

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Sandale Developments Limited's Application [2010] NIQB 43

AN APPLICATION FOR JUDICIAL REVIEW BY

SANDALE DEVELOPMENTS LIMITED

WEATHERUP J

[1] This is an application for Judicial Review of a decision of the Department of the Environment for Northern Ireland, Planning Service, dated 3 December 2008, granting outline planning permission to the Trustees of Dean Maguire College for the construction of a new 450 pupil Secondary School, school meals accommodation, outdoor activity spaces and pitches, car parking and the demolition of the existing school at 26 Terman Road, Carrickmore, Omagh, County Tyrone. Mr Beattie QC and Ms Comerton appeared for the applicant and Dr McGleenan appeared for the respondent.

[2] The grant of outline planning permission included -

Condition 6 - No development shall take place until a plan of the site has been submitted to and approved by the Department indicating the existing and proposed contours and levels, details of any earthworks, grading or mounding of land, the finished floor level(s) of the proposed building(s) and the position, height and materials of any retaining walls. Development shall be carried out in accordance with the approved plans.

Reason - To ensure the development takes account of the sites natural features.

Condition 10 - Parking, picking up and setting down, servicing and turning areas shall be provided within the curtilage of the site, the extent of which shall be determined by the Department at Reserved Matters stage.

Reason - To ensure adequate traffic management measures are provided in the interests of road safety and the convenience of road users.

Informative 1 - It should be noted that the concept design drawing 02 rev 01 date stamped 23/OCT/2008 is considered to be a broadly acceptable approach to the development of the site. However it may not be the only concept design that would be acceptable to the Department.

[3] The site is within the statutory settlement limit for Carrickmore under the adopted Omagh Area Plan 1987-2002. The proposal involved the demolition of the existing school and the erection of new premises on the existing playing fields to the rear of the existing school building, together with the construction of the recreational areas that included an extension of the existing site boundaries. To the north of the existing school is Glenview House. A stream bounds the north and east of the site. The stream is a tributary of the Camowen River and joins the river some 800 metres from the site. The Camowen River is a tributary of the River Foyle.

[4] Ms Jacqueline McHugh, a Chartered Engineer acting on behalf of the applicant, referred to the absence of information within the planning permission with regard to the scope of earthworks required, workable design levels and accommodation of all pitches, courts and associated features within the planning application boundaries. She described the site of permitted development as being 9.5 hectares with an existing school footprint of approximately 3,700 square metres and a proposed school building with a footprint of approximately 4,810 square metres together with new external recreation facilities involving the construction of four pitches. The four pitches were a synthetic pitch of 6,400 square metres, a second synthetic pitch of 6,400 square metres, a hurling/ Gaelic/ camogie pitch of 11,000 square metres and a tennis court of 1,220 square metres.

[5] Based on the initial proposal Ms McHugh considered that substantial earthworks would be required to construct the additional pitches. The second synthetic pitch was estimated to require the excavation of some 23,470 cubic metres of soil, the hurling pitch to require the excavation of some 13,010 cubic metres and the tennis court to require the excavation of some 200 cubic metres. Taking account of the fill required, the excavations were estimated to involve 13,872 cubic metres of excess soil. In addition it was anticipated that four retaining structures would be required, first along the north eastern

boundary of the second synthetic pitch, secondly between the boundary of the second synthetic pitch and the hurling pitch, thirdly between the watercourse and the western boundary of the hurling pitch and tennis court and fourthly between the hurling pitch and the tennis court. The raising of site levels to form the hurling pitch was said to result in final finished levels of up to 5 metres above the existing watercourse. The impact of construction was said to concern scour and flooding events on any soil retaining structure, the removal of possible flood water storage areas and the increase of flooding during flood events at down stream location, changes in drainage characteristics and impact upon the watercourse.

[6] Further to discussions with Planning Service an amended scheme was submitted by the Trustees on 23 October 2008 showing the proposed playing pitches on the area adjacent to Glenview House and the new school in the area of the existing playing fields.

[7] Mr Barry Diamond, Senior Planning Officer in the Planning Service, considered that Ms McHugh had based many of her conclusions upon the likely consequences of a development completed in accordance with the proposal outlined in the indicative drawing, which was not a stamped approved drawing. Mr Diamond stated that the details of the number, size, design and siting of the playing areas were all matters to be considered at Reserved Matters stage. Approval had been granted for "pitches" but no details had been approved.

[8] The applicant and the respondent debated on affidavit the extent to which the grant of outline planning permission committed the respondent to the approval of the four playing areas referred to in the application. The applicant asserted that the four playing areas had been approved, with consequential impact, whereas the respondent contended that there was no commitment beyond approval of more than one playing area and the final number and type and location and details of the playing areas had yet to be determined.

[9] The applicant's grounds for judicial review are as follows:-

(i) European Treaty and Directive obligations.

1. Acted unlawfully and in breach of Council Directive 85/337/EEC as amended and the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 1999 as amended including inter alia -

(a) Granting planning permission in breach of Regulation 4 which provides for the "*Prohibition on the*

grant of planning permission without consideration of environmental information -

4(1) Planning permission shall not be granted for EIA development unless the Department or the Commission, as the case may require, has first taken into consideration environmental information.”

(b) Making a determination under Regulation 9 without taking any or adequate account of the selection criteria as required by Regulation 9(1) and as set out in Schedule 3 of the EIA regulations and Article 4.3 of the Directive.

(c) Failing to make any or adequate enquiry into whether the development proposal would be likely to have significant effects.

2. In making a determination under Regulation 9 of the EIA Regulations, failed to have regard to material considerations including -

(a) The selection criteria in Schedule 3.

(b) The impact on protected wildlife and fish species.

(c) The impact on hedgerows or trees.

(d) The impact on the adjacent watercourse, the Camowen River, River Foyle and tributaries impacting upon a European designated Special Area of Conservation and any sub catchment areas thereof.

3. Misdirected itself in determining that an environmental statement was not required because the environmental effects of the development proposal could be dealt with through the normal development control process.

4. Acted unlawfully and in breach of the Habitats Directive, Council Direction 92/43/EEC and Conservation (Natural Habitats, etc) Regulations (NI) 1995 and in particular failing to carry out an appropriate assessment of the implications for the site under Regulation 43 of the 1995 Regulations before granting the outline planning permission to determine whether the development project was likely to have significant

environmental effects upon the SAC and also habitats, Atlantic Salmon and Otter.

5. Acted unlawfully, ultra vires and in breach of the 1995 Regulations and in particular Regulation 49(3) in granting outline planning permission without being satisfied that no development likely to adversely affect the integrity of a European site and in particular the Foyle SAC could be carried out under the outline planning permission whether before or after obtaining approval of any reserved matters.

6. Failed to have regard to a material consideration namely the Habitats Directive and the 1995 Regulations.

(ii) Failing to have regard for a material consideration.

7. Failed to conduct any or adequate enquiry into and have regard for material considerations namely the construction implications of the planning application arising from the earthworks and retaining structures, the impact of the construction both during and post construction and the land-take implications.

8. Took into account an irrelevant consideration in failing to consult, namely the absence of "recorded hazards" affecting the site.

(iii) Misdirecting itself on consultation criteria.

9. Not consulting with the Landscape Architects Branch.

10. Deciding that consultation in relation to the likely environment effects of the proposed development and the environmental assessment determination with any statutory authorities was not necessary.

(iv) Acting unfairly and inconsistently.

11. In the treatment and consideration of the planning application for the Dean Maguric School compared with the planning application for the applicant's site opposite the school.

(v) Failure to conduct adequate enquiry.

12. (a) Into the visual impact of the development proposal and its effect on the landscape;

- (b) Into the retaining structures;
- (c) Into the earthworks arising from and proposed levels of the development proposal prior to making the impugned decisions.

(vi) Road considerations.

13. Misdirected itself in deciding as part of the application process that it was unlawful and/or ultra vires to require the applicant for planning permission to make amendments to the school access on road safety grounds.

14. Failed to have regard to the intensification of the road access at the impugned development site.

15. Failed to have regard to material considerations namely the road safety concerns and danger created by granting permission whereby the school access would face permitted housing development.

16. Misdirected itself and erred in fact in determining that there was no intensification of use of the proposed access to the new school.

(vii) Absence of inquiry

17. Acting unlawfully, unreasonably and irrationally in making the impugned decision in the absence of adequate and proper enquiry and without the full adequate and necessary information to determine the planning application.

(viii) Improper motive

18. Having regard to an irrelevant consideration and/or improper motive namely the need for outline planning permission to be granted by early December in order for the planning applicants to secure funding to construct the new school.

Protection of Habitats and Species - the Habitats Directive

[10] Council Directive 92/43/EEC (the Habitats Directive) deals with the conservation of natural habitats and of wild fauna and flora. Article 3(1) provides for special areas of conservation to be set up under the title Natura

2000 comprising sites hosting the natural habitat types listed in Annex 1 and habitats of species listed in Annex 11. The River Foyle Special Area of Conservation has been established, although the proposed development is not within the conservation area. The species listed in Annex 11 include salmon, described as “*Salmo salar (only in fresh water)*”.

[11] In relation to the protection of habitats, Article 6.3 provides –

“Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessments of its implications for the site in view of the site’s conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site and if appropriate after having obtained the opinion of the general public.”

[12] In relation to protection of species, Article 12.1 provides –

“Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range, prohibiting –

- (a) all forms of deliberate capture or killing of specimens of these species in the wild;
- (b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;
- (c) deliberate destruction or taking of eggs from the wild;
- (d) deterioration or destruction of breeding sites or resting places.

The animal species listed in Annex IV(a) include bats and otters.

The Habitats Regulations.

[13] The Conservation (Natural Habitats, etc) Regulations (Northern Ireland) 1995 implements the Habitats Directive in Northern Ireland. Regulation 9 defines a “European site” as including a special area of conservation. The River Foyle Special Area of Conservation (SAC) is a European site. The overall conservation objective of Foyle SAC is to maintain the qualifying features in favourable condition and these include Annex 11 species that are a primary reason for selection of the site, namely Atlantic salmon, and Annex 11 species that are present as a qualifying features but not a primary reason for site selection, namely otter.

[14] In relation to the assessment of the implications of development for European sites in Northern Ireland, Regulation 43 provides:-

“(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which -

(a) is likely to have a significant effect on a European site in Northern Ireland (either alone or in combination with other plans or projects), and

(b) is not directly connected with or necessary to the management of the site,

shall make an appropriate assessment of the implications for the site in view of the site’s conservation objectives.

(6) In the light of the conclusions of the assessment, and subject to Regulation 44, (considerations of overriding public interest) the authority shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site in Northern Ireland”

[15] In relation to planning decisions Regulation 49(3) provides that where Regulations 43 and 44 apply, outline planning permission shall not be granted unless the Department, or, as the case may be, the Planning Appeals Commission, is satisfied (whether by reason of the conditions and limitations to which the outline planning permission is to be made subject or otherwise) that no development likely to adversely affect the integrity of a European site in Northern Ireland could be carried out under the permission, whether before or after obtaining approval of any reserved matters.

[16] In relation to the protection of species, Regulation 33 provides for European protected species of animals, being the species of animals listed in

Annex IV(a) of the Habitats Directive whose natural range includes any area of Northern Ireland. The protected species are listed in Schedule 2 to the Regulations and include Bats, Typical (all species), scientific name Vespertilionidae and Otter, Common, scientific name *lutra lutra*.

[17] Regulation 34 provides for the protection of European protected species by making it an offence -

- (b) deliberately to disturb such an animal while it is occupying a structure or place which it uses for shelter or protection; and
- (c) deliberately to disturb such an animal in such a way that it is likely to -
 - (i) affect the local distribution or abundance of the species to which it belongs;
 - (ii) impair its ability to survive, breed or reproduce or rear or care for its young; or
 - (iii) impair its ability to hibernate or migrate.

[18] The Directive and the Regulations involve consideration of two aspects, namely the protected species and the protected habitats. For the protected species, it is an offence to disturb the animals. There is a different structure to the legislative scheme for protected habitats. For present purposes the protected habitat is the European Site at the River Foyle SAC. The issue is whether the proposed development is likely to have a significant effect on the SAC. If that is so the Planning Service should not give planning permission until it is satisfied that development will not adversely affect the site.

The interpretation of the Habitats obligations.

[19] The European Court of Justice considered the interpretation of Article 6.3 of the Habitats Directive in Waddenzee [2005] All ER (EC) 353. In relation to the requirement in the first sentence of Article 6.3 for an appropriate assessment of the implications of a plan or project, this is conditional on it being likely to have a significant effect on the site. The triggering of the environmental protection mechanism follows from the mere probability that such an effect attaches to the plan or project, a probability or a risk that the plan or project will have significant effects on the site concerned. In the light, in particular, of the precautionary principle, such a risk exists if it cannot be excluded on the basis of the objective information that the plan or project will have significant effects on the site concerned. In case of doubt as to the absence of significant effects such an assessment must be carried out. Thus any plan or project not directly connected with or necessary to the management of the site

is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded on the basis of objective information that it will have a significant effect on that site (Paragraphs 39 to 45).

[20] The significant nature of the effect on a site of a plan or project not directly connected with or necessary to the management of the site is linked to the site's conservation objectives. Thus where a plan or project not directly connected with or necessary to the management of a site is likely to undermine the site's conservation objectives it must be considered likely to have a significant effect on that site. The assessment of that risk must be made in the light, inter alia, of the characteristics and specific environmental conditions of the site concerned by such a plan or project (Paragraphs 46 to 49).

Environmental Impact Assessments - the EIA Directive

[22] Council Directive 85/337/EEC deals with the assessment of the effects of certain public and private projects on the environment. The first Recital refers to the actions programmes of the European Communities on the environment affirming the need to take effects on the environment into account at the earliest possible stage in all the technical planning and decision making processes.

Article 2.1 provides that Member States shall adopt all measures necessary to ensure that before consent is given, projects likely to have a significant effect on the environment by virtue inter alia of their nature, size or location, are made subject to a requirement for development consent and an assessment with regard to their effects.

Article 4 provides that projects listed in Annex 1 shall be made subject to an assessment and for projects listed in Annex II the Member States shall determine through (a) a case by case examination or (b) thresholds or criteria set by the Member State, whether the project shall be made subject to an assessment.

Annex II paragraph 10(b) refers to "Urban development projects, including the construction of shopping centres and car parks". The proposed development has been treated as an urban development project.

The EIA Regulations

[23] The Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 1999 implemented the Directive. An 'EIA application' is an application for planning permission for EIA development. 'EIA development' includes Schedule 2 development which is likely to have significant effects on the environment by virtue of factors such as its nature, size or location. Schedule 2 development corresponds with Annex 2 of the Directive and

paragraph 10(b) applies to urban development projects including the construction of shopping centres and car parks.

[24] In relation to an application for planning permission for EIA development, Regulation 4(2) provides that planning permission shall not be granted "... unless they have first taken the environmental information into consideration and they shall state in their decision that they have done so."

In relation to whether an application for planning permission is for EIA development, Regulation 9 provides -

"(1) Where it appears to the Department that an application for planning permission or a subsequent application -

- (a) is a Schedule 1 application or a Schedule 2 application;
- (b) has not been the subject of a determination as to whether the application is or is not an EIA application; or in the case of a subsequent application, has been the subject of a determination before planning permission was granted to the effect that it is not an EIA development; and
- (c) is not accompanied by a statement referred to by the applicant as an environmental statement for the purposes of these Regulations,

it shall make a determination as to whether the application is for EIA development, taking into account the selection criteria."

The "selection criteria" are set out in Schedule 3 under the headings -

- (i) characteristics of development
(with regard to six matters in particular, including the size of the development, the production of waste and pollution and nuisances);
- (ii) location of development
(with regard to eight matters in particular, including the absorption capacity of the natural environment, with particular attention to wetlands and protected areas and designated areas under the Wild Birds Directive and the Habitats Directive);
- (iii) characteristics of the potential impact
(with regard to five matters in particular, including magnitude, complexity, probability, duration, frequency and reversibility of impact).

If there is a determination that the application is for EIA development, notice must be given to relevant authorities and an environmental statement must be prepared and considered.

[25] For the purposes of the Directive and the Regulations it had to be determined whether the proposed development was 'likely to have significant effects on the environment'. In that event an environmental statement was required and the Department could grant outline planning permission only if it considered the environmental statement.

The interpretation of the obligations

[26] The House of Lords considered an early form of the Regulations in R(Barker) v Bromley London Borough Council [2006] UKHL 62. Lord Hope at paragraph 22 referred to the first Recital of the Directive on the need to take account of the effects on the environment of the project at the earliest possible stage; in the case of a Schedule 2 development the competent authority must decide at the outset if an EIA is needed because the development is likely to have significant effects on the environment; an application for outline planning permission should be accompanied by sufficient information to enable that question to be answered; an EIA, if needed, should be obtained and considered before outline planning permission is granted.

The assessment by Planning Service in relation to habitats, species and EIA

[27] Paul McDermott, a Higher Professional and Technical Officer in the Planning Service, was tasked to deal with the application for outline planning permission. The application was not accompanied by an Environmental Statement. Mr McDermott concluded that the proposal would require an EIA determination and concluded that the application fell within Schedule 2 paragraph 10(b) of the 1999 Regulations.

[28] Mr McDermott considered the planning application form and drawings, the planning history of the site, where a nil EIA determination had been made in respect of a previous proposal for housing development on the site, the existing land use and proposed development, the Department's mapping system which identified spacially relevant hazards and constraints, such as notable landscape features or watercourses or archaeological sites, the Omagh Area Plan 1987-2002 and the Development Control Advice Note 10 policy on Environmental Impact Assessments (DCAN 10) which included a protocol in relation to the screening process for outline planning permission applications. It was considered that consultation was not necessary in order to complete the EIA determination. Mr McDermott recommended that an Environmental Statement was not required and that the environment effects of the proposal

could be dealt with through the normal development control process, a recommendation that was accepted by the Department.

[29] On the EA Determination Sheet completed on 19 September 2008 the likely environmental effects of the proposal were identified as visual impact, dust pollution, traffic generation and noise. The sheet listed the selection criteria referred to in Article 4.3 of the Directive and provided 21 tick boxes, being one for each criterion. There was no entry in any of the boxes.

[30] The interaction of EIA and Habitats appears under selection criterion 2(c)(iv) which requires that the environmental sensitivity of geographical areas likely to be affected by development must be considered, having regard in particular to the absorption capacity of the natural environment, paying particular attention to areas designated by Member States under the Habitats Directive. For present purposes the applicant considers that this involved Foyle SAC. Mr McDermott noted that the proposed development abutted a small undesignated watercourse and that the proposal did not require that the existing watercourse be diverted and there appeared to be no likely significant impact on the Foyle SAC.

The applicant's complaints about the assessment by Planning Service

[31] Dr James O'Neill, a principal of Corvus Consulting and Ecological Consultancy, noted the four issues identified by Mr McDermott as the likely environmental effects of the proposal and considered that Planning Service had failed to consider the issue of ecology or the obligations in relation to wildlife and habitats. He considered that the omission may be explained, but could not be excused or mitigated, by the failure to consult the Northern Ireland Environment Agency or the absence of a dedicated preliminary desktop study or the absence of a site visit or preliminary survey. Dr O'Neill's desktop study indicated that the Camowen River was an important fisheries river and primary fish species within the Camowen catchment included Atlantic salmon; that the national biodiversity network gateway website indicated that otter was known from the Camowen River; that Northern Ireland Environment Agency guidance indicated that the features of the site rendering it likely to support bats included tree lines and hedgerows with good connections to riparian (riverien) habitats; that the presence of badgers in the immediate vicinity was known to Planning Service; that site visits in March 2009 confirmed habitats suitable for breeding birds, bats, otter and badgers to be extant on the site, with finds of badger hair and a spraint and holt of otter with otter trails, tunnels in the stream banks, resting holes and couches typical of otter. Three common pipistrelle bats were observed foraging along the stream bounding the site to the east.

[32] Dr Michael Meharg, head of biodiversity at the Northern Ireland Environment Agency, stated that the pipistrelle bat was the most common bat and one would expect to find pipistrelle activity along virtually any linear habitat feature such as a hedgerow or watercourse. It had not been identified that any bats were roosting or breeding on the site. Similarly there was no evidence of badgers breeding on the site and no badgers' set was located. Dr Meharg recognised that the presence of an otter holt on a proposed development site may be of ecological significance but considered that steps could be taken to ensure that the impact of any development was appropriately mitigated.

[33] Keith Finnegan, Higher Scientific Officer in the Northern Ireland Environment Agency, carried out an Article 6 assessment under the Habitats Directive and reported on 21 April 2009. He referred to one area of concern being the possibility of spills in the construction project or increased sedimentation entering the watercourse. He referred to the small stream which abuts the site flowing into the Camowen River which then flows through the conurbation of Omagh where it joins the River Strule and then flows north through Newtownstewart towards the Foyle. The total measured distance from the watercourse to the boundary of Foyle SAC was stated to be some 30 kilometres. He concluded that the proposed development would have no significant adverse impact on the River Foyle SAC. Further, had he considered that there was likely to be a significant adverse impact from a risk of sedimentation or spill into a watercourse, the Northern Ireland Environment Agency would typically have required a buffer zone. In the present case there was stated to be some 20 metres available for a buffer zone so no mitigating action would be required to protect the Foyle SAC.

[34] On the other hand Dr O'Neill referred to reports of young salmon being observed up stream and down stream of the point where the boundary stream joined the Camowen River. This was stated to confirm that Foyle catchment salmon breeding and migrating within the Camowen catchment area had the potential to be impacted by pollution from the proposed development. That impact would arise from the effects of the construction work and also from the use of the new facilities including the treatment of the new grasslands and synthetic pitches. As to the creation of a potential safe zone between the construction area and the watercourse, the applicant disputed the availability or effectiveness of such a safe zone.

[35] On 3 September 2009 Dr O'Neill completed a report on a survey of the site. He identified bat roosts on and adjacent to the site and advertising posts of bats on site and concluded that removal of hedgerows and treelines would impact on breeding. He identified a badger sett on site and badger foraging signs throughout the site and concluded that development would have a significant negative effect on the group. He identified a probable otter natal den on site with three additional holts located on the opposite bank of the boundary

stream. He concluded that there was a probable breeding site across a wider area and its protection should have priority over that of the natal den.

[36] Kevin Gillespie, Chartered Town Planner, on behalf of the applicant, referred to additional environmental effects not included in the Planning Service list, namely soils, water, landscape and engineering. Mr Gillespie's complaints included the absence of proper inquiry into the effects of the proposed development, the undue haste with which the matter was concluded and the intrusion of funding issues into the consideration of the application. Dr O' Neill listed other potential impacts involving contamination of the watercourse and the land.

[37] On the other hand Barry Diamond, Senior Planning Officer, rejected the applicants approach as failing to apply the tests specified in the Directives and the Regulations in relation to EIA and Habitats intervention and that Planning Service had no information and no reasonable expectation as to the presence of any of the species or the existence of any of the potential hazards referred to by the applicant.

Conclusion on the assessment of the proposed development

[38] The essence of environmental assessment concerns the potential impact of development. The assessment of the proposal was conducted through the use of the 'EA Determination Sheet'. The European Commission published guidance on EIA screening. The guidance recognises that in many cases the Habitats assessment can be carried out through the EIA procedure. The 'selection criteria' must be considered during the screening. As noted above the 'location of development' includes consideration of designated areas under the Habitats Directive. In relation to the 'characteristics of the potential impact' the guidance refers to a brief description of the likely impacts of the project, considering the matters concerning impact that are referred to in the Directive and the Regulations, including impact on fauna and water quality and the extent of the impact, including the size of the affected habitat/species. The guidance provides a screening checklist of questions of which number 12 concerns the presence of areas on or around the location which are important or sensitive for reasons of their ecology, including the example of watercourses, which could be affected by the project. Question 13 asks whether there are any areas on or around the location which are used by protected, important or sensitive species of fauna, eg for breeding, nesting, foraging, resting, overwintering or migration, which could be affected by the project.

[39] The 'EA Determination Sheet', as completed, stated the likely environmental effects of the project to be visual, air/dust pollution, traffic and noise. There was no reference to ecology, habitats or wildlife, although Mr McDermott states that he considered the Habitats Directive. Mr McDermott

was aware of the watercourse and noted that it was not to be diverted and that there appeared to be no likely significant impact. He does not appear to have been aware of Atlantic salmon in the Camowen River 800 meters along the watercourse. I repeat the ECJ approach to the Habitats obligations - the triggering of the environmental protection mechanism follows from the mere probability that such an effect attaches to the plan or project, a probability or a risk that the plan or project will have significant effects on the site concerned. In the light, in particular, of the precautionary principle, such a risk exists if it cannot be excluded on the basis of the objective information that the plan or project will have significant effects on the site concerned.

[40] The above approach requires objective information about the risk, the potential impact. If no information on Habitats issues is provided, requested, researched, sought or obtained then any objective information about the risk to Habitats is unlikely to emerge. The concept of 'screening' implies some attempt to become sufficiently informed. One known feature was the presence of the watercourse. Such a feature should alert Planning Service to consideration of environmental issues concerning that feature. It is an example of what the Department described as a 'spacially relevant hazard'. It is an example in the EA Determination Sheet of a feature that might be important or sensitive for reasons of ecology. It demands examination of the impact of the development on that feature.

[41] Further, a Service Agreement was entered into between the Planning Service and the Environment and Heritage Service (EHS). It provided that, in relation to Development Control, Planning Service would consult with the EHS on relevant planning applications where development land was adjacent to a watercourse. Further it provided that Planning Service would consult with the EHS where the proposed development had the potential to affect an SAC or where Planning Service was aware that the development had the potential to affect a protected species or aware that it affected flowing water. The Service Agreement is not referred to here in relation to the issue of consultation but rather as recognition that the very presence of the watercourse indicated the need for added scrutiny by Planning Service.

[42] Given the particulars furnished on behalf of the applicant in relation to the Atlantic salmon connection of the watercourse with the River Foyle SAC and the presence of domestic and European protected species, the absence of any reference to ecology, habitats or wildlife is striking. More particularly, the information that has now emerged does indicate that the risk exists that the proposed development will have significant effects on the SAC, in that the salmon may be affected by discharges into the watercourse. The precautionary principle dictates that the risk exists because it cannot be excluded on the present state of knowledge. Is this merely the benefit of hindsight or should the screening exercise have yielded sufficient information for this material to have become available to decision makers?

[43] Development Control Advice Note 10 on Environmental Impact Assessment at paragraph 8.2 states the fundamental test as being whether the particular type of development and its specific impacts in the particular location are likely to result in significant effects on the environment. The indicative thresholds and criteria for identification of Schedule 2 developments requiring EIA at paragraph A18 refer to urban development projects and state that EIA is unlikely to be required for the redevelopment of land unless the new development is on a significantly greater scale than the previous use or the types of impact are of a markedly different nature. If it had been known that the disturbance of the hedgerows and treelines and the landscape would impact on protected species and that contamination of the watercourse would impact on the salmon, it cannot be doubted that the types of impact would be of a markedly different nature and the indicative threshold and criteria would have been satisfied. Again the question arises, should this information have been known to Planning Service?

[44] This development was acknowledged to be a Schedule 2 development, namely an urban development project. It would have been apparent from a desk top assessment of the proposed development that while this may have been classed as an urban development project it was located in a semi-rural setting, the development concerned a large site, involved substantial earth moving over an extensive area, included an adjacent watercourse, involved the disturbance of hedgerows and treelines and did not include any environmental information. These known features of the site demanded that Planning Service should be sufficiently informed about the potential impact of the development.

[45] Regulation 9(2) of the EIA Regulations provides that if the Department considers that it has not been provided with sufficient information to make a determination whether the proposal is for EIA development, it shall notify the applicant of the particular points on which it requires further information. This further information extends to any of the matters that may be included in an Environmental Statement. The known features of the site required that initially the applicant should have been required to provide sufficient information about the potential impact of the development on the environment. Such initial information should have raised concerns about the salmon in the Camowen River and the bats, badgers and otters on the site. Sufficient information would have established a probability or a risk that the proposed development would have significant effects and in the light of the precautionary principle such a risk exists if it cannot be excluded. It would have been established that the proposed development was likely to have significant effects on the environment.

[46] In view of the information now available about the site it is inconceivable that there could be development without an environmental

impact assessment. That it could have been determined that this was unnecessary is a reflection of the inadequate approach that exists in relation to the making of such determinations. The planning authorities must have sufficient information to enable them to make a properly informed determination. The developer must be required to provide initial environmental information. Where a Schedule 2 development site contains features requiring particular attention, such as watercourses, the developer should address the potential impact on that feature in making the application.

[47] The watercourse was not considered to be at risk because it was not being diverted and could not affect Foyle SAC. The former is correct and on the applicant's case the latter is mistaken. In light of the applicant's evidence about protected salmon above the watercourse in the Camowen River the potential impact is clear and must be excluded.

[48] The approach of Planning Service may be exemplified by the statement that the proposed development was for a replacement of an existing school with the same number of pupils and staff at the same location. Such an approach may distract from a complete analysis of the environmental impact of the works and the character of the replacement.

[49] The Department concluded that the principle of the development was acceptable and detailed proposals could be dealt with through the normal development control process. That approach did not address the ecology, habitats and wildlife matters. If the reference to the normal development control process was a reference to the imposition of conditions to the grant of outline planning permission and the later consideration of reserved matters, this could not in any event have been a legitimate means of dealing with the habitats, species and EIA obligations. These are issues to be dealt with at the time of the initial authorisation for development.

[50] The proposed development is a Schedule 2 development that is likely to have significant effects on the environment by virtue of factors such as its nature, size and location and is thus EIA development and requires an environmental statement from the applicant. Planning Service could not grant outline planning permission in the absence of environmental information. Thus the determination that the development was not 'EIA development' and did not require an 'environmental statement' together with the grant of outline planning permission will be quashed.

Consultation with Landscape Architects Branch.

[51] The applicant complained that the Planning Service did not consult with Landscape Architects' Branch (LAB). A "Protocol for Consultations with Landscape Architects' Branch on Operational Issues" was issued on 9 October

2006 and a revised protocol was issued on 18 November 2008. Paragraph 13 of the revised protocol refers to consultations with LAB “when proposals are located within or adjacent to a local landscape policy area or other landscape as zoned in an area plan and when the policy advice provided by the plan is not sufficiently specific to address the issues raised by that proposal. In such circumstances careful scrutiny should be given to the proposal before a consultation with LAB is initiated and should only be undertaken with approval of the relevant PPTO who should countersign the consultation request.”

[52] The Omagh Area Plan (OAP) designated three landscape areas adjacent to the site. The first applies to the curtilage of Glenview House on the northern boundary. The second applies to the southern boundary of the dwelling abutting the existing school and adjacent to the playing fields. The third applies to the southern extremity of the site. For present purposes the proposed development is located adjacent to a Local Landscape Policy Area and the issue is whether the policy advice provided by the OAP is sufficiently specific to address the issues raised by the proposed development. The Planning Service contends that the OAP provides explicit guidance on development affecting the landscape areas, namely the areas are to be protected from unsuitable development, remain in their present use, schemes which add to landscaping of the sites will be encouraged and pre-preservation orders may be considered if particular trees or areas of woodland are perceived to be under threat of clearance.

[53] The initial plans submitted for the proposed development led Barry Diamond, the Senior Planning Officer, to complete a site inspection of 25 September 2008 and it was concluded that the proposal would impact adversely on the wooded setting of the listed building and the associated LPA. A meeting was held with the applicant on 13 October 2008 and an amended scheme was submitted on 23 October 2008. The area adjacent to Glenview House was allocated to playing pitches. The second landscape area was not heavily wooded and had the benefit of a tree preservation order designation and the third landscape area abutted land which was not proposed for development. Planning Service concluded that it was not necessary to consult with LAB.

[54] The applicant contends that this conclusion was fundamentally flawed as there was a complete lack of inquiry into the landscaping issues. It was said that Planning Service could not have been known whether the development added to the landscaping of the LPA sites and it could not be said that the area plan was sufficiently specific to address the issues raised by the development and there was an absence of careful scrutiny of the proposal.

[55] The respondent examined the issue in relation to the sensitive landscape areas. There is an area of judgment in relation to proposals adjacent to

sensitive landscape areas where Planning Service must determine whether the judgment of the planning officer is sufficient to address the issues or whether he must seek the advice of the landscape architects in the context of a protocol seeking to limit the engagement of landscape architects on resource grounds. While it may be considered surprising that landscape architects were not involved in circumstances where substantial earthmoving works were contemplated adjacent to sensitive landscape areas, I have not been satisfied that the conclusion of Planning Service on this issue was unreasonable.

Access to the site of the proposed development.

[56] The applicant contends that the respondent misdirected itself in considering the access to the site. The proposed development will use the existing site access. The existing use involves set downs and pick ups at a lay-by adjacent to the entrance or on the roadway itself as well as access to and egress from the site to and from the public road. The proposed development will bring all bus set downs and pick ups and most car set downs and pick ups within the site.

[57] Planning Policy Statement 3 (PPS 3) on Access, Movement and Parking includes Policy AMP 2 on Access to Public Roads which provides -

“Planning permission will only be granted for a development proposal involving direct access, or the intensification of the use of an existing access, on to a public road where -

- (a) such access will not prejudice road safety or significantly inconvenience the flow of traffic; and
- (b) the proposal does not conflict with Policy AMP3 access to protected routes.”

[58] Development Control Advice Note 15 (DCAN 15) on Vehicular Access Standards at paragraph 11 on ‘Schools’ states that significant congestion can be caused by the setting down and picking up of pupils and adequate facilities for this activity shall be provided in the form of a lay-by with a turning area if necessary. Further it is stated that in some cases the setting down or turning area may have to be provided within the site and if that is so it should be separated from areas used by children.

[59] “Access” at school premises may thus include a lay-by outside the site which facilitates setting down and picking up of pupils attending the school. Thus “intensification of the use of an existing access” may involve consideration of not only the use by those entering and leaving the site but also

those using the lay-by. Using the roadway, other than the layby, for setting down or picking up would not involve vehicular use of the "access".

[60] The applicant contends that there has been intensification of the use of the existing access as virtually all traffic will now enter the site to the pick up and set down point. This is literally correct if one ignores the impact of the off site lay-by. On the other hand the respondent contends that there is not intensification of the use of the existing access as the same number of pupils and staff will attend the new school. This too is literally correct if one treats all pick ups and set downs in the lay-by and the roadway or within the site as involving the use of the access. What is clear is that there will be a change in the pattern of traffic around the access under the proposal for on site set downs and pick ups. The new traffic pattern may improve road safety if it removes set downs and pick ups from the public road and transfers them within the site.

[61] The concerns about access arrangements relate to public safety and traffic congestion. The policy documents permit the respondent to consider the extent of the use of the access to the school by reference to the traffic using the lay-by as well as the traffic entering and leaving the site. The former is treated as part of the access and has been required in the interests of public safety and preventing congestion. This does not apply to pick ups and set downs on the public road.

[62] A further consideration is that the access to the school is opposite the applicant's access to the proposed housing development. Roads Service were of the view that the two accesses should not be opposite each other and that the schools access should be staggered by 15 metres. Planning Service did not introduce such a requirement. Planning Service states the position to be that Road Service did not consider the crossroads to be unsafe but considered that a staggered junction would be safer. According to Andrew Alderdice, Assistant Section Engineer with Road Service, with the present access being into an existing school site, Road Service did not have power to insist that the access be relocated as Road Service had formed the view that there was no intensification of the proposed school access on the proposed development. This conclusion rests on the nature of "intensification" of the use of the access.

[63] Interpretation of the policy is for the Court. 'Access' to schools has a particular meaning in the policy documents in that the use of lay-bys to supplement school entrances is treated as part of the 'access'. That being so, the removal of the lay-by and the requirement that those formerly using the lay-by should instead use the entrance to enter the school, means that there will be no intensification of the use of the 'access'.

Additional grounds.

[64] There are certain additional grounds that it is not necessary to consider. The applicant complains about unfairness and inconsistency in comparison with the applicant's previous application for adjacent development. This is of no assistance to the present dispute. The applicant complains about inadequate inquiry being made and inadequate information being obtained. It is implicit in the above conclusions that in general there was inadequate information available to Planning Service. The applicant complains of improper motive. Whatever may have driven the timing of the original decision, about which I reach no conclusion, the decision has been quashed for other reasons and such considerations can no longer apply.

[65] For the reasons set out above the grant of outline planning permission will be quashed.