Neutral Citation No: [2024] NIKB 43 *Judgment: approved by the court for handing down (subject to editorial corrections) **	*Ref:* **SCO12534** *ICOS No:* **23/066450/01** *Delivered:* **29/05/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JOHN McMULLAN FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF ARDS AND NORTH DOWN BOROUGH COUNCIL

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The applicant appeared in person
Stewart Beattie KC and Philip McEvoy (instructed by Carson McDowell LLP) appeared for the proposed respondent
Paul McLaughlin KC (instructed by O'Reilly Stewart, Solicitors) appeared for the interested parties

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SCOFFIELD J

Introduction

[1] By these proceedings the applicant seeks to challenge the grant of planning permission (reference LA06/2020/1115/F), made on 11 May 2023, by Ards and North Down Borough Council ("the Council"). The applicant lives at 29 Station Road, Holywood and the impugned permission was obtained by his neighbours, Dr and Mrs Hastings, who live at 27 Station Road, Holywood, in relation to their property there.

[2] Mr McMullan, who represents himself in these proceedings, has made a wide-ranging attack on the grant of permission and the process of consideration which preceded it. The Council, represented by Mr Beattie KC and Mr McEvoy, opposed the grant of leave; as did the interested parties, the beneficiaries of the permission, who were represented by Mr McLaughlin KC. I am grateful to all parties for their helpful submissions at the recent leave hearing.

[3] I have concluded that there is no 'knock-out blow' which is sufficient to merit the refusal of leave in this case in its entirety. At the same time, some of the grounds relied upon by Mr McMullan do not, in my view, surmount the leave threshold of being arguable grounds with a realistic prospect of success, for a variety of reasons. In relation to some of those grounds Mr Beattie's point is well made that they involve an impermissible attempt to re-open the planning merits of the decision. Nonetheless, I propose to grant the applicant leave to apply for judicial review on some of the issues raised but, in an effort to focus the proceedings, to also direct him (pursuant to the court's power contained in RCJ Order 53, rule 4) to amend his Order 53 statement in the terms set out below (see para [71]).

[4] This written ruling gives brief reasons for the refusal of leave in respect of certain grounds and the grant of leave on others. It is not intended to discuss the factual background or the arguments in any detail, these being matters for the full hearing and any subsequent judgment at that stage. The primary purpose of this ruling is to clarify for the parties on which precise issues leave is being granted and those on which leave is being refused.

[5] The applicant's grounds of challenge are set out at section 5 of his Order 53 statement. That section alone runs to some 22 pages. In his skeleton argument for the leave hearing, Mr McMullan helpfully summarised his proposed grounds under ten headings. These were not mapped across to the pleaded grounds in the Order 53 statement. I am confident that no new issue was raised in the skeleton argument; but some pleaded matters do not appear to have been addressed in the skeleton. Nonetheless, in the discussion below, I use the headings which Mr McMullan adopted in his skeleton argument as a framework.

Factual background

[6] As noted above, for present purposes I do not intend to set out in any great detail the factual background which has given rise to these proceedings. The following brief observations are made by way of setting the context to what follows.

[7] It seems clear that there is some history between the two sets of neighbours at the heart of this dispute, Mr McMullan (and his wife) on the one hand and the Hastings on the other. Two important points are that there is a (disputed) boundary between their two properties (which broadly runs along the side of the applicant's house and along his driveway); and that the Hastings' property is at a much higher level than the ground level of Mr McMullan's property. The ground slopes down from the Hastings' house to Mr McMullan's and there is something of an embankment between them, ending in a small watercourse at the foot of the embankment which is close to the McMullans' driveway. The key areas of contention are how steeply the ground slopes down towards the boundary, how this is landscaped and how any material at the higher level is retained. Mr McMullan categorises the whole issue as having arisen because the Hastings want a "flat garden" at the higher level of their

house, rather than a much more gradually sloping area down towards the boundary with his property.

[8] The Hastings received planning permission for a house at their site in May 2015 (under application W/2014/0177/F ("the 2014 permission")). It is common case that what they then built was not in compliance with this permission in a number of respects, including some details such as the windows and the design of the patio area. The key issue, however, is that the ground levels at the site were not what was specified in the 2014 permission. As Mr McLaughlin's skeleton argument puts it, "The landscaping works included some changes in levels and contouring to create a flatter garden. This included raising the level of the embankment on the No 27 side of the boundary." The notice parties also did not construct a stone retaining gabion structure at the top of the embankment as envisaged in the 2014 permission. Rather they planted a laurel hedge there instead; with a timber retaining structure mid-way down the embankment.

[9] The non-compliant groundworks led to a complaint and the Council opening an enforcement file (reference LA06/2016/0285/CA) in relation to additional infill at the site and the timber retaining structure which had been built by the Hastings at the embankment area. This was met by the Hastings applying for a new planning permission to regularise the position (reference LA06/2018/0003/F), the purpose of which was to allow them to retain what had been built on the site, including the timber structure.

[10] There is some dispute as to why or how any additional retaining structure came to be necessary. Mr McMullan's consistent case has been that this was because of the landscaping carried out by the Hastings when they completed their home in non-compliance with the 2014 permission. The notice parties have asserted that the embankment area was destabilized when Mr McMullan widened his driveway and in doing so removed a number of stone gabion baskets along the boundary, a suggestion he appears to strongly dispute.

[11] Since one of the issues in relation to the enforcement case was the stability of what had been built at the bank sloping down to the applicant's home, the Council instructed an engineering firm (Cassidy Geotechnical) to conduct an independent assessment. Their report of April 2019 is discussed in further detail below but, in short, it raised significant concerns about the stability of the present situation and the effectiveness of the timber retaining structure.

[12] It therefore became clear that something else needed to be built to provide stability at the bank sloping down towards the applicant's property, where the watercourse (also referred to as "the sheugh") runs. That was the purpose of the application which gave rise to the impugned permission, which is for the following development:

> "Retention of dwelling approved under W/2014/0177/F, including alterations to fenestration of approved dwelling, revisions to patio/terrace area, landscaping and associated ground retention to include existing timber structure. Also proposed amendment to existing development to include new 'Macwall' block wall to facilitate culverting of existing small watercourse which runs adjacent to boundary with No 29 Station Road."

[13] There is no dispute, as far as I can discern, about the changes to the windows and patio area at the Hastings' house. The issue in dispute is the landscaping and "ground retention", along with the new block wall and the culverting of the watercourse. This is to retain what the Hastings have built on site and also to shore up the embankment by means of the new 'Macwall' retaining structure.

[14] On 9 September 2021, a planning enforcement notice (reference EN/2021/0241) was served on the Hastings in relation to the unauthorised landfill and the unauthorised timber retaining structure, requiring these to be removed within 120 days. The Hastings appealed against this notice to the Planning Appeals Commission (PAC). The hearing of the appeal was on 2 March 2023, with the Council arguing against the interested parties' case on appeal. However, the permission with which these proceedings are concerned was issued on 11 May 2023, before the enforcement appeal had been determined. At that point, given that the impugned permission granted planning permission for the development, which was the subject of the enforcement notice, the Council informed the PAC that it was no longer seeking enforcement and the appeal against the enforcement notice fell away.

Relevant planning policy

[15] There are a number of planning policies which are relevant to the Council's determination in this case but, for present purposes, I need only set out two. Section 7.5 of the North Down and Ards Area Plan 1984-1995 (NDAAP) states as follows:

> "The Department will use its development control powers to ensure the maintenance of an acceptable level of amenity in residential areas and to avoid the creation of monotonous areas of housing by insisting upon a high standard of design in future housing developments. This will involve provision of a range of house types in larger schemes, variety in the layout of the estate, provision of properly located open spaces and pedestrian linkages, with proper attention to details such as perimeter walls and fences where proposed."

[16] In addition, Policy FLD4 of Planning Policy Statement 15: *Planning and Flood Risk* (PPS15) provides as follows:

> "The planning authority will only permit the artificial modification of a watercourse, including culverting or canalisation operations, in either of the following exceptional circumstances:
>
> - Where the culverting of short length of a watercourse is necessary to provide access to a development site or part thereof;
>
> - Where it can be demonstrated that a specific length of watercourse needs to be culverted for engineering reasons and there are no reasonable or practicable alternative courses of action."

[17] This policy is relevant because, as discussed in further detail below, the Hastings' proposal which has been granted planning permission includes a proposal to culvert the sheugh which runs along, or in the vicinity of, the boundary between their property and that of Mr McMullan. Mr McMullan contends that there is no proper policy justification for culverting that watercourse and that it should remain open. If the Council had taken that approach, that is likely to have resulted in refusal of the Hastings' application. Although they could have amended the proposal (or could submit a new proposal) to achieve a similar result – namely achieving greater stability for the groundworks towards the boundary – this is likely to be more complicated and costly if the watercourse is to remain open. This was therefore a key point of contention in the course of the planning application.

Consideration

[18] Against the above background, I address below each of the grounds of challenge as summarised in Mr McMullan's skeleton argument for the leave hearing.

"Ground 1: Illegality – due to the disregard of the stipulations of section 45(1) of the Planning Act, resulting in an approved plan which would amass earth and infill against [the applicant's] dwelling."

[19] I am not granting leave in relation to the applicant's assertion that the Council failed to have regard to the local development plan as required by section 45(1) of the Planning Act (Northern Ireland) 2011. It plainly did. The relevant portions of the NDAAP are cited in the development management case officer report ("the officer's report"). It seems to me that the proposed respondent is likely correct to submit that the passage principally relied upon by Mr McMullan (section 7.5, set out at para [15] above) does not relate to the subject planning application, since it is setting policy for new housing schemes rather than single replacement dwellings. In any event, the contention that the perimeter and boundary issues were not adequately considered or

addressed is encompassed within a number of the applicant's other grounds, such that reliance on this passage of the NDAAP would add nothing.

[20] This first ground does, however, go to the heart of the applicant's concern that the result of the development permitted by the impugned permission will be that earth or infill is amassed against a wall which forms part of his house and/or his garage. His concerns in this regard appear to me to fall into two categories, namely that (i) the Council did not adequately inquire into what was proposed at the boundary of his property and did not understand this; and/or (ii) that the Council was irrational to accept that it was permissible for the Hastings' proposed development to have the effect which he fears.

[21] I spent some time during the leave hearing trying to ascertain precisely what the ground levels would look like if the impugned permission was implemented and trying to understand precisely how this was dealt with in the approved drawings. Was it as Mr McMullan feared, with soil or infill piled against his wall? Or was that not permitted? Mr McLaughlin in particular sought to persuade me that Mr McMullan had misconstrued the nature and effect of the planning permission and that development of the type he feared was simply not permitted by it. Whether the walls of the applicant's house could or should now be used to retain soil from the embankment "is entirely a question of private law which falls outside the scope of the impugned permission", he submitted.

[22] Mr Beattie relied upon the Council's pre-action response which states clearly that "the proposed new retaining wall does not abut the Applicant's dwelling." That may well be right, although it is certainly not clear to me from the plans which are stamped 'approved.' (Mr McLaughlin also relied upon the fact that it would not be permissible, as a matter of civil law, to 'tie in' the new wall to Mr McMullan's existing wall without his consent; and indicated that the new retaining wall is only to be built *between* the applicant's existing wall and the garage at No 31B, rather than alongside or contiguous to them.) This leaves some detail to be worked out in relation to precisely what will happen at either end of the new wall, where the applicant's wall and the garage of No 31B are. Will there be a gap between those structures and the new wall? (The officer's report, at p11, suggests, perhaps contrary to Mr McLaughlin's submission, that "the portion of the wall that will be above 2m in height will be constructed adjacent to and *as a continuation of* the existing wall adjacent to the dwelling at No 29" [my emphasis]; in contrast to the reference, at p13, to the new wall stopping *before* the garage at No 31B) If there will be a gap, how will any backfill be retained there? The more pertinent issue is perhaps what groundworks or levels are proposed or permitted at those two locations, namely beside (or up against) the applicant's wall and the garage of No 31B.

[23] Mr McLaughlin's answer to this was that, in the absence of any agreement with the neighbouring landowners, the infill will simply contour down to the ground level of their properties at those points. However, Drawing 09A and Drawing 13 appear to indicate that, at cross-section Z-Z, just 1.62m from the applicant's garage, the new

retaining wall will be at a height of 2.28m and will have backfill material immediately behind it to almost that full height. Whether and how that level of backfill will taper down to zero over such a short space before it reaches the applicant's wall/garage is unclear. This also begs the question whether, if that is the case, the new retaining wall will in fact be effective to provide the required stability which it is designed to secure along the length of boundary. If it will not be, that in turn raises questions as to whether there is a proper engineering justification for the wall, which is a relevant material consideration in the context of Policy FLD4 and more generally.

[24] Mr McMullan is also concerned that, even if the approach described by Mr McLaughlin is what is intended and will be effective in engineering terms, the works later undertaken on foot of the permission may not actually reflect this. He has some cause for concern because, previously, the Hastings did not comply with their approved permission in terms of ground levels (and also because he is in dispute with them over ownership of the strip of land at the physical boundary between the two properties). For these reasons it would have been preferable if the ground levels and engineering solution to be provided next to the applicant's wall had been expressly dealt with and made clear. That is particularly so when a major focus of the planning application was the question of ground levels. Although the description of the development refers to "ground retention", it is clear that the infill to be placed behind the new retaining wall goes further than mere retention of existing levels. That is what has given rise to the applicant's fears.

[25] The applicant contends that the development which has been approved would result in infill material being piled to a total height of 2.3m against the wall of his dwelling. Some of the claims made by Mr McMullan about the proposed development appeared to me to be somewhat outlandish and to misunderstand the true nature of the permission. Mr McLaughlin may also be correct to say that most if not all of the issues about which he is concerned could be addressed by way of a civil law remedy if they came to pass. Nonetheless, on one reading of the permission, it might be said that it appears to permit ground levels to be elevated to a degree which would see soil or infill amassed against the applicant's wall, which would plainly be relevant (inter alia) to amenity concerns. Whether the outworking of the proposed development as it abuts the applicant's property (and the garage of his other neighbours at No 31B) was appropriately examined and made the subject of conditions is an issue worthy of further investigation in these proceedings. Although Mr Beattie pointed to the requirement, in condition 9 of the impugned permission, that a construction method statement (CMS) for the culverting of the watercourse and retaining wall construction was to be submitted by the contractor and approved by the Council prior to work commencing, it is arguable that this was not designed or sufficient to address the key issue of the ground levels which were permissible adjacent to the applicant's property, which was a matter of planning.

[26] I am therefore prepared to grant leave on the question of whether this issue was properly examined by the Council and adequately addressed in the resultant permission. Put bluntly, had it been dealt with much more clearly and explicitly, we

should not be in the position where there are competing interpretations of the permission or any lack of clarity about these important matters. That is not to say that the case made by the Council and interested parties is wrong; simply that this is an issue which is worthy of further investigation, and which may be clarified further in the course of the proceedings.

"Ground 2: Illegality – due to the breach of section 42(1) of the Planning Act (Northern Ireland) 2011, whereby it is clear that the planning applicant could not possibly have been in actual possession of all the land as claimed in the applicant related to the impugned permission"

[27] I am refusing leave on this ground and the related land ownership arguments. The applicant is concerned that the Hastings have lodged the wrong certificate in relation to the issue of possession of the relevant lands at the application site, having lodged Certificate A along with the planning application which indicates that the designated land is all within the actual possession of the planning applicants. He contends that part of his property has been encompassed within the red-line boundary in the plans submitted with the application. In this regard he has relied upon a boundary report by a chartered surveyor, Mr McVitty MRICS, which he provided to the Council ("the McVitty report"). This report was prepared for the purpose of ongoing equity proceedings in the County Court in which the applicant and interested parties are in dispute about the precise boundary between their properties. These proceedings have been stayed for the moment and have not resolved the issue.

[28] I accept the proposed respondent's position that, in essence, Mr McMullan wanted it to seek to determine the boundary dispute between him and the Hastings. That was unnecessary; and nor is it an appropriate function for this court in these proceedings. The land ownership issue is not immediately clear-cut. It is well-known that the grant of planning permission does not confer title upon the planning applicant. There is nothing impermissible in principle about Person A applying for planning permission in respect of land owned by Person B, provided that Person B is notified and has a fair opportunity to participate in the planning process. Planning permission is frequently granted for development which, at the time of the grant, could not lawfully be built without the consent of a third-party landowner or a property acquisition.

[29] Ideally, land ownership issues will be clear throughout the planning process, even if they do not materially alter the exercise of planning judgment. Sometimes, however, as where there is an ownership or boundary dispute, that will not be possible. In the present case it is clear that the Council was aware that Mr McMullan disputed the extent of the Hastings' land ownership and contended, not only that the proposed development would abut his home, but also that it involved development on a strip of land owned by him. The Council drew this to the attention of the planning applicants and asked them to amend the certificate which accompanied the planning application. They declined to do so, on a number of occasions and with the benefit of legal advice, probably because (consistent with their case in the equity proceedings) they contend that their ownership extends further than Mr McMullan

concedes. In any event, the key point is that since Mr McMullan was neighbour notified of the application and participated fully in the planning process, no prejudice arose even if he is correct that the initial certificate misrepresented the extent of the Hastings' holding (which is a matter which remains in dispute).

[30] The Council has understandably relied upon the fact that the applicant was on full notice of the planning application and participated in it in full. The decisions in *Re Bray Investments* [1997] NIJB 262 and *Re Callan's Application* [1997] 6 BNIL 142 indicate that the issues of notification and participation are key when it comes to considering complaints about section 42 certificates. As Kerr J commented in relation to the predecessor provision of section 42, its purpose "is to ensure that certain persons likely to be interested in or affected by the outcome of a planning application are notified of it." This is made clear by the cross-heading to the section, 'Notification of applicants to certain persons.' He went on:

> "The purpose of [s 42] is to ensure that accurate certificates are submitted and that owners are timeously notified of planning applications which involve their property. As the guardian of the planning process the department has an obvious policing role in ensuring that certificates are accurate. I accept the argument of counsel for the respondent that the department is not obliged to satisfy itself of the accuracy of every certificate but where it becomes aware of inaccuracy it must act if an owner would thereby be unable to make representations on the planning application…
>
> … I have been invited to express my opinion on whether the submission of an inaccurate certificate has the inevitable effect of invalidating the planning application. In my view it does not. As Coghlin J observed in *Callan* recent judicial authority has tended to focus on the purpose of the statutory provision rather than its mandatory language in assessing the effect of a breach of the provision."

[31] In view of the applicant's awareness of, and full participation in, the planning process leading to the grant of the impugned permission, his reliance on section 42 of the 2011 Act and the suggested inaccuracy of the certificate lodged by the planning applicants has no realistic prospect of success in terms of the grant of any relief in these proceedings.

"Ground 3: Immaterial considerations. The impugned decision is vitiated by the proposed Council having taken into account the following immaterial facts/considerations."

[32] The applicant contends that the Council took into account a range of immaterial considerations. From the applicant's skeleton argument, the particular consideration

encompassed within Ground 3 is that if a protective fence was placed on either side of a structure permitting the watercourse to remain open and un-culverted, this would increase the fall height and not actually remove the hazard posed.

[33] This ground relates to the Council's treatment of Policy FLD4 on the question of whether the watercourse or sheugh should be culverted or remain open. In light of the proposed ground levels, if the sheugh was to remain open it was suggested on behalf of the planning applicants that this would require a significant structure presenting a fall hazard down into the watercourse. Mr McMullan contends that the simple way to deal with this is by providing a fence which would stop people from falling in. However, the planning applicants' riposte was that the provision of a fence would actually make the structure *more* dangerous because someone could fall over the fence or from the top of the fence, creating a hazard of an even greater fall. Mr McMullan contends that this is an irrational analysis and contrary to both commonsense and relevant technical guidance. (There is a separate point, considered later, about whether reliance on the fall hazard if the watercourse was to remain open is inconsistent with the Council's treatment of a potential fall hazard upon which Mr McMullan himself relied, namely the risk of someone falling off the new retaining wall structure.)

[34] This is a very net point and I am inclined to grant leave on it given the illogicality, at first blush, of considering that the provision of a fence (to fence off a fall hazard) is considered to increase the risk.

"Ground 4: Material considerations. The Council failed to consider the material facts/considerations of their commissioned Geotechnical study."

[35] By this ground, the applicant complains that the Council did not pay adequate regard to certain aspects of the Cassidy Geotechnical report produced upon its instruction in April 2019. In particular, he contends that the Council only considered the potential engineering solution of covering the watercourse, whereas Cassidy also proposed another potential solution to the lack of stability provided by the wooden retaining structure. This is relevant, indeed pivotal (Mr McMullan contends), to the proper consideration of how Policy FLD4 was to be understood and applied in the circumstances of this case. This ground links to the previous ground because the Council relied upon the fact that a civil engineer appointed by the Hastings had 'designed out' the option to retain the open watercourse on health and safety grounds.

[36] I do not propose to grant leave in relation to the suggestion that the Council failed to consider the Cassidy Geotechnical report. It plainly did (although the submissions at the leave hearing indicated that there may be some doubt or debate about precisely what was meant by the recommendations in the conclusion of that report). I am proposing to grant leave, however, more generally in relation to the Council's consideration of Policy FLD4 (see paras [45]-[56] below). The present ground adds nothing to that.

"Ground 5: Material considerations. The Council failed to consider the material facts/considerations of the interested parties' title deed map and McVitty MRICS report."

[37] I am refusing leave on this ground for the reasons expressed at paras [27]-[31] above.

"Ground 6: Material considerations. The Council has failed to engage DFI Rivers on key elements of this impugned decision, to consider the material facts/considerations surrounding the watercourse and how it will perform its function across the entirety of its path in relation to the impugned decisions."

[38] I also refusing leave to apply for judicial review on this ground. The applicant's complaint is that DFI Rivers has been consulted in relation to part of the relevant watercourse but not all of the affected stretches. In particular, he contends that a section of the watercourse under the driveway of 27 Station Rd and along the side of No 27 (along the North-east boundary) and the golf course have not been the subject of consultation and have "no Schedule 6 coverage." This is a reference to a consent under Schedule 6 of the Drainage (Northern Ireland) Order 1973 (which requires the consent of the Department, inter alia, before a person erects or places any structure in, over or under any watercourse which is likely to affect the flow of the water in the watercourse).

[39] The Council was required to consult a number of statutory consultees in relation to the proposed development. The Council was not in my view required to consult DFI Rivers about development which may *previously* have been undertaken which forms no part of the application presently before it for consideration and determination. In any event, DFI Rivers was consulted and was in a position to make whatever comments, objections or recommendations it wished. In the event, it did not raise any objection to the planning application. The question of consents under Schedule 6 of the 1973 Order is a separate matter. The grant, or otherwise, of a Schedule 6 consent does not affect the grant of planning permission. It relates to an independent regulatory regime with its own scheme for remedies and enforcement. Moreover, consent to the culverting works incorporated in the development permitted by the impugned permission was provided by DFI Rivers in June 2021. I do not consider that this ground has a realistic prospect of success.

"Ground 7: Breach of policy in relation to the Council's scheme of delegation."

[40] Mr McMullan has a number of complaints about the procedure adopted by the Council and, in particular, the fact that the planning application was determined by officers acting under the Council's Scheme of Delegation, rather than having been 'called in' to be considered by the full Planning Committee. His key point is that six separate objections were made which all raised material planning concerns so that relevant condition for call-in to the committee had been met.

[41] I propose to also grant leave on this issue. There were two separate objections from private neighbours (the McMullans at No 29 and McFarlands at No 31B); one from a private company (McCutcheon 1863 Ltd); and two from councillors, each at separate addresses. There does not appear to be any dispute that these were objections which count for the purposes of the Scheme of Delegation. The issue is whether an objection from NIE Networks (NIE), a statutory consultee, counts to make up the sixth so that the relevant trigger for call-in was operative. The Council's position is that NIE was a consultee to the planning process "as opposed to an objector" and that the Council's Scheme of Delegation, at 'Part B – Non-Mandatory applications for determination by Planning Committee' relates to objectors and not consultees to the planning process.

[42] I consider that there is an arguable ground in relation to this issue on the following basis. The meaning and effect of the Scheme of Delegation is an issue of law for the court. The relevant section, outlining a type of planning application which will be considered by the Planning Committee even though this is not expressly required by statute, reads as follows:

> "A Local development application attracting six or more separate individual objections which are contrary to the officer's recommendation, and where a material planning matter has been raised.
>
> In determining if the threshold of six or more separate objections is met, the following clarification shall apply for the purposes of the calculation:
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> - Multiple letters of objection from one individual person (or body including any corporate entity) will constitute one objection;
> - Multiple letters of objection from one address (whether by one individual or more) will constitute one objection;
> - Pro-forma objections letters will constitute one objection;
> - Petitions will constitute one objection."

[43] This does not make clear on its face that a qualifying "objection" can only come from a private individual or company who is not a statutory consultee. Indeed, such an interpretation may seem counter-intuitive. If a statutory body, or a body required to be consulted under statute, objects on material planning grounds, why should that not be considered to be a separate objection (over and above others) which would warrant consideration by the committee if the threshold has been reached? In many instances, these objections may be more important than issues raised by individuals with private interests at stake. The officer's report records the NIE response as an "objection", albeit subject to the planning applicant liaising with it to discuss a

possible resolution. Other statutory consultees are noted as having made "no objection." The NIE consultation response also says that it has "little option but to object." In the brief discussion of this issue in the officer's report (see para [65] below), the Council again proceeded on the basis that NIE had "objected to the proposal." Against this background, it seems to me that there is an arguable case that the Council has misdirected itself as to whether or not its Scheme of Delegation required a call-in in these circumstances.

"Ground 8: Breach of policy in relation to the Council's approach to planning and environmental considerations."

[44] This ground concerns the Council's alleged non-compliance, without proper planning justification, with a range of planning policies: (i) Policy FLD4 of PPS15; (ii) paras 6.124 and 6.125 of the Strategic Planning Policy Statement (SPPS); and (iii) Policy QD1 of PPS7.

Policy FLD4 and the SPPS

[45] The challenge in relation to the interpretation and application of Policy FLD4 overlaps with Grounds 3 and 4 discussed above. I propose to grant leave on this ground. The core elements of the applicant's challenge relating to alleged misapplication of Policy FLD4 are that:

(a) the Council failed to realise that there was a "reasonable or practicable alternative course of action" other than culverting the watercourse, or that it was irrational in concluding that the other solution was not reasonable or practicable;

(b) the reliance on health and safety considerations in this regard (to design out a scheme which retained an open watercourse) was irrational in the manner described at paras [33]-[34] above or because it adopted a different and inconsistent approach to health and safety considerations as were applied to (i) the applicant's own reliance upon the fall hazard presented by the new retaining wall, (ii) the Council's acceptance that the timber training structure, which is to be retained, does not present a fall hazard, or (iii) the more relaxed approach to the potential hazard identified in the NIE objection; and

(c) the "engineering reasons" relied upon to justify the culverting of the watercourse were (Mr McMullen submits) created by means of the planning applicants' own unauthorised development.

[46] For its part, the proposed respondent indicates that it was entitled to permit the culverting "for engineering reasons." Obviously, this is not enough on its own in terms of Policy FLD4. In addition to there being engineering reasons there must also be "no reasonable or alternative courses of action."

[47] The Council and interested parties have understandably emphasised that the question of whether there were reasonable and practical alternatives to what the Hastings proposed involves issues of planning judgment; and that DFI Rivers raised no objection and commented that it "cannot sustain an objection under PPS15 Sub-Policy FLD4" (because it had already issued a consent for the culverting). DFI Rivers nonetheless recognised that the Council still had to consider the issue as a matter of planning control.

[48] Whether there was a reasonable and practical alternative to the scheme which the Hastings proposed turns, to some degree, upon an interpretation of the Cassidy report. Section 8.12 of that report deals with remedial options. The key paragraph is the final one, in the following terms:

> "However, just as the presence of the lower slope increases the consequences of the hazard it also greatly complicates and adds to the cost of the solution. It would be necessary to ensure that a remedial solution is not undermined by the lower slope. This could be achieved by either excavating to the base of the sheugh and forming a larger 2.5m high retaining structure or piping the sheugh and sloping material back up the slope."

[49] Mr McMullan contends that the first of the two options proposed by Cassidy in the final sentence of the quoted passage does *not* involve culverting the sheugh but, rather, placing the new retaining structure on the *other* side of the sheugh from his property. Mr McLaughlin read both options as requiring the culverting or 'piping' of the sheugh. To some degree, this turns on what is meant by the phrase "excavating to the base of the sheugh." I would be surprised if this could not be clarified with Cassidy Geotechnical in due course.

[50] In the officer's report, this issue was ultimately dealt with in the following way (at pp18-19):

> "The inclusion of the culverting is therefore considered as an engineering reason to allow the suitable connection of the small watercourse to the watercourse within the golf club lands and to allow the construction of a retaining wall at the bottom of the slope to provide suitable stability in line with a structural engineer's comments and is therefore considered as acceptable.
>
> The applicant's civil engineer has designed out the alternative to culverting of the watercourse to facilitate the development now proposed due to health and safety reasons. It is considered that there may be other reasonable and practicable alternative courses of action to culverting

> the watercourse at this site, however as an independent structural engineer previously suggested the culverting and retaining wall as the solution to bank stability and again has considered the proposed solution of culverting the watercourse and constructing a 'Macwall' retaining structure as suitable for this site, and a civil engineer appointed by the applicant 'designed out' the option to retain an open watercourse on health and safety grounds, it is considered that determining weight has been given to these factors in relation to this matter.
>
> The objectors assert that other practicable alternatives to the proposed culverting exist; however, no evidence of same has been submitted to the Council for consideration and it is not clear that such alternatives would facilitate the development as now proposed. In any event, determining weight is attributed to the comments of the independent structural engineer that the proposal is a suitable design solution for the site, and also to the lack of any objection from statutory consultees to the proposal in terms of flood risk or environmental harm.
>
> Although the culverting and retaining wall are required due to the increase in site levels without the benefit of planning permission, it is considered that the proposed works, following consultation with the relevant bodies (NIEA, Environmental Health and DfI Rivers) will have no unacceptable adverse impacts on the environment or human health and will not cause a risk of flooding to the site or elsewhere and therefore there will be no demonstrable harm to warrant the refusal of this part of the application."

[51] As to the health and safety concerns, Mr McMullan himself relied upon the risk of falls from the top of the new retaining wall (into his driveway) as a reason why planning permission should be refused. (Cassidy, when asked to comment on the proposal, also appears to have raised this issue: "The Applicant should assess the potential for a fall hazard as at present there is no edge restraint at the top of the proposed structure" (see p17 of the officer's report)). This objection was discounted because "this area is completely separated from the [Hastings'] garden by a mature laurel hedge which restricts access to this part of the property therefore it is not essential to have a safety fence erected at this location" (in order to mitigate the risk of fall from the new retaining wall). The applicant's point is that if there is no material risk of fall from the new wall because that area is inaccessible, there must, by the same logic, be no safety risk of fall into the sheugh if it remained un-culverted. At first sight, this appears an attractive point.

[52] It is also unclear whether the Council's decision was taken on the basis that Policy FLD4 was complied with in all material respects (because there were no reasonable or practicable alternatives) or whether, on the other hand, it was considered that Policy FLD4 was *not* complied with (because there was or may be a reasonable or practicable alternative) but that, in the circumstances, some other material consideration justified departure from the policy. I do not consider this query was adequately addressed in the proposed respondent's submissions and it may be that it requires explanation on affidavit. The passage within the officer's report, at p18, which notes that "It is considered that there may be other reasonable and practicable alternative courses of action to culverting the watercourse at this site…" suggests the latter; but, if so, there is no clear or express indication as to how any non-compliance with the policy was dealt with.

[53] In certain parts of the officer's report, it appears that the Council accepts that there are, or may be, reasonable or practicable alternatives to the proposed culverting. At one point, the officer notes that "no evidence of same has been submitted to the Council for consideration." There may be a potential misdirection there if the proposed respondent failed to properly understand that the policy requires the planning applicant to demonstrate that there is *no* reasonable alternative. In the same passage, the officer notes that "it is not clear that such alternatives would facilitate the development as now proposed", raising a question of whether that is an appropriate test. That is particularly so when the development "now proposed" is the retention of originally unauthorised development in circumstances where the Council approached the matter on the basis that "the culverting and retaining wall area required due to the increase in site levels without the benefit of planning permission…"

[54] The policy behind Policy FLD4 is underscored by the relevant provisions of the SPPS, which are in the following terms:

> "6.124 While culverting may in some instances alleviate local flood risk, it cannot eliminate it and often increases the flood risk downstream by the accumulation of higher flows. The artificial modification of watercourses through culverting or canalisation is also widely considered to be environmentally unsustainable as such operations can adversely impact upon landscape quality, ecological integrity and biodiversity of watercourses.
>
> 6.125 Planning authorities should only permit the artificial modification of a watercourse in the exceptional circumstances where culverting of a short length of a watercourse (usually less than 10m) is necessary to provide access to a development site (or part thereof), or where such

> operations are necessary for engineering reasons unconnected with any development proposal."

[55] Para 6.125 indicates that the engineering reasons justifying culverting should be "unconnected" with the development proposal, rather than simply a means of facilitating the development proposal. There does not appear to be any discussion of para 6.125 of the SPPS in the officer's report. (It is simply mentioned in passing, on p25, in a summary of objectors' representations, since they suggested that the proposed culverting was not compliant with this paragraph of the SPPS). There is again no indication of whether this provision was considered to be complied with or breached; and no discussion of whether or not it was in conflict in any material respect with retained policy under PPS15 for the purpose of resolving that conflict pursuant to para 1.12 of the SPPS.

[56] For the reasons given above, I propose to grant leave in relation to the question of how the Council dealt with the culverting policies.

Policy QD1

[57] The applicant further contends that Policy QD1 of PPS7 has been "breached" because of the impact on local amenity. He makes complaint about each of the various factors or sub-criteria mentioned in Policy QD1. I am satisfied that this policy was generally appropriately taken into account. It was dealt with in some detail in a number of places in the officer's report. A number of the matters to which it relates plainly involve the exercise of planning judgment. The question therefore is whether, in respect of any of those matters, there is an arguable case that the Council reached a planning judgment which is so unreasonable as to be *Wednesbury* irrational.

[58] Generally speaking, it appears clear to me that the Council was entitled to reach a view (as it did) that the development would have no unacceptable adverse impact on the character of the surrounding area. The impact at issue is really only that which arises in relation to the immediately neighbouring properties, most notably that of the applicant at No 29.

[59] I am prepared to grant leave in relation to a limited aspect of this challenge, concerning a number of matters which impact upon the Council's consideration of residential amenity and the relationship of the proposed development with the applicant's property, falling within sub-criteria (a) and (h) of Policy QD1. The former relates to scale, proportions and massing of the Macwall; and the latter to Mr McMullan's case that the development will create a conflict with the land use at his property and give rise to an unacceptable adverse effect on his property in terms of overlooking or other disturbance.

[60] This is the area of challenge which most naturally engages the Council's consideration of the amenity of the applicant's dwelling. I consider that there is an arguable case in relation to potential misdirection, either in law or policy, as regards

the significance of permitted development rights. The Council approached the matter on the basis that the majority of the new retaining wall was only, or less than, 2m in height such that the Hastings could have built most of the wall without planning permission under Class A of Part 3 of the Schedule to the Planning (General Permitted Development) Order (Northern Ireland) 2015. This permits minor operations to be undertaken including "the erection, construction… of a… fence, wall or other means of enclosure." Development is not permitted by Class A if the height of the fence, wall or means of enclosure erected or constructed exceeds 2m above ground level.

[61] In light of this, the following was said in the officer's report:

> "I am therefore satisfied that the proposed boundary wall would not have an impact significantly greater than a wall allowable under Permitted Development rights and that this in turn demonstrates that the wall will have no unacceptable adverse impacts on the character of the area." [p9]

> "The portion of the boundary wall that is 2m and below meets the criteria for permitted development set out in the Planning (General Permitted Development) Order (NI) 2015. It is considered that boundary features of this scale are common in residential areas, and it would have no potential to result in unacceptable adverse impacts on neighbouring residential amenity. As such, I will focus my assessment on the portion of the wall higher than 2m." [p11]

[62] Mr McMullan has a short point to the effect that a *retaining* wall with backfill behind it is not included within Class A of Part 3 of the Schedule to the 2015 Order because it is not what one would normally consider a minor operation or a "means of enclosure." That point is either right or wrong as a matter of law. If it is right, it is also then arguable that the Council misdirected itself by addressing the question of the impact of the retaining wall on neighbouring properties by reference to a comparison with a wall which would enjoy permitted development rights. Alternatively, it is argued that it is irrational to treat the two as equivalent when the retaining wall (with infill behind it to the top of the wall) overlooks the neighbouring property in a way which a standard wall would not. I am prepared to grant leave on this point.

[63] Another small but related point which touches upon the question of residential amenity or impact on the applicant's property is the question of drainage from the new retaining wall. Mr McMullan objected that the new wall required drainage at its base and that, on Drawing 12, a drainage pipe was shown within the new wall which had no suitable outfall. He queried where this outfall would be and made clear that he would object if it drained onto his property. The officer's report merely said (at

p23) that an independent engineer had assessed the wall as suitable and that the relevant drawing "shows a 100mm perforated pipe and connected to a suitable outfall." DfI Rivers were content that the proposal would not result in flooding and had granted consent to discharge for the culvert. However, this does not identify where the drainage pipe within the wall will drain to or address the question of whether this will discharge onto the applicant's property in some way.

[64] In addition, Mr McMullan has referred to the requirement at sub-criterion (i) of Policy QD7 that the development is designed "to promote personal safety." He has raised a number of health and safety concerns. The first of these is the risk of someone falling off the new retaining wall or falling over it from the raised ground behind it at No 27, and injuring themselves. As noted above, he contends that this would pose just as much, if not more, of a safety risk as the risk of falling into the watercourse if it remained unculverted.

[65] In the course of discussion of the policy FLD4 point, the applicant has also raised the question of how the Council dealt with the NIE Networks' objection. He contends that the Council did not seek a satisfactory resolution to this issue prior to approving the impugned decision, instead simply leaving it as a matter to be further discussed. The officer's report contains the following comment in relation to this issue (at p29):

> "NIE has objected to the proposal based on there being low voltage overhead lines in the vicinity of the site, but it has expressed a desire to continue to liaise with the applicant with a view to finding a possible solution. It is considered that ensuring the stability of the existing electric pole during the construction process is the responsibility of the developer and any request to alter the location of the pole can be applied for under separate legislation outside the remit of planning. Plans show the pole will remain unaltered."

[66] In his oral submissions, Mr McMullan made the point that the nature of the pole is such that it will be difficult to move. This issue is raised in his Order 53 statement but not addressed directly in the summarised grounds in his skeleton argument (other than in relation to Ground 7 in relation to the Scheme of Delegation). It is addressed as a further safety risk because NIE's concern was that the proposal may, either during the course of construction or following completion, "infringe on the safety clearances that are required to be maintained between its equipment and any building or structure." I will also grant leave on this issue.

"Ground 9: Procedural unfairness, in that the impugned decision was procedurally unfair in the following respects:"

[67] The applicant is highly suspicious of the timing of the Council's decision "in light of the ongoing enforcement proceedings, and the limited availability of councillors to challenge the decision through being called in." Monday 8 May 2023 was an additional Bank Holiday arising by reason of the King's coronation. On Tuesday 9 May the planning application moved from being noted on the website as 'consultations issued' to 'under consideration.' The officer's report appears to have been uploaded shortly before 3.00 pm that day. The following day, 10 May, provided some time for councillors who were on the Planning Committee to consider the application and call it in should they so wish. The decision itself issued the next day, on 11 May. This provided a very short window for councillors who were on the Planning Committee to consider the matter and pursue a call-in. Mr McMullan is particularly critical of this given that the local elections were taking place on 18 May and, he says, councillors would therefore have been absent because they would have been out canvassing. Mr McMullan complains that the officer's report was published only 48 hours prior to the impugned decision which was insufficient time for any stakeholder to read and respond to any issues within it. He is also highly suspicious because the planning enforcement appeal hearing had taken place on 2 March 2023. As it happens, the PAC Commissioner presiding in that appeal undertook a site visit on 11 May 2023, the day of the impugned decision.

[68] The above timeline has given me some cause for concern. It does rather appear to be rushed and fell at an inopportune time given the likelihood that councillors may have been pre-occupied with the upcoming election. Nonetheless, I was persuaded by Mr Beattie's submission that this ground of challenge does not have a realistic prospect of success. He assured the court that the short turn-around time for councillors considering an officer's report and requesting a call-in is commonplace and, indeed, is reflected in the relevant Council procedures. One application on the very same delegated list, in the same circumstances, *had* been called in to the full Planning Committee, indicating that this was possible where councillors on that committee wished to do so. The further point he made was that Mr McMullan had been advised at a very early stage that was open to councillors on the Planning Committee to call in a delegated application and that planning objectors were quite free to lobby councillors to this end, such that, albeit the final stage of the process may have been somewhat contracted, Mr McMullan had had more than enough time prior to that to seek to persuade a councillor on the Planning Committee that the application should be called in.

[69] Mr McMullan contended that "this procedural anomaly constitutes procedural unfairness, is irrational and displays bias in both the decision not to call in, and the decision to grant planning in such a rapid and unnecessary time frame…" For the reasons given immediately above I do not consider that the procedure was procedurally unfair or necessarily out of the ordinary. I also do not consider there to be any arguable case of bias on the basis of the evidence presented.

"Ground 10: Irrationality: The Applicant contends that the impugned decision was irrational in the Wednesbury (Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223) in the following sense."

[70] Finally, the applicant also contends that the decision to grant planning permission was irrational in the *Wednesbury* sense. This sweep-up ground incorporates many aspects of the applicant's case which have already been referred to above, including that his house would be "partially buried" by the proposed development. I do not consider that it adds anything material to the grounds already discussed and therefore also propose to refuse leave on a broadly based rationality challenge.

Conclusion

[71] The applicant is directed to amend his Order 53 statement by striking out all of the text in section 5 of that statement after the words "The Applicant's grounds of challenge are:" and replacing them with the following grounds, namely:

(1) The respondent failed in its duty of inquiry, or left material considerations out of account, by failing to adequately ascertain the effect of the proposed development at the applicant's property (and, in particular, the ground/backfill levels proposed by the planning applicants at the location of the wall forming part of the applicant's home or garage) and at the location of the garage at No 31B Station Road.

(2) The respondent misinterpreted, misapplied or failed to properly apply Policy FLD4 of PPS and/or para 6.125 of the SPPS in the following respects:

    (a) Irrationally concluding that there was no "reasonable or practicable alternative course of action" other than culverting the watercourse (and, in particular, considering that a solution which retained the open watercourse was not reasonable or practicable on health and safety grounds because it would require the provision of a fence which would increase rather than mitigate the fall risk, which conclusion was irrational in all the circumstances of the case).

    (b) Considering that there were material "engineering reasons" which required the watercourse to be culverted when those engineering reasons were either (i) created by means of the planning applicants' own unauthorised development, which was in contravention of the principle (recognised by the respondent) that a person should not gain any benefit from carrying out works without planning permission and/or (ii) reasons connected to the development proposal itself and designed to facilitate the proposal.

(c) Failing to determine, or provide sufficient reasons in respect of its determination as to, the question of whether Policy FLD4 and/or para 6.125 of the SPPS was each complied with or breached and, if the latter, what material planning consideration outweighed the relevant non-compliance with planning policy.

(d) Failing to consider para 6.125 of the SPPS in substance at all.

(3) The respondent erred in its assessment of residential amenity and/or the impact on the applicant's property:

(a) By wrongly considering that a large portion of the new retaining wall could, or was equivalent to a wall which would, benefit from permitted development rights under Class A of Part 3 of the Schedule to the Planning (General Permitted Development) Order (Northern Ireland) 2015;

(b) Failing in its duty of inquiry, or leaving a relevant consideration out of account, by failing to ascertain where the drainage pipe within the new wall (marked on Drawing 12) would have its outfall and whether this would impact the applicant's property; and/or

(c) By virtue of the matters raised at ground (1) above and ground (5)(b) below.

(4) The respondent misdirected itself and/or acted in a procedurally improper manner by failing to consider that the threshold of "six or more separate individual objections which are contrary to the officer's recommendation, and where a material planning matter has been raised" was met, requiring the application to be called in for consideration by the full Planning Committee.

(5) The respondent failed to take material considerations into account, failed in its duty of inquiry in relation to them and/or reached an irrational conclusion in relation to those considerations, namely:

(a) the safety risk presented by means of falling from the proposed retaining wall;

(b) the location and nature of the outfall from the drainage pipe proposed within the new retaining wall; and/or

(c) the subject matter of the objection from NIE Networks.

[72] The applicant has also applied for a protective costs order (PCO) on the basis of the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013. In its response to pre-action correspondence the Council took issue with the suggestion

that this was an Aarhus Convention case. It did so on the basis that the applicant had failed to demonstrate how his intended application would have a significant effect on the environment; and that "the issues in the subject application are matters of planning policy, not environmental."

[73] I do not consider there is a rigid distinction to be drawn in this context between matters of planning policy and environmental matters, since many (if not most) planning policies are designed to protect some aspect of the environment. It is correct that there are some authorities indicating that neighbour disputes may not attract costs protection under the Aarhus regime. If necessary, I will hear further argument on this issue but, provisionally, am minded to conclude that the case is covered by the Aarhus Convention and to grant a PCO in the standard terms under the 2013 Regulations. That is on the basis that a central plank of the applicant's case is non-compliance with Policy FLD4 and the provisions of the SPPS relating to the culverting of watercourses which, in my view, have a clear basis in environmental protection.

[74] In terms of directions for further case management:

(a) The applicant is to issue and serve his notice of motion within 14 days of the grant of leave, ie within 14 days of the date of this judgment.

(b) The notice of motion is to be accompanied by an amended Order 53 statement (see para [74] above). The pleaded case to be struck out can stand as an averment on the part of the applicant but will no longer form the grounds of challenge in these proceedings.

(c) The respondent is to confirm within seven days of the date of this judgment whether it wishes to oppose the making of a PCO in the terms mentioned at para [73] above. If so, and assuming the applicant continues to contend that he should have the benefit of such an order, a short hearing on this issue will be convened.

(d) I will hear the parties on the further questions of the timetabling of affidavit evidence and the full hearing.

[75] From an early stage, I have encouraged mediation in this case given the multiplicity of issues between the parties (including the civil proceedings referred to at para [27] above), the need for clarity (and reassurance) on the part of the applicant as to what it is that the Hastings intend to build at the site of the boundary between their properties, and the need for both of those parties to live in close proximity on an ongoing basis. If a global resolution to the issues could be found, so much the better. I was disappointed to hear that, despite a variety of adjournments for the purpose of pursuing mediation, it has not been possible for this to be progressed for some reason. I continue to encourage all parties to explore whether a negotiated resolution to some or all of the issues between them might be achieved.