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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY CHRISTINE ALEXANDER FOR JUDICIAL REVIEW

-v-

CAUSEWAY COAST AND GLENS BOROUGH COUNCIL

McCLOSKEY J

Preface

The hearing of this judicial review challenge, which acquired certain organic and unpredictable elements as it progressed, was conducted over a period of several days, ending on 13 June 2018. Having regard to the full history, coupled with the position of the developer and the developing situation on the subject site, an acute need for certainty and finality has emerged. While regrettable instances of non-compliance with the Court's directions and the Judicial Review Practice Note delayed the initiation of the hearings, considerable expedition has still proved possible.

Introduction

[1] Christine Alexander (hereinafter "*the applicant*"), a resident of 108 Dunluce Road, Portrush, challenges the decision of Causeway Coast and Glens Borough Council ("*the Council*"), dated 28 September 2017, granting planning permission for the development of a caravan site and associated works at 45 Craigahulliar Road, Portrush ("*the site*"). If / when completed the development will comprise 118 individual "sites" (formerly, in conventional parlance, "pitches" I believe). The successful planning applicant and owner of the lands is Blairs Caravans Limited ("*the developer*"). The court has heard from its managing director, Mr Mayrs, at various stages of these proceedings. This legal challenge was initiated on 11 December 2017.

[2] The developer has chosen to proceed with construction of the works authorised by the impugned decision. As of 05 June 2018, the Council having issued the requisite licence, the first phase of the site development works were complete and business had begun some two weeks previously, with 21 "sites" fully developed for the purpose of receiving touring caravans and motor homes. Altogether ten of the static caravans have been sold, yielding some £333,000. The developer asserts that the purchase cost of the site, the planning and legal fees to date and the construction/development costs total some £1.25 million. Work continues, with a view to the development being fully operational by Easter 2019.

<u>The challenge</u>

[3] The grounds of challenge have proved to be organic. Their formulation has required proactive intervention by the Court, giving rise to several amendments of the Order 53 pleading resulting in the following, in brief outline:

(a) <u>Error of Law re "fall back":</u> the Council erred in relying upon a Certificate of Lawful Use or Development ("the Statutory Certificate") regarding a concrete blockworks plant on around 50% of the site, as this land use had expired through extinguishment or abandonment.

(b) By reason and in consequence of (a), the Council erred in law in relying upon and purporting to give effect to Planning Policy Statement 4 ("PPS4"), as there was no "*established*" economic development.

(c) The Council misconstrued and/or misapplied Planning Policy Statement 16 ("PPS16") by focusing on the question of whether the <u>site</u>, rather than the <u>area</u> (see TSM6), had the capacity to absorb the proposed development.

(d) Disregard of a material consideration, namely the visual impact of the proposed development on the surrounding landscape, in contravention of policies TSM6 and TSM7 of PPS16.

(e) Misconstruction and/or misapplication of Planning Policy Statement 3 ("PPS3"), specifically AMP2 thereof, regarding the traffic impact of the proposed development; and, hence, disregard of a material consideration; and/or acting irrationally.

(f) An outright failure to have regard to two material considerations namely policies CTY13 and CTY14 enshrined in Planning Policy Statement 21 "Sustainable Development in the Countryside" ("PPS21").

(g) Contravention of planning policy, namely Planning Policy Statement 11 "Planning and Waste" ("PPS11"), specifically Policy WM5 thereof, by failing to require an odour assessment.

(h) EIA error of law and/or irrationality in the Council's "screening" assessment/decision that the planning application did not entail "EIA Development" within the compass of the Planning (Environmental Impact Assessment) Regulations (NI) 2017 (the "*EIA Regulations*") given the hydrological link between the site and sites designated under the Conservation (Natural Habitats) Regulations (NI) 1995 (the "Habitats Regulations") and the absence of any Construction Environmental Management Plan (the "*CEM Plan*").

(i) Material information, namely aerial photographs and photomontages of the site, was not considered by <u>all</u> members of the Council's planning committee (the "*PC*").

[4] The skeleton argument of Mr Shaw QC and Mr Turbitt (of counsel), representing the applicant, largely equated with the Court's analysis of the final incarnation of the amended Order 53 Statement in [3] above. In the oral submissions of Mr Shaw there was particular emphasis on grounds (a), (b), (d) and (e). This judgment has been structured accordingly. The Council was represented by Mr Beattie QC and Mr McAteer (of counsel). Mr Mayrs, the developer, represented himself and made representations to the Court, both oral and written, at various stages of the proceedings.

<u>The impugned decision</u>

[5] The impugned grant of planning permission by the Council is dated 28 September 2017 and is in the following terms:

> "*Site of proposed development: Portrush block yard, Craigahulliar Quarry, 45 Craigahulliar Road, Portrush …*
>
> *Description of proposal: Demolition of existing sheds. Proposed caravan park including sites for 51 touring caravans, 49 static caravans, 18 camping cabins, managers and amenity caravans, access roads and landscaping, improvement of Ballymacrea Road (including new public footpath) to improve site access and carriageway improvements at numbers 39, 90 metres west of 59D, 59C/59G and 67 Ballymacrea Road and at the Ballymacrea/Ballybogey Roads junction …*
>
> *Applicant: Blairs Caravans Limited …*

Agent: GM Design Associates Limited."

The development approval was granted subject to a detailed code of conditions.

Some key dates and events

[6] The history of the site and the chronology of the impugned decision include the following salient dates and events:

(a) Historically, the site was used for basalt quarrying for some 150 years.

(b) In the 1960s the larger, composite area which includes the subject site, was effectively subdivided. Quarrying on the site was discontinued and, following substantial alterations to levels and the construction of a hardened surface, the land use became the manufacture and storage of concrete blocks which continued for some 45 years.

(c) While full planning permission for renewed quarrying was granted in December 1974, this was not implemented and later expired.

(d) On 14 May 2008 the Department of the Environment ("*the Department*") certified, under Article 83(a) of the Planning (NI) Order 1991 that "*… the concrete manufacturing and storage works have been in operation in excess of ten years. The operations are therefore immune from enforcement action and can only be regularised by the granting of this certificate of lawful development*". The statutory certificate was granted to Cemex (NI) Limited ("*Cemex*").

(e) In April 2012 the subject site was marketed and was subsequently purchased by the developer noted above.

(f) On 22 March 2013 the developer's application for planning approval culminating in the impugned decision was made to the Department of the Environment (the "Department").

(g) On 30 June 2015 the Council, which had by statute assumed the decision making function of the Department, granted the planning permission sought.

(h) In September 2015 this applicant challenged the aforementioned decision by judicial review and, on 08 February 2016, an order quashing such decision was made by consent of the parties.

(i) During the period which followed the Council was engaged in the exercise of remaking the decision.

(j) On 27 September 2017, nine members of the Council's Planning Committee (the "*PC*") which has a membership of 13, visited the subject site, accompanied by Council planning officers.

(k) At its public meeting later on the same date, the Council's PC resolved to approve the planning application, eight members voting in favour, four against and one abstaining.

(l) On 11 December 2017 these proceedings were initiated and, following an inter-partes leave hearing, by order dated 16 March 2018 leave to apply for judicial review was granted. The ensuing substantive hearing was spread across several dates: 11 May and 01, 04 – 06, 07 and 13 June 2018.

The Planning History, or "fall back", Ground

[7] The essence of this ground is that the Council materially misdirected itself in law and took into account an irrelevant consideration in failing to recognise that the land use permitted by the Statutory Certificate dated 14 May 2008 had been either extinguished or abandoned and could not, in consequence, rank as a "fall back" alternative to the developer's proposal.

[8] By the aforementioned certificate, the Department certified that the concrete block works operations were an "*existing use*". It is tolerably clear from the language of the certificate that this is what was represented to the Department by Cemex's agent. The evidence bearing on this historical use of the site is relatively limited. There are two main sources. First, in the estate agent's sales brochure generated in April 2012 for the purpose of selling the site was described as comprising as 18.5 acres of land "*which was **previously** used as a concrete block plant*" [emphasis added]. The brochure continues:

> "*The property is situated beside Craigahulliar landfill site which is owned and operated by Coleraine Borough Council. The property comprises of* [sic] *a **former** concrete block plant with associated warehousing and outbuildings together with an area of land that was **previously** quarried.*"
>
> [Emphasis added.]

[9] The second main source of historical information is contained in materials prepared by the developer's agents. These included a report dated January 2013 entitled "Industrial Heritage Survey of Craigahulliar Quarry, Portrush, County Antrim". It described the industrial quarrying of the basal outcrop dating from 1908. It further noted the change of industrial operations to concrete block

production using quarried aggregates in the 1960s, with quarrying continuing until the 1980s, followed by the sale of most of the quarry to the Council for use as a landfill site. Cemex became the industrial operator in 2005 and -

> *"With the cessation of block making in 2011, the site was closed."*

Some three months later, in a letter dated 24 May 2013 to the Department's Area Planning Office, the developer's agents outlined the history of the site in essentially the same terms and then stated:

> *"The manufacture and storage of concrete blocks on a very large area, however, including all of the north western part of the quarry as approved in 1974* ***continued up until recently."***
>
> [My emphasis.]

The author then proffered two reasons for contending that in law no abandonment had accrued. First –

> *".. the site remains in a condition and with all the buildings necessary to allow the commencement of the approved operation at any time."*

Second:

> *"Also only a short period has passed since the last operator ceased business on the application site."*

The author also employed the description "*an established, very large, vacant industrial site in an unsightly condition.*"

[10] In his report to the Council's PC, which occupied centre stage in these proceedings, Mr Mathers, the Principal Planning Officer ("*PPO*") who clearly had a central role in the processing and consideration of the planning approval application, devoted much attention to the site's history. He described the site as "*currently derelict and was previously a concrete works and batching plant …*". Having referred to the 2008 statutory certificate (*supra*) and a series of individual topics, including objections and material considerations, the crux of his report is contained in a lengthy section entitled "Considerations and Assessment". This chapter begins:

> *"The main considerations in the determination of this application relates to planning history and fall-back; principle of the development (PPS4/PPS16/SPPS); traffic/road issues; impact on amenity; flooding and land*

drainage; compatibility of development with adjacent land uses (PPS11); impact on designated sites; and other matters."

The report then outlines the relevant policy framework. There is no suggestion on behalf of the applicant of any omission or error in this respect.

[11] This is followed by a lengthy section entitled "Planning History and Fall Back Position". The effect of the 2008 statutory certificate is described in the following terms:

> "*This certificate means that a concrete block yard could, at any time, begin operating within this site without the need for a planning application. This is a material consideration in assessing the proposed caravan site.*"

The author then adverts to one of the objections, namely a contention that as the certified use had "*subsequently ceased*", there is "*no fall-back position*". Acknowledging (correctly) that this raises an issue of law, the author then refers to certain decided cases and a planning law text. Next, he states:

> "*However, as the objector has raised the issue of a fall-back position, there is a need to consider if the use as a block yard, established through the* [statutory certificate], *has been abandoned.*"

[12] In light of its importance, it is appropriate to reproduce in full the immediately ensuing section of the report:

> "[The] *tests include the physical condition of the building; the length of time for which the building had not been used; whether it had been used for any other purpose; and the owner's intentions. The buildings still remain and the physical condition, when the planning application was submitted, was that of a block yard. A satellite image of the land shows blocks still on site in July 2011. The application was submitted in early 2013 …*
>
> *It does not appear that the land has been used for any other purpose, other than importing spoil onto the site in accordance with the previous permission and prior to the quashing of this decision, which is still on site. The owner's intention was to change the use of a block yard to a caravan park, which is the subject of this application.* ***Having regard to these factors, it is not considered that the previous use has been abandoned***."

[My emphasis.]

In the "Errata" annex which accompanied the PPO's report, the following was added:

> *"Were operations to resume, it is the official's planning judgement that enforcement action would not be appropriate given the history of the site and the factors considered above."*

[13] Next, the PPO advised the PC in the following terms:

> *"The* [Gambone**] *case makes clear that once the question of whether or not the fall-back matter is material to the decision has been concluded, which is accepted here, the question for the decision maker is what weight should be attached to it … the weight which might be attached to the fall-back position will vary materially from case to case and will be particularly fact sensitive."*

(**As regards Gambone: see [25] *infra*.)

The text continues:

> *"In this case, officials are of the opinion that, should the concrete block yard use resume, that* [sic] *this industrial use in the countryside, with HGVs coming to and from the site, is likely to have a greater impact on the countryside and its environs than a tourism use of a holiday park.* ***Therefore significant weight is apportioned to the fall-back position of the planning history as a material consideration ….***
>
> *Given the foregoing, the Council's position cannot be considered to fall foul of the Wednesbury unreasonable test."*

[Emphasis added.]

The penultimate sentence, which I have highlighted, is contained in the body of the report. However, in the 'Errata' supplement it is deleted. This section of the report ends with the omnibus conclusion:

> *"Therefore, having regard to the planning history, it is considered there is a fall-back position of a concrete block yard to lawfully operate at this site."*

In a later passage the author adds that the block yard use "*… is established and can recommence at any time*".

[14] Mr Worthington, a planning consultant engaged on behalf of the objectors, and this applicant, highlights in his affidavit that the statutory certificate relates to approximately 50% of the subject site only. (This is uncontentious.) He suggests that the photographs in the April 2012 sales brochure depict a derelict and abandoned site. He draws attention to the lifespan of a Pollution Prevention Control Permit issued by the Council in June 2000 and ultimately revoked in February 2014 because the concrete block manufacturing operation on the subject site had ceased. This discrete segment of documentary evidence includes a reference to "*moth balling*" in 2012. The "*large modern steel diesel tank*" which had been an essential part of such operations had been removed by May 2013. The hopper was also removed on an unspecified date. In the Valuation List the use of the site is described as "*stores*". These evidential building blocks combine to form the contention that the aforementioned operations had been abandoned some years prior to the impugned planning permission.

[15] In his second affidavit Mr Worthington asserts that between the initial grant of planning permission in June 2015 and the High Court quashing order in February 2016 –

> "*… a large scale land engineering exercise had been undertaken by the owner .. to prepare the ground for the caravan site. The works entailed raising the levels of the site and creating the discrete groupings where the caravans would sit …*
>
> *Block making requires large level areas for the machinery to lay the blocks onto …*
>
> *The removal of* [a large area of hard standing] *through the land forming exercise would leave the land in a condition where block making could not have been resumed as planning permission would have been required to remove the imported material … and re-lay the level surface.*"

These assertions, which are contentious, form a significant part of the evidential foundation for the contention that the concrete block making land use had been extinguished. Mr Worthington further suggests that the possibility of "extinguishment" was nowhere considered in the PPO's report.

[16] It is convenient at this juncture to address briefly some of the discrete issues relating to the briefing by the Council's planning officers of the PC:

(a) On 12 September 2017 the PPO's report was published on the Council's 'Planning Portal'.

(b) The same report was published on the Council's website and distributed to PC members by email on 13 September 2017.

(c) The visit to the subject site by nine of the 13 PC members was conducted on the morning of 27 September 2017 when those in attendance, who included two Council planning officers, (per the contemporaneous record) "*… walked to the access and there was an overview given that there will be works to the existing site access and road works to the Ballymacrea Road including passing bays ... the location of the passing bays was clarified with Members …*".

(d) On the afternoon of the same date the planning approval application was presented to the PC, at its scheduled public meeting by the PPO and the Senior Planning Officer (Mr Wilson – SPO).

[17] There was a PowerPoint presentation containing slides in text, a location map, a site location plan and three photographs which had been generated two days earlier. While other photographs were available, these were not deployed. No aspect of the presenting officer's narrative departed from the PPO's report. The "Errata" (*supra*) and "Addendum" appendices were distributed to PC members. The PC received verbal presentations from the PPO, the SPO, the developer's agent, a Department for Infrastructure *("DFI")* (Roads) representative and the objectors' agent (Mr Worthington). The presentation of Mr Worthington was, by dint of the PC's Protocol, confined to five minutes.

[18] The following excerpts from the minutes of the PC's meeting are of note:

> "*Issues raised included fall-back position, traffic volume, impact on road safety, visual impact and landscaping .. jobs, economic benefit to wider area, need for accommodation .. environmental improvement .. traffic incidents, speed limit, road safety and passing bays.*"

The questions canvassed by PC members included:

> "*.. fall-back position, nature of objections and peak times for refuse vehicles driving near the site location.*"

By a vote of eight to four, with one abstention, the PC resolved to adopt the PPO's recommendation that planning approval be granted.

[19] The submissions of Mr Shaw QC (with Mr Turbitt, of counsel) on behalf of the applicant formulated this ground of challenge in a staged manner. The first

submission is that the historical industrial use of the site had been abandoned. The second, alternative submission is that the historical use had been extinguished by dint of the site works undertaken by the developer prior to the second grant of planning permission i.e. the impugned decision. The third submission is that there was a failure by decision makers to identify and apply the correct legal tests.

[20] The question of whether a proposed development site benefits from a so-called "fall-back" land use is one of law. The applicable legal principles are found in the decided cases and are not in dispute between the parties. Abandonment and extinguishment are not necessarily distinct, or mutually exclusive, legal concepts. The decided cases and texts make clear that where it is held that abandonment has occurred as a matter of law, this gives rise to extinguishment, or lapse (my preferred terminology), of the pre-existing lawfully permitted land use. Where this is the outcome of the legal analysis, there is no "fall back" land use, thus engaging the principle of disregard of immaterial considerations.

[21] The applicable principles derive from, firstly, Hartley v Minister of Housing and Government [1970] 1 QB 413, where Lord Denning MR stated in succinct terms at 420E:

> "*I think that when a man ceases to use a site for a particular purpose and lets it remain unused for a considerable time, then the proper inference may be that he has abandoned the former use. Once abandoned, he cannot start to use the site again, unless he gets planning permission: and this is so, even though the new use is the same as the previous one …*
>
> *The material time is when he starts on the new use …*
>
> *The question in all such cases is simply this, has the cessation of use (followed by non-use) been merely temporary or did it amount to an abandonment?*"

What are the tools to be applied in answering this fundamental question: Lord Denning MR continues at 420H:

> "*Abandonment depends on the circumstances. If the land has remained unused for a considerable time, **in such circumstances that a reasonable man might conclude that the previous use had been abandoned**, then the Tribunal may hold it to have been abandoned.*"
>
> [My emphasis.]

[22] Thus the test to be applied imports the assessment of the hypothetical reasonable person. It is conventionally accepted, in a range of legal contexts, that

this hypothetical person makes its assessment on a well-informed basis. This – my addendum to what the Court of Appeal held in Hartley – is confirmed by Hughes v Secretary of State for the Environment [2000] 1 PLR 76, where a later division of the Court of Appeal formulated the governing test as the view to be taken by a reasonable man with knowledge of all the relevant circumstances (per Kennedy LJ at 82A). The Court further, in substance, acknowledged that a reasonable man would be expected to have knowledge of the physical condition of the site, the period of time during which the previous use in question had not been undertaken, whether the site had been used for any other purposes and the owner's intentions: see 77E/G.

[23] In the exercise of giving effect to the applicable principles in any given case, it is tolerably clear from the decisions in Hartley and Hughes that the familiar concept of evaluative planning judgement has a role to play. This is expressed with particular clarity in Mansell v Tonbridge and Malling BC [2017] EWCA Civ 1314 at [27], in a bulky passage which I reproduce in full:

> *"The status of a fallback development as a material consideration in a planning decision is not a novel concept. It is very familiar. Three things can be said about it:*
>
> *(1) Here, as in other aspects of the law of planning, the court must resist a prescriptive or formulaic approach, and must keep in mind the scope for a lawful exercise of planning judgment by a decision-maker.*
>
> *(2) The relevant law as to a 'real prospect' of a fallback development being implemented was applied by this court in Samuel Smith Old Brewery (see, in particular, paragraphs 17 to 30 of Sullivan L.J.'s judgment, with which the Master of the Rolls and Toulson L.J. agreed; and the judgment of Supperstone J. in R. (on the application of Kverndal) v London Borough of Hounslow Council [2015] EWHC 3084 (Admin), at paragraphs 17 and 42 to 53). As Sullivan L.J. said in his judgment in Samuel Smith Old Brewery, in this context a 'real' prospect is the antithesis of one that is 'merely theoretical' (paragraph 20). The basic principle is that '… for a prospect to be a real prospect, it does not have to be probable or likely: a possibility will suffice' (paragraph 21). Previous decisions at first instance, including Ahern and Brentwood Borough Council v Secretary of State for the Environment [1996] 72 P. & C.R. 61 must be read with care in the light of that statement of the law, and bearing in mind, as Sullivan L.J. emphasized, '… 'fall back' cases tend to be very fact-specific" (ibid.). The role of planning judgment is vital. And '[it] is important … not to constrain what is, or should be, in each case the*

exercise of a broad planning discretion, based on the individual circumstances of that case, by seeking to constrain appeal decisions within judicial formulations that are not enactments of general application but are themselves simply the judge's response to the facts of the case before the court' (paragraph 22).

(3) Therefore, when the court is considering whether a decision-maker has properly identified a 'real prospect' of a fallback development being carried out should planning permission for the proposed development be refused, there is no rule of law that, in every case, the 'real prospect' will depend, for example, on the site having been allocated for the alternative development in the development plan or planning permission having been granted for that development, or on there being a firm design for the alternative scheme, or on the landowner or developer having said precisely how he would make use of any permitted development rights available to him under the GPDO. In some cases that degree of clarity and commitment may be necessary; in others, not. This will always be a matter for the decision-maker's planning judgment in the particular circumstances of the case in hand."

In a later passage Lindblom LJ added, at [42]:

"(3) Where the line is drawn between an officer's advice that is significantly or seriously misleading – misleading in a material way – and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example R. (on the application of Loader) v Rother District Council [2016] EWCA Civ 795), or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, Watermead Parish Council v Aylesbury Vale District Council [2017] EWCA Civ 152). There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law (see, for example, R. (on the application of Williams) v Powys County Council [2017] EWCA Civ 427). But unless there is some distinct and material defect in the officer's advice, the court will not interfere."

[24] Supervening events, namely activities and operations on the subject site post-dating a lawful specified land use, may in principle attract the doctrine of abandonment. In the Encyclopaedia of Planning Law and Practice it is stated at paragraph 2-3200:

> "*Existing use rights may be lost when there is a material change in use to another use: this is because the reversion to the former use will normally itself involve development requiring planning permission. It makes no difference that the change is from a use which was itself instituted with the benefit of planning permission, because that permission is spent when the development authorised by it has occurred.*"

It is convenient to highlight at this juncture another principle, namely that there is no distinction to be made between a land use authorised by a grant of planning permission and one which has the benefit of a statutory certificate, each being capable in law of being abandoned: see M&M v Secretary of State for Communities and Local Government [2007] 2 P and CR18. The applicable test as regards this discrete issue, in my view, is whether the historical land use under scrutiny was lawfully permitted, by whatever means. In passing, from this it would appear to follow logically that an unlawful historical land use cannot be reckoned in any "fall back" debate.

[25] My review of the decided cases concludes with Gambone v Secretary of State for Communities and Local Government [2014] EWHC 952 (Admin). One distils from this decision, firstly, two inter-related principles. The first is that unless the suggested alternative land use is a realistic possibility, it would be Wednesbury unreasonable to treat the harm that would result from same as a reason for authorising the proposed development under scrutiny. The second is that "fall-back" issues are to be viewed through the lens of material considerations. The Deputy Judge stated at [25]:

> "25. *The fallback argument is in truth no more or less than an approach to material considerations in circumstances where there are, or may be, the opportunity to use land in a particular way, the effects of which will need to be taken into account by the decision-maker. That involves a two-stage approach. The first stage of that approach is to decide whether or not the way in which the land may be developed is a matter which amounts to a material consideration. It will amount to a material consideration on the authorities, in my view, where there is a greater than theoretical possibility that that development might take place. It could be development for which there is already planning permission, or it could be development that is already in situ. It can also be development which by*

> *virtue of the operation of legal entitlements, such as the General Permitted Development Order, could take place."*

Continuing, the Judge identified a <u>second</u> stage of the intellectual exercise to be performed, at [26]:

> "26. *Once the question of whether or not it is material to the decision has been concluded, applying that threshold of theoretical possibility, the question which then arises for the decision-maker is as to what weight should be attached to it. The weight which might be attached to it will vary materially from case to case and will be particularly fact sensitive."*

The familiar concept of evaluative planning judgement and its doctrinal relative, <u>Wednesbury</u> unreasonableness (or irrationality), shine brightly in this passage. What emerges with particular clarity in this case – and others – is that the second stage evaluative judgement (how much weight?) falls to be made only where there is a realistic possibility that the alternative land use in question will be undertaken. This question will, self-evidently, demand a negative answer in any case where the assessment is that the alternative use is, as a matter of law, defunct. I consider that evaluative judgement infiltrates both stages of this exercise.

[26] From these decisions it is apparent that in every case having a suggested "fall-back" element, the first question for the decision maker must be whether the subject site benefits from a permitted land use which is capable of being implemented. If the assessment is that a previously authorised land use – whether implemented historically or not – has been abandoned or extinguished as a matter of law, the first question will plainly be answered in the negative and no further analysis will be required.

[27] The PPO's report to the Council's PC has three noteworthy features. First, it contains no mention of the relevant objective test to be applied, namely that of the hypothetical reasonable person possessed of all relevant information making an assessment of whether the previously authorised use had been abandoned (<u>Hughes</u>). Second, there is no express reference to the <u>Gambone</u> decision. Third, the possibility of the previously authorised land use having been extinguished by later events, specifically any works allegedly undertaken by the developer between the June 2015 grant of planning permission and the February 2016 quashing order, is nowhere canvassed.

[28] However, it is axiomatic that <u>all</u> of the evidence bearing on the PC's approach to the "fall back" issue be considered. Thus the PPO's report is not to be viewed in isolation. Rather, as Mr Beattie QC stressed, all of the evidence bearing on this discrete issue must be considered fully and in the round, bearing in mind at all times two questions in particular. The first is whether there is a realistic possibility that the previously authorised land use could commence or

recommence. A negative answer denotes that this is not a material consideration to be reckoned. But if a positive answer is supplied, the decision maker must proceed to the second stage of assessing the weight which this factor should attract.

[29] The focus of Mr Beattie's submission on this issue was the requirement to consider the material evidence as a whole, avoiding selectivity and undue parsing. To this I would add that the canons of construction to be applied to a planning officer's report are not those appropriate to an exercise of construing a statute, deed or other legal instrument. In my view Mr Beattie is correct to submit that in the key passages of the PPO's report (paragraphs 8.12 and 8.13) the two questions formulated immediately above, which correspond with the two stage Gambone test, have in substance been posed. I further consider that the author was entitled to express his opinion that the previously authorised use had not been abandoned – a view which, of course, was not binding on the decision makers. Furthermore the report made clear, at the outset of this discrete chapter, that the statutory certificate applied to approximately one half of the site only. Thus I reject Mr Shaw's submission that the report suffers from conflation, or distortion, of the two stage test.

[30] It is correct, as Mr Shaw submitted, that the author did not, in express terms, invite the reader to apply the first stage of the Gambone test through the lens of the hypothetical informed reasonable person. However, it is in my view clear from the contemporaneous records of the public meeting that this issue featured in the question and answer exchanges with the PC members. In my judgement, the contemporaneous notes of the Council's solicitor leave no room for doubt concerning this issue. The objector's planning consultant squarely made the case that by reason of abandonment, the site did not benefit from any "fall back" land use:

> "*Main issue fall-back position – legal cases – fight is abandoned – Planning required for Block – so no fall back – even if fall back, Block only covers half site – fall back in error ….*"

In the solicitor's notes, under the banner of "Question Session", one finds the following:

> "*Fall back – officer report …*
>
> *View reasonable man – realistic proposition – restarted …*
>
> *Abandonment is fact specific … with no intention to resume - …*
>
> *Reasonable man with knowledge of circumstances ..*
>
> *REAL – NOT THEORETICAL …. POSSIBLE …*

BLOCK MAKING COULD RESUME …"

[No emphasis supplied]

[31] While mindful of the manner in which this ground was "packaged" by Mr Shaw – see [19] above – I consider the real question to be whether any error of law, or legal misdirection, can be demonstrated in the approach to the "fall back" issue of the decision makers and those advising them. I would add that this issue is not to be determined on Wednesbury principles, applying the prism of evaluative planning judgement and its doctrinal cousin, irrationality. Rather, the task of the Court is to conduct a clinical, detached assessment, applying the principles outlined above, with a view to diagnosing any material error of law. Giving effect to the foregoing analysis I conclude that this ground of challenge is not established.

The Traffic and Roads Ground

[32] In the final incarnation of the applicant's formal pleading, this ground is formulated in the following terms:

> "*The Council erred in fact and failed to make adequate enquiry in considering that the proposed development would not prejudice road safety or significantly inconvenience the flow of traffic.*"

The components of this ground are the asserted lack of provision of projected traffic figures/volumes; erroneous information concerning the projected number of occupants per vehicle; the absence of baseline figures for current traffic volumes; the non-viability of the vehicle passing bays at certain points due to insufficient road breadth; and inadequate sight lines.

[33] The non-contentious starting point for the evaluation of this discrete ground is Planning Policy Statement 3 ("PPS3"), the subject matter whereof is "Access, Movement and Parking". PPS3 enshrines a series of individual policies, one of which is policy AMP2, "Access to Public Roads". The key provision in this policy is the opening passage:

> "*Planning permission will only be granted for a development proposal involving direct access, or in the intensification of the use of an existing access, onto a public road where:*
>
> *(a) Such access will not prejudice road safety or significantly inconvenience the flow of traffic ….*"

Among the non-exhaustive list of factors to be reckoned is "*the standard of the existing road network together with the speed and volume of traffic using the adjacent*

public road and any expected increase". The "justification and amplification" paragraph states *inter alia*:

> "*The planning system has an important role to play in promoting road safety and ensuring the efficient use of the public road network. New developments will often affect the public road network surrounding it and it is part of the function of planning control to seek to avoid or mitigate adverse impacts. In assessing development proposals the Department will therefore seek to ensure that access arrangements for development proposals are safe and will not unduly interfere with the movement of traffic.*"

[34] I have considered, but do not reproduce, the affidavit evidence underpinning this aspect of the applicant's challenge. The various road safety issues are addressed in two affidavits of Mr Black, author of the Lisbane Consultants (consulting civil and traffic engineers) report, and in parts of the two affidavits of Mr Worthington. These reflect the Lisbane report and develop the outworkings of the headline road safety complaints which I have identified above. The omnibus criticism which these two experts combine to advance is that by virtue of the cumulative effect of a series of clearly identifiable deficiencies and omissions the Council failed to give proper consideration to the roads and traffic impact issues. The ingredients of this criticism are plentiful: no actual traffic generation figures; no baseline figures for current or future traffic movements; a misleading assertion that the proposed development is not of the non-residential species; incongruous figures regarding projected vehicle occupancy (5 persons per vehicle); no inter-visibility of the four proposed passing bays on Ballymacrea Road; the physical inability of three of these bays to accommodate two caravans passing each other and inadequate and dangerous sight lines.

[35] Mr Black in particular is critical in particular of the two traffic documents submitted by the developer, namely the "Transport Statement" and the TAF (*supra*). His critique includes the suggestion that the former was non-compliant with the relevant guidelines. Mr Black avers *inter alia*:

> "*There is nothing in the Traffic Statement which should have provided DFI Roads with comfort that the traffic impacts of the development would be acceptable. This was not rectified by further submissions following the original quashing of the application and similarly DFI Roads did not request any further information …*
>
> *As the Transport Statement is not fit for purpose, it contravenes Policy AMP6 ….*"

Mr Black then develops his critique of the inadequate visibility splays and forward sight distance vis-à-vis the proposed access to the subject site. Having reproduced in his affidavits what the Court has already considered (above), namely the contents of his earlier report, Mr Black makes the following omnibus conclusion:

> *".. the proposal is unsafe, does not comply with current design standards and information necessary to inform the decision making process has not been provided."*

[36] In his second affidavit Mr Black draws attention to one of the contemporaneous records of the PC's public meeting on 27 September 2017, which attributes to the DFI Roads case officer the statement that, as DFI did not have the resources to undertake a speed survey at the location, this officer estimated the speed of traffic on the Ballymacrea Road by driving past the site. This yielded two vehicular speeds of 35 and 41 mph respectively, which he averaged as 37 mph. While this should, of course, have been 38 mph, there is no attempt in the applicant's case to magnify this discrete error on engineering or other technical grounds. Mr Black suggests, however, that DFI could – and should – have required the developer to provide a comprehensive technical speed survey. Second, Mr Black draws attention to the DFI Road's consultation responses in respect of 4 other planning approval applications on the Ballymacrea Road since 2014 indicating an assessment of traffic speeds at between 40 and 45 mph as a result of <u>surveys</u>. These speeds, he avers:

> *".. would have required a forward site distance on the Ballymacrea Road at the proposed site access which simply could not have been achieved."*

[37] The PPO's report to the Council's PC has a discrete chapter entitled "Traffic/Road Issues". This notes *inter alia "substantial objection in relation to the traffic matters …"* in a context where the development proposal included works to upgrade the existing site access, to realign part of the Ballymacrea Road, to construct four vehicle passing bays and to adjust the Ballymacrea Road/Ballybogey Road junction. The <u>initial</u> concerns of DFI Roads (formerly Transport NI) regarding visibility, geometry of access and "*other technical details*" are noted. It is further recorded that, in response, the developer submitted a "Transport Statement" (*"TS")* and a "Transport Assessment Form" *("TAF").* Ultimately DFI Roads and its successor, with whom "*extensive consultation"* is noted, expressed themselves content. DFI Roads is described in the report as "*the competent authority on such matters*".

[38] One of the recurring themes of the said chapter is that DFI Roads (and its predecessor) were, respectively, the relevant "*competent authority*". A related theme is that the Council's planning officers were content to accept the final DFI Road's stance, which was one of contentment. This is reflected in the submissions of

Mr Beattie QC on behalf of the Council and encapsulated in the following excerpt from counsels' skeleton argument:

> "*The expert statutory consultee with respect to roads was ultimately satisfied after extensive consideration that Policy AMP2 of PPS3 was satisfied and the Respondent's decision to accept its recommendation was entirely reasonable. It certainly was not Wednesbury unreasonable.*"

The court's attention was also drawn to the extensive, indeed protracted, interaction between the Council and the road authority and the number of consultation exchanges, 17 in total.

[39] I enumerate briefly some of the other salient features of the PPO's report on this topic:

(i) The proposed visibility splays are sufficient for "*the estimated traffic speeds of 37 mph …*", being compatible with the standards enshrined in Development Control Advice Note 15 ("DCAN15").

(ii) The four proposed passing bays and the aforementioned junction improvements "*.. are all contained within the public maintained verge and will assist in accommodating any additional traffic generated by this proposal*".

(iii) DFI Roads "*… has confirmed that if two cars towing caravans meet, then they may need to pull up onto the grass verge to pass one another but the passing bays are an acceptable mitigation measure*".

(iv) DFI Roads had considered everything submitted on behalf of the developer.

This section of the PPO's report ends in the following omnibus terms:

> "*DFI Roads has been consulted as the competent authority on road safety and traffic flows and it raises no objection. Therefore, having regard to the proposal as a caravan park, the previous use as a concrete block yard and the existing landfill site, that the proposal improves an existing access, and the current speeds and increase in traffic, it is considered that the access will not prejudice road safety or significantly inconvenience traffic flows …*
>
> *The proposal is therefore consistent with the requirements of Policy AMP2 of PPS3.*"

[40] On 20 October 2016 the applicant wrote to the Council in the following terms:

> *"I refer to the most recent document 'Transport Assessment' added to this application. It would seem absurd to assume that the assessment document content is factually correct? The agent has indicated that every section of the form is 'not applicable', which suggests that the proposed application will not generate any traffic movements whatsoever. I would challenge the content of this document and request CCGH Planning to question the accuracy of the information provided. Could you also please arrange an open file appointment for me at your earliest convenience."*

By a letter dated 22 December 2016 the case officer concerned acknowledged a variety of objections, including that expressed in the applicant's above-mentioned letter. This was followed by a letter (correctly dated 04 January 2017) from the DFI Roads Divisional Manager which, duly deconstructed, conveys the authority's opinion that the measures proposed "*will assist in accommodating*" or "*will accommodate*" the "*traffic generated by this proposal*".

[41] The evidence demonstrates that the Council consulted with DFI Roads and its predecessor on multiple occasions. The final consultation request was stimulated by the receipt of the TAF submitted by the developer's agent. The TAF took the form of a completed pro-forma. Having described the proposed development, it represented as follows: the development would not entail ten or more residential units, it was not likely to generate 30 or more vehicle movements per hour; and it was not likely to generate five or more freight movements per day. The next question, "*How many journeys will be made to the site each day?*", elicited the response "*N/A*". Ditto the question "*Will there be any peak times for traffic accessing the site?*" In the immediately ensuing section of the pro-forma, the following information was requested:

> "***Describe below the transport impacts of the development.*** *For example, consideration should be given to the effect on transport infrastructure, possible increased risks of accidents, busier junctions …*"

The reply was "N/A". The same reply was made to the final request, which invited a description of "W*hat measures will be taken to influence travel to and from the site and within it?*"

[42] The completed TAF was the subject of the Council's final consultation request of the road authority, eliciting the response:

> "*Transport NI has considered the report …*

> *Transport NI remain satisfied with the proposal and our opinion to recommend approval."*

This terminology follows closely the response made to the immediately preceding consultation request.

[43] The reference to the road authority's previously recommended approval invites a little analysis. The authority's conversion was from a position of "*serious concerns*" (per its first and second consultation responses) to one of ultimate contentment. In its third consultation response the authority continued to raise road safety issues. Its fourth response, which followed just weeks later, consists of a list of proposed conditions and informatives. There was no accompanying text. The next, fifth, consultation response of the authority addressed, without expression of concern, some specific issues raised in a letter of objection (27 June 2014). The authority's sixth consultation response, which followed some two years later, denoted no change of position.

[44] Sequentially, there followed a meeting attended by, *inter alios*, the applicant, the PPO and road authority representatives. The following excerpts are noteworthy:

> "*Road safety concerns. Difficult to understand stated speed at 37 mph. Previous reports showed 44 and 45 mph … 70 metre splay not provided … 700 – 900 traffic movements per day anticipated … passing points are not adequate … impossible for caravans to pass … danger to cyclists …* [danger to pedestrians] *.. visibility splay was 50 metres and should have been 90 metres .. carriageway too narrow where caravans meet … transport NI requested a 90 metres visibility splay for dwelling. A caravan waiting here will obstruct this visibility splay … using verge for passing will bring muck onto road and make it more dangerous."*

Notably one of the road authority's representatives acknowledged, per the minute:

> "*Cannot insist that a TAF was fully completed. Yet would have been helpful."*

The evidence demonstrates that the minutes of this meeting were forwarded to the road authority's Case Officer, who replied on 06 March 2017:

> "*Transport NI has noted the content of the minute and would advise that our previous consultation responses remain unchanged."*

[45] The first task for the court is to identify the standard of review engaged in its adjudication of this ground of challenge. If the applicant's challenge to the Council's treatment of the vehicular impact and road safety issues incontestably thrown up by the planning approval application culminating in the impugned decision were to be viewed through the lens of Wednesbury irrationality, it would encounter the familiar elevated threshold which a challenge of this species entails. As the Lisbane report and associated affidavits of Mr Black in particular make clear, a considered and reasoned critique of the conclusion reached – namely that "*… the access will not prejudice road safety or significantly inconvenience traffic flows …*" – can be constructed and, objectively, appears to have some force and requires to be taken seriously. There is no suggestion that this was not taken into account.

[46] One of the recognised principles of planning decision making is that decision makers and their advisers are entitled, within certain limits, to place reliance on the contributions and input of presumptively expert consultees. I consider that, as a matter of legal principle, such limits are to be viewed from the perspective of the Wednesbury principle. This was uncontroversial as between the parties.

[47] In a case of the present kind, in which objections on traffic and road safety grounds grew as the decision making process advanced, the court will be astute to ascertain whether, at each turn, the decision making authority turned to the expert consultee concerned for further input. This, demonstrably, occurred in the present case and reflects well on the planning officials concerned. Irrationality can only be evaluated by reference to the information available to the decision makers and this, in turn, throws up questions relating to the decision making process. Assessed in this way, and having scrutinised the relevant evidence critically, while remaining alert that the court's role is one of supervisory superintendence, I consider that the Council's decision withstands challenge on this particular ground.

[48] The foregoing analysis does not in my view operate to dispose of this ground conclusively. The clear thrust of Mr Shaw's submissions was that the Council should have conducted further enquiries and armed itself more fully, whether by engagement of a suitable expert or otherwise. The task for the court is to identify the legal standard which this very precise line of attack engages.

[49] Alertness to the doctrinal truism that the role of the court is one of supervisory oversight is essential in every judicial review challenge and is a principle of some longevity in planning cases. However, this limited judicial superintendence is normally confined to issues of evaluative planning judgement and the application of the Wednesbury principle thereto. That said, the court must also be alert to consider whether, in a given context, the correct prism is that of disregarding material considerations or permitting the immaterial to intrude and infect. Having acknowledged this ordnance, I would add at once that the function of the Court in a challenge of this species raises two basic questions. The first is whether the fact or factors in play was or were – or was or were not – taken into

account by the public authority decision maker. This is a pure question of fact, which falls to be determined by the application of the 'SOS' principle:

> *"It is for an applicant for leave to show in some fashion that the deciding body did not have regard to such changes in material considerations before issuing its decision. It cannot be said that the burden is imposed on the decider of proving that he did not.* ***There must be some evidence or a sufficient inference that he failed to do so*** *before a case has been made out for leave to apply for judicial review."*
>
> (Re SOS Application [2003] NIJB 252, at [19], emphasis added.]

I consider that, as a matter of principle, this passage must apply equally in the context of substantive hearings. The second question – which could, without objection, be considered first – is whether the information or factor in question is, as a matter of law, material.

[50] This entails the application of the relevant/irrelevant considerations doctrine in its pure public law form to a planning context. The proposition that the Council was obliged to consider all available information bearing reasonably on the issues of traffic impact and road safety seems to me unassailable. My analysis of the evidence is that the Council did not fail in this duty. Indeed, the applicant's attack did not entail any suggestion to the contrary. The real question, in my view, is whether the Council, as a matter of law, should have done more and ought to have gone further.

[51] There are four particular facts which, inexhaustively, inform the Court's answer to this question: neither the developer nor its agent professed any highways expertise; nor did the Council; Lisbane, in contrast, did indeed have expertise of this kind; and the road authority was, presumptively, the expert statutory consultee. The correct question in law, in my estimation, is whether the Council was legally obliged to pursue further enquiries and investigations of these issues. One begins with the uncontentious observation that the Council could have done so – for example, by requiring more detailed and expert evidence from the developer, by engaging its own expert or by requiring more extensive and focused engagement by the road authority with the issues raised in particular by Lisbane (Mr Black). But was there a legal obligation to do so?

[52] I consider the question of law to be whether the Council was, in the context under scrutiny, legally bound to pursue further enquiries of one or more of the types mooted immediately above. In public law shorthand, the question is whether a duty of enquiry was triggered. This duty is no free-wheeling palm tree. Rather, by well established principle, it has intrinsic limitations. At this point of the

analysis, the Wednesbury principle makes a further appearance. This occurs by virtue of the jurisprudence pertaining to the duty of enquiry, to which I now turn.

[53] The governing principles were distilled in the recent judgment of this court in Re Hegarty's Application [2018] NIQB 20 at [31] – [34]:

> *"[31] I consider that the 'Tameside' principle must also have some purchase in the context of executive decisions entailing deprivation of liberty. In a passage familiar to all judicial review practitioners, Lord Diplock stated:*
>
> > *'The question for the Court is did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?'*
>
> *(Secretary of State for Education and Science v Tameside MBC [1977] AC 104 at 1065B.) Similarly, in R v Secretary of State for the Home Department, Ex parte Venables [1998] AC 407, the Court of Appeal, having emphasised the "essential" requirement that the decision maker be "fully informed of all the material facts and circumstances", at 455G, considered that he "… did not adequately inform himself of the full facts and circumstances of the case" (at 456E). And in Naraynsingh v Commissioner of Police [2004] UKPC 20, the Privy Council highlighted, at [21], that:*
>
> > *'Substantially more in the way of investigation was required than was undertaken here.'*
>
> *[32] The context of this statement was a successful challenge to a police decision revoking the claimant's firearms licence. Interestingly, the Commissioners formulated this requirement through the lens of a procedurally fair decision making process, holding that a fair procedure demanded that further inquiries be made by the decision making agency in circumstances where a series of questions arose and further information was obviously available. The failure to acquit this discrete duty had the consequence that the Doody requirement of giving the subject a fair opportunity to respond to the case against him could not be fulfilled. If ever there is an example of how principles of public law overlap and interlock, this must surely be it.*

[33] It may be said that the Tameside principle has been restrictedly construed and applied in practice. It seems uncontroversial to suggest that it is inextricably linked with the entrenched principle of public law that every decision maker take into account all material facts and considerations. In R (Khatun) v Newham LBC [2004] EWCA Civ 55, which involved a challenge to a Council's homelessness policy, Laws LJ formulated a specific question to be addressed in that litigation context, at [33]:

> *'Even though there is no free-standing right to be heard, does the decision-maker's duty to have regard to relevant considerations nevertheless require him to ascertain and take into account the affected person's views about the subject matter? More pointedly in the present context, does the policy, by denying the applicant the opportunity to view the property and comment, disable the council from the process of accurate decision-making—from an appreciation of all the factors relevant to its decision as to the suitability of the offered property?'*

Having considered the familiar jurisprudential sources, namely Re Findlay [1985] AC 318, 3333 – 354 and Creednz v Governor General [1981] 1 NZLR 172, Laws LJ stated, at [35]:

> *'In my judgment the CREEDNZ Inc case (via the decision in In re Findlay) does not only support the proposition that where a statute conferring discretionary power provides no lexicon of the matters to be treated as relevant by the decision-maker, then it is for the decision-maker and not the court to conclude what is relevant subject only to Wednesbury review. By extension it gives authority also for a different but closely related proposition, namely that it is for the decision-maker and not the court, subject again to Wednesbury review, to decide upon the manner and intensity of inquiry to be undertaken into any relevant factor accepted or demonstrated as such.'*

His Lordship found support for this doctrinal approach in another familiar passage in the decided cases, that of Neill LJ in R v Kensington and Chelsea LBC, ex parte Bayani [1990] 22 HLR 406, at 415.

[34] This restrictive approach, as I have termed it, finds expression in more recent jurisprudence, in particular the decision of the Divisional Court in R (Plantagenet Alliance) v Secretary of State for Justice [2014] EWHC 1662 (Admin), at [100]. The effect of these two decisions is to erect a relatively high cross bar for litigants who seek to establish that a decision involving the exercise of public law powers is vitiated by a failure on the part of the decision making agency to undertake certain enquiries."

[54] In Hegarty this Court was not unquestioning or uncritical of the governing principles elicited from the authorities. See [35]:

"[35] I consider that there is clear scope for further examination of this doctrinal approach at a higher level, stimulated by at least three juridical considerations. The first is whether the Tameside principle which, after all, emanates from the highest court in the legal system, has been inappropriately emasculated. The second is whether the restrictive approach which I have described is compatible with the entrenched requirement of public law that a decision maker take into account all material facts and considerations. The third is whether this approach is compatible with the calibration of the Wednesbury principle which has been one of the hallmarks of the evolution of public law in recent years. The fourth is whether the broad and intrinsically flexible public law doctrine of procedural irregularity, most frequently (but not invariably) exposed in cases involving complaints of procedural unfairness, is adequately accommodated in the restrictive approach. The common law being nothing if not organic and resourceful it remains to be seen whether the superior courts take up this gauntlet in an appropriate future case."

[55] It is not argued on behalf of the applicant that the Hegarty template should not be applied. For any such argument to succeed would be plainly difficult in any event, the last of the Hegarty passages quoted making clear the respect to be paid by a first instance court to the doctrine of precedent. Thus the question becomes: did the Council's planning officers and PC members lapse into the Wednesbury abyss by failing to undertake further enquiries of the kind argued on behalf of the applicant?

[56] Had this litigation had the character of an appeal to the Planning Appeals Commission, the Council might have been vulnerable on this issue. Legal challenges of that species are properly to be considered full blown merits appeals. Judicial review challenges are of a distinctive juridical character. The more confined role of this court in judicial review, namely that of supervisory superintendence, is resoundingly reinforced by the jurisprudence considered in Hegarty, reproduced above. Unconstrained by this jurisprudence, the merits of this ground of challenge might have flourished. However, where a ground of this species arises, this Court does not exercise a merits appellate jurisdiction. I consider that the non-pursuit of the further enquiries urged on behalf of the applicant lay within the range of reasonable options at the Council's disposal. Properly exposed, this aspect of the applicant's challenge reflects the espousal of the opinion of her consultants that the Council ought to have done what they suggest. This opinion, in my view and giving effect to the legal principles identified above, does not suffice to establish this ground of challenge. The conclusion that this ground is not made out follows.

The Visual Impact and Site Levels Issue

[57] I preface my consideration of the other grounds of challenge with an examination of the inter-related issues of visual impact and site levels. This was an issue of ever increasing prominence as the hearings progressed, to the extent that a not insubstantial tranche of further evidence was directed and produced. Furthermore, the Court prepared a text which, following due consideration, was ultimately agreed by all three parties. This agreed text follows in the next three paragraphs.

[58] The subject site is adjacent to a landfill site, operated by the Council in a former quarry, comprising an access road, weighbridge and other infrastructure. The access to the landfill site is via a vehicular passage situated on a portion of the subject site, along one of its boundaries. The landfill site is situated beyond the south eastern boundary of the subject site. Each is concealed from the other by natural contours and existing vegetation. At their nearest points the landfilling area and caravan site are separated by a distance of approximately 240 metres. From this point the subject site extends a maximum distance of 330m metres to the north and 180 metres to the west.

[59] The ground levels of the subject site are not uniform. There are significant variations. The lowest level, on the northern (i.e. coast) side, is around 70 metres 'Above Ordnance Datum' ("OD" - broadly, sea level) while the highest levels, on the south eastern boundary, rise to 82.5 metres OD for the physical development (specifically the camping cabins) and approximately 90 metres as regards the natural site contours. The lowest site contour, on the northern boundary, is 70.50 metres (and on the north-west boundary, 69.5 metres). This is, in short, a site which slopes down from south to north by approximately 19.5 metres, dropping by 15

metres over a distance of approximately 60 metres, and then by 4.5 metres over a distance of approximately 210 metres. From east to west at broadly the middle of the site the slope is considerably more gentle, from approximately 74.5 m to 71.5 metres over a distance of approximately 170m.

[60] The various holiday units which will occupy the site – static caravans, touring caravans, motor homes and static camping cabins – are distributed throughout the area in a series of clusters. When completed there will be 118 such units in total. In this context I refer also to, but do not repeat, [2] above.

The PPS4 Ground

[61] The gist of this ground is that the Council erred in law in its construction and application of Policy PED4 enshrined in Planning Policy Statement 4 ("PPS4"), Planning and Economic Development.

[62] The policy context is provided by the Introduction to PPS4:

> "*Economic growth is considered the Executive's top strategic priority in its first Programme for Government, in order to raise the quality of life for the people of Northern Ireland, through increasing economic opportunities for all, on a socially and environmentally sustainable basis. The Executive considers it essential to create a vibrant economy, to produce employment and wealth for the future, if a cohesive, inclusive and just society is to be achieved …*
>
> *The planning system has a key role to play in achieving a vibrant economy. It seeks to promote sustainable economic development through supportive planning policies, zoning land for development, identifying and protecting development opportunities and integrating employment generation with essential supporting provision in terms of housing and infrastructure …*
>
> ***The key aim of this PPS is to facilitate the economic development needs of the Region in ways consistent with protection of the environment and the principles of sustainable development.***"
>
> [My emphasis.]

The outworkings of this overarching policy strategy are contained in what follows.

[63] One of the discrete land use policies enshrined within PPS4 is Policy PED4 "Re-development of an Established Economic Development Use in the

Countryside". Once again there is no substitute for reproducing the salient passages:

> *"A proposal for the redevelopment of an established economic development use in the countryside for industrial or business purposes (or a sui generis employment use) will be permitted where it is demonstrated that all the following criteria can be met: (a) the scale and nature of the proposal does not harm the rural character or appearance of the local area and there is only a proportionate increase in the site area; (b) there would be environmental benefits as a result of the redevelopment; (c) the redevelopment scheme deals comprehensively with the full extent of the existing site or in the case of partial redevelopment addresses the implications for the remainder of the site; and (d) the overall visual impact of replacement buildings is not significantly greater than that of the buildings to be replaced. The redevelopment of an established storage or distribution site for continuing storage or distribution use will also be permitted subject to the above criteria. However, the redevelopment of an established industrial or business site for storage or distribution purposes will only be permitted in exceptional circumstances. On occasion, proposals may come forward for the alternative use of economic development sites in the countryside. Proposals for the redevelopment of sites for tourism, outdoor sport and recreation or local community facilities will be viewed sympathetically where all the above criteria can be met and where the proposal does not involve land forming all or part of an existing industrial estate."*

Under the rubric of "Justification and Amplification", it is stated:

> *"5.15 The Northern Ireland countryside contains some major developed sites presently or formerly in industrial or business use. Whether they are redundant or in continuing use, the complete or partial redevelopment of these sites may offer the opportunity for environmental improvement 23 and the promotion of job creation without adding to their impact on the amenity of the countryside.*
>
> *5.16 The design and layout of new development will need to be considered as well as its footprint. The location of the new buildings should be decided having regard to the character of the area, the main features of the landscape and the need to integrate the new development with its surroundings."*

[64] The primary submission developed by Mr Shaw QC is that there was no "*established economic development use*" on the subject site, with the result that Policy PED4 is of no application. I construe this to be an immaterial considerations ground. His alternative submission is that, by virtue of the statutory certificate, any established economic development use could apply only to approximately one half of the site. His third submission is that, in any event, the specified criteria were not correctly applied by reason of the absence of what he termed "a proper visual impact assessment".

[65] The evidence bearing on this discrete issue is not abundant. In the first incarnation of his draft to the Council's PC, the PPO stated:

> "*In land use terms, the land is considered to **formerly** be an industrial use which is considered under PPS4 'economic development'*".

I have highlighted the word "*formerly*" since, via the mechanism of the "Errata" supplement, this was removed. The report continues:

> "*This land does not form part or all of an industrial estate and the redevelopment for proposals to a use other than for economic development is limited. However, tourism is one of the uses that is considered to be acceptable, with policy PED4 stating that proposals for the redevelopment of economic development sites for tourism will be viewed sympathetically, provided this does not involve an existing industrial estate and the following criteria can be met …*"

This is followed by a rehearsal of the four criteria enshrined in PED4.

[66] Addressing the second of the Policy PED4 criteria, the report states:

> "*The existing site is almost entirely covered in hard standing, with several buildings. **This proposal would be a more sympathetic use than a concrete block yard**. The proposal would soften the large mass of hard standing with grass, landscaping and open space which will result in environmental benefits.*"
>
> [Emphasis added.]

The author's assessment of compliance with the third of the four specified criteria was couched in positive terms – and this is not contentious. As regards the fourth criteria on, the report states:

> "*The impact of the new buildings is not significantly greater than the existing. The site is reasonably screened which helps aid the visual integration of the proposal. A significant proportion of the site, particularly to the north, next to Ballymacrea Road will be used for touring caravans. This will assist in reducing the visual impact as the use will likely be transitory with limited occupancy off season.*"

The overarching conclusion was that the development proposal was "*consistent with*" the policy.

[67] The Council's affidavit evidence does not specifically address this issue. This is entirely appropriate, given the self-contained nature of the evidence bearing thereon which is located in the PPO's report and summarised above. The main replying submission of Mr Beattie makes clear the close connection between this ground of challenge and the first ("fall back"). The central contention is that the Council committed no error of law in adopting – as it plainly did – the PPO's assessment that "*… there is a fall-back position of a concrete block yard to lawfully operate at this site*". Mr Beattie submits that Policy PED4 of PPS4 was "*therefore*" correctly considered.

[68] The first issue for the court to determine is whether this policy applied at all. This poses the question, in the language of the opening paragraph: was this a "*proposal for the redevelopment of an established economic development use in the countryside for industrial or business purposes*"? In answering this question I consider the critical word to be "*established*". How is this word to be construed? In particular, has it any relationship with the nuances and complexities of the concepts of "fall back" and abandonment of land use in the planning legal world?

[69] The next step must be to identify the legal principles applicable to the interpretation of planning policy documents of this *genre*. Planning policies are not to be construed by the mechanisms applicable to a statute, contract or deed. Rather they are to be viewed as instruments of guidance which are not designed to place decision makers in a straightjacket and do not demand precise correspondence with the planning application concerned. They are devised within a realm which respects the central role of evaluative planning judgement, permitting some flexibility: see for example Re Lisburn Development Consortium's Application [2000] NIJB 91. In Tesco Stores v Dundee City Council [2012] UKSC 13, Lord Reed stated at [18]:

> "*The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in*

other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained ….

Policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context."

[Emphasis added.]

This doctrinal approach falls within the embrace of a more general principle, namely that the interpretation of every document, in whatever litigation context, is a question of law for the court. See In Re McFarland [2004] UKHL 17 at [25] per Lord Steyn.

[70] The word under scrutiny is "*established*". It contrasts with "*existing*", "*present*" or "*active*", or any combination of these adjectives. "*Established*" is a familiar, unsophisticated member of the English language. It has a variety of readily recognised meanings, depending on the context. If those formulating Policy PED4 had intended to convey the essence of any of the adjectives just mentioned, singly or in any combination, this could have been readily and easily achieved. They did not, however, do so. Applying the foregoing principles, I consider that "*established*" in this specific context, embraces both currently active and previously active land uses. While I do not exclude the scope for debate in a hypothetical case where a previous economic use belongs to the long distant past and/or was of transient duration, these considerations do not arise in the present case. The only land use of the subject site during many decades up to approximately 2011/2012 was purely industrial in nature. The argument on behalf of the applicant seeks to apply to the word "*established*" a narrow, technical and legalistic meaning, inextricably linked with planning law concepts and doctrines. For the reasons given I reject it.

[71] The first of Mr Shaw's two alternative submissions is that if there was, as a matter of law, an established industrial use, this was confined to approximately one half of the site by virtue of the statutory certificate. This, in my judgement, invites the riposte, firstly, that the PPO's report to the Council's PC must be read as a whole and not in isolated or selective fragments. This is a cornerstone principle. In one of the initial passages of the report the author explicitly recognised that the statutory certificate did not encompass the entirety of the site:

"*A portion of this site (just over half) has been subject to* [the statutory certificate] *…*"

I consider that the discrete section of the report addressing the policy in question falls to be read and evaluated in conjunction with what preceded and followed it. Furthermore, it was not argued, correctly in my view, that Policy PED4 requires

that the whole of the subject site be, or have been, devoted to an industrial activity. Accordingly I reject this submission.

[72] The second of Mr Shaw's alternative submissions is that the impugned decision entailed the misapplication of three of the four specified criteria by reason of the absence of a "*proper visual impact assessment*". I consider that this submission must be evaluated by reference to the Wednesbury principle given that the three criteria in question are paradigm matters of evaluative planning judgement. While it is an uncontentious fact that certain available photographic depictions of the subject site were not brought to the attention of PC members, this must be balanced against at least four factual considerations: the totality of the information made available to the PC; the visit to the site of a majority of PC members undertaken earlier on the day of the impugned decision – taking into account that this did not extend to a detailed exploration of the site or all of its boundaries; the photographic evidence provided at the eleventh hour by the applicant and the representations made and debate in the course of the PC's public meeting when it made the impugned decision.

[73] While both the Council and the developer suggest that these "virtual" images are an inaccurate distortion of the reality of the appearance of the completed development, the important fact in my estimation is that they brought to the attention of the PC members, in a vivid and visual way, what was said to be the worst case visual outcome. In this way, there was laid before the PC a visually striking depiction (which the court has considered) of a lengthy line of caravans on a gradually rising ridge at the rear of the subject site (viewed from the direction of the coast) accompanied by the following text:

> "*The photograph montage highlights the negative and intrusive aspect that tiered caravans rising some 60 feet in elevation will have on the adjacent Area of Outstanding Natural Beauty, landscape and residence of Craigahulliar.*"

It is of course a fact that, by virtue of the manner and timing of the presentation of this photographic evidence – itself a matter of some controversy - the PC did not have the benefit of the PPO's considered views or response. However, the simple reality is that by dint of this strategy, the applicant placed before the PC something which is now said to be a worse than "doomsday" depiction of (in the wording of the policy) the "*overall visual impact*" of the proposed development.

[74] In this context I refer to Re Conlon's Application [2018] NIQB at [85] – [86]. It is not for this court of supervisory superintendence to resolve the issues of contention which have arisen between the parties, as noted above. Nor is this court's evaluation of the issue of visual impact of any relevance. Furthermore, the court takes into account the absence of any suggestion that the visual aids which were provided to the decision makers failed to comply with any recognised

standard or guideline. Taking into account and giving effect to all of the foregoing, I conclude that the contention that Policy PED4 was misapplied on account of deficiencies in the visual evidence is not made out.

[75] It is appropriate to add the following. The arguments of both parties seem to me to proceed on the premise that the PC adopted the PPO's view that the subject site has an available "fall back" lawful land use. It is far from clear to the Court that the PC in fact did so. This I consider to be a clear illustration of the inescapable phenomenon that under the new arrangements for planning decision making in this jurisdiction, certain aspects of the reasoning underlying a Council's planning decisions will be inscrutable. This is a consequence of the absence of a reasoned written decision. In the present case, there is no direct evidence of what the PC members made of the advice and other information pertaining to the "fall back" issue, nor in my view is there any primary evidence from which this could be properly inferred. Thus, as my resolution of the first ground of challenge makes clear, the question for the Court was not whether the PC erred in its application of the "fall back" legal principles to the factual matrix under scrutiny. Rather, the issue was whether there were any indicators of error of law or misdirection in law in how this issue was presented to the committee.

The PPS16 Ground

[76] The subject matter of Planning Policy Statement 16 ("PPS16") is "Tourism". This policy instrument enshrines a series of individual policies. The focus of the applicant's challenge is Policy TSM6. This policy provides that a development of this species be located in an area which has the capacity to absorb it. The applicant's contention is that this policy was misconstrued, or misunderstood, since the focus of the PPO's report was whether the site, rather than the area, possessed such capacity.

[77] The PPO's report to the Council's PC addressed PPS16 in a free standing section, which includes the following:

> "*The location, siting, size, design, layout and landscaping of the holiday park proposal must be based on an overall design concept that* ***respects the surrounding landscape, rural character and site context*** *….*"
>
> [My Emphasis.]

Next, the PPO expressed his opinion that the surrounding landscape, rural character and site context had indeed been respected. This was followed by a recitation of the two criteria enshrined in Policy TSM6, the first being that –

> *"… the site is located in an area that has the capacity to absorb the holiday park development, without adverse impact on visual amenity and rural character …"*

The report then states:

> *"The site is assessed in its local context in this regard along with the Regional and Local Landscape Character Assessments" ("RLCA")."*

This was followed by consideration of the RLCA, in the course of which the PPO opined that –

> *"… the site is sufficiently far removed from this part of the coastline to have any significant impact or effect on the seascape character."*

The PPO then turned to consider the natural and historical interest of "*the area*", identifying (inter alia) rugged cliffs, sandy bays, the North Coast and the Bush Valley. Consideration was also given to the "Causeway Coast" and the related AONB. The PPO then focused on the site itself, adverting to the issues of tree planting and screening. The report continues:

> *"Having regard to the previous land use, and the hard industrial nature of this, and both the RCLA and LCA assessments, the landscape at this site has the capacity to absorb the holiday park development, without adverse impact on visual amenity and rural character."*

[78] I accept Mr Shaw's submission that this infelicitous phraseology does not accurately reflect the wording of Policy TSM6. However, I consider that this isolated statement cannot be divorced from its full context within the report. Approached in this way, as the excerpts reproduced above make abundantly clear, the attention of PC members was repeatedly drawn to the broader setting of the site, the surrounding area. This in my view suffices to confound this ground of challenge.

[79] I would add that I have been unable to identify anywhere in the voluminous materials assembled in the Council's decision making process or those compiled for the purpose of this challenge any suggestion that the area did not have the capacity to absorb the proposed development. Furthermore (and *obiter*), I consider that as a matter of construction, "*capacity*", in this discrete context, is linked with the question of whether the offending development would have an unacceptably adverse impact on visual amenity and rural character. As is clear from the above, I have found the visual amenity elements of the applicant's challenge to be without substance.

[80] For this combination of reasons I conclude that this ground of challenge is without merit.

The PPS21 Ground

[81] As noted in [2](f) above, the essence of this ground is an asserted outright failure to have regard to policies CTY13 and CTY14 enshrined in PPS21. Developing this ground, Mr Shaw QC submitted that, in substance, the Council failed to recognise that the developer's proposal would entail the development of "*new buildings*" on the subject site.

[82] The subject matter of PPS21, published in June 2010, is "Sustainable Development In The Countryside". The preamble to this policy identifies the Regional Development Strategy for Northern Ireland 2025 (the "RDS") and, in particular, certain strategic objectives:

> "*… to conserve and enhance the environment, whilst improving the quality of life of the rural communities and developing the rural economy …* [to] *develop an attractive and prosperous rural area, based on a balanced and integrated approach to the development of town, village and countryside, in order to sustain a strong and vibrant rural community, contributing to the overall wellbeing of the Region as a whole.*"

The reader is reminded – as in many of these planning policies – that developing a sustainable economy is "*as to the heart of the Programme for Government*", the text continues:

> "*Planning and other environmental policies must play their part in facilitating economic development but not at the expense of the region's rich natural assets and not at the expense of the natural and built environment.*"

This is followed by a passage which is familiar in both tone and content in the world of planning law:

> "*An approach which strikes a balance between the need to protect the environment whilst simultaneously sustaining a strong and vibrant rural community* [is required]."

[83] PPS21 enshrines a range of discrete policies. The first of these, Policy CTY1, "Development in the Countryside" lists a series of countryside development types considered in principle to be acceptable. Every proposed development of this kind:

> "*.. must be sited and designed to integrate sympathetically with their surroundings and to meet*

> *other planning and environmental considerations including those for drainage, access and road safety."*

The first of the two discrete policies invoked on behalf of the applicant – Policy CTY13 – bears the title "Integration and Design of Buildings in the Countryside". This policy rehearses in somewhat greater detail the integration principle contained in the Policy TT1 excerpt reproduced above. It seems uncontroversial to suggest that there is a close association between integration and visual impact. Themes such as sympathetic blend and incongruous appearance are prominent. Importance is attached to the siting and design of proposed new buildings. The applicant places particular emphasis on the following passage:

> *"New buildings that would read as sky line development or occupy a top of slope/ridge location or otherwise be a prominent feature in the landscape will be unacceptable."*

[84] While Policy CTY14 is identified in the applicant's pleading, it did not feature in the submissions of Mr Shaw. Whereas its sister policy, CTY13, expresses the general principle of acceptability of a development involving "*a building in the countryside where it can be visually integrated into the surrounding landscape and it is of an appropriate design*", CTY14 gives expression to a slightly different general principle, namely the acceptability of a new building in the countryside "*… where it does not cause a detrimental change to, or further erode the rural character of an area*". As this terminology, coupled with the "*unacceptable*" passage which follows, demonstrates there is clear scope for overlap and interplay between these two policies. In passing, this might explain why Policy CTY13 only featured in argument at the hearing.

[85] I have considered the supporting averments of the applicant's planning consultant, Mr Worthington. Those aspects of his two affidavits which consist of mere comment and sworn argument I have disregarded. As regards <u>factual issues</u>, the main contribution which he makes to this discrete topic is unremarkable viz the approved development will entail *inter alia* 18 "*camping cabins*" and an amenity/services block.

[86] The PPO's report to the Council's PC contains the following passage, under the rubric of "Planning Policy":

> "*The RDS promotes a sustainable approach to the provision of tourism infrastructure. The principle of development proposed must be considered having regard to the Northern Area Plan, the* (Strategic Planning Policy Statement) ***and relevant Planning Policy Statements*** *specified above.*"
>
> [Emphasis added.]

The "*relevant Planning Policy Statements specified above*" are PPS4, PPS11, PPS16 and the SPPS (*supra*): there is no acknowledgment, nor any ensuing consideration, of PPS21.

[87] The Council takes its stand on this issue on the contention that the approved development does not encompass any new buildings but, rather, entails a change in the use of the land to a caravan park. This is encapsulated succinctly in the affidavit of Mr Wilson, Senior Planning Officer:

> "*[Policies CTY13 and 14 of PPS21] relate to the integration and rural character of new buildings in the countryside. This proposal does not include any new buildings but rather a change in the use of the land to a caravan park. The issues of integration and rural character are addressed in paragraphs 8.22 – 8.30 of the [PPO's report]. It would have been superfluous to make explicit reference to Policies CTY13 and 14 as the proposal does not include 'new buildings'. That said, the point it addressed in paragraph 9.1 of the [PPO's report].*"

The relevant passage in the PPO's report to the Council's PC states:

> "*As the proposal complies with PPS16, satisfactorily integrates into the countryside and does not affect the rural character, it does not conflict with Policy CTY of PPS21.*"

[88] It is convenient to reproduce the succinct riposte of Mr Beattie QC and Mr McAteer in their skeleton argument:

> "*This ground primarily relies upon the earlier ground asserting that the Respondent has erred in its consideration of PPS16. For the reasons set out above that is not correct and as such the Respondent's consideration of PPS21 was not infected by an unlawful consideration of PPS16 …*
>
> *PPS21, CTY13 and 14, expressly refer to permission for 'a building'. PPS16 expressly supersedes CTY1 and expressly references the relevance of tourist policies in PPS21. There are only two: CTY4 and CTY11.*"

The relevant passage in PPS16 is found in the Preamble and states that from its operative date (June 2013) –

> "… *the policies of this Statement will supersede …. [inter alia] Policy CTY1 of PPS21 as it relates to the tourism policies of PSRNI.* ***Policies in PPS21 offering scope for tourism development in the countryside are not duplicated in PPS16 and will be applied as appropriate to individual proposals.***"
>
> [My emphasis.]

The passage highlighted above formed the centrepiece of Mr Beattie's oral submissions.

[89] Having regard to the clear focus and refinement of this ground as ultimately presented in argument, I consider that the primary task for the court is to construe the Preamble to PPS16, giving effect to the principles outlined above. As to both intention and effect, the language relating to Policy CTY1 of PPS21 is unequivocal: this policy is repealed. Crucially, PPS16 does not "repeal" any of the other policies in PPS21. The rationale must have been that the territory covered by Policy CTY1 encompassed a series of development principles which had been updated and overtaken by PPS16. Pausing, whereas the latter applies to the niche subject of tourism, the former was of more wide ranging and general application. It seems to me that the policy makers were alert to possible conflicts between these two policy instruments. Their apparent intention was to confine the impact and application of the broader policy to the narrower field of tourism. I consider that there was coincidence of both intention and effect.

[90] PPS16, chronologically the later of the two policies, unequivocally "repeals" those aspects of PPS21/CTI1 relating to "*the tourism policies of PSRNI*" (the Planning Strategy for Rural Northern Ireland). I consider that PPS16 does not directly or indirectly, expressly or by implication, have any comparable impact on PPS21/Policies CTY13 and CTY14. In my view, neither of the last mentioned policies is a "*tourism policy*". Each of them, by their terms, is of considerably wider scope. PPS16 is entirely silent as regards these freestanding policies.

[91] As the relevant passages in the Council's affidavit evidence (*supra*) in tandem with paragraph 9.1 of the PPO's report, make clear, the advice to the PC from the in-house planning professionals was, in substance, that PPS21/Policy CTY1 was engaged and was not infringed. The effect of my analysis above is that there should have been no mention of policy CTY1. However, I consider it necessary to examine this issue from the perspective of substance rather than form. The central elements of Policy CTY1 are those of siting, the surrounding area and sympathetic integration. (While road safety is also mentioned, this was addressed extensively in another section of the PPO's report and does not feature in this aspect of the applicant's challenge.) These factors are not exclusive to Policy CTY1. Rather, as the Court's consideration of other planning policies invoked in this challenge makes clear, they feature in other policy contexts. This is entirely

unsurprising. In the real world, planning policies are not arranged in neat, hermetically sealed compartments. Rather they frequently interact, overlap, sometimes to the point of near merger. Furthermore, these factors involve matters of evaluative planning judgement. Given this analysis, I consider that the mis-statement regarding the applicability of Policy CTY1 was a benign error not equating to any operative public law misdemeanour. I would add that no argument to the contrary was presented.

[92] Reverting to this ground of challenge as formulated, in [81] above, the question becomes one of pure law: did the developer's proposal entail the development of "*new buildings*" on the subject site? Mr Shaw's submission, urging an affirmative answer, was founded on the decision in R (Save Woolley Valley Action Group) v Bath and North East Somerset Council [2012] EWHC 2161(Admin). I prefer to begin with the definition of "*building*" in section 250(1) of the 2011 Act:

> *"'Building' includes any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised in a building …*
>
> *'Erection' in relation to buildings includes extension, alteration and re-election."*

There is no statutory definition of "*structure*".

[93] The definition of "*building*" in the equivalent English statutory code – section 55 of the Town and Country Planning Act 1990 – is identical**.** In the Save Woolley case, Lang J stated at [69]:

> *"69. The term 'building' in s.336(1) TCPA 1990 has a wide definition which includes 'any structure or erection'. This definition has been interpreted by the courts to include structures which would not ordinarily be described as buildings. In Skerritts an Inspector held that the erection of a 40m by 17m by 5m high marquee for an eight-month period was the erection of a building. In Hall Hunter v First Secretary of State [2007] 2 P. & C.R. 5 the erection of polytunnels was also the erection of a building. Both decisions were upheld by the Courts."*

While not binding as a matter of precedent, I have no quibble with this formulation. Thus I accept that the court must be alert to avoid an unduly narrow or excessively technical approach to the question of what constitutes a "*building*".

[94] The permitted development will, when completed, accommodate 51 touring caravans, 49 static caravans and 18 "camping cabins". The technical and

engineering evidence relating to all of these is meagre in the extreme. As regards matters such as dimensions, floor space, engineering structure, physical permanence, drainage *et al* , while there is evidence that the static caravans will have a height of 3.5 metres while the "camping cabins" will be just under three metres high there is almost nothing else. The affidavits of the applicant's expert, Mr Worthington, are entirely silent on this issue and I have been unable to identify anything of relevance in the expert reports generated on behalf of the objectors during the Council's decision making process. The onus being on the applicant, as in every judicial review case, the court finds itself insufficiently equipped and informed to make a proper determination of this issue. From this it follows that the ground of challenge must fail.

[95] There is a further, free standing reason for rejecting this ground. For the reasons given in dismissing the applicant's grounds promoted under PPS4 and PPS16, I am satisfied in any event that the central elements of Policies CTY13 and 14, as summarised in [91] above, were <u>in substance</u> addressed in any event.

<u>The PPS11 Ground</u>

[96] The burden of this ground of challenge is that the Council's assessment that the development proposal was harmonious with this planning policy is unsustainable in law as there was no "odour assessment" (the terminology of the applicant's formal pleading). The immediately preceding formulation is the Court's: it is striking that neither in the pleading nor in the skeleton argument is any public law misdemeanour identified. The same observation applies to the applicant's written rejoinder submission.

[97] Planning Policy Statement ("PPS") 11, which regulates "Planning and Waste Management" and was published in December 2002, is invoked by the applicant in pursuance of this ground. Per its preamble, this policy –

> "… *seeks to promote the highest environmental standards in developing proposals for waste management facilities and includes guidance on the issues likely to be considered in the determination of planning applications. In addition, it explains the relationship between the planning system and authorities responsible for the regulation and management of waste.*"

Policy WM5 is one of the freestanding policies within PPS11. It addresses the discrete topic of "Development in the vicinity of waste management facilities". This short policy begins:

> "*Proposals involving the development of land in the vicinity of existing or approved waste management facilities and waste water treatment works … will only be permitted where all of the following criteria are met:*

- *It will not prejudice or unduly restrict activities permitted to be carried out within the waste management facility and*

- *It will not give rise to unacceptable adverse impacts in terms of people, transportation systems or the environment."*

The rationale is explained in these terms:

> *"Waste management facilities carry out an important function in the treatment and disposal of waste and will be approved in appropriate locations. However, such facilities often undertake complex operations that can impact adversely on the environment. While environmental standards are continually improving, nevertheless there may be potential risks at individual sites, for example in relation to odour, wind blown litter or birds …*
>
> *The potential adverse impact of existing or approved facilities upon neighbouring land uses will be a material consideration in the determination of planning applications for the development of that land. Planning control must consider the acceptability of development in proximity to potential sources of pollution. Consideration will therefore need to be given to the sensitivity of development proposed in the vicinity of waste management facilities and WWTWs*, particularly sensitive uses such as residential development or areas of public use."*

[* Waste water treatment works]

[98] The applicant's case, as presented, focussed exclusively on the word "odour" and entailed the submission that the treatment of this specific issue in the PPO's report was (per Mr Shaw) "*cavalier*". One of the elements of this ground, I discern, is that of unsatisfactory land use neighbours. I refer to, but do not reproduce, the topographical information digested in [55] – [57] above.

[99] The PPO's report to the Council's PC addressed, in the span of eight paragraphs, the subject of "Compatibility of development with adjacent land uses". In so doing the official identified PPS11/Policy WM5 as providing "*the appropriate policy context*". The author then provided an outline of this discrete policy and, as regards topography, stated:

> *"The proposed and existing uses will share an existing access onto a private route from the Ballymacrea Road. There will then be a separate access into the proposed caravan site which is segregated by an acoustic barrier in the form of a large earth bund, which would also be planted … this .. provides protection from noise impacts/HGVs using the private access route …*
>
> ***Policy WM5** requires the consideration of odour. It should be noted that the current landfill site has a management licence issued by NIEA which has a management condition in relation to odour. Furthermore, the landfill site has a 'landfill engine' with the operator sucking gases produced within the landfill to produce power."*

This section of the report also adverts to the Council's Environmental Health Department (*"EHD")* consultation response in favourable terms. The text of this response was:

> *"EH would have considered the potential for odours but we are aware that the current landfill site would have a management licence issued by NIEA where there would be a management condition in relation to odour. Further the landfill site has a 'landfill engine' where Council are sucking gases produced within the landfill to produce power … we have no further comments."*

In thus responding this consultee was reaffirming the stance which it had adopted when previously consulted in the context of the process culminating in the first, later quashed, planning permission. Both the PPO's report and the Council's affidavit evidence make clear that reliance was placed upon the last mentioned consultation response.

[100] I consider that, properly analysed, the focus of this ground of challenge is a matter of evaluative planning judgement, thereby engaging the Wednesbury principle. No argument to the contrary was advanced. Reflecting on all of the relevant evidence as a whole, I consider that the opinion which was formed on this issue during the decision making process fell comfortably within the range of rational assessments available to the planning officers concerned. It is demonstrably distant from the kind of aberration which would trigger the condemnation of Wednesbury irrationality. This ground of challenge is dismissed accordingly.

The EIA Challenge

[101] The thrust of this ground entails the complaint that the Council made a legally unsustainable negative screening decision and should, rather, have required

a full blown Environmental Impact Assessment ("EIA") within the compass of the Planning (Environmental Impact Assessment) Regulations (NI) 2001 (the "*EIA Regulations*"). As the relevant passage in the applicant's pleaded case makes clear, this ground is linked to other grounds:

> "*The EIA determination sheet identifies likely significant effects of the proposal as including 'traffic impact … hydrology and water impacts … [and] landscape visual impacts' …. as set out in relation to the grounds above, the Council did not have sufficient or adequate information to properly assess the proposal for EIA screening purposes.*"

The submissions of Mr Shaw highlighted two matters, namely visual impact and highway impact.

[102] It is appropriate to begin with the relevant statutory overlay. The regime of the EIA Regulations includes provision for a pre-planning permission application whereby the putative developer requests the council concerned to –

> "*… make a determination as to whether a proposed development is or is not EIA development (a 'screening determination').*"

"EIA Development" per regulation 2(1) is defined as (*inter alia*):

> "*Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location …*"

It is common case that what was proposed by the developer in this instance was "Schedule 2 development". Accordingly, the test which the Council's officials had to apply was that of "*…. likely to have significant effects (etc) ….*" The second starting point is that this test, by its very nature, calls for the formation of an evaluative judgement on the part of the decision maker concerned. Thus the Wednesbury principle is engaged. The contrary was not argued.

[103] The single authority which featured in the applicant's submissions on this issue is that of R (Jones) v Mansfield DC [2003] EWCA Civ 1408, which concerned the equivalent English EIA statutory provisions. There are two significant features of this Court of Appeal decision. First, it approved the approach of the first instance Judge, Richards J, at [52] of his judgment:

> "*The straightforward position is that under the regulations an EIA is required if a non-exempt development of a Schedule 2 description 'would be likely to have significant effects on the environment by virtue of factors such as its*

> *nature, size or location'. It is only* significant *effects that bring a development within the scope of the EIA regime; minor environmental effects do not do so, though all such effects may fall to be taken into account in the normal way as material considerations (cf. the observations of Sullivan J in* Milne *e.g. at para 113, in relation to the details to be included in an* ****401*** *environmental statement where an EIA is required). It is for the authority to judge whether a development would be likely to have significant effects. The authority must make an informed judgment, on the basis of the information available to it and having regard to any gaps in that information and to any uncertainties that may exist, as to the likelihood of significant environmental effects. The gaps and uncertainties may or may not make it impossible reasonably to conclude that there is no likelihood of significant environmental effects. Everything depends on the circumstances of the individual case."*

Second, Dyson LJ, delivering the main judgment of the Court, stated at [39]:

> *"39 I accept that the authority must have sufficient information about the impact of the project to be able to make an informed judgment as to whether it is likely to have a significant effect on the environment. But this does not mean that all uncertainties have to be resolved or that a decision that an EIA is not required can only be made after a detailed and comprehensive assessment has been made of every aspect of the matter. As the judge said, the uncertainties may or may not make it impossible reasonably to conclude that there is no likelihood of significant environmental effect. It is possible in principle to have sufficient information to enable a decision reasonably to be made as to the likelihood of significant environmental effects even if certain details are not known and further surveys are to be undertaken. Everything depends on the circumstances of the individual case."*

It seems to me that each of the passages reproduced above reinforces my characterisation of the exercise as one of formation of an evaluative judgment.

[104] The assembled evidence includes the written responses of the agencies consulted on the EIA issue. They were, respectively, the Council's EHD, the Northern Ireland Environmental Agency ("NIEA"), DFI Roads and the Rivers Agency. In brief compass, each of these agencies was "*content with*" the development proposal and limited itself to recommending the imposition of specified conditions and informatives.

[105] Ultimately the Local Planning Office of the Council made a formal written determination that an Environmental Statement was not required. The text reveals that the following environmental effects were identified: size, traffic, waste, contamination, ecology, hydrology/water, landscape visual, noise/disturbance and pollution. These are addressed with some care and in appropriate detail in the text which follows. This exercise yielded the omnibus conclusion:

> "*It is considered that the environmental effects from the development would be limited to the site and immediate surrounding area. The proposal is not located directly within any environmentally sensitive locations. It adjoins Craigahulliar ASSI. The development is not considered to be unusually complex or have any potentially hazardous environmental effects. The consultation with NIEA, Rivers Agency, TNI (DFI Roads) and Environmental Health has not identified any adverse environmental effects from the proposal which will result in significant environmental harm. Therefore it is considered that the development proposal will not have a significant environmental impact.*"

In this context, Mr Beattie was keen to highlight that, although not recommended by any of the statutory consultees, the Council, on its own initiative, included among the conditions of planning permission the following [13]:

> "*A Construction Environmental Management Plan (CEMP) shall be finalised and agreed in writing with the Council at least 8 weeks prior to works commencing. This plan shall set out details of the construction activities; objectives of protection of the ASSI; and all the mitigation and avoidance measures to be employed to ensure protection of the ASSI …*
>
> *Reason: to protect the integrity of the geological features of Craigahulliar ASSI.*"

It is convenient to insert here the detail that the evidence includes confirmation of due compliance with this condition.

[106] The adjective "adequate" and its near relative "adequacy" lay at the heart of Mr Shaw's submissions under this ground. This choice of language serves to remind that this aspect of the applicant's challenge seeks to pit a competing opinion against that formed by the Council's officials. I consider that it invites the following riposte. All appropriate consultees were engaged, each consultee provided a considered and coherent response and all of this material was plainly considered and weighed by those concerned. Furthermore, this was the second environmental screening decision made within a period of some two years and, significantly, the

views of the statutory consultees were consistent throughout. In addition there was input from "Shared Environmental Service" ("SES"), a specialised public authority which provides advice and services to all of the Councils of Northern Ireland.

[107] I am unable to identify in the relevant evidence any aberration, error or gap pointing in the direction of a Wednesbury condemnation by the court. While Mr Shaw's ultimate submission was that the Jones test was not satisfied, the correct question, in my judgement, must be whether the principle expounded in Jones is satisfied by reference to the relevant public law standard engaged which, in this instance, is the Wednesbury principle. This I consider to be the public law misdemeanour applicable to this ground. I conclude that the elevated threshold to be applied is plainly not overcome.

[108] Mr Shaw advanced a further discrete challenge to the Council's treatment of a habitats issue which is not readily identifiable in the final incarnation of the applicant's pleading. This discrete attack was based on the recent decision of the Seventh Chamber of the CJEU pursuant to a preliminary ruling reference under Article 267 TFEU from the High Court (Ireland) in a case which attracted some national publicity. The formal reference is Case C – 323/17 and, in the domestic proceedings, the claimants were "People Over Wind" and "Peter Sweetman", while the Defendant was the Coilte Teoranta, a company owned by the Irish State. Lying at the heart of the dispute was a consent authorising the installation of a cable connecting a wind farm to the electricity grid, issued by the Irish Planning Authority (An Bord Pleanala) and the potential impact of this on two special areas of conservation.

[109] The legal context was shaped by a series of provisions of the Habitats Directive [Council Directive 92/43/EEC]. Article 6 of this measure provides:

> *"Article 6*
>
> *1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.*
>
> *2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.*
>
> *3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a*

significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted."

[110] The High Court (Ireland) referred the following question for preliminary ruling:

"Whether, or in what circumstances, mitigation measures can be considered when carrying screening for appropriate assessment under Article 6(3) of the Habitats Directive?"

The CJEU explained, at [25], that Article 6 divides measures into three categories, namely conservation measures, preventive measures and compensatory measures. It highlighted that Article 6 makes no mention of the concept of mitigating measures. The Court, at [26], described these as "*measures that are intended to avoid or reject the harmful effects of the envisaged project on the site concerned*". Next, the Court highlighted the distinction between the preliminary, screening stage and the second, later stage of appropriate assessment: see [27]. It answered the question referred in the following terms, at [40]:

*"… Article 6(3) of the Habitats Directive must be interpreted as meaning that, in order to determine whether it is necessary to carry out, subsequently, an appropriate assessment of the implications, for a site concerned of a plan or project, **it is not appropriate** at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site."*

[Emphasis added.]

[111] As already noted, the basis of the consensual quashing order of this Court dated 08 February 2016 in respect of the first grant of planning permission for the contentious development was the Council's acknowledged failure that its consideration of the proposed development with reference to the Conservation Regulations 1995 –

> "*… had failed to take into account the presence of a water course which runs through the site which discharges into the sea at East Strand and into the Skerries and Causeway SAC.*"

In the reconsideration exercise giving rise to the impugned grant of planning permission, the Council determined, on 02 March 2016, that the proposal would not be likely to have a significant effect on the features of any protected European habitats site. The Council's affidavit evidence explains further:

> "*Condition 13 required a ….* [CEMP]. *Whilst the consultees did not require this measure the Respondent decided that it wanted this in place to ensure that the water course and on site works were managed and controlled.*"

[112] The new materials generated by and during the Council's reconsideration exercise included a report entitled "JNCC Phase 1 Habitat and Protected Species Surveys". This report investigated in particular the possibility of badger setts, otter activity and bat roasts. None of these was identified. The report concluded:

> "*It is the conclusion of this report that the proposed development is unlikely to have any negative impact on the ecology of the site. With replacement of extensive hard standings with native woodland planting and 'softening' generally of a derelict former industrial site there will be an overall positive impact of the development.*"

The same consultants prepared a separate Article 6(3) report which focused specifically upon the previous decision making lacuna which had stimulated the High Court's quashing order. The context is neatly explained thus:

> "*The proposal site is not situated within any Natura 2000 site. However, it is situated upstream of and hence indirectly connected to the Coastal SCI/SACs.*
>
> ['Site of Community Importance' and 'Special Area of Conservation'.]

> *"Therefore, should the project give rise to sources of adverse environmental impact, there is the potential for such sources to give rise to indirect impacts on these Natura 2000 sites."*

[113] Topographically, there is a hydrological connection between the subject site and the downstream Natura 2000 sites. In a later section of the report addressing possible indirect impacts, specifically that arising from construction, it is stated:

> *"During any construction works a number of activities may be undertaken on site, some of which may have the potential to give rise to noise and to modify hydrological regimes and affect the water quality in the receiving environment. A review of the project reporting to date and all allied documents (**including mitigation proposals**) indicates that the following significant construction impacts are not likely to arise:*
>
> - *Potential for contamination of receiving water bodies from construction run off (from silt and potential contaminates present);*
>
> - *Potential for contamination of receiving water bodies via mobilisation through the ground water of potential contaminates present.*
>
> *In consequence, no likely significant effects upon Natura 2000 sites are likely from construction works."*

In the immediately succeeding passage the report makes the same assessment in respect of the operation of the site. The words "*including mitigation proposals*" are highlighted as these form the evidential basis of the contention that there has been a breach of the Sweetman principle. Finally, in the "Conclusions" section the report states:

> *"This assessment has concluded that no likely significant effects upon Natura 2000 sites are likely to arise should the project succeed. **Mitigation proposed** in respect of drainage and foul sewerage is suitable for purpose …"*
>
> [Emphasis added.]

[114] In three discrete, consecutive paragraphs of the PPO's report to the Council's PC the advice given, clearly drawing on the aforementioned Corvus reports, was (in shorthand) that there had been a Regulation 43(1) compliant assessment and, further, a sustainable assessment under Article 6(3) of no likely significant effects

upon any Natura 2000 site. Each was expressly related to the possible impact of the proposed development on the culverted water course traversing the site.

[115] The evidence bearing on this discrete issue extends to embrace the SES consultation response noted above. This pre-dated the Corvus report. It has two features of significance. First, the following assessment:

> "*Having considered the nature, scale, timing, duration and location of the project it is concluded that further assessment is not required because it would not have a likely significant effect on the selection features, conservation objectives or status of any European site.*"

Second, this assessment is clearly neither conditional upon nor informed by any possible mitigation measure. Furthermore, the discrete passages of the Corvus report forcing on possible indirect impacts on "*hydrological regimes*" do not elaborate upon or particularise "*mitigation proposals*". The third element of this discrete equation is that mitigation proposals feature nowhere in the PPO's report to the Council's PC.

[116] This, for the court, throws up the question of the genesis of the reference to "*mitigation proposals*" in the Corvus report. Mr Beattie highlights, correctly in my view, that in the voluminous evidence assembled this reference has no identifiable genesis. Furthermore, neither SES nor Corvus itself recommended any mitigation measures, particularised or otherwise. Furthermore, this issue features nowhere in the PPO's report to the PC. <u>If</u> there were evidence, direct or reasonably to be inferred, that the decision making committee members <u>had</u> taken into account the factor of proposed mitigation measures in concluding that all was well vis-à-vis the habitats legal requirements, I accept that the <u>Sweetman</u> principle would have required consideration, with a view to assessing whether the impugned decision was contaminated by error of law. However, in my assessment here is no such evidence. It follows that this discrete limb of the applicant's challenge must fail.

<u>The "Eleventh Hour" issue</u>

[117] The taxonomy of the above heading is the court's. It is convenient to reproduce the relevant passage in the applicant's amended Order 53 pleading:

> "*The Council erred in law and failed to have proper regard to information submitted a few days before the Planning Committee Meeting and therefore failed to have regard to material considerations …*
>
> *Two days before …. the applicant provided further information to local councillors. The information included aerial photographs of motor homes and caravans trying to pass each other on the access road to the site, as well as*

> *photomontages depicting views of the site with and without the proposed development …*
>
> *However, it seems clear from comments of a Planning Committee member (who ultimately withdrew himself from the decision making process) reported in the local press that not all members of the Planning Committee received and considered this relevant information …*
>
> *Accordingly, the Council failed to have regard to all material considerations before taking the impugned decision.*"

[118] The factual matrix underpinning the above formulation is, basically, accurately portrayed in the initial passage ("*two days before …*"). The second factual element of the above formulation ("*however, it seems clear …*") is based on a single press report (emanating from "Causeway Coast Community News") which attributes the following words to a single PC member who (as other evidence confirms) withdrew from the PC's public meeting when the impugned decision was made at an intermediate stage of the proceedings:

> "[The Councillor] *says he withdrew from today's planning meeting due to sustained lobbying which he felt compromised the integrity of the planning process.* [He stated] *'.. additional information from applicants or objectors is always better going to planning officers with a request to disseminate to members of the planning committee. That avenue ensures rigorous impartiality and that all councillors receive the same information … information relating to planning matters was passed to some members in some cases – hand delivered, while others did not catch site* [sic] *of same.'*"

[119] It is quickly apparent that this ground is quite devoid of substance. The applicant avers unequivocally that she personally provided the materials in question to "***all***" members of the PC. This is followed by the contradictory averment, based on the press report, that it <u>seems</u> that not all PC members received the materials. This averment is confounded by the unambiguous averments which precede it. The applicant next avers that it <u>seems</u> that not all PC members "*considered*" the further materials. This I consider pure and unvarnished conjecture. The press report is also the source – the only one – of this suggestion. When one examines the text reproduced above, the inescapable conclusion is that it provides <u>no</u> support for this alternative suggestion. Furthermore, only the recipients of the hand delivery could satisfactorily address this issue – for example by the medium of public statement, letter or sworn affidavit. There is no evidence of this kind or anything comparable.

[120] Furthermore the applicant's assertions are not borne out by the records of the PC meeting, one of which makes explicit reference to the legend accompanying two of the late advent photographs ("*caravans tiered up 60 feet …*: per the notes of the Council's solicitor). Nor do the applicant's assertions find any support in the amendment which was made to the PC's Operating Protocol soon after the event, incorporating the stipulation that all documentation must be submitted to the Planning Department (and not to committee members) by a specified deadline.

[121] If, contrary to the analysis above, there were any substance in the applicant's assertions, this would not, in any event, serve to make good this discrete ground, for two separate reasons. First, I have held above that PC members were adequately informed on the issue of visual impact, to which the new materials were predominantly directed. Second, the suggestion that the maximum elevation of the impugned development will, upon completion, have dimensions of 60 feet is factually controversial, takes no account of screening and is based on virtual (as opposed to real) photographic depictions, noted above, which are also contentious. Second, it is not for this court of supervisory competence to descend into the arena on issues of this kind. That said, I have evaluated this discrete issue from the perspective most favourable to the applicant.

[122] I consider it appropriate to add the following, in the interests of broader guidance. There is no legal principle that every scrap of information submitted by every objector and consultee must be considered by planning officers and decision making Councillors. No objector or consultee can assert a legal entitlement to this effect. Rather, where an issue of this kind arises, it will be determined within the framework of established public law principles. In some cases, the question might be whether the decision making process was procedurally fair. In others – probably the majority – the question will be whether material information was disregarded and, if so, whether this constitutes a failure of a kind sufficient to vitiate the impugned decision.

[123] In the present case, the new materials had a bearing on two issues of significance, namely visual impact and integration and were, therefore, relevant. However, if the court had concluded that the underpinning assertions were made out, this would not inexorably have impelled to the conclusion that the impugned decision must be quashed. Rather, it would have been incumbent upon the court to examine the question of whether, having regard to the totality of the evidence which was considered by the decision makers, they were sufficiently informed on these issues. Public law operates in the real world and does not normally require the notionally paradigm or perfect.

Omnibus Conclusion

[124] On the grounds and for the reasons elaborated above, none of the grounds of challenge having been established this application for judicial review must be dismissed. I would add two observations. First, as confirmed by the court's earlier

order granting leave to proceed, certain of the issues raised by the applicant were of some substance and moment, requiring careful judicial examination. Second, if any of the applicant's grounds had succeeded there would have been evident scope for debate regarding the appropriate remedy, if any, bearing in mind decisions such as Re Acquis Estates' Application [2000] NIJB 1.

[125] If there is to be any suggestion that the normal "follow the event" costs rule is not to be applied, a procedural facility for this will be devised.