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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* 22/02/19

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

____

IN THE MATTER OF AN APPLICATION BY GREENCASTLE ROUSKEY GORTIN CONCERNED COMMUNITY LIMITED FOR JUDICIAL REVIEW

-V-

DEPARTMENT FOR INFRASTRUCTURE

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Glossary of Main Terms /Acronyms

1.	**"AONB"**	Area of Outstanding Natural Beauty
2.	**"EIA"**	Environmental Impact Assessment
3.	**"ES"**	Environmental Statement
4.	**Form PA1**	The prescribed pro-forma for every application for planning permission in Northern Ireland
5.	**"PACC"**	Pre-Application Community Consultation process
6.	**"PACCR"**	Pre-Application Community Consultation Report
7.	**"PAD"**	Pre-Application Discussions

8.	"**PAN**"	Proposal of application Notice
9.	"**Planning Application**"	Planning application ref. LA10/2017/1249/F lodged by DGL on 27th November 2017 for, broadly, gold mining and exploration and other development
10.	"**PIE**"	'Public Information Event': required by Reg 5(2)(a) of The Development Management Regulations 2015
11.	"**Regionally Significant**"	Designation of certain major planning applications under Section 26(6) of the Planning Act 2018.

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McCLOSKEY J

Introduction

[1] The three protagonists in these proceedings are Greencastle Rouskey Gortin Concerned Community Limited ("the Applicant"), the Department for Infrastructure ("the Department") and Dalradian Gold Limited, the planning applicant/developer (hereinafter "Dalradian"). The Applicant company has been granted leave to apply for judicial review challenging a decision of the Department made under section 50 of the Planning Act (NI) 2011 (the "Planning Act") that Dalradian had complied with the requirements of section 27 of the same statute. These are two novel statutory provisions which have not previously been judicially considered in this jurisdiction.

The Proposed Development

[2] The genesis of these proceedings lies in Dalradian's proposal to undertake a development of major regional significance in the vicinity of Greencastle and Rouskey, County Tyrone on a site comprising 997 hectares (hereinafter "the site"). These are predominantly undeveloped agricultural lands, whose features include a tunnel and some surface development. The site and its surrounds benefit from certain protective designations. According to the terms of its planning application, Dalradian is proposing the following development:

> "*Underground valuable minerals mining and exploration, including new portal (tunnel entrance), decline (ramp), paste backfill plant, secure explosives store, fuelling and small service maintenance facilities, refuge stations and ancillary infrastructure, mine workings and waste backfill and waste rock placed in the workings ….*
>
> *Two additional ventilation raises (main ventilation fans located underground) and retention of the existing ventilation raise …*

Associated surface level development …."

There follows a lengthy list of proposed surface infrastructure covering an area of 144 hectares. These works, inexhaustively, include a processing plant, a mine waste storage facility, five separate buildings (administration, maintenance, *et al*), a fuel station, electrical installations including transformers, a water treatment plant, four water storage ponds, a sewage treatment plant, lighting, vehicle access and parking and temporary and permanent peat and spoil storage areas.

[3] An outline of the site history is appropriate at this juncture. Throughout the evidence there is much reference to the so-called "Curraghinalt gold deposit", which is located beneath the site. This has been the subject of exploration by several different undertakings since 1983. In 1987 planning permission was granted to construct underground exploration tunnels, entrances, stock piles and ancillary buildings. This approved development was duly executed and upon completion of the exploration programme, the site was fully restored with the exception of the ventilation shaft, an access tunnel and the underground tunnels. Pursuant to a second grant of planning permission in January 2014, a further development was undertaken entailing an exploration compound, upgrading of the existing access and enlargement of the underground exploration workings. Since 2010 all exploration and associated works have been carried out by Dalradian. In a nutshell, the outcome of the most recent authorised works has stimulated the assessment that an economically viable gold mine exists.

[4] The foregoing exploration activities have resulted in Dalradian taking further steps to achieve its ambition of extracting all available gold within the site. This has given rise to three legal steps of particular significance:

(a) During the period August to November 2016 particularly Dalradian purported to comply with the "*pre-application community consultation*" ("PACC") requirements enshrined in section 27 of the Planning Act.

(b) On 27 November 2017 Dalradian submitted its application for permission to undertake the development outlined in [2] above.

(c) On 08 February 2018 the Department, in purported discharge of its duty under section 50 of the Planning Act, determined that Dalradian had complied with its obligations under section 27, with the legal consequence that the Department would not decline to determine the planning application.

The latter is the decision under challenge in this litigation. These proceedings were initiated promptly on 26 February 2018. The Court, by its order dated 09 March 2018, made on the papers, granted leave to apply for judicial review.

[5] The Applicant company was incorporated on 09 June 2016. By its articles of association, its *raison d'etre* is to oppose Dalradian's development ambitions. There is an uncontested assertion that in substance the company consists of some 40 residents who will be directly affected by the proposed development. It is further asserted that public meetings in the locality have attracted attendances of 300/400 persons. There is a lack of consensus within the local community, as the following averments in the company's affidavit evidence make clear:

> "*The goldmine itself has been present at the site for a number of years as an exploratory project. This undoubtedly created employment and there were knock-on benefits for some businesses as a result ….*
>
> [However] *the proposed site is within close proximity to many homes, farms, our primary school, play school, churches, graveyards and playing fields …*
>
> [There has been a] *high level of community division that has occurred as a result of these proposed plans; what was once a very tight knit community has now been divided between those who stand to benefit from the plans financially and those who are concerned for their future, their health and that of their children and animals, the air we breathe and the land we hold so dear.*"

These averments, in tandem with much other evidence, prompt the observation that the rule of law is rooted in *inter alia*, the real world wherein members and sections of the population, in certain contexts, espouse strongly differing views and aims without consensus. The present case is a paradigm illustration of the operation of two of the central pillars of the rule of law, namely legislation enacted by the democratically elected body and independent and related impartial judicial adjudication.

Statutory Framework

[6] The following are the material provisions of the Planning Act:

Section 1(1) and (2)

"1.—(1) The [Department for Infrastructure] must formulate and co-ordinate policy for securing the orderly and consistent development of land and the planning of that development.

(2) The [Department for Infrastructure] must—

(a) ensure that any such policy is in general conformity with the regional development strategy;

(b) exercise its functions under subsection (1) with the objective of furthering sustainable development and promoting or improving well-being."

<u>Section 2</u>

"2.—(1) The [Department for Infrastructure] must prepare and publish a statement of community involvement.

(2) The statement of community involvement is a statement of the [Department for Infrastructure]'s policy as to the involvement in the exercise of the [Department for Infrastructure]'s functions under Part 3 of persons who appear to the [Department for Infrastructure] to have an interest in matters relating to development.

(3) The [Department for Infrastructure] must prepare and publish a statement of community involvement within the period of one year from the day appointed for the coming into operation of this section."

<u>Section 26(1) and (2)</u>

"26.—(1) A person who proposes to apply for permission for any major development (except a development to which section 213 applies) which is prescribed in regulations made for the purposes of this subsection ("the prospective applicant") must, before complying with

section 27, enter into consultations with the [Department for Infrastructure].

(2) The [Department for Infrastructure] may make regulations prescribing the procedure to be followed in relation to consultations under this section."

[7] While the above statutory provisions form part of the broader framework to which this challenge belongs, the following lie at its heart:

Section 27

"27.—(1) Before submitting an application for planning permission for a major development (except a development to which section 213 applies), the prospective applicant must comply with the following provisions of this section.

(2) The prospective applicant must give notice (to be known as a "proposal of application notice") to the appropriate council that an application for planning permission for the development is to be submitted.

(3) A period of at least 12 weeks must elapse between giving the notice and submitting any such application.

(4) A proposal of application notice must be in such form, and have such content, as may be prescribed but must in any event contain—

(a) a description in general terms of the development to be carried out;

(b) if the site at which the development is to be carried out has a postal address, that address;

(c) a plan showing the outline of the site at which the development is to be carried out and sufficient to identify that site, and

(d) details as to how the prospective applicant may be contacted and corresponded with.

(5) Regulations may—

(a) require that the proposal of application notice be given to persons specified in the regulations,

(b) prescribe—

(i) the persons who are to be consulted as respects a proposed application, and

(ii) the form that consultation is to take.

(6) The council may, provided that it does so within the period of 21 days after receiving the proposal of application notice, notify the prospective applicant that it requires (either or both)—

(a) that the proposal of application notice be given to persons additional to those specified under subsection (5) (specifying in the notification who those persons are);

(b) that consultation additional to any required by virtue of subsection (5)(b) be undertaken as regards the proposed development (specifying in the notification what form that consultation is to take).

(7) In considering whether to give notification under subsection (6) the council is to have regard to the nature, extent and location of the proposed development and to the likely effects, at and in the vicinity of that location, of its being carried out.

(8) In the case of an application for planning permission to be made to the [Department for Infrastructure], this section has effect as if any reference to a council were a reference to the [Department for Infrastructure].”

Section 28

"28.—(1) A person who, before submitting an application for planning permission for a development, is required to comply with section 27 and who proceeds to submit that application is to prepare a report (a "pre-application community consultation report") as to what has been done to effect such compliance.

(2) A pre-application community consultation report is to be in such form as may be prescribed."

Section 50

"*Duty to decline to determine application where section 27 not complied with*

50.—(1) A council or, as the case may be, the [Department for Infrastructure] must decline to determine an application for the development of any land if, in the opinion of the council or the [Department for Infrastructure]—

(a) compliance with section 27 was required as respects the development, and

(b) there has not been such compliance.

(2) Before deciding whether, under subsection (1), an application must be declined the council or, as the case may be, the [Department for Infrastructure], may request the applicant to provide such additional information as it may specify within such time as may be prescribed.

(3) Where, under subsection (1), a council or the [Department for Infrastructure] declines to determine an application, the council or, as the case may be, the [Department for Infrastructure], must advise the applicant of the reason for its being of the opinion mentioned in that subsection."

[8] The relevant measure of subordinate legislation is the Planning (Development Management) Regulations (NI) 2015 (the "2015 Regulations"), which came into operation on 01 April 2015. This measure, by its Schedule, defines "*major developments*" prescribed for the purpose of section 26(1) of the Planning Act. In the context of these proceedings it is common case that the development proposed by Dalradian falls within the embrace of paragraph 5, namely the underground mining of minerals involving a surface area exceeding two hectares.

[9] The jurisdictional provision of the 2015 Regulations is Regulation 3.

> **<u>Regulation 3</u>**
>
> "3. The major development prescribed for the purposes of section 26(1) is—
>
> (a) development described in Column 1 of the table in the Schedule, where any applicable threshold or criterion in the corresponding entry in Column 3 of that table is met or exceeded; and
>
> (b) any change to or extension of development of a class described in paragraphs 1 to 5 of Column 1 of the table in the Schedule where that change or extension itself meets or exceeds the threshold or criterion in the corresponding entry in Column 3 of that table."
>
> **<u>Regulation 4</u>**
>
> "4. A proposal of application notice must be in writing and must, in addition to those matters required by section 27(4), also contain—
>
> (a) a copy (where applicable) of any determination made under regulation 7(1)(a) of the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2015 in relation to the development to which the proposal of application notice relates;
>
> (b) a copy of any notice served by the Department under section 26(4) or (6); and

(c) an account of what consultation the prospective applicant proposes to undertake, when such consultation is to take place, with whom and what form it will take."

This is followed by a series of provisions regulating pre-application community consultation.

Regulation 5

"5.—(1) Where the prospective applicant has been served with a notice under section 26(4), the Department must consult the appropriate council as respects a proposed application and in doing so, must give a copy of the proposal of application notice to that council.

(2) The prospective applicant must—

(a) hold at least one public event in the locality in which the proposed development is situated where members of the public may make comments to the prospective applicant as regards the proposed development; and

(b) publish in a newspaper circulating in the locality in which the proposed development is situated a notice containing—

- (i) a description of, and the location of, the proposed development,
- (ii) details as to where further information may be obtained concerning the proposed development,
- (iii) the date, time and place of the public event,
- (iv) a statement explaining how, and by when, persons wishing to make comments to the prospective applicant relating to the proposal may do so, and
- (v) a statement that comments made to the prospective applicant are not representations to the council or as the case

may be the Department and if the prospective applicant submits an application there will be an opportunity to make representations on that application to the council or as the case may be the Department at a later stage.

(3) A public event held by the prospective applicant in accordance with paragraph (2)(a) must not be held earlier than 7 days after notification of the date, time and place of such event is given under paragraph (2)(b)(iii)."

Regulation 6

"6. The period prescribed for the purposes of section 50(2) is the period of 21 days beginning with the day on which the additional information referred to in that subsection was requested."

Departmental Policies

[10] The relevant Departmental guidance is contained in the "Development Management Practice Note Number 10" (hereinafter "DM10"), (entitled "Pre-Application Community Consultation and Pre-Application Discussions") published by the Department's predecessor (DOE) in April 2015. This policy, as its title indicates, addresses two inter-related subjects. The first is the innovative regime governing early consultation with the community in major development applications regulated by section 27 of the Planning Act. The second is the Departmental Practice relating to so-called "Pre-Application Discussions" (hereinafter "PAD"), which is an extra-statutory matter.

[11] DM10 expresses itself to be "*part of a series of new practice notes stemming from the Planning Act …. and any related subordinate legislation*", with a stated emphasis on advice. While this measure must be considered in its entirety, I have singled out certain of its provisions in particular:

Paragraph 1.1

"*1.1 Engaging communities is an essential part of an effective and inclusive planning system. Both pre-application consultation with the community and pre-application discussions with the council, or as the case may be the*

Department, are intended to add value at the start of the development management process by improving the quality of the proposal and allowing applicants the opportunity to amend their emerging proposals to accommodate community and stakeholder opinion. This seeks to ensure that all parties are clear on the process that leads to a decision."

Paragraph 1.2

1.2 Where applicants engage in meaningful pre-application consultation, local communities can be better informed about development proposals and have an opportunity to contribute their views before a formal planning application is submitted. In so doing, it is hoped this will subsequently improve the quality of planning applications received; mitigate negative impacts where possible; address community issues or misunderstandings; and provide for smoother and more effective decision making.

Paragraph 1.3

1.3 Pre-Application Discussions (PADs) are a separate activity from statutory pre-application consultation with communities, although they can inform the planning process and scope of the statutory consultation activity. Such consultation may also support the applicant's preparation of the statutory design and access statement."

Paragraph 1.4

1.4 *Part A of this practice note will set out the requirements associated with pre-application community consultation (PACC) whilst Part B will examine the PAD process.*

Paragraph 2.13

2.13 It is important to note that the carrying out of such pre-application community consultation is the responsibility of the applicant and all feedback and community comments should be made to the applicant. A council, or as the case may be the Department, will not accept representations or objections to a

proposal at this stage since no planning application has been received.

Paragraph 3.1

3.1 The level and extent of pre-application engagement should be proportionate to the scale and the complexity of the proposed development.

Paragraph 3.2

3.2 There are many ways in which communities can be effectively involved in proposals which may affect them. At its most simple level, a community consultation process should ensure that people:

- *have access to information*

- *can put forward their own ideas and feel confident that there is a process of considering ideas; and*

- *have an active role in developing proposals and options to ensure local knowledge and perspectives are taken into account.*

To achieve this it is essential that prospective applicants understand the local communities who are most likely to be affected by the development proposal.

Paragraphs 5.1 and 5.2

5.1 It is recognised that community consultation requirements will vary depending on the nature and scale of the planning proposal and the area in which the development is to be located. A range of consultation methods may therefore be considered more appropriate for some developments in a particular location than others. It is advisable therefore that prospective applicants use a variety of techniques to ensure that they access all sections of the community identified.

5.2 As a minimum pre-application consultation must involve at least one public event. This event should have an open invitation and be advertised through the local press

although it may also be helpful to inform residents within the vicinity of the proposal about the public event by way of a letter.

<u>Paragraph 5.6</u>

5.6 Venues should be local and accessible to cater for all audiences and the format of any event or meeting should allow for meaningful participation. Depending on the proposal, it may be appropriate to hold more than one event over a number of dates, times and places.

<u>Paragraphs 6.1 and 6.2</u>

*"**Information to assist local communities**.*

6.1 Local communities will require the necessary information to enable them to understand and respond to the development proposal. It would be preferable that proposals are sufficiently developed to allow for meaningful comment to be made although not so detailed that flexibility to amend the proposal has diminished.

6.2 A short document could initially be prepared by the prospective applicant specifically for local communities, summarising the proposals, outlining the matters on which the view of the local community is sought. It could also, as far as possible, describe the key aims and objectives of the proposal and explain what the potential impacts of the proposal might be. Where documents are being used they should be written in clear, accessible and non-technical language."

[12] Annex A of DM10 consists of a single, free standing instrument entitled "Pre-Application Discussion – Model request proforma" which is in the following terms:

Annex A: Pre-application Discussion – Model Request Pro-forma

Applicant Details	**Agent Details (if any)**
Name: Address:	Name: Address:

<table>
<tr><td>Postcode:

Telephone:

Email:</td><td>Postcode:

Telephone:

Email:</td></tr>
<tr><td colspan="2">Location of application site and ownership</td></tr>
<tr><td>Address:

Postcode:</td><td></td></tr>
<tr><td>Grid Reference:</td><td>Ownership:</td></tr>
<tr><td colspan="2">Description of the proposed development (including inter alia the nature and purpose of the development and of its possible effects on the environment…)</td></tr>
<tr><td colspan="2"></td></tr>
<tr><td colspan="2">Attached Information</td></tr>
<tr><td colspan="2">• A site plan (scale 1:1250 or 1:2500) marked with the footprint of the proposed development (in red) and the limit of the land in the applicants ownership/control (in blue); ☐

• Photographs of the existing site; ☐

• Initial sketch drawings of the proposed development showing the nature and scale of the development; ☐

• Drawings/plans showing the potential constraints [trees, other ☐
•</td></tr>
</table>

vegetation, overhead wires, listed buildings etc…]; ☐

- Results of any preliminary consultation with neighbours, other authorities or statutory undertakers (as appropriate); ☐

- Other supporting information such as draft environmental statement; transport assessments or ecological surveys; evidence of community engagement (as appropriate). ☐

Disclosure of Information

Developers and applicants should be aware that information related to pre-application requests may be subject to requests under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004. The Act and Regulations provide for some exemptions from the need to disclose commercially sensitive information and in cases where applicants consider that specific information is exempt from the requirements of the Act or the regulations, the justification for their position should be provided to the relevant council planning office (or Department as the case may be).

Status of Pre-application Advice

General advice obtained from the Department's or relevant councils website or indeed advice obtained through discussions with duty officers or through the pre-application discussion process does not bind the council, or as the case may be the Department, in making a formal decision at the regulatory stage, following public consultation with all interested parties and consultation with relevant stakeholders.

It is important to note therefore that all pre-application advice is given without prejudice to the formal consideration of a planning application as other information may arise from consultations, third party representations or policy changes during the regulatory determination process. Any variations from the general advice offered at the pre-application stage would be unusual.

Declaration

Signed	Dated

Return this completed form to your relevant Planning Office: Contact details are available on the Planning Portal (www.planningni.gov.uk)

April 2015

The SPPS

[13] The Strategic Planning Policy Statement for Northern Ireland ("SPPS"), published in September 2015, states at paragraph 5.50:

> *"A key element of the enhanced arrangements for community engagement is ensuring that community views are reflected at the earliest stage. Pre-Application consultation with communities is a statutory requirement for all major, including regionally significant, development proposals. It is the responsibility of the applicant to undertake this consultation. Applicants for all major, including regionally significant, developments will therefore be required to demonstrate that they have undertaken consultation with the community prior to the submission of a planning application. Likewise councils must ensure that communities are given the opportunity to be actively involved in the preparation of their LDPs at the most appropriate stages in their preparation."*
>
> ["LDP" denotes "Local Development Plan".]

Chronology and Agreed Facts

[14] The parties helpfully co-operated with the court in the compilation of the following schedule:

No.	Date / Period	Event
1.	1983	Exploration of Curraghinalt gold deposit begins; undertaken over time by a number of companies (since 2010, Dalradian)
2.	1987	Planning permission granted *inter alia* to construct underground exploration tunnels

3.	January 2014	Planning permission granted to Dalradian *inter alia* to establish exploration compound, and to extend underground exploration workings to access and define the deposit and sample the mineralised material for off-site metallurgical testing
4.	26th May 2015	Section 26 determination by Department (agreeing with Dalradian that proposal is for major development of regional significance)
5.	December 15 – July 17	Dalradian engages in Pre-Application meetings with Department
6.	11th December 2015	Dalradian requests EIA Scoping Opinion from Department
7.	23rd – 28th January 2016	Series of five events held in locality of site by EIA and engineering design team, to share information about project and consult in respect of environmental information then available
8.	28th January 2016	Dalradian submits request for pre-application discussions ("PAD")
9.	20th May 2016	Meeting between Dalradian and directors of the Applicant and the Applicant's planning consultant
10.	23rd May 2016	PAD meeting with Department
11.	23rd June 2016	PAD meeting with Department
12.	4th August 2016	PAD meeting with Department
13.	9th August 2016	Department responds to request for EIA scoping opinion
14.	16th August 2016	PAD meeting with Department
15.	23rd August 2016	PAD meeting with Department
16.	30th August 2016	Dalradian submits 1st PAN
17.	7th September	Department's consideration note of 1st PAN

	2016	
18.	23rd – 30th September 2016	Exchange of correspondence between the Applicant Company and Dalradian: Rouskey Community Centre no longer available for public events
19.	17th October 2016	Dalradian advises of change of venue and dates for public events
20.	27th October 2016	Dalradian submits revised PAN – form confirms that public event will be at the Notice Party's own site on 19th and 21st November 2016
21.	27th October 2016	Department's consideration note of revised PAN
22.	27th October – 13th November 2016	Newspaper advertisements published in 15 local newspapers – the information in the advertisement reflects the PAN information.
23	4th November 2016	Pre-action protocol correspondence from Finucane Toner Solicitors
24	15th November 2016	Department's response to letter of 4th November 2016
25.	19th and 21st November 2016	Public information events
26.	27th November 2017	Planning application lodged by Dalradian
27.	November 2017	As part of planning application submission, Dalradian lodges its Pre-Application Community Consultation Report ("PACCR")
28.	c. 13th December 2017	Dalradian lodges Updated Form P1
29.	14th December 2017	Applicant's solicitors write to Department raising concerns with PACC process
30.	21st December	Applicant's solicitors write further to Department setting

	2017	out more detailed concerns with PACC process
31.	7th February 2018	Department responds to Applicant's solicitors advising, *inter alia*, that it will shortly make a decision on Dalradian's compliance with S. 27.
32.	8th February 2018	Section 50 determination made (the impugned decision)
33.	21st February 2018	Notification of impugned decision
34.	21st February 2018	Neighbour notification of the planning application
35.	22nd February 2018	Planning application and Environmental Statement advertised in four local newspapers
36.	22nd February 2018	Pre-Action letter issued
37.	26th February 2018	Leave papers lodged with Court

The Impugned Decision

[15] The coalescing of sections 27, 28 and 50 of the Planning Act obliged the Department, upon receipt of Dalradian's planning application, to decide whether Dalradian had complied with the requirements of section 27. A positive decision would result in the planning application being processed and determined. In contrast, a negative decision would entail the Department declining to determine the planning application. The third alternative available to the Department was to request further information in the exercise of its discretion under section 50(2).

[16] By its impugned decision made on 08 February 2018, the Department determined, under section 50 of the Planning Act, that Dalradian had complied with the requirements of section 27. This decision is recorded in an internal note, or memorandum, which has the following contents:

(a) An outline of the proposed development.

(b) A rehearsal of sections 27, 28 and 50 of the Planning Act.

(c) *Ditto* regulations 4 and 5 of the 2015 Regulations.

(d) Reproduction of the text of paragraph 5.50 of the SPPS (*supra*).

(e) "Consideration – DMPN10".

(f) "Consideration – Background to PAN".

(g) "Consideration – Content of the PACCR".

(h) "Conclusion and Recommendations".

[17] The impugned section 50 determination contains a clear acknowledgement of the nexus between the exercise being carried out by the decision makers and the earlier PAN process, in the autumn of 2016. It notes that the Department was then satisfied with Dalradian's compliance with section 27 of the Planning Act and regulations 4 and 5 of the 2015 Regulations. This segment of the memorandum contains the following sentence:

> "*The PAN and the Department's processing of it was not challenged at the time.*"

I shall revert to this in [23] – [30] *infra*.

[18] In the "Consideration – Content of the PACCR" section of the memorandum it is stated:

> "*The submitted PACCR comprises a report together with accompanying Appendices. With regard to the advice in* [DM10] *….*
>
> - *The purport of the report, which is to confirm that pre-action community consultation has taken place in line with the statutory minimum requirements, has been fulfilled. The applicant may go beyond the minimum requirements but is not required to do so. In this case the applicant has met and gone beyond the minimum requirements.*
>
> - *The level and extent of the pre-application engagement should be proportionate to the scale and the complexity*

of the proposed development. The applicant has outlined an Engagement Strategy at Section 5, the various other engagement methodologies employed at Section 6, the pre-PAN consultation activity at Section 7 and post-PAN consultation activity at Section 8 of the PACCR. This demonstrates a proportionate response to the project in excess of the statutory minimum.

- *The Department is not privy to the individual events of the engagement process as this is a matter for the prospective applicant. The Department is nevertheless satisfied that the information in the PACCR and the Appendices would have provided the public with the necessary information* ***to understand and respond to the development proposal****.*

- *The Department is satisfied that the proposal was sufficiently developed to allow for meaningful comment to be made although not so detailed that flexibility to amend the proposal was diminished.*

- *The PACCR includes comment as appropriate on the matters advised at paragraph 7.3 of DMPN 10.*

- *Evidence has been provided to substantiate that the various steps have been taken.*

- *The PACCR provides a concise (as far as practicable given the scale of the project), yet thorough assessment of consultation activities that have taken place. The PACCR at Section 11 sets out in some detail the issues raised by those consulted and the applicant's response. Section 12 sets out the changes in the project proposal as a result of the feedback from the community. The Department is satisfied that the PACCR sets out the issues raised by those consulted throughout the consultation process as well as the changes made to the proposals to address those issues."*

[emphasis added]

[19] I have reproduced above paragraph 5.7 of the memorandum in its entirety. At paragraph 5.8 it is stated:

> [5.8] *It is noted that the PAN provided a description in general terms of the development to be carried out. The P1 (application form) includes additional detail; the additional detail does not fundamentally alter the nature, scale or location of the proposal (see Annex 1).*"

Paragraph 5.9 continues:

> *"I am satisfied that the content of the PACCR is compliant with relevant legislative requirements and broadly compliant with the guidance in DMPN 10."*

The author, accordingly, recommended that the Department should not decline to determine the application under section 50(1). The other two planning officials concerned, as indicated by their signatures, concurred with the author's conclusion and recommendation. (In passing the author of the impugned memorandum of decision is the Department's deponent in these proceedings.)

[20] Annex 1 to the section 50 determination is a schedule consisting of three columns entitled "The Planning Application Description (Form P1), the PAN Description [and] Comment" respectively. Its umbrella title is "Principal Differences between the P1 and PAN descriptions". The analysis contained in this schedule is that none of the following elements of the proposed development was included in the PAN: a ramp; a paste backfill plant; fuelling and small service maintenance facilities; refuge stations and ancillary infra structure; mine workings and paste backfill and waste rock placed in the workings; two additional ventilation raises (main ventilation fans located underground) and retention of the existing ventilation raise; additional surface level development consisting of a crusher building, covered coarse ore stock pile, a laboratory building, a mine dry building, a mine rescue building, a warehouse building and a fuel and lube station; cycle parking; circulation space; the temporary retention of an explosives store; four water storage ponds; a below surface sewage treatment plant; surface water diversion berms; water management ditches and distribution channel; laydown areas; five metre high rock berms; lighting; temporary and permanent peat and spoil storage areas; a new road to the east of the proposed dry stack facility/mine waste storage facility; use of the existing infra structure as a secondary mine access; temporary (24 months) use of an existing hard standing area has a turning point for heavy goods vehicles; landscaping and habitat mitigation, enhancement and compensation works including the erection of a bat house;

and, finally, "*other ancillary works*" related to the eventual closure of the mine and associated phased landscape restoration.

[21] The "Commentary" column of Annex 1, in general terms, observes that in the various respects set out – see [20] above – Form P1 "*expands on*" the PAN description. The additional elements contained in Form P1 are assigned to eight discrete categories. Four of these attract the comment of "*ancillary or relatively small scale development*". There is also the comment "*… does not significantly alter the overall nature, scale or location of the proposal already described in the PAN*", in virtually identical language, in three places. The various vehicular, roads and access additions, together with those of the sewage treatment plant and surface water installations, attract each of the foregoing comments, with the addition of:

> "*…. it would be reasonable to expect such details to develop as the design process evolved. Some details would also be expected to derive from the iterative EIA process as the project impacts were further developed.*"

[22] The HGV turning point addition attracts the comment that this "*… developed as a result of traffic consultations and as work developed on the traffic impact assessment*". There are no comments relating to the addition of the new easterly road and the use of existing infrastructure as a secondary mine access. Finally, the landscaping/habitat (etc) additions are addressed in the comments as works which "*…. can be expected to derive from the iterative EIA process as the project impacts were further developed ….* [and] *works in themselves* [which] *are not considered to represent significant change to the overall proposal as presented in the PAN*".

<u>The November 2016 Correspondence Issue</u>

[23] The two letters to which I turn at this juncture are linked to the discrete issue noted in [17] above. The purpose of the exercise which follows is to consider a freestanding argument developed on behalf of the Applicant focusing on the following sentence in the memorandum of decision:

> "*The PAN and the Department's processing of it was not challenged at the time.*"

The first of the two letters is dated 04 November 2016, written by a firm of solicitors representing one of the Greencastle residents. As appears from the chronology in [13] above, at this stage Dalradian had issued its initial PAN

followed by the revised PAN. The latter was stimulated by a clearly unexpected refusal by the Rouskey Community Centre to make its premises available for the proposed PAN public information event ("PIEs"). As a result the revised PAN, which the Department accepted, notified two changes namely an alteration of venue (to a building on the subject site) and an alteration of the two PIE dates, which were put back by approximately one month.

[24] Written in the foregoing context, the solicitors' letter listed five complaints on behalf of their client. Four of these related to the change of venue and change of dates. The fifth suggested that, at that stage, there was insufficient information about Dalradian's development proposals to the extent that the consultation process was not "*effective or fair*" vis-à-vis their client. The solicitors invited the Department to take eight specific steps, including in particular a series of "*declarations*" (in effect, concessions).

[25] This is a self-proclaimed "PAP" letter. The exercise of construing it is not altogether straightforward. Notwithstanding it has two features in particular. The first is the invocation of section 27 of the Planning Act and regulations 4 and 5 of the 2015 Regulations. The second is the specific request (the eighth and last in the list noted above) that the Department acknowledge –

> "*… that the planning application notice presently lodged is defective and of no effect …*"

I consider that, in substance, this letter embodied a contention that the PAN was non-compliant with the aforementioned statutory requirements, coupled with a threat to initiate judicial review proceedings in the event of an unsatisfactory departmental response.

[26] I turn next to the reply to the letter, written by the Department's solicitor. Under the rubric of "*Detail of the matter being challenged*", the solicitor states:

> "*It appears that your client's concern in this matter at this time is that he takes issue with the proposed pre-application community consultation to be carried out by Dalradian Gold Limited in respect of proposed mining and processing development at the Curraghinalt site.*"

Next, under the heading "*Response to the proposed application*", the correspondence states:

> *"The pre-application community consultation in question has been proposed by Dalradian Gold Limited and not the Department."*

The solicitor then adverts to sections 27, 28 and 50 of the Planning Act and regulations 4 – 6 of the 2015 Regulations, continuing:

> *"In short it is upon receipt of the actual planning application and the pre-application community consultation report that the Department is required to determine whether section 27 has been complied with, and not before then. In the meantime it is a matter for the putative planning applicant to carry out that consultation and thereafter, if they proceed to submit a planning application, to report upon the said consultation to the Department.*
>
> *There is therefore no matter arising at this time for which the Department is responsible that is amenable to judicial review. Furthermore and for the same reasons any challenge to compliance with section 27 is at this stage premature."*

[27] The discrete argument developed on behalf of the Applicant company relating to this letter has two basic factual components. First, the Department's solicitor, while making two references to section 27 of the Planning Act, made no explicit reference to section 27(6). Second, while the letter reproduces sections 28 and 50 of the statute, it does not reproduce section 27. From this factual foundation the argument was developed that the single sentence in the impugned decision reproduced in [23] above is erroneous in fact, betokens the intrusion of an immaterial (incorrect) consideration and, in consequence, vitiates the impugned decision.

[28] I have struggled to link this specific argument with the ultimate incarnation of the Order 53 pleading which, as a result of proactive and intensive judicial scrutiny from the outset of the proceedings, was reformulated more than once. Neither this correspondence nor the relevant passage in the impugned determination features anywhere in the final amended pleading. It follows that the Applicant company has not been granted leave to apply for judicial review on this ground. This is no technical point given that the Respondent's Counsel were driven to deal with this unexpected line of challenge *ad hoc* and

without the benefit of reflection on whether replying evidence would be appropriate.

[29] I am satisfied that this discrete argument has no merit in any event. A protracted debate about the meaning of the word "challenged" would in my view be arid. The sentence in the impugned memorandum on which the spotlight falls was written by a public servant. The memorandum is not to be construed through the legal prism applicable to a statute, a contract, a deed, a lawyer's advice or, indeed, the judgment of a court. There was no legal challenge to any act or omission of the Department pertaining or belonging to the PAN phase. Such a challenge was threatened, but did not materialise.

[30] I consider this exchange of correspondence to be a typical example of pre-litigation sparring. The Applicant's argument, properly exposed, contends that the solicitors' letter was a challenge to the Department's failure to exercise its discretionary powers under section 27(6) of the Planning Act. The first riposte to this is that the letter, even on the most benevolent view of this argument, does not yield this construction. The second is that there is no nexus between the main thrust of the solicitors' letter, as diagnosed and explained above, and the provisions of section 27(6). The latter empowers the Department, in the exercise of its discretion, to require the prospective planning applicant to serve the PAN on additional persons or agencies and/or to undertake consultation additional to that required by section 27(5)(b). In short, these two statutory powers were simply not to the point with regard to the solicitors' letter. To summarise, this specific argument lies outwith the permitted ambit of the Applicant's challenge and fails on its merits on any event.

The Proposal of Application Notice

[31] The Proposal of Application Notice ("PAN") required by section 27 of the Planning Act is contained in a specially designated pro-forma (Form PAN1) and dated 30 August 2016. The PAN did not suddenly appear from the ether. Quite the contrary. It had a history of some longevity. I preface what follows with this observation. As the new statutory consultation regime has a clear focus on the knowledge and understanding of those consulted, neither the PAN process nor the ensuing PACCR report is to be divorced from their broader context and history. The latter, where relevant, may be considered by the court in its audit of compliance with the relevant statutory requirements. No contrary argument was advanced.

[32] The factual framework bearing on this freestanding issue is adequately rehearsed in the chronology at [14] above. In short, the two public events organised and held by Dalradian in November 2016 were preceded by proactive interaction between the developer and the local community and were followed by a structured "feedback" process. Events during this period are to be considered in their entirety. They <u>included</u> specially devised meetings with members of the local community; advertisements of such meetings in local newspapers and church bulletins; the creation and dissemination of a specially tailored newsletter; the attendance of experts at the aforementioned meetings; and a series of "pre-application discussion" ("PAD") meetings attended by representatives of Dalradian and the Department designed *inter alia* to consider the steps to be taken in the PAN exercise.

[33] The PAN is a two page document with a map attached. It first describes the address of the proposed development. This is followed by a section entitled "Description of Proposal", which was completed in the following terms:

> "*Underground valuable minerals mining and exploration including new portal (tunnel entrance), decline, paste plant, secure explosives store and ancillary infra structure ….*
>
> *Associated surface level development including:*
>
> - *Processing plant.*
> - *Mine waste storage facility.*
> - *Administrative, welfare, maintenance and secure storage buildings.*
> - *Vehicle parking and internal roads.*
> - *New water treatment facility and associated water storage ponds.*
> - *Electricity substation.*
> - *Communications tower.*
> - *New site access from Crochanboy Road ….*

- *Landscaping.*

- *Perimeter fencing.*

Demolition (when required) of existing holiday cottage and associated buildings at 80 Mullydoo Road ….

A new route located to the south of the proposed mine waste storage facility …

Retention of the existing portal, tunnel and surface development at [specified location] ….

Additional water treatment facilities at this existing site to serve the mine …

Road improvements, as required, along the extent of the Camcosy Road [at specified locations] ….

Mine closure and associated phased landscape restoration."

[34] Next the PAN contains particulars of the forms of consultation which the planning applicant (Dalradian) was proposing to undertake: two public information events, advertisements in specified newspapers, distribution of information leaflets to circa 1600 properties, proposed meetings with "immediate neighbours", elected representatives and Council officials, other proposed meetings with community groups and business organisations and, finally, the provision of project information on the Dalradian website. The PAN, as contemplated by the new statutory provisions, was served on the Department.

[35] A large map entitled "Site Location and Layout Plan" accompanied the PAN. This identifies vehicular accesses, the proposed tunnel entrance and the various elements of proposed infrastructure – the processing plant, the mine waste storage facility, the water treatment plant and two proposed water ponds. The three public roads bordering the site are also identified, together with a nearby river and the existing surface infrastructure. There is a prominent blue line which, according to the legend, denotes the "*maximum extent of proposed exploration area*". There is also a green line, enclosing a smaller area, denoting the "*maximum extent of proposed mine extraction area*". The Applicant's two specific complaints about this map are that it has no development "red line" and, in common with the PAN, it discloses nothing

relating to what emerged later in Form P1 namely the proposed peat stripping and storage on the site.

The 'PAN' File Notes

[36] Receipt of Dalradian's PAN stimulated the preparation of an internal file note. This is dated 07 September 2016 and has three signatures. It is necessary to reproduce this record in full:

> "***Consideration*** ***Section 27(6)***
>
> *Following receipt of a PAN It is discretionary whether the Department should notify the prospective applicant of additional persons and consultation to be carried out under Section 27 (6)*
>
> *In accordance with Section 27 (7) the Department has considered whether it is necessary to give notification under Section 27(6), having regard to the nature extent and location of the proposed development and to the likely effects, at and in the vicinity of that location, of its being carried out.*
>
> *It is noted that the 'Regulations' The Planning (Development Management) Regulations (Northern Ireland) 2015 do not specify that the PAN be given to any person and there is only a requirement for the Department to consult with the relevant local council.*
>
> *Given the proposed form of consultation outlined in the PAN, (the publicity, the information leaflet to 1500-1600 properties, the range of political representatives, business organisations, community groups and the public information events etc), the Department is satisfied that both a satisfactory range of persons and form of consultation have been identified for the purposes of Section 27 and in these circumstance does not consider that it is necessary to notify the prospective applicant under Section 27 sub-section 6 (a) and (b).*
>
> *The actual extent of consultation will be outlined in the pre-application community consultation report and the Department has a further opportunity to determine*

whether what has been done to effect compliance with Section 27 is adequate and can request further information under Section 50 on receipt of the application."

[37] Some weeks later Dalradian provided a revised PAN. This mirrored the preceding PAN with one exception namely the two proposed public information events (PIEs) were to be carried out (a) on different dates, about a month later than first notified and (b) on the site, rather than (as first notified) at the Rouskey Community Centre. This prompted compilation of a second internal file note dated 27 October 2016 and signed by the same three officials, in approving terms. Nothing of note turns on the language used.

The Public Information Event ("PIE")

[38] The background to the two PIEs organised and hosted by Dalradian on 19 and 21 November 2016 has been outlined above. The statutory touchstones pertaining to these events are section 27(5) of the Planning Act and regulation 5(2) and (3) of the 2015 Regulations. The Applicant's challenge focuses firstly on the specific requirement enshrined in regulation 5(2)(b)(i) that the newspaper advertisement contain "*a description of, and the location of, the proposed development ….*".

[39] The provision of the full suite of newspaper advertisements in real size and in glorious technicolour represents one of multiple instances of willing and professional co-operation with the court on the part of the parties and their legal representatives. The court commends and thanks all concerned. These advertisements, uniformly, in the wake of unavoidable revision of the PAN noted in [37] above, provide all necessary particulars of the arranged PIEs and list the elements of the proposed development under the umbrella description of "Underground valuable minerals mining and exploration including new portal (tunnel entrance), decline, waste plant, secure explosive store and ancillary infrastructure", as the following:

"*Associated surface level development including:*

- *Processing plant.*
- *Mine waste storage facility.*
- *Administrative, welfare, maintenance and secure storage buildings.*
- *Vehicle parking and internal roads.*

- *New water treatment facility and associated water storage ponds.*

- *Electricity substation.*

- *Communications tower.*

- *New site access from Crockanboy Road (approximately 25m to the east of 225 Crockanboy Road).*

- *Landscaping.*

- *Perimeter fencing."*

These are the "headline" elements of the proposed development as advertised. They are amplified in various respects in the adjoining column (demolition works, a new access road, phased landscape restoration *et al*).

[40] Regulation 5(2)(b) stipulates that the requisite notice be published in "*a*" newspaper circulating in the locality of the proposed development. According to the evidence there were 13 such advertisements in this case. To summarise, whereas the statutory requirements are that there be a <u>single</u> "public event" and that it be advertised <u>once</u> in a local newspaper – per regulation 5(2) of the 2015 Regulations – Dalradian organised two such tailor made events preceded by 13 newspaper advertisements. Additional, non-statutory steps included the circulation of 5,000 publicity leaflets and the distribution of same to 5284 properties lying within a 15 kilometre radius of the site.

[41] There is uncontested evidence that on the two PIE dates 15 expert members of the Dalradian consultancy team were in attendance for the purpose of interacting with participants. The specialisms of these experts ranged from the subject of air quality and noise to ecology and habitats and environmental impact assessment. Other Dalradian representatives, including board members, also attended. One of the main features of these two events was the so-called "display boards". The court received enlarged versions of these in full colour. I calculate that there were 54 such boards altogether. These contained information about the proposed development in a series of forms: while the written word, unsurprisingly, was dominant there were also extensive pictorial aids consisting of maps, plans, schematic drawings, photographs and computer generated images.

[42] The information thus provided by the display boards addressed the following topics: the central elements of the contemplated planning application; the reports *et al* which would be generated for the purpose of the planning application; the components of the Environmental Statement ("ES"); an indicative timeline of the planning process; consents, permits and licences; site layout and location; the "*project perimeters*"; the underground mine; the mine waste storage (dry stack) facility; the processing plant; project timelines and main activities; the environmental assessment process; the eventual closure of the mine; air quality; noise; ecology; operational water uses; ground water; surface water; landscape and visual amenity; the cyanide management code; cyanide destruction; cultural heritage; health and safety policy; access to the site; and traffic.

[43] At the stage when the two PIEs were held (November 2016) Dalradian, in accordance with the new statutory arrangements, had not submitted any planning application to the Department. It had, however, engaged in a series of pre-application discussions with departmental representatives (see [14] above). This process, popularly known as "PAD", is described in the judgment of this court in Re Belfast City Council's Application [2018] NIQB 17 at [45] – [50]. During the period of around one year prior to the PIEs there had been some 30 "PAD" Dalradian/Department meetings. These were clearly carried out in a structured way, addressing individual issues and topics, many of them reflected in the display boards noted above. The subjects discussed included that of the PAN itself.

The Planning Application

[44] As appears from the agreed chronology, the submission of the Dalradian planning application materialised approximately one year following the two PIE exercises belonging to the PAN process. During the intervening year there had been some 12 further PAD interactions. Dalradian's planning application was received by the Department on 27 November 2017. It was formulated in the conventional Form P1. The accompanying plans (108 in total) included specialist reports, environmental statements and other materials comprising some 10,000 pages arranged in 18 lever arch files.

[45] In brief compass, Form P1 describes the area of the site as comprising 997 hectares, with 144 hectares of proposed surface infrastructure. The description of the extant use of the land indicates that this is mainly agricultural in nature. Certain existing residential properties and agricultural buildings were also identified. In addition brief particulars were given of the

land uses previously authorised for commercial exploration and activity: an existing portal and tunnel with associated surface development, together with an existing vents raise and explosive magazine. It was further stated that decommissioning of buildings *et al* and closure/restoration of the site would be undertaken at the end of the projected life of the mine. The proposed development was described in an accompanying summary document. Its essence is captured in the following extract:

> "*Underground valuable minerals mining and exploration including new portal (tunnel entrance), decline (ramp), paste backfill plant, secure explosives store, fuelling and small service maintenance facilities, refuge stations and ancillary infrastructure, mine workings and paste backfill and waste rock placed in the workings.*"

The outworkings and colour of this summary are gleaned from the text which follows. I refer also to [2] – [3] above.

<u>The "PACCR"</u>

[46] It was stated in Form P1 *inter alia* that one of the accompanying documents was Dalradian's Pre-application Community Consultation Report (the "PACCR"). This consists of an executive summary, 12 chapters and over 70 appendices. This extensive report details *inter alia* the following: over 17,000 visits to the project's website; a "tunnel tour" of the existing mine attended by 674 individuals and 25 groups; meetings attended by 313 land owners; private and public meetings with residents, community groups and representative organisations; the distribution of over 8,000 news letters and 13,000 leaflets, fact sheets and letters to over 5,000 properties within 15 kilometre radius of the site; the attendance of 270 people at the two PIEs; in excess of 500 comments and representations; and (amongst other figures) an indication that 65% of respondents supported the project subject to suitable controls and safeguards. In addition, 71% of respondents either agreed or strongly agreed about the socio-economic benefits of the project. The report further indicates that Dalradian's PAN community consultation activities spanned the period January to November 2016, while engagement with the community dated from 2010.

[47] The preceding paragraph, unavoidably, provides the briefest of overviews only. I have paid particular attention to those aspects of the report and its appendices which featured in the Applicant's grounds of challenge and

counsel's submissions. I shall where appropriate, highlight some of these *infra*.

The PAN and Form P1 Compared and Contrasted

[48] The differences between the PAN and Form P1 formed a major plank of the Applicant's case. They are assembled in a single document (which I shall describe as "the Schedule") which, at the court's request, was appended to the final incarnation of the Order 53 Statement. In short, those aspects of Form P1 identifiable as additional to, or different from, the contents of the PAN are in the blue font which has double underlining. Attention to the "Key" renders the Schedule readily intelligible.

[49] The Schedule is in the following terms:

Schedule to the Amended Order 53 Statement

1. The differences between the PAN and Advertisement descriptions and the Form P1 descriptions are as set out below (being the text of the compare document exhibited at RT 1 Tab 11 (Trial Bundle 1, Folder 1, pages 155A to 157)).

2. The Applicant notes that neither the PAN or Advertisement descriptions, or indeed the Form P1 description refers to the removal of 30.2 hectares of peat – the Form P1 text refers to *"temporary and permanent peat and spoil storage areas"*.

3. There are also differences between the PAN Plan and the Planning Application plan, which are set out in the document which is to be agreed between the parties.

Compare document – exhibited at RT 1 Tab 11 – Trial Bundle 1, Folder 1, pages 155A to 157

KEY:

~~Deletion~~ – Advert/PAN

Insertion – P1

FORM P1

Proposal Description

Underground valuable minerals mining and exploration including new portal (tunnel entrance), decline, (ramp), paste backfill plant, secure explosives store, fuelling and small service maintenance facilities, refuge stations and ancillary infrastructure, mine workings and paste backfill and waste rock placed in the workings.

Two additional ventilation raises (main ventilation fans located underground) and retention of the existing ventilation raise.

~~Associated~~ Associate surface level development including:

- Processing plant (crusher building, covered coarse ore stockpile and process plant building)
- Laboratory building
- ~~Mine~~ Dry stack facility (also called the mine waste storage facility)
- Administration and mine dry building
- Mine rescue building
- Warehouse building
- Maintenance workshop building
- Fuel and lube station
- Main substation (electrical room, substation (electrical room) and electrical rooms
- Electricity transformer
- ~~Administrative, welfare, maintenance and secure storage buildings~~
- ~~Vehicle~~ Vehicle and cycling parking~~and internal roads~~
- Internal roads and circulation space
- Retention of existing explosive store (on a temporary basis)
- ~~New water~~ Water treatment ~~facility and~~ plant ~~associated water storage ponds~~
- ~~Electricity substation~~
- ~~Communications tower~~

- 4 x water storage ponds
- Sewage treatment plant (below surface)
- Surface water diversion berms
- Water management ditches and distribution channels
- New site access from Crockanboy Road (approximately 2~~5~~2m to the east of ~~225 Crockanboy Road~~ Irish grid reference 258003, 383422)
- Landscaping
- Perimeter fencing
- Laydown areas
- 5m high rock berms
- Lighting

- Temporary and permanent peat and spoil storage areas

Demolition (when required) of existing ~~holiday~~ cottage and associated buildings at 80 Mullydoo Road, Greencastle, BT~~7~~9 7QP.

A new ~~route~~ road located to the south and east of the proposed dry stack facility/mine waste storage facility.

Retention of the existing portal, tunnel and surface development ~~at~~ on lands ~~165m west of No. 45~~ off Camcosy Road (approved under planning permissions ~~K/2014/0246/F~~ S/2014/0246/F and K/201~~3~~4/0~~0~~3872/F), with consequential amendments to planning conditions ~~limiting~~ on the duration of this development and it's restoration~~). Additional~~ .

Upgrade of water treatment facilities at this existing site to serve the mine. The existing infrastructure to be used as secondary mine access.

Road improvements, as required, along the extent of the Camcosy Road between lands approximately 165m west of No. 45 Camcosy Road ~~and No. 2 Camcosy Road~~ (turning point west of Rouskey).

Temporary use (24 months) of an existing hard standing area of Lenagh Road agricultural yard as a turning point for heavy goods vehicles.

Landscaping and habitat mitigation, enhancement compensation works including the erection of a bat house.

Mine closure and associated phased landscape restoration.

Other ancillary works.

Address

Lands north west of Greencastle and ~~E~~east of Rouskey; north of the Crockanboy Road, mainly west of Mullydoo Road, north and south of Camcosy Road ~~and works, as required along the Camcosy Road between~~ including lands approximately 165 metres west of ~~N~~no. 45 Camcosy Road to the junction of Camcosy Road and ~~No. 2 Camcosy~~ Crockanboy Road and lands 47m to the south east of 73 Crockanboy Road off the Lenagh Road (in the townlands of Crockanboy, Teebane West, Casorna, Rouskey, ~~Drumlea,~~ Attagh, Curraghinalt, Altcamcosy, Alwories ~~and~~ , Monanameal, Drumlea, Fallagh Lower and Glenmacoffer).

The Applicant's Case

[50] The briefest review of the case management phase of these proceedings, in particular the court's successive case management orders and its formal ruling dated 02 July 2018, serves to illuminate the evolution of the formal Order 53 pleading in these proceedings. The aforementioned ruling stated *inter alia:*

> *"It is convenient to spell out the court's assessment that ground (a) in substance, asserts that the impugned decision of DFI is vitiated by illegality. The context is self-evidently important. DFI was required by statute to form an opinion. The task for the court will be to determine ultimately whether the express and implied requirements of the relevant statutory provisions were observed. In so doing the court considers that the two discrete complaints canvassed in grounds (b) and (c) viz inadequate enquiry and inadequate reasons will admissibly form part of the court's adjudicatory framework …. The court*

> *will treat the substance of this ground* [ground (a)] *……… as set forth …. above.*"

The underlying intent of the court's proactive case management activity was to expose the legal core of the Applicant's challenge and, in so doing, to prune from the pleading the surplus, the peripheral and the opaque.

[51] In the final configuration of the Order 53 pleading, the Applicant makes the case, in essence, that the impugned decision made under section 50 of the Planning Act is unlawful by virtue of a series of facts and factors pointing to a failure by Dalradian to comply with the PAN/PACCR requirements enshrined in section 27 and the supporting subordinate legislation. The language of the revised pleading is "*significant flaws*". Pursuant to the court's insistence upon clear and concise particularisation the following fivefold list was devised:

(a) The PIE was moved from an independent and locally accessible community centre to the site of the proposed development.

(b) The information provided at the PIE was insufficient and vague.

(c) The display boards at the PIE provided a very undetailed and simplistic overview of what is clearly a very significant and complex proposal.

(d) The feedback forms "*majored*" on a series of closed questions which focused on the environmental aspects of the proposal and used the forms as a rationale for amending the proposal on the submission of the planning application.

(e) The PACCR failed to provide the original comments/feedback from the PIE and failed to include the PAN drawing, which would have given the Department an indication of the variances between the PAN proposal and the ultimate planning application as lodged.

These five particularised complaints are followed by eight subparagraphs – (a) – (h) – which for the most part merely recite provisions of primary and secondary legislation and DM10 (all noted in [8] – [11] above), ending with a mere comment/assertion about one aspect of the report. There is no identifiable ground of challenge anywhere in this text. In the event the Applicant's case, as presented, had a major emphasis on grounds (b) and (c).

[52] Next there is a subparagraph which states:

> "*The Department …. failed to undertake proper enquiry into whether* [Dalradian] *had complied with its statutory obligations pursuant to section 27 and section 28 of the Planning Act …*"

I consider that the inclusion of section 28 in this contention is otiose. This court is engaged in a review of DFI's decision under section 50(1) of the Planning Act. This provision required DFI to form an opinion as to whether Dalradian had complied with section 27. There is no mention of section 28 in section 50(1). Section 28 is a short and uncomplicated provision. It required Dalradian to submit with its planning application a report in such form as may be prescribed. The Applicant has not been granted leave to apply for judicial review of the PACCR. Nor was leave granted on the ground that Dalradian's PACCR was not in the prescribed form or was otherwise non-compliant with the express or implied requirements of section 28. The focus of the Applicant's challenge is, rather, directed to the conduct of Dalradian in the preceding PAN/section 27 consultation phase. Thus I consider that the invocation of section 28 adds nothing to the Applicant's case.

[53] The particulars of the Applicant's essential legal complaint are completed by the Schedule noted above. To summarise, I consider the main question for the court to be whether the Department, in making the impugned determination under section 50 of the Planning Act that to decline to determine Dalradian's planning application was not appropriate, erred in law. As I shall explain *infra*, I consider the applicable public law barometer to be that of Wednesbury irrationality.

[54] While the arguments canvassed on behalf of the Applicant included a suggestion that the Department had failed in its duty of enquiry, I consider that this issue belongs to the framework of section 50(2) of the Planning Act, which specifically empowered DFI to request further information from Dalradian. Three observations are apt. First, in substance and as presented the Applicant's case did not attack DFI's failure to exercise this discretionary power. Second, the non-exercise of this power is not the target of the Applicant's challenge. Third, this is not one of the permitted grounds of challenge. Rather, in substance, the case made was that the PAN/section 27 consultation process was infected by a series of incurable defects, to the extent that the Department was bound to make a "non-compliant" determination under section 50(1). This analysis also puts into focus those aspects of the Applicant's arguments which ranged over the territory of asserted inadequate

reasons. Properly analysed this is not a reasons challenge. It is, rather, a challenge to the evaluative judgment of the Department that in its "opinion" – the statutory language - Dalradian had complied with the requirements of section 27, with the result that a non-compliant determination under section 50(1) was not appropriate. The Applicant's arguments about certain aspects of the Department's reasoning have been considered by the court in considering whether irrationality has been demonstrated.

The Parties' Competing Contentions

[55] The summary which follows is unavoidably lean, in the interests of economy. The Applicants' critique of Dalradian's PAN and accompanying map is conveniently formulated in counsel's skeleton argument in these terms. Significant flaws are asserted on the basis that there was no mention of the following elements of the proposed development which was later formulated in the formal planning application: the removal of some 30 hectares of peatland (a priority habitat) and its storage; a crusher installation; the retention of an existing explosive store; and a sewerage treatment plant. In response to a direction from the court to provide full particulars of the asserted deficiencies of the PAN, the Applicants also rely on the omission from the PAN of the additional planning application elements discernible from [49] above.

[56] From this evidential launch-pad Mr Jones developed the argument that the planning application differed so substantially from the PAN that DFI had erred in law in its assessment under section 50 of the Planning Act that the PAN requirements of section 27 had been satisfied. Counsel's submissions included a critique of the extensive illustrative and written *montages* which Dalradian had exhibited during the two PACC public events, contending that there was excessive deployment of concepts, demonstrable uncompleted assessments of various kinds, un-particularised environmental and ecological mitigation and enhancement measures and excessive reference to steps still to be taken and completed. The central complaint, in essence, was that Dalradian's consultation with the community in the autumn of 2016 related to a development proposal which was excessively embryonic and insufficiently advanced, thereby contravening the "*general terms*" statutory requirement enshrined in section 27(4)(a).

[57] Mr Jones also developed certain submissions relating to the meaning and effect of specific aspects of the primary and secondary legislation and departmental guidance (DM10) under scrutiny. I shall address these *infra*.

[58] The main submission of Mr Tony McGleenan QC, with Mr Philip McAteer, of counsel, on behalf of DFI was that the decision to be made under section 50 of the Planning Act is one of evaluative assessment engaging the application of the Wednesbury principle. Counsel submitted that no irrationality was demonstrated. It was contended that DFI had formulated an analysis which was clear and which entailed taking all relevant matters into account and avoiding the intrusion of the irrelevant. It was further submitted that no failure of enquiry had been demonstrated to the requisite standing of review, namely that of Wednesbury. Finally, counsel submitted that if and insofar as the court's grant of permission to apply for judicial review embraced any discrete complaints relating to the venue chosen by Dalradian for the two public information events, the contents of the "feedback" forms and the approach to comments/feedback from the public in the PACC report no illegality was demonstrated.

[59] The submission of Mr Stewart Beattie QC, with Mr Donal Sayers, of counsel, on behalf of Dalradian had an appropriate focus on the limitations flowing from the grant of leave and the uncomplicated terms of the statutory provisions under scrutiny. Counsel helpfully enumerated each of the express statutory provisions viz those enshrined in the Planning Act and the 2015 Regulations, contending that all had been observed by Dalradian. It was further submitted that no implied statutory requirement was engaged. Finally, counsel reminded the court of the broader legal context to which section 50 belongs, describing the impugned decision as "*a gateway to the determination of a planning application to which the full panoply of requirements of lawful consultation will apply*".

Sections 27, 28 and 50 Analysed and Construed

[60] There being no true Pepper v Hart issue in this case, consideration of the background to and broader context of the new legislation in Northern Ireland is doctrinally unobjectionable. In this respect the court circulated to the parties' representatives a published judicial paper "The New Planning and Environmental Law Regime in Northern Ireland" (12.08.2018). It is convenient to reproduce the following excerpts:

> "[5] It is instructive to reflect on the policy drivers underpinning the 2011 Act. In the publicity blaze which accompanied the publication of the consultation paper in July 2009 the Minister of the Environment stated:

"*Planning impacts on everyone's life and helps to provide places to live and work, to support regeneration and to protect the best of our natural and historical environment.*"

The Minister had, in a single and simple sentence, encapsulated what is arguably the central concept in the field of planning and environmental law, namely <u>balance</u>. The need for transparency, speed and democratic accountability was also emphasised. So too was the necessity that the planning system play its role in promoting the key aim of central government, namely expanding the economy. It is, of course, a truism that economic growth requires development, including major infrastructure provision and that development must be sustainable, embracing all material considerations and respecting the wider public interest. Self-evidently social, economic and environmental factors will frequently tug in different directions, with multiple interfaces, requiring a balanced judgment to be made.

[6] It is worth reflecting on the expert advice which was the impetus (though not the only one) for the administration's decision in principle that planning law in Northern Ireland must be reformed. The advice was provided by Professor Lloyd, an acknowledged expert, to the Minister of the Environment in April 2008. The Professor was alert to the balancing equation in play: to achieve the orderly development of land to meet the needs of the population of the country and to secure the strategic mediation of the different economic, social and environmental values and interests involved in land and property development, while serving as an efficient and effective governance mechanism in the wider public interest. Strikingly, the Professor's evaluation of the extant land use planning system in Northern Ireland was largely positive. He noted that the worst excesses of unregulated land and property development and of unmanaged or uneconomic urban growth had been avoided in NI. The Professor further noted that valuable natural and built environments had been protected and managed in the public interest. Simultaneously he identified a clear need for modernisation to reflect the

emergent views and political priorities concerning economic development, the environmental issues associated with climate change and sustainable development, social and community concerns regarding infrastructure provision and the provision of affordable housing. During the previous decade in particular, developments (in the broad sense) in Northern Ireland society had generated complex and multi-layered issues which would have to be balanced and reconciled in planning decision making.

[7] The priorities which Professor Lloyd identified were threefold:

- First, the need to change and challenge existing practices, assumptions, behaviours and attitudes to the so-called "right" to land and property development in a modern society in which greater emphasis on the public interest is required.

- Second, the need to promote a wider appreciation of the public interest in land use planning and to devise effective mechanisms for mediating between competing interests and economic, community and environmental factors in different localities.

- Third, linked to each of the foregoing, the need to elevate land use planning in the political agenda via a concerted programme of discussion and debate designed to avoid polarisation and to promote an explicit and engaged recognition of the competing interests and priorities engaged."

[61] As the hearing progressed, the evidential matrix was augmented by two further components. The first is the DOE Planning Service Consultation Paper of July 2009. The contents of this publication include a section dedicated specifically to the topic of "Pre-application Community Consultation". My tentative attempts at either summarising or cherry picking the relevant passages having proved unyielding, I reproduce the material text in full:

"4.27 The Department wishes to encourage improved trust and more open, positive working relationships from the earliest stages in the application process. Providing an early opportunity for community views to be reflected at the pre-application stage will be key to this relationship. The early involvement of local communities, particularly when combined with the new arrangements for pre-application discussion through PAs, can bring about significant benefits for all parties:

- *to allow members of the public to influence the way proposals are developed by providing feedback on potential issues and an opportunity to shape the way their community develops;*
- *to help local people understand better what a particular proposal means for them so that concerns resulting from misunderstandings can be resolved early on; and*
- *to enable potential mitigating measures to be considered and, where appropriate, built into the proposal before an application is submitted.*

4.28 Effective pre-application consultation with communities will also lead to applications which are better developed, and in which the important issues have been clearly set out and considered as far as possible in advance of submitting the application to the Department. Some developers already seek consultation with the local community in advance of submitting large and complex applications, particularly if there are perceived sensitivities about the proposal. This allows them to hear directly about community concerns, respond to them and show that they have done so (particularly in terms of mitigating any negative impacts and addressing any misunderstandings). Experience suggests that this can lead to shorter and more efficient considerations of the formal application and help achieve a smoother route to an

acceptable planning decision.

4.29 There are already a number of important methods for local people to become involved in the current planning decision-making process (for example, through neighbour notification, commenting when applications are advertised, and open public access to case files). These arrangements come after the formal submission of an application when the opportunity to influence the proposal will be limited. As part of the new approach to development management the intention is to move away from the situation where a developer submits an application and the planning authority then consults the community, to one where a proposal is developed with the engagement of the community at the outset of the process, prior to the submission of the planning application. Pre-application community consultation will therefore be an additional measure to the existing right of communities and individuals to express their formal views during the application process.

4.30 The Department is proposing that developers will carry out pre-application consultation with the community as a statutory requirement for all regionally significant applications. Legislation will provide a framework within which proportionate consultation with the community can be developed by proposers of regionally significant development in association with the Department as the decision-maker for these developments. New regulations and guidance will be developed to ensure the adequacy of the consultation before the submission of a planning application, including how an applicant will report on the consultation that has been carried out and the planning authority verify the appropriateness of what has been consulted on and the methods used."

[62] This was followed by the "Government Response to Public Consultation", also published by DOE Planning Service, dated March 2010. Again, the

material text does not lend itself readily to a summary. It states, in relevant part:

> *"3.21 The Department wishes to encourage improved trust and more open, positive working relationships from the earliest stages in the application process. Providing an early opportunity for community views to be reflected at the pre-application stage will be key to this relationship. The Department considers that the early involvement of local communities, particularly when combined with the new arrangements for pre-application discussion through performance agreements, can bring about significant benefits for all parties.*
>
> ***Consultation paper proposals***
>
> *3.22 Respondents were asked if they agreed that developers should carry out pre-application consultation with the community for all regionally significant applications (Question 33), whether this should be a statutory requirement (Question 34), and whether the processes for statutory pre-application community consultation should also apply to applications for major developments (Question 44). Respondents were also asked whether the Department should have the power to decline to determine regionally significant applications where pre-application community consultation had not been carried out or the applicant had not complied with the requirements of pre-application community consultation (Question 36). The Department also asked for views on what form the process for verifying and reporting the adequacy of pre-application consultation with the community should involve (Question 35).*
>
> ***Consultation responses***
>
> *3.23 Overall, there was general support for all proposals*

in this area. Seventy-eight (78) per cent of the 175 who responded supported the proposal that developers should carry out pre-application consultation with the community for all regionally significant applications, and 74 per cent of the 157 who responded were in support of this being a statutory requirement. Seventy-eight (78) per cent agreed that the processes should apply to proposals for major developments as well. Seventy-three (73) per cent of the 146 who responded supported the power to decline to determine an application which had not met the pre-application consultation requirements. Some respondents, such as the Historic Buildings Council, did not agree that pre-application community consultation should be statutory as they thought this could give undue weight to the pre-application stage and lead to pressure for a bad planning decision. The Confederation of British Industry argued that it should be 'best practice' rather than statutory, otherwise it could lead to legal arguments about who or what is the community to be consulted.

3.24 Many of those in support of the proposals expressed concerns over the definition of 'community' within the statutory requirements: how to ensure that it was sufficiently wide to include all interested parties beyond the immediate geographical area of the development, yet not so general that the developer was unsure who to consult with. The issue of capacity building for community and resident groups was also raised by several respondents.

3.25 Whilst in support of pre-application community consultation, the Equality Commission for Northern Ireland raised the importance of engaging with the Traveller community, children and young people and to bear in mind racial equality when proposals are being drawn up. NILGA commented that that it is vital to be clear on the 'weight' community consultation will have

and that guidelines are needed on the level of consultation that will be regarded as necessary. The Ulster Farmers Union thought the process could help all parties as it would be an opportunity to deal with many issues in advance and could help strengthen the robustness of applications.

3.26 *Some respondents, for example Northern Ireland Environment Link, the Causeway Coast Communities Consortium, Clonard Residents Association and the Ulster Farmers Union objected to developers carrying out pre-application community consultation as they are not independent. There was also some concern that a statutory requirement would make the process into a 'tick-box' exercise for developers. It was generally considered that the requirements for major developments should be less onerous than those for regionally significant development, with flexibility introduced for the scale and scope of the developments.*

3.27 *Pre-application community consultation was discussed at the stakeholder events in the context of the need for tighter controls and stricter arrangements in future to ensure meaningful community engagement. Developers and agents were in praise of the current system of pre-application discussions (known as PADs) but several asked about resourcing and facilitating these in future.*

Department's consideration and response

3.28 *Due to the level of support expressed, the Department intends to introduce a statutory requirement for pre-application community consultation to be undertaken by the developer prior to the submission of regionally significant and major applications. A power to decline to determine applications which have not satisfied their statutory requirements in this area will be*

introduced for regionally significant and major applications.

3.29 *The Department considers that the requirements for pre-application consultation will vary for specific developments. However, in order to maintain consistency, certain minimum requirements will be specified in legislation to ensure that any consultation engages as much of the affected community as possible (for example, at least one public meeting will be required to take place). Planning authorities will be able to require additional elements, depending on the application. Also, developers will have to ensure their consultation reaches all relevant section 75 groups*[1] *that may be impacted by the proposals and take their views into account.*

3.30 *The legislative requirements will be supplemented with guidance on how the consultation should be carried out and reported on, who should be involved and what issues the consultation should address, and will provide sufficient flexibility for varying the extent and requirements of pre-application consultation, depending on the nature of the application itself. The planning authority will have a scrutiny role over the consultation report, and will be able to decline to determine an application if it is of the opinion that the developer did not fully meet the statutory requirements for pre-application community consultation."*

[63] The court takes cognisance of the differences between certain of the views and tentative proposals expressed in the texts reproduced above and the ultimate statutory product, namely sections 27, 28 and 50 of the Planning Act and its subordinate relative.

[64] I consider that the new regime constituted by sections 27, 28 and 50 of the Planning Act has the overarching aim of enhancing the quality of land use decision making at every stage, from initial project conception to final

[1] Section 75 of the Northern Ireland Act 1998.

decisions by the relevant public authority. Section 27 invites the following analytical breakdown:

(i) The consultation requirements which it imposes are mandatory.

(ii) The obligatory minimum gestation period of 12 weeks between submission of the PAN and lodgement of any ensuing planning application is designed to facilitate reflection, revision and reconfiguration and, where appropriate, abandonment of the project concept.

(iii) The obligatory minimum period of 12 weeks is also designed to ensure that all consultation responses are conscientiously considered.

(iv) Given the uncontentious overlay of well-established common law principles, the project concept must be sufficiently developed and advanced to facilitate informed and meaningful responses from those consulted. The phrase "*in general terms*" falls to be construed in this light. On the other hand, the project concept should not be so refined and advanced as to jeopardise the conscientious responses of consultees.

(v) The PAN plan must sufficiently identify the site of the concept development.

(vi) The PAN must be in the prescribed form and have the prescribed content.

(vii) The developer must comply with any additional consultation requirements imposed by the relevant planning authority under section 27(6).

(viii) Consideration of whether to exercise the powers conferred by section 27(6) is mandatory.

(ix) The exercise required by section 27(6) and (7) must include consideration of the nature, extent and location of the proposed development and its likely effects on both the location and its vicinity. This is not an exhaustive list of factors to be weighed and, in every case, will be subject to the inalienable and contextual public law duties of taking into account all material considerations while disregarding anything extraneous.

(xi) The decision making required under the discrete regime of section 27(6) and (7) informs the meaning of the phrase "*in general terms*" which, in turn, imposes an intensely contextual requirement. The concept project must be sufficiently developed to ensure the due discharge of the relevant public authority's duties under the section 27(6) and (7) regime.

(xii) Finally, there is no scope for extension of the 21 day window within which the relevant authority must make its assessment and decision. This is a time limit prescribed by primary legislation and, as it has no dispensing provision, it is inflexible (see, in passing, Croke v SOSFL & LG [2019] EWCA Civ 54).

[65] As the above analysis makes clear, the three crucial words in section 27 are "*in general terms*". This phrase is not susceptible to precise definition. It does not pose a hard edged question. It eschews bright luminous lines. There is no "*one size fits all*". The proposed development must be described "*in general terms*" and not in the terms of a fully worked up planning application. The two are qualitatively and quantitatively distinct. What is required by the *"in general terms"* standard in any given case will be unavoidably fact and context sensitive.

[66] In a judicial review challenge to a determination under section 50(1), the question for the court is not whether, as a matter of fact or in the opinion of the court, the putative developer's PAN was in accordance with section 27(4)(a) and (c). Rather the question for the court, whose jurisdiction is one of supervisory superintendence, will be whether the evaluative judgment required of DFI (or the council) in forming its "*opinion*" under section 50(1) is sustainable in law. While the standard of review most likely to be engaged is that determined by the Wednesbury principle, it is, in the abstract, conceivable that other public law misdemeanours could arise: in particular a failure by the authority concerned to take into account all material considerations, permitting something immaterial or extraneous to intrude, misdirection in law, procedural unfairness, fetter of discretion or bias. The court will be mindful at all times that the impugned decision, one way or the other, was one of evaluative judgment and balance striking on the part of the authority concerned. The decision maker must be accorded appropriate latitude.

[67] In every case to which section 27 of the Planning Act applies, the PAN is the first formal step in an iterative process. The statutory arrangements are such that, at this preliminary stage, the interaction is between the putative developer and the relevant planning authority only. If the developer proceeds to the next stage, the statutory requirements relating to advertisement, notifications and a public information event must be observed. At this, the second, stage of the process, the engagement is between the developer and the community.

[68] The effect of the new statutory regime is that at the first stage the relevant planning authority's role is confined to considering whether to exercise its discretionary power under section 27(6) whereby it may require more extensive notifications and/or more onerous consultation than prescribed by the 2015 Regulations. This is the only express function conferred on the planning authority at this, the first stage. No question arises in the present case as to whether the planning authority has any additional implied functions, powers or duties at this juncture.

[69] The effect of regulation 5 of the 2015 Regulations is that the notification and newspaper advertisement requirements represent the second stage of the new statutory process. At the second stage the requirements to be observed are specified in regulation 5(2): and may be augmented if the planning authority has exercised its discretionary power under section 27(6) of the parent statute. Regulation 5 has the further effect of separating the act or acts of compliance with the notification and advertisement requirements from the minimum requirement of one public information event ("*PIE*"). In this way the PIE becomes the third stage of the process.

[70] A fourth stage will materialise only if the putative developer, having completed the first three stages, decides to proceed with a planning application. In this event, section 28 of the Planning Act is triggered and the developer must submit a PACCR outlining its purported compliance with section 27. This is plainly a mandatory requirement. While the statutory word "*before*" contemplates the possibility that a planning application will not invariably follow the submission of a PACCR, one would expect such cases to be few in practice. This might, however, arise if, for example, the planning authority were to notify the developer, informally or otherwise, of a likely negative assessment of its PACCR, with an ensuing "non – compliant" determination under section 50(1). If a formal planning application were not to materialise the exercise of the authority's powers under section 50 would not arise.

[71] Section 27(5)(b) envisages supporting secondary legislation. The relevant measure of subordinate legislation is the 2015 Regulations. This, firstly, lists (in the Schedule) the types of "major development" prescribed for the purposes of section 26(1). The prescribed requirements of every PAN are specified in regulation 4, while those of every community consultation exercise are specified in regulation 5. These include, per regulation 5(2)(b), a local newspaper advertisement which contains, *inter alia, "a description of, and the location of, the proposed development*". It is indisputable, as Mr Jones emphasised, that this does not replicate the language of section 27(4) ("*a*

description in general terms of the development …."). However, if and insofar as the two linguistic formulae differ in substance, I consider that by well-established principle this provision of subordinate legislation, which by definition is subservient to the parent measure, cannot operate to modify or dilute the latter.

[72] In short, regulations 4 and 5 prescribe certain of the mechanics which must be observed in every consultation exercise under section 27(5)(b). The requirements which they establish, however, are not exhaustive. The reason for this is the superimposition of the relevant common law principles considered in [67] above. Ultimately, in reply and when pressed by the court, Mr Jones submitted that section 27 of the Planning Act modifies the common law principles. While this contention had not previously been canvassed in argument, I understand it to be, in essence, that the common law principle that consultation to be undertaken when proposals are "*still at a formative stage*" (per Coughlan at [108] – see [76] *infra*) is modified by section 27 so as to require the project in contemplation to be formulated.

[73] I reject this submission. First, I consider it to be unsupported by the statutory language, namely the terminology of section 27(4)(a), "*a description in general terms of the development to be carried out*". Second, it is undermined by the familiar principle expressed in Bennion on Statutory Interpretation (7th Edition, section 25.3) that the words of a statute will normally attract a construction which is most consistent with the area of law to which the enactment relates, in this instance public law. Third, I consider that any modification of prominent and entrenched common law principles of this kind, if intended, would require clear statutory language to this effect, of which there is none. Considered in their full statutory and pre-enacting context, I am unable to discern any difference in substance between "*a description in general terms of the development to be carried out*" and the familiar common law formulation *proposals at a formative stage*. In each case the possible future course of action must be described with sufficient clarity and in sufficient detail to enable the consultee to make a meaningful response. That is the key requirement of every section 27 consultation exercise.

[74] Turning to section 28, the requirements governing the PACC report therein enshrined are backward looking. They are framed in mandatory terms. It is clear that they do not arise if the putative developer, following the section 27 consultation exercise, does not proceed with a planning application. They are triggered only where the developer decides to submit a planning application. This is the trigger for the PACC report. Every such report must be in the prescribed form. I refer also to [52] above.

[75] Section 50 of the Planning Act is, accurately, entitled "Duty to Decline to Determination Application Where Section 27 Not Complied With". It invites the following analysis:

(i) The section applies only in cases where the (now) planning applicant was obliged to comply with section 27.

(ii) The relevant authority must form an opinion as to whether such compliance was effected, an exercise which engages the public law standards, principles and concepts expounded above.

(iii) The authority has a discretionary power to require the planning applicant to provide further information.

(iv) In any case where the authority forms the opinion that the planning applicant failed to comply with section 27, it must decline to determine the planning application: there is no discretion.

(v) Where the authority does not form this opinion, the planning application must be accepted and duly determined.

[76] The briefest reference to judicial authority at this juncture suffices. In R v North and East Devon Health Authority, ex parte Coughlan QB 213, the English Court of Appeal stated at [108]:

> "*To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken.*"

As stated in De Smith's Judicial Review (7th Edition) at 7-054:

> "*Essentially, in developing standards of consultation, and applying those standards to particular statutory contexts, the courts are using the general principles of fairness to ensure that the consulted party is able properly to address the concerns of the decision maker.*"

[77] As Mr Jones reminded the court, specific instances of the application of these well recognised common law principles in the context of planning decisions are found in inter alia R v Rochdale MBC, ex parte Brown [1997] ENV.L.R 100 and R (Holborn Studios) v Hackney LBC [2017] EWHC 2823 (Admin), which contains an interesting analysis by deputy Judge Howell QC of the distinction between the substantive and the procedural constraints on the power of a planning authority to grant planning permission for a development other than that proposed in the application, for example via the mechanism of amendment, a partial approval only or the grant of permission subject to conditions modifying the original proposal.

[78] Mr Jones placed particular emphasis on R (Derbyshire County Council) v Barnsley (etc) Combined Authority and Others [2016] EWHC 3355 (Admin). This is a first instance decision concerning a statutory public consultation exercise carried out by the respondent authority under section 113 of the Local Democracy, Economic Development and Construction Act 2009. The court concluded that the consultation exercise was inadequate, failing to achieve its statutory purpose. Ouseley J stated at [59]:

> *"Fundamental to a consultation which would achieve the statutory purpose of section 113 is that at least the major proposals in the scheme should be identified and be made the subject of consultation, with adequate, even if simplified material provided to explain it* ***so as to permit of sensible response****. I do not think that a consultation is 'in connection with the scheme', merely because it asked questions which were connected to the proposals, if major issues were nonetheless omitted."*

I have highlighted the words on which Mr Jones relied heavily.

[79] The coexistence of statute and common law principles is one of the hallmarks of the United Kingdom legal system. Instances where there is a statutory duty to consult provide a paradigm illustration of this truism. In the world of public law the legal trigger for a public authority's duty to consult is frequently imposed in the form of a statutory requirement to do so. Consultation, where required as a matter of law, engages the well-established common law principles outlined above. The content and out-workings of the statutory duty to consult could, in principle be prescribed by the statute itself. In this instance, the Planning Act does not do so. The starting point is the duty to consult. In the statutory model under scrutiny in the present case, this duty is imposed, albeit in a somewhat idiosyncratic way, by section

27(5)(b). This provision directs the reader to the relevant measure of subordinate legislation. I turn briefly to consider this.

[80] An overview is appropriate at this juncture:

(i) At the PAN stage, the interaction is exclusively between the putative developer and the relevant planning authority.

(ii) The PAN stage may lawfully be preceded – and followed – by "PAD" and EIA "scoping" exercises, which will also involve the same bilateral interaction.

(iii) There is nothing to prevent interaction between the putative developer and the community in advance of the PAN stage. Where this occurs, it could serve to inform the planning authority's evaluation of the developer's compliance with section 27.

(iv) The lodgement of a PAN with the planning authority is logically prior to a second identifiable stage, namely a community consultation exercise under section 27, when the interaction is between the putative developer and the community.

(v) The relevant planning authority may, in the exercise of its discretionary power under section 27(6), impose on the putative developer consultation requirements more onerous than those specified in the subordinate regulations, but only of the kind and to the extent specified in paragraphs (a) and (b).

(vi) Where, following a section 27 consultation exercise, a planning application is to be submitted, the focus switches to the PACCR statutory requirements.

(vii) The exercise of juxtaposing a planning application with a PAN and comparing and contrasting the two is, in principle, a legitimate one in two contexts. First, when the planning authority is discharging its functions under section 50. Second, in the event of a legal challenge to a decision of the relevant authority under section 50, whether it be one of accepting or refusing to accept the planning application, under section 50, in the judicial exercise of determining whether the latter decision is sustainable in law. However, any assessment of this kind must not overlook that, as emphasised in the submissions of Mr Beattie, a PAN and a planning application are governed by distinctive

legal requirements, have their individual legal character and have differing legal effects and consequences.

[81] The importance and utility of the new discrete statutory regime constituted by sections 27, 28 and 50 of the Planning Act are not to be under-estimated. They reflect, and constitute, an imaginative and progressive statutory innovation. This discrete regime gives prominence to those members of the community likely to be most directly affected by altered or new land uses. It provides such people with a structured mechanism whereby their voices can be heard. Whereas previously the opportunity for expressing their views did not crystallise until the submission of a planning application, the new regime allows them to express their views at a considerably earlier stage. In this way those who would seek to develop land must, in advance of completing and submitting a planning application, confront the reality of community impact and engage with local people. Such engagement must be meaningful and conscientious, two separate though interrelated requirements, in every case. Any retrospective assessment of the legality of community engagement will be undertaken by applying the barometer of the common law consultation principles outlined above.

[82] These statutory reforms represent the response by the Northern Irish legislature to perceived frailties and shortcomings in the earlier planning regime. At heart, they seek to imbue the planning process with fairness, transparency and balance. They give prominence to the community. They are further designed to ensure that the overarching factor of the public interest predominates in the Northern Ireland planning process.

[83] I turn briefly to the broader contextual framework. The new, discrete statutory regime on which the spotlight falls in these proceedings does not exist in isolation. Rather, it co-exists with the separate statutory regimes relating to, inexhaustively but in particular, environmental impact and protected habitats. It further co-exists with other provisions of the main primary and subordinate legislation, in particular those relating to advertisement, neighbour notification, objections and, where appropriate, amended development proposals. There is one further layer of co-existence namely that relating to the published policy and practice of the planning authority concerned. Among the instruments which resonate in this context are the "PAD" policy of DFI and local councils, the PACC policy enshrined in DM10, Councils' Schemes of Delegation and the formal Protocols pertaining to the activities of Councils' planning committees. Thus, in short, alertness to <u>orientation</u> is essential: the discrete new statutory regime, while constitutionally supreme of course, operates within a broader context

elements whereof are traceable to the statute itself and may be capable of informing its correct interpretation in discrete instances.

Consideration and Conclusions

[84] The arguments advanced on behalf of the Applicant entailed, appropriately, a heavy focus on the statutory requirement (a mandatory one) that in every case where a PAN is required the notice must contain "*a description in general terms of the development to be carried out*": section 27(4)(a). Mr Jones developed some specific submissions relating to how this statutory provision and related provisions belonging to the new regime are to be construed. I have already considered, and rejected, one of these: see [73] above. I turn to consider the other main contentions advanced.

[85] First, Mr Jones pointed to the meaning of "*development*" in section 23 of the Planning Act, subsection (1) whereof provides:

> "*In this Act, subject to subsections (2) to (6), 'development' means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.*"

This is the general definition of "*development*". What follows, in subsections (2) – (6), is in essence the particulars and out-workings thereof. Drawing on this definition, Mr Jones submitted that the general definition in section 23(1) applies to the word "*development*" in section 27(4)(a) and in other places. This submission, which is strictly correct, does not detract from the unavoidable assessment that this statutory provision has the effect of imposing a minimum threshold requirement, described as "*a description in general terms*" of the development contemplated at that point in time. While section 27(4)(a) will not tolerate anything less, it does not prescribe anything more. The putative developer, who is <u>not</u> at that stage a planning applicant, could of course opt to exceed the minimum threshold requirement. But this would be a matter of choice rather than legal obligation.

[86] The Applicant's central complaint is that the evaluative judgment which the Department formed under section 50(1) should have been to the effect that the aforementioned minimum threshold requirement was not satisfied by Dalradian's PAN. The statutory definition of "*development*" does not, in my view, fortify or advance this complaint in any material way. Mr Jones' related submission was that the application for planning permission, (I add) which is

in contemplation at the section 27 stage, must have reached a level of description such that it is capable of being the subject of meaningful consultation with the community. I concur with this formulation. This does not alter the essential question to be determined by the court, namely whether the Department's evaluative assessment under section 50 can be upset by the application of the Wednesbury principle.

[87] Next, Mr Jones drew attention to the language of regulation 5(2)(b)(i) of the 2015 Regulations, which requires that the notice stipulated by section 27(5) must be published in a newspaper and must contain "*a description of, and the location of, the proposed development*". The word "*description*" is not qualified by "*in general terms*". However, I consider that this measure of subordinate legislation is, as a matter of elementary principle, incapable of amending or altering any part of its primary legislation parent. From this it follows that the requirement enshrined in regulation 5(1)(b)(i) is no more onerous or expansive than that imposed by section 27(1)(4)(a). Thus the words "*in general terms*" are readily inserted by implication in the former. This submission is rejected accordingly.

[88] Mr Jones also placed some emphasis on the statutory terminology "*to be carried out*", which appears twice in section 27(4). Insofar as he was submitting that these words import that the PAN must contain a description more detailed and advanced than one that is sufficient "*in general terms*" to enable meaningful consultation with the community I cannot agree. Considered in their full surrounding context the words "*to be carried out*" mean no more than *as contemplated at the section 27 stage*. To construe these words as connoting something such as *so well developed and advanced as to be almost or virtually concrete and final*, which was the essence of the argument advanced, is confounded by the statutory provisions considered as a whole, their natural and ordinary meaning and the underlying rationale identified above. Any such construction would also be incompatible with the fundamental common law requirements of consulting conscientiously and with an open mind and at a sufficiently early stage of the contemplated project. Thus I reject this submission also.

[89] The next step in Mr Jones' submissions entailed reliance on section 27(6) of the Planning Act. This is an intrinsically limited provision. It confers on the relevant authority a discretionary power to require the putative developer to take steps in excess of those prescribed by regulations made under section 27(5): nothing more. The steps in question, which are procedural in nature, are specified in regulations 4 and 5 of the 2015 Regulations. Section 27(6) does not confer on the relevant authority any coercive or other powers vis-à-vis the

substance of the putative developer's proposed compliance with section 27(4). Under the new statutory regime evaluation of this issue is confined to the mechanisms devised by section 50.

[90] Furthermore, the subject matter of this judicial review is not whether the Department gave proper consideration to exercising its discretionary powers under section 27(6) or made a decision thereunder which the Applicant has been granted leave to challenge. This challenge, I re-emphasise, is directed squarely to the evaluative assessment made by the Department under section 50(1) of the Planning Act following receipt of Dalradian's planning application. The provisions of section 27(6) seem to me remote from this basic reality and analysis. They were properly considered, as the evidence noted at [36] above confirms. I can identify no merit in this discrete argument.

[91] Mr Jones was on firmer ground in relying upon section 27(7) of the Planning Act. I agree with the submission that the relevant authority could not properly and sensibly have regard to "*the nature, extent and location of the proposed development and to the likely effects, at and in the vicinity of, that location of its being carried out*" unless these features had been identified with sufficient clarity and particularity in the PAN "*description in general terms*" required by section 27(4)(a). Thus section 27(7) is to be considered in conjunction with section 27(4)(a). This is a factor which the court will consider in any case where there is a challenge to the sustainability in public law terms of the relevant authority's evaluative judgment under section 50(1) of the Planning Act. To this I would add that while the word "*only*" does not feature in section 27(7), this is of no moment in the context of the present challenge.

[92] As the court's repeated formulations above of the central issue to be determined make clear, I reject Mr Jones' submission that the opinion forming exercise required of the relevant authority under section 50(1) of the Planning Act is "*jurisdictional*" and not one of evaluative assessment. The word "*opinion*" has a readily recognisable meaning in the world of public law, pointing firmly in the direction just noted. The language of section 50(1) makes abundantly clear that a duty to reject a planning application may arise. But this duty crystallises only where the relevant authority forms an opinion that there was non-compliance with section 27 by the planning applicant. By well-established principle the role of this court, one of supervisory superintendence, will normally – though not exclusively, and as explained in [66] above – be to determine whether this assessment is vitiated by irrationality (as explained in Re McGowan's Application [2019] NICA 12 at [96] – [97]), the omission of a material consideration or the intrusion of

something alien. I refer also to [55] – [56] above. Thus I reject this submission.

[93] The central submission advanced on behalf of the Applicant was that at the PAN stage the project proposals upon which Dalradian consulted were not sufficiently advanced. They were, it was contended, too embryonic in nature. Thus the PAN process was undertaken too soon. The particulars of this umbrella submission ranged beyond the permitted grounds – see [50] to [53] above – focussing on the newspaper advertisements, the PAN/PIE maps and display boards, the feedback forms, the two contemporaneous DFI PAN file notes, the PACC report and the section 50 memorandum of decision. The constant undercurrent of the Applicant's central and subsidiary submissions was the contention that section 50 establishes a jurisdictional gateway. I have already addressed, and rejected, this argument: see [65] – [66] and [89] above.

[94] I turn to consider the main elements of the subsidiary, or supporting, arguments which were formulated. While I propose to do so in relatively compact terms, I have considered all lines of attack which were developed. It is pertinent at this juncture to repeat that the court's consideration of these discrete issues does not entail the application of hard edged legal rules or bright luminous lines. This follows from the court's construction of section 50 and the ensuing assessment that, properly analysed, this is at heart an irrationality challenge.

[95] The court must also bear in mind that the Applicant is challenging a single, indivisible decision. Insofar as certain discrete or isolated aspects or elements of the decision making process are capable of being identified in the evidence, the question for the court is not whether <u>individually</u> these are vitiated by irrationality or, for that matter, inadequate reasoning or other error of law. That is not to say that if and insofar as either of these defects is demonstrated in relation to any specific issue it will be ignored by the court. Rather the task of the court would be to weigh any such defect in carrying out the wider, holistic exercise of determining whether the Applicant's primary ground of challenge has been established to the public law standard identified.

<u>Compliant PAN?</u>

[96] I have outlined the PAN and its preceding history in [31] – [35] above. Section 27(4) of the Planning Act imposes, firstly, the twofold requirement that every PAN be in the prescribed form and have the prescribed content. This means, in effect, that it must be compliant with regulation 4 of the 2015

Regulations. The Applicant does not make the case that Dalradian's PAN was non-compliant with either of these requirements.

[97] The Applicant's primary case, rather, is that Dalradian's PAN was non-compliant with the requirement enshrined in section 27(4)(a) that it contain "*a description in general terms of the development to be carried out*". The purely written description is contained in the PAN, reproduced in full in [33] above. In argument, two specific features of this were highlighted: first, the word "*including*" immediately preceding the bullet point list and, second, the absence of any reference to the stripping and storage on site of peat. This latter criticism was directed to the accompanying map (the "*PAN map*") also. Factually, it is correct: the removal of peat and its on-site storage were first mentioned at the planning application stage, in form P1, in the terms of "*temporary and permanent peat and spoil storage areas*": see the Schedule reproduced in [49] above.

[98] As the analysis in [67] – [70] demonstrates, the second and third stages of the new statutory process are closely connected. This, doubtless, explains why the Applicant's critique of the PAN, the PAN map, the ensuing newspaper advertisements, the PIEs (in effect, the display boards) and the feedback forms was presented as a unitary package. I understand the Applicant's case to be that at each of these two stages there were cumulative, or repeated, defects which combined to yield the conclusion of non-compliance with section 27(4)(a) in particular and section 27(4)(c) also.

[99] Those aspects of the Applicant's challenge concerning the requirements of section 27(4)(a) of the Planning Act which I have already considered, and rejected, are set forth above. One of the main pillars of this discrete challenge, namely that section 27 had the effect of modifying the relevant common law principles so as to impose a more onerous consultation burden on every putative developer at the PAN stage: see [72] above. This ground nonetheless still falls to be addressed. The question for the court is whether the Department could rationally form the opinion that there had been compliance with this free standing statutory requirement at the anterior, PAN/section 27 consultation stage.

[100] It is convenient at this juncture to consider the Applicant's discrete critique of the DFI "*PAN*" internal file notes, the more important whereof is reproduced in full in [36] above. These were generated in the wake of receipt of the two Dalradian PANs. As already emphasised, the only express statutory function which DFI had at this stage was the possible exercise of its discretionary power under section 27(6) of the Planning Act to require Dalradian to provide

an enlarged audience of consultees with its PAN and/or to undertake more expansive consultation than prescribed by the 2015 Regulations. It is a fact that DFI did not exercise this power in this case. This non-exercise of the statutory power is not under challenge in these proceedings. Nor does it form part of any of the permitted grounds of challenge. Logically, it is difficult to see how it could have done so in any event since, in making its decision under section 50, the relevant planning authority is enjoined to examine the anterior conduct of the putative developer rather than its own conduct. If the authority has not previously exercised its time limited discretionary power under section 27(6), at the later section 50 stage this simply has the status of an indelible historical fact. Thus, as a matter of both pleading and principle, I am unable to identify anything in this discrete line of argument advancing the Applicant's case.

[101] The arguments developed were, in substance, that the main file note was too bare, was insufficiently reasoned, did not engage sufficiently with section 27(6) and should have set out the contemplated development more fully. Addressing these criticisms briefly on their merits, and entirely without prejudice to the analysis in the immediately preceding paragraph, I am unable to diagnose anything of substance. The status of this document is that of a <u>mere</u> internal note which did not have to comply with any statutory requirements. Indeed it did not have to be generated at all. It contains a digest of the deliberations of three senior planning officials. It betrays no error of law, explicit or implicit. And, finally, it was focused throughout on the correct question, namely the possible exercise of the section 27(6) power. In my judgment it adds nothing to the Applicant's case.

[102] The peat stripping/storage omission from the PAN featured prominently in Mr Jones' submissions. The main affidavit sworn by the Applicant's consultant describes peat extraction as "*a further key element of the proposal*". This appears in the form of a bare assertion in a single sentence. It is both unexplained and unexpanded. Insofar as it can be properly characterised an expression of <u>opinion</u>, which generously I am prepared to accept for this purpose, it is yet another illustration of the subjectivity which features throughout the consultant's critique of Dalradian's PAN consultation process. It has elicited the following affidavit response from the Department's deponent:

> "*Permission is not being sought for peat extraction although the proposal involves peat stripping to allow the development to take place. This is similar to the stripping of top soil for most development proposals and such works*

> *are considered implicit in development proposals and would not be specifically mentioned in a planning application description much less so in the general description of development required in a PAN."*

This I consider a paradigm illustration of a measured, balanced evaluative judgment on the part of a planning professional, far removed from the forbidden territory of irrationality.

[103] In addition to the foregoing, objectively analysed, the Applicant's consultant does not attempt any contextual evaluation of the inclusion of the proposed "peat works" in the planning application. Its surrounding context, namely all of the other works of development proposed at the PAN stage and later, is in effect ignored. There is no attempt to engage with the fact that, in Form P1, "*temporary and permanent peat and spoil storage areas*" is one of 25 elements arranged under the heading "*associated surface level development including…..*". It does not form part of the main proposed development activities, which precede it. Furthermore, this group of 25 "*associated*" proposed development activities is followed by a series of other discrete development proposals: the demolition of buildings, the construction of a new road, the retention of certain extant engineering features, the upgrade of water treatment facilities, improvements to certain public roads *et al*.

[104] The court, in its supervisory review of the aforementioned competing opinions, will also take into account that the characterisation of the "peat works" as a "*key element*" of the project is made in a context wherein the Applicant's consultant has expressly excluded it from her assessment of the three principal elements of the project namely the development of the mine, the construction of the waste facility and the construction of the processing facility. The court further recognises that this land use, *per se*, would have required planning permission.

[105] Next, the Applicant's consultant addresses certain other elements of the development specified in the planning application which did not feature during the PAN consultation exercise. In this context I refer to the Schedule reproduced in [49] above. The consultant avers:

> *"Whilst admittedly some of the additional components may be variations of that previously contained within the PAN description and ancillary to the main function of a goldmine, the totality of numerous buildings and*

ancillary works and the 1.3km length of additional road equates to significant changes to the scheme."

[106] This is, again, an expression of subjective opinion. In response the Department's deponent, referring to the components of the consultant's list, avers:

> *"These appear to be based on a premise that the PAN description must align extremely closely with the future planning application description. Retaining structures are matters of detail. Water storage ponds and vehicle parking were in any event identified in the PAN and the retention of the existing explosive store (on a temporary basis) is not considered to be a key element and is clearly ancillary to the main site activities. The processing plant was identified in the PAN description and the P1 Form expanded on this to give more detail of its constituent parts. This did not fundamentally change the nature, scale or location of the processing plant."*

The next succeeding averment brings home the court's textual analysis of competing opinions and the legal analysis that the challenge to this decision under section 50 of the Planning Act belongs firmly to Wednesbury territory.

[107] Section 27 does not require attainment of the theoretically perfect. Its effect is to notionally stop the clock at a particular moment in time and to require the putative planning applicant to conduct a public engagement exercise which gives the community a fair and reasonable opportunity to express its views relating to the "*general terms*" of the project then in contemplation. Neither a completed project concept nor a highly advanced one is required by the statute or the associated common law principles.

[108] The new statutory regime, in my view, accommodates the possibility of what some might, subjectively, later consider to be imperfections or inadequacies or unacceptable omissions in the development proposal published at the earlier section 27 stage. This stage is, by definition, a preliminary, or intermediate, one. It does not require the developer to publish and consult upon a completed project. Rather, what must be published is a general outline of the project then in contemplation. The combination of the express requirements of primary and subordinate legislation, in tandem with the associated common law principles, envisages that in the event of a planning application materialising subsequently, this may legitimately differ in significant respects

from the project concept published and debated at the section 27 stage. Section 27 clearly envisages that, at the PAN consultation stage, a balance will be struck by the putative developer. This is replicated in section 50, which requires that the relevant planning authority, in an exercise of retrospective evaluative judgment, strike its own balance. At all stages the familiar public law traits of balancing, margins, latitude and evaluative judgment shine brightly.

[109] Furthermore, it is the very essence of the new statutory regime that alterations, ranging from the minimal to the more significant, may legitimately be made to a planning project in the wake of a section 27 PAN consultation exercise. To this I add that the new statutory regime does not require any alteration at the later planning application stage, where this eventuates. But where, as in this instance, alterations do occur these may serve to inform the court's evaluation of whether the explicit requirements of the primary and secondary legislation and the requirements imported by the associated common law principles have been observed.

[110] The conclusion that the new statutory regime contemplates, and thus permits, significant measures of evolution and alteration in a project concept between the PAN and planning application stages seems to me inescapable. The question will always be one of degree. The legislature has entrusted to professional planning officers the task of making this assessment, has created no right of appeal against "acceptance" decisions under section 50 and has left undisturbed the court's traditional function of supervisory superintendence. Giving effect to all of the foregoing, this aspect of the Applicant's challenge, which emerged as its main cornerstone, must fail.

The PAN Map

[111] I turn to address the section 27(4)(c) criticism. The question for the court is not whether, as a matter of fact or in the opinion of the court, the PAN map was compliant with section 27(4)(c). In passing, if the question were of either of these species, the court would unhesitatingly supply an affirmative answer. The correct legal question, rather, is whether the Department, in the language of section 50(1), could rationally form the "*opinion*" that the PAN map was compliant with the statutory requirement.

[112] The sole complaint about this map is that it does not contain a red boundary line of the kind commonly encountered in planning application [ie Form P1] maps. The PAN map does not indeed have a luminous red line of this familiar kind. It does, however, clearly identify the differing locations of the

central features of the proposed development – the new tunnel entrance, the mine waste storage facility, surface mine infrastructure, water pond, access road *et al* – together with the proposed access road and the existing surface infrastructure and tunnel entrance. The map also clearly identifies the settlements of Greencastle and Rouskey, the several roads in the area and the main river in the locality. Furthermore, there are separately coloured lines identifying clearly the maximum extent of the proposed "*exploration area*" and the maximum extent of the proposed "*mine extraction area*". All of the existing structures, including housing, surrounding the site are also clearly marked.

[113] In addition, there is an unmistakable red boundary, or delineating, line in the smaller ("schematic") plan located towards the bottom left corner of its larger associate. One must also bear in mind that given the protracted history of operations on the subject site and the close proximity of the residences of the consultees most directly affected, the key members of this audience must have been, objectively, reasonably informed. This is clear from *inter alia* the main affidavit on behalf of the Applicant and would be reasonably inferred in any event. The absence of any complaint about the adequacy of the PAN map in the Applicant's affidavits must also be weighed.

[114] While the Applicant's planning consultant has developed an elaborate critique of the PAN map this, strikingly, is not replicated in any of the affidavits of the Applicant. These criticisms resolve to the purely subjective opinion of a person (the consultant) having no connections with the locality. The "red line" espoused by the consultant is a requirement that is specific to Form P1 and is not replicated in the series of statutory requirements governing PAN maps. Furthermore, while I have taken into account the consultant's subjective view that at one specific point – the Crockanboy Road/Lenagh Road intersection – the PAN map differs from the planning application map, this has not been demonstrated objectively by the Applicant (on whom the onus of proof rests). Moreover I do not conceive it to be the function of this court of supervisory superintendence to undertake a microscopic and technical/scientific analysis and comparison of these two maps in a context where there has been no oral expert evidence and no cross examination.

[115] To summarise, the court is in effect presented with two competing professional views. That advanced by the Applicant's expert is weakened by the shortcomings highlighted above. The competing view, which given the applicable legal framework equates with the "*opinion*" which the Department was obliged to form under section 50 of the Planning Act, is, per its deponent, that the PAN map sufficiently identified the site. The question for the court is

whether this opinion is tenable in public law terms. Even taking the competing view of the Applicant's expert at its zenith, the court does not hesitate to supply an affirmative answer. This discrete aspect of the Applicant's challenge, therefore, fails.

The Newspaper Advertisements

[116] Regulation 5(1)(b) of the 2015 Regulations prescribes a series of requirements which the newspaper advertisement/s must meet. Only the first of these features in the Applicant's argument on this discrete issue, namely the requirement that the advertisement contain "*a description of, and the location of, the proposed development*". I have already considered, and rejected, the premise upon which this argument is constructed: see [81] above.

[117] If I am wrong in that conclusion, having called for and considered the multiple newspaper advertisements in full size and colour I consider that this argument has no traction in any event. The development had to be described in the newspaper advertisements: nothing more and nothing less. Regulation 5(2)(b)(i) neither stipulates nor implies that the description comply with a certain level of detail or particularity. The definition of "*development*" adds nothing to the requirements to be observed at what is by definition a preliminary and pre-Form P1 stage. Furthermore, for the reasons already explained, this court's opinion about this discrete matter is irrelevant and the judicial exercise is not one of fact finding. It follows that, even assuming the Applicant's statutory construction argument to be correct, viewed in the most generous light, this argument, if accepted, cannot operate to upset the broad, overall evaluative judgment formed by the Department in making its decision under section 50.

[118] The arguments developed with reference to the specific issue of the newspaper advertisements, properly analysed, embrace both of the freestanding grounds identified above. The court has rejected both. The question to be determined is whether the Applicant's challenge to the "*description in general terms of the development to be carried out*" in both the PAN and the corresponding newspaper advertisements is made out. This is but a single challenge, given that the two mechanisms described the contemplated development in identical terms. Once again, the question for the court is not whether, as a matter of fact or in its opinion, the PAN and newspaper advertisements were compliant with section 27(4)(a). Rather, the question is whether the Department could rationally form the "*opinion*" under section 50(1) that there had been compliance by Dalradian with this aspect of section 27. The court's reasoning in rejecting the first (PAN) limb of the Applicant's

challenge applies fully. Furthermore, I accept Mr McGleenan's submission that this ground adds nothing new in any event.

<u>The Display Boards</u>

[119] The display boards employed at the two Dalradian PIEs clearly formed an integral part of the overall section 27 consultation exercise. As already noted there were over 50 of these. Two of them, under the rubric of "*Ecology*" make express reference to peat. First, it was stated that a "*Peat Characterisation Survey*" had been carried out, one of a number of surveys whereby baseline ecological data on designated sites, habitats and species had been collated. Second, "*peat land habitats*" had been identified as one of the "*important ecological features*" having "*the potential to be directly or indirectly affected by the proposed goldmine infrastructure*" – and which would be the subject of more detailed assessment in the later Ecology Impact Assessment ("*EcIA*"). In passing, it is clear from the PACCR (Chapter 11) later submitted to DFI that the envisaged EcIA was indeed carried out (presumably as part of the obligatory environmental impact assessment).

[120] I have already addressed, and rejected, the freestanding argument relating to the omission of "peat works" from the PAN consultation exercise. This was, by some measure, the main element of the Applicant's challenge to the impugned "acceptance" decision of DFI under section 50, with its heavy emphasis on the underlying requirement enshrined in section 27(4)(a) of the Planning Act. I do not overlook the <u>other</u> criticisms of the display boards which featured in counsel's submissions. Approximately a quarter of the boards were singled out in this way. The core elements of the submissions presented to the court were, in brief compass, these: some aspects of the ultimately envisaged development were described in terms which included the language of "*ongoing … will continue … conceptual … is being assessed … is being undertaken … will be … at least …* [and] *… including*". Mr Jones drew these various strands together in support of the central submission that the project presented and considered at the PAN consultation stage was insufficiently detailed.

[121] Having rejected the Applicant's challenge to both the PAN and the newspaper advertisements, I consider that this discrete attack adds nothing of substance. It falls measurably short of the public law threshold engaged, namely irrationality. Differing opinions about how things might have been done better or more fully belong to the realm of an impermissible merits challenge.

The PACCR

[122] Much in the immediately preceding paragraphs serves to identify the context to which the PACCR belongs. This report is properly to be taken into account by the court in determining whether DFI's "acceptance" decision under section 50 is liable to be upset in accordance with the legal standard identified above. Dalradian's PACCR, obligatory by virtue of section 28 of the statute and compiled approximately one year after the PAN consultation exercise, is a voluminous piece of work, consisting of 13 chapters and multiple appendices, totalling 571 pages. The court, while paying particular attention to those aspects of the text which featured most prominently in the party's submissions, has considered the whole of the document.

[123] The "Executive Summary" draws attention to *inter alia* a series of figures: over 17,000 "visits" to the project's website; 2 million impressions via interaction with the project's social media channels; print coverage with a combined circulation approaching 6 million; "tunnel tours" of the existing mine attended by 674 people and 25 groups; meetings with 313 land owners, together with dozens of individual, private and public meetings attended by residents, community groups and representative organisations; the circulation of 8,400 newsletters and more than 13,000 leaflets *et al* to over 5,000 properties within a 15 kilometre radius of the site; the receipt of over 500 individual written representations and comments; and, with specific reference to the feedback pro-formae (*supra*) support for the project with appropriate controls and safeguards from 65% of respondents, opposition from 26% of respondents and a recognition by 71% of respondents of the importance of the project for the creation of local employment. The report further documents the early, pre-PAN engagement by Dalradian with the community and stakeholders, dating from 2015, orchestrated and overseen by expert consultants retained by the company. (See the chronology in [14] above.)

[124] The PACCR has a free standing chapter entitled "Changes in the Project Proposals". These are listed with the following preface:

> "*Feedback from the community, both residents and the wider public, has informed a number of changes to the project. These include…* "

The changes are then listed. This is followed by:

> "*In addition a number of improvements and changes in design have resulted as a consequence of feedback from*

> *specialists, review of good practice and the incorporation of feedback from regulatory consultations. This has included: …"*

A further, separate list of alterations follows.

[125] The PACCR is supplemented by a total of 77 Appendices. Some of these reproduced certain of the PIE display boards. One of them (Appendix 2.3) is entitled "Local Stakeholder Perception Study". This is a report prepared for Dalradian by the specialist consultants noted in the preceding paragraph. This appendix was criticised by Mr Jones on the ground that its content did not adequately portray the responses of consultees. This criticism (a) was purely subjective in nature, (b) seems to (mistakenly) overlook that this report was prepared over three years before the formal, statutory PAN consultation exercise, (c) has no identifiable evidential foundation and (d) is in any event yet another illustration of the intrusion of purely subjective opinion and assertion into the litigation arena.

[126] In my judgment, the "cherry picking" of the PACCR, which was notably limited in any event, whether considered in isolation or in tandem with all of the other elements of the Applicant's challenge, comes nowhere close to establishing a successful challenge to the impugned opinion forming decision of the Department under section 50.

The Feedback Questionnaire

[127] The final ingredient in the arguments canvassed on behalf of the Applicant entailed a critique of the feedback questionnaires devised by Dalradian in the context of the PAN consultation exercise. The questions posed, submitted Mr Jones, were of the "closed" variety and, in certain instances, could not be meaningfully answered by virtue of the asserted shortcomings in the PAN, its accompanying map and the associated PIE display boards. The main element of this submission has been addressed, and rejected, above.

[128] I consider the Applicant's critique of the feedback forms to be quite hopeless. They were additional to the statutory requirements. On any reasonable objective assessment, they enhanced, rather than undermined, this exercise. Furthermore, their utilisation was a purely voluntary choice on the part of consultees, all of whom remained at liberty to make representations in such manner as they desired. Fundamentally, the pro-forma, which was but one element of the consultation exercise, did not infringe any of the common law consultation principles and violated no other legal standard, statutory or

otherwise. The assertion of a subjective opinion that the pro-forma could have been more open or better (or whatever) falls demonstrably short of displacing this juridical reality.

Omnibus Conclusion

[129] Giving effect to the analysis of the evidence and the juridical framework set forth above, I conclude that the Applicant's challenge falls well short of overcoming the legal threshold necessary for success.

[130] This judicial review challenge may, foreseeably, ultimately prove to be the first major staging post in a lengthy legal struggle on the part of all opposed to Dalradian's proposed gold mining at Curraghinalt. A former Minister of the Northern Ireland Executive has promised a public inquiry and, irrespective, all objectors have a statutory right to make representations opposing the proposed development. Mechanisms more efficacious and intrusive than judicial review will be available. In certain eventualities further legal challenges may materialise. On one view, the real battle has just begun in earnest.

[131] The legal challenge brought by certain residents of Greencastle and Rouskey has raised important and interesting questions relating to the construction and effect of the new regime constituted by sections 27, 28 and 50 of the Planning Act. The case was properly brought before the court. For the reasons given the challenge must fail. Accordingly the application for judicial review is dismissed.