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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY CLARE McCANN
FOR JUDICIAL REVIEW

Before: McCloskey LJ, Horner LJ and Colton J

Representation

Appellant: **Mr Paul McLaughlin KC and Mr Malachy McGowan of counsel, instructed by Phoenix Law**
Respondent: **Mr William Orbinson KC and Mr Simon Turbitt, of counsel, instructed by A&L Goodbody Solicitors**
Southern Regional College (qua interested party): Mr Stewart Beattie KC (instructed by Carson McDowell LLP)

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GLOSSARY/ACRONYMS

The court is grateful to the parties for compiling a list of acronyms and abbreviations, which is hereby reproduced in full

1.	**AA**	Appropriate Assessment (stage 2 assessment under the Habitats Regime
2.	**CAP / CAP 2010**	Craigavon Area Plan 2010
3.	**CEMP**	Construction Environmental Management Plan
4.	**DAERA**	Department of Agriculture, Environment and Rural Affairs
5.	**DFI**	Department for Infrastructure
6.	**EIA**	Environmental Impact Assessment
7.	**ES**	Environmental Statement
8.	**FEI**	Further Environmental Information
9.	**GDPO**	The Planning (General Development Procedure) (Northern Ireland) Order 2015
10.	**KSR**	Key Site Requirement
11.	**LC**	Leisure Centre
12.	**LDP**	Local Development Plan
13.	**NED**	Natural Environment Division
14.	**PACC**	Pre-Application Community Consultation
15.	**PCEMP**	Proposed Construction Environmental Management Plan

16.	**PPS 2**	Planning Policy Statement 2
17.	**PSRNI**	Planning Strategy for Rural Northern Ireland
18.	**RIA**	Retail Impact Assessment
19.	**SES**	Shared Environmental Services
20.	**sHRA**	shadow Habitats Regulations Assessment
21.	**SPO**	Senior Planning Officer
22.	**SPPS**	Strategic Planning Policy Statement for NI
23.	**SRC**	Southern Regional College
24.	**SSA**	Sequential Site Assessment
25.	**TCP/CTCP/CTCBRDP**	Craigavon Town Centres Boundaries and Retail Designations Plan
26.	**TOLS**	Test of Likely Significance (stage 1 assessment under the Habitats regime)
27.	**WYG**	White Young Green – the Notice Party's planning and environmental consultants

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McCloskey LJ (d*elivering the judgment of the court*)

Introduction

[1] This is the unanimous judgment of the court, to which all members have contributed, in this appeal in judicial review proceedings involving the three parties identified in the title hereof. We shall describe them as, respectively:

- Clare McCann: "*the appellant*."
- Armagh City, Banbridge and Craigavon Borough Council (the Respondent): "*the Council*."
- Southern Regional College (the developer): "*SRC*."

By her appeal to this court the appellant challenges the judgment and consequential order of Huddleston J dismissing her application for judicial review.

The Impugned Decision

[2] By its decision dated 18 January 2019 the Council acceded to SRC's application for a development at South Lake, Lake Road, Craigavon ("*the subject site*"). The development thereby approved is described in the following terms: construction of a new Further Education College Building (use class D1) (Southern Regional College) (2 no and 3 no storeys) and associated car parking, landscaping, associated site works and provision of 830 PV solar panels to roof (total system size of 241 KWP). The impugned grant of planning permission was subject to a series of conditions, 46 in number.

The Challenge

[3] These proceedings were commenced on 18 April 2019. The appellant's case was advanced on a series of disjunctive grounds which, broadly, fell into two separate groups namely (a) asserted breaches of statutory requirements and restrictions and (b) incompatibility with specified planning policies. All of the grounds of challenge were dismissed by the judge.

[4] The issues for determination by this court are the following:

(i) Whether the impugned decision was based upon an erroneous assessment that the proposed development is in accordance with Plan Policy TOU1 of The Craigavon Area Plan 2010 ("CAP 2010") and, if so, is vitiated in law in consequence.

(ii) Whether the impugned decision was based upon an erroneous assessment that the proposed development is in accordance with Plan Policy TOU1 of CAP 2010, with the result that it is not in accordance with Plan Policy COM1 and Plan Policy SETT1 of CAP 2010 and, if so, is vitiated in law in consequence.

(iii) Whether the impugned decision was based upon an erroneous interpretation of paragraph 6.280 of the Strategic Planning Policy Statement for Northern Ireland ("SPPSNI") to the effect that CAP 2010 is not (in the language of the paragraph) "out of date", with the result that a sequential site assessment was not required and, if so, is vitiated in law in consequence.

(iv) Whether the impugned decision is vitiated in law being in contravention of (a) regulation 3(3) of the Conservation (Natural Habitats, etc.) Regulations (NI) 1995 (the "Habitats Regulations") and/or (b) policy NH2 of Planning Policy Statement 2 ("PPS2") and/or (c) paragraph 6.179 of SPPSNI by reason of insufficient enquiry to ascertain the

possible presence of otters on the development site and/or the possibility of adverse effects upon otters.

(v) Whether the impugned decision is unsustainable in law being based upon a material error of fact (and/or the disregard of material factors) namely significant effects on otters were not anticipated as there were no otters on the site.

(vi) Whether the impugned decision was vitiated in law on the ground that the Environmental Statement was non-compliant with regulation 4 of and Part 1(2) of Schedule 4 to the Planning (Environmental Impact Assessment) Regulations (NI) 2015 (the "EIA Regulations").

(vii) Whether the impugned decision is vitiated in law on the ground that the Council was required by paragraph (b) of the Planning (Notification of Council's own Applications) Direction 2015 to notify the subject planning application to the Department for Infrastructure and failed to do so.

As will become apparent, there is considerable overlap between issues (i) and (ii) and also issues (iv) and (v).

Chronology

[5] Taking into account the lengthy period under scrutiny (fifteen years plus), the multiple events of significance during that period, the necessity of excavating the detail of those events, the broad range of agencies involved and the abundance of paper before the court, a brief chronology of salient dates and events is indispensable. The court records the assistance provided by the parties in this respect.

1973	Site in use as public parkland.
August 2004	The Department formally adopted the Craigavon Area Plan 2010. The site is zoned for tourism development under this plan.
June 2008	The Department formally adopted the Craigavon Town Centre Boundaries and Retail Designations Plan 2010.
2009	Site developed to include 10.6 km of mountain bike trails.
14.08.17	Planning Application submitted to develop Council Leisure Centre on adjoining site.
14.12.17	Permission granted for Leisure Centre.
20.12.17	Planning Application submitted by SRC.

02.11.18 Council request for Further Environmental Information ("FEI") based upon the SES consultation response dated 2nd October 2018. The FEI request also required an update of the Proposed Construction Environment Management Plan, and requested more information on the choice of the South Lake Site, taking into account, in particular, the environmental effects.

20.11.18 In response to the FEI request, an ES Addendum, including ecology appendices is submitted.

03.12.18 NIEA (Natural Environment Division) consultation response re SRC returned in relation to the November 2018 ES Addendum: conditions required. Natural Heritage response.

19.12.18 SES consultation response: made no comment on otter, its focus being Appropriate Assessment under Article 6(3). It did however recommend that the PCEMP (which inter alia includes measures related to otter) be secured by condition.

18.01.19 Planning permission granted.

18.04.19 Judicial review proceedings commenced.

A separate chronology of the material dates and events relating to the fourth ground of appeal is at para [96] of this judgment.

The Appellant

[6] Clare McCann, the appellant, is a long-term resident of Craigavon. She describes Craigavon City Park as her local public amenity, a beautiful and natural environment with trees and wildlife which has been a central part of her life and the lives of her children and grandchildren for many years. She describes the park as located beside the subject site. Her concerns about the development authorised by the impugned decision are encapsulated in the following averments:

> "I am aware of otters in the lake and have seen the trails that they leave ….. I am aware of many others who [likewise] … I believe that the development will change the character and nature of the park entirely, particularly the space where I spend my time ….
>
> There will be a significant number of trees cut down, I believe that the wildlife will inevitably be displaced and instead there will be a 10,000 square metre building constricted with thousands of students attending the

> college and a car park filled with hundreds of cars every day. This will be concentrated in the area near to the new leisure centre that was built last year, ensuring that the area around this section of the park will change significantly in character as a result of the number of people using it. It will turn the park into a college campus. If the college is in fact built there it will mean that I will no longer be able to enjoy this site …
>
> This will mean a loss for the community as a whole."

The appellant's standing to bring this challenge is, properly, not contested.

The Developer

[7] Southern Regional College *("SRC")* came into existence on 01 August 2007 upon the merger of the three colleges of further education at Armagh, Newry and Upper Bann. SRC is one of six Further and Higher Education Colleges in Northern Ireland. It is the largest such institution outside Belfast. It has a total of six campuses spanning two separate council areas, namely (a) Armagh, Banbridge and Craigavon and (b) Newry, Mourne and Down. These are situated in Armagh City, Banbridge, Kilkeel, Lurgan, Portadown and Newry City. If the proposed development proceeds it will unite the campuses at Lurgan and Portadown. In August 2014 a business case and economic approval for this proposal were approved by the Department for Employment and Learning and the Department of Finance.

The Planning Act

[8] The legal framework to which the so-called "plan-led system" belongs must be considered. This was introduced in the jurisdiction of Northern Ireland for the first time by section 6(4) of the Planning Act (NI) 2011 (the "Planning Act"). Section 1(1) of the Planning Act must first be considered:

> "The Department must formulate and co-ordinate policy for securing the orderly and consistent development of land and the planning of that development."

By section 6(4) it is provided:

> "Where, in making any determination under this Act, regard is to be had to the local development plan, the determination must be made in accordance with the plan unless material considerations indicate otherwise."

The Scottish equivalent of section 6(4) featured in *City of Edinburgh v Secretary of State for Scotland* [1997] 3 PLR 71. There Lord Clyde, delivering the unanimous judgment of the House, expounded the meaning of "in accordance with" in these terms, at p85:

> "[The decision maker] will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in the light of the whole plan the proposal does or does not accord with it."

Thus, in many cases this discrete task will involve a balancing exercise for the decision maker and the interpretation of the relevant plan policies in accordance with the principles set forth in paras [14]–[18] infra.

[9] The requirement enshrined in section 6(4) of the Planning Act is triggered only in cases where the determination in question must be made in accordance with the LDP. The latter requirement applies in the present case, by virtue of section 45(1) of the statute. As the court observed in *Re Knox's Application* [2019] NIQB 34, at para [4], the effect of the new legislative arrangements introduced in this jurisdiction by the Planning Act is that the relevant Area Plan (in this case CAP 2010) will remain the LDP of the council concerned unless and until the council formally adopts a successor measure.

[10] There is one further aspect of the statutory matrix of some importance. The power to adopt a development plan for any area of Northern Ireland was formerly vested in the Department, by Article 4 of the Planning (Northern Ireland) Order 1991. CAP 2010 is one such plan. By section 6 (and following) of the Planning Act each of the district councils of Northern Ireland became responsible for adopting a development plan for its area. The appellation "Local Development Plan" ("*LDP*") applies to every such plan. This transfer of powers from central government to local government, one of the key features of the new statutory regime, took effect on 01 April 2015. The new statutory regime recognised the need for a transitional mechanism and made provision accordingly. In short, every extant Departmental LDP was preserved and would remain in force unless and until superseded by a new adopted Council LDP. This was the effect of paragraphs 1 and 2 of Schedule 1 to the Planning (Local Development Plans) Regulations (NI) 2015.

[11] As the foregoing resume demonstrates the introduction of the soi-disant "plan led system" was designed to confer a level of primacy on LDPs devised by local councils in the determination of every planning application. Sadly, this new dawn remains purely aspirational in Northern Ireland. Notwithstanding that almost eight years have elapsed since the transfer of powers noted above, not a single local council has adopted a LDP for its district. The new regime, therefore, remains purely

aspirational throughout this jurisdiction. This is obviously incompatible with the reforms effected by the new legislation. It has one particularly unfortunate consequence demonstrated abundantly by this appeal. The determination of every planning application requires the elementary step of identifying all relevant planning policies. "Relevant" denotes any policy which may have a bearing on the determination exercise. While making due allowance for the existence and desirability of instruments of regional planning policy, the search for a central instrument collating in a sensible, coherent, logical and accessible manner all material local planning policies bearing on a given land use is sadly in vain. It is clearly out of step with the interrelated standards of accessibility and transparency which are supposed to be two of the hallmarks of both central and local government in the 21st century.

[12] As a result the task confronting the Senior Planning Officer ("SPO") who compiled the report for consideration by the Council's Planning Committee was a frankly daunting one. As recorded in paragraph 8.0 of this report the SRC application for permission to develop a new site in the South Lake Zone of Craigavon fell to be considered and determined in a planning policy context comprising a total of 13 separate planning policies and six measures of "supplementary planning guidance", scattered both near and far. That this veritable maze has generated protracted and expensive litigation is unsurprising by itself. But the analysis does not end there. The SPO, having identified all of the foregoing instruments, was then confronted by the further task of assimilation, trying to work out how they interrelated with each other. This formed part of the fundamental exercise which had to be undertaken following the initial step of identification, namely (a) construing the relevant provisions of these policy instruments and (b) then applying them to the SRC planning application.

[13] Given all of the foregoing, it is little wonder that these proceedings have generated an unprecedented commitment of judicial time and resource both at first instance and on appeal. In the appeal phase there were ten case management listings, multiple case management orders, protracted electronic interaction between the judicial panel/office and the parties' legal representatives, five hearing days and the adoption of all manner of mechanisms to facilitate the court's passage through the jungle. One struggles to identify the furtherance of any recognised public interest in the labyrinthine expedition which began on the date when the SRC planning application was received. At this juncture it is appropriate to record the court's appreciation of the efforts of the legal representatives in facilitating its task.

The Interpretation of Planning Policies

[14] By well-established principle the interpretation of any planning policy is a question of law for the court: see in particular *Tesco Stores v Dundee City Council* [2012] UKSC 13 at [18]–[19]:

> "In the present case, the planning authority was required by section 25 to consider whether the proposed

development was in accordance with the development plan and, if not, whether material considerations justified departing from the plan. In order to carry out that exercise, the planning authority required to proceed on the basis of what Lord Clyde described as "a proper interpretation" of the relevant provisions of the plan. We were however referred by counsel to a number of judicial dicta which were said to support the proposition that the meaning of the development plan was a matter to be determined by the planning authority: the court, it was submitted, had no role in determining the meaning of the plan unless the view taken by the planning authority could be characterised as perverse or irrational. That submission, if correct, would deprive sections 25 and 37(2) of the 1997 Act of much of their effect, and would drain the need for a "proper interpretation" of the plan of much of its meaning and purpose. It would also make little practical sense. The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained. Those considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality. On the contrary, these considerations suggest that in principle, in this area of public administration as in others (as discussed, for example, in R (Raissi) v Secretary of State for the Home Department [2008] QB 836), policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context.

19. That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition,

> many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759, 780 per Lord Hoffmann). Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean."

[15] The exercise is one of objective judicial interpretation of the language used in the policy's contextual setting. The court must also take cognisance of the correct approach to planning policies generally. It has been stated repeatedly in the jurisprudence bearing on this topic that planning policies are measures of guidance and direction, not to be construed by applying the tools and standards appropriate to the construction of a statute or legal instrument (see *Re Sands Application* [2018] NIQB 80 at para [90] and compare *Re McNamara's Application* [2018] NIQB 22 at para [22]). Reflection on the governing principles also serves as a reminder that in judicial review proceedings the jurisdiction of the court is supervisory in nature. Judicial review does not equate to an appeal on the merits, emphatically so.

[16] Policy is one aspect, an obviously important one, of how both central government and local government function. Much judicial ink has been spilled on the issue of policy in various guises and contexts. These include compensation for miscarriages of justice, immigration, prosecutorial decisions, ex gratia criminal injuries compensation payments and child sex offender disclosure. Policies of all kinds have been considered at the highest judicial levels. See for example *Mahad (Ethiopia) v Entry Clearance Officer* [2010] 1 WLR 48, *Re McFarland* [2004] UKHL 17, at para [24] especially per Lord Steyn and, most recently, *R (A) v Secretary of State for the Home Department* [2021] 1 WLR 3931. In *Mahad*, Lord Brown exhorted construction "… according to the natural and ordinary meaning of the words used", at para [9]. In *R v Criminal Injuries Compensation Board, ex parte Webb* [1987] QB 74, at 78, Lawton LJ formulated the test of "… what a reasonable and literate man's understanding of [the ministerial policy statement] would be …" In its recent decision in *A*, the UK Supreme Court stated at para [39]:

> "The approach to be derived from Gillick is further supported by consideration of the role which policies are intended to play in the law. They constitute guidance issued as a matter of discretion by a public authority to assist in the performance of public duties. They are issued to promote practical objectives thought appropriate by the public authority. They come in many forms and may be more or less detailed and directive depending on what a

> public authority is seeking to achieve by issuing one. There is often no obligation in public law for an authority to promulgate any policy and there is no obligation, when it does promulgate a policy, for it to take the form of a detailed and comprehensive statement of the law in a particular area, equivalent to a textbook or the judgment of a court. Since there is no such obligation, there is no basis on which a court can strike down a policy which fails to meet that standard. The principled basis for intervention by a court is much narrower, as we have set out above."

The judgment continues at para [47]:

> "In a category (iii) case, it will not usually be incumbent on the person promulgating the policy to go into full detail about how exactly a discretion should be exercised in every case. That would tend to make a policy unwieldy and difficult to follow, thereby undermining its utility as a reasonably clear working tool or set of signposts for caseworkers or officials. Much will depend on the particular context in which it is to be used. A policy may be sufficiently congruent with the law if it identifies broad categories of case which potentially call for more detailed consideration, without particularising precisely how that should be done. This was the approach adopted by Green J in *R (Letts) v Lord Chancellor (Equality and Human Rights Commission intervening)* [2015] 1 WLR 4497 ("Letts")."

[17] It is convenient at this juncture to acknowledge another settled principle relating to an interrelated issue. In *Mansell v Tunbridge and Malling Borough Council* [2017] EWCA Civ 1314 the English Court of Appeal stated the following, at para [42](2).

> "The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge: see the judgment of Baroness Hale of Richmond JSC in *R (Morge) v Hampshire County Council*[2011] PTSR 337, para 36 and the judgment of Sullivan J in *R v Mendip District Council, Ex p Fabre* [2017] PTSR 1112, 1120. Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave: see the judgment of Lewison LJ in *(Palmer) v Herefordshire Council* [2017]] WLR 411, para 7. The

> question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way—so that, but for the flawed advice it was given, the committee's decision would or might have been different—that the court will be able to conclude that the decision itself was rendered unlawful by that advice."

[18] The judicial approach to the interpretation of planning officers' reports in this jurisdiction is in substance the same. However, as regards the second part of the immediately preceding quotation it is opportune to make the following clear. A "materially misleading" statement is not the only basis upon which a planning officer's report to a council's planning committee may give rise to a judicial review challenge. In short, the full panoply of recognised judicial review grounds applies: omitting some material fact or factor, considering and according weight to or reliance upon some immaterial fact or factor, misinterpreting or misapplying a statutory provision and misconstruing a planning policy and procedural unfairness, in the main.

First Ground of Appeal: Compatibility with Policy TOU1 of CAP 2010

[19] Planning policies feature in four of the seven grounds of appeal rehearsed in para [4] above. Bearing in mind the language of the policies which the court will be examining, the following framework is uncontroversial. First, the site of the proposed development lies within a "settlement limit" ie the Craigavon urban area. This area contains three designated town centres. Second, this site is not situated within any designated town centre. Third, the site is on land specifically zoned for specified uses under CAP 2010. Fourth, one of the site boundaries abuts an adjoining site where the Council's leisure centre is situated. Fifth, the site of the proposed development was owned by the Council at all material times. While the Council had executed an agreement to sell the site to SRC subject to the grant of the impugned planning permission, the court was informed that the transfer of ownership had been effected following the judgment of Huddleston J, on 24 May 2022.

[20] The essence of CAP 2010 must be considered at the outset. Its status is that of the local plan for the Borough of Craigavon. It was formally adopted in August 2004, with a nominal "shelf life" of some six years. The adopting agency (as noted above) was the Department and, as today, the legal status of CAP 2010 continues to be that of "Departmental LDP." One of the features of the LDP is the familiar one of "zoned land." There are 48 zonings for housing; 8 in respect of employment (industry); 1 for tourism (policy TOU1); 1 district centre; 1 education site; and 10 town centre opportunity sites. Each of these zonings is phrased in positive terms. Each specifies

the uses for which they are designated ie what uses are in accordance with the LDP. With a very small number of exceptions, none of them specify unacceptable or prohibited uses.

[21] Pausing at this juncture, the broader policy framework within which CAP 2010 reposes, must be reckoned. This arises because, in common with England and Wales, the planning system in Northern Ireland has as one of its features a layer of regional planning policy. This, as its description would suggest, emanates from central (rather than local) government, the relevant agency in this jurisdiction being the Department for Regional Development ("DRD").

[22] Three regional policies of this kind fall to be considered. These are, respectively – and in no hierarchical order – the Strategic Planning Policy Statement for Northern Ireland ("SPPS"), the Regional Development Strategy 2035 (the "RDS") and the Planning Strategy for Rural Northern Ireland (the "PSRNI"). The thread common to these three policy measures is that each applies to the whole of the region of Northern Ireland. Paragraph 3.8 of the SPPS states:

> "The Department will require development proposals to be designed and implemented in accordance with prevailing regional planning policy and with the relevant Plan proposals, including the key site requirements set out for zoned land and other development sites as appropriate."

The nexus with section 1(1) of the Planning Act is readily apparent. Under the rubric of "Refusal of Planning Permission" paragraph 5.72, reflecting paragraph 3.8 (supra), states:

> "Planning authorities should be guided by the principle that sustainable development should be permitted, having regard to the local development plan and all other material considerations, unless the proposed development will cause demonstrable harm to interests of acknowledged importance. In such cases the planning authority has power to refuse planning permission."

[23] It is trite that the SPPS must be evaluated as a whole. Its context, as appears from the Introduction, is that of:

> "…. a new 2- tier model of delivery whereby councils have primary responsibility for the implementation of the following key planning functions:
>
> - Local plan-making;

- Development management (excluding regionally significant applications); and

- Planning enforcement."

Paragraph 1.2 continues:

> "The Department retains responsibility for regional planning policy, the determination of regionally significant and called-in applications and planning legislation. It also provides oversight, guidance for councils, governance, performance and management functions."

What is the SPPS?

> "The SPPS is a statement of the Department's policy on important planning matters that should be addressed across Northern Ireland …
>
> It has a statutory basis under Part 1 of the Planning Act (NI) 2011 which requires the Department to formulate and co-ordinate policy for securing the orderly and consistent development of land and the planning of that development …
>
> The provisions of the SPPS apply to the whole of Northern Ireland. They must be taken into account in the preparation of Local Development Plans (LDPs) and are material to all decisions on individual planning applications and appeals."

This is followed by the cautionary words:

> "The SPPS should not be read as a full explanation of the variety of complex social, economic and environmental and other factors (including those which have implications beyond the confines of the land-use planning system) that should be addressed in implementing the planning system. Neither does it seek to restate policy or guidance that is expressed elsewhere within other relevant government strategies or policies."

[24] This is followed by a passage of some note, in paragraph 2.1, under the rubric of "The Purpose of Planning." This states:

> "The objective of the planning system, consistent with Part 1, Section 1 of the Planning Act (Northern Ireland) 2011 (hereafter referred to as the 2011 Act), is to secure the orderly and consistent development of land whilst furthering sustainable development and improving well-being. This means the planning system should positively and proactively facilitate development that contributes to a more socially economically and environmentally sustainable Northern Ireland. Planning authorities should therefore simultaneously pursue social and economic priorities alongside the careful management of our built and natural environments for the overall benefit of our society."

In the passages which follow there is a heavy emphasis on the public interest. Paragraph 3.8 of the SPPS states:

> " …. The guiding principle for planning authorities in determining planning applications is that **sustainable development should be permitted, having regard to the development plan and all other material considerations, unless the proposed development will cause demonstrable harm to interests of acknowledged importance. In practice this means that development that accords with an up to date development plan should be approved and proposed development that conflicts with an up to date development plan should be refused unless other material considerations indicate otherwise.**"
> [Emphasis added.]

LDPs are explained in paragraph 5.14 in these terms:

> "Within the wider context of spatial planning LDPs allocate appropriate land for differing types of land use and set out the main planning requirements to be met in respect of particular zoned sites. They also show particular designations, for example Conservation Areas and Areas of Outstanding Natural Beauty."

[25] The multiple planning policies assembled in CAP 2010 are not all of the same kind. In particular, there is a mix of the general and specific. One of the individual policies which is plainly of a general nature is Plan Policy SETT1. This draws attention to the settlement limits of what is described as the "Craigavon Urban Area" wherein:

> "Land is zoned, within this settlement limit, for the principal land uses."

Policy SETT1 then, having addressed the separate issue of designated settlement limits for identified villages and smaller settlements, continues:

> "Favourable consideration will be given to development proposals within settlement limits and on zoned sites providing the following criteria are met: ……"

There follows a list of seven criteria. The seventh is in these terms:

> "The proposal is in accordance with prevailing regional planning policy **and the policies, requirements and guidance contained in the Plan** [ie CAP 2010]."

[26] Policy SETT1 then explains the zoning mechanism:

> "….. Zoned land, along with key site requirements which developers will be expected to meet, is set out and shown in Part 3 of the Plan. The zoning of land provides a basis for rational and consistent decisions on planning applications and provides a measure of certainty about which types of development will and will not be permitted …
>
> Within the settlement limit of Craigavon Urban Area land is normally either developed or zoned for a particular use. There remains, however, some land which is neither developed nor zoned for a particular use and this is generally known as 'white land.' Plan policy SETT1 applies to both zoned land and white land …"

From this it follows that Policy SETT1 fell to be considered in the determination of the SRC planning application.

[27] Next it is appropriate to consider Plan Policy COM1. This is a <u>specific</u> land use policy. It is found in a discrete chapter of CAP 2010 entitled "Community Uses." The two community uses identified in this chapter are (a) education and (b) health and social services. The policy statement in this chapter recites:

> "Planning permission will be granted for community uses within settlement limits provided this can be integrated into comprehensive development, particularly on zoned sites, and where all of the following criteria are met …"

There follows a list of seven criteria. The fifth of these is "… the proposal is not located on zoned industrial land." The seventh criterion states:

> "The proposal is in accordance with prevailing regional planning policy and the policies, requirements and guidance contained in the Plan."

There are two further discrete provisions of Policy COM1 which this judgment will address in its consideration of the third ground of appeal.

[28] The SPO's report to the Planning Committee also mentioned, briefly, the Craigavon Town Centre Boundaries and Retail Designations Plan (the "Town Centre Plan"). This will be examined in a little more detail in the court's consideration of the third ground of appeal. In a brief passage the SPO advised councillors that the subject site is located within the settlement of Craigavon and outside the town centre boundary of Craigavon. Both statements are correct.

[29] The other planning policy identified by the SPO as having some bearing on the determination of the SRC planning application is the Planning Strategy for Rural Northern Ireland ("PSRNI"). This policy, in common with the RDS, is specifically mentioned in the preamble of Policy TOU1. The following passages forge the relevant nexus:

> "One of the key roles of the … RDS is to provide the spatial framework to accommodate changing tourism and leisure habits, whilst conserving the key assets of the natural and built environment …
>
> The Department's regional planning policies for tourism in Craigavon Borough are currently set out in [PSRNI] ..."

In passing, in the passages which follow there is no indication of whether the relevant parts of PSRNI survived the advent of Plan Policy TOU1 or the SPPS. PSRNI promulgates the following "Tourist Development" policy:

> "To give favourable consideration to proposals for tourist development which are appropriate in terms of nature, scale and location."

In the accompanying text one finds the following:

> "Through the development plan the Department will seek to facilitate and protect the tourist industry. Where appropriate area plans will contain a tourist development strategy tailored to the needs and assets of the particular locality."

[30] By the route charted above one arrives at Plan Policy TOU1. The setting for this policy is a discrete chapter within CAP 2010 entitled "Tourism." There follows a brief account of the tourist attractions, facilities and growth potential in the Craigavon Borough. Next there is a summary of the relevant Strategic Planning Guidelines contained in the Regional Development Strategy ("RDS") together with a brief reference to the "Planning Strategy for Rural Northern Ireland" ("PSRNI").

[31] Plan policy TOU1, entitled "The South Lake Zone", incorporates Map No 5 within which two areas – "A" and "B" are designated. The text is as follows:

> "Within the South Lake Zone two areas are designated, A and B as shown on Map No 5 Craigavon Urban Area. Within Area A favourable consideration will be given to proposals for tourism, recreational and cultural development. Within Area B favourable consideration will be given to proposals for tourism, cultural, community, civic and recreational development. Both areas A and B are subject to the following key site requirements:

There follows a list of nine separate site requirements – relating to matters such as integration, amenity, site access et al. None of these is germane to any aspect of the appellant's challenge.

[32] By virtue of its architecture and layout of CAP 2010, Plan Policy TOU1 consists of the text reproduced in para [31] above and the nine site requirements which follow. These are followed by this text:

> "The South Lake Zone is zoned to provide an attractive location for tourism, cultural, community, civic and recreational schemes to enhance the role and image of the central area and provide facilities for Borough residents and visitors. It occupies a prestigious location on the shores of Craigavon South Lake, with good communication links to the rest of the Borough and beyond. This is an ideal location to contribute to the tourism potential of the Borough. The landscape setting will require a high standard of design from development proposals."

The submissions of all three parties espoused the suggestion that this is to be viewed as explanatory text, not forming part of the statement of policy. While the court does not have to resolve this discrete issue, we would caution against a rigid dichotomy of this kind. This signifies the end of the "Tourism" chapter of CAP 2010.

[33] Policy TOU1 was identified in the SPO's report to the Council's Planning Committee as one of several policies material to the application. The report recognised that the proposed development lies exclusively within Area A. It further

recognised that it does not fall within the embrace of tourism, recreational development or cultural development:

> "… The relevant policy test that falls to be considered by the Council in the particular circumstances of this application is whether or not education development per se falls within any of the categories of development favoured by TOU1, that is tourism, recreation and/or cultural development……
>
> As an initial observation, Officers are of the opinion that education development does not sit within any of the aforementioned categories. That being said, Officers note that … education development is not excluded by the terms of TOU1. Officers would cite the provisions of the Planning (Use Classes) Order (NI) 1989, as amended ["PUCO"]… as being a material consideration in the determination of this application that points towards it being approved."

[34] Next the report advised that Class 15 of PUCO brings together the following land uses: education, the display of works of art and use as a museum. Thus, PUCO:

> " … treated educational and cultural activities as being in at least broadly the same category …. [and] … in the Officer's opinion the UCO 1989 did form the statutory use classes context for TOU1 and that suggests no inconsistency between TOU1 and educational development being permitted within the zoning. That being so, Officers are of the opinion that it must be a material consideration in the determination of the application that the UCO made that provision when the 2010 CAP was adopted."

Accordingly, (the author reasoned):

> "Notwithstanding the considerations set out in the paragraphs above, Officers are of the opinion that while Policy TOU1 states that favourable consideration will be given to development proposals for tourism, recreational and cultural development this does not preclude other uses falling outside of those listed from being considered acceptable."

In a later passage, the author states:

> "As such, Policy TOU1 does not establish any sort of excisional presumption or sequential test in favour of the specified categories of development, or indeed exclusionary of other forms of development follow outside the specified categories and as officers are of the opinion that the proposal complies with the [key site requirements] of this zoning, that being so, Officers therefore attach significant weight to the proposals consistency with Policy TOU1 in the overall planning balancing exercise."

[35] In the next section of the report the SPO identified two further sources of policy support. This entailed drawing attention to two separate passages in Policy COM1 and Policy SETT1. First, the opening words of the former:

> "Planning permission will be granted for community uses within settlement limits …"

The words "will be granted" were underlined by the author. Second, the statement in Policy SETT1 (with the author's underlining):

> "Favourable consideration will be given to development proposals within settlement limits and on zoned sites …"

The author, correctly, drew to the reader's attention that each of these statements is qualified by the requirement that specified criteria are satisfied, including:

> "The proposal is in accordance with prevailing regional planning policy and the policies, requirements and guidance contained in the Plan."

This, of course, is an overarching statutory requirement.

[36] The court considers the following analysis apposite. The SPO's report to the Council advised that the proposed development was considered to be (in the statutory language) "in accordance with" CAP 2010. Next, it advised that the proposed development was neither precluded by nor excluded from Policy TOU1. However, the SPO did not analyse the distinction between the language pertaining to Area A and that pertaining to Area B. In advising that the proposed development was in accordance with Policy TOU1, the officer made no distinction between Area A and Area B. Fundamentally, the rationale of the officer's advice to the Council that the proposed development was in accordance with Policy TOU1 was that the terms of this policy neither precluded nor excluded it. The judge, in substance, endorsed all of this advice.

[37] The essence of this ground of appeal and the centrepiece of the related arguments of Mr McLaughlin KC, is that Policy TOU1 was erroneously interpreted in

the SPO's report to the councillors. The three parties joined issue on this fundamental question. The arguments advanced were nothing if not resourceful and elaborate. The court pays tribute to their quality. They demonstrated how difficult the exercise of interpreting planning policies can be. In a case of the present kind this difficulty is directly linked to the matters addressed in the court's observations at [11]–[13] above.

[38] The submissions of Mr Orbinson KC incorporated the following contentions in particular: as the proposed development is not in conflict with Policy TOU1 of CAP 2010 it is (in the statutory language) "in accordance with" CAP 2010; the policy language "favourable consideration" expresses a non-exclusionary preference, nothing more; and this construction of Policy TOU1 is supported by the language of Policy SETT1 (in particular), Policy COM1 and paragraph 3.8 of the SPPS. Mr Orbinson further contended that a non-favoured land use – in this instance, a proposed education land use in Area A of the South Lake Zone – is "acceptable" under policy TOU1.

[39] In determining this ground of challenge we take as our starting point five fundamental principles. First, the interpretation of planning policy is a question of law for the court. Second, this policy must be considered as a whole and, further, in the broader context to which it belongs. Third, planning policies are instruments of guidance and direction. Fourth, they are designed to guide and inform members of the public, planning officials, members of the business community, public authorities, QUANGO's and other interested persons and agencies. From these latter two principles it follows (fifth) that they are not to be construed as if they were a statute or legal instrument.

[40] A further, related consideration is appropriate. Planning policies are not formulated by Parliamentary draftsmen. They are, rather, written by planning officials, who will presumably have the audience noted above in mind. Thus, it will generally be appropriate to accord to the language used its ordinary and natural meaning unless there are indications to the contrary: for example, there may be instances where, considered in their full context, a word, phrase or term is evidently drawn from a measure of planning legislation and is, therefore, to be accorded its technical legal meaning. The PUCO issue considered infra illustrates this.

[41] The court will also take into account that where a planning policy relating to a particular zone identifies specific land uses and not others, this is not the product of inadvertence or oversight. This is of particular force in the case of a local development plan such as CAP2010 where (as here) the history includes a public inquiry, the reception of substantial evidence, the provision of oral and written representations; an ensuing PAC report; and subsequent deliberations by planning officers, applying their expertise and experience. Of course, in any case where there is an evidential basis, direct or inferential, for the assessment that inadvertence or oversight has crept in the court will recognise this and will assess the consequences. Subject thereto, as highlighted in para [18] of *Dundee City Council*, every development plan is "a carefully

drafted and considered statement of policy." The court apprehends that no self-respecting planning official would disagree.

[42] The foregoing observation about zoning applies with particular force in any case where a planning policy relating to a specified zone divides the zone into two and lists appropriate land uses in differing terms, while repeating the dominant clause ("Favourable consideration will be given to …"). A court is bound to take cognisance of a distinction of this kind in the exercise of interpreting the document, to which we now turn.

[43] The first striking feature of Policy TOU1 is its setting within CAP 2010. It belongs to the dedicated chapter on tourism (entitled "Tourism"). Tourism issues, unsurprisingly, dominate in the passages which follow. The expressed land uses which are common to both Area A and Area B are tourism, recreational development and cultural development. Each of these is, in one way or another, readily associated with the overarching land use, namely that of tourism. Furthermore, the identification for tourism purposes of an area which features a large lake, boating, woodland, picnic areas, cycle paths and pedestrian routes is of obvious significance. It is within this context that "community" and "civic" land uses feature only in Area B and not Area A: in contrast with the three land uses of tourism, recreational development and cultural development which are common to both areas.

[44] Next, it is necessary to identify the overarching aim of policy TOU1 as this is a self-evidently important consideration in construing its content. We consider it beyond plausible argument that the overarching aim of this policy is the promotion of tourism in the Borough of Craigavon. Some brief elaboration is instructive. A reading of this dedicated chapter as a whole discloses that tourism is the dominant theme. This is reinforced by the incorporation of the relevant RDS Strategic Planning Guidelines. These focus exclusively on tourism.

[45] It is necessary to consider also the policy treatment of tourism in the self-evidently important context of CAP 2010 as a whole. The relevant CAP map (Map No 5), which forms part of Policy TOU1, depicts the Craigavon Urban Area. It identifies inter alia the South Lake Zone. This is the zone which the CAP 2010 designates for the discrete land use of tourism. It is, on any objective assessment, a prime, choice site. In addition, it is the only site thus designated within the entire urban area and it represents but a tiny percentage of the relevant geographical territory as a whole.

[46] The exercise of construing the various planning policies in the mix must also focus on how the South Lake Zone has been divided. Area A and Area B differ in several striking respects. In particular: Area A occupies the vast majority of the designated zone, approximately 90% thereof; the western boundary of Area A borders South Lake in its entirety; more than half of its eastern boundary has an open space aspect; and its nearest neighbour in the south west corner is a council leisure centre. Area B, in contrast, is very much the land use poor relation. In addition to its markedly

smaller dimensions it is bordered by two main roads on two sides of its triangular shape, is adjacent to a major roundabout and is in very close proximity to a large area zoned for industrial use, which itself borders existing industrial land. The contrasts between the two areas are unmistakable.

[47] That Policy TOU1 accommodates within the South Lake Zone the possibility of a community or civic land use in one identified part of the zone is unsurprising, when considered in its wider context. This, firstly, entails a recognition that contiguous tourism uses (in one part of the zone) and community or civic land uses (in the other) could be achieved harmoniously with appropriate design. In this respect, one readily distinguishes between community and civic land uses (on the one hand) and, for example, industrial, retail, transport and housing land uses (on the other). The public interest underpinning the two former uses is incontestable. Furthermore, Policy COM1, which addresses all community uses and, in doing so, specifically encompasses education and other public services, has no zoning dimension, in contrast with Plan Policy TOU1. There is the further consideration that CAP 2010 does not contain any lands zoned for education, with the exception of a single, identified primary school. Thus analysed, the terms of Policy TOU1 relating to Area B are unsurprising.

[48] We elaborate on Policy COM1 as follows. Education land use is, in planning policy terms, embraced by the discrete category of "community [land] uses." This is clearly stated in the "Community Uses" chapter of CAP 2010. As this chapter makes clear, CAP 2010 designated only one area of land for education purposes – specifically the construction of a new primary school. With regard to <u>further</u> education, the three separate campuses of the Upper Bann Institute at Portadown, Lurgan and Banbridge were noted, followed by the statement:

> "It is anticipated that any land requirements for the expansion of these facilities over the planned period can be met on the existing sites."

[49] Policy COM1 did not designate any other land for education or any other community use. Rather, it simply contemplated that community use development proposals within settlement limits could, notwithstanding this lack of specific zoning, be accommodated if they satisfy seven specified criteria. Mr Orbinson placed particular emphasis on the fourth of these:

> "The proposal is not located on zoned industrial land."

However, as Mr McLaughlin emphasised, the seventh of these criteria is of obvious importance:

> "The proposal is in accordance with prevailing regional planning policy and the policies, requirements and guidance contained in the Plan."

This, with the addition of "regional planning policy", is an elaborate restatement of section 6(4) of the Planning Act. In the text which follows it is stated:

> "An unforeseen demand for new community facilities may arise over the lifetime of the Plan. Accordingly, a flexible approach is required in considering such development within settlement limits in order to make the most effective use of existing facilities, infrastructure, utilities and resources …."

This is, of course, subject to section 6(4) of the Planning Act and the seventh of the specified criteria.

[50] At this juncture, it is necessary to address the question of planning policy hierarchy in the specific context of these proceedings. The assessment that Policy TOU1 is the specialised policy in the multi-faceted policy framework is in the court's view clear. It is the tailor-made policy for tourism land uses. (Were it a statute it would attract the appellation lex specialis). That is not to say that the other policies in the mix, including the regional policies, are not relevant. No: they occupy part of the broad planning policy framework and must be construed and evaluated accordingly. But the fundamental consideration is that Policy TOU1 is the dominant planning policy. This assessment in our view gives full effect to section 6(4) of the Planning Act and the associated legal principles outlined in paras [14]–[18] above.

[51] The court considers that the terms of Policy TOU1 are a model of the clear and uncomplicated. Phrases such as "favourable consideration" are readily comprehensible. Equally recognisable are those which import the well-established factor of evaluative planning judgement – "significant detrimental impact … unreasonable or detrimental impact … suitable … adequate … [and] appropriate to its landscape setting." All are familiar, unpretentious members of the English language, to be accorded their ordinary and natural meaning.

[52] The "Favourable consideration will be given to …" clause presents no interpretive challenge or complication. It simply denotes that development proposals which fall within the specified land uses will be subjected to an assessment which, at the outset, has the scales tipped positively for the developer. They have, in sporting terms, a head start. Nothing more and nothing less. In contrast, any proposed development lying outwith the land use descriptions to which "favourable consideration" will be given does not benefit from this advantageous starting point. Mr McLaughlin KC submitted that proposed developments of the latter kind attract an assessment which begins with the scales balanced evenly. The court agrees.

[53] In our judgement both the SPO and the judge in substance conflated the Area A and Area B land uses, simultaneously failing to grapple with the underlying policy rationale for the distinction made. While both correctly recognised that an educational

land use was not explicitly excluded from the Area A policy, they failed to explore the policy reasons why this was so and failed to grapple with the distinctive terms of the two sub-policies. Furthermore, they failed to recognise that there is no express policy positively affirming land uses other than the three specified in the Area A subzone. It is not uncommon for planning policies to recognise the scope for land uses other than those expressly identified. However, the Area A sub-policy does not do so. Both the SPO and the judge failed to recognise the land use limitations pertaining to the TOU1/Area A subzone.

[54] This court considers that, giving effect to the analysis in the immediately preceding paragraphs, the meaning of Policy TOU1 admits of no plausible doubt. The tool of dividing this specially designated tourism zone into two is the most arresting feature of the policy. The language which has been employed in the adoption of this tool is entirely uncomplicated. It gives rise to an irresistible and deliberate distinction between the two subzones of Policy TOU1. The court concludes that Policy TOU1 of CAP 2010, considered in its full context and objectively construed, must be interpreted as meaning that the SRC development proposal was not "in accordance with" its terms.

[55] While linguistic elasticity is one of the hallmarks of the exercise of construing planning policies, there comes a point at which the elastic cannot legitimately and plausibly be stretched any further. While the relevant section of the judgment of Huddleston J is characterised by thought and care, as are the corresponding passages in the SPO's report to the Council, we are unable to agree with their conclusions on this issue, for the reasons given.

[56] Giving effect to the foregoing analysis, and it being common case that in acceding to the recommendation to grant planning permission the Council presumptively accepted all material aspects of the SPO's advice, this court considers that the SPO's assessment and the judge's conclusion that the proposed development is in accordance with Policy TOU1 were based upon a misinterpretation of this policy and are, therefore, erroneous in law. The SPO's report to the Council should have advised that the Proposed Development is not in accordance with Policy TOU1 (and, hence, CAP 2010) and should then have embarked upon an examination of whether, notwithstanding, the development should nonetheless be approved having regard to all material considerations. This exercise was not undertaken. The Council's decision to grant planning permission is legally unsustainable in consequence.

[57] From the foregoing analysis a principle of elevated importance emerges. Section 6(4) of the Planning Act, a provision of primary legislation, dominates every determination made under the Planning Act. Section 6(4) is the ever-present shadow which overhangs the deliberations, analyses and evaluative judgements featuring in the process of making every determination under the Act. It is the ultimate point of reference for every planning determination. All planning policies are subservient to section 6(4) of the Planning Act. This means that formulations in planning policies

such as that found in the last of the seven specified criteria noted above are, strictly, otiose. Notwithstanding, the court would not wish to discourage this practice.

[58] The consequence of the Council's failure to recognise that the proposed development was not in accordance with the LDP was that it failed to apply the correct legal prism. The Council should properly have been advised to take this failure as its starting point. The advice should then have identified and weighed the various planning policy provisions and material considerations both favouring and contraindicating approval, finishing with a recommendation. This approach was mandated by section 6(4) of the Planning Act and para 3.8 of the SPPS. We agree with Mr McLaughlin's submission to this effect. Expressed in slightly different terms the clearly expressed land use policy objective for sub-zone Area A is not furthered by the impugned decision. It is, rather, positively frustrated by it. Any grant of planning permission which does not promote or further a clearly expressed land use policy objective does not accord with the LDP in question.

[59] This conclusion does not mean that, in the reconsideration and new decision-making exercise which will follow upon this judgment it will not be open to the Council to lawfully grant planning permission for the proposed development. The effect of this conclusion is, rather, that any fresh decision to this effect will have to be preceded by the correct legal route.

[60] We would add the following. In the assembled evidence there are several illustrations of deponents expressing their views about the interpretation of Policy TOU1. This is inappropriate in affidavits as it intrudes upon the exclusive domain of the court and infringes the fundamental rule that every affidavit must be confined to averments of fact. In this respect affidavits are to be contrasted with the reports of planning officers and (as here) associated correspondence. We would repeat with some emphasis: the interpretation of any planning policy is a question of law for the court. Thus, we have disregarded the subjective opinions of deponents in our analysis and conclusion.

The PUCO 1989 Issue

[61] When CAP 2010 was adopted in 2004 the relevant measure of use classes legislation was the Planning (Use Classes) Order (Northern Ireland) 1989 (the "1989 Order"). The operation of this discrete statutory regime is explained in Article 3(1):

> "Subject to the provisions of this Order, where a building or other land is used for a purpose of any class specified in the Schedule, the use of that building or that other land for any other purpose of the same class shall not be taken to involve development of the land."

The Schedule contains 15 Classes. One of these, Class 15, is labelled "Non-Residential Institutions" and provides in part:

"Any use (not including a residential use) –

…

(c) For the provision of education,

…

(e) As a museum,

(f) As a public library or reading room …"

Thus, a land use involving the provision of education could be transformed to a museum or a public library without the necessity of securing planning permission.

[62] Class 15 provided the impetus for one discrete aspect of advice to the Council in the SPO's report, in the following terms:

> "The [1989 Order], in the Officer's opinion, …… treated educational and cultural activities as being in at least broadly the same category. While TOU1 does not explicitly reference the [1989 Order] or acknowledge that categorisation in use classes terms, nonetheless in the Officer's opinion the [1989 Order] did form the statutory use classes context for TOU1 and that suggests no inconsistency between TOU1 and educational development being permitted within the zoning. That being so, Officers are of the opinion that **it must be a material consideration in the determination of the application** …."
> [Emphasis added.]

This advice formed part of the SPO's interpretation of the relevant CAP2010 policies and the conclusion made, namely that the SRC planning application was in accordance with these. The court has concluded that this was erroneous in law. Strictly, therefore, this separate PUCO issue does not require to be determined. However, given its importance and since the court has received full argument it is appropriate that it be addressed. The question which arose, forming a discrete component of the first ground, was whether this advice was legally flawed. If "yes", the impugned grant of planning permission would be vitiated on a further, free-standing basis.

[63] While the term "material consideration" ranks as one of the most favoured linguistic formulae in the planning lexicon, tripping off the tongues and flowing freely from the pens and keyboards of planning officers at all levels, it cannot be correct to

describe legislation, ie black letter law, in these terms. Every instrument of legislation establishes legal rules. The 1989 Order is no different.

[64] Furthermore, it is important to bear in mind that CAP 2010, in common with every area plan, was the product of a protracted process spanning a lengthy period involving much debate, deliberation and reception of evidence, all reflected in a detailed report of the expert independent agency, namely the Planning Appeals Commission ("PAC"), to the Council. One of the products of this elaborate process, namely Policy TOU1 CAP 2010, made no mention of PUCO. This consideration per se called for considerable caution on the part of the SPO in formulating advice that (in terms) the PUCO was a legitimate aid to construing Policy TOU1.

[65] However, the analysis does not end there. The SPO, correctly, did not consider Policy TOU1 in isolation. Rather it was weighed in conjunction with a series of other planning policies, including Policy COM1. In the COM1 chapter one finds the following statement:

> "For the purposes of interpreting this policy, Community Uses refers to those uses specified in Use Classes 13 and 15 of [PUCO] …."

The effect of this was to forge a direct nexus between PUCO and Policy TOU1 which, in the specific context of Area B, specifies five land uses one of which is "community." In its 2004 incarnation Class D1 of PUCO, entitled "Community, Recreation and Culture", gathered together eight specific land uses, including use "for the provision of education."

[66] This simple analysis demonstrates that the "PUCO" approach of the SPO was based on a correct interpretation of the two policies under scrutiny, namely COM1 and TOU1 in this specific respect. While the author's injection of "cultural" into her reasoning is questionable, this did not undermine the correctness of her analysis. Furthermore, having regard to the Mansell principle, the correctness of the SPO's advice on this issue is not contaminated by her description of PUCO as a "material consideration." Taking into account also the audience to whom her report was directed, the court is satisfied that the thrust of her advice to the councillors was both clear and correct. It would be preferable not to classify instruments of legislation as "material considerations" in future reports.

Second Ground of Appeal: Incompatibility with Policy COM1 and Policy SETT1

[67] Each of the above-entitled policies within CAP 2010 contains a provision to the effect that applications for planning permission must satisfy specified criteria. Within each a list follows and, common to each, is the following criterion:

> "The proposal is in accordance with prevailing regional planning policy and the policies, requirements and guidance contained in the Plan."

Given the court's conclusion in respect of the first ground of appeal, namely that the proposed development is not in accordance with Policy TOU1 of CAP 2010, it follows that this second ground of appeal must succeed without more.

[68] We would add that, as appears from paras [44] – [45] of his judgment, the judge did not approach this ground in this way. As a result of the extensive case management which this court found necessary to apply to this appeal there are indications that certain aspects of the appellant's case may not have had the refinement and clarity which have been brought to bear at this stage.

Third Ground of Appeal: No Sequential Site Assessment

[69] This is another planning policy ground of challenge. It is based on the Strategic Planning Policy Statement for Northern Ireland ("SPPS"), published in September 2015. The cornerstone of this ground of appeal is paragraphs 6.280 and 6.281 of the SSPS. Paragraph 6.280 states:

> "A sequential test should be applied to planning applications for main town centre uses that are not in an existing centre and are **not in accordance with an up to date LDP.** While it is established that an alternative sequentially preferable site or sites exist within the proposals whole catchment, an application which proposes development on a less sequentially preferred site should be refused."
> [key words highlighted]

By paragraph 6.281:

> "Planning authorities will require applications for main town centre uses to be considered in the following order of preference (and consider all of the proposals catchment):
>
> - Primary retail core;
> - Town centres;
> - Edge of centre; and
> - Out of centre locations, only where sites are accessible by a choice of good public transport mode."

By paragraph 6.282:

> "In the absence of a current and up to date LDP, councils should require applicants to prepare an assessment of need which is proportionate to support their application. This may incorporate a quantitative and qualitative assessment of need ……. "

[70] By this ground the appellant contends that the impugned decision is vitiated in law as it was based on inter alia an erroneous interpretation of paragraph 6.280 of SPPS, the effect whereof was that the Council was wrongly advised by the SPO that planning permission could be granted in the absence of a so-called "sequential site assessment." The thrust of this ground of appeal is that at the time when the impugned decision was made CAP 2010 was not "up to date", with the result that planning permission for the offending development could not be granted in the absence of a sequential site assessment and due consideration thereof by the Council.

[71] In her report to the Council the SPO recognised that the first of these two qualifying conditions – namely the proposal was not in an existing centre – was satisfied. This much is common case. Turning to the second qualifying condition, the author expressed the view that the proposed development was LDP compliant and that the relevant sections of the LDP remained up to date. Thus, (it was reasoned) the requirement of applying the sequential test did not arise.

[72] The appellant's case rests on two pillars. The first is the advent of the Craigavon Town Centre Boundaries and Retail Designations Plan 2010 (the "TCP"), which was formally promulgated by the Department in June 2008, post-dating the formal adoption of CAP 2010 by some six years. The second is the following passage in Policy COM1 (considered above):

> "Further education facilities in the Borough are provided by the Upper Bann Institute of Further and Higher Education at campuses in Portadown and Lurgan, as well as in Banbridge. **It is anticipated that any land requirements for the expansion of these facilities over the plan period can be met on the existing sites.**"
> [Our emphasis]

A later passage must be reproduced:

> "An unforeseen demand for new community facilities may arise over the lifetime of the Plan. Accordingly, a flexible approach is required in considering such development within settlement limits in order to make the more effective

> use of existing facilities, infrastructure, utilities and resources."

The argument developed is that the fact of the SRC later planning application, in August 2017, demonstrates that CAP 2010 had become "out of date" as the foregoing expectation had not been fulfilled.

The Town Centres Plan

[73] The Town Centres Plan ("TCP") was adopted four years following adoption of CAP 2010 and two years before the latter was technically scheduled to expire. The advent of the TCP is explained by the fact that CAP 2010 did not prescribe any town centre boundaries or related retail designations. The later TCP filled this lacuna. It is described as "additional to" CAP 2010. Its scope is the three town centres of Central Craigavon, Lurgan and Portadown. Its text makes clear that it co-exists with, inter alia, the RDS, Planning Policy Statements and supplementary planning guidance documents.

[74] The "Plan Aim and Objectives" are framed in these terms:

> "The overall aim of the Plan is to provide a planning framework which facilitates high quality and sustainable **commercial growth and other related uses,** resulting in the creation of healthy, balanced and vibrant town centres for Central Craigavon, Lurgan and Portadown."

In this passage and those which follow there is a notable emphasis on commercial growth/development.

[75] As already noted the site of the impugned development does not lie within any of the town centres designated in CAP 2010 or the Town Centres Plan. The question which this throws up is: what are the consequences of this in planning policy terms? As noted above, the SPPS contains a section devoted to town centres and retailing. The first few paragraphs of this discrete chapter do not mention educational land use. However, it must be recognised that they are framed in open-textured, non-prescriptive terms. They are followed by a series of "Regional Strategic Objectives" for town centres and retailing. While the same analysis applies to parts of these paragraphs, "Community Facilities" (which, as noted above, include education), are specifically mentioned, in para 6.271. By this route, therefore, one arrives at the conclusion that the impugned development is, in planning policy terms, considered to be a "main town centre use."

[76] Mr McLaughlin's core submission on this issue is formulated in the following terms: The CAP is out of date for the purposes of SPPS para 6.280 because it does not contain any town centre boundary designations and therefore cannot provide the policy framework for application of its mandatory provisions. … the problem derives

from an omission within the CAP, rather than a positive policy provision. The CAP therefore does not provide the policy framework which is essential to apply the 'town centre first' approach required by the SPPS. It cannot therefore be an up to date plan for the purposes of para 6.280.

[77] The main submissions of Mr Orbinson and Mr Beattie are, first, that the effect of the TCP (and, they add, the retail designations plan) was to create a LDP "package." Second, they submitted that the SPPS should be viewed as supplementary to this "package." Third, emphasis is placed on the express recognition in CAP 2010 that there could be unforeseen demand for new community (including education) facilities. Fourth, counsel advocated acceptance of the SPO's assessment.

Interpretation

[78] "Out of date" is a quintessentially uncomplicated phrase. In its specific context, it simply denotes *no longer fit for purpose by reason of vintage*. The interpretation of this phrase is uncontroversial.

Application

[79] In contrast, the court is mindful that the application of "out of date" and its sister policy formulation "current and up to date" may sometimes present certain challenges. These phrases lack definition and are unaccompanied by criteria. Some guidance is appropriate. In the abstract, a LDP might not be considered up to date if, for example, there had been substantial exhaustion of its zonings between the date of adoption and the later date under scrutiny, giving rise to possible unmet public needs of (for example) a social, economic or cultural nature. This is one abstract possibility. Another is that certain of an LDP's policies have been lawfully revised or substituted. Or an unexpected economic boom could affect the currency of LDP policies relating to, for example, industrial, housing or transport land uses. An assessment that a LDP has in its entirety become out of date would, in principle, seem unlikely. An altogether more likely scenario is that certain discrete LDP policies might warrant this assessment.

[80] As the immediately foregoing reflections indicate, the fact of the advent of the expiry date of any given LDP does not, as a matter of law, warrant an "out of date" assessment. While the materiality of this fact is undeniable, this will not per se warrant such an assessment. An altogether more subtle analysis is required.

[81] The court was referred to the decision of the English Court of Appeal in *Peel Investment v Secretary of State for Housing, Communities and Local Government* [2021] PTSR 298. There one of the issues determined was the interpretation of the term "out of date" in para [11](d) of the English National Planning Policy Framework. On the one hand, the court purported to determine this issue on the basis that it was a matter of "pure planning judgement, not dependent on issues of legal interpretation": see para [71]. One of the clearest messages ringing out from *Tesco Stores v Dundee* is that

the touchstone for the meaning of planning policies as interpreted from time to time by planning authorities is not irrationality: see para [18] and what follows:

> "On the contrary ….. in this area of public administration as in others ….. policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context."

However, on the other hand, consistent with this unambiguous statement of principle, it is stated in the next succeeding para – [19] – that the standard of irrationality does apply to matters lying within the domain of the application of planning policies in any given context, the rationale being that this exercise requires evaluative judgement. This analysis we consider unassailable.

[82] In determining this ground of appeal it is necessary to adopt the correct starting point in the calendar. This means applying the "*out of date*" test to the date when the impugned planning decision was made ie 18 January 2019. We consider the correct analysis to be that in June 2008 the promulgation of the TCP filled a gap in CAP 2010. It merged with and became part of CAP 2010, supplying an additional plan policy which the latter, ideally, should have contained but did not for the simple reason that the Department considered that quite extensive further work on this discrete subject had to be undertaken in light of the criticisms in the PAC report following the public inquiry. This gave rise to the promulgation of an incomplete CAP 2010 which was followed by an act of completion some four years later. Thus, the TCP gave rise to an updated CAP 2010. We consider that it had the opposite effect of that for which the appellant contends. The omission advanced on behalf of the appellant belonged to the distant past. Furthermore – addressing another discrete element of Mr McLaughlin's submission - there was no barrier to the SPPS, specifically its espousal of the 'town centres first' policy, being properly reckoned in the decision making process, as the SPO's report demonstrates.

[83] The second element of this ground of appeal requires the court to interpret the provisions of policy COM1 reproduced in para [72] above. This exercise is to be undertaken in accordance with the principles rehearsed in paras [14]–[18] of this judgment. It is in our view a straightforward one. The relevant passages in Policy COM1 gave expression to a mere expectation, a prediction of sorts. This, in common with many expectations and predictions in the real world, was not scientifically calculated and did not have the benefit of a looking glass. Expectation and event not infrequently fail to merge. Furthermore, this truism was expressly recognised in the text of Policy COM1.

[84] The court recognises that the fact of the SRC planning application, coupled with the reasons and justification on which it was based (fully recognised by the trial judge), pointed towards non-fulfilment of the policy expectation, subject of course to examination, analysis and evaluation by the Council's planning officials and, ultimately its Planning Committee. For the purpose of determining this discrete issue

the court will, in the Appellant's favour, assume that the Planning Committee formed the view that the expectation expressed in Policy COM1 had not been fulfilled in the event.

[85] The policy expectation is crafted in open-textured language. Furthermore, it is subject to the qualifying text highlighted in para [72] above. It must also be considered in tandem with the statutory framework and broader policy framework outlined in this judgment. The effect of these, as the court has explained in para [59] above, was – and remains – that a legally sustainable grant of planning permission for the development proposed by the SRC planning application is possible. The vintage of CAP 2010 does not undermine this analysis in any way. It follows that the second of the building blocks in this ground of appeal evaporates.

[86] We are satisfied that the factors expressly identified in the SPO's report namely (a) the relevant CAP 2010 policies had not been repealed or superseded and (b) they had not been rendered outdated by any relevant "on the ground" event cannot be characterised immaterial or alien to the specific issue which the officer was addressing or the decision to be made by the Council's Planning Committee. We consider that these were plainly proper considerations to be weighed. Second, had the officer conducted the more elaborate exercise which the court has undertaken her assessment of this issue would have been fortified. In short, the appellant's case falls measurably short of attaining the threshold posed by the notoriously elevated standard of *Wednesbury* irrationality.

[87] In substance, the submissions of Mr Orbinson KC and Mr Beattie KC rehearsed in para [77] prevail. For the reasons given, this ground of appeal fails.

[88] Finally, SRC, as a precaution, provided the Council with a SSA. The significance of this is that if this court had concluded that a SSA was required, the legality of this instrument would have had to be determined. The two main criticisms developed by Mr McLaughlin KC were that the consultants' approach to the catchment issue was untenable and their analysis of the other sites was inadequate. The *Wednesbury* principle provides the appropriate standard of review for this alternative ground of challenge: *Warners Retail v Cotswold DC & ors* [2016] EWCA Civ 606 at para [39]. In a cogent submission Mr Orbinson KC demonstrated the frailties in this aspect of the appellant's case. Had this issue required judicial determination the demanding *Wednesbury* threshold would not have been overcome, by some measure.

Fourth Ground of Appeal: Habitats Regulations and Policy NH2

[89] In its lengthy interaction with the parties during the case management phase, the court ultimately identified the contours of this ground of appeal to be the following. It has both statutory and policy dimensions. As set out in para [4](iv) above, the question for the court is whether the impugned decision is vitiated in law being in contravention of (a) regulation 3(3) of the Habitats Regulations and/or (b)

Policy NH2 of PPS2. The appellant's case (in written argument) is that the impugned decision involves breaches of both measures "… by reason of insufficient enquiry to ascertain the possible presence of otters on the development site and/or the possibility of adverse effects upon otters."

[90] The specific legal rule on which this ground of challenge is based is pleaded is regulation 3(3) of the Conservation (Natural Habitats etc) (NI) Regulations 1995 (as inserted by regulation 4 Conservation (Natural Habitats etc) (Amendment) Regulations (NI) 2012 (the "Habitats Regulations"). It is necessary to begin with Regulation 3(1):

> "(1) A Northern Ireland Department … in the exercise of their functions relative to nature conservation … shall secure compliance with the requirements of the Directives
>
> (2) Paragraph (1) applies, in particular but not exclusively, to functions under the following enactments ……. The Planning (NI) Act 2011
>
> (3) Without prejudice to paragraphs (1) and (2), a competent authority in the exercise of functions generally, shall have regard to the requirements of the Directives. "

The Respondent District Council is a "competent authority" for the purposes of regulation 3(3) (per regulation 5 of the 1995 Regulations). Otters are one of the European protected species listed in Schedule 2. The most draconian form of protection is contained in regulation 34 whereby it is an offence to inter alia:

> "… deliberately to disturb such an animal while it is occupying a structure or place which it uses for shelter or protection."

In passing, regulation 3(1) is mirrored in its English counterpart, regulation 9(1) of The Conservation of Habitats and Species Regulations 2017. The court received no argument on whether the duty in regulation 3(3) is less onerous than that in regulation 3(1): a potentially interesting issue.

[91] There is an evident nexus between regulation 34 and what is one of the more important provisions of the Habitats Directive (Council Directive 92/43/EEC), namely Article 12:

> "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 …
>
> (b) Deliberate disturbance of these species …"

More generally, the overarching aim of the Directive is ascertainable from the following recital:

> "Whereas the main aim of this Directive being to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements ….
>
> Whereas, in view of the threats to certain types of natural habitat and certain species, it is necessary to define them as having priority in order to favour the early implementation of measures to conserve them …"

More specifically:

> "Whereas land – use planning and development policies should encourage the management of features of the landscape which are of major importance for wild fauna and flora …
>
> Whereas a system should be set up for surveillance of the conservation status of the natural habitats and species covered by this Directive …"

[92] The first of the recitals reproduced immediately above is reflected in Article 2 of the Directive:

> "1. The aim of this Directive shall be to contribute towards ensuring biodiversity through the conservation of natural habits and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.
>
> 2. Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.
>
> 3. Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics."

We draw attention to Article 6(3) for the purpose of making clear that this did <u>not</u> apply to the determination of the SRC planning application:

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

This is reflected in Regulation 43(1) of the Habitats Regulations.

[93] In *National Trust's Application* [2013] NIQB 60 Weatherup J neatly summarized the legal requirements at [41]:

> "[41] In relation to habitats the Directive finds its domestic form in the Conservation (Natural Habitats) Regulations (Northern Ireland) 1995. The scheme provides for protected sites by designating Special Areas of Conservation, in the present case the North Antrim Special Area of Conservation and the draft Skerries and the Causeway Coast Special Area of Conservation. A determination has to be made as to whether or not the proposed development is likely to have significant effect on the Special Area of Conservation. For this purpose an 'appropriate assessment' of the implications of the proposal has to be undertaken and the developer provides such information as the Department reasonably requires. No planning permission can be granted unless the development will not adversely affect the Special Area of Conservation. The habitats scheme therefore differs in structure from the environmental impact assessment scheme."

He continued, at [42]:

> "[42] Further the habitats Regulations provide for protected species. There are European Protected Species of animals, such as bats and otters, and strict protection of the protected animals. Similarly, there are European Protected Species of plants, again subject

> to strict protection. The Department must have regard to the Directive in relation to the grant of planning permission."

And at [58]:

> "[58] Similarly in relation to habitats, it is for the developer to provide the information reasonably required by the Department. The Department will decide if sufficient information has been provided by the developer. The Department may have other relevant information. The Department will make an appropriate assessment of likely significant effect of the development. In each instance the Department's conclusion is subject to the Wednesbury rule."

Paras [42] and [58] are of particular significance to this ground of appeal. In *Re Sands' Application* [2018] NIQB 80 the court, having reproduced the above passages, added at para [43]:

> "It is perhaps otiose to add that, agreeing with Weatherup J, I consider it clear that the Wednesbury principle provides the appropriate standard of review for this ground of challenge mainly because of the clearly identifiable factor of evaluative judgement and assessment. In the context of statutory measures of this kind, which have their genesis in EU law, the Wednesbury principle is the domestic law equivalent of the EU law standard of manifest error of assessment."

[94] In *R (Morge) v Hampshire CC* [2011] UKSC 2 the Supreme Court, by a majority, construed Art 12(1)(b) of the Directive (para [91] supra) as follows (per Lord Brown):

> "In my judgment certain broad considerations must clearly govern the approach to article 12(1)(b). First, that it is an article affording protection specifically to species and not to habitats, although obviously, as here, disturbance of habitats can also indirectly impact on species. Secondly, and perhaps more importantly, the prohibition encompassed in article 12(1)(b), in contrast to that in article 12(1)(a), relates to the protection of "species", not the protection of "specimens of these species." Thirdly, **whilst it is true that the word "significant" is omitted from article 12(1)(b)** – in contrast to article 6(2) and, indeed, article 12(4) which envisages accidental capture and killing having "a significant negative impact on the protected

> species" **– that cannot preclude an assessment of the nature and extent of the negative impact of the activity in question upon the species and, ultimately, a judgment as to whether that is sufficient to constitute a "disturbance" of the species.** Fourthly, it is implicit in article 12(1)(b) that activity during the period of breeding, rearing, hibernation and migration is more likely to have a sufficient negative impact on the species to constitute prohibited "disturbance" than activity at other times."

The passage of most significance in the context of this appeal is highlighted.

[95] This protective legal regime is accompanied by another layer of non-statutory protection in the form of planning policy. First, it is stated in Policy NH2 of Planning Policy Statement 2:

> "Planning permission will only be granted for a development proposal that is not likely to harm a European protected species."

The second element of planning policy bearing on the subject of habitats protection is contained in the following paragraphs of SPPS:

> "6.180 Planning permission will only be granted for a development proposal that is not likely to harm a European protected species.
>
> In exceptional circumstances a development proposal that is likely to harm these species may only be permitted where: • there are no alternative solutions; and • it is required for imperative reasons of overriding public interest; and • there is no detriment to the maintenance of the population of the species at a favourable conservation status; and • compensatory measures are agreed and fully secured.
>
> 6.181 Planning permission will only be granted for a development proposal that is not likely to harm any other statutorily protected species (including National Protected Species) [Insert footnote: Listed under the Wildlife Order under Schedules (1), (5) & (8) and which can be adequately mitigated or compensated against.
>
> 6.182 Development proposals are required to be sensitive to all protected species, and sited and designed to protect them, their habitats and prevent deterioration and

destruction of their breeding sites or resting places. Seasonal factors will also be taken into account."

[96] In excavating this ground of appeal it is necessary to rehearse the following sequence of events:

26.12.13	Centre for Environmental Data and Recording (CEDaR) records otter sighting in the lake immediately adjacent to the SRC site.
29.09. 15	Extended Phase 1 Habitat Survey to identify broad scale habitats and to identify any protected species evidence and usage on SRC site was undertaken (this was to inform and complete the Phase 1 Habitat Report).
Oct 2015	Phase 1 Habitats Survey conducted (per SRC Otter Report 4th February 2016).
04.02.16	One-day site visit to conduct **otter survey of SRC site** undertaken by WYG: no evidence of otter.
25.11.16	A one-day site visit of Leisure Centre site undertaken by WYG to conduct an otter survey for the Leisure Centre Application. This identifies potential evidence of otter beyond the boundary of the Leisure Centre site, on the SRC side.
12.12.16	WYG Otter Report for the Leisure Centre application, written by Ashleen Higgins of WYG (based on Field Survey of 25th November 2016).
30.01.18	Site visit to SRC site undertaken by DAERA (NED).
23.02.18	One-day site-visit undertaken by WYG to conduct pre-construction otter survey of **Leisure Centre site**. This identifies otter spraint 40m outside the Leisure Centre site, between the Leisure Centre site and the SRC site, but not within the SRC site, and bankside disturbance on the edge of the SRC site (albeit the report confirms: "no otter prints were identified either at or near this area during either survey and it is suspected to be used by dogs and was heavily contaminated with discarded litter.")
27.02.18	NIEA (NED) consultation response to the planning application and environmental statement indicates that the developer had agreed to carry out further investigations of a mammal hole on the SRC site. NED also requested further information, including a bat survey and a tree climb inspection.

15.5.18-11.6.18: Camera Trap survey of a mammal hole **on the SRC site** undertaken by WYG. No evidence of otter or any other protected mammal species using the mammal hole was found.

22.06.18 Council's request for FEI.

June 2018 Version 3 of the Extended Phase 1 Habitats Report prepared by the SRC consultants (WYG).

9 July 2018 The consultants' FEI response (including "Version 3 (etc)" noted above).

16 July 2018 The Council invited a consultation response from SES and NIEA regarding the FEI.

20 July 2018 NIEA response: "Natural Heritage and Conservation Areas .. NED has no concerns with this proposal subject to recommended conditions." The response was silent on the 'Extended Phase 1 Habitats Report, Version 3'.

2 Oct 2018 SES consultation response: no engagement with "Version 3 (etc)"

[97] The most important fact in this discrete matrix is that in June 2018 the SRC consultants stated unequivocally – thrice – in their 'Extended Phase 1 Habitats Report (Version 3)' that otters could be present on the site and recommended a full otter survey. They did so in the following terms:

> "**Protected and notable species … Otters**
>
> Proximity of the site to Craigavon Lake South and the small river in the south west of the site, both of which provide suitable habitat for otter, indicate that otters may be potentially present on site. **A full otter survey is recommended**. An otter survey can be carried out at any time of the year, however it must follow three days with no rain fall …
>
> [Conclusions …. Otters]
>
> **Full otter survey to NIEA Survey Guidelines** to determine presence or absence on the site."
>
> [emphasis added]

This must be at once juxtaposed with the relevant passage in the SPO's report:

> "Otters are a European Protected Species. An otter survey was conducted for evidence of holts or other otter activity on the site. No evidence of otter activity was recorded on site. Therefore, otters are not currently considered to be present on the site and no significant effects to [sic] otters is possible."

The contrast is stark.

[98] The main submissions of Mr Orbinson KC and Mr Beattie KC relied heavily on the Council's affidavit evidence, particularly the second affidavit of the Council's Planning Manager. This contains the following salient averments:

> "[The council] is not legally obliged to undertake its own otter survey at the SRC application site … that onus rests squarely upon planning applicants ….
>
> A number of surveys were undertaken in respect of the SRC application site (and latterly the LC application site) all of which have confirmed that there are no otters or evidence of the presence of otters on the SRC application site ….
>
> DAERA (NED) concluded on 20 July 2018 …. 'We are content that this mammal hole is not used by a protected species' ….
>
> Furthermore, DAERA (NED) raised no issue regarding otters on the SRC application site in its final consultation response dated 03 December 2018 ….
>
> [The Council] …. was entitled and obliged to give the views of DAERA (NED) great weight and any departure from those views would have required cogent and compelling evidence and reasons ….
>
> Dr O'Neill [the appellant's expert] has provided absolutely no evidence to counter the aforementioned survey findings of no otters and in fact no evidence of the presence of otters on the SRC application site …. "

The deponent also addresses the "Full Otter Survey" factual issue in these terms:

> "A full otter survey was conducted by ecologists acting for SRC in February 2016, with no evidence of otters or evidence of the presence of otters on the SRC application

> site being found. However, … a separate survey for the LC application did identify what was at first considered to be evidence of a feeding station on the SRC site by the lake shore. ... this was later discounted in the subsequent updated otter survey dated 23 February 2018."

[99] At this point it is appropriate to examine the "drafting errors", or "erroneous inclusion" (the court's paraphrase), issue. The affidavit evidence includes an affidavit sworn by one Michael Graham, a director of the SRC Consultants, WYG. This contains the following averments bearing on this issue:

> "It is noted that the Extended Phase 1 Habitat Survey Report submitted as part of the ES refers to a requirement for a full otter survey. **However, this text was included in error in the final submitted report, having been left over from an earlier draft of the report in question.** The recommendation for a full otter survey was acted upon and was carried out for the Application site by WYG on 4th February 2016, which found no evidence of use of the Application site by otters. An 'Otter Survey Report' was subsequently produced detailing these findings and which formed part of the ES that accompanied the planning application (appendix 8.6 of the ES). As a result of this, the Extended Phase 1 Habitat Survey Report should have been updated to reflect the fact that a full 'Otter Survey Report' had been completed."
> [Emphasis added]

Next the deponent refers to the consultants' report of June 2018 following the camera trap survey of a mammal hole. The immediately succeeding averment deals with the NED consultation contribution dated 20 July 2018.

[100] Mr Graham's affidavit does not engage with the consultants' Extended Phase 1 Habitats Report (Version 3). This receives only the briefest of mentions in his first affidavit in averments confined to correcting a mis-description of this report in one of the appellant's affidavits. The contents of this report are simply ignored. This observation applies also to <u>both</u> affidavits sworn by the Council's Planning Manager.

[101] There are three particular features of the affidavit evidence of the Planning Manager. First, while the documentary exhibits to the two affidavits were voluminous, exceeding 2,000 pages, these did not include the Extended Phase 1 Habitat Report. Second, there is no averment that this report was provided by the Council to NED, or any other statutory consultee. Third, there is neither an averment nor an exhibit relating to any response by NED, or any other statutory consultee, to this report. Fourth, the "erroneous inclusion" suggestion having surfaced in the consultant's affidavit, the Planning Manager did not swear a further affidavit setting

out the facts bearing on this issue from the Council's perspective. In summary, there is a litany of striking omissions, none of them rectified by the strenuous efforts of the Council's legal team.

[102] There is another noteworthy feature of the Council's affidavit evidence. One of its affidavits was sworn by the Senior Environmental Planning Officer of Shared Environment Service ("SES") a public authority which advises all Northern Ireland local councils on (in brief) the assessment requirements of the Habitats Directive. SES is one of the expert consultees with which the Council interacted in its consideration of the SRC Planning Application. The deponent describes this consultation process, which began in January 2018. He avers that SES was satisfied that the SRC "Shadow Habitats Regulations Assessment" provided by its consultants in November 2018 was compliant with the relevant assessment requirements. It advised the Council accordingly. There is no mention in this affidavit of the Extended Phase 1 Habitat Report of June 2018. This notwithstanding that there is a tailored section of this affidavit responding directly to the appellant's expert witness (Dr O'Neill) who, in his affidavit, had developed an extensive critique of how the otters issue had been handled throughout the assessment and determination exercise conducted by the Council.

[103] Pausing, the "story" of the 'Extended Phase 1 Habitats Report (Version 3) effectively concluded at the time when it was compiled, ie June 2018. The material content reproduced in para [97] above features nowhere in any of the materials generated subsequently, including the SPO's report which contains merely an anodyne recitation of environmental materials provided on behalf of SRC. Nor was this crucial report addressed by any of the statutory consultees: this in a context where it formed a self – evidently important part of the ES, as augmented, and was created in order to facilitate the discharge of the Council's statutory and policy duties.

[104] As regards the "drafting errors/erroneous inclusion" suggestion, a multiplicity of pertinent questions arises. How did two highly qualified experts make such a fundamental error? Why has neither of them sworn an affidavit explaining precisely how this suggested error came about? Why is the affidavit of Mr Graham silent on the details of the error? Why is this issue – not less than critical in nature – not addressed in the Council's affidavit evidence? Why was the interested party's senior counsel left to attempt to provide the court, in oral submissions, with his personal explanation and rationalisation of these issues? Furthermore, how did the expert statutory consultees come to formulate their 'clean bill of health' final consultation responses in the teeth of, and without engaging with, the 'Extended Phase 1 Habitats Report (Version 3) '?

[105] The court, while inevitably concerned about all of the foregoing, will not of course engage in speculation. Highlighting what is not contained in the evidence assembled is, nonetheless, an integral part of the judicial function. Having rehearsed exhaustively above the dates and events belonging to this discrete chronology, the court draws attention to the following indelible facts:

(i) In June 2018 the SRC consultants advised that a "full otter survey to NIEA Survey Guidelines" be carried out "to determine presence or absence on the site." This advice was stated in three different parts of their report.

(ii) This advice was not withdrawn or amended subsequently.

(iii) Subsequent consultation responses from, in particular, NED and SES did not engage with this advice.

(iv) The SPO's report to the Council's Planning Committee did not mention this advice, much less analyse it.

(v) The SPO's advice to the Planning Committee that "… otters are not currently considered to be present on the site and no significant effects to otters is possible" is irreconcilable with this advice.

(vi) It is highly probable that in this advice the SPO was referring to the consultants' February 2016 Otter Survey Report which, at the time of compiling the SPO's report, was of almost three years vintage. This fact was not brought to the attention of the councillors. The description of "currently" was unsustainable on the basis of this fact alone. Its reliability, by reason of its vintage, was further undermined by the NIEA Otter Surveys Guidelines.

(vii) The "erroneous inclusion" suggestion, emanating from the developer's consultants, first emerged in the course of these proceedings.

[106] The main submission of Mr Orbinson and Mr Beattie is formulated thus: What matters is the quality of the information that the respondent had before it when making the impugned decision and the respondent submits that its approach to the issue of otters is legally sound. Regardless of any drafting error debate, the respondent did in fact have full [sic] otter survey before it and required (through the condition) a post-consent pre-commencement survey.

[107] The "Full Otter Survey" to which this submission refers relates to an event on 04 February 2016 which is described in the agreed chronology – para [5] supra in the following terms:

> "04/02/16 – one day survey visit to conduct otter survey of SRC site undertaken by WYG. This finds no evidence of otter."

This bare statement is factually correct, as the WYG report of February 2016 confirms. However, there are at least two material qualifications to be added to this discrete

equation. First, on the date when the planning application was submitted almost two years had elapsed and the date of the impugned grant of planning permission postdates this report by just under three years. Second, this otter survey could not have been compliant with the NIEA "Otter Surveys – NIEA Specific Requirements" as these post-dated it. Furthermore, these requirements, being dated 17 February 2017, were in vogue at the time when the planning application was made. Indeed, it cannot be considered compliant with either these guidelines or their 2014 predecessor by reason of its vintage alone. Notably, these issues are not addressed either in the affidavits of Mr Gillespie or the affidavit of Mr Graham.

[108] The next significant fact in this discrete equation is the following. In the course of these proceedings Mr Graham has provided an ex post facto explanation, and purported correction, of the three passages in the June 2018 report. None of this was within the knowledge of the SPO compiling the report to the Council's planning committee. The councillors in consequence had no opportunity to critically evaluate it or to formulate appropriate questions at their public and private meetings at the decision-making stage. Furthermore, this formed no part of the PAP response.

[109] By the somewhat protracted route charted above one returns to the starting point, namely the information and advice tendered to the Council's Planning Committee by the SPO, reproduced in para [97] above. In short, in the space of four lines, the decision makers were informed that there had been one otter survey on the subject site which yielded no evidence of otter activity. As the history detailed above demonstrates, this narrative was both incomplete and inaccurate. Summarising, the advice and information provided to the decision makers was incompatible with the facts in the following several respects: the site had been surveyed for otters on three dates; potential otter presence had been noted as long ago as November 2016; there had been material surveys in close proximity to the site boundaries (in the context of the leisure centre planning application); more recent site investigations had been considered appropriate, with certain results; most recently the consultants engaged by SRC had (a) advised of the potential presence of otters on the site and (b) recommended a full otter survey; and no such survey had been undertaken.

[110] The duty on the SPO was to accurately and fully convey all material information to the Planning Committee members. The report failed to do so for the reasons explained. This was no triviality. It was, rather, an error of substance. This court does not discount the possibility that an error in a planning officer's report might be redeemed on the basis that, viewed panoramically, it was peripheral, trivial or immaterial. For the reasons which will be readily apparent from the preceding paragraphs we consider this assessment plainly inappropriate. The court is not disposed to sweep aside solemn statutory and policy requirements in this way.

[111] Nor can refuge be found in planning condition No. 13. The court accepts the submission of Mr Beattie that, properly assessed, the evidence establishes that this condition will require the developer to carry out some kind of inspection or assessment, designed to establish whether there are otters on the site, before

construction works commence. However, this cannot redeem a legally flawed grant of planning permission. Nor can it result in revocation of the permission granted. The horse will already have bolted. All planning conditions are based on the premise that the relevant development will be fully constructed. Accordingly, the protection which this condition might provide in the future cannot be compared with the protections inherent in a lawful planning determination.

[112] The court would add the following. The purpose of a lawful planning determination is to decide whether the proposed development should take place at all. It is self-evident that a legally flawed grant of planning permission cannot be rescued by a planning condition. As Mr McLaughlin submitted, a planned mitigation measure cannot cure the failure, identified above, to conduct the necessary pre-decision assessment in the requisite way. This was stated emphatically in *National Trust* by Weatherup J at para [57]:

> "… the Department cannot postpone the decision on likely significant effects or on whether mitigation measures will mean that there is no likely significant effect. If a conclusion on likely significant effects requires a survey, then the survey must be done. Nor can the Department impose conditions instead of making the assessment. Fifthly, there must be sufficient information for the Department to decide on the likely significant effects and mitigation. It is for the Department to decide if there is sufficient information and the Department may require further information from a planning applicant, with the required publicity for such further information, and may obtain additional information from consultees or from members of the general public."

[113] Given the contours of this challenge, the public law duties, well established, governing the decision making of the Planning Committee were to take into account all material facts and considerations, to disregard the immaterial and to avoid material error of fact. Summarising, this translated to a duty to consider all material and factually accurate information bearing on the issue of possible detrimental impact on otters in the event of the proposed development proceeding. The conclusion that this duty was not performed is irresistible. In the same way the aforementioned planning policy provisions and regulation 3(1) and (4) of the Habitats Regulations were infringed. While we recognise that the judge reached a different conclusion and acknowledge the care with which he did so, he failed to apply the appropriate public law prism, adopting instead the incorrect standard of what was "proper and proportionate" and, further, fell into error regarding planning condition No.13.

[114] The preceding analysis demonstrates the dangers of disproportionate reliance on presumptively expert consultees. These agencies are human. They are capable of

error and oversight. Statements such as that of Lord Brown in *Morge* at para [30] must not be read too literally. He said:

> "Where, as here, Natural England express themselves satisfied that a proposed development will be compliant with article 12, the planning authority are to my mind entitled to presume that that is so. The Planning Committee here plainly had regard to the requirements of the Directive: they knew from the Officers' Decision Report and Addendum Report … not only that Natural England had withdrawn their objection to the scheme but also that necessary measures had been planned to compensate for the loss of foraging."

Lord Brown was careful to link his statement of principle to the specific litigation context. Furthermore, he used the language of presumption. In law every presumption is rebuttable. Such statements do not absolve planning officials and committees alike from their duty to carefully evaluate the evidence assembled. Planning officials in particular must critically evaluate and interrogate the evidence, mindful of the differences between their role and that of the decision-making committee. Nothing else will suffice to ensure the discharge of the indelible public law duties outlined in the immediately preceding paragraph.

[115] It follows from the foregoing that this ground of appeal succeeds.

Fifth Ground of Appeal: EIA Regulations Compliance

[116] The applicable legal framework is as follows. Regulation 4 of the EIA Regulations applies to every application for planning permission for "EIA development" as defined. By regulation 4(2) the Council:

> "… shall not grant planning permission … unless they have first taken the environmental information into consideration and they shall state in their decision that they have done so."

Where regulation 4(1) applies the developer must provide an environmental statement ("ES") compliant with schedule 4 to the Regulations. This must have the contents specified. That aspect of the prescribed contents which is relevant in the present case is:

> "An outline of the main alternatives studied by the applicant …. and an indication of the main reasons for his choice, taking into account the environmental effects."
>
> (Per Schedule 4, Part 1, paragraph 2.)

[117] The appellant's formulation of this ground is in these terms:

> "The contents of the [ES] relating to alternative sites was …. inadequate … and [in contravention of] regulation 4 and Schedule 4, Part 1(2) … in particular the information on the main reasons for their choice **taking into account the environmental effects**."

The ground addressed by the judge was framed by him in these terms:

> "Failure to properly consider alternative sites with reference to environmental effects."

[118] Section 3 of the ES provided by the developer purported to comply with this requirement. According to the narrative, SRC began a "site identification and options appraisal exercise" in October 2014 liaising with CBC, SIB and SELB. In this way 60 sites were identified. This was reduced to a shortlist of ten having applied six specific criteria. This list was then reduced to four sites. The criteria of neutrality, centrality and accessibility were applied to each. This gave rise to the selection of the subject site as the College's first option.

[119] The analysis of the three alternative sites is contained in paragraphs 3.18–3.26 of the ES. These passages explain, in brief terms, the perceived shortcomings of the other three sites: inadequate size, detrimental impact on nearby residential amenity, poor accessibility, geographical remoteness and perceived lack of community neutrality. The analysis extols the virtues of the subject site and concludes that it is the most appropriate for the proposed development.

[120] In the section which follows consideration is given to protected bird species, trees and woodland areas. Mention is made of proposed mitigation and compensation measures and, specifically, a Woodland Habitat Creation Plan. Next, two possible design options are identified. One of these, which would entail a building of seven storeys, would have less impact on flora, fauna and habitats etc. This was rejected on the grounds of (*inter alia*) adverse visual amenity impact, orientation, access and parking. The second design option, which would consist of two or three storeys, was considered preferable for the reasons given. This is the design option approved by the impugned grant of planning permission.

[121] Having considered the ES the Council exercised its power to require the provision of further information, including, with specific reference to Schedule 4, Part 1(2) of the EIA Regulations:

> "…. More information on the choice of the South Lake Site, taking into account in particular the environmental effects."

The response to this request is contained in section 5 of the ES Addendum, consisting of ten short paragraphs. The first four paragraphs simply repeat the main ES. The next paragraph asserts, without elaboration or particularity, that the subject site was considered to be "more environmentally suitable." This is explained by reference to "noise, overlooking, loss of light, over shadowing and inter visibility." The remaining five paragraphs are in substance a repetition of this paragraph and the relevant passages in the ES. The consultees' response was to suggest certain planning conditions.

[122] The information and advice to the Council's Planning Committee in the SPO's report was the following. In substance, the SPO provided a summary of the relevant ES information. There is no mention of the Council's request for further environmental information or the ES Addendum thereby generated. The report continues:

> "With reference to **Brian Holohan and Others v An Bord Pleanala** [2013] judgment, there is no legal obligation under the applicable 2015 EIA Regulations to identify, describe and assess the environmental effects of the alternatives. Officers are of the opinion that the outline of the main alternatives provided by the applicant, including the indication of the main reasons for the applicant's choice taking into account the environmental effects, complies with the requirements of the aforementioned legal provisions."

[123] This ground of challenge throws up two questions. First, what is the correct construction of paragraph 2 of Schedule 4 to the EIA Regulations? Second, was the ES submitted by the College compliant with this provision, properly construed?

[124] As regards the first question, in *Holohan and Others v An Bord Pleanala* [Case – C – 461/17] one of the issues referred to the CJEU under Article 267 TFEU related to the meaning of "an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects" in Article 5 of the EIA Directive (the progenitor of paragraph 2 of Schedule 4 to the EIA Regulations). In substance, the particular question of relevance for present purposes enquired how much environmental impact information about the alternative sites had to be supplied. The CJEU held that a full blown EIA of the rejected alternative sites is not required. However, per para [66]:

> "That said, that provision (Article 5(3)(d) of the EIA Directive) requires the developer to indicate the reasons for

> his choice, **taking into account at least the environmental effects** …..
>
> [Adding at para 67] …
>
> That obligation on the developer ensures that, thereafter, the competent authority is able to carry out a comprehensive environmental impact assessment that catalogues, scribes and assesses, in an appropriate manner, the effects of the approved project on the environment, in accordance with Article 3 of the EIA Directive."

In the dispositif of its judgment, the CJEU ruled:

> "Article 5(3)(d) of Directive 2011/92 must be interpreted as meaning that the developer must supply information in relation to the environmental impact of both the chosen option and of all the main alternatives studied by the developer, together with the reasons for his choice, **taking into account at least the environmental effects** even if such an alternative was rejected at an early stage."
> [Emphasis added.]

[125] The decision in *Holohan* was applied by the English Court of Appeal in *Gathercole v Suffolk County Council* [2020] ECWA Civ 1179. The importance of this decision is that it establishes the legal test to be applied in a domestic law challenge based on the statutory provisions identified above. In short, the legal standard in play is the *Wednesbury* principle. As the judgment records, this was the test applied in *R (Blewett) v Derbyshire CC* [2003] EWHC 2775 (Admin) and applied consistently in subsequent cases. We take this opportunity to endorse the correctness of the *Wednesbury* principle as the appropriate standard of review.

[126] It is trite that the ES and its addendum must be considered together. In its determination of this ground of appeal the court considers that two questions arise. First, did the information supplied by SRC "take into account the environmental effects" of the alternative sites considered? If "yes", the second question arising is whether it did so sufficiently, or adequately. Given that the first question is essentially one of fact the scope for the operation of the *Wednesbury* principle is at best limited. The second question is altogether different: it bears the clear stamp of evaluative planning judgement clearly engaging the *Wednesbury* principle as the appropriate standard of review by the court.

[127] Focussing on the first question, the ES Addendum is silent on the environmental effects of the alternative sites considered. However, it is of obvious importance to consider the terms of the request to which the SRC consultants were responding. The request, based on the statutory language, related solely to the

environmental effects of "the choice of the South Lake Site": it said nothing about the alternative sites considered. The relevant passages in the ES Addendum are to the effect that if the proposed development were to proceed on any of the three alternative sites considered this would have unsatisfactory consequences on account of inter alia adverse impact on the amenity of extant residential settlements by reason of noise and over shadowing. The court is satisfied that these are environmental effects. Thus, the mainly factual question (the first one posed above) yields a positive answer.

[128] The second of the two questions formulated by the court, as explained, engages the *Wednesbury* principle. To the inexpert eye the environmental effects assessment of the three alternative sites may appear quite limited. It might also be said that there is a heavy emphasis on facts and factors which are plainly non-environmental in nature: in particular the SRC preference, community neutrality, accessibility for users and value for money. Notwithstanding, the court must take into account that the very fact of the ES addendum request is indicative of care and attention on the part of the planning officials concerned. The court must also consider the terms of the FEI request, highlighted above. Furthermore, the court must be alert to the principles to be applied to the relevant passage in the SPO's report. While this is conclusionary rather than analytical appropriate latitude must be permitted.

[129] In a challenge of this species the *Wednesbury* principle presents an undeniably elevated threshold for judicial intervention in the exercise of supervisory superintendence. The court itself must form an evaluative judgement. On balance, the court is not satisfied that this threshold is overcome. Accordingly, this ground of appeal is dismissed.

The Notification Ground of Appeal

[130] Councils are obliged in certain circumstances to notify the Department for Infrastructure (formerly the Department of the Environment) of planning applications. Article 13 of the Planning (General Development Procedure) Order (NI) 2015 empowers the Department to make directions to this effect. This power was exercised in the Planning (Notification of Council's Own Applications) Direction 2015, (the "2015 Direction") which is a species of subordinate legislation. By Paragraph 2:

> "(1) Where a district council proposes to grant planning permission for development falling within any of the descriptions of development listed in the Schedule to this Direction, it shall send to the Department the following information:
>
> (a) a copy of the planning application, accompanying plans and any other information provided in connection with the application (e.g. transport/retail assessment), together with the full address and post-code of the site to be developed;

(b) copies of all observations submitted by consultees and all representations and petitions received, together with a list of the names and addresses of those who have submitted observations/made representations (including details of any petition organiser if known). Where 'pro-forma' representations are received, only one copy example need be submitted, but all names and addresses must be provided. Copies of petitions should be submitted, but only the organiser or first named should be included in the list of names and addresses;

(c) the district council's comments on the consultees' observations and on representations received;

(d) the district council's reasons for proposing to grant planning permission, including, where relevant, a statement setting out the reasoning;

(i) behind the district council's decision to depart from the development plan; and/or

(ii) for taking the decision it has, in light of any objections received.

(2) Where the district council holds the information set out in sub-paragraphs (a) to (d) above on its website, it may comply with some or all of the requirement to provide this information to the Department by means of an e-mail to the Department containing a link, or a series of links, to the relevant pages on the council's website."

The types of planning application which a council must notify to the Department are defined in the Schedule to the 2015 Direction in the following terms:

"1. Development:

(a) for which the district council is the applicant/developer;

(b) in respect of which the district council has a financial or other (e.g. partnership) interest; or

(c) to be located on land wholly or partly in the district council's ownership or in which it has an interest;

> in circumstances where the proposed development would be significantly contrary to the development plan for its district."

(In passing, the statutory measure now in operation is the 2017 Direction)

[131] In the present instance subparagraphs (b) and (c) apply. In short, the SRC proposal was to develop a site on land then owned by the Council and, further, the Council had a financial interest as it had entered into an agreement to sell the land to SRC conditional only upon the grant of planning permission. (As noted in para [19], the sale is now completed).

[132] The question for the court is whether the proposed development "… would be significantly contrary to the development plan for its district." This is a question of pure statutory interpretation. The words requiring interpretation are "significantly contrary to."

[133] There is a textual difference between "contrary to" and the language of section 6(4) of the Planning Act, which is "[not] in accordance with the development plan …" However, taking into account the overall context, in particular the status of section 6(4) as a provision of primary legislation and the subordinate status of the 2015 Direction, the court considers it clear that "contrary to" equates with "not in accordance with."

[134] In determining the first ground of appeal in favour of the appellant, the court has concluded that the proposed development is not in accordance with CAP 2010. The question therefore becomes: is the proposed development significantly not in accordance with/contrary to CAP 2010? Standing back and in the abstract, on the notional scale a development proposal might involve a minor departure from the relevant development plan. At the opposite end of the scale the departure might be of an egregious kind. Between these two extremes there might be other grades of departure.

[135] Next it is instructive to reflect briefly on adjectives other than "significantly" which the statutory language has not employed, for example "Seriously contrary to" or "substantially contrary to" or "manifestly contrary to." Furthermore, in orthodox terms "significantly" normally denotes more than minimally.

[136] The resolution of this ground of challenge turns on the terms in which the court has reasoned that the proposed development is not in accordance with CAP 2010. We refer particularly to paras [41] – [57] above. Consideration of these passages indicates that the departure of the development proposal from CAP 2010 diagnosed by the court is one of some substance. While it may not be of the egregious variety, it is demonstrably more than minimal. This impels to a twofold conclusion. First, the SRC development proposal is significantly contrary to CAP 2010, in those respects

addressed in paras [41] – [57] above. Second, and in consequence, the Council should have notified it to the Department. As this is a statutory requirement admitting of no relaxation and a matter of unmistakable importance, the further conclusion that the impugned grant of planning permission is vitiated on this freestanding ground must follow.

Omnibus Conclusion

[137] For the reasons given, this court concludes that the impugned grant of planning permission is unsustainable in law on the following grounds:

(i) It is not in accordance with Policy TOU1 of CAP 2010.

(ii) It is not in accordance with Policy COM1 and Policy SETT1 of CAP 2010.

(iii) It is in breach of regulation 3(3) of the Habitats Regulations; it is not in accordance with Policy NH2 of Planning Policy Statement 2; and it is based on the taking into account of inaccurate and incomplete information and the disregard of material information relating to the presence of otters on the subject site.

(iv) The Council has failed to observe the notification requirement in the Planning (Notification of Council's Own Applications) Direction 2015.

It follows that the appeal of Clare McCann succeeds.

Order

[138] Subject to considering the parties' submissions, the court is minded in the exercise of its powers under section 35 of the Judicature (NI) Act 1978 to make an order allowing the appeal and substituting the order at first instance with an order of certiorari quashing the impugned grant of planning permission. This tentative indication will enable the parties to formulate any necessary submissions.

[139] In principle, the appellant is entitled to her costs both at first instance and on appeal. Again, this tentative view will be subject to any further submissions of the parties.