Neutral Citation No: [2024] NIKB 119 *Judgment: approved by the court for handing down (subject to editorial corrections) **	*Ref:* **SCO12664** *ICOS No:* **24/005337/01** *Delivered:* **05/12/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY GORDON DUFF FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF LISBURN AND CASTLEREAGH CITY COUNCIL

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Re Duff's Application (Re Hillhall Road, Lisburn) (Leave Stage)

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The applicant appeared in person
Stewart Beattie KC and Philip McEvoy (instructed by Cleaver Fulton Rankin) appeared for the Respondent
The notice party also appeared in person

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SCOFFIELD J

Introduction

[1] By this application the applicant, Mr Gordon Duff, seeks to challenge a decision of Lisburn and Castlereagh City Council (LCCC) ("the Council"), made on 20 October 2023, whereby it granted reserved matters approval (reference LA05/2021/0721/RM) with respect to matters reserved by the grant of outline planning permission (reference LA05/2018/0405/O) for the erection of a new storey-and-a-half dwelling with detached garage at a site between Nos 254 and 260 Hillhall Road, Lisburn.

[2] The application was initially lodged in January of this year. At that time, Mr Duff had a range of extant judicial review applications before the High Court which dealt with various aspects of the interpretation and application of Policy CTY8 of Planning Policy Statement 21 (PPS21) and/or the similar policy in Policy COU8 of the Council's Local Development Plan relating to infill or ribbon

development. It had previously been determined by the court that one such case ("the *Glassdrumman Road* case") would be treated as a lead case for consideration of a range of issues, including the main issues, raised by many of Mr Duff's applications in relation to infill development. Accordingly, other cases raising similar issues in relation to these policies which had been brought by Mr Duff – including the present case – were not progressed pending the conclusion of the decision of the High Court and, after that, the Court of Appeal in the lead case.

[3] Judgment was given by the Court of Appeal in the lead case (*Re Duff's Application (Re Glassdrumman Road, Ballynahinch)* [2024] NICA 42) on 3 April 2024, with Mr Duff being successful in a number of aspects of his appeal. No party has since sought permission to appeal that judgment further to the United Kingdom Supreme Court. Accordingly, it deals authoritatively with a number of the issues which arise in similar cases in this jurisdiction, at least insofar as they relate to Policy CTY8 of PPS21. (There may be some differences in relation to Policy COU8 of the LDP, albeit many of the concepts are similar.)

[4] After the lead case had concluded, the notice party in the present case, Ms Simpson, who is the beneficiary of the reserved matters approval, which is under challenge, asked that this case be progressed. Having considered the application for leave to apply for judicial review, I granted leave on the papers pursuant to RCJ Order 53, rule 3(3) in relation to some of the applicant's grounds but not others. There was then a case management review hearing to discuss the further management of the proceedings. The present ruling arises for two reasons. First, Mr Duff wishes to pursue a number of the grounds upon which I did not consider it appropriate to grant leave on the papers. Second, he has identified a number of new grounds of challenge which he also wishes to pursue. There was a third issue – in relation to whether the proceedings are an "Aarhus case" and as to the terms of the protective costs order which should be granted as a result – which has since been resolved by agreement, as described briefly below.

[5] These issues were addressed at an oral leave hearing at which Mr Duff appeared in person; Mr Beattie KC appeared for the Council with Mr McEvoy; and Ms Simpson also appeared in person. I am grateful to all parties for their submissions.

Factual background

[6] As with several of Mr Duff's applications seeking to challenge decisions of LCCC, this case has a somewhat convoluted factual background. It is summarised only briefly for present purposes.

[7] The notice party's father (Mr Harry Simpson) made an application for outline planning permission and did so with the benefit of an architect's practice who provided advice in relation to this (Ballymullan Architect (BMA) Ltd). The outline planning permission was granted on 3 May 2019 on the basis that an 'infill' dwelling

was acceptable in principle at the site under Policy CTY8 of PPS21. Mr Duff did not challenge the grant of this outline permission at the time and accepts that he is not in a position to challenge it now, although in his evidence he is heavily critical of the planning officer's report which underpinned the decision. The essence of his case, however, is that the grant of outline planning permission was so flawed that it is not now possible to grant a lawful reserved matters approval consistent with planning policy.

[8] The notice party (Mr Simpson's daughter) then 'took over the site' and applied for reserved matters approval, using the same architect, in June 2021. The purpose of the applications is to provide a home for her family, including her children. She emphasises that there were no objectors when the reserved matters application was made and that all relevant statutory consultees agreed to the approval. A reserved matters approval was then initially granted in September 2021, at which point her architect applied for building control approval which was also granted. Work commenced on the ground works and the foundations for the garage of the house in December 2021.

[9] However, the reserved matters approval was then challenged by Mr Duff and later quashed on the application of the Council's own Chief Executive (Mr Burns) in circumstances which are described in the judgment of the court in *Re David Burns' and Gordon Duff's Applications* [2022] NIQB 10, given on 11 February 2022 ("the February 2022 judgment"). This coincided with Ms Simpson selling her previous property and moving into rented accommodation to release funds to construct their intended new property at Hillhall Road. I understand that the building works have since been put on hold. Mr Duff's previous application for judicial review (which was dismissed as academic given that the approval it challenged had been quashed on Mr Burns' application) raised a number of grounds which are repeated or developed in these proceedings.

[10] Ms Simpson has indicated that she understood her previous approval to have been quashed on Mr Burns' application because of the failure of the Council to take into account the Planning Advisory Note on the Implementation of Regional Policy for Development in the Countryside ("the PAN"). That is correct. She has also indicated that she viewed this as "in essence an administrative error and not an environmental point." Whether or not that is correct, a more fundamental point is that she has also indicated that she understood that the failure to take the PAN into account "was the only issue Mr Duff could cast up", which is why she indicated to the court through her architect that she was allowing her planning approval to be quashed, notwithstanding the human cost of that. It was, however, incorrect (as it appears the notice party now recognises) to think that the only issue which could or would be revisited by the Council when re-determining the application was the effect of the PAN. That was explained in the course of the February 2022 judgment, as described in paras [72]-[73] of the court's recent judgment in *Re Duff's Application (Re Old Coach Road, Hillsborough) (Recusal Application)* [2024] NIKB 79.

[11] The Council proceeded to re-determine the application for reserved matters permission, giving rise to the approval which is now challenged in these proceedings. In doing so, it took into account Mr Duff's objections which had been raised in his earlier pre-action correspondence and judicial review application; and a further representation made by him in the course of the planning process, which reiterated those objections and concerns. Those were then dealt with in the planning officer's report prepared by Mr Conor Hughes ("the officer's report") which sets out the reasoning for the grant of the approval, this being an application which could be determined by a Council officer on a delegated basis.

The grounds upon which leave has been granted

[12] Policy COU8 – which is the replacement for Policy CTY8 – contains the following text:

> "The proposed dwellings must respect the existing pattern of development in terms of siting and design and be appropriate to the existing size, scale, plot size and width of neighbouring buildings that constitute the frontage of development."

[13] Whether Policy CTY8 or Policy COU8 is the appropriate policy for consideration of the matters reserved by the outline permission, they contain materially similar provisions for the purpose of these proceedings.

[14] The applicant has been granted leave on the following grounds contained within his Order 53 statement, namely: ground (i), bullet point one, insofar as it relates to Policy COU8; ground (ii), bullet point two; ground (iii), bullet point one; and ground (iv), bullet points one and two. These grounds broadly relate to the question of whether the respondent has misdirected itself in relation to the interpretation of Policy COU8; whether it acted irrationally in considering that the proposal respected the development pattern of other properties in the substantial and continuously built up frontage ("SCBUF") (in particular, the domestic garage at No 260 Hillhall Road and what the applicant described as the "pile of rubble" at No 254 Hillhall Road); and whether it wrongly took into account the development pattern (and plot sizes) outside the SCBUF in determining matters such as the siting and design of the proposed property.

Summary of the parties' positions

[15] Mr Duff seeks the grant of leave to apply for judicial review on the grounds upon which leave was not previously granted; and, indeed, on several further additional grounds which he has now raised in an amended Order 53 statement provided in late October. The merits of the grounds are addressed below.

[16] The notice party in the case, Ms Simpson, is the beneficiary of the reserved matters approval which has been granted. She is representing herself and her husband. She has explained that she cannot afford legal representation since that would leave her with no money left to build the house which is the subject of the impugned decision in this case. Her development plans, and the construction of the new family home she had hoped to be occupying by now, have been delayed and put in jeopardy by the range of proceedings which have arisen as a result of Mr Duff's objections. In her submissions to the court she has emphasised, as other interested parties have in similar cases, a feeling of unfairness that someone who lives so far away from her proposed property has (in her words) "targeted" her. She feels that it is unnecessary and malicious. She also complains that Mr Duff has not complied with his duty of candour because he has presented factual evidence, or commentary within his affidavit evidence, which is "speculative and untrue." She is most aggrieved that Mr Duff has raised the prospect of dishonesty or bad faith on the part of a variety of persons (including her father, herself or planning officials) in the course of obtaining planning permission or reserved matters approval for the site.

[17] In particular, the notice party has emphasised that there was previously a house at No 254 Hillhall Road which unfortunately was burnt down. She has explained that she is trying to build a home in the area in which she grew up, near to her father's farm (for whom she acts as a carer), and that it is very difficult to explain to her sons why they have had to stop building. She is from a well-established farming family, which she considers has done much for the environment, and her sons continue to have an interest in farming. She also relies upon the fact that the development will result in an increase in hedge planting and additional trees at the site which she contends will be of benefit to the environment, as well as additional energy efficiency measures she intends to take. In summary, she contends that her father applied for outline permission in good faith and that she simply wants to build a family home on family land which in her view will not impact negatively on the environment. The effects upon her of the litigation relating to the site and the delay in building has previously been outlined to the court in representations on her behalf, including health concerns which she considers to be linked to the stress caused by this.

[18] The notice party's submissions were understandably focused on factual matters and the effect of the proceedings upon her and her family rather than detailed legal submissions, which were left to the respondent council. The respondent objects to leave being granted on any grounds over and above those upon which leave was granted on the papers. It contends that none of those grounds satisfy the test for the grant of leave, namely an arguable case with a realistic prospect of success. The respondent's arguments in that regard are addressed below.

Standing

[19] The notice party has sought to put in issue Mr Duff's standing to bring the present proceedings on the basis that, she believes, he is not the true "environmentalist" he claims to be. She relies, in particular, on two planning applications which she considers he sought to make previously: (a) a planning application (reference LA06/2017/1406/F) to convert two farm sheds into holiday homes; and (b) a planning application (reference Z/2004/1360/F) to develop houses in Strandburn Parade, which would involve cutting down trees which were subject to a tree protection order (TPO). She considers that he is, in fact, an aggrieved planning applicant who is taking out his frustration at the planning system on planning authorities and successful planning applicants.

[20] The issue of standing in environmental cases, particularly with reference to Mr Duff, was examined in *Re Duff's Application (Re East Road, Drumsurn) (Leave Stage)* [2022] NIQB 11. Having considered the authorities, the court reached the view, broadly, that sufficient interest in such cases could be demonstrated by means of a direct personal interest in the development at issue *or* a wider environmental interest provided that, in the latter case, the applicant had participated in the planning process, or both. These concepts have been described in the case-law as "the interest factor" and "the participation factor." The authorities indicate that wide access to the courts is required in environmental challenges which is why the participation factor is frequently sufficient to establish standing even where the applicant has no personal interest in the development under challenge. On appeal, the applicant successfully challenged the refusal of standing in that case, even though he had not participated in the planning procedure itself: see [2023] NICA 22. The Court of Appeal accepted the importance of participation in the planning process as a touchstone of standing in this area (see paras [29](vi) and [33]). It also accepted that Mr Duff is "a person properly engaged with rural planning policy" (see para [34]). Given his lack of direct interest in many of the cases he brings, in his own time and at his own personal cost, his litigation can scarcely be explained otherwise than by a motivation to protect the environment, at least as he sees it.

[21] In this case, Mr Duff did participate in the planning process, at least in its most recent phase. That is because the Council agreed to treat the issues raised in his pre-action correspondence and subsequent proceedings directed towards the (later quashed) reserved matters approval into account in re-determining the application. He was therefore treated as having made representations in opposition to the application before it was granted; and, indeed, he engaged in further correspondence with the Council reiterating his objections in advance of the grant of the impugned approval. These were considered in the course of the Council's decision-making. This is not therefore a case like the *Drumsurn* case where the planning applicant was taken by surprise by Mr Duff's interest only *after* the impugned decision, without having had an opportunity to address his objections before the impugned decision was made (although that was the position when he

mounted his first application for judicial review before Mr Burns, on behalf of the Council, brought an application also seeking that the approval be set aside).

[22] On the basis of the authorities, I consider that Mr Duff does have standing to pursue this application notwithstanding his lack of direct, personal interest. That is one reason why leave was granted on the papers in relation to some grounds. The notice party's concerns about Mr Duff's own planning applications are similar to those raised by the notice party in the *Drumsurn* case: see the final judgment in that case at High Court level ([2024] NIKB 31), at paras [44]-[45]. In that case the notice party relied on these matters to suggest that Mr Duff was an undeserving applicant; whereas in the present case the notice party relies upon them to question the legitimacy of his claimed concern for the environment upon which he relies in support of his standing. As in the *Drumsurn* case, I do not consider that a sufficient basis has been raised to determine that the applicant does not have standing in this case so that leave should be refused. Nonetheless, as Mr Duff indicated in the course of the hearing he may wish to do in any event, I consider it would be helpful if he addressed the circumstances of the two planning applications mentioned above on affidavit in case a standing objection is maintained at some later stage of the proceedings, for instance in relation to the question of any relief which might be granted.

The 'red line' issue

[23] In his initially pleaded case, the applicant placed a degree of emphasis on alleged illegality arising by virtue of the fact (as he contended) that "the impugned decision relates to a different site from that in the prior approval of [outline permission] and therefore [the application for reserved matters approval] was/is not a lawful reserved matters application pursuant to condition 2 of the prior outline approval decision." He asserts that as the outline and reserved matters applications are both part of the same planning approval, they must have "the exact same site location plan" and that "the planning applicant has no business submitting a different site location plan in this [reserved matters] application no matter what personal or other reasons arise."

[24] Condition 2 of the outline approval was in the following, relatively standard, terms:

> "Approval of the details of the siting, design and external appearance of the buildings, the means of access thereto and the landscaping of the site (hereinafter called "the reserved matters") shall be obtained from the Council, in writing, before any development is commenced."

[25] In his recent skeleton argument, the applicant argues that leave should be granted on this issue because "there were significant errors in the red line and detail of the site location plans and site layout plans in the outline application and it is not

lawful to rectify these significant deficiencies by submitting a reserved application within a different red line that carries new meaning; and also by submitting significantly different sightlines for the access to the proposed dwelling." The roads issue is dealt with separately below.

[26] There is no doubt that the red line drawn to identify the site is different in the outline and reserved matters applications. In summary, the identified site is somewhat smaller in the reserved matters application, with a strip of land no longer included to the left of the entrance to the site as one exits it. The question is whether this has any particular legal significance. In his evidence, Mr Duff has prepared a plan showing the area which was included in the site layout plan in the outline application, but which has been excluded from the site layout plan in the reserved matters application. He shaded this area green and, in the course of the hearing, for convenience it was referred to as "the green area." He roughly estimated that this was over 500m^2.

[27] The respondent contends that the reserved matters application was made in accordance with condition 2 of the outline approval since all that is required to deal with the reserved matters has been included within the site and no development is to occur, nor is any required to address the reserved matters, in the green area.

[28] The notice party has provided a brief response from her architect, appended to her submissions, explaining how this matter was dealt with. That explanation is in the following terms:

> "To clarify the issue of the red line – The site boundaries for the reserved matters are exactly the same as the outline approval with no difference at all in the boundaries set for the plot size. The only difference from the outline redline relates to the position achieved for the site entrance. The outline application left 'wriggle room' for where the sightlines fronting Mark Crowe's site would be finalised with DFI roads. Ultimately the outline locked down what was required, and the red line was then tailored for the reserved matters application to meet the sightlines/entrance geometry at its optimum size (i.e. reduced). This would be common practice in reserved matters applications and in no means would or should alter the assessment of the suitability of the position of the house for infill."

[29] The respondent has further explained that, at the outline application stage, the red line included land behind the visibility splay on the left-hand side as one exits the site. On the other hand, the site layout plan submitted with the reserved matters application only included the land actually required to achieve the access and visibility splay requirements which had been settled at the outline permission

stage. The red line area in the reserved matters application was therefore smaller because (unnecessary) land to the rear of the left-hand visibility splay was now excluded. Notwithstanding this, the subject area of the reserved matters application, identified by the red line drawing submitted with it, was of sufficient size to address the condition within the outline permission. That is to say, the issues which had been reserved for further approval could be addressed having regard only to the reduced subject area. This is consistent with the notice party's explanation that a larger site area was identified at outline application stage *in case* a greater visibility splay was required than that with which the Roads Division of the Department for Infrastructure (DfI) ("DfI Roads") was ultimately content. The 'wriggle room' was the inclusion of land within the identified site at outline stage on the provisional basis that it *might* be necessary to incorporate it into the site if a greater visibility splay was required than the architect hoped. When that transpired to be unnecessary, that strip could simply be dropped from the site. The respondent further points to the fact that the issue of the difference in the red line boundaries was expressly dealt with in a number of sections of the case officer's report, having been raised by Mr Duff.

[30] Section 40(1) of the Planning Act (Northern Ireland) 2011 provides as follows:

> "Any application for planning permission—
>
> (a) must be made in such form and in such manner as may be specified by a development order;
>
> (b) must include such particulars, and be verified by such evidence, as may be required by a development order or by any directions given by a council or the Department under such an order."

[31] The form and content of planning applications is therefore governed by development order. In this case, the relevant order is the Planning (General Development Procedure) Order (Northern Ireland) 2015 (SR 2015/72) ("the GDP Order"). Article 3(1) of that Order provides that an application for planning permission is to be made in accordance with that Article. Article 3(2) provides as follows:

> "An application for planning permission shall contain—
>
> (a) a written description of the development to which it relates;
>
> (b) the postal address of the land to which the development relates or, if the land in question has no postal address, a description of the location of the land; and

(c) the name and address of the applicant and, where an agent is acting on behalf of the applicant, the name and address of that agent."

[32] The planning application itself therefore must only identify the land to which it relates by postal address or, failing that, a description of the location. The application must, however, be *accompanied* by a plan. That is provided for in Article 3(3) which states (insofar as material) as follows:

"The application must be accompanied –

(a) by a plan –

(i) sufficient to identify the land to which it relates, and
(ii) showing the situation of the land in relation to the locality and in particular in relation to neighbouring land;

(b) by such other plans and drawings as are necessary to describe the development to which it relates; …"

[33] The purpose of the required plans is therefore to show the site's location and locality (Article 3(a)(ii)); and *sufficient to identify* the land to which the application *for development* relates. Article 3(4) provides that, in the case of an application for outline planning permission, "details need not be given of any proposed reserved matters." Outline planning applications are dealt with in Article 4 of the GDP Order, which need not be set out for present purposes.

[34] Applications for approval of reserved matters are then dealt with in Article 5, which is in the following terms:

"An application for approval of reserved matters—

(a) shall give sufficient information to enable the council or, as the case may be, the Department to identify the outline planning permission in respect of which it is made;

(b) shall include such particulars, and be accompanied by such plans and drawings as are necessary to deal with the matters reserved in the outline permission; and

(c) shall be accompanied by 3 additional copies of the application, plans and drawings submitted with it, except where the council or, as the case may be, the Department indicates that a lesser number is required."

[35] There is no contention in relation to the requirements of Article 5(a) or (c). The applicant's objection – insofar as it maintains that the reserved matters application was invalid – can only relate to the requirements of Article 5(b). This requires merely that the reserved matters application include such particulars and be accompanied by such plans and drawings "as are necessary to deal with the matters reserved." There is no requirement in law, as the applicant suggests, that the site outline must be identical in both the outline and reserved matters permission; much less that any failure to comply with this requirement results in the reserved matters application being invalid. It may well make sense, or be good practice, for the site to be identified in the same way in each case; but that is unnecessary if the plans and drawings submitted at reserved matters stage address what is necessary to deal with the matters reserved by the parent permission.

[36] In the present case, there was and is nothing which requires to be addressed in 'the green area' because it is not proposed that any development whatever will be carried out there. As Mr Beattie explained in his submissions, no change at all is proposed to the land in 'the green area' which is simply unnecessary for the notice party's proposed development. All of the matters reserved by the outline planning permission – the siting of the dwelling, the design and external appearance of the buildings, the means of access to them and the landscaping of the site – can be addressed without regard having to be had to the relatively small area which is no longer contained within the site boundary, on which no development is now proposed.

[37] The affidavit evidence initially submitted by the applicant speculated to a significant degree on why there had been a reduction in the site plan when the reserved matters application was lodged; and, more particularly, upon why a greater area was included in the plan for the outline application and upon what other requirements might have been imposed which might have required use of the green area in some way. Subject to the visibility splay issue addressed separately below, these matters are beside the point. The identification of a slightly smaller site was sufficient to deal with the reserved matters and there was no illegality in the respondent processing the reserved matters application. I therefore refuse leave on this issue.

[38] The applicant raised a further concern, which I found somewhat difficult to follow, to the effect that the inclusion of the green area in the reserved matters application would have deprived two additional fields of road frontage, so meaning that they could not later be relied upon (or could not be relied upon in determining this application) as forming part of a SCBUF for the purposes of planning policy.

That does not follow. Whether or not the green area was included within the site layout plan for the reserved matters application, no development was or is proposed within that area. Moreover, the application for planning permission by, or even the grant of such permission to, a third party in relation to land would not affect the ownership of the property. Put simply, the inclusion (or not) of the green area within the application would not alter matters on the ground in a way which was fundamentally important to the road frontage of the other properties in the area in the way in which the applicant submits.

[39] The applicant has also recently contended that the reserved matters application was invalid because it failed to comply with condition 3 of the outline approval, since an accurate scale plan and accurate site survey were not submitted with the application which showed the access to be constructed and other requirements generally in accordance with Drawing No 02/4 date stamped 4 February 2019. This was dealt with at para 81 of the officer's report, where it was noted that the red line was reduced when compared with the red line of the outline application, but the access was "generally in accordance" with the approved drawing from the outline stage, in compliance with the relevant condition. In relation to this ground, the respondent repeated its objections in relation to the previous ground and contended that the site plan related to the reserved matters application was generally in accordance with the outline permission site plan. This was a conclusion which was plainly open to the respondent, and I refuse leave in relation to that complaint also as having no realistic prospect of success.

[40] As a result, I refuse leave on ground (i), bullet points two and three; ground (ii), bullet point five; ground (iii), bullet points two and three; and ground (iii), bullet point four insofar as it relates to any reduction in the size of the site or general claim of inaccuracy in relation to the site plan (covering the preamble to that bullet point and sub-para (a)).

The EIA issue

[41] The applicant also argues that, as the site is within an area of outstanding natural beauty (AONB), the application was required to be screened for environmental impact assessment (EIA) pursuant to the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2017 ("the EIA Regulations"). He asserts that the respondent failed to screen the application as required by regulations 2, 12(1), 8(1)(a) and 8(8) of those regulations and it was unlawful for it to fail to do so.

[42] Regulation 8(1) is not relevant, in my view, since it relates to a pre-application determination as to the need for EIA and the applicant did not request such a determination in this case. The relevant regulations are regulation 4 and 12. Regulation 4 prohibits a council from granting planning permission "or subsequent consent" (which includes reserved matters approval) for EIA development unless an

environmental impact assessment has been carried out in respect of that development. Regulation 12(1) provides as follows:

> "Where it appears to the council… that an application for planning permission—
>
> (a) is a Schedule 1 application or a Schedule 2 application;
>
> (b) the development in question has not been the subject of a screening determination as to whether the development is or is not EIA development; and
>
> (b) the application is not accompanied by a statement referred to by the applicant as an environmental statement for the purposes of these Regulations,
>
> the council… shall make a screening determination as to whether the development is EIA development, and paragraphs (7), (8), (9), (10), (11), (14) and (15) of regulation 8 shall apply as if receipt of the application were a request made under paragraph (1)(a) of regulation 8.

[43] The respondent observes that the obligation upon it to undertake EIA screening is dependent upon whether the application is a Schedule 1 or Schedule 2 application as defined in regulation 2, that is to say an application for planning permission for Schedule 1 development or Schedule 2 development. There is no suggestion that the present application for a single dwelling in the countryside relates to Schedule 1 development. An application will be for Schedule 2 development where it is for development, other than exempt development, of a description mentioned in column 1 of the table in Schedule 2 where "(a) any part of that development is to be carried out in a sensitive area; or (b) any applicable threshold or criterion in the corresponding part of column 2 of that table is respectively exceeded or met in relation to that development." In such cases, the application should be screened but will only be an application for "EIA development" where an additional criterion applies, namely that the development is "likely to have significant effects on the environment by virtue factors such as its nature, size or location." That is what is determined through the screening process.

[44] The respondent accepts that an AONB is a sensitive area for the purposes of regulation 2 of the EIA Regulations; and that if development within column 1 of Schedule 2 is within a sensitive area it falls under the definition of Schedule 2 development, even if that development does not exceed any applicable threshold criterion in the corresponding part of column 2 of that table. The issue therefore is where the development in this case is "of a description mentioned in column 1" of

the table in Schedule 2. The respondent objected that Mr Duff had failed to identify the category of Schedule 2 development within which he says the subject development falls. In the course of the hearing, Mr Duff made clear that the only possible candidate for this was within Class 10 and, in particular, an "urban development project" under paragraph 10(b) of column 1 in the table. The respondent contends that it was not irrational for it to consider that the development at issue in these proceedings was not such a project; and, indeed, that it would have been perverse for it to consider that it was.

[45] The courts' approach to this issue has helpfully been considered in *R (Goodman) v London Borough of Lewisham* [2003] EWCA Civ 140. That was a case in which the claimants challenged the grant of planning permission for construction of a warehouse and self-storage blocks on the basis that EIA had been required. They contended that the defendant authority had erred in law and/or acted unreasonably in finding that the proposed development was not Schedule 2 development under the applicable EIA regulations either as an "industrial estate development project" or an "urban development project." In the judgment of Buxton LJ, with which the other two members of the court agreed, he said this (at para [8]):

> "In the present case, the only serious contender for a category of Schedule 2 development under which the application might fall is paragraph 10(b) of the Schedule: infrastructure projects that are urban development projects. These are very wide and to some extent obscure expressions, and a good deal of legitimate disagreement will be involved in applying them to the facts of any given case. That emboldened Lewisham to argue, and the judge to agree, that such a determination on the part of the local authority could only be challenged if it were *Wednesbury* unreasonable. I do not agree. However fact-sensitive such a determination may be, it is not simply a finding of fact, nor of discretionary judgement. Rather, it involves the application of the authority's understanding of the meaning in law of the expression used in the Regulation. If the authority reaches an understanding of those expressions that is wrong as a matter of law, then the court must correct that error: and in determining the meaning of the statutory expressions the concept of reasonable judgement as embodied in *Wednesbury* simply has no part to play. That, however, is not the end of the matter. The meaning in law may itself be sufficiently imprecise that in applying it to the facts, as opposed to determining what the meaning was in the first place, a range of different conclusions may be legitimately available. That approach to decision-making was emphasised by Lord Mustill, speaking for the House

of Lords, in *R v Monopolies Commission ex p South Yorkshire Transport Ltd* [1993] 1 WLR 23 at p 32G, when he said that there may be cases where the criterion, upon which in law the decision has to be made:

> "may itself be so imprecise that different decision-makers, each acting rationally, might reach differing conclusions when applying it to the facts of a given case. In such a case the court is entitled to substitute its own opinion for that of the person to whom the decision has been entrusted only if the decision is so aberrant that it cannot be classed as rational."

[46] That was the approach to be taken to the question of whether the relevant development was Schedule 2 development. If the authority concluded that it was Schedule 2 development, then it had to go on to decide whether that Schedule 2 development was also EIA development by determining whether it was likely to have significant effects on the environment by virtue of factors such as its nature, size or location. On that issue, the *Wednesbury* principle would apply (see para [9] of the judgment of Buxton LJ).

[47] Accordingly, in the present case, the first question is whether the Council erred in law as to the meaning of the phrase "infrastructure project" or "urban development project." There is no evidence whatever that it did so; nor that it fell into the error identified by the Court of Appeal in the *Goodman* case, that is to say, treating certain types of project *as a category* as being incapable of falling within paragraph 10(b) of Schedule 2.

[48] The phrase "urban development project" is one which, as Buxton LJ foresaw in *Goodman*, is sufficiently imprecise that, even where there is no error of law as to its meaning, in applying it to the facts a range of different conclusions may be legitimately available (see also para [13] of his judgment). The scope for some discretion in the application of the development categories set out in column 1 of the table in Schedule 2 to the EIA Regulations seems to be recognised in regulation 12(1) itself, since it refers to case "where it *appears* to the council… that an application for planning permission… is… a Schedule 2 application…" That being so, the next question is whether the Council acted irrationally in concluding that the notice party's development was not an urban development project.

[49] Mr Duff relied upon an answer provided in response to a Written Question in the Northern Ireland Assembly (AQW 42530/11-15) by the then Minister of the Environment in March 2015, who was asked by Mr Agnew MLA of the Green Party whether the construction of a development of 19 dwellings comprising an area greater than 0.5ha and located within a defined settlement requires an EIA determination, whereas that same development outside of any settlement, located

within an area of high scenic value and adjacent to a Special Area of Conservation, would not require EIA screening. The Minister's response was as follows:

> "Any residential proposal that meets the relevant thresholds/criteria set out in Schedule 2.10(b) of the [then applicable EIA Regulations] will require EIA screening. However, a residential proposal that is not within a sensitive area and does not meet the relevant thresholds/criteria set out in Schedule 2.10(b) of the Regulations may not necessarily require EIA screening. The Department considers all applications and the necessity for EAI screening on a case by case basis."

[50] The relevance of this response is simply that the Department appeared to accept – correctly, in my view – that the question of whether a development is an "urban development project" cannot be determined *solely* by reference to whether or not it is within a settlement limit (i.e. a recognised urban setting). More detailed and helpful guidance is contained in a number of publications, which also address these issues, which have been placed before the court: (i) 'Interpretation of definitions of project categories of annex I and II of the EIA Directive', published by the Directorate-General for Environment of the European Commission ("the EU Guidance"); and (ii) Development Management Practice Note 9B: 'Screening projects for Environmental Impact Assessment (EIA), published in December 2023 by the DfI ("the DfI Guidance").

[51] In relation to the category of "Urban development projects, including the construction of shopping centres and car parks" in para (10)(b) of Annex II to the Directive, the EU Guidance says this:

> "The EIA Directive provides two examples of what could be considered to fall within this category, i.e. shopping centres and car parks, but these do not constitute an exhaustive list of the activities covered. Information on existing practices in Member States shows that interpretations differ regarding the scope of this project category, although Member States have in most cases interpreted this category in a broad sense.
>
> Housing developments, in particular, are frequently included in the 'urban development projects' category, as are sports stadiums. In some Member States, this category also includes leisure centres and multiplex cinemas. In one Member State, this project category also includes projects for cemeteries, human crematoriums, the extension of theme and amusement parks, and overhead roadways. Another example is that urban development

projects can include the construction of bus or trolleybus parks, car parks or garage complexes, sports stadiums or wellness centres (with a construction area exceeding 0.5 ha). Finally, one Member State introduced the following thresholds above which an environmental impact assessment is to be conducted: shopping centres and supermarkets with a surface greater than 2 500 m2; independent parking places with a capacity of more than 300 vehicles; football pitches and stadiums with a capacity greater than 2 000 seats; cinema complexes with more than six screens; schools for higher education with a capacity greater than 500 students; university campuses; and churches and other places for religious worship. Urban development projects in sensitive areas have to be carefully assessed for their environmental impact.

In interpreting the scope of Annex II (10)(b), the 'wide scope and broad purpose' of the EIA Directive should be borne in mind. The ruling of the Court in Case C-332/04, *Commission v Spain*, deals with the selection criteria of Annex III projects based on an example of this project category. The case dealt with a recreational centre (cinema complex) to be constructed in an urban area. The Court concluded that national legislation that excludes all urban development projects in urban areas from this project category amounts to incorrect transposition of Annex II (10)(b) project category. This is because, given the size, nature and location of the recreational centre (cinema complex), it could not have been ruled out from the outset that it is not likely to have a significant impact on the environment. Therefore, in relation to project location, an urban development project should be seen as a project that is urban in nature regardless of its location."

[52] The EU Guidance goes on to provide some pointers which may be of assistance in considering whether or not a particular type of development falls within the definition of an urban development project, in the following terms:

"To this end, the interpretation of this project category could take account of, inter alia, the following:

(i) Projects with similar characteristics to car parks and shopping centres could be considered to fall under Annex II (10)(b). This could be the case, for example, of bus garages or train depots, which are

not explicitly mentioned in the EIA Directive, but have similar characteristics to car parks.

(ii) Construction projects such as housing developments, hospitals, universities, sports stadiums, cinemas, theatres, concert halls and other cultural centres could also be assumed to fall within this category. The underlying principle is that all these project categories are of an urban nature and that they may cause similar types of environmental impact.

(iii) Projects to which the terms 'urban' and 'infrastructure' can relate, such as the construction of sewerage and water supply networks as well as telecommunications/wireless communication deployment, could also be included in this category. Projects for integrated urban transport schemes (e.g. parallel works at different locations to upgrade bus lanes, tramlines, bus, tram and/or metro stops), could also fall under this project category.

Member States may decide in their national environmental impact assessment systems that some of the above-mentioned projects (for example, sports stadiums or water supply networks, drinking water treatment plants and pipes for carrying treated drinking water) fall within other Annex II project categories. Compliance with the Directive will be ensured, irrespective of which Annex II category is considered applicable, provided that those projects which give rise to significant environmental effects do not escape from the scope of application of the Directive."

[53] The DfI Guidance contains the following relevant observations:

"Many court rulings have consistently supported the position that the application of EIA should be considered to have a broad scope and a wide purpose. What this means is that a PA [planning authority] cannot ignore the need to screen a proposed development for EIA simply because it appears on first consideration not to exactly or closely align to any of the descriptions listed in Schedules 1 and 2.

Considering how residential/housing development should be considered in terms of EIA screening provides a useful example:

The terms residential and housing are not found in the descriptions set out across Schedule 1 or 2 of the EIA Regulations. They are regularly screened for EIA where they qualify as Schedule 2 development by PAs under Schedule 2 10(b): "Urban development projects, including the construction of shopping centres and car parks."

Whilst this definition does not specifically state that it covers residential development, it is clearly established in practice that residential developments can have potentially significant effects on the environment and should be screened for EIA when they qualify as Schedule 2 development.

Further to the above, while the Schedule 2(10)(b) category is termed 'urban development' where such developments are proposed in non-urban areas they could still have an urbanising effect on the local area. Examples could include a proposed residential development on the edge of a small village or the development of an out-of-town supermarket or shopping centre.

Further examples, although non exhaustive, include:

- Solar farms/solar energy projects are not listed under sub-sections (a) to (k) of Schedule 2 (3), however, they are considered to be "energy projects" and thus would fall within the overall category.

- Desalination projects for the production of potable water are not listed in Schedule 2 but are likely to be considered to be 'infrastructure projects', and thus could be considered under Schedule 2(10).

- Recycling, composting and reuse facilities should be considered within Schedule 2 (11)(b) as the facilities are designed to manage and handle materials that are considered to be waste under the legal definition of waste."

[54] Although the reference to shopping centres and car parks is clearly not exhaustive, I accept Mr Beattie's submission that these examples give some indication of the nature and scale of projects which fall within the relevant description. In my view, the overall title of class 10 within the table, "Infrastructure projects", also assists in relation to the interpretation and application of the relevant description. The type of projects listed within class 10 are mostly such as to provide, or require, significant new infrastructure in terms of transport and/or utilities. A substantial housing development scheme will frequently fall within this category.

[55] Whilst it is also clear that residential development projects can be urban development projects for the purposes of EIA, and that an out-of-town location is not determinative of the matter, the size and location of the project are relevant. The guidance referred to above indicates that these factors will affect the assessment of whether the project is urban in nature of itself (wherever located) and/or whether it will have an urbanising effect by transforming a non-urban area into an urban one. An urbanising effect may arise, in particular, where a development is at the edge of a settlement and will in effect expand the settlement limit; or where there is a large, intensive-use development in a non-urban setting which will completely transform the character of the area (the examples given in the DfI Guidance being out-of-town shopping centres or supermarkets).

[56] As noted above, the present case concerns an application for a single, storey-and-a-half dwelling in the countryside. The (larger) site in the application for outline permission is cited as being 0.27ha. I do not consider that a single house in the countryside, save in highly exceptional circumstances which I cannot presently foresee, could be considered to be an infrastructure project. Nor do I consider that the notice party's proposed development could be considered to be an "urban development project." The nature of projects included within Class 10 can be gleaned from the other specified projects which are in principle included. These are projects such as industrial estates; transshipment facilities; construction of railways, airfields, roads and harbours; inland-waterways, dams and tramways; oil and gas pipelines and long-distance aqueducts; etc.. The construction of a single dwelling is of an entirely different nature and order to such projects. The mere fact that Policy COU16 – against which all proposals for development in the countryside in the Council area must be assessed (including but not limited to housing) – refers to the possibility of new development marring the distinction between a settlement and the surrounding countryside or otherwise resulting in "urban sprawl" does not mean that such an application must necessarily be considered to be urban, or potentially urban, in nature. I accept the respondent's submission that on no reasonable view does the proposed development fall within class 10(b) of Schedule 2 to the EIA Regulations. The respondent was not irrational to proceed on that basis. Indeed, I consider there to be much force in Mr Beattie's submission that it would have been irrational for it to have determined otherwise on the facts of this case. That being so, the fact that the proposed development is within an AONB is of no significance in terms of EIA screening being legally required.

[57] The applicant also relied upon the guidance relating to project-splitting, or 'salami-slicing', in order to avoid the need for EIA. I do not consider that this avails him. Project-splitting occurs where an initial project is split into smaller projects or phases in order to avoid any individual application reaching or exceeding a relevant threshold for Schedule 2 development. I have considered the terms of the two guidance documents cited above insofar as they relate to this. The issue of correct professional identification is a matter of judgement for a planning authority based on the available evidence. This may arise where the developer takes an incremental approach to development, for example by seeking permission for an initial development and then later seeking permission for the development of an adjacent site. It is also possible that unrelated applicants may come forward with similar types of development in a similar geographic area at the same time, with each proposal falling below the Schedule 2 thresholds. Such situations might not necessarily be considered to be project splitting. However, the planning authority needs to be vigilant to correctly apply the EIA requirements in relation to cumulative impacts. The EU Guidance refers to projects which have "an objective and chronological link between them" (by reference to Case C-244/12, *Salzburger Flughafen*, at para 21).

[58] The most obvious form of project-splitting is where a developer seeks planning permission on the site and then returns with a smaller application or set of applications below this schedule two thresholds. In the present case, however, there is no evidence whatever pointing towards project-splitting on the part of the notice party. The issue arises only because of the applicant's speculative concern that there may be further applications for development in the same area by someone at a later point (and that the grant of permission in this case may increase the prospects of a subsequent application being granted). So far as the notice party is concerned, this has been expressly disavowed. However, more importantly, there must be some evidence suggesting that project-splitting has occurred or is in prospect, not a mere fear of potential unrelated development at some later point.

[59] For the above reasons, there is no arguable case having a realistic prospect of success that the Council was obliged to screen the development under the EIA Regulations. I also have concerns about this aspect of the case being raised at this time. Under the EIA Regulations, an EIA application may include "a subsequent application in respect of EIA development." However, EIA development is (for present purposes) defined as "Schedule 2 development likely to have significant effects on the environment…" The suggestion that the development at issue in this case is Schedule 2 development should have been raised and addressed at the stage of the application for, and grant of, outline planning permission. This issue was also not addressed in pre-action correspondence. These factors may have warranted the refusal of leave if on this ground even if the issue was arguable. In the event, I do not need to determine this.

[60] I refuse leave on the EIA issue (addressed in the following grounds within the Order 53 statement: ground (i), bullet point four; ground (iii), bullet point five; and ground (iv)).

Road safety

[61] The applicant relies upon the fact that Policy COU16 indicates that a new development proposal "will be unacceptable where access to the public road cannot be achieved without prejudice to road safety…" He contends that this is highly relevant because, in his submission, the evidence suggests that the approved plan departs from recommended DfI visibility standards and therefore the access to the approved property is potentially dangerous.

[62] This is linked to further new ground proposed by the applicant – ground (ii), bullet point six - in which he contends that the respondent's view that policy was complied with because "the visibility splay to the right was always intended to be 79m" (as noted in the officer's report) was irrational. That is because, Mr Duff submits, "every DfI Road consultation response on this site and the adjacent site" required a visibility splay of 110m to the right, rather than 79m. In support of this contention, Mr Duff took me to earlier consultation responses from DfI Roads which appear to require a visibility splay of 110m x 2.4m to the right as one exits the site. However, the critical consultation response, offering no objection on DfI Roads' behalf, is dated 21 March 2019. This post-dated the key drawing (marked Drawing No 02/4 by LCCC Planning Department but also referred to as Drawing No 100 Rev C by the architect) which was received by the Council's Planning Department on 4 February 2019. DfI Roads offered no objection having been provided with this plan and suggested a condition that a further plan be submitted as part of the reserved matters application "showing the access to be constructed and other requirements generally in accordance with Drawing No. 02/4 bearing the date stamp 04 February 2019" in order "to ensure that there is a satisfactory means of access in the interests of road safety and the convenience of road users." The respondent relies upon the absence of objection after this plan had been received and considered by DfI Roads; but the applicant considers that DfI Roads have misunderstood the plan and/or made a mistake because of an inconsistency or inconsistencies within it.

[63] The respondent notes that the access and visibility splay requirements are addressed at paras 70 to 75 of the case officer's report. Paras 71-73 are in the following terms:

> "71. The difference between the detail of the drawing submitted with this application and the stamped approved drawing 02/04 are noted. The visibility splay on the right-hand side visibility splay is now shown to be 79 metres and not 110 metres as shown in the concept drawing.

> 72. Based on a review of the consultation advice received from DfI Roads at the outline planning stage it is accepted that the visibility splay in this direction was always intended to be 79 metres and the Council has no reason to disagree with advice received from DfI Roads in respect of the standard of visibility and forward visibility that can be achieved.
>
> 73. The extent of the splay is smaller than what was considered at the outline planning stage. Additional land outside the extent of the application site is not required. The position of the access remains in accordance with the concept drawing agreed at the outline stage."

[64] The report went on to note that there were no road safety or adverse traffic impact concerns identified, as the access and visibility splays were designed in accordance with the guidance in Development Control Advice Note 15 (DCAN15) and therefore requirements of the relevant policies touching on roads considerations, including criteria (h) and (i) of Policy COU16, were met.

[65] The respondent disputes that it was irrational to say that the visibility splay to the right was always intended to be 79m. It explains this in the following way. In the relevant drawing attached to the outline permission (Drawing 02/4) there are two separate lines to the right of the exit, namely a lightly dashed purple line and a more heavily dashed green line. The green line was shorter than the purple line, although both were annotated indicating that they were 110m long. As the applicant has pointed out in his second affidavit, the green dotted line, which represents the length of the relevant visibility splay on the outline site layout plan, is approximately 80m when scaled up, but is wrongly annotated as 110m. In addition, in the legend of the drawing, it is stated next to the green line that this represents "proposed sightlines 2.4m x 79m both directions (shared access)." That, the respondent submits, is also consistent with other annotations on the drawing. In summary:

(a) The green line showing the visibility splay to the right is consistent with only 79m being required. It measures 80m (when scaled up). Mr Duff accepts that the length of this line illustrating the required distance is consistent with 79m.

(b) Although Mr Duff relies upon the annotation of 110m beside the green line (which says "2.4m x 110m (tangent) visibility splay") which is inconsistent with the length of the line, the respondent says that is inconsistent with a range of other annotations on the map, namely:

    (i) The legend to the map which defines the green dashed lines in the following terms: "PROPOSED SIGHTLINES 2.4 x 79M BOTH DIRECTIONS (SHARED ACCESS)";

(ii) The annotation in relation to the fence which required to be moved to facilitate the right-hand visibility splay which is in the following terms: "EXISTING FENCE POSITION TO BE SET BACK TO PROVIDE 2.4 X 79M SIGHTLINE"; and

(iii) Similar annotations in relation to the left-hand visibility splay which again shows that it was clearly understood to be 2.4m x 79m.

[66] Taking these together, the respondent's case is that DfI Roads must have understood when it withdrew its objection that the planning applicant was only proposing a visibility splay of 79m in both directions, notwithstanding that one annotation on the right-hand splay was inconsistent with this and reflected the 110m length which DfI Roads had previously required.

[67] On the other hand, the applicant, in his third affidavit, contends that the change to the visibility splay in this drawing was a unilateral change on the part of the applicant "which got the green light from the DfI in error." He relies upon the 2014 planning permission for the replacement dwelling at No 254, and the DfI consultation response in relation to this application, both of which required a 110m visibility splay to the right at essentially the same location. He further relies upon earlier consultation responses in relation to the application giving rise to the impugned approval, which appeared to require a 110m visibility splay to the right. Finally, and perhaps most importantly, he also refers to a much more recent DfI consultation response of 11 October 2024 in relation to a current application for permission at No 254 which, again, requires a 110m visibility splay to the right. On this basis, save for the response immediately before the impugned approval, the applicant is able to say that DfI consistently sought a longer visibility splay to the right of the entrance at or about this location, both before and after the impugned approval. He asks rhetorically: why would it have done so in its recent consultation response if, in 2019, it changed its position to accept a 79m splay to the right?

[68] In the course of the hearing, Mr Beattie indicated, upon instruction and after enquiry from the court, that the reference in para 72 of the officer's report to the "review of the consultation advice received from DfI Roads" was simply a desktop review, that is to say it did not involve any further engagement with DfI Roads in order to clarify their position or understanding.

[69] On balance, I consider it appropriate to grant leave in relation to this issue. The courts will sometimes take a more generous view in relation to the grant of leave in a planning case where the concern relates to road safety standards and therefore, potentially, public safety. I consider this to be an issue which would benefit from further investigation. It might well be that DfI Roads can confirm, one way or another, whether they were content, on an informed basis, to accept a visibility splay of 2.4 x 79m to the right when they withdrew their objection to the outline planning application. If so, that is likely to be the end of the matter. If it was indeed a mistake

on the part of DfI Roads (as the applicant contends) because of the inconsistent annotation on Drawing No 02/4, further argument may need to be had in relation to the effect of that and whether – as Mr Beattie submitted without developing the argument at this stage – this was simply a matter of interpretation of the outline permission upon which the Council was entitled to take a view and/or in respect of which the beneficiary of the permission is entitled to the benefit of any doubt. In any event, I therefore grant leave on ground (ii), bullet point six; ground (iii), bullet point four, sub-paras (b) and (c); and ground (iv), bullet point three.

Other grounds

[70] The applicant also maintains his objections based upon the contents of Policy COU1 (the general, restrictive policy in relation to development in the countryside) and Policies COU15 and COU16. I refuse leave in relation to the issue of Policy COU1 as I continue to be of the view that this does not add anything material to the applicant's challenge in relation to Policy COU8. If the respondent misdirected itself in relation to compliance with Policy COU8, the basis for its conclusion that Policy COU1 was complied with would also fall away. Separate reliance upon Policy COU1 is superfluous. If the Council misinterpreted that policy or was irrational in its application, its decision would be unlawful on that basis and in COU8 gateway to compliance with Policy COU1 would no longer be available.

[71] Policy COU15 deals with the integration and design of buildings in the countryside; and Policy COU16 deals with the rural character, including matters such as whether the proposed development is unduly prominent in the landscape or has an adverse impact on the rural character of the area. The applicant argues that these policies apply at both the outline planning stage and the stage of the approval of reserved matters. In particular, he argues that heightened intensity of review is required in respect of these matters given that the proposed development is located within an AONB.

[72] The respondent submits that it is clear from the case officer's report that the Council was alive to, considered and applied each of these policies. It complained, with some force in my view, that the applicant had failed to particularise within his Order 53 statement how the respondent had misinterpreted these policies. The respondent contends that they were correctly considered and that the view taken that the proposal complied with the policies was an exercise of planning judgement which the Council was entitled to reach. Several of the applicant's complaints in relation to the application of these policies plainly amount to a disagreement, on the merits, with the planning judgement of the Council in relation to prominence and integration, harm to the character of the area, etc..

[73] The site's location within an AONB was identified in the officer's report at the time of the grant of outline permission and a design and access statement was provided, addressing the details of the application, in light of this. This permission established the acceptability in principle of the development at this location. The

reserved matters application dealt with outstanding matters of detail such as siting and design. However, the officer's report from July 2021 recognised that the site was located within the Castlereagh Slopes Area of High Scenic Value and the Lagan Valley AONB. It had specific regard to Policy NH6 of PPS2 on this account. The issue of the site's location within an AONB was not then revisited in Mr Duff's objection. It has been appropriately taken into account in the decision-making process overall.

[74] Save for the reliance on the road safety issue which finds expression in Policy COU16 (on which leave has been granted separately), I do not consider the applicant to have an arguable case with a realistic prospect of success in relation to the interpretation or application of either Policy COU15 or COU16 and propose to refuse leave in relation to them also.

[75] Moreover, I accept the respondent's submission that a number of the further grounds upon which the applicant now seeks leave are duplicative of, or add nothing material to, the grounds upon which leave has already been granted.

[76] I have also not been persuaded that the applicant should be granted leave on ground (ii), bullet point three, which alleges further irrationality, and that the respondent wrongly interpreted the guidance in the supplementary planning guidance publication, *Building on Tradition*, in relation to design principles for infill houses. The respondent asserts that the proposal has been assessed against the guidance in *Building on Tradition*, which is expressly and extensively referred to in the case officer's report in several sections.

[77] On these bases, I propose to refuse leave on ground (i), bullet point one (insofar as it relates to Policies COU1, COU15 and COU16); ground (ii), bullet points one and three; and ground (v).

The 'competence' issue

[78] Finally in terms of the grounds of challenge, the applicant has also indicated that, in addition to seeking a quashing order in relation to the impugned approval in these proceedings, he seeks a declaration "that the Respondent has acted irrationally and/or without competence in this matter." He relies upon the fact that he has a range of challenges in relation to decisions of LCCC and "the outcome of each case provides insight into the general dysfunction and incompetence of the Respondent to such a degree that the Court will be obliged to (a) consider whether one case informs other cases in the cohort and (b) whether any case indicates bias in favour of planning applicants within the cohort generally."

[79] This issue is reflected in an additional ground (ground (ii), bullet point four) on which the applicant seeks leave, again pleading a species of irrationality. It is in the following terms;

> "The Applicant contends that the Respondent's view that Policy was complied with was irrational in the *Wednesbury* sense in that the Respondent having acted incompetently in this case and numerous other cases brought by the Applicant, and having failed to expeditiously re-determine this application and the 16 other applications as was Ordered by the Court in [2022] NIQB 10, can claim to be a competent authority, entitled to exercise planning judgement that can only be challenged if deemed irrational or illogical in the Wednesbury sense."

[80] I refuse leave to apply for a judicial review on this ground for a number of reasons. First, the respondent is correct in my view to submit that the ground is unarguable because it seeks to extend, on a new basis, the grounds upon which matters of evaluative judgement by a planning authority are vulnerable to challenge in judicial review. This issue has been addressed in previous case-law, including of the highest authority and which is binding on this court, on many occasions. The judgement exercised by the respondent in this case was either irrational or it was not. If it was irrational, the resulting decision is liable to be quashed. If it was not irrational, the resulting decision is not liable to be quashed on that ground, notwithstanding that the same planning authority may have made errors in other planning applications. Whether or not that is so, the respondent cannot be debarred from relying upon the rationality of its own decision in these proceedings. Nor can the notice party be deprived of the benefit of a rational decision simply because the same planning authority may have acted wrongly or irrationally in another case (assuming that to be so).

[81] Second, in my view it would not be constitutionally proper for the court to decline to afford any respect to the planning judgement exercised by the Council. The limited basis upon which the court will intervene in exercises of planning judgement does not depend, or at least does not merely depend, upon the expertise of those exercising the relevant judgement. In the planning sphere in particular, local councillors from the relevant area are deemed to have local knowledge which the court does not. Properly qualified, professional planning officers are also assumed to have a knowledge and expertise built up through learning and experience which the court does not have. However, district councils and their members also enjoy a democratic legitimacy in exercising judgement in such matters which the court does not. The members have been elected to take decisions such as these and are answerable to the electorate in due course for the exercise of their functions. Most importantly, this is the body upon which the legislature – Parliament or, in this case, the Assembly – has conferred the relevant functions.

[82] Third, I consider the applicant's proposed course in respect of this ground to be a misuse of the court process. He contends that the respondent has acted incompetently in numerous other cases brought by him (and, indeed, in other decision-making where he did not bring a challenge, such as in relation to the grant

of outline planning permission in this court). However, it is not appropriate for the court, within the confines of this case, to seek to examine the decision-making in a whole variety of other cases in order to ascertain the respect which should, or should not, be paid to the Council's exercise of planning judgement.

[83] The central issue relied upon by Mr Duff to ground his incompetence argument is that the outline planning permission should never have been granted in the first place, since there is no existing dwelling at No 254 Hillhall Road. (The previous dwelling there burned down some time ago and there is now only a planning permission for a replacement dwelling at the site but no dwelling, only limited remains.) However, to proceed on the basis that this represents a separate ground of judicial review would be to permit the applicant to mount a challenge to the outline permission, within this challenge to a later decision, in circumstances where he accepts that he is out of time to challenge the grant of outline permission. For all of these reasons, I refuse leave on this ground.

The Aarhus issue and the terms of the PCO

[84] Mr Duff also sought a further protective costs order (PCO), or amendment of the existing PCO, so that his maximum costs liability in these proceedings did not exceed an absolute cap of £1,000. The Council has not accepted that this is an Aarhus Convention case for the purposes of the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013, as amended ("the Costs Protection Regulations"). Nonetheless, in order to save time and costs it had previously agreed, on a pragmatic basis, to a PCO in the standard terms which might be granted under those regulations, limiting Mr Duff's costs liability to £5,000 plus VAT, with its own costs liability limited to £35,000 plus VAT.

[85] Mr Duff was unsatisfied with this level of costs protection and sought a further order limiting his adverse costs liability to a maximum of £1,000 in total on the basis that any costs liability greater than that "would be prohibitively expensive and objectively unreasonable." That gave rise to a number of issues. First, whether the case properly falls within the purview of the Aarhus Convention for the purposes of the Costs Protection Regulations; second, whether there was any proper basis for reducing the standard costs cap in this case; and, third, whether Mr Duff was right in his assertion that VAT should never be payable *in addition to* any capped costs ordered against a party who benefits from a PCO under the Regulations.

[86] The Council filed written arguments in relation to these issues but, at the hearing, Mr Duff indicated that he was not in a position to deal with these issues in detail and, further, submitted that he was entitled to clarity on his potential costs liability before any significant developments in the proceedings because the Costs Protection Regulations provide that, where the respondent has argued that the case is not an Aarhus Convention case (as the Council does here), that issue should be determined "at the earliest opportunity" (see regulation 4(2)).

[87] Having taken instructions on this issue, Mr Beattie KC on behalf of the respondent presented a revised position to the court. The Council was prepared, purely on a pragmatic basis and in order to avoid an adjournment, which would itself entail the expenditure of further time and costs, to consent to the level of costs protection Mr Duff sought. That view was reached partly because the course suggested by Mr Duff would itself 'eat up' any additional costs benefit to the Council in this case but also having regard to the notice party's clear desire that further delay in the proceedings be avoided. Mr Duff indicated his consent to this course and was content that the issues of principle between the parties (identified at para [85] above) could be argued and determined in some other proceedings, if necessary.

[88] As a result, by consent, I made a further PCO in this case limiting Mr Duff's potential adverse costs liability to a figure of £1,000 only; and limiting the respondent's potential adverse costs liability to a figure of £5,000 only.

Conclusion

[89] For the detailed reasons given above, I grant leave in relation to what I have termed the 'road safety issue' (see para [69] above). I refuse leave to apply for judicial review on the original grounds upon which leave was not initially granted on the papers. I further refuse leave to apply for judicial review on the other new grounds raised by Mr Duff in his amended Order 53 statement.

[90] I will hear the parties in relation to the further case management of the proceedings.