

Neutral Citation No. [2011] NIQB 106

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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

LS Banbridge Phase 2 Ltd's Application [2011] NIQB 106

**IN THE MATTER OF AN APPLICATION BY LS BANBRIDGE
PHASE 2 LTD FOR JUDICIAL REVIEW**

AND

**IN THE MATTER OF A DECISION BY THE DEPARTMENT OF
ENVIRONMENT OF NORTHERN IRELAND (PLANNING SERVICE)
DATED 1 DECEMBER 2009 TO REFUSE PLANNING PERMISSION FOR
THE DEVELOPMENT OF A SUPERSTORE AT BRIDGEWATER RETAIL
PARK BANBRIDGE**

TREACY J

Introduction

[1] The applicant, LS Banbridge Phase 2 Ltd, is a subsidiary of Land Securities plc and is a company specialising in property development which formed a joint venture with a company called Stoney Properties Ltd to progress the second phase of development of land at Bridgewater Retail Park approximately one mile south west of Banbridge ("Bridgewater Park"). The first phase consisted of a factory outlet centre which opened in April 2006. The respondent is the Department of the Environment of Northern Ireland.

[2] By this judicial review, the applicant challenges the respondent's decision dated 1 December 2009 to refuse to grant planning permission for a 12,999 square metre food superstore with associated parking and ancillary works at Bridgewater Park.

[3] Tesco Stores Limited ("Tesco") is the proposed occupier of the superstore and operates an existing store on the Castlewellan Road on the edge of Banbridge town centre.

[4] Since this matter was heard the respondent has on 30 March 2011 issued a Notice of Opinion that planning permission should be granted in respect of the development of a superstore at Bridgewater Retail Park, Banbridge. This was the outcome of a separate planning application by the applicant.

[5] The decision, the subject of the present challenge, related to a planning application for a 139,920 sq ft gross superstore with a net retail floor space of 100,000 sq ft. The planning permission to which the Notice of Opinion dated 30 March 2011 relates is for a smaller superstore, with a gross floor space of 110,783 sq ft and a net retail floor space of 80,000 sq ft, albeit in the same location.

[6] The applicant did not agree with the department's view that its published intention to grant permission for the smaller store is relevant to the extant challenge to refuse permission for the larger store.

[7] Accordingly, notwithstanding that development, the Court is required to determine the extant challenge.

Background

[8] The applicant submitted an application for planning permission on 1 December 2006 for proposed development at Bridgewater Park. The application was for the construction of a 12,999 square metre food superstore with associated parking, access, landscaping and general site works.

[9] On 23 March 2007 the respondent decided that the procedures under Article 31 of the Planning (Northern Ireland) Order 1991 should be applied to the proposals. Therefore, the planning application was the subject of an Article 31 Notice of Opinion and a Public Inquiry before the Planning Appeals Commission ("PAC"). Handling of the planning applications was allocated to the Strategic Projects Division of the respondent's Planning Service.

[10] On 11 June 2008 the Director of Strategic Planning wrote to the then Minister with the recommendation that a Notice of Opinion to refuse planning permission be issued. On 18 June 2008 the Minister accepted this recommendation of the Strategic Projects Team. The Notice of Opinion that permission should be refused was then issued on 20 June 2008. For the present purposes, the relevant reason contained in the Notice of Opinion contended that the proposal would have a material impact on the vitality and viability of Banbridge town centre.

[11] On 2 September 2008, the respondent's Planning Service notified the PAC the applicant wished to appear before and be heard by the PAC.

[12] A public inquiry into the proposals before the PAC was held between 29 June and 1 July 2009 at which expert evidence was called *inter alia* by both the applicant (with Tesco) and the respondent. Evidence for the respondent in opposition to the grant of planning permission was given at the inquiry by Damien Mulligan of the Strategic Projects Team.

[13] Following the inquiry, the PAC issued a report dated 29 October 2009 recommending refusal. The main finding in the PAC report, which was subsequently reflected in the respondent's reason for refusal, was that the proposal would be contrary to para 39 of PPS 5 by having an adverse impact on the vitality and viability of Banbridge town centre and undermining its convenience and comparison shopping functions.

[14] A report dated 4 November 2009 from Damien Mulligan to the Planning Manager of the Strategic Projects Division and to the respondent's Planning Service Management Board recommended refusal of the application. Damien Mulligan's report advised in the following terms:

"3. Having carefully considered the report of the PAC and all representations received in relation to this application, the Strategic Projects team has concluded that:

- **the proposal fails the policy tests of PPS 5 and specifically criterion 3 of paragraph 39;**
- **the economic employment factors arising from the proposal are not so significant that they should attract substantial weight.**

4. Having regard to the above it is the recommendation of the Strategic Projects Team that the planning application be progressed to a Decision Notice to Refuse for the following reason:

- **The proposal is contrary to Paragraph 39 of the Department's Planning Policy Statement 5: Retailing and Town Centres in that it would, if permitted, have an adverse impact on the vitality of Banbridge town centre and undermine**

its convenience and comparison shopping functions”.

[15] The Planning Manager of the Strategic Projects Division and the respondent’s Planning Service Management Board agreed with this recommendation.

[16] A report dated 9 November 2009 from the Planning Manager of the respondent’s Strategic Projects Division to the Minister of the Environment stated the respondent’s Planning Service agreed with the PAC’s recommendation to refuse planning permission. On 30 November 2009 the Minister of the Environment accepted this recommendation.

[17] The respondent’s formal Notice of Refusal of Planning Permission was issued on 1 December 2009. This decision was founded on the acceptance of the reasoning, conclusions and recommendation of the PAC in its report dated 29 October 2009 and gave the following reason for refusal:

“The proposal is contrary to Paragraph 39 of the Department’s Planning Policy Statement 5: Retailing and Town Centres in that it would, if permitted, have an adverse impact on the vitality of Banbridge town centre and undermine its convenience and comparison shopping functions”.

The Main Issue

[18] The applicant’s skeleton argument indicates that this challenge relates to the respondent’s acceptance of the PAC’s conclusions in its report dated 29 October 2009 which were then reflected in the respondent’s reason for refusal dated 1 December 2009.

[19] The main finding in the PAC report rests on conclusions concerning the:

- (a) catchment area and trade draw of the proposed store;
- (b) turnover of the existing edge-of-centre Tesco store at Castlewellan Road;
- (c) calculation and detailed retail impacts on stores within Banbridge town centre; and
- (d) comparison shopping function of Bridgewater Park.

[20] The applicant says such conclusions are either not supported by the evidence in front of the inquiry, or conflict with the PAC’s own findings and reasoning elsewhere in the report.

Relief Sought

[21] The relief sought, as set out in full in the Order 53 Statement dated 4 February 2010, is as follows:

- (i) an order of certiorari quashing the decision of the respondent to refuse to grant planning permission on 1 December 2009;**
- (ii) a declaration that the said decision of the respondent is unlawful, irrational, ultra vires and of no force or effect;**
- (iii) an order of mandamus compelling the respondent to determine the application for planning permission (ref. Q/2006/1075/F) in a lawful manner;**
- (iv) such further or other relief as the Court shall deem necessary;**
- (v) all necessary and consequential directions; and**
- (vi) an order that the respondent pay the applicant's costs.**

Grounds of Challenge

[22] The Order 53 Statement dated 4 February refers to the grounds of challenge under four broad headings, as follows:

- (i) Failure to take into account material considerations;**
- (ii) Irrationality;**
- (iii) Failure to give adequate or intelligible reasons; and**
- (iv) Breach of the rules of natural justice and Article 6 of the European Convention of Human Rights ("ECHR").**

Statutory Framework

Article 3 of the Planning (Northern Ireland) Order 1991

[23] The foundation statute for planning control in Northern Ireland is the Planning (Northern Ireland) Order 1991 (the "Planning Order"). Article 3 of the Planning Order provides for the functions of the Department of Environment (the "Department") with respect to the development of land and, *inter alia*, it provides:

"(1) The Department shall formulate and co-ordinate policy for securing the orderly and consistent development of land and the planning of that development".

Article 25 of the Planning Order

[24] Article 25(1) of the Planning Order contains the Department's fundamental legal duty when determining an application for planning permission:

"(1)...where an application is made to the Department for planning permission, the Department, in dealing with the application, shall have regard to the development plan, so far as material to the application, and to any other material considerations and -

(a)...may grant planning permission, either unconditionally or subject to such conditions as it thinks fit; or

(b) may refuse planning permission".

Article 31 of the Planning Order

[25] Article 31 enacts a special procedure to be applied for major planning applications:

"(1) Where, in relation to an application for planning permission...the Department considers that the development for which the permission or approval is sought would, if permitted -

(a) involve a substantial departure from the development plan for the area to which it relates; or

- (b) be of significance to the whole or a substantial part of Northern Ireland; or
- (c) affect the whole of a neighbourhood; or
- (d) consist of or include the construction, formation, laying out or alteration of a means of access to a trunk road or of any other development of land within 67 metres of the middle of such a road, or of the nearest part of a special road;

the Department may within two months from the date of the application serve on the applicant a notice in such form as may be specified by a development order applying this Article to the application.

(2) For the purpose of considering representations made in respect of an application to which this Article applies, the Department may cause a public local inquiry to be held by the planning appeals commission.

(3) Where a public local inquiry is not held under paragraph (2), the Department shall, before determining the application, serve a notice on the applicant indicating the decision which it proposes to make on the application; and if within such period as may be specified in that behalf in the notice (not being less than 28 days from the date of service thereof) the applicant so requests in writing, the Department shall afford to him an opportunity of appearing before and being heard by the planning appeals commission.

(4) In determining an application to which this Article applies, the Department shall, where any inquiry or hearing is held, take into account the report of the planning appeals commission.

(5) The decision of the Department on an application to which this Article applies shall be final".

Articles 110 and 111 of the Planning Order

[26] Article 110 of the Planning Order makes provision for the PAC and Article 111 outlines the procedure to be followed by the PAC.

Planning Policy Guidance

Planning Policy Statement 5 ("PPS 5") - Retailing and Town Centres

[27] PPS 5 was prepared in accordance with the Department's statutory general function in Article 31 of the Planning Order and it sets out the Department's policy for town centres and retail development in Northern Ireland.

[28] Para 5 of PPS 5 states the Government's policy objectives for town centres and retail developments. One such objective is "to sustain and enhance the vitality and viability of town centres".

[29] Para 41 deals with food supermarkets and food superstores and, *inter alia*, provides:

"...Proposals for food supermarkets and food superstores on sites outside town centres...may be acceptable provided that the proposal satisfies all the criteria set out at paragraph 39..."

[30] Para 39 of PPS 5 relates to comparison shopping and mixed retailing and requires the development to satisfy certain criteria, as follows (where reference is only made to the criteria most relevant to the present case):

"Major proposals for comparison shopping or mixed retailing will only be permitted in out-of-centre locations where the Department is satisfied that suitable town centre sites are not available and where the development satisfies all the following criteria:

- complements or meets existing deficiencies in the overall shopping provision;**
- is unlikely to lead to a significant loss of investment in existing centres;**
- is unlikely to have an adverse impact on the vitality or viability of an existing centre or undermine its convenience or comparison shopping function..."**

PAC report dated 29 October 2009

[31] The detailed conclusions of the PAC were accepted by the respondent and formed the basis of the respondent's decision to refuse permission. The

performance of the proposed superstore in relation to the first three criteria in para39 of PPS 5 was particularly relevant to the impact of the proposal on shopping functions at the identified centres.

Planning Policy Statement 5

[32] Para16 of the PAC Report describes the retail impact assessments (“RIA”) produced by the applicant, and commented on by the respondent and third parties, as pertinent to the analysis of whether the proposal satisfied the first three criteria in para39 of PPS 5. However, it is also noted that “...RIA is not a precise science as even relatively small differences in some variables and assumptions can lead to widely differing conclusions”.

Disputed elements of the RIA

[33] In paras17 – 26 of the report the PAC sets out its reasoning on disputed elements of the RIA of the proposed development which were material to its appraisal of the performance of the proposed development in relation to the third criterion. The disputed elements were (i) the extent of the likely catchment area of the proposed superstore; (ii) the level of trade the proposed superstore was likely to attract within that catchment area; and (iii) the level of trade which the proposed superstore was likely to attract from the Republic.

The extent of the likely catchment area of the proposed superstore (paras17-20)

[34] The Department’s view was the catchment area should be defined by a 15 minute drive time from the proposal based on the premise customers purchasing perishable goods would be less likely to travel any further on a regular basis. The applicant’s view was the catchment area should be defined by a 20 minute drive time from the proposal. The PAC found the Department’s application of a 15 minute drive time to be “somewhat arbitrary”. Para18 of the PAC report states:

“Bearing in mind the high proportion of net floorspace to be devoted to comparison goods (50%) and the overall size of superstore proposed (the largest Tesco in Ireland), we consider it appropriate to assume that its main catchment would extend to a 20-minute drive time...”

[35] The applicant furnished a map showing his interpretation of the 20 minute catchment area, dividing it up into 10 distinct zones. Paras19 and 20 of the PAC report essentially provide the PAC concluded the applicant’s catchment Zone 8 lay beyond his 20 minute catchment area.

The level of trade the proposed superstore was likely to attract within that catchment (paras21 - 25)

[36] The applicant assessed the expenditure and estimated turnover and market shares of stores in existing centres by means of household surveys. Para21 of the report stated the market share approach is a recognised and established method of estimating development turnover and "...[g]iven it is based on the surveyed shopping characteristics of the catchment area, it is preferable to the Department's use of typical or average turnover to floorspace ratios".

[37] The applicant attributed the percentage of available expenditure within each of his catchment zones that would make up the proposed store's turnover based on a judgment of four factors, namely, (i) the distance of the zone to the proposal; (ii) the general ease of accessibility; (iii) the performance and attraction of competing centres; and (iv) the attraction of the proposal.

[38] Para 23 of the report indicates the PAC agreed with the validity and relevance of these four factors but it was recognised that:

"...estimates of available expenditure attracted to the proposal from zones within the catchment and market share of the proposal are based on an element of subjective judgment. Such estimates are subject to differing conclusions in the best of circumstances, and the scope for debate can therefore be wide..."

[39] At para 25 the report stated that the PAC considered the percentage of available expenditure achieved by the proposal is likely to be highest from within those zones closest to the proposal. The report found the degree of available expenditure attracted to the proposed store from the nearest Zones 1, 2 and 3 to be underestimated; a figure of 40% of available expenditure from Zone 7 to the proposal to be overestimated; and that Zone 8 being ruled out from the 20 minute catchment area took out approximately £3m of the applicant's estimated turnover.

The level of trade which the proposed superstore was likely to attract from the Republic (para26)

[40] Para 26 acknowledged some of the factors (the peace dividend/improved road links/differences in land values and labour costs) which had contributed to increased expenditure flowing into Northern Ireland from the Republic of Ireland but the report goes on to note:

"However, the relative strength of the euro against the pound in more recent times has in our view

been the primary driver of this increased expenditure. Fluctuations in exchange rates arise from a number of economic factors. The current economic recession, brought about by sudden and largely unforeseen circumstances, has played a significant part in the present strength of the euro against the pound. While this situation favours expenditure inflow from south to north, we do not accept the applicant's assumption that the present situation will continue either over the long term or at current levels".

[41] The applicant estimated the proposal would draw £9.7m of its total convenience turnover from the Republic of Ireland. The Department's assessment was an allowance of 10% of expenditure coming from outside the catchment to take account of Republic of Ireland trade. The PAC report states the Department's estimate "seems a more reasonable estimate".

PPS 5 Criterion 3 - is unlikely to have an adverse impact on the vitality or viability of an existing centre or undermine its convenience or comparison shopping function

[42] The focus of the applicant's first three grounds is upon the reasoning in the PAC report which led it to conclude that the proposed superstore is likely to adversely impact on the vitality of Banbridge town centre and undermine its convenience and comparison shopping functions, thus failing to fulfil the third policy criterion in para39 of PPS 5. In paras39 - 54 of the report the PAC explains in some detail why it reached this conclusion in respect of Banbridge.

[43] At para39 the report states that, in assessing the potential impact of the proposal on Banbridge town centre, estimates of market share and trade draw, of themselves, are of limited value and it is highlighted that "[t]he important point is the impact of trade diversions on the individual shops and the likely consequential effect on the nature and function of Banbridge town centre". The report states the Department's estimate of the town centre convenience turnover was £28.5m of which £20.5m would be diverted to the proposal. The applicant's estimate of town centre convenience was £20.5m, of which £1.2m would be diverted to the proposal. The PAC stated that "[i]n reality the actual impact is more likely to lie somewhere between these extremities".

The existing Tesco store

[44] The PAC report provides it was appropriate to look, firstly, at the likely impact the proposal would have on the existing edge-of-centre Tesco store. The applicant estimated the 2009 main convenience turnover for the existing Tesco store was in the order of £34.7m out of a total turnover of

£38.6m. The Department referred to a RIA prepared by Ostick and Williams wherein a figure of between £17m and £23m was estimated as the turnover. The Department's 2011 estimate of convenience turnover is £24.7m. Para41 of the report notes the "very significant difference" between these estimates and considered the figure of £34.7m to be over inflated and the actual figure is likely to be closer to the Department's estimate and the original Ostick and Williams figure.

[45] At para42 of the report it is stated that the applicant assumes that within his 20 minute catchment area the existing Tesco store's estimated 2013 main food turnover of £35.8m would be reduced to £21.3m by the proposal. The report notes that despite this the applicant assumes the popularity and strength of the existing Tesco store will remain and it will continue to be financially viable. However, at para42 of the report, the PAC found due to its previous comments on estimated convenience turnover of the existing Tesco and the "flagship status" of the proposal, its impact on the existing store was likely to materially exceed that estimated by the applicant. It was also noted that the 2013 estimated turnovers include an assumption the existing Tesco would have its November 2005 approved 2622 square metre extension in place but evidence was given at the hearing that if planning permission was granted for the superstore such extension would probably not be carried out and also the suggested "Head of Terms" for the proposed Article 40 agreement referred to the existing Tesco store continuing to trade for a minimum period of 10 years in "its current format".

[46] At para43, the PAC report concluded Tesco would see no need to implement the approved extension to the existing Tesco store if planning permission is granted for the proposal and, consequently, inclusion of the extension into the equation serves to minimise the impact of the new proposal on that store and thus renders the applicant's estimates of market shares and turnovers "highly questionable". The report states, therefore, that the applicant's estimate of residual turnover for the existing Tesco store in 2013 (with the new store in place) of £21.3m is "likely to be an overestimation".

[47] In relation to the financial viability of the existing Tesco store the PAC report concludes, notwithstanding the suggested Article 40 agreement, "downsizing or significant change in shopping format in the [existing Tesco store] seems likely".

Supervalu

[48] Paras 44-47 of the report considered the retail impact on a number of other stores within Banbridge town centre. The PAC report concludes that the proposal is likely to significantly change Supervalu's convenience shopping function and to undermine its viability.

Lidl

[49] At para 45, the report concludes it would expect the proposal to impact on the Lidl store (which provides a basic “no frills” offer at the discounted end of the retail market) and found it surprising that the applicant assumed no impact would occur as the proposed store is likely to have a greater range and quantity of “value” items than the existing Tesco store.

Iceland

[50] At para 46, the report concludes, for the same reasons given in respect of Lidl, the applicant’s estimate of the impact on Iceland was likely to be underestimated.

Centra, Church Street and Scarva Street

[51] At para 47 the report concludes the PAC did not expect Centra in Church Street to be significantly affected by the proposal but expected some of its “top-up” turnover to be diverted. The report continues to state that the Centra in Scarva Street would have some impact on its main food turnover and that the applicant’s estimate of £0.1m diversion to the proposal was a somewhat underestimated impact but concluded “overall we do not consider this store is likely to be significantly affected by the proposal”.

Existing Tesco store - linked trips

[52] Para 48 of the report considers the existing Tesco store. It was considered in terms of linked trips between the existing Tesco store and Banbridge town centre where in this way it played a role in maintaining the vitality and viability of the town centre. The report refers to the Retail and Economic Assessment (“REA”) submitted with the planning application for the extension to the existing Tesco store and states the REA sees the existing Tesco store as “pivotal in retaining convenience expenditure within Banbridge and its catchment”. Para 49 of the report states:

“...we can appreciate the linkages between the store and the town centre as described in the REA. Further confirmation of these links are provided by the applicant’s survey, which showed that 62% of main food shoppers at the TCR store also visited Banbridge town centre in conjunction with their Tesco visit. The Department’s town centre survey also showed 61% of respondents there intended to visit the TCR store also visited Banbridge town centre in conjunction with their Tesco visit. The Department’s town centre survey also showed 61%

of respondents there intended to visit the TCR store whilst in the town”.

[53] Para 50 of the report states the applicant accepted the proposal would bring about a reduction in the linked trips between the existing Tesco store and Banbridge town centre but not to the extent that it would undermine the town centre. However, the report goes on to state that the PAC considers the impact of the proposal on the existing Tesco store is likely to significantly exceed that estimated by the applicant and that this must inevitably result in a further reduction in anticipated linked trips to the town centre, and an additional adverse impact on its vitality. The report states the evidence that the extension to the existing Tesco store was unlikely to proceed would represent a loss of investment at an edge of town centre site which contributed through linked trips to the vitality and viability of Banbridge town centre. The report continues: “Accordingly there is likely to be some (albeit limited) indirect loss of investment in Banbridge Town Centre”.

[54] At para 51 the report states that the means and practicalities of marketing both Bridgewater Park and the town centre were “somewhat vague and unconvincing”. The PAC went on to say:

“[Bridgewater Park] occupies a peripheral position within Banbridge, being separated from most of the town by the A1 dual carriageway. With easy and direct access to the [factory outlet centre] and the proposal from the A1 we consider it more likely that relatively few shoppers would visit Banbridge town centre in conjunction with their [Bridgewater Park] visit. Consequently the proposal would have an overall negative effect on linked trips to Banbridge town centre which would significantly impact on its vitality”.

Comparison shopping

[55] Para 52 of the report considers the comparison shopping function of the proposal. Evidence was given that, with the superstore built, Bridgewater Park would become a large out of town ‘one destination’ shopping centre that would be able to effectively compete with Newry, Craigavon and Sprucefield. However, the report states that “the prospect of a development capable of achieving such a role was the essence of the third parties concerns that a new and distinctly separate town centre would be created at [Bridgewater Park], which would have a direct and detrimental effect on Banbridge town centre”.

[56] Para 53 of the report notes that the existing factory outlet centre already competes with Banbridge town centre in that they retail many comparison items which are also on offer in Banbridge. The factory outlet

centre also offers two UK franchised coffee outlets and a restaurant. The PAC went on to state:

“The proposals comparison floorspace is significant on its own but when added to that of the [factory outlet centre] we conclude that it will significantly affect and likely undermine the comparison function of Banbridge Town Centre”.

The PAC’s conclusion

[57] At para 54 of the report, the PAC concludes, as follows:

“In summary we conclude the proposal is likely to adversely impact on the vitality and viability of Banbridge town centre and undermine its convenience and comparison shopping functions. It therefore fails to fulfil the third criterion of paragraph 39 of PPS 5”.

Legal principles

General Principles

[58] In respect of how the Court determines challenges to planning decisions, both the applicant and the respondent refer to the general principles set out by Girvan J in para 43 of *Re Bow Street Mall Ltd & Ors* [2006] NI 28. For ease of reference, para 43 is set out below in its entirety:

“[43] A number of clearly established principles of central relevance in the case emerged from the authorities and can be stated briefly as follows:

- (a) The judicial review court is exercising a supervisory not an appellate jurisdiction. In the absence of a demonstrable error of law or irrationality the court cannot interfere. The court is concerned only with the legality of the decision making process. If the decision maker fails to take account of a material consideration or takes account of an irrelevant consideration the decision will be open to challenge. (per Lord Clyde in City of Edinburgh Council v Secretary of State [1998] 1 All ER 174).**

(b) It is settled principle that matters of planning judgment are within the exclusive province as the local planning authority or the relevant minister (per Lord Hoffmann in Tesco Stores v Secretary of State [1995] 2 All ER 636 at 657).

(c) The adoption of planning policy and its application to particular facts is quite different from the judicial function. It is for Parliament and ministers to decide what are the objectives of planning policy, objectives which may be of national, environmental, social or political significance and for those objectives to be set out in legislation, ministerial directions and in planning policy guidelines. The decision of ministers will often have acute social, economic and environmental implications. They involve the consideration of the general welfare matters such as the national and local economy, the preservation of the environmental, public safety and convenience of the road network and these transcend the interests of particular individuals (see R (Alconbury Limited) v Secretary of State [2003] 2 AC 327 per Lord Slynn, Lord Nolan and Lord Hoffmann).

(d) Policy decisions within the limits imposed by the principles of judicial review are a matter for democratically accountable institutions and not for the courts (per Lord Hoffmann in Alconbury at 327).

(e) In relation to statements of planning policy they are to be regarded as guidance on the general approach. They are not designed to provide a set of immutable rules. The task of formulating, co-ordinating and implementing policy for the orderly and consistent development of land may require the resolution of complex problems produced by competing policies and their conflicting interests. Planning policies are but some of the material considerations that must be taken into account by the planning authority in accordance with the 1991 Order (per Carswell LCJ in Re Lisburn Development Consortium

Application [2000] NI JB 91 at 95() - (e), per Coghlin J in Re Belfast Chamber of Trade Application [2001] NICA 6.

(f) If a planning decision maker makes no inquiries its decision may in certain circumstances be illegal on the grounds of irrationality if it is made in the absence of information without which no reasonable planning authority would have granted permission (per Kerr LJ in R v Westminster Council ex parte Monahan [1990] 1 QB 87 at 118(b) - (d)). The question for the court is whether the decision maker asked himself the right question and took reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly (per Lord Diplock in Tameside).

(g) Where the Department has issued an art. 31 notice indicating the Department's proposed decision the applicant is entitled to expect that it will be implemented in the absence of some good reason to the contrary. It is open to the Department to change its mind for sufficient reasons and give a different final decision on the application if it is desirable in the public interest to do so (per Carswell LCJ in Re UK Waste Management Application [1999] NI 183).

(h) In the context of planning decision the decision making process may take place in stages. Thus, for example, a resolution by a local authority proposing to permit or refuse a planning application may be later followed by a grant or refusal of planning permission. The decision of the planning authority passing the resolution does not grant the permission but it is susceptible to review as will be the later decision to grant or refuse planning permission. An applicant will not be precluded from challenging the latter if he acts timeously after the grant or refusal on the ground that he should have challenged the earlier step (R (Burkett) v Hammersmith & Fulham [2002] 1 WLR 1593 (I)).

(i) The planning decision-maker's powers include the determination of the weight to be given to any particular contention. He is entitled to attach what weight he pleases to the various arguments and contentions of the parties. The courts will not entertain a submission that he gave underweight to one argument or failed to give any weight at all to another (per Forbes in Sedon Properties v Secretary of State for the Environment [1978] JPL 835)".

Duty to give reasons

[59] In respect of the extent to which reasons require to be spelt out, para 62 of *Re Bow Street Mall* refers to Lord Brown's discussion of this issue in para 36 of *South Buckingham District Council v Porter* [2004] 1 WLR 1953. Lord Brown provided a broad summary of the authorities governing the proper approach to a reasons challenge in the planning context in order to focus the reader's attention on the main considerations to have in mind when contemplating a reasons challenge:

"36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons

challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision”.

[60] In this regard, the respondent also refers to the judgement of Lord Clyde in *City of Edinburgh Council v Secretary of State for the Environment* [1997] 1 WLR 1447 HL, 1465B:

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

[61] In addition, the respondent relies on the legal principles on the correct approach to decision letters in planning appeals as set out in *Bolton MDC v Secretary of State* (1995) 71 P&CR 309 HL. At p 314, Lord Lloyd of Berwick, considered a number of authorities on this issue and commented:

“...What the Secretary of State must do is to state his reasons in sufficient detail to enable the reader to know what conclusion he has reached on the “principal important controversial issues”. To require him to refer to every material consideration, however insignificant, and to deal with every argument, however peripheral, would be to impose an unjustifiable burden”.

[62] At p 315, Lord Lloyd of Berwick then concludes:

“Since there is no obligation to refer to every material consideration, but only the main issues in dispute, the scope for drawing any inference will necessarily be limited to the main issues, and then only...when “all other known facts and circumstances appear to point overwhelmingly” to a different decision”.

[63] Further, the respondent relies on the decision of the Court of Appeal in *Clarke Homes Ltd v Secretary of State for the Environment* (1993) 66 P & CR

263 where, on another reasons challenge, Sir Thomas Bingham MR felicitously observed, at pp 271-272:

"I hope I am not over-simplifying unduly by suggesting that the central issue in this case is whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication."

Material error of fact

[64] Regarding the characterisation of an error as a material error of fact, the applicant relies, in particular, on para63 of *E v Secretary of State for the Home Department* [2004] QB 104 which cites *R v Criminal Injuries Compensation Board ex parte A* [1999] 2 AC 330:

"63. In our view, the *CICB* case points the way to a separate ground of review, based on the principle of fairness. It is true that Lord Slynn distinguished between "ignorance of fact" and "unfairness" as grounds of review. However, we doubt if there is a real distinction. The decision turned, not on issues of fault or lack of fault on either side; it was sufficient that "objectively" there was unfairness. On analysis, the "unfairness" arose from the combination of five factors:

- i) An erroneous impression created by a mistake as to, or ignorance of, a relevant fact (the availability of reliable evidence to support her case);
- ii) The fact was "established", in the sense that, if attention had been drawn to the point, the correct position could have been shown by objective and uncontentious evidence;
- iii) The claimant could not fairly be held responsible for the error;
- iv) Although there was no duty on the Board itself, or the police, to do the claimant's work of proving her case, all the participants had a shared interest in co-operating to achieve the correct result;

v) The mistaken impression played a material part in the reasoning”.

Principles of procedural fairness

[65] The applicant relies on *R v Secretary of State for the Home Department ex p Doody* [1994] 1 AC 531 in which Lord Mustill held at 560D:

“What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that... (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. 6. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer”.

Apparent/structural bias

[66] The applicant made reference to the current approach to apparent bias in *Porter v Magill* [2002] 2 AC 357:

“...The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased”.

[67] The applicant also referred to *R (on the application of Lewis) v Redcar & Cleveland BC* [2009] 1 WLR 83 which considered the application of this principle as developed to address decision makers acting in a judicial or quasi judicial capacity to administrative decisions in the planning field. The principle was applied at para 71 by Pill LJ:

“It is for the court to assess whether the Committee members did make the decision with closed minds or that the circumstances give rise to a real risk of closed minds that the decision ought not in the public interest be upheld”.

[68] Rix LJ held at para 96:

“So the test would be whether there is an appearance of predetermination, in the sense of a mind closed to the planning merits of the decision in question”.

Applicant’s Submissions

Ground (i) Failures to take into account material considerations

[69] It is submitted, as required by Article 25(1) of the Planning Order, the respondent failed to take into account evidence which was material to the issue of the impact that the proposed superstore would have on the retail function of Banbridge town centre. The applicant categorises these failures under the following five headings:

- (i) trade draw and catchment;
- (ii) trade from within the main catchment;
- (iii) trade from outside the main catchment;
- (iv) turnover of Tesco, Castlewellan Road; and
- (v) linked trips.

Trade draw and catchment

[70] It is submitted that, in considering the retail impact assessment of the proposals, the PAC failed to take into account the important elements of the evidence relating to the anticipated turnover of the proposed store and the pattern of retailing in the wider area, including the turnover of the existing Tesco store, all of which were material to the question of the impact that the new store would have on Banbridge town centre.

[71] Two competing approaches to the retail impact assessment of the proposals were presented at the PAC inquiry. The applicant asserts the PAC Report preferred and accepted Mr Loughrey’s (on behalf of the applicant) approach because it was based on surveyed actual shopping characteristics (rather than the use of theoretical figures). It is also contended the PAC concluded Mr Loughrey’s definition of a 20 minute drive time area as the basis for his assessment was appropriate.

[72] The applicant argues that the PAC then acted inconsistently with its acceptance of/preference for empirically based judgments and reached other findings on how the store would draw trade from different parts of its catchment area which failed to take into account evidence relating to existing shopping patterns as contained in Mr Loughrey’s evidence.

Trade from within the main catchment

[73] It is submitted the PAC's finding that Zone 8 of Mr Loughrey's catchment area should be excluded from consideration failed to take into account the survey evidence which showed 5% of the convenience shopping trade at the existing Tesco store on the Castlewellan Road was already drawn from Zone 8 and that visitors to Bridgewater Park already came from Zone 8. It is contended the view no shoppers would come from Zone 8 was plainly perverse in light of the survey evidence.

[74] The applicant argues, in reliance on *E v Secretary of State for the Home Department* [2004] QB 104, the error of the PAC to take Zone 8 into account was capable of being characterised as a material error of fact where such mistake played a material part in the reasoning in the present case.

[75] In addition, it is asserted the PAC report incorrectly stated Mr Loughrey estimated the proposal would draw £3m from Zone 8 when his evidence was that £5.8m would have been drawn from Zone 8.

[76] The applicant submits that the failure to take account of the information discussed in the above paragraphs resulted in an unreasonable or perverse approach to the PAC's assessment of retail impact.

Trade from outside the main catchment

[77] The PAC preferred Mr Mulligan's approach of allowing for 10% of expenditure coming from outside the main catchment to account for Republic of Ireland trade. Mr Loughrey estimated the proposal would draw £9.7m of its convenience turnover from the Republic of Ireland and he made the assumption that the present levels of cross-border trade would continue over the long term or at current levels. The PAC rejected this assumption.

[78] It is submitted the PAC did not take into account the grounds for Mr Loughrey's estimate. The applicant asserts Mr Loughrey produced evidence of the shopping habits of those living in the Republic of Ireland and he explained the longevity of the trade flows before assuming that only 50% of the potential existing market at Bridgewater Park might be attracted to the proposed store. It is argued the PAC did not take this into account in its report and that no rational basis was given for rejecting this given the PAC's preference for empirical evidence.

[79] It is contended the effect of the PAC's failure to take these matters into account was to attribute a greater proportion of the turnover of the proposed store to trade diversion from existing centres (as opposed to trade drawn from the Republic of Ireland) with a potentially material effect on the assessment of impact.

Turnover of Tesco, Castlewellan Road

[80] The applicant referred to the approach of the PAC in paras 41–43 and 50 in the PAC report (as discussed in the paragraphs above). It is submitted that the PAC’s approach to the turnover of the existing Tesco at Castlewellan Road failed to take the following summarised matters into account:

(i) the explanation given in evidence why Mr Loughrey’s estimate of turnover was to be favoured over the approach taken in the original Retail Impact Assessment (and by the respondent), in particular, due to the advantages of a survey-based market share approach when compared with a sales density approach using average turnovers and the confirmation of the turnover amount with Tesco;

(ii) the confirmation by Tesco as operators of the store that Mr Loughrey’s estimate was appropriate; and

(iii) the evidence that the claimed “overestimate” of turnover which assumed the building out of the extension was based on a typographical error (being “and extn”) that was not reflected in the text or the other tables in the evidence.

[81] The applicant’s skeleton argument refers to direct evidence from David Potts, a Tesco Board Director, which explained why the existing edge-of-centre store was trading at a higher level than the figure relied upon by Mr Mulligan.

[82] It is argued there is no indication from the report that this evidence was acknowledged in any way by the PAC nor were any reasons given for rejecting the evidence of the operator of the store.

[83] The applicant asserts that such failures led the PAC to underestimate the turnover of the existing store or make erroneous assumptions about why it considered the applicant to have overestimated its turnover. It is contended this conclusion was material to the assessment of the retail impact of the proposals on Banbridge and, therefore, to the decision to refuse permission.

Linked trips

[84] The applicant’s skeleton argument refers to para 50 of the PAC report. It is argued that the mistakes in the report regarding the level of turnover at the existing Castlewellan Road store impacted the PAC’s conclusions on the

loss of linked trips with Banbridge town centre and thus affected the judgment regarding the impact on the town centre.

[85] The applicant's skeleton argument referred to paras 49 and 51 of the PAC report. However, it is submitted the PAC Report failed to take the following matters into account:

(i) Mr Loughrey's evidence that linked trips by Tesco shoppers to the town centre are carried out to use services that would not be available at the proposed store, such that shoppers would have to travel to the town centre anyway to access them; and

(ii) the influence that travel distances to alternative locations for those services would have on the potential for existing linked trips to be lost.

[86] It is submitted these failures were material to the decision as they affected the assessment of the extent to which the proposed store would have an adverse effect on retailing in Banbridge town centre.

Ground (ii) Irrationality

[87] It is submitted that the conclusions reached by the PAC on the likely impact of the proposed superstore were irrational for the following reasons:

- (a) rejection of evidence of existing shopping patterns;
- (b) turnover of existing Tesco Castlewellan Road store; and
- (c) impact calculations.

(a) rejection of evidence of existing shopping patterns

[88] As already mentioned, the PAC preferred and accepted the methodology of using evidence of existing shopping patterns within the catchment area to assess the trade draw of the proposed store. It is submitted the PAC inconsistently/irrationally rejected the evidence of those shopping patterns by concluding:

- (i) Zone 8 of Mr Loughrey's catchment area should be excluded ; and
- (ii) Mr Loughrey had overestimated the extent to which the store draws trade from the Republic of Ireland.

[89] It is contended the PAC unreasonably failed to assess the implications of its own preferred approach for a proper analysis of retail impact (or by so doing gave inadequate reasons for its approach):

- (i) if Zone 8 were excluded from consideration, this would inevitably impact on the wider assessment of shopping patterns in the area and on the turnover of the proposed store. Any resulting reduction in the estimated turnover of the proposal would potentially reduce the impact that the turnover had on the town centre;
- (ii) the PAC also found that Mr Loughrey's estimate of available expenditure attracted to the proposal from zones 1 – 3 was too low and too high in the case of zone 7. However, it failed to assess the effect of these considerations on the turnover of the proposal and therefore its impact on the town centre; and
- (iii) as for the anticipated flow of trade from the Republic of Ireland, the reasoning of the PAC would involve reducing the turnover of the proposed store, but the Report failed to examine the effect that change would have on the analysis of impact.

(b) Turnover of existing Tesco Castlewellan Road store

[90] It is submitted the assessment by the PAC of the turnover of the existing Tesco was also flawed:

- (i) despite rejecting the respondent's approach of estimating turnover based on sales densities and average turnovers, it accepted the respondent's estimate of the turnover of the existing store which was founded on the same approach;
- (ii) the applicant's assessment of existing turnover was rejected on the basis of a single typographical error that was apparent on a proper reading of the evidence as whole or should have been the subject of a request for clarification from Mr Loughrey;
- (iii) the actual turnover of the store, as set out in the evidence of Mr Loughrey and confirmed in the evidence of Mr Potts, was not scrutinised at any stage of the inquiry process.

[91] In addition, it is asserted that the report moved from a conclusion Mr Loughrey overestimated the turnover of the existing store but then applied his estimate of a £16 million trade diversion as a result of the proposals (para 43) when that estimate was based upon his own view of the existing store turnover. It is argued the approach of the PAC was, therefore, confused, inconsistent and irrational.

[92] The applicant referred to the PAC's conclusions in para 43 of the report. As Tesco had offered an Article 40 agreement which would have required the existing Tesco store to trade for a minimum period of 10 years in its current format, it is submitted the PAC's conclusion was irrational as the purpose of the proposed Article 40 Agreement was to prevent a change to the existing store which would affect the viability of the town centre. It is argued that, at no stage, was any evidence presented to the PAC which questioned the ability of the proposed Article 40 Agreement either to ensure the continued trading of the existing Tesco store or to prevent changes in its shopping format, rejecting Mr Mulligan's suggestion at para 6 of his affidavit that the draft Article 40 agreement was properly taken into account.

(c) Impact calculations

[93] It is submitted the approach adopted by the PAC assessing the impact on the town centre was irrational. It is argued that the PAC concluded the impact would be unacceptable notwithstanding that it reached judgments on the likely impacts on individual stores which, when added together, did not amount to a significant impact.

[94] It is asserted that when the PAC's own analysis is followed through, it results in a level of trade diversion from the centre as a whole that is much closer to Mr Loughrey's figure. Paras 49 and 50 of the applicant's skeleton argument illustrate this argument in detail. It is submitted the PAC proceeded to an unsubstantiated conclusion on impact that ignored its own reasoning.

[95] It is also contended that the PAC report irrationally concluded (in the absence of any evidence) that:

“the [Outlet] units already compete with Banbridge town centre in that they retail many comparison items which are also on offer in Banbridge”;
The proposed 4100sqm net of comparison floorspace was “significant on its own but when added to that of the [Outlet]...it will significantly affect and likely undermine the comparison function of Banbridge town centre” (paragraph 53).

[96] It is asserted the PAC had no analysis before it which would have enabled it to reach a position contrary to the detailed assessment carried out by Mr Loughrey and it was illogical to assume that retail locations compete simply on the basis of their size.

[97] It is submitted that a similarity in the scale of comparison floorspace at the existing factory outlet centre at Bridgewater Park and in the town centre does not mean there will be a similarity in retail function at these locations. It

is contended the view that a similar function existed was unreasonable and fundamentally undermined the PAC's conclusions on impact.

Ground (iii) Failures to give adequate or intelligible reasons

[98] In reliance on *South Buckinghamshire CC v Porter (No. 2)* [2004] 1 WLR 1953, it is submitted the PAC Report was deficient in setting out the reasoning which formed the conclusions. It is asserted the failures to give adequate or intelligible reasons each related to the main issue before the inquiry, namely the retail impact of the proposals on Banbridge town centre.

[99] It is submitted the PAC and the respondent failed to give adequate or intelligible reasons for:

- (a) rejecting the applicant's evidence on trade draw, given it had accepted the validity of using the survey data on which the applicant's evidence was based;
- (b) accepting survey data in some instances but not in others;
- (c) how its own conclusions on trade draw (and its adoption of the respondent's assumption of 10% of expenditure from outside the catchment) might affect its analysis of impact on convenience shopping in the town centre, particularly if those conclusions meant that the turnover of the proposed store was reduced accordingly;
- (d) rejecting the applicant's evidence of turnover at the existing Tesco store as confirmed directly by Tesco at the inquiry;
- (e) concluding that the impact on existing convenience stores within the town centre would be unacceptable, when there was no assessment of how discrete criticisms of the applicant's trade diversion figures would translate into an overall level of impact;
- (f) equating the similarity in the scale of comparison floorspace between the Outlet and the town centre to a similarity in retail function at these locations as a basis for concluding that the proposal would exacerbate existing

competition between Bridgewater Park and the town centre.

[100] It is asserted these failures create a substantial doubt as to whether the report contains errors of law by failing to take account of, or responding irrationally to, relevant evidence.

Ground (iv) Breaches of the rules of natural justice also amounting to a breach of Article 6 of the ECHR

[101] It is asserted that a fair procedure was not followed by the PAC/respondent in reaching its decision and there was apparent and/or structural bias in the process adopted in reaching a decision. It is argued that these breaches of the rules of natural justice also amounted to breaches of Article 6 ECHR and Section 6 of the Human Rights Act 1998.

[102] It is submitted that the respondent failed to comply with the common law principles of procedural fairness as set out in *R v Secretary of State for the Home Department ex p Doody* [1994] 1 AC 531. It is asserted a breach of common law principles will involve a breach of Article 6 ECHR and, therefore, Section 6(1) of the Human Rights Act 1998.

[103] It is argued the respondent failed to comply with these principles because the applicant was not given a fair opportunity to respond to concerns which were raised for the first time in the PAC report and which clearly affected the recommendation and decision to refuse permission:

(i) regarding the assessment of the current and likely future turnover of the existing edge-of-centre Tesco store:

(a) the PAC did not raise any concerns about the applicant's estimate of the existing turnover of the store;

(b) the approach to be taken to the permitted extension in Mr Loughrey's retail analysis was clearly an issue of concern to the PAC but this was not raised at the inquiry and the applicant was not given an opportunity to explain why the analysis relied upon by the PAC misunderstood the evidence.

(ii) any concerns over the potential for Article 40 obligations to secure the continuation of the retail offer at the existing store were not raised at the inquiry;

(iii) regarding the impact of the proposal on the comparison retailing function of the town centre:

(a) the respondent did not raise any issue in relation to the effect of the proposal on comparison retailing in Banbridge town centre;

(b) no party at the inquiry disputed that the comparison shopping at the factory outlet centre provided a different retail function to the town centre;

(c) only Mr Loughrey's evidence provided any detailed assessment of impact on comparison shopping, which indicated a 6% impact on Banbridge, which was not disputed;

(d) the PAC did not raise any concerns at all regarding comparison impact at the inquiry or otherwise with the applicant.

(iv) the applicant has been prejudiced because it was not given any opportunity to respond to concerns which patently influenced the recommendations of the PAC and the decision of the respondent;

(v) in so far as the PAC held these concerns, the principles of fair procedure required that they be raised with the parties at the inquiry or before the recommendations were made.

Apparent/structural bias

[104] The applicant relies on the principles set out in *Porter v Magill* [2002] 2 AC 357 and *R (on the application of Lewis) v Redcar & Cleveland BC* [2009] 1 WLR 83 and argues such principles should apply equally to the advice given to a decision-maker, particularly where the decision-maker depends to a significant degree on the advice given (and follows it).

[105] It is submitted that the respondent reached a decision that was vitiated by apparent bias because it adopted an approach which involved Mr Mulligan at several stages (ie the same officer who gave evidence in opposition to the proposals at the inquiry).

[106] It is submitted that the role of the witness to the inquiry was fundamentally inconsistent with the role of the respondent as independent decision-maker based on the evidence and the recommendations of the PAC.

[107] It is argued that an officer of the respondent who had reached a concluded view on the merits of the proposal by giving evidence to the inquiry who was then involved in making recommendations to the Minister can also be described as structural bias. Reference was made to the case of *Kingsley v United Kingdom* (2001) EHRR 13 in which it was held that the structural bias of the Gaming Board expressing an initial view and then purporting to determine the application as to whether the applicant was a fit and proper person to be a casino director breached Article 6 ECHR.

[108] It is submitted where Article 6 ECHR refers to a fair hearing by an “independent and impartial tribunal”, the concept of impartiality mirrors the bias test at common law. The applicant asserts any apparent or structural bias which involved a breach of Article 6 ECHR and section 6(1) of the Human Rights Act 1998 would also be unlawful at common law.

[109] It is contended:

(i) the respondent could not lawfully give evidence and be decision-maker since it was in effect asking itself whether to approve the position which it promoted itself through the Planning Service evidence. If the decision were quashed it would still fall to be determined by the respondent;

(ii) alternatively, any officer of the respondent who took an active part in the inquiry part of the process and gave evidence could not be involved at all with the processing of, and approach to be taken to, the PAC recommendations which resulted from that inquiry.

[110] The applicant also refers to the case of *Re Seaport Investments Ltd's Application* [2008] Env LR 23 in which the High Court in Northern Ireland found that different sections within the Department are unable to exercise particular statutory functions independently (albeit in the context of consultation as part of the strategic environmental assessment process).

Respondent's Arguments

First ground – failure to take into account material considerations

[111] The respondent asserts the applicants' arguments under this first ground must be considered in accordance with the established legal

principles in *Bolton MDC v Secretary of State* (1995) 71 P&CR 309 HL (pp314-5). Reliance is also placed on *City of Edinburgh Council v Secretary of State for the Environment* [1997] 1 WLR 1447 HL (1465B). It is submitted the fact the applicant can point to evidence before the PAC which was not mentioned in the report does not justify the inference the PAC ignored or misunderstood that evidence. Also, it is contended the fact the PAC's conclusions are at variance with the evidence relied on by the applicant does not justify the inference the PAC ignored or misunderstood that evidence or that the PAC failed to take such evidence into account.

Trade draw and main catchment

[112] It is submitted the PAC explained why it regarded Zone 8 as lying beyond the likely catchment for the proposed superstore in paras 18–20 of the report. It is asserted there was no inconsistency in the PAC's reasons and that these reasons were soundly based on the accessibility of the proposed store from various locations within that zone and the existence of other food stores likely to attract shoppers living within it. It is contended that the PAC's judgment the proposed superstore was unlikely to attract convenience shoppers from Zone 8 is consistent with the PAC having taken account of the survey evidence – because the factory outlet centre and the existing Tesco attracted shoppers from Zone 8 it did not follow that the proposed store would do so to any significant degree.

[113] The respondent submits that this issue is not properly capable of being a material error of fact. It is asserted that question of whether the proposed store was likely to draw any significant trade from within Zone 8 was a question of estimation and planning judgment.

[114] Further, it is argued that the PAC's apparently mistaken reference to the estimate the proposal would draw £3m from Zone 8 is not a material error as the PAC's point was, in its judgment, the proposed store could not be expected to attract any significant trade from within Zone 8. The PAC also explained why it expected the proposed store to draw its trade from elsewhere within the main catchment and, to a limited degree, from the Republic of Ireland (paras 25 and 26 of the report).

Trade from outside the main catchment

[115] It is argued the applicant has no justification for drawing the adverse inference that the PAC ignored Mr Loughrey's evidence on the issue of the likely level of trade drawn to the proposed store from the Republic of Ireland. It is submitted the PAC explains clearly and sufficiently why it preferred the respondent's more cautious assessment of this factor.

Turnover of Tesco, Castlewellan Road

[116] The respondent argues, for the reasons in para 41 of the report being that there were estimates in evidence which supported a significantly lower figure, the PAC was entitled to judge that the convenience turnover of the existing Tesco store was likely to be substantially lower than that put forward by Mr Loughrey.

[117] Further, it is contended that para s42 and 43 of the report explain the reasons for the PAC's view that Mr Loughrey's assumption of the likely impact of the proposed development on the trading performance of the existing store was based on a doubtful assumption. It is asserted that the PAC's view was in response to the evidence referred to in paras 42 and 43. It is submitted the applicants' assertion that there was a typographical error in respect of Mr Loughrey's Table 10 was not explained to the PAC and there was no reason for the PAC to infer the table was subject to that error.

[118] It is submitted the PAC's reasoning establishes it expressly had regard to Tesco's offer to agree to retain the current format of its existing store for a minimum period of 10 years. It is argued the PAC did not conclude the existing Tesco store was at risk of closure during the 10 year period of the proposed Article 40 agreement. The final sentence of R43 assumes the article 40 agreement is in effect. The respondent explains that the PAC'S concern was that the Article 40 agreement offered no more than a limited degree of protection against the market forces of the proposed development in operation and trading in competition with the existing store. It is submitted this was a judgment the PAC was entitled to reach on the evidence and for the reasons it gave in paras 41-43 of the report.

Linked trips

[119] The respondent asserts that, at para 48-51 of the report, the PAC considered the issue of the degree to which the operation of the proposed superstore was likely to diminish the role of the existing Tesco store in maintaining the vitality and viability of the town centre as the existing Tesco's presence and location offered the opportunity for linked shopping trips to the town centre.

[120] The PAC concluded this role would be diminished to such a degree as to lead to a significant adverse impact on the vitality of the town centre. It is submitted the PAC gave its reasons for this conclusion - it gave a straightforward and clear explanation of the factors leading it to such a conclusion. The respondent argues there is no reason to infer the PAC failed to take into account the aspects of Mr Loughrey's evidence mentioned in para 38 of the applicant's skeleton argument.

Second ground – irrationality

[121] For reasons already given in respect of the first ground, it is argued that the PAC's assessment of existing shopping patterns was rational and consistent with the evidence.

[122] It is submitted the applicant's assertion the PAC irrationally failed to consider the implications of its conclusions on shopping patterns is without merit. It is argued that the PAC's reasoning explains its conclusions on shopping patterns influenced its assessment of the likely impact of the proposed superstore on existing shops within and on the edge of Banbridge town centre (and in other centres)(Paras 33-54).

[123] The respondent refers to the arguments it has already made under ground 1 in response to the applicant's submissions about the PAC's assessment of the turnover of the existing Tesco store.

[124] It is argued that retail impact assessment involves estimation and that it was reasonable for the PAC to judge that the evidence, including Mr Loughrey's assessment, indicated that the trading performance of the existing store was at significant risk from the operation of the proposed development (see para s41-43 of the report).

Impact calculations

[125] The respondent asserts the applicant's arguments in respect of impact calculations is an attempt to engage the Court in an impermissible appeal against the merits of the PAC's reasons and conclusions.

[126] It is argued that in para s39-53 of the report the PAC explains in some detail its conclusions on retail impact, taking account of and analysing the estimates of turnover and trade diversion produced by the applicant in evidence. It is submitted the applicant's assertion in para 50 of its skeleton argument that the PAC might have reached a different conclusion is irrelevant to the court's proper function which is to determine whether the PAC could reasonably reach the view that it did in its report.

[127] It is asserted there is no justification for the Court to find that the PAC's own reasons for its conclusion in para 54 are irrational. It is contended these reasons are a detailed, clear and relevant response to policy 39 of PPS 5 and the evidence of the parties.

[128] It is argued that although the respondent did not raise any specific concern to the proposed development on the grounds of its likely impact on the health of Banbridge town centre's comparison shopping, this was a

particular concern raised in the objections and the evidence of third parties and it was a relevant policy consideration under para 39 of PPS 5.

[129] It is contended that the PAC's assessment of the degree of risk which the proposed development posed to comparison shops in the town centre is adequately explained in paras 52/53 of the report and responds reasonably to the evidence of the parties. It is asserted the PAC's reasoning did address the question of retail function and is not limited to the question of comparative size.

Third ground - failure to give reasons

[130] It is asserted, in reliance on *Clarke Homes Ltd v Secretary of State (1993) 66 P&CR 263*, that the question to consider is if there is a genuine as opposed to a forensic doubt as to what the PAC decided on the decisive issue, i.e. whether the proposed superstore is likely adversely to impact on the vitality of Banbridge town centre and undermine its convenience and comparison shopping functions, thus failing to fulfil the third policy criterion in para 39 of PPS5?

[131] The respondent refers to the submissions it has already made under grounds 1 and 2 in respect of the PAC's consideration of the matters identified by the applicant which set out its reasons for submitting that, in relation to each matter, the PAC's reasoning is such as to produce an adequate and intelligible basis for the respondent's decision to refuse planning permission. For the same reasons the respondent submits ground 3 should be rejected.

Fourth ground - breach of natural justice and Article 6 ECHR

Natural justice - unfair procedure

[132] The respondent asserts the applicant's arguments on this issue were necessarily predicated on the following assertions, all of which, it is submitted are incorrect (as argued under grounds 1 -3 above):

- (i) That the reliability of the applicant's estimate of the current and likely future turnover of the existing Tesco store was not an issue before the PAC;**
- (ii) That it was unfair of the PAC to take and consider Mr Loughrey's evidence in his Table 10 at face value;**
- (iii) That the likelihood of the existing store experiencing a significant diminution in its trading performance notwithstanding the commitments**

offered in the article 40 agreement was not an issue before the PAC; and
(iv) That the likelihood the proposed development would give rise to adverse impact on comparison shopping was not an issue before the PAC.

Bias

[133] It is argued that the key to fair process and to avoiding any appearance of bias or pre-determination in the handling of planning applications under the Article 31 procedure (in which Mr Mulligan was involved) lies in the function of the PAC.

[134] It is asserted that the PAC provides the applicant with the opportunity to present his case for the proposed development in an open hearing before an independent and impartial body. That body then reports its conclusions and recommendations to the respondent as decision maker, to be taken properly into account in reaching a final decision. It is argued that this took place in the present case. The PAC reported its recommendation that the application be refused planning permission and the respondent accepted the recommendation and the PAC's stated reasons. It is argued that the respondent determined the planning application on that basis.

[135] In such circumstances, it is submitted the decision to refuse planning permission was transparently based on the PAC's assessment of the planning merits of the proposed development and for the reasons given by the PAC for its assessment of those merits. The respondent argues that there is no reason for the Court to conclude that, in these circumstances, the fair minded and informed observer would find any risk Mr Mulligan's involvement may have closed the respondent's mind to those planning merits.

[136] It is asserted the handling of the planning application was consistent with the process under Article 31 of the Planning Order. It is contended the applicant's submissions on structural bias do not add to the analysis of this ground under the common law principles as set out in *Lewis v Redcar*.

Discussion

[137] Following the public inquiry before the PAC which involved detailed expert evidence from the respective parties over a number of days (29 June – 1 July 2009) the PAC issued its report dated 29 October 2009. The main finding of the report, subsequently reflected in the respondent's impugned refusal was that the proposal for the superstore would be contrary to para 39 of PPS 5 by having an adverse impact on the vitality and viability of Banbridge Town Centre and undermining its convenience and comparison shopping functions.

[138] Under four broad, overlapping, headings the applicant has sought to impugn the respondent's decision alleging failure to take into account material considerations, irrationality, inadequate reasoning and breach of natural justice including structural bias.

[139] The general principles applied by the Court in determining challenges to planning decisions have been summarised by Girvan J (as then was) in para 43 of *Re Bow Street Mall & Ors Applications* [2006] NI 28. In the context of the present application the following would appear to be the most relevant. (1) The judicial review court is exercising a supervisory not an appellate jurisdiction. In the absence of a demonstrable error of law or irrationality the court cannot interfere. The court is concerned only with the legality of the decision making process. If the decision maker fails to take account of a material consideration or takes account of an irrelevant consideration the decision will be open to challenge. (2) It is settled principle that matters of planning *judgment* are within the exclusive province of the local planning authority or the relevant minister. (3) The planning decision-maker's powers include the determination of the *weight* to be given to any particular contention. He is entitled to attach what weight he pleases to the various arguments and contentions of the parties. The courts will not entertain a submission that he gave underweight to one argument or failed to give any weight at all to another 835)".

[140] Under the first ground of challenge the applicant submitted that, as required by Article 25(1) of the Planning Order, the respondent had failed to take into account evidence which was material to the issue of the impact that the proposed superstore would have on the retail function of Banbridge Town Centre. As previously pointed out these alleged failures were categorised under five headings namely:

- (i) Trade draw and catchment;
- (ii) Trade from the main catchment;
- (iii) Trade from outside the main catchment;
- (iv) Turnover of Tesco, Castlewellan Road; and
- (v) Linked trips.

[141] I preface my remarks by observing that pointing to evidence before the PAC which was not explicitly mentioned in the report or to conclusions which do not coincide with the evidence relied upon by the applicant, does not justify the inference that the PAC misunderstood or ignored that evidence or failed to take it into account.

[142] As far as the *trade draw and catchment* is concerned the PAC explained why it regarded Zone 8 as lying beyond the likely catchment for the proposed superstore in paras 18-20 of the report:

“18. Bearing in mind the high proportion of net floor space to be devoted to comparison goods (50%) and the overall size of superstore proposed (the largest Tesco in Ireland), we considered appropriate to assume that its main catchment would extend to a 20 minute drive time. Notwithstanding this, we agree with the general premise of the department that there are overlapping catchments relevant to the application proposal and that the effect and influence of competing stores/centres have to be weighed into the equation.

19. The applicant furnished us with a map showing his interpretation of the 20 MCA, dividing it up into ten distinct zones. Having familiarised ourselves with the stores in the 20 MCA and driven to and from them to the proposed site, we do not accept the applicant’s MCA should include his catchment zone 8 – that is the “arch shaped” area stretching from the east of Lurgan, westwards to and south from Portadown. The two main roads from this area to the site are the Portadown to Banbridge Road and the Lurgan to Banbridge Road.

20. The applicant accepted there were traffic congestions problems associated with Gilford. We also found the main Banbridge to Portadown Road via Gilford to be characterised by numerous bends, few overtaking opportunities and speed restrictions through Laurencetown and Seapatrick. Additionally, progress to BWP through Banbridge itself, using different routes, was hampered by traffic build up, passive speed restraint measures, traffic lights or combinations of these factors. Consequently we found the inner edge of Zone 8 equated to 20 minutes rather than the applicant’s fifteen minutes, and this also applied to the Lurgan to Banbridge Road. Our findings largely reflect the journey times provided on the department’s map for these routes, leading us to conclude that the applicant’s Zone 8 lies beyond his 20 MCA. The implications of this for the proposal will be considered in more detail as we assess the proposal against the various criteria/test set out in para 39 of PPS 5.”

[143] I see nothing contradictory or inconsistent in the PAC's reasons which were logically and credibly based on the accessibility of the proposed store from various locations within that zone and the existence of other food stores likely to attract shoppers within it.

[144] Contrary to the claim being made by the applicant the PAC's judgment that the superstore was unlikely to attract convenience shoppers from Zone 8 is consonant with them having taken account of the survey evidence. Indeed it is questionable whether this issue is capable of constituting a material error of fact. As it seems to this Court the issue of whether the proposed store was likely to draw any significant trade from within Zone 8 was one of estimation and planning *judgment*.

[145] I accept the respondent's argument that the PAC's mistaken reference in para 25 that the proposal would draw 3m from Zone 8 (as opposed to 5.8m) is not a *material* error. The point that the PAC was addressing was that in its judgment the superstore could not be expected to attract any significant trade from within Zone 8. The PAC also articulated why its predictions were that the superstore would draw its trade from elsewhere within the main catchment and, to a limited degree, from the Republic of Ireland.

[146] So far as the issue of *trade from outside the main catchment area* is concerned I reject the applicant's contention that the PAC ignored Mr Loughrey's evidence on the issue of the likely level of trade drawn to the superstore from the ROI. There is no justification for drawing such an adverse inference against the PAC. In my view the PAC adequately explained why it preferred the respondent's more circumspect assessment.

[147] So far as the *turnover of Tesco at Castlewellan Road* is concerned this matter is fully addressed in para 41 of the report. There were estimates in evidence which supported a considerably reduced figure and the PAC was entitled to judge that the convenience turnover of the Tesco store was likely to be substantially lower than that put forward by Mr Loughrey. Para 41 of the report notes the "*very significant difference*" between the estimates and considered the applicants figure of 34.7m to be "*over inflated*" and that the actual figure was likely to be closer to the department's estimate and the original Ostick and Williams figure.

[148] Moreover, paras 42 and 43 of the report spell out the PAC's view that Mr Loughrey's assumption of the likely impact of the proposed development on the trading performance of the existing store was based on a *doubtful assumption*. This view was in response to the evidence referred to in paras 42 and 43. The applicant's assertion of a typographical error in respect of Mr Loughrey's table 10 was not explained to the PAC and that there was no reason for the PAC to infer the table was subject to that error.

[149] The PAC's reasoning makes it expressly clear that they had regard to Tesco's offer to agree to retain the current format of its existing store for a minimum period of ten years. Contrary to the applicant's claims the PAC did not conclude that the existing store was at risk of closure during the ten year period of the proposed Article 40 agreement. The PAC's concern was that it offered a limited protection against the market forces of the proposed development. I accept that this was judgment that the PAC was entitled to reach from the evidence and for the reasons which it gave in paras 41-43 of the report.

[150] So far as the issue of *linked trips* is concerned at paras 48-51 of the report the PAC considered the issue of the degree to which the operation of the superstore was likely to diminish the role of the existing Tesco Store in maintaining the vitality and viability of the town centre as the existing Tesco's presence and location offered the opportunity for linked shopping trips to the town centre. The PAC concluded this role would be diminished to such a degree as to lead to a significant adverse impact on the vitality of the town centre. At the end of para 51 of the report they stated:

"We consider it more likely that relatively few shoppers would visit Banbridge Town Centre in conjunction with their BWP visit. Consequently the proposal would have an overall negative effect on linked trips to Banbridge Town Centre which would significantly impact on its vitality."

[151] At paras 48-51 of the report the PAC gave a clear exposition of the factors which led it to the conclusion which I have set out above.

[152] At para 38 of its skeleton argument the applicant complained that the PAC report had failed to take into account certain aspects of Mr Loughrey's evidence. However, I do not accept that there is any reason to infer that the PAC did fail to take into account those aspects of his evidence which are mentioned in para 38.

[153] So far as the second ground of challenge namely *irrationality* is concerned I conclude that the PAC's assessment of existing shopping patterns was rational and consistent with the evidence. The applicant's contention that the PAC irrationally failed to consider the implications of its conclusions on shopping centres is not sustainable. At paras 33-54 of the report the PAC explains its conclusions on shopping patterns influenced its assessment of the likely impact of the proposal on existing shops within and on the edge of Banbridge Town Centre. I have already dealt above with the applicant's submissions about the PAC's assessment of the turnover of the existing Tesco store. Retail impact assessment involves estimation and in my view it was reasonable for the PAC, having looked at the totality of the evidence, to

consider that the trading performance of the existing store was at significant risk from the proposal.

[154] So far as the impact calculations are concerned in paras 39-53 of the report the PAC explains in detail its conclusions on retail impact taking account of and analysing the estimates of turnover and trade diversion produced by the applicant in evidence. This was a rational conclusion for the PAC to have arrived at on the basis of the evidence summarised therein.

[155] I consider that there is no basis for the Court to conclude that the PAC's reasons for its conclusions in para 54 are irrational. On the contrary, the reasons constitute a detailed and rational response to para 39 of PPS 5 and the evidence of the parties.

[156] A concern raised in the objections on the evidence of third parties but not specifically raised by the respondent was the likely impact of the proposal on the health of Banbridge Town Centre's comparison shopping. This was plainly a relevant policy consideration under para 39 of PPS 5. The PAC's assessment of the degree of risk posed by the proposal to comparison shops is sufficiently articulated in paras 52-53 of the report and is a rational and reasonable response to the evidence of the parties. Contrary to the contention of the applicant it did address the question of retail function and is not limited to the question of comparative size.

[157] So far as the *reasons* challenge is concerned the established approach, in the planning context, is set out in a number of authorities to which I have earlier drawn attention at paras 55-59 hereof. It is perhaps worth repeating at this juncture what Lord Brown stated in *Porter*:

"36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to

assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision”.

[158] As long as the critical issues are dealt with and the reasoning does not give rise to a substantial doubt as to whether the decision maker fell into reviewable error an adverse inference against the decision maker will not be readily drawn. As Lord Brown said in the passage referred to above a reasons challenge will *only* succeed if the party aggrieved can satisfy the Court that he is genuinely being substantially prejudiced by the failure to provide an adequately reasoned decision.

[159] The critical issue in this case was whether the proposed superstore was likely to adversely impact on the vitality of Banbridge Town Centre and undermine its convenience and comparison shopping functions thus failing to fulfil the third policy criterion in para 39 of PPS 5. Adapting Lord Brown’s formulation the central question therefore becomes whether or not the reasoning of the PAC is such as to give rise to a substantial doubt as to whether the decision maker erred in law. Such a challenge as has already been pointed will only succeed if the aggrieved party can satisfy the Court that it has genuinely been substantially prejudiced by failure to provide an adequately reasoned decision.

[160] In my view the PAC’s reasoning is such as to produce an adequate and intelligible basis for the respondent’s decision to refuse planning permission.

Natural Justice and Bias

[161] For the reasons already given I reject the contention that the applicant was denied a fair opportunity to respond to material concerns. I also accept the respondents arguments summarised at para 132 above. So far as the allegation of *structural bias* is concerned I am prepared to accept that the concept of impartiality in Article 6 mirrors the bias test at common law and propose to approach the case on that basis. The test is whether “the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias”. The observer, however, should be “neither complacent nor unduly sensitive or suspicious” as Kirby J stated in

the Australian case of *Johnston v Johnston* [2000] 200 CLR 488. As Lord Hope said:

“A fair minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to, that matters, not what was in the mind of the particular Judge or tribunal member who is under scrutiny.”

[162] The PAC provides an applicant with the opportunity to present his case for a proposed development in an open hearing before a body which is accepted as being independent and impartial. The PAC then reports its conclusions and recommendations to the respondent as decision maker. In the present case the PAC reported its recommendation that the application for planning permission be refused and the respondent accepted the recommendation and the PAC stated reasons. This was the basis upon which the planning application was determined. Accordingly, I am satisfied that the decision refusing planning permission was plainly based on the PAC’s assessment of the planning merits of the proposal. There is no reason for this Court to conclude that in the circumstances of the present case the fair minded and informed observer would find that there was any risk that Mr Mulligan’s involvement may have closed the respondent’s mind to those planning merits. In my view the suggestion that there is an appearance of pre-determination, in the sense of a mind closed to the planning merits of the decision in question, is not tenable in light of the overall architecture of the decision making process.

Conclusion

[163] Accordingly, for the above reasons the applicant’s judicial review is dismissed.