# City of Edinburgh Council v. Secretary of State for Scotland and Others [1997] UKHL 38; [1998] 1 All ER 174; [1997] 1 WLR 1447 (16th October, 1997)

**HOUSE OF LORDS**

Lord Browne-Wilkinson Lord Mackay of Clashfern Lord Steyn
Lord Hope of Craighead Lord Clyde

**OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE**

*CITY OF EDINBURGH COUNCIL*
*(RESPONDENTS)*
*v.*
*SECRETARY OF STATE FOR SCOTLAND*
*(APPELLANT)*
*AND OTHERS (RESPONDENTS)*
*(SCOTLAND)*
*CITY OF EDINBURGH COUNCIL*
*(RESPONDENTS)*
*v.*
*SECRETARY OF STATE FOR SCOTLAND*
*(RESPONDENT)*
*AND OTHERS (APPELLANTS)*
*(SCOTLAND)*

**ON 16 OCTOBER 1997**

**LORD BROWNE-WILKINSON**

My Lords,

I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend, Lord Clyde. For the reasons he gives I would make the order which he proposes.

**LORD MACKAY OF CLASHFERN**

My Lords,

I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend, Lord Clyde. For the reasons he has given I would also make the order which he proposes.

**LORD STEYN**

My Lords,

I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend Lord Clyde. For the reasons he has given I would also make the order which he proposes.

**LORD HOPE OF CRAIGHEAD**

My Lords,

I have had the advantage of reading in draft the speech which has been prepared by my noble and learned friend, Lord Clyde. I agree with it, and for the reasons which he gives I also would allow the appeal on the planning law issue and dismiss the appeal on the issue about listed building consent.

I should like however to add a few observations about the meaning and effect of section 18A of the Town and Country Planning (Scotland) Act 1972, and to say rather more about the listed building consent issue which has revealed some practical problems about the way buildings are listed for the purposes of the statute - as to which I am unable, with respect, to agree with the approach taken by the learned judges in the Second Division.

**The planning issue**

Section 18A of the Town and Country Planning (Scotland) Act of 1972, which was introduced by section 58 of the Planning and Compensation Act 1991, creates a presumption in favour of the development plan. That section has to be read together with section 26(1) of the Act of 1972. Under the previous law, prior to the introduction of section 18A into that Act, the presumption was in favour of development. The development plan, so far as material to the application, was something to which the planning authority had to have regard, along with other material considerations. The weight to be attached to it was a matter for the judgment of the planning authority. That judgment was to be exercised in the light of all the material considerations for and against the application for planning permission. It is not in doubt that the purpose of the amendment introduced by section 18A was to enhance the status, in this exercise of judgment, of the development plan.

It requires to be emphasised, however, that the matter is nevertheless still one of judgment, and that this judgment is to be exercised by the decision taker. The development plan does not, even with the benefit of section 18A, have absolute authority. The planning authority is not obliged, to adopt Lord Guest's words in *Simpson v. Edinburgh Corporation*, 1960 S.C. 313, 318, "slavishly to adhere to" it. It is at liberty to depart from the development plan if material considerations indicate otherwise. No doubt the enhanced status of the development plan will ensure that in most cases decisions about the control of development will be taken in accordance with what it has laid down. But some of its provisions may become outdated as national policies change, or circumstances may have occurred which show that they are no longer relevant. In such a case the decision where the balance lies between its provisions on the one hand and other material considerations on the other which favour the development, or which may provide more up to date guidance as to the tests which must be satisfied, will continue, as before, to be a matter for the planning authority.

The presumption which section 18A lays down is a statutory requirement. It has the force of law behind it. But it is, in essence, a presumption of fact, and it is with regard to the facts that the judgment has to be exercised. The primary responsibility thus lies with the decision taker. The function of the court is, as before, a limited one. All the court can do is review the decision, as the only grounds on which it may be challenged in terms of the statute are those which section 233(1) of the Act lays down. I do not think that it is helpful in this context, therefore, to regard the presumption in favour of the development plan as a governing or paramount one. The only questions for the court are whether the decision taker had regard to the presumption, whether the other considerations which he regarded as material were relevant considerations to which he was entitled to have regard and whether, looked at as a whole, his decision was irrational. It would be a mistake to think that the effect of section 18A was to

increase the power of the court to intervene in decisions about planning control. That section, like section 26(1), is addressed primarily to the decision taker. The function of the court is to see that the decision taker had regard to the presumption, not to assess whether he gave enough weight to it where there were other material considerations indicating that the determination should not be made in accordance with the development plan.

As for the circumstances of the present case, I agree that the Reporter was entitled in the light of the material which was before him to give priority to the more recent planning guidance in preference to the development plan, and that the reasons which he gave for his decision in the light of that guidance to grant planning permission were sufficient to explain the conclusions which he had reached.

**The listed buildings issue**

The appellants' argument was that the list of buildings of special or historic interest which the Secretary of State for Scotland has compiled under section 52 of the Town and Country Planning (Scotland) Act 1972 did not include the former riding school at Redford Barracks and that the reporter was entitled to make a finding to this effect. Their approach was that the question whether the building was a listed building was a question of fact which the reporter was entitled to decide as part of the case which was before him in the appeal against the refusal of listed building consent. Yet it became clear in the course of counsel's argument that the issue which the appellants regard as one of fact depends upon the proper construction of the entries in the list. So it seems to me that the underlying question - if it is truly one of construction - is one of law.

The structure of the legislation which is contained in sections 52 to 54 of the Act is to this effect. It is the responsibility of the Secretary of State to compile or approve of the list. He may take account, in deciding whether or not to include a building in the list, of the building itself and its setting. Any respect in which its exterior contributes to the architectural or historic interest of any group of buildings of which it forms part may be taken into account. So also may be the desirability of preserving any feature of the building fixed to it or comprised within its curtilage on the ground of its architectural or historic interest. The building itself must be identified in the list, but section 52(7) also provides that, for the purposes of the Act, any object or structure fixed to the building or forming part of the land and comprised within the curtilage of the building shall be treated as part of it. Thus it is not necessary to do more than to identify the building - or, in cases such as the present, the principal buildings - in order to extend the statutory protection to these additional elements. The details of the procedure are set out in the Town and Country Planning (Listed Buildings and Buildings in Conservation Areas) (Scotland) Regulations 1975 (S.I. 1975 No. 2069) as amended by the Town

and Country Planning (Listed Buildings and Buildings in Conservation Areas) (Scotland) Amendment Regulations 1977 (S.I. 1977 No. 255).

The control which the Act lays down of works for the demolition of a listed building, or its alteration or extension in a manner which would affect its character as a building of special architectural or historic interest, is the prohibition of any such works which have not been authorised. The question whether works of alteration or extension should be authorised can be dealt with as part of an application for planning permission. Section 54(2) provides that, where planning permission is granted for such works, that permission shall operate as listed building consent in respect of those works. But in this case what the appellants wish to do is to demolish the building, so a separate application for listed building consent under Schedule 10 to the Act of 1972 was required. Paragraph 7(2) of that Schedule provides that a person appealing against a decision to refuse consent by the local planning authority may include in his notice as the ground or one of the grounds of his appeal a claim that the building is not of special architectural or historic interest and ought to be removed from the list. But there is no provision in that Schedule or elsewhere in the Act which enables a person aggrieved to include as one of his grounds of appeal that the building to which his application for consent relates is not included in the list as a listed building. The Act assumes, in regard to the statutory procedures, that the question whether or not a building is a listed building can be determined simply by inspecting the list which the Secretary of State has prepared.

The list itself is not the subject of any prescribed form. The only prescribed form for which the Act of 1972 provides is that for the form of notice which is to be served on every owner, lessee and occupier of the building under section 52(5) stating that the building has been included in, or excluded from, the list as the case may be. The prescribed form of notice is set out in Schedule 5 to the 1975 Regulations. It is in these terms:

> "NOTICE IS HEREBY GIVEN that the building known as .....
> situated in the .....
> has been included in the list of buildings of special architectural or historic interest in that area compiled by the Secretary of State under section 52 of the Town and Country Planning (Scotland) Act 1972 on
> ..... 19 .....
> Dated ..... 19 ....
> (Signature of Authorised Officer)."

It can be seen from this form of notice that the only information which is communicated to the owner, lessee and occupier to indicate the identity of the listed building is the name by which the building is known and the place where it is situated. The effect of section 52(7), as I have said, is to require any object or

structure fixed to that building or forming part of the land and comprised within the curtilage of the building to be treated as part of the building for the purposes of the provisions in the Act relating to listed buildings. But the form of notice does not require a description of the building to be given. The assumption is that the name of the building will be sufficient to identify what is in the list.

The list which is available for public inspection under section 52(6) is a more elaborate document, and it is this aspect of the matter which appears to have given rise to some confusion in the present case. It comprises six columns, headed respectively "Map reference," "Name of Building," "Description," "References," "Category" and "Notes." In the column headed "Name of Building" there appears this entry:

> "REDFORD BARRACKS Colinton Road and Colinton Mains Road (original buildings of 1909-15 only)."

The column headed "Description" contains a very detailed description of the premises. It begins by naming the architect, who is said to have been Harry B. Measures, Director of Barrack Construction, 1909-15. There then follows a comprehensive description of the barracks and the various buildings comprised therein, together with references to various features of architectural or historic interest. In the middle of this description, which occupies nearly four pages on the list, there appears this passage:

> "other buildings to S. with large riding school at extreme S.E., all tall single-storey, simple treatment."

The column headed "References" contains this entry:

> "Information courtesy Buildings of Scotland Research Unit."

My impression is that the list which I have been attempting to describe was intended to serve several functions. First, it was intended to identify the listed building. It did this by stating its name and its location. That was all it needed to do in order to record the information which had been given in the prescribed notice to the owner, lessee and occupier. Then it was intended to provide a description of the building. There is no requirement for this - nor is there space - in the prescribed form of notice. But a description is a useful thing to include in the list, as decisions may have to be taken from time to time as to whether authorisation should be given under section 53(2)(*a*) of the Act of 1972 to a proposal to demolish, alter or extend the listed building. Both the decision taker and the developer will, no doubt, find it helpful to know what the features were which persuaded the Secretary of State that the building should be listed as being of special architectural or historic interest. Lastly, it was intended to provide a list of references to the sources of information, if any, which had been used in compiling the description. On this analysis I would

regard the columns headed "Description" and "References," while informative, as subservient to the column headed "Name of Building." In my opinion it is the latter column which serves the statutory function of identifying the listed building in the list which the Secretary of State is required to keep available for public inspection under section 52(6) of the Act of 1972. In their printed case Revival state that the inclusion of the words of limitation in this column reflects a practice of compiling the list so that the "Name of Building" column is the official entry which defines the scope of the listing. That observation is consistent with my understanding of the list.

The Lord Justice-Clerk mentioned in his opinion that counsel for the Secretary of State had pointed out in the course of the hearing before the Second Division that it has been the practice for some time now for the list of buildings of special architectural or historic interest to be set forth in a different form from that which has been used in this case. A specimen form was produced in the course of that hearing from which it appeared that the list now contained eight columns. The first, which was entitled "Name of Building and/or Address," was headed as being the "Statutory List." The remaining seven columns contained information under various headings not dissimilar to those used in the present case, including "Description," "Reference" and "Notes." They were the subject of a separate heading which read: "The information (cols. 2-8) has no legal significance, nor do errors or omissions nullify or otherwise affect statutory listing." We were not shown a copy of this form, as the Secretary of State did not appeal against the decision of the Second Division on this point. But Revival refer to this passage in the Lord Justice-Clerk's opinion in their printed case, in order to make the point that the modern form of list has merely formalised the practice that it is the "Name of Building" column which defines the scope of the listing. The description which we have been given is sufficient to indicate that the more modern form is an improvement on the previous form, as it removes the possibility of a misunderstanding about the function which the columns headed "Description" and "References" were intended to serve.

It is plain from the way in which the learned judges of the Second Division approached this issue that they regarded all the columns on the list which was before them in this case as forming part of the statutory listing. For my part - although counsel for Revival was content to adopt this approach in presenting his argument - I think that they were in error in taking this view. It does not seem to me that there is any real difficulty in understanding the functions of each of the columns, if the list is read in the context of the legislation which it was designed to serve. But my conclusion that the only column which sets out the statutory listing is that which is headed "Name of Building" does not solve all the problems which have arisen in this case.

The listing of Redford Barracks was in itself sufficient, with the benefit of section 52(7) of the Act of 1972, to include within the statutory listing all objects

or structures forming part of the land and comprised within the curtilage. Unless some words of limitation were included every building within the curtilage, however modest or unimportant, would be the subject of the statutory controls. It was no doubt for this reason that the words "(original buildings 1909-15 only)" were included in the column headed "Name of Building." But this was not an entirely satisfactory method of distinguishing between those buildings which were intended to be included in the statutory listing and those which were not. The words which were selected were ambiguous. The dates 1909-15 are the same as those mentioned in the next column as being those between which Harry B. Measures was the Director of Barrack Construction. But it is not clear whether they were intended to refer to the period of design of the buildings or the period of their construction, and if the latter whether the buildings had to be completed by 1915 in order to qualify or it was sufficient that they were commenced before or during that year. In this situation I think that it is permissible to examine the contents of the column headed "Description" in order to see whether it can help to resolve the ambiguity. Phrases are used in various parts of the description such as "some lesser buildings" and "other buildings" which suggest that this was not intended to be a definitive description of the entire premises comprised within the curtilage. But the fact that the riding school is mentioned in the description is sufficient, in view of the ambiguity, to put in issue the question whether that building was included in the statutory listing.

The reporter concluded, on the evidence which was before him, that the riding school was one of the last buildings to be erected, and that this took place after 1915. It was for this reason that he held that the riding school was not covered by the statutory listing and that listed building consent was not required for its demolition. He noted that the view of all the experts who gave evidence at the inquiry was that, if the riding school was built after 1915, it was not covered by the barracks listing. It seems to me however that this evidence was insufficient to resolve the difficulty which had been created by the ambiguity in the list. That evidence did not address the possibility that the riding school was part of the original design for which Harry B. Measures was responsible. Unless it could be asserted that this structure had no part to play in the original design it would not be safe to assume that it was not included in the statutory listing. I would therefore hold, albeit for different reasons, that the result at which the Second Division arrived was the right one, as the reporter had insufficient information before him in the evidence to entitle him to resolve this issue in favour of the developer.

I should like, finally, to add this further observation in regard to the ambiguity in the list. The problem which has arisen in this case suggests that the list, even in its new form, may require some reconsideration in order to remove such ambiguities. It is important that words of limitation which are used to exclude parts of a building from the statutory listing are sufficiently clear to enable those who

are interested to identify what parts of the building are subject to the statutory controls and what are not. The fact that the controls are the subject of criminal sanctions provides an added reason for seeking greater clarity in the composition of the list than has been exhibited in this case.

**LORD CLYDE**

My Lords,

In 1993 Revival Properties Limited ("Revival") who are the second appellants in this appeal sought outline planning permission for the development of a food store, petrol filling station and ancillary works at a site in Colinton Mains Drive in Edinburgh. They also sought listed building consent for the demolition of a former riding school building which was on the site. The City of Edinburgh District Council refused planning permission and also refused listed building consent. Revival then appealed to the Secretary of State. A Senior Reporter was appointed to determine the appeal. He held a public local inquiry and thereafter issued a decision letter dated 7 March 1995. He decided that listed building consent was not required for the demolition of the former riding school building. On the matter of planning permission he allowed the appeal and granted outline planning permission subject to certain conditions. The Council then appealed to the Court of Session both on the matter of the listed building consent and on the matter of planning permission. After hearing the appeal the Second Division of the Court of Session by a majority allowed the appeal on both of those matters. The Secretary of State and Revival have now appealed to this House.

The matter of listed building consent can conveniently be dealt with at the outset. It has been seen and treated as a distinct and separate issue from that of the planning permission. The Reporter considered a preliminary question whether listed building consent was required for the demolition of the former riding school building. It has not been suggested that he was not entitled to explore that question and I express no view on the propriety of his doing so. Section 52 of the Town and Country Planning (Scotland) Act 1972 provided for the compilation of lists of buildings of special architectural or historic interest. The provisions of that Act have now been superseded by the recent consolidating statute, the Town and Country Planning (Scotland) Act 1997, but it will be convenient for the purposes of the present case to refer to the legislation in force at the time of the appeal processes. In terms of section 52(1) the lists may be compiled by the Secretary of State or by others with his approval. Section 52(5) provides for notice to be given

to the owner, lessee and occupier of a building of its inclusion in or exclusion from the list. That notice is to be given in a prescribed form. But there does not appear to have been any prescribed form for the lists themselves.

There was produced to the Reporter a document relating to the City of Edinburgh District headed "List of Buildings of Architectural or Historic Interest." The list was set out in six columns. The first and the last three are not of importance. The second was headed "Name of Building" and the third was headed "Description." In the second column there was entered the following:

> "REDFORD BARRACKS
> Colinton Road and
> Colinton Mains Road
> (original buildings of
> 1909-15 only)."

The third column commenced with the words "Harry B. Measures, Director of Barrack Construction, 1909-15. Two large complexes of building on exceptionally spacious layout . . . comprising chiefly . . . " There then followed descriptions of a variety of buildings with some architectural detail. Included here, under the subheading Farriers' Shops and Riding School were the words "other buildings to S. with large riding school at extreme S.E. . . ." The view taken by the Reporter was that in the light of the evidence the building in question had probably been erected after 1915, that precedence should be given to the entry in the second column, and that on account of the reference to "original buildings of 1909-15 only" the riding school building was excluded from the list notwithstanding its specific mention in the third column. Having taken the view that listed building consent was unnecessary the Reporter did not address the question whether the demolition of a listed building should be permitted.

The judges of the Second Division unanimously held that the Reporter was not entitled to hold as he had done that the building was not covered by the entry for Redford Barracks in the List. An appeal against that decision was taken only by Revival, the second appellant. Counsel for the Secretary of State did not address the issue. It should be observed that it would have been useful to have had more evidence about the form used for the compiling of such lists and the relative significance of the respective columns. Plainly it is desirable to compile the List with sufficient clarity and precision to avoid the kind of question which has arisen here. The insertion of a complex of buildings as one entry in a List may well give rise to problems. Even the provision of section 52(7) of the Act which extends the identification to buildings within the curtilage of a building may not produce sufficient clarity, particularly in a case such as the present where the building in question had passed into the separate ownership and occupation of the local authority and had in some way at least became separated from the barracks and other buildings still in military occupation. The argument, however, which was

presented in the appeal was essentially that the matter was one of fact for the Reporter, or at least was not one which could be open to review. But the critical question here is one of the interpretation of the List and if the Reporter has misconstrued it and so misdirected himself that is undoubtedly a matter on which he may be corrected on appeal to a court of law.

On the face of the List there is no evident problem. It was agreed by counsel for Revival that the whole document with its six columns comprised the "List" and his argument was presented on that basis. The building in issue is specifically mentioned in the document and can readily be taken to be entered on the list. The dates in the second column can be seen to echo the dates in the third column, indicating that it is the work of Harry Measures which is to be listed, and the riding school is noted in the description of the buildings for which he was presumably responsible.

A problem may be thought to arise when it is found that the riding school was built after 1915. But it also appears that the barracks were not completed until the end of 1916. Ambiguity only arises if the words in the brackets are read, as the Reporter read them, as if they were intended to refer to buildings built during the specified years. But that is not what is stated and that is not the only possible construction. Even if there was a conflict between the two parts of the list it would be proper to find a construction which would make sense of the whole and that can be readily done by accepting that the period of years to which the passage in brackets refers is a period not of the completion of the building but of the processes of planning, conception, design and, at least to an extent, the realisation of Harry Measures' work. In that way there is no difficulty in recognising that the riding school may consistently with the text in the second column be entered in the third column as a listed building. In my view the judges of the Second Division reached the correct view on this matter and I would refuse the appeal on the matter of the listed building consent.

I turn next to the appeal on the matter of the planning permission. The first point raised on behalf of the Secretary of State in opening his appeal concerned the meaning and effect of section 18A of the Act of 1972. It was stated on his behalf that this was the principal purpose of his appeal. The section had excited some controversy and guidance was required. Neither of the other parties however was concerned to challenge the submission advanced by counsel for the Secretary of State. The views which I would adopt on this part of the appeal accord with his submission and at least in the absence of any contradiction seem to me to be sound.

Ever since the introduction of a comprehensive system for the control of land development in Scotland by the Town and Country Planning (Scotland) Act 1947 planning authorities have been required to prepare a plan which was to serve as a guide for the development of their respective areas. These plans required to be

submitted to the Secretary of State for his approval. Following on the reorganisation of local government introduced by the Local Government (Scotland) Act 1973 planning functions became divided between the regions, who were required to prepare "structure plans," and the districts, who were required to prepare "local plans." For the purposes of the present case the structure plan was the Lothian Regional Structure Plan of 1985 and the local plan was the South West Edinburgh Local Plan ("S.W.E.L.P."). But the old terminology was also preserved. Section 17 of the Town and Country Planning (Scotland) Act 1972 provided that for the purposes of the planning statutes the development plan shall be taken to consist of the structure plan approved by the Secretary of State with any approved alterations and the provisions of the approved local plan with any adopted or approved alterations. In and after the 1947 Act provision was made for the recognition of the development plan in relation to determinations of applications for planning permission. Section 26(1) of the 1972 Act, echoing the language of section 12(1) of the Act of 1947, required a planning authority in dealing with the application to "have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations." The meaning of this formulation in the context of section 12(1) of the Act of 1947 was set out in a decision in the Outer House of the Court of Session by Lord Guest in *Simpson v. Edinburgh Corporation,* 1960 S.C. 313. His Lordship stated (at pp. 318-319):

> "It was argued for the pursuer that this section required the planning authority to adhere strictly to the development plan. I do not so read this section. 'To have regard to' does not, in my view, mean 'slavishly to adhere to.' It requires the planning authority to consider the development plan, but does not oblige them to follow it . . . If Parliament had intended the planning authority to adhere to the development plan, it would have been simple so to express it . . . .In my opinion, the meaning of section 12(1) is plain. The planning authority are to consider all the material considerations, of which the development plan is one."

Section 18A was introduced into the Act of 1972 by section 58 of the Planning and Compensation Act 1991. A corresponding provision was introduced into the English legislation by section 26 of the Act of 1991, in the form of a new section 54A to the Town and Country Planning Act 1990. The provisions of section 18A, and of the equivalent section 54A of the English Act, were as follows:

> "Status of development plans
> Where, in making any determination under the planning Acts, regard is to be had to the development plan, the determination shall be made in accordance with the plan unless material considerations indicate otherwise."

Section 18A has introduced a priority to be given to the development plan in the determination of planning matters. It applies where regard has to be had to the development plan. So the cases to which section 26(1) of the Act of 1972 apply are

affected. By virtue of section 33(5) of the Act of 1972 section 26(1) is to apply in relation to an appeal to the Secretary of State. Thus it comes to apply to the present case.

By virtue of section 18A the development plan is no longer simply one of the material considerations. Its provisions, provided that they are relevant to the particular application, are to govern the decision unless there are material considerations which indicate that in the particular case the provisions of the plan should not be followed. If it is thought to be useful to talk of presumptions in this field, it can be said that there is now a presumption that the development plan is to govern the decision on an application for planning permission. It is distinct from what has been referred to in some of the planning guidance, such as for example in paragraph 15 of PPG1 of 1988, as a presumption but what is truly an indication of a policy to be taken into account in decision-making. By virtue of section 18A if the application accords with the development plan and there are no material considerations indicating that it should be refused, permission should be granted. If the application does not accord with the development plan it will be refused unless there are material considerations indicating that it should be granted. One example of such a case may be where a particular policy in the plan can be seen to be outdated and superseded by more recent guidance. Thus the priority given to the development plan is not a mere mechanical preference for it. There remains a valuable element of flexibility. If there are material considerations indicating that it should not be followed then a decision contrary to its provisions can properly be given.

Moreover the section has not touched the well-established distinction in principle between those matters which are properly within the jurisdiction of the decision-maker and those matters in which the court can properly intervene. It has introduced a requirement with which the decision-maker must comply, namely the recognition of the priority to be given to the development plan. It has thus introduced a potential ground on which the decision-maker could be faulted were he to fail to give effect to that requirement. But beyond that it still leaves the assessment of the facts and the weighing of the considerations in the hands of the decision-maker. It is for him to assess the relative weight to be given to all the material considerations. It is for him to decide what weight is to be given to the development plan, recognising the priority to be given to it. As Glidewell L.J. observed in *Loup v. Secretary of State for the Environment and Another* (1995) 71 P. & C.R. 175 at p. 186 "What section 54A does not do is to tell the decision-maker what weight to accord either to the development plan or to other material considerations." Those matters are left to the decision-maker to determine in the light of the whole material before him both in the factual circumstances and in any guidance in policy which is relevant to the particular issues.

Correspondingly the power of the court to intervene remains in principle the same as ever. That power is a power to challenge the validity of the decision. The

grounds in the context of planning decisions are contained in section 233 of the Act of 1972, namely that the action is not within the powers of the Act, or that there has been a failure to comply with some relevant requirement. The substance of the former of these grounds is too well established to require repetition here. Reference may be made to the often quoted formulation by Lord President Emslie in *Wordie Property Co. Ltd. v. Secretary of State for Scotland*, 1984 S.L.T. 345 at 347-348. Section 18A has not innovated upon the principle that the court is concerned only with the legality of the decision-making process. As Lord Hoffmann observed in *Tesco Stores v. Secretary of State for the Environment* [1995] 1 WLR 759 at p. 780. "If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State."

In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse.

Counsel for the Secretary of State suggested in the course of his submissions that in the practical application of the section two distinct stages should be identified. In the first the decision-maker should decide whether the development plan should or should not be accorded its statutory priority; and in the second, if he decides that it should not be given that priority it should be put aside and attention concentrated upon the material factors which remain for consideration. But in my view it is undesirable to devise any universal prescription for the method to be adopted by the decision-maker, provided always of course that he does not act

outwith his powers. Different cases will invite different methods in the detail of the approach to be taken and it should be left to the good sense of the decision-maker, acting within his powers, to decide how to go about the task before him in the particular circumstances of each case. In the particular circumstances of the present case the ground on which the Reporter decided to make an exception to the development plan was the existence of more recent policy statements which he considered had overtaken the policy in the plan. In such a case as that it may well be appropriate to adopt the two-stage approach suggested by counsel. But even there that should not be taken to be the only proper course. In many cases it would be perfectly proper for the decision-maker to assemble all the relevant material including the provisions of the development plan and proceed at once to the process of assessment, paying of course all due regard to the priority of the latter, but reaching his decision after a general study of all the material before him. The precise procedure followed by any decision-maker is so much a matter of personal preference or inclination in light of the nature and detail of the particular case that neither universal prescription nor even general guidance are useful or appropriate.

This chapter in the appeal was presented as a criticism of the approach adopted by the majority of the judges in the court below. But that criticism comes at the most to criticism of particular expressions rather than any allegation of error in principle. Lord McCluskey criticised the description given by the Reporter in paragraph 181 of his decision letter of the effect of the section. His Lordship stated:

> "But section 18A did not simply 'enhance the status' of development plans; it made the development plan the governing or paramount consideration; and it was to remain so unless material considerations indicated otherwise."

But while the expression used by the reporter may have been somewhat imprecise in not stressing the priority inherent in the enhanced status it does not appear that the reporter fell into error in any misunderstanding of the effect of the section. The submission made by counsel for the Secretary of State on the construction of section 18A was correctly seen by the respondents as not constituting any serious attack on the decision which they sought to defend. The judges in the Second Division correctly recognised that it was competent for the Reporter in principle to decide that the more recent material should overcome the priority given to the development plan. The issue was whether he was entitled to take that course on the material before him. The reference to paragraph 181 of the decision letter leads immediately to the substantial dispute in the appeal regarding the reporter's treatment of the problem of retail trade and impact.

In paragraph 181 the Reporter begins to set out his conclusions on the chapter of the decision letter which concerns the issue of retail trade and impact. It should

be observed at the outset that the structure plan of 1985 indicated a prohibition of developments such as that proposed by Revival except in existing or new shopping centres, and that S.W.E.L.P. expressed at least a presumption against out-of-centre shopping development. The Reporter however stated:

> "Dealing first with the question of policy, I should say that, although there is no dispute that the statutory development plan consists of the 1985 structure plan and the S.W.E.L.P., and although recent legislation enhances the status of development plans, I believe that in this case it is appropriate to attach greater weight to other material considerations."

That he was entitled in principle to decide that the presumption in favour of the development plan had been overcome by other material considerations was recognised in the court below. The criticism of the majority of the court was directed rather at his entitlement to take that course in the circumstances of this case. The other material considerations to which the Reporter looked consisted of expressions of policy and planning guidance more recent in date than the structure plan of 1985. He noted that while the S.W.E.L.P. was only adopted as recently as 1993 it was required to conform generally with the provisions of the 1985 structure plan. The more recent material of which the Reporter considered account should be taken consisted of the National Planning Guidelines 1986, Planning Policy Guidance of 1993 ("PPG6), and the latest version of the structure plan which had been finalised and sent to the Secretary of State but had not yet been approved. A view was expressed in the court below that it was not appropriate to have considered PPG6 because it applied to England and Wales and not Scotland. No question was raised in that regard in the present appeal and I refrain from expressing any view about it. The new version of the structure plan represented in the view of the Reporter the Regional Council's most recent thinking on the subject of retailing and it was to the policies set out in that document that he applied his mind.

Chapter 7 of the new structure plan deals with shopping. In paragraph 7.37 it was stated that free-standing developments, such as large convenience stores, could generate unacceptable traffic levels and affect residential amenity. The paragraph later states that:

> ". . . new stores can only be justified to provide consumer choice or where there will be significant local population increase. . . . new developments outside existing or proposed centres should be permitted only if they meet strict criteria."

The plan then sets out a policy identified as S17. That policy related to proposals for major retail developments not in or adjacent to existing or proposed strategic shopping centres. It is understood that the proposed development at Colinton Mains Drive is such a proposal. The policy provides that in considering

such proposals "District Councils should be satisfied that all of the following criteria are met. . . ." There are then set out seven criteria of which only two need be quoted:

> "A. Local shopping facilities are deficient in either quantitative or qualitative terms; . . .
> "C. They would not, individually or cumulatively, prejudice the vitality and viability of any strategic shopping centre."

The strategic shopping centres are listed earlier in the document, but it is unnecessary to refer to that in detail.

The Reporter was satisfied that all of the seven criteria were met and it was on that basis that he granted the planning permission. It is with criterion A that the present dispute is concerned. The Reporter dealt with the matter of quantitative deficiency in paragraph 184 of his letter as follows:

> "184 The *first* matter relates to quantitative or qualitative deficiencies in the area. It appears that there may be a slight increase in both population and expenditure per head on convenience goods in the near future in the study area, but the most obvious indicator of an expenditure surplus is the calculation that certain stores (notably Safeway at Cameron Toll, Morningside and Hunter's Tryst) are performing at levels significantly higher than company averages. Even allowing for the opening of stores at e.g. Straiton (which may be in doubt) and for turnover levels at Colinton Mains substantially higher than would probably be achieved by Tesco in a relatively small store, there would appear to be a quantitative case."

In paragraph 185 he considered the matter of qualitative deficiency and took the view that the argument for such a deficiency was not strong. The case would accordingly have to rest on the basis of a quantitative deficiency. Finally in this part of his letter he added in paragraph 186:

> "186. Many local residents and organisations claim that there is no need for either the proposed foodstore or the pfs. I accept that there is not a significant shortage of either, such as might establish a strong presumption in their favour in the public interest which might outweigh relevant objections, However, planning approval does not have to be based on a case of need. I have explained why I consider the policies in the more recent version of the structure plan are to be preferred, and there remains a general presumption in favour of development unless demonstrable harm is shown to interests of acknowledged importance."

The majority of the judges in the Second Division held that the Reporter had erred in this part of his decision. The Lord Justice-Clerk was satisfied that the

Reporter was entitled to regard the NPG and the draft structure plan as justifying a departure from the development plan but considered that the Reporter had not had a proper factual basis for overcoming the presumption in section 18A. In particular he considered that:

> ". . . merely to say that certain stores within the area are trading at exceptionally high levels does not justify the conclusion that there is a deficiency in local shopping facilities in the area in question."

He noted that of the three stores mentioned in paragraph 184 only one, Hunter's Tryst, was, as the Reporter had recognised in paragraph 185, within the study area. He also noted that the Reporter had accepted in paragraph 186 that there was not a significant shortage of food stores or petrol filling stations. Lord McCluskey questioned whether the Reporter had properly addressed the problem of quantitative deficiency at all. "If he has then he has not even begun to explain how a quantitative deficiency coexists with no significant shortage and a failure to make out any case of need." He considered that even if a finding of a quantitative deficiency was justified the Reporter had given no indication as to why that circumstance should overcome the presumption in favour of the terms of the development plan. Both the Lord Justice-Clerk and Lord McCluskey suggested that the final words of paragraph 184 lacked the conviction of a positive finding.

In my view it is critical to an understanding of the Reporter's decision to have a clear understanding of the concept of "quantitative deficiency." This is a matter of the interpretation of the policy S17. It may well be that the point was not made sufficiently clear in the presentation of the appeal before the Second Division. Certainly it appears that, as the Lord Justice-Clerk records, counsel were not at one as to what was meant by the reference to quantitative terms and it was on his own initiative that reference was made to paragraph 7.9 of the draft structure plan for a clue to its meaning. That paragraph starts with the sentence "In quantitative terms, demand is determined by trends in consumer expenditure. . . ." This is far from providing a definition but it does, as Lord Morison appreciated, point to the fact that it is consumer expenditure which is being considered as reflected in the turnover in the available shopping facilities. As I understand it from the helpful explanations given to us by counsel for the Secretary of State quantitative deficiency has to do with a comparison between the amount of shopping facility and the amount of customers. It seeks to express a situation where there is a shortage of shopping floorspace as compared with the number of customers in the locality. It is measured by reference to consumer expenditure. Quantitative deficiency is a concept different from that of need, where what is meant is the kind of necessity which would, for example, justify the sacrifice of some amenity for the purpose of the development. There can be a quantitative deficiency even although there is no "need" for the development in so far as everyone in the area is able to do their shopping albeit with the delay and inconvenience of a possibly overcrowded shop or of travelling some distance to get there. Once the definition is

understood there is no discrepancy between paragraphs 184 and 186 of the decision letter.

The next question is how a quantitative deficiency should be established. Where the approach is one of considering consumer expenditure a quantitative deficiency is most readily established by the discovery that other stores are trading at a level which is above what would be expected of them, the inference being that there is room to accommodate a further shopping facility. As Lord Morison observed: "No other way of demonstrating a quantitative deficiency in a particular area, determined only by consumer expenditure, was suggested to us, and none occurs to me." That was the kind of evidence which was led in the present case and it appears that while there was dispute about the reliability of the inferences to be drawn from the figures adduced there was no objection taken to the use of that material in principle as a method of establishing the alleged deficiency.

It was suggested that the Reporter was not entitled to find some deficiency without going on to quantify the extent of the deficiency. I see no obligation on him to do that. The policy S17A does not require the finding of any particular extent of the deficiency. If the deficiency is too slight to enable the whole of the proposed new shopping facility to be accommodated then the matter will be covered by criterion C. If the development is greater than can be absorbed by the deficiency then the result may well be to cause prejudice to the vitality and viability of the existing strategic shopping centres. In that respect criterion C secures the adequacy of the extent of the deficiency identified for the purpose of criterion A. In the present case the Reporter indeed went further in his assessment of the deficiency than he strictly needed to go. In the final sentence of paragraph 184 he takes into account not only the possible further store at Straiton but also higher levels at the development site at Colinton Mains than were likely to be achieved by the proposed Tesco store. Even taking these into account he finds that "there would appear to be a quantitative case." It is evident from that passage that the deficiency was such as to enable the proposed store to be wholly accommodated within it and when account is taken of the hypothesis on which he is proceeding the passage indicates a very positive finding of a quantitative deficiency. What was suggested to be only a tentative finding is in reality clear and certain.

It was argued that the Reporter was not entitled to draw the conclusion which he did from the evidence before him. Counsel for the Respondents suggested a variety of reasons which might account for the expenditure surplus. He also sought to criticise the quality of the evidence on which the Reporter had relied. But it was not suggested that there was no evidence before the Reporter which could entitle him to discount such other explanations and to hold that there was an expenditure surplus which pointed to a quantitative deficiency. Whether the evidence did or did not so point was a matter wholly for him to determine. Provided that the evidence was there it was for him to assess it and draw his own conclusions from it. It is no

part of the function of a reviewing court to re-examine the factual conclusions which he drew from the evidence in the absence of any suggestion that he acted improperly or irrationally. Nor is it the duty of a reviewing court to engage in a detailed analytic study of the precise words and phrases which have been used. That kind of exercise is quite inappropriate to an understanding of a planning decision.

Counsel for the Respondents also sought to argue that the Reporter had not given proper or adequate reasons for his decision. In part this point was related to matters to which I have already referred, such as a specification of the extent of the deficiency, the allegedly "tentative" nature of the conclusion on the critical issue, the finding of the quantitative deficiency in the face of the absence of need, and the link between the expenditure surplus and the quantitative deficiency. But in any event the pursuit of a full and detailed exposition of the Reporter's whole process of reasoning is wholly inappropriate. It involves a misconception of the standard to be expected of a decision letter in a planning appeal of this kind. As Lord President Emslie observed in *Wordie Property Co. Ltd.* (p. 348):

> "The decision must, in short, leave the informed reader and the court in no real and substantial doubt as to what the reasons for it were and what were the material considerations which were taken into account in reaching it."

It is worth re-iterating the observations made by Lord Lloyd of Berwick in *Bolton Metropolitan District Council v. Secretary of State for the Environment* (1995) 71 P.Q.C.R. 309 in the context of the requirement on the Secretary of State to notify the reasons for his decision. His Lordship said (p. 313):

> "There is nothing in the statutory language which requires him, in stating his reasons, to deal specifically with every material consideration . . . He has to have *regard* to every material consideration; but he need not mention them all."

As to what should be mentioned his Lordship gave two quotations. In *In re Poyser and Mills' Arbitration* [1964] 2 Q.B. 467 at p. 478 Megaw J. said:

> "Parliament provided that reasons shall be given, and in my view that must be read as meaning that proper, adequate reasons must be given. The reasons that are set out must be reasons which will not only be intelligible, but which deal with the substantial points that have been raised."

In *Hope v. Secretary of State for the Environment* (1975) 31 P. & C.R. 120 at 123 Phillips J. said:

> "It seems to me that the decision must be such that it enables the appellant to understand on what grounds the appeal has been decided and be in sufficient detail to enable him to know what conclusions the inspector has reached on the principal important controversial issues."

It is necessary that an account should be given of the reasoning on the main issues which were in dispute sufficient to enable the parties and the court to understand that reasoning. If that degree of explanation was not achieved the parties might well be prejudiced. But elaboration is not to be looked for and a detailed consideration of every point which was raised is not to be expected. In the present case the Reporter dealt concisely but clearly with the critical issues. Nothing more was to be expected of him.

The Reporter satisfied himself as he was entitled to do that there was quantitative deficiency and that criterion A was met. He then went on to consider the other criteria. He gave careful consideration to criterion C, including in that an assessment of the effect of the development on Hunter's Tryst and at some length its effect on the shopping centre at Wester Hailes. He was satisfied that criterion C was met and no challenge is made to that conclusion. His unchallenged finding on that matter affirms the adequacy of the deficiency which he found for the purpose of criterion A. He had already decided that the statutory presumption should be overcome by the more recent expressions of policy and in particular the draft structure plan. It was the existence of that recent guidance, not his finding of a quantitative deficiency, which justified the overcoming of the presumption. It is not in dispute that if the seven criteria were met the Reporter was then entitled to grant planning permission.

For the foregoing reasons I would refuse the appeal by the appellant Revival Properties Limited on the matter of the listed building consent and I would allow the appeal by both appellants on the matter of the planning permission.

The Secretary of State should be entitled to his costs from the District Council both here and one half of his expenses in the court below. Revival Properties Limited should be entitled to one half of their costs from the District Council here and one half of their expenses in the court below.