not might reach) the same decision.

If the delegated officer cannot be so satisfied, and he fails to refer the application back to the committee for reconsideration, the planning authority will be in breach of its statutory duty. *R (Kides)* v *South Cambridgeshire DC*, paragraphs [125] – [126]. Conversely, there is no requirement for applications to be referred back to the planning committee where it is clear that (a) the authority was aware of the new factor, (b) it had considered the factor with the planning application in mind, or (c) it would have reached the same conclusion if matters had been referred back to the committee: *R (Leckhampton Green Land Action Group)* v *Tewkesbury Borough Council* [2017] EWHC 198 (Admin) at paragraphs 69-77.

(6) A planning authority may grant "planning permission in principle" subject to a condition, imposed under section 37(1)(a), that the development in question will not be begun until certain matters have been approved by the planning authority (section 59(1) of the 1997 Act).

(7) The planning authority's power to approve matters specified in condition cannot be used as a means of revoking or modifying the permission already granted in principle (*R (Chieveley Parish Council) v Newbury DC* [1999] PLCR 51 per Pill LJ at 64C).

(8) Section 59 of the 1997 Act sets out the definitions of planning permission in principle and the procedure that requires to be followed, once granted. Detailed requirements are set out in the Town and Country Planning (Development Management Procedure) Regulations 2013 ("the Regulations"). Reference was made to Regulations 12, 14, 18, 21, 23 and 24 of the Regulations.

(9) If an appellant alleges that a material consideration was left out of account the court should only quash the decision if it is shown that proper consideration of that factor would have had some weight that would have been likely to tip the balance to some extent and might have led to a different outcome: *Bova* v *Highland Council* 2013 SC 510 at paragraph 57; *Carroll* v *Scottish Borders Council* 2015 CSIH 73 at paragraph 66.

(10) A planning officer's report to a planning committee requires to be sufficiently clear for the committee to understand the important issues and material considerations and requires to be sufficient for the committee to exercise its planning function: *R (on the application of Trashorfield Ltd)* v *Bristol City Council*

[2014] EWHC 757 (and the various authorities quoted at paragraph 13 of that decision).

(11) It is not necessary for a decision-taker, or planning officer in a report, to refer to each and every line of evidence or objection and give his detailed views upon it. If he should fail to deal in detail with any particular line of evidence, it does not follow that he has overlooked or ignored it. A report to committee and its decision must be regarded as a whole. In the absence of contrary evidence, it is a reasonable inference that members of a planning committee follow the reasoning of a report to it, particularly where a recommendation is adopted. The purpose of the officers' report is not to decide the issue, but to inform the members of relevant considerations, allowing for the fact that the intended recipients, already have substantial local and background knowledge and part of the officers' expert function in reporting to a committee is to assess how much information needs to be included in a report, in order to avoid over-burdening busy members with material and undermining their ability to read and digest it effectively. A Court should therefore focus upon the substance of the report, which should be read as a whole and in a common-sense manner, not legalistically. A Council cannot be criticised for following advice given unless it was so obviously erroneous, that the authority knew, or ought to have known, that it was acting irrationally: *R (Protectbath.org & Another)* v *Bath and North East Somerset Council* [2015] EWHC 537 (Admin) at paras 3 – 5).

Submissions on behalf of the petitioners

[37] The petitioners' Greenspace challenge is predicated upon legal principle (5) and their *vires* argument is predicated on legal principle (7). Mr Sutherland's primary submission was that there had been a material change in circumstances between the 2013 Resolution and the Decision (in January 2017) to grant planning permission in principle. In short, it is argued that Plan 1 annexed to the Greenspace Agreement and the plan annexed to the Pitches Agreement do not reflect the plans that were put before the Committee. Taken together, the greenspace excluded from development by the Pitches Agreement and the Greenspace Agreement does not include all of the greenspace designation within the boundary of the Application site. Amongst other things, it does not include the open parkland immediately in front of the Listed Building, which is within the curtilage of a Grade B listed building. Consequently, that area of greenspace is not protected from development. These areas were clearly referenced in the supporting plans submitted with the planning application as being green space, and, he submitted, they are designated and included as greenspace in City Plan 2 and Campus Plan 2. The Application should have been referred back to the Committee to determine in accordance with the development plan and the material conditions as they existed as at January 2017. The Council's failure to do so meant that there was a failure to take into account a material consideration. They took into account an irrelevant consideration. It cannot be said that the Committee would have reached the same decision, hence reduction of the Decision was sought.

Matters relied on an illustrating the green space to be protected as at the 2013 Resolution

[38] Mr Sutherland developed his submissions under reference to a number of documents. He began by referring to two plans: the first was the plan (No 6/6 of process)

which showed the proposed area of development outlined in red ("the Application Plan") and the second was the plan (produced at No 6/71 of process) with the indicative, but not binding, layout of the proposed development ("the Illustrative Plan"). The Listed Building was identified as plot 11 on the Illustrative Plan. He referred to the West DPP Map, noting that Area 1 was green (up to the physical face of the eastern elevation of the Listed Building) and that it accorded with DPP DEV 11 of the development plan. This was critical.

[39] Mr Sutherland next noted the references in City Plan 2 to the Campus Plans (at paras 2.23ff and 8.21). His point was that Campus Plan 2 informed City Plan 2. Turning to Campus Plan 2, this had been the product of close consultation with the Council and consultation with the petitioners. He made extensive reference to the following passages of Campus Plan 2 (which I summarise but need not quote in full):

1) Chapter 1(Introduction): paragraphs 1.1.1 to 1.1.14 (background to Campus Plan 1 and 2), 1.2.1 to 1.2.8 (scope and purpose of Campus Plan 2, to promote the site for residential land use in principle); 1.2.9 (Campus Plan 2 is a material consideration which "sits alongside and supports" the development plan); 1.2.10 (given its purpose, the illustrations are not intended to present a "fixed masterplan"); 1.2.11 (protection of the "strategic view" of the Listed Building), and 1.4;

2) Chapter 2 (The Existing Campus): paragraphs 2.1.3, to 2.1.5 (site location); 2.2.1 to 2.2.4 (site on a plateau, falling away to the east, forming an attractive setting for the Listed Building); 2.3.5 to 2.3.6 (the Listed Building as a "grand building" whose front elevation "is prominent from the east"); 2.4.1 to 2.4.7 (open space, and landscape, noting that there was a "large open lawn"

directly in front of" the Listed Building and which forms "a key part of the setting of the building");

3) Chapter 3 (Policy Context): 3.3.3 (noting that the finalised draft City Plan 2 refers to Campus Plan), and 3.3.7 (quoting the terms of DEV 2 and DEV 11);

4) Chapter 5 (Transportation etc): paragraphs 5.2.1 to 5.2.6 (access) and 5.3.1 to 5.3.8 (Transport assessment summary);

5) Chapter 6 (Open Space and Landscape): paragraphs 6.1.1 to 6.2.4 (introduction and the intention to protect and improve existing open and green space);

6) Chapter 9 (Campus Plan Development Framework): paragraphs 9.2.2 (open spaces described) and 9.2.5 (the open parkland in front of the Listed Building not to be developed); and 9.2.10 and 9.2.11 and associated plans (recording open space on front of the Listed Building).

7) Chapter 8 (Consultations): paragraphs 8.1.1 to 8.1.4 (describing a community consultation exercise; and 8.2.1 to 8.2.10 (noting that the Council and community councillors were among the consultees);

The principal points Mr Sutherland drew from this were the references to the DEV 11 policies; that this set out a strong presumption for retention and protection of all green spaces identified, including the lawn in front of the Listed Building (his emphasis); and finally, that this was all in the mind of the Committee at the time of the 2013 Resolution. Any proposal to develop the green space shown, including Area 1, would require careful consideration by the Committee.

The Report

[40] Mr Sutherland next referred to the Report. I have set out the key passages above (at paras [21] to [32]). He stressed the observation in the proposal section (quoted at para [26], above) that the open space was to be left undeveloped and the fact that the illustrative plan showed no buildings on any green space. These features demonstrated a respect for DEV 11. This was, he argued, advice to the Committee that all of the remaining unbuilt ground was to be retained as green space. Mr Sutherland's ancillary submission was that there must be a condition which is effective to preclude any form of development on any green space or a section 75 agreement. He submitted that the planning authority has already determined this as a matter of principle.

[41] In response to a question from the Court that the final part of this paragraph (the passage in bold in the second para quoted at para [26] above) was suggestive that the Council was in fact reserving control to deal with these matters later (including the precise layout of the buildings on the site), and that all that had been granted was a decision in principle for residential development, Mr Sutherland's position was that this was not the case. This led to his *vires* argument. There was no express condition that completely excluded development, in the sense of development outwith the grant of planning permission in principle. The reserved conditions or section 75 Agreements could not, he submitted, be used to exclude development altogether. See legal principle (7) at paragraph [36], above. He contended that it was essential that there be express provision for a condition or a section 75 agreement to exclude development on greenspace. In the absence of that, it was, he argued, impermissible to use other conditions or a section 75 agreement to exclude development, because this had already been granted in the planning permission in principle. The section 75 Agreements do not protect DEV 11 and the other conditions could not be used to modify or revoke the planning

permission in principle granted or to ensure protection of any area covered by DEV 11: see legal principle (7), at paragraph [36] above.

[42] From this passage of the assessment in the Report (in the last paragraph at the foot of page 7 set out at the end of para [25], above), Mr Sutherland argued that the Committee would have taken this as an assurance that the prospect of development on green space would have been prevented. This was the basis on which the Committee were minded to make the 2013 Resolution, subject to a section 75 agreement.

[43] This was further reinforced by the assessment of the Application against Policy ENV 1 (at the foot of page 9, set out in para [26], above). Notwithstanding the last sentence in this passage (see the second para of that passage), that "a condition attached to any approval can ensure that future applications for MSC do not show any development on greenspace", Mr Sutherland's position is that there is no such condition. Accordingly, the Council were not entitled to redraw the green space boundary in the way that they have in the Greenspace Agreement. Rather, in doing so, the planning officer was obliged to return the Application to Committee for reconsideration.

Matters relied on as constituting material changes or considerations since the 2013 Resolution

[44] The first document Mr Sutherland turned to in this chapter of his submissions was the Greenspace Agreement. The reference in recital six to "appropriate development" was problematic, because there was no discussion in 2013 as to what was appropriate development. In his submission, it was clear in 2013, that <u>all</u> green space required to be protected. Clause 3 confirmed the intention that no green space be built upon. The problem was the white rectangle in Plan 1 of the Greenspace Agreement, immediately to the east of the Listed Building (ie about one-half of Areas 1), and which was not coloured green or

designated as green space. This, Mr Sutherland submitted, was a material change of circumstance from when the Committee had considered matters in 2013. The landscape area in front of the Listed Building was not being protected. It was not excluded from development.

[45] Furthermore, he argued that it was not legitimate to rely on Planning Advice Notice 65: Planning and Open Space ("PAN 65"), as the Council do in their answers, because this was not referred to in the Report and so was not in the mind of the Committee at the time of the 2013 resolution. It does not feature in the Greenspace Agreement. If the Council now argue that the Glasgow OSM governs green space, that was not stipulated in the Greenspace Agreement. In 2013, the Committee addressed DEV 11 and green space. There was no consideration, then, of PAN 65 or the Glasgow OSM. There was no reference in 2013 to an "appropriate" amount of development. All of the land designated as green space was to be protected. Accordingly, this was, he submitted, an inappropriate use of a section 75 agreement. The 2013 Resolution proceeded on the basis that the intention had been to protect all green space in the site; not an "appropriate" amount of green space.

[46] In relation to City Plan 2, the West DPP Map and the Glasgow OSM, while there was no green space designation for Area 1, the key issue Mr Sutherland identified is whether Area 1 nonetheless had protection under green space designation. Mr Sutherland contended that it did. Mr Sutherland submitted that the Glasgow OSM formed only part of the Council's protection of green space. It had a role to play and its purpose was in part to apply policy protection. However, it could not cut across DEV 11. Just because an area is shown green within DEV 11 but not given a sub-category of open space designation for the purposes of the Glasgow OSM, he submitted this did not mean that it was no longer open space or no longer to be protected as such. In effect, he argued that the green designation of

Area 1 in the West DPP Map subsisted, notwithstanding the omission of any particular open spaces designation on the Glasgow OSM.

[47] The Report did not suggest that there could be a material redrawing of the boundaries of the open space, as the Greenspace Agreement purports to do. If that is what was intended, the Report lacked clarity to convey that. The Committee would not have taken that from a reading of the Report. While there might be a refinement of boundaries, there could not be an actual redrawing, that is by removing the rectangular areas of lawn comprising a sizable portion of Area 1, and removing the intended green space policy protection. This cut across Campus Plan 2.

[48] Alternatively, if the Council had carried out an open spaces audit after 2013, this was a material consideration but (if this were so) there was nothing to indicate that the Committee were aware of this in 2017. There was a strong presumption in favour of retaining green space. The area in front of the Listed Building (ie Area 1) had been singled out in Campus Plan 2 as a key landscape area. If the Committee had been aware that there was a real possibility that this area might not be protected, it might have required this to be done in a section 75 agreement.

[49] In relation to the *vires* argument, there were no conditions attached to the planning permission in principle capable of entirely excluding development on green space. In the absence of an express condition, if the Council tried to use a condition to do so, this would amount to an impermissible revocation or modification of the planning permission granted. The logic of this submission appeared to be that planning permission in principle had been granted. That permitted development of the site and no aspect of this could be eroded or impermissibly taken away by a condition.

The Transport and the Traffic challenges

[50] In terms of the transport and traffic grounds of challenge, the relevant policies and passages of the Report are quoted in statements 17 and 18 of the Petition, which state:

> "17. That the Application was assessed against Policy TRANS 2 Development Locational Requirements of City Plan 2 (Report, page 5). Policy TRANS 2 seeks to ensure that new housing developments are well integrated into public transport, walking and cycling networks. Policy TRANS 2 provides that '*where travel generation is significant, and the required accessibility is not available, then public transport enhancement is likely to be necessary in order for the proposal to progress.*' (Report, page 8; TRANS 2) The Report noted that '*the location of much of the Jordanhill Campus means that much of the site area which is proposed to be redeveloped is considered to have below base acceptability which means that it does not meet the expected accessibility levels for new development*.' Base acceptability is defined in Development Guide TRANS 3 Public Transport Accessibility Zones as being within 400 metres of a bus service which runs 6 or more times an hour at peak times. The Report took account of the University's Transport Assessment dated 5 April 2011 ('the 2011 Transport Assessment') and illustrative layout, which were lodged with the Application. The 2011 Transport Assessment highlighted the importance of the First Glasgow 44/44A bus services to the accessibility of the development (paras 3.11 to 3.14). The Report considered that '*it would be disproportionate to require the applicants to fund diverting the existing bus service to enter the site*' and concluded that '*the failure to achieve base accessibility for the full site as described above is not so significant an issue that it would warrant resisting the proposal*.' (Report, page 9)
>
> ***Traffic impact***
>
> 18. The impact of the Development on the local road network, including traffic safety and congestion, was a material consideration in the determination of the Application. It was assessed in the 2011 Transport Assessment, and considered by the respondent's Transport Planning officers in their consultation response to the Application dated 21 February 2012. The 2011 Transport Assessment concluded that the proposed development could be accommodated within the existing road network with no significant detrimental impact on the existing road users. However, the results of the Southbrae Drive/Westbrae Drive priority junction assessment indicated that this junction experiences capacity problems during the Weekday AM Peak period irrespective of the addition of development generated traffic. To mitigate against the impact of traffic from the Development, the 2011 Transport Assessment recommended upgrading the junction to provide traffic signals incorporating widening on the eastbound approach and pedestrian crossing facilities. It identified a 'trigger' point of 174 residential units for the introduction of this new infrastructure taking into account the level of traffic at that time. The Transport Planning Committee confirmed that it was satisfied that delivery of the new infrastructure could be

delayed until the construction of the 174th dwelling. The Decision included a condition (Condition 4) requiring the approval of plans prior to commencement of work for the signalisation of the Southbrae Drive/Westbrae Drive junction to be installed after the construction of the 174th dwelling".

Mr Sutherland was content to rest on his written submissions in respect of these two grounds.

These were as follows:-

"11.2. **Traffic impact:** The 2011 Transport Assessment was based on traffic surveys carried out in 2007 and 2010 (paras 4.2 and 4.5). There has been a significant increase in traffic on Westbrae Drive during the Weekday PM Peak period routing through the priority Southbrae Drive/Westbrae Drive junction (reference is made to the 2017 Transport Assessment, paras 5.1 to 5.4 and 5.9). The increased traffic will have a material impact on the junction. The Respondent considered it necessary to impose a condition requiring signalisation of the junction after the construction of the 174th dwelling to mitigate against traffic impact. The 2017 Traffic Impact Assessment states that signalisation is anticipated to be required after the construction of 50 to 100 units (para 5.13). Having regard to the significant increase in traffic at the junction, the Respondent's Planning Committee should have been given the opportunity to reconsider the Application and whether or not the proposed signalisation works will continue to provide the necessary capacity, or whether Condition 4 should have been amended to require the provision of the signalisation infrastructure following the completion of a reduced number of dwellings (as is accepted by the 2017 Transport Assessment). The Respondent based its Decision on incorrect factual information and failed to take into account relevant information. The Decision has established the principle of development up to 174 units without the requirement for the signalisation of the Southbrae Drive/Westbrae Drive junction. The Respondent cannot use the approval of conditions attached to the Decision as a means of revoking or modifying that permission.

11.3. **Public transport provision:** There have been material changes to the bus network since the 2011 Transport Assessment was undertaken. The Development is not substantially less accessible and significantly further below the required baseline accessibility required by TRANS 2 and DG/TRANS3 (reference is made to the Transport Assessment 2017, paras 2.10 to 2.15). This should have been considered by the Planning Committee prior to permission being granted. In particular, and in terms of TRANS 2, the Planning Committee ought to have reconsidered the requirement for public transport enhancement for the proposal to be able to progress.

12. The above changes in circumstance were individually and cumulatively material. The Respondent's Planning Committee should have reconsidered the Application having had regard to them. They were material considerations, which the Respondent's Planning Committee should have taken into account before permission was granted. There is a real possibility

> the Respondent would not have granted permission in the terms it did if it had taken them into account."

Submissions on behalf of the Council and the interested parties

[51] Generally (but not surprisingly), there was a high degree of overlap in the submissions of the respondents (the Council) and two interested parties (the developer and the University, respectively). Other than in relation to the plea of no title to sue (or no standing), advanced by the first interested party (the developer), and from which the University distanced themselves, they were content to adopt each other's submission. I therefore do not record each set of submissions, but simply record the points they made collectively against the petitioners' challenge.

[52] Comment was made on the scope of the petitioners' representations to the Council. The site was clearly identified in the City Plan 2 and in Campus Plan 2 as suitable for residential development. In their letter of objection prior to the 2013 Resolution, the petitioners stated that they and local opinion agreed that a housing development on the site was the preferred option for redevelopment. Their letter raised issues *inter alia* in relation to the preservation and control and use of the playing fields and traffic issues at the Junction, but they did not raise any concerns about the land around the Listed Building or in relation to ecological issues or public transport provision.

[53] The starting point was that the Application was only an application for planning permission in principle. The Decision relates to the grant of planning permission in principle and no development can take place on the site until the Council have considered the detail contained in any proposed developers' application of permission in relation to approval of matters subject to condition ("MSC") and granted permission in relation to it. Most of the issues raised in relation to the petitioners' grounds of challenge will be subject to

further detailed consideration by the Council in relation to any application for approval of MSC.

[54] In relation to the Greenspace challenge, the petitioners complain that the Report explained that the Application could only be supported in policy terms if development on green space was prevented by conditions or a section 75 Agreement and that Plan 1 does not cover all the area of green space covered by the development plan policies and thus, it is said, allows development on green space that should be protected. In particular, they complain that the Greenspace Agreement does not prevent development on land to the north and east of the Listed Building.

[55] The Council and interested parties dispute this reading of the Report. In fact, the Report identified that "a legal agreement is required in relation to preventing any future development on the green space as defined in City Plan 2 (subject to detailed analysis of the designation boundaries)" (emphasis added). On a proper construction of the relevant policies in City Plan 2, the Greenspace Agreement does include all of the area covered by the protection afforded in DEV 11 (Green Space) and Policy ENV1 (Open Space Protection). It was shown that the Policy ENV1 states that protection is accorded to the relevant categories of open space identified in detail in the Glasgow OSM, prepared in terms of the PAN 65. The Greenspace Agreement covers all of the land designated in the Glasgow OSM.

The West DPP Map

[56] It was noted that the petitioners place significant weight on the fact that the Areas are both marked green on the West DPP Map. However, this was ill-founded, as Mr Thomson explained. The structure of City Plan 2 moves from the general to the particular, as is reflected in the policies and detail as one moves, for example, from part 3

(applicable to applications for planning permission in principle) to the most detailed level in part 4. Part 3 is the appropriate level against which the Application was assessed. The West DPP Map has to be understood in that context. It is at the level when in broad terms the 12 DPPs are allocated to land use as shown on these maps. Only two policies (residential and green space) covered the part of West DPP Map showing the site.

[57] If the area outside the Listed Building (ie Area 1) is not green it has to be another colour. But, because no other use was appropriate (eg mixed development or residential) then, for the purposes of this level of the development plan (which was one of generality not detail) green was the most appropriate colour from among the menu of the only two possible land uses. The use of green therefore was not a mistake. But one also had to delve deeper to get the appropriate designated land use. This was the function of part 3 of City Plan 2 and which provided the tools for consideration of applications for planning permission in principle. For the purposes of part 3, the site was designated as part residential and part green space. So these policies from part 3 were applied to the site.

[58] For the purposes of the Greenspace challenge, the relevant policy was Policy ENV 1. (For the petitioners' other challenges, it would be "Trans 2".) Policy ENV 1 was brought in, by reference in the definition, the Glasgow OSM. This map provided the appropriate detail of the 20 or more categories of specific green or open space uses that were all protected under Policy ENV 1. When one looked at the Glasgow OSM relating to the site, Area 1 was not covered by any of these uses. It was left uncoloured. Accordingly, reading the two maps together, Area 1 was not subject to a greenspace designation under Policy ENV 1 as at 2013.

[59] Accordingly, he submitted that, insofar as the petitioners' Greenspace challenge was premised on Area 1 having a green space designation, it proceeds on an error because this was not in fact the designation in the development plan, as just explained.

Campus Plan 2

[60] In relation to the petitioners' reliance on Campus Plan 2, Mr Thomson explained that Campus Plans 1 and 2 (dated 2007 and 2008, respectively) predated the adoption of City Plan 2.

[61] At the time Campus Plans 1 and 2 were prepared, there was an emerging opportunity for redevelopment of the site. This was not anticipated by, and therefore not reflected in, the development plan at that time (ie in City Plan 2's predecessor, City Plan 1). Accordingly, the Council adopted the Campus Plans as supplementary guidance. In other words, the Campus Plans were material considerations in respect of the site before the land use designation of the site was changed to residential (as it was upon the adoption of City Plan 2). At the point in time that the City Plan 1 was reaching the end of its lifespan, the Campus Plans were relevant and material considerations in respect of any proposed development of the site. In other words, if an application for residential development of the site had been brought forward at that time (ie before City Plan 2 was adopted), then it would be contrary to the development plan but the Campus Plans would be material conditions that might justify a departure from the development plan. However, once City Plan 2 was adopted – which reflected the change of use promoted by the Campus Plans, then the significance of the Campus Plans fell away. The petitioners placed too much reliance on the Campus Plans. The Council must apply the development plan to the Application. This meant, for the purposes of the Greenspace challenge, Policy ENV 1 of City Plan 2 and the Glasgow OSM as governing the land use of Area 1.

[62] In any event, as indicated in the Report, further consideration of the exact boundary of the green space within the site was undertaken by the Council and the area covered by the Greenspace Agreement was identified as the appropriate area which should be kept free from any obstruction preventing its use as green space. The Greenspace Agreement provides for the areas identified as the green space areas to be kept open and unbuilt on and kept free of obstructions. Reference was made to Clause 1, 3.1 and Plan 1 of the Greenspace Agreement. The Greenspace Agreement and Plan 1 were prepared after the Council had carried out an analysis of the site. There was no substance to the petitioners' *vires* argument. They were also prepared in the knowledge that the conditions attached to the planning permission in principle allowed the Council to control the development of the site. The grant of planning permission in principle was subject to conditions including conditions to control the detailed design layout and phasing of the development. Reference is made to conditions 2, 4, 7, 8 and 14.

[63] In relation to the *vires* argument about the use of conditions generally, reference was made to Scottish Government Policy on conditions and section 75 agreements contained in circular 7/1998, Use of Conditions in Planning Permissions ("the 1998 Circular") and circular 3/2012, Planning Obligations and Good Neighbour Agreements ("the 2012 Circular"). The 1998 Circular provides that "... the planning authority should normally seek to regulate a development by a condition rather than through an agreement" (Annex paragraph 11). The 2012 Circular sets out that

> "Planning obligations have a limited, but useful, role to play in the development management process where they can be used to overcome obstacles to the grant of planning permission ... Where a planning permission cannot be granted without some restriction or regulation, and before deciding to seek a planning obligation, the planning authority should consider the following options in sequence: i) The use of a planning condition ... ii) The use of an alternative legal agreement ... iii) The use of a planning obligation ...." (paragraphs 2 and 15 - see also paragraph 24).

[64] Mindful of that guidance the Report recommended the imposition of 14 conditions. Reference was made to conditions 2, 3, 4, 6, 7, 8, 9, and 14 and the reasons for the conditions. The Decision imposed similar conditions: see conditions 2, 3, 4, 6, 7, 8, 9 and 14.

[65] Turning to the conditions in the planning permission in principle, condition 2 provides that development shall not begin until an application for landscaping of the site has been approved by the planning authority. Landscaping is defined in the condition as meaning "the treatment of land (other than buildings) for the purpose of enhancing or protecting the amenities of the site and the area in which it is situated and includes screening by fences, walls or other means, the planting of trees, hedges, shrubs or grass, the formation of banks, terraces or other earthworks, the laying out or provision of gardens, courts or squares, water features, sculpture or public art and the provision of other amenity features". Condition 2 also provides that development shall not be begun until an application for the layout of the site and siting of buildings and other structures has been approved by the planning authority. The conditions attached to the permission therefore allow the Council to retain control over the detailed layout of the development and the siting of buildings.

[66] Once the decision on the merits had been taken by the Committee, the conclusion of such agreements and the issuing of permission were matters to be dealt with by its officials. That is a normal procedure for a planning authority. The Committee was also aware that the applicant would require to submit a further application in relation to detailed matters subject to condition before commencing development. The petitioners' Greenspace challenge failed. Whether there is a change in circumstances that is of sufficient importance to require that an application be reconsidered by the Council's planning Committee (ie whether the *Leckhampton* criteria are engaged), is a matter of planning judgment exclusively

for the decision maker and not for review by the Courts. There is no requirement for applications to be referred back to the planning committee when circumstances have changed following the passing of a resolution if it is clear that the Committee would have reached the same conclusion if matters had been referred back to it: *Kides* and *Leckhampton*. In the circumstances here, there was no change of circumstance of sufficient materiality to require the Application to be reconsidered by the Committee. The Report correctly identified that "the full detail of impact will only be considered once an MSC application is submitted". The Council was entitled to conclude that there was no material change of circumstances which would justify referring the matter back to Committee, or for it to refuse permission in principle as a result of the detailed consideration of the area to be covered by the Pitches and Greenspace Agreements.

[67] Having regard to the foregoing and the terms of the Report, the Committee would be aware of the relevant key policies and text of City Plan 2. The key policies are DEV2, DEV 11, Policy ENV1 and TRANS 2. The Committee would be aware that Policy ENV1 provides that, "[p]rotection is accorded to the following categories of open space as identified on the Council's Glasgow Open Space Map". The Committee would also be aware of the relevant sections of Campus Plan 2 (contained in Chapters 6 and 9 and pages 85 and 87), the Transport Planner's Assessment and the 2011 Transport Assessment (at paras 5.18 and 6.16 to 6.19).

[68] Mr Burnett explained that after the 2013 Resolution, the Council put forward proposals for the section 75 agreements. These proposals recognised the detailed analysis of the designation boundaries which was undertaken for the Council's Glasgow OSM and further analysis. The Council had entered into the two section 75 Agreements in relation to the site. The Greenspace Agreement provided for the green space therein defined to be kept

open and unbuilt on and kept free of obstructions preventing use of the green space areas as open space. Reference was made to clauses 1, 3.1 and 3.2. Once the section 75 Agreements were completed, the Council's appointed officer could then issue the Decision. The appointed officer who issued the Decision would be aware of the fact that he was issuing a planning permission in principle for development whereby the Council would retain control of the development through the conditions attached and the process for approval of MSC. He would be aware that no party had come forward with relevant arguments that the Decision should not be issued. He would be aware that the Council had entered into the two section 75 Agreements controlling the extent of development.

[69] In any event, having regard to the fact that the David Stow Building is a listed building and the nature of the conditions attached to the permission granted, there is no realistic possibility that the developer be allowed to develop on the lawn or open parkland in front of the Listed Building in a way that adversely effects the setting of that building. There would be no practical point in the Court quashing the Decision on this ground.

[70] In relation to the petitioners' reliance on the Application, Mr Thomson submitted that it had to be borne in mind that this was only an application for planning permission in principle. The description was simply of the land to which the application related, and which was very general. The Application Plan is simply a location plan used to indicate the extent of the proposed development site, not what was to be developed on it. The reference to "residential" development just means houses. It says nothing about their number, density or layout. All of those features will be regulated by condition 2. If the petitioners' argument were correct, that once permission for development was granted it could not be trenched upon by conditions, then the developer could build 20-storey buildings, because (in Mr Sutherland's phrase) "that couldn't be taken away from him". But that patently was

not the case. There is no limitation on the scope of condition 2, so long as it says what it is doing in a *Newbury* sense. Only the reserved matters can be the subject of approval. Everything about the houses is covered by that. To test this, consider questions about the height and type of housing. This was all covered by reserved matters. Look at the reasons for Condition 2. Having regard to the power in section 59 of the Act, and the further details in regulations 12 and 28 of the Regulations, there was nothing *ultra vires* in controlling the rectangle of land comprising Area 1 outside the Listed Building by a condition, namely under condition 2.

[71] The other strand of the petitioners' argument contained the tacit assumption that a section 75 agreement affords greater protection. That was not correct. A section 75 agreement only binds the parties to it (typically, the land owner, developer and the local authority). It does not confer rights on third parties to enforce it. Only the Council, as the "creditor" under a section 75 agreement, can enforce it. So a section 75 agreement does not, *pace* Mr Sutherland's argument, afford greater protection.

[72] Accordingly, the petitioners' Greenspace challenge is misguided and fails (i) to recognise properly the distinction between a planning permission in principle (as defined in Section 59 of the 1997 Act and the process in the Regulations) and a planning permission, (ii) fails to note the control that the Council retains over the development of the site in accordance with the planning permission in principle, and (iii) fails properly to understand the basis for the Greenspace Agreement.

[73] It is for the officer who issues the Decision to apply his judgment on whether to remit matters back to the Committee. In the circumstances that judgment cannot be regarded as unreasonable.

Public transport provision

[74] Reference was made to the Transport Assessment dated 2 March 2017 ("the 2017 TA") which had been prepared for the purposes of the application for approval of MSC. Reference was made to paragraphs 2.10 to 2.15 and 3.13 to 3.17 of the 2017 TA. In particular, these paragraphs identify:

1) "There is a reasonable level of bus services operating in the vicinity of the Jordanhill Campus that provides a frequent link to Glasgow City Centre and beyond" (para 2.11);
2) "The First Glasgow X4 bus service ... provides the development with a highly accessible and direct bus link to Glasgow City Centre ..." (para 3.13);
3) "It is recognised that the X4 is not as frequent as the First Glasgow 4 service that it replaced. However, the closure of Strathclyde University's Faculty of Education will have resulted in a reduction in demand particularly by students which may have contributed to the introduction of a reduced frequency service" (para 3.15);
4) "It is anticipated that the proposed development will potentially replace some of the lost demand and therefore provide scope for future discussions with First Glasgow regarding the reinstatement of a more frequent service" (para 3.16).

[75] The issue of public transport provision was identified in the Report. The change in the timetable of buses following the closure of the college could not be considered a material change in the material considerations. In any event, it is a matter of planning judgment for the officer issuing the Decision whether there has been a material change in circumstances. The officer was in the circumstances entitled to issue the Decision and not remit to the Committee.

[76] The 2017 TA identifies that "There is a reasonable level of bus service operating in the vicinity of the Jordanhill Campus that provides a frequent link to Glasgow City Centre and beyond" (paragraph 2.11).

[77] The petitioners' argument is in essence that the reduction in bus services in the vicinity of the site is a material change in circumstance that arose after the Committee meeting and before the Decision, and is of such significance that the matter should have been referred back to the Committee to reconsider its decision. In reality there has been no material change in the material considerations which would require the respondent to reconsider the resolution. The Report had considered the issue of bus provision. It was taken into account in the Decision. The Report noted *inter alia* that "...it would be difficult to justify resisting the redevelopment of a brownfield site on the basis that residents need to walk for an extra 100-200 metres to get a bus service". That was a conclusion that the author of the Report and the Committee was entitled to reach. It is not one that would have been likely to have been altered given the change in bus provision in the interim period. The petitioners require to demonstrate that had the change in bus provision been known about by the Committee, that it was of sufficient materiality that it might have led to tipping the balance and the Committee reaching a different decision. There is no proper basis on which to reach such a conclusion. The issue had been considered by the Committee and it had made a planning judgment in relation to it when reaching its overall view on the acceptability of the proposal in planning terms. The Committee were aware that there were concerns about the distance to bus stops and the provision of buses in the vicinity and decided that these did not outweigh the other factors in favour of the development. It was not a key determining issue. It was a planning judgment and would not have been affected by any minor change in the nature of the bus provision.

[78] In any event, the 2017 TA post-dates the Decision. It would not have been a reason to refer the matter back to Committee. There is no real possibility that the Committee would have reached a different decision if the changes in the availability of buses following the closure of the college were presented to it to reconsider the Application. It would not have been a reason to refer the matter back to the Committee.

[79] The Report identifies traffic issues and in particular the Junction identified by the petitioners as a potential problem. The Council's transport planning department response dated 21 February 2012 concluded that signalisation of the Junction could be delayed until the construction of the 174th dwelling on the Development site. That is a conclusion that the respondent was entitled to reach. Reference is also made to paragraphs 5.18, and 6.145 to 6.19 of the 2011 Transport Assessment. When the respondent took the Decision, it had regard to the transport assessment before it. The respondent correctly considered that it had sufficient information on which to decide the Application of planning permission in principle on the basis of that transport assessment. Condition 4 attached to the planning permission in principle requires detailed proposals for the signalisation of the Southbrae Drive/Westland Drive junction.

[80] In any event the conditions, including condition 2 (subparagraphs 2 and 9), and conditions 4 and 14, allow the respondents to control the predicted impact on traffic of the development. The 2017 TA concludes that development can be accommodated on the site. In the circumstances, there was no material change in circumstance that would have led to a different decision being taken if the matter were reconsidered by the respondents' Committee. The Decision would not have been altered by the contents of the 2017 TA. In addition, the applicants are addressing the issue of the Junction as part of their application of approval of matters subject to condition. There would be no practical point in quashing

the Decision on the basis of this alleged issue.

Conclusion

[81] The petitioners have failed to show any failure to take into account a material consideration or placing of weight on any irrelevant consideration or any other error of law or breach of statutory duty on the part of the respondent in relation any of the four issues they raise and, accordingly, the orders sought in the Petition should be refused.

Discretion

[82] Separately, even if the Council has made an error of law (which it denied), the matters which the petitioners allege were left out of account or should have been reconsidered by the Committee would not have led to any different decision on the merits of the Application, and, in any event, these matters will be subject to sufficient scrutiny and control in the consideration of any application for the approval of MSC before any development can take place on the site. Therefore, in all the circumstances, the Court should in any event decline to exercise its discretion to quash the Decision.

[83] In all of these circumstances, the prayer of the petition should be refused. This was the common position of the Council and the interested parties. Only the developer moved its separate plea that the petitioners had no sufficient interest or standing.

Discussion

The Greenspace Challenge

[84] The factual premise underlying the Greenspace challenge is that all of the areas shown green on Campus Plan 2 or the other documentation submitted to the Council in 2011 in respect of the site (eg on the Application Plan or the Illustrative Plan) attracted the policy

protection of DEV 11 and Policy ENV 1. The Council and interested parties dispute this, relying on the Glasgow OSM in particular, as illustrating that the Areas did not have this protection. The petitioners' riposte is that it is not legitimate to look at the Glasgow OSM or PAN 65, as these documents were not referred to in the Report and so, it is argued, were not in the mind of the Committee at the time of the 2013 Resolution.

[85] I have already set out the terms of DEV 11, Policy ENV1 and the Glasgow OSM. I have also set out the different parts of City Plan 2, how these different parts interrelate and the level of detail appropriate to the different parts. I do not accept the petitioners' submission that it is impermissible to have regard to the Glasgow OSM. This is referred to expressly in the definitions in each of DEV 11 and Policy ENV 1: see paragraphs [18] and [19] above. That definition clearly identifies the map prepared in accordance with PAN 65 and it is the Glasgow OSM produced, and which was in force at the material time. Accordingly, and contrary to the petitioners' submissions, the Glasgow OSM was encompassed within the Report. This was entirely proper, as it formed part of the relevant planning context for consideration of the Application in respect of the site. In particular, the Glasgow OSM identified the extent of land on the site attracting the policy protection of ENV1.

[86] What of Mr Sutherlands' reliance on Campus Plan 2? Even considering this on its own terms, I am not persuaded that it was as definitive of the precise areas to be protected as open or green space as was implicit in Mr Sutherland's submissions. More importantly, Campus Plan 2 was not interpreted in that way by the author of the Report. As noted above, the Report describes Campus Plan 2 as setting out "broad principles" for the design and layout of the future development of the site. The "two key factors" extracted from Campus Plan 2 were the future retention of the sports pitches and public transport serving the

development. It need hardly be said, too, that the Illustrative Plan is just that, illustrative – not binding.

[87] Turning from the terms of Campus Plan 2 to consider its status, I accept Mr Thomson's explanation regarding the emergence of the Campus Plans and the evolution of City Plan 2 to reflect this. (In his reply, Mr Sutherland acknowledged this explanation and he also acknowledged that City Plan 2 prevails.) Mr Sutherland is correct, as acknowledged in the submissions of the other parties, that the Campus Plans informed City Plan 2. However, Mr Thomson is also correct that, once City Plan 2 was adopted, the Campus Plans fell away in importance. To the extent that City Plan 2 reflects the Campus Plans, then it can be said that the Campus Plans have informed City Plan 2, and resort to their terms might assist as an interpretative tool. However, to the extent that City Plan 2 does not reflect the ambitions in the Campus Plans, that difference must be assumed to be a considered one. In that context, it is impermissible to resort to the Campus Plans to justify a certain state of affairs (eg what land on the site is to enjoy protection under Policy ENV 1) which is contradicted by, or not reflected in, City Plan 2 itself. In the event of such a discrepancy, City Plan 2, as the development plan, must prevail. (I did not understand Mr Sutherland ultimately to dispute this.) And, as already noted, the relative policies in City Plan 2 incorporate the Glasgow OSM by reference.

[88] I am fortified in this view by the terms of the Report concerning this issue (set out at paras [25] to [26], above) and its discussion of the extent of green space which justified protection in the form of section 75 Agreements against future development (set out in para [24], above). Under reference to the Illustrative Plan and the University's intention that they "do not propose to develop any greenspace within the site" (a passage the petitioners found on strongly), the Report observes that the Application is merely governing the

principle of development and there is "no detailed layout which can be used to control the extent of development". That language is wholly inconsistent with a reading of the Report (and by implication, the mind of the Committee in approving it) as acknowledging that the green spaces shown on an illustrative plan are in fact definitive, binding and unchangeable at any later stage in the process of bringing the proposed development to fruition. That submission cannot bear up upon a reasonable reading of the Report. The next sentence in this passage (at para [24]), of using conditions to ensure that future applications for MSC do not show any development on green space, further reinforces that reading. It was manifestly the position in the Report that the extent of the development as it may impact on green space would be subject to, and controlled by, conditions (or, as it happens, the section 75 Agreements). It necessarily follows that the Report did not proceed on the premise that the 2013 Resolution was conclusive as to the extent and location of green space attracting this protection. This understanding of matters is further supported by the anticipated use of a section 75 agreement. See the passage set out in paragraph [24], above.

[89] While the petitioners rely on the language there underlined, regarding "prevention" of development on green space, it is notable that the Report unequivocally provides for the green space to be protected by a section 75 agreement, and the areas to be protected are defined by reference to "City Plan 2", not, significantly in my view, by reference to the Campus Plans or any indicative plans lodged by the University. (It would be inconsistent with planning law and practice to use an indicative plan lodged in support of an application for planning permission in principle, as conclusive of the layout, design or landscaping of a development, or to do so such as to preclude consideration or control of those matters at a later, more appropriate stage.) The other, critical, point to note from this passage of the Report is the proviso that this is "subject to detailed analysis of the designation boundaries".

(The "designation" means the policy designation to protect green space from development.) That language necessarily undermines the petitioners' reliance on illustrative plans or expressions of intent as conclusive of the precise locations and boundaries of green and open space on the site. On a fair reading of the Report, this is not what the Report envisaged; rather, the reverse. In any event, the degree of fixity the petitioners contend for is inimical to the kind of application the Committee were considering, namely, one for planning permission in *principle*.

[90] In relation to the apparent conflict between the West DPP Plan (in which the Areas are coloured green) and the Glasgow OSM (in which the Areas have no policy protection), I accept the explanation tendered by Mr Thomson about the use of green for the Areas on the former plan, but the primacy of the latter. The conflict is more apparent than real. The West DPP Plan reflects DEV 11 whereas the Glasgow OSM reflects the more detailed Policy ENV 1. DEV 11 refers to Policy ENV 1. Policy ENV 1, contained in part 3 of City Plan 2, is the part with the appropriate level of detail corresponding to an application for planning permission in principle. Reading these policies together, Policy ENV 1 is the governing policy in respect of policy protection for open spaces. The areas attracting open space protection under ENV1, and their specified open space categories of use, are recorded on the Glasgow OSM. It follows that I do not accept the petitioners' contention that the green space protection indicated for Area 1 in the West DPP Map is definitive (or is to be preferred), despite the absence of such a designation in the Glasgow OSM. The Glasgow OSM is consistent with the terms of ENV 1; which is the relevant policy governing this issue at the relevant level of detail (ie consistent with the "layered format" of City Plan 2).

[91] Accordingly, the principal factual premise of the Greenspace challenge is not well-founded. The Report itself did not proceed on the basis that all green areas of green space

shown on indicative plans, including the Areas, would necessarily and in their precise layouts attract policy protection. Rather, the position in relation to the designation of the Areas as between the 2013 Resolution and the Decision is more one of continuity, than change. If that is correct, the *Leckhampton* criteria are not engaged. There was nothing that was "new"; and there would be no basis for remitting matters back to the Committee in respect of the Greenspace challenge. The petitioners' principal ground of challenge fails.

The Transport and Traffic challenges

[92] I accept the submissions on behalf of the Council and the interested parties in respect of the Transport challenge. In the first place, in the light of the observations in the Report, that the fact that residents would require to walk an extra 100 or 200 metres would not justify refusing the redevelopment of the site (see para [30]), it is clear that this was not a key determining issue. Secondly, the assessment of the impact, if any, on the change in public transport provision involves a degree of planning judgment and is pre-eminently one for the Council. The Council has not been shown to have been *Wednesbury* unreasonable in its consideration of the material available to it at the time of the Decision. On the material presented, I do not accept that there has been a material change in the matters considered by the Council in 2013 and as at January 2017. This is borne out by the assessment of the 2017 TA (even assuming it was available to the Council at the time of the Decision). The changes in transport provision were not "new" material. In any event, it was not one that would "tip the balance to some extent, one way or the other" (*Leckhampton* at para 70(i)). In my view, the Council have not left a material consideration or relevant factor out of account. It has not been demonstrated that the *Leckhampton* criteria are engaged or would have been satisfied in respect of the Transport challenge.

[93] Given my determinations of the Greenspace and Transport challenges, I need say very little about the traffic impact issue. This was not offered as free-standing challenge, but relied on solely for cumulative impact with any other error found. As I have found no errors as alleged on the part of the Council, even if there were an issue about the assessment of traffic impact, this is not relevant or sufficient for the purposes of the remedies the petitioners seek.

The Leckhampton criteria

[94] Lest I am wrong on these matters, I accept the respondents' submissions that in any event the petitioners would not succeed in establishing the *Leckhampton* criteria. On the pursuers' hypothesis of fact as regards what was to be protected as green space (a hypothesis I have determined to be ill-founded), I nonetheless would not have accepted that, considered either individually or collectively, the "changes" in green space provision or in transport provision as between the 2013 Resolution and the Decision would have satisfied the third of the *Leckhampton* criteria, if applied in a commonsense manner (as enjoined by the courts to do: see, eg, *Bova v Highland Council I* 2013 SC 510 at para 57). (The common sense approach would, in my view, include the matters I refer to below (at para [98]), under the discussion of discretion.) In other words, it cannot be said that there is any real possibility that the Council would have reached a different conclusion (the test as expressed in *Bova*, at para 57) if the subject matter of the petitioners' challenges had been drawn to the attention of the Committee prior to the issue of the Decision. I am satisfied that the delegated officer would be satisfied that the Committee would reach the same decision (see condition (c) in *Leckhampton* at para 70) and that therefore, even on the hypothesis that the subject matter of

the petitioners' challenges constituted matters that were relevantly "new", there was no error in law in not remitting the Application back to the Committee.

The vires argument

[95] In the light of my determination of the Greenspace challenge, the petitioners' *vires* argument does not arise. The argument was that the Council could not use a condition to control development that had already been considered and determined in the grant of planning permission in principle, unless (as I understand it) the Council had at one and the same time included a condition expressly prohibiting development. It was argued that, in the absence of such a condition, the Council would be in breach of legal principle (7), and it would be impermissibly trenching upon the planning permission it had granted if it subsequently endeavoured to control green space issues via a condition or agreement. In my view, there is no merit in this argument. In the first place, I am not persuaded that, in order permissibly to control the matter of green and open space on the site, the Council required to have an express condition in the grant of the planning permission in principle expressly prohibiting any development on the Areas. I accept Mr Thomson's submission on this matter.

[96] The Report expressly states that the precise boundaries of the areas to attract the relevant policy protection in terms of City Plan 2 (ie the development plan) are to be determined at a later point. Accordingly, it has not considered and 'determined' that matter at the stage of the grant of planning permission in principle. The subsequent working out of the precise boundaries is not an impermissible modification of the permission already granted, much less a revocation, such as to contravene legal principle (7) (at para [36]),

above). It matters not, in my view, whether this control is effected by a section 75 Agreement (see para [24], above) or by a condition (see para [26], above).

Discretion

[97] Even if I am wrong and the impact of the 2013 Resolution was that the Areas (especially Area 1) were to be protected as green space and unbuilt upon (notwithstanding my conclusions regarding the relationship of the Campus Plans to City Plan 2, the proper interpretation of City Plan 2 and the relevance of the Glasgow OSM), I would have exercised the discretion available to me to refuse the Petition. It respectfully seems to me that the appropriate stage to address the petitioners' concerns is at the stage of consideration of the approval of MSC. One of the plans showing what was proposed in the rectangular part of Area 1 was, seemingly, to retain the semi-circular drive but to make provision for parking on either side thereof. Whether that assuages the petitioners' concerns or not, is not relevant to these proceedings but it is that kind of detail that can be addressed through the approval of MSC. Furthermore, I accept the force of the observation that as a listed building (and having regard to the extra protections listed buildings enjoy), it is highly unlikely that any development would be permitted in the curtilage of the Listed Building that would jeopardise its setting or its listed status.

The plea of no standing

[98] The point Mr Armstrong QC sought to make on behalf of the first interested party (the developers) is that the petitioners' representations in respect of the Application focused on the effect of traffic on the Junction, and on retention of the pitches and of the larger grassed area at the east of the site, not on the Areas. Given that there were conditions or

provision for section 75 agreements to address *these* issues, as Mr Armstrong put it, the petitioners got what they asked for. They could not now complain that the Council was proceeding via these mechanisms. It was also suggested that the petitioners have failed to aver any interest such as to afford them standing to bring these proceedings.

[99] I did not hear full argument on this issue. In the light of my determination of the merits, any comment is obiter. I am inclined to reject this argument having regard to the following factors: the status of the petitioners as the community council in whose area the site is situated; the fact that they made representations at an earlier stage in respect of the University's proposals for the site; that they were consultees at earlier stages (eg in relation to Campus Plan 2); that at least part of their representations were directed to broadly the same type of concern (eg the sports pitches), even if not specifically to the Area; and the fact that the material produced in support of the Application (eg the Illustrative Plan referred to by Mr Sutherland at para [38] above) did not trench upon the Areas such as to put them on notice at that time. I would also regard Mr Armstrong's submission as harking back to an unduly restrictive approach to title an interest reminiscent of what may, on occasion, have obtained pre- *AXA General Insurance Ltd* v *HMA* [2011] UKSC 46.

[100] It remains for me to thank Counsel for their careful and well-presented oral and written submissions, and their agents for the multiple volumes of well-ordered productions and authorities that had been helpfully marked in colour-coded passages corresponding to the parties founding these.

Decision

[101] The petitioners' challenges all fail and the petition falls to be refused. I will reserve meantime any question of expenses.