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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF SOME 18 APPLICATIONS BY DAVID BURNS FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF SOME 17 APPLICATIONS BY GORDON DUFF FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTERS OF VARIOUS DECISIONS OF LISBURN AND CASTLEREAGH CITY COUNCIL TO GRANT PLANNING PERMISSION IN THE COUNTRYSIDE

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Mr Duff appeared in person as the applicant in his applications and as an interested party in Mr Burns' applications
Stewart Beattie QC and Philip McEvoy (instructed by Cleaver Fulton Rankin, Solicitors) appeared for the applicant, Mr Burns, in his applications
Stewart Beattie QC and Philip McEvoy (instructed by Cleaver Fulton Rankin, Solicitors) also appeared for the respondent, Lisburn and Castlereagh City Council, in Mr Duff's applications
A variety of notice parties in each set of applications (beneficiaries of the permissions under challenge) appeared in person, by solicitor or through a planning agent

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SCOFFIELD J

Introduction

[1] This written ruling is being provided in order to explain an order which is being made dealing with a range of related applications for judicial review and to give reasons for the course which the court is adopting in respect of those applications.

Summary of the various judicial review proceedings

[2] The order relates to some 35 applications for leave to apply for judicial review which have been lodged with the court. Those applications relate to some 18 decisions of Lisburn and Castlereagh City Council (LCCC) ("the Council") whereby it granted planning permission for proposed developments in the countryside. (Two further cases – relating to one further planning permission – were previously associated with this cohort of cases. They have been dealt with separately, for reasons described at para [46] below.)

[3] On the one hand, most of the 18 planning decisions with which this ruling is concerned have been challenged by Mr Gordon Duff. Mr Duff is an environmental activist and, in recent times, a regular litigant in the judicial review court in this jurisdiction who seeks to challenge grants of planning permission where he feels that planning policy has been misinterpreted or misapplied or there has been some other legal flaw in the planning decision. Most of his applications for judicial review concern the application of Policy CTY8 within Planning Policy Statement (PPS) 21 entitled, 'Sustainable Development in the Countryside.' Most of the applications therefore relate to what are known as 'infill dwellings'; although some relate to farm dwellings or other replacement dwellings in the countryside. For reasons which are not significant for present purposes, Mr Duff did not commence proceedings in relation to one of the 18 contentious planning decisions (although he had written pre-action correspondence to the Council indicating an intention to bring proceedings in relation to it). That explains why Mr Duff has only 17 applications before the court in the present cohort. In each case he has also sought a protective costs order under the provisions of the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013, as amended.

[4] On the other hand, the Council itself (in effect) has also now applied to the Court, bringing the applications in the name of its Chief Executive Mr Burns, seeking that its own decisions be quashed. In most instances, it did so after receipt of pre-action correspondence from Mr Duff indicating that he was intending to bring proceedings in relation to the decision in question but before he did so. In other cases, Mr Burns' application was brought around the same time or after Mr Duff had issued proceedings challenging the decision in question. I say something briefly below about the procedural mechanism used to challenge these decisions. I proceed on the basis, however, that Mr Burns' applications essentially amount to the Council inviting the court to quash its own decisions.

[5] There is a discrepancy between the grounds on which Mr Duff seeks the quashing of the relevant permissions and those on which Mr Burns seeks that they be quashed. Mr Duff has a wide range of complaints about the application of policy, and particularly Policy CTY8, in the vast majority of these cases. (A few cases involve replacement dwellings in the countryside where the key policy is Policy CTY3, rather than Policy CTY8, or a farm dwelling where the key policy is Policy CTY10). In most cases, Mr Duff has contended that the Council took a wide variety of immaterial considerations into account; left material considerations out of account; and acted in

breach of planning policy (in the form of Policies CTY8, CTY13 and CTY14 of PPS21; supplementary planning guidance in a publication entitled 'Building on Tradition'; the Strategic Planning Policy Statement (SPPS) for Northern Ireland; and the Planning Advice Note discussed below) – or some variation of these grounds. In contrast, Mr Burns asks that the relevant decisions be set aside on one limited ground only, namely that it is accepted that the Council left a material consideration out of account. That material consideration is a Planning Advice Note (PAN) issued by the Department for Infrastructure (DfI) ("the Department"), entitled 'Implementation of Strategic Planning Policy on Development in the Countryside', which would have been a relevant consideration at the time of the decision-making. A complicating factor is that, as matters stand today, the PAN has now been withdrawn by the Department.

[6] In Mr Burns' submission, made on behalf of the Council, the correct course is for the court to quash each of the 18 planning permissions on his application and to then dismiss the corresponding applications brought by Mr Duff on the basis that they are academic. For reasons which are explained further below, Mr Duff does not agree with this course. Mr Duff has been recognised to be an interested party in all of Mr Burns' applications, because those applications appear to have been prompted by the threat or commencement of judicial review proceedings by him in respect of the planning permissions. A further factor is that, in each case, whether brought by Mr Duff or Mr Burns, there is another interested party, that is to say the person who enjoys the benefit of the planning permission which the court is being asked to quash. Their involvement with the proceedings and the various reactions on their part are explained in further detail below.

[7] For convenience and ease of reference, a table is attached as an annex to this ruling giving brief details about the applications with which it is concerned, including the planning permission involved, the ICOS number of the respective applications brought by Mr Duff and Mr Burns relating to the permission, and some further details including the planning applicant's response to Mr Burns' suggested course of action.

The Council's Proposal

[8] As explained briefly above, Mr Burns has brought a range of judicial review applications in his name but on behalf of the Council seeking the quashing of the 18 planning permissions set out in the table in the annex to this ruling. In each case, this application is made on the basis that the decision is now recognised by the Council to have been legally flawed, in that it wrongly left out of account the Departmental PAN referred to above. Having recognised that its own decisions are legally flawed and therefore susceptible to being quashed on an application for judicial review, the court has been asked simply to quash those decisions now on the Council's own application through its Chief Executive. Although the application being made in the Council's most senior officer's name may appear unusual, this is now a reasonably well-recognised mechanism where a planning authority desires that its own grant of planning permission be quashed by virtue of an accepted legal flaw in the decision-making. It avoids the permission having to be revoked (which may require

compensation to be paid to the beneficiary of it); and also avoids the odd circumstance where a corporate body initiates proceedings against itself.

[9] In the event that the court accedes to this application, the Council has committed itself to reconsidering the planning application and reaching a fresh decision in each case as expeditiously as possible. That has been a significant factor in a number of the interested parties agreeing to the course proposed. The Council has also indicated that, in the course of its reconsideration, it will take into account the points which have been raised by Mr Duff in his pre-action correspondence and/or in any proceedings he has issued challenging the permission and treat those as points which have been made by Mr Duff as an objector in the course of the planning process.

[10] Mr Beattie QC for Mr Burns submits that there are a number of clear advantages to this course:

(a) In the first instance, as a matter of principle, it is said that it is right for a public authority which recognises that it has made a decision which is legally flawed to put that right and reconsider the matter.

(b) Secondly, in the interests of efficiency and legal certainty, it is said that the course proposed by Mr Burns will result in a fresh decision being taken quickly and with all relevant matters and representations being considered, with a view to a more legally robust decision being taken as soon as possible. This is contrasted with a situation where Mr Duff's applications for judicial review in each respective case may proceed and take some time to be litigated, heard and adjudicated upon, particularly in light of the fact that there are so many of these applications and they are being progressed by Mr Duff acting as a litigant in person.

(c) Thirdly, Mr Beattie has emphasised that Mr Duff's points will be taken into account by the Council in the further substantive reconsideration which follows in each case. In the event that planning permission was granted again and that Mr Duff was unhappy about this, he would retain the right at that stage (subject to the usual objections which can be raised in such proceedings) to mount a further application for judicial review – but in circumstances where the matter had been fully considered by the Council, taking into account the points he has already raised. In this way, it is submitted that Mr Duff's position is protected and also that any further judicial review application will have the benefit of a more carefully considered and/or reasoned decision.

(d) Fourthly, if Mr Duff's applications are then dismissed, having become academic in the event that the relevant planning permission has been quashed on Mr Burns' application in any event, this will save time and costs for all concerned. It is therefore compliant with the court's overriding objective as set out in The Rules of the Court of Judicature (NI) 1980 (RCJ) Order 1, rule 1A.

(e) Moreover, in the majority of cases – 15 out of the 18 permissions concerned – the beneficiary of the relevant planning permission has consented to this course or positively indicated that they have no objection to it (in light, Mr Beattie would say, of the advantages of it which are identified above).

Mr Duff's opposition to this course

[11] Mr Duff's response to this proposal is not entirely straightforward, for reasons which are explained further below, but can broadly be summarised as opposition to the course which has been proposed on behalf of the Council. His views on the matter have been canvassed at three case management review hearings and have been set out in a detailed affidavit of 21 January 2022 which he has been permitted to file, which contains some evidence but also a considerable amount of representations and submissions.

[12] The key bases upon which Mr Duff opposes the Council's proposed way forward, or at least a wholesale adoption of the Council's proposal, are as follows:

(a) First, he contends that the Council's approach is a means of shielding it from scrutiny of the way in which its decisions were taken and thereby avoiding criticism for wrongdoing. He refers to the Council's proposal as being "damage limitation."

(b) Second, he makes the point that the basis upon which the Council seeks to have its decisions quashed is a weak one (discussed further below); and that, in contrast, the grounds of challenge upon which he has relied are strong ones which require consideration.

(c) Third, he submits that the relevant permissions should be quashed on his application and that, whether or not this occurs, if they are quashed in consequence of his actual or threatened challenges he should be entitled to his costs of bringing the proceedings.

(d) Fourth, he contends that a number of the cases concerned raise more important, or less common, issues in relation to the interpretation and application of policy and so should be examined by the court in the nature of 'lead' cases on certain issues.

(e) Fifth, he is critical of the selective nature (as he submits) of the Council's decisions as to the cases in which it will seek to have a planning permission quashed for non-consideration of the PAN. He contends that this is inconsistent and has not been fairly applied across the board. Some further discussion of this concern is set out below.

[13] Mr Duff's recent affidavit has emphasised that, in the period between 2 August 2021 and 15 October 2021 when the PAN was in force, he believes that the Council

granted planning permission for 39 developments which represented one or two house development in the countryside; but that, of those, he has only challenged those which he considers were erroneous or particularly poor decisions, after careful evaluation and applying a "strong filter", in recognition of the likely opposition to his application from the Council and other interested parties. In support of this Mr Duff has provided details of a range of LCCC decisions which he considered but did not challenge and has also provided details of the case (mentioned in para [3] above, relating to planning permission at 5A Sycamore Road, Dundrod) in which he issued pre-action correspondence but later determined that he should not issue proceedings.

[14] Notwithstanding the strong filter which Mr Duff says he applied in order to only progress challenges with a high prospect of success, he contends that it is remarkable that this particular council has such a high proportion of legally vulnerable decisions in this area. He also draws attention to the fact that Mr Burns has sought to have the decision set aside in *every one* of the LCCC cases in which he (Mr Duff) submitted a pre-action protocol letter; but in *none* of the other cases determined during the currency of the PAN which he had not proposed to challenge. On this basis, Mr Duff contends – with some apparent force – that Mr Burns has brought his applications in response to Mr Duff's actual or threatened challenges but has allowed other decisions taken during the currency of the PAN, which are likely to have suffered from the same legal infirmity upon which Mr Burns relies, to stand. In summary, Mr Duff contends that the Council has not acted fairly and equitably by seeking to overturn only some of its own planning decisions during the period when the PAN was in force but not others. He also contends that, as a private citizen, he has a luxury in being selective about which cases to pursue and abandon which the Council does not, or should not, enjoy.

[15] Mr Duff has also recognised that the court "may wish to dispose of a large number of cases expeditiously without having to deal with repetitive issues that will burden the Courts and unnecessarily delay and increase the impact on various Notice Parties who are the recipients of the planning permissions" (see para 4 of his recent affidavit). In his oral submissions, similar sentiments have been expressed, including sympathy for some of the planning applicants 'caught up' in his challenges to their planning permissions and/or in the challenges brought by Mr Burns. Mr Duff has indicated that he is realistic about the court wishing to deal with matters in an efficient and expeditious way and does not, in principle, seek to stand in the way of this. However, he would prefer the permissions to be quashed on his application, rather than Mr Burns', and would like a number of cases to proceed for further argument and examination.

[16] Mr Duff's position is that there are three cases which ought to be considered in depth, namely (i) his case in relation to the site between 26 and 30 Magheraconluce Road (ICOS No 21/077108/01); (ii) his case in relation to 118 Saintfield Road (ICOS No 21/095529/01); and (iii) his case in relation to 75 Dromore Road, Hillsborough (ICOS No 22/00813/01). One of these relates to a full permission; one to an outline permission; and the other to a reserved matters approval. In each of those cases, the

beneficiary of the permission has consented or not objected to the course proposed by Mr Burns.

The leaving out of account of the PAN

[17] The Planning Advice Note which Mr Burns has said was not taken into account in the cases in which he says the Council's decisions should be quashed was issued by the Department on 2 August 2021 and withdrawn on 15 October 2021. The background to the PAN was set out in paras 6-8 of the document. It referred to the Department's Call for Evidence (following the publication of the SPPS in September 2015) and the commissioning of independent consultants to undertake background research on the issue of development in the countryside. The aim of this research was to provide an updated evidential context to inform the best strategic planning policy approach for development in the countryside. The consultants recommended to the Department that it should provide an additional emphasis on fundamental aspects of the existing SPPS policy, rather than undertaking a review of it. In light of this, the DfI Minister concluded that the relevant SPPS provisions were appropriate and robust but decided that the Department should "reaffirm and clarify" the policy approach set out in the SPPS in relation to sustainable development in the countryside in order "to support its implementation."

[18] Accordingly, the purpose of the PAN was stated as follows:

> "The purpose of this PAN is to re-emphasise fundamental aspects of existing strategic planning policy on Development in the Countryside, as contained in the SPPS; and, clarify certain extant provisions of it. It does not add to or change existing policy or guidance. This PAN is relevant to planning authorities and all users of the planning system involved in the preparation and determination of planning applications and appeals; and, in the formulation of LDPs."

[19] On this basis, the PAN was clearly, and was intended to be, supplementary planning guidance which should be taken into account in development control decisions (see also para 12 of the PAN to similar effect). Although it expressly did not add to or change existing policy, it was designed to bring back into renewed focus (and presumably, therefore, encourage planning authorities to give more careful consideration or greater weight to) key aspects of the existing policy framework. It focused on integration and rural character (paras 13-15); dwellings on farms (paras 16-19); infill/ribbon development (paras 20-23); and new dwellings in existing clusters (paras 24-26).

[20] The passages which are probably of most direct application to the majority of the cases brought by Mr Duff are paras 21-23, which are in the following terms:

> "21. The application and interpretation of infill/ribbon development policy has and continues to be a cause of debate, particularly in respect of the definition of a 'building' for the purposes of the policy, and what constitutes a 'substantial and continuously built up frontage.' Preparing plans and taking decisions that are not in keeping with the original intention of the policy will therefore undermine the wider policy aims and objectives in respect of sustainable development in the countryside.
>
> 22. The acceptance of an unsubstantial ancillary building, such as a domestic garage or small outbuilding as a 'building' which contributes to the assessment of a substantially and continuously built up frontage, is at odds with the original policy intent. It was not the intention of the policy that such buildings would be considered suitable in any reasonable planning assessment of a proposal for an infill dwelling, given their limited size and visual impact, in terms of their ability to contribute visually to a substantial and continuously built up frontage.
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> 23. As set out above, the SPPS is clear, in that, for plan-making and decision-taking, all development in the countryside should integrate, respect rural character and not create or add to a ribbon of development."

[21] These paras emphasise the original policy intention of para 6.73 of the SPPS and, indeed, of Policy CTY8 within PPS 21; caution against unsubstantial ancillary buildings being considered to form part of a substantial and continuously built up frontage; and underscore that all development in the countryside (including infill dwellings) must integrate, respect rural character and not create or add to a ribbon of development. Without altering the relevant policy, the PAN clearly seeks to set a different tone for decision-making in such cases: one which is more cautious and protective of rural character.

[22] However, the PAN was far from universally welcomed. It was later withdrawn, with little or no notice, by means of an announcement by the Department on 15 October 2021. The explanation publicly given by the Department included the following:

> "The intention of the advice note was to assist with ensuring a consistent interpretation of the policy by re-

> emphasising and clarifying certain fundamental aspects of it in order to have a positive impact on the planning system overall and our rural communities. The PAN did not add to or change existing planning policy.
>
> The Department had not expected such a significant response to what is essentially an advice note to support the efficient and effective workings of the two-tier planning system.
>
> Regrettably, rather than bringing certainty and clarity, as was its intention, the PAN seems to have created confusion and uncertainty. The Department has listened carefully to and reflected on all the concerns and has decided to withdraw the PAN today to swiftly restore clarity to this situation."

[23] The Department indicated that it would take stock of the concerns raised in relation to the PAN and undertake further engagement and analysis on this important policy area, to include consideration of current and emerging issues, such as the climate emergency and a green recovery from the pandemic.

[24] Mr Duff is supportive of the points which were made in the PAN which, he agrees, simply explain what the correct approach is (and has always been) to relevant policy set out within the SPPS. Nonetheless, Mr Duff contends that the leaving out of account of the PAN is insufficient on its own to warrant the quashing of any of the planning permissions "unless it can be shown [that] the impact of not considering the PAN was so significant that the impugned decisions would have been unlawful." He also suggests that it was withdrawn at least partly for political reasons; that the stated reasons given for its withdrawal are "nonsense" (since it did not, in fact, cause further confusion, he submits); and that the real issue was that the Department did not have the resolve to defend it, even though its stance was correct.

[25] For its part, the Council, through Mr Burns, has averred that, in each case, the PAN pre-dated the impugned decision but was not considered by the decision-maker when reaching the impugned decision. The Council's position is that, in the interests of fairness, transparency and openness, the impugned decision in each case should be quashed rather than allowing it to stand "tainted by illegality."

[26] Mr Burns has also indicated that, had the PAN not been withdrawn by DfI, it is likely that proceedings would have been issued by the Council to have the PAN quashed. Indeed, several grounds of challenge had been identified and, by 15 October, a draft pre-action protocol letter and draft Order 53 statement had been prepared for service by the Council. This suggests to me that, not only was the PAN left out of account, but there may also have been active opposition to its purpose and effect within the Council.

[27] In one case (the application for planning permission LA05/2018/0826/F at a site between 26 and 30 Magheraconluce Road) the PAN was mentioned in the case officer's report as part of the planning policy context but, in the body of the report, expressly given "no weight" since "all three buildings read as separate elements in the road frontage irrespective of their size (the policy test)." This appears to have been a conscious decision to depart from the clarification contained in the PAN that an unsubstantial ancillary building, such as a domestic garage, should not be considered in determining whether there was a substantial and continuously built up frontage for the purposes of Policy CTY8 (since, in that case, the frontage was considered to consist of only two dwellings, one of which had a separate garage). In his grounding affidavit in this case, Mr Burns explains that the *contents* of the PAN were not brought to the attention of the Planning Committee and, in consequence, it was led into error by the limited treatment of the PAN in the case officer's report.

Should the permissions be quashed on Mr Burns' application?

[28] I have decided that the appropriate course in the majority of cases is that the relevant planning permission should be quashed upon Mr Burns' application. In my view, the leaving out of account of the PAN was a legal flaw on the basis of which it would in principle be appropriate to quash the resulting decision. It was plainly a relevant consideration at the time and, in each case, Mr Burns has provided affidavit evidence, authorised by the Council, averring that this material consideration was not taken into account.

[29] Mr Duff raised a concern at one point that some or all of Mr Burns' grounding affidavits were unsworn. It has been a feature of legal practice during the Covid-19 pandemic that, for a variety of reasons, it has been difficult to have affidavits sworn. A practice has developed, where necessary, of filing unsworn affidavits on the understanding or undertaking that a sworn version will be provided in due course. I accept Mr Beattie's assurance that that is the simple explanation for unsworn affidavits being lodged in these cases. In several cases, a sworn version of the affidavit has now been provided. It is anticipated that sworn versions will be provided in the remainder of Mr Burns' applications. I do not consider anything to turn on the fact that the applications were initially grounded by affidavits which were unsworn.

[30] Once it is accepted that a material consideration has been left out of account, the usual course would be that the resulting decision requires to be quashed and reconsidered. There may be some force in the suggestion that, if a planning permission is quashed on this basis and the matter is remitted back to the Council for reconsideration now, the new decision is likely to arrive at the same result. That is primarily because, when the matter is reconsidered, the PAN, which has now been withdrawn, will no longer require to be considered. However, I am not persuaded by the argument (raised by some of the interested parties and also advanced by Mr Duff) that the court's discretion as to remedy should be exercised so as to decline the grant of relief upon Mr Burns' applications. There are a number of reasons for this:

(a) Firstly, it would be unusual for a court to stand in the way of a public authority having its own decision quashed, on its own application, when it comes before the court and admits a public law flaw in its decision-making process which is substantiated by evidence provided on its behalf. Put another way, there would need to be something quite unusual for the court to decline to permit a public authority to reconsider a decision when it has conceded illegality which would generally warrant the making of a quashing order.

(b) Secondly, to focus on what the fresh decision to be taken in the future might be is to ask the wrong question. Although the court has a discretion to withhold relief when persuaded to a high degree that the legal flaw identified would have made no difference to the decision-making, that discretion is circumscribed and relates to the question of whether the decision would have been the same (absent the legal flaw) *at the time the decision was made*. I am not persuaded that, had the PAN been properly and conscientiously considered at the relevant time, the Council's decisions would necessarily have been the same. At the very least, its contents are likely to have caused the Planning Committee to think more carefully about the type of issues which Mr Duff has been raising.

(c) Thirdly and in any event, it is also extremely difficult to say with any degree of confidence that when the Council reconsiders the planning applications on foot of any quashing order that its decisions will necessarily be the same. Quite properly, the Council has declined to give any planning applicant such an assurance (and indeed it could not do so, since it cannot fetter its discretion in that way if the reconsideration exercise is to be undertaken genuinely and in good faith). The Council has agreed that, when it is taking a fresh decision, it will carefully consider the points which Mr Duff has raised in his pre-action correspondence or proceedings relating to the case. In light of that, it is quite possible that a different view may be taken or more enquiries may have to be undertaken.

[31] As noted above, the usual approach is that where a material consideration has been left out of account, a quashing order will follow: see, for instance, Fordham, *Judicial Review Handbook* (7th edition, 2020, Hart) ("Fordham"), at sections 24.3.14 and 24.3.15. In considering the exercise of the court's discretion to withhold such a remedy, I also consider that it is permissible and appropriate for the court to take into account the wider case management issues which have been raised (summarised in para [10](b)-(d) above) and which also engage the public interest more generally in the efficient and cost-effective administration of justice.

[32] Moreover, it is highly relevant that in the majority of cases the beneficiary of the planning permission is agreeable to the course proposed by Mr Burns, which agreement has been communicated to the court and/or to the Council's solicitor. In a small number of cases there is no response or a neutral response, notwithstanding that

the relevant party has been given adequate opportunity to make their position known. I say something further about the responses provided by the various planning applicants below (see paras [47]-[52]).

[33] For these reasons I propose to accede to Mr Burns' application that the relevant planning permission will be quashed in all of the cases listed in the annex to this judgment, save for the application bearing the ICOS reference 2021/94653/01 in relation to the grant of planning permission at 1A Moss Lane, Stoneyford. An order of certiorari will issue in those cases pursuant to the court's power under RCJ Order 53, rule 3(9) to grant substantive relief at the leave stage where it considers that, in the special circumstances of the case, such an order should be made forthwith. I am not making such an order in the Moss Lane case for the reasons described at para [48] below.

What is the effect on Mr Duff's applications?

[34] The result of my decision that the relevant planning permissions should be quashed in the cases mentioned in para [33] above is that Mr Duff's applications for leave to apply for judicial review in respect of the same planning permissions ought to be dismissed. The reason for this is that, since the impugned permission in each case is being quashed in any event, Mr Duff's corresponding application in each case has become academic.

[35] The court has a discretion to nonetheless allow a case to proceed notwithstanding that it has become academic as between the parties, in the sense of being of no real practical benefit to the applicant. I recently considered this discretion in *Re Bryson's Application* [2022] NIQB 4, at paras [20]-[22] and [25]-[29]. As I explained in that case, an applicant for judicial review will not generally be able to maintain that the case is not academic simply by virtue of the fact that the respondent has not conceded all or any particular of their grounds for judicial review.

[36] Applying the well-worn guidance set out in *R v Secretary of State for the Home Department, ex parte Salem* [1999] UKHL 8 and considered in the *Bryson* case, I do not consider that Mr Duff's cases are ones which involve a discrete point of statutory construction which requires to be resolved. It is correct that Mr Duff may be able to argue with some force that there are a large number of similar cases (most or all of which have been brought by him) and that the court needs to give guidance in relation to the meaning of relevant planning policy, rather than a statutory provision. However, in my view there is no need for any of these cases to proceed as a 'test' case. In addition to his applications against LCCC, Mr Duff has issued a range of other applications raising the same or similar issues against other planning authorities in Northern Ireland. One of those has already proceeded to hearing and is designed to be a lead case in relation to many of the issues which Mr Duff's applications repeatedly raise. Others are stayed pending the result of the lead case (and, potentially, any appeal to the Court of Appeal). To permit other cases to proceed at this time when the planning applicant has had their permission quashed on the respondent's

application would neither be fair nor a proper or appropriate use of the court's resources, in my judgment. Since each case will be reconsidered by the Council again, there will in any event be a further opportunity for challenge, if appropriate, if any arguable error of law arises. Any such challenge would be in the context of the Council having given fuller consideration to the relevant issues than it may have done to date.

[37] Accordingly, I propose to dismiss all of the cases brought by Mr Duff which are listed in the annex to this judgment, save again for that relating to permission LA05/2020/0346/F at 1A Moss Lane (ICOS reference 21/93170/01).

[38] As to the suggestion that this course 'lets the Council off the hook' and means that its approach generally to planning applications of this type will not be examined in detail by the court, there may be an element of truth to this. It is right that the Council has not sought to have quashed every decision it made in relation to applications in the countryside during the currency of the PAN. As a matter of common sense it seems that Mr Burns' applications have been, to a large degree, responsive to Mr Duff's actual or proposed challenges. Mr Duff is concerned that this means that there may be other Council decisions, with a similar legal vulnerability, which have been left to stand. That may be so; but the Council is entitled in my view to take a pragmatic approach to such issues and, in the interests of legal certainty, not to seek to upset decisions which affect third party interests in the absence of any actual or proposed challenge.

[39] It is also right that, even after Mr Burns made his first application to the court (on 24 September 2021) on the basis of the PAN having been left out of account, the Council continued to make decisions which it now seeks to have quashed on the same basis (suggesting that the appropriate steps were not taken either by Mr Burns or the relevant planning officers to ensure that, from that point, the PAN was properly taken into account). Mr Duff complains about that and contends that it requires to be investigated. However, it is not the function of this court exercising its supervisory jurisdiction to undertake something of a mini public inquiry into the Council's conduct across a wide range of cases (see, by way of example, the observations of McCloskey LJ in *Re Allister and Agnew's Application* [2019] NIQB 79, at para [53]). I am not at all attracted to Mr Duff's suggestion that some or all of his cases should be permitted to proceed with an order made for cross-examination of relevant officials from the Council. The court will also not readily accept an assertion, much less an innuendo, that public officers have acted improperly or in bad faith without some clear evidence of this (see, for instance, *Inland Revenue Commissioners v Coombs* [1991] 2 AC 283, as applied in *Re HM's Application* [2007] NICA 2, at para [33], and *Re Bryson Recycling Ltd's Application* [2014] NIQB 9, at para [157]). If Mr Duff has concerns about the propriety of the Council's actions, there are other means by which such complaints may be pursued and investigated, including (but not limited to) complaint to the Northern Ireland Local Government Commissioner for Standards. It is obvious, however, that the Council's proposal as to how these cases should be dealt with is highly pragmatic in nature and motivation.

[40] Mr Duff's recent affidavit has also made reference to the enormous efforts he has felt compelled to go to in order (in his view) to maintain the integrity of the planning system. These comments are made in the context of complaint that the Department ought to have been bearing this mantle. However, they disclose that Mr Duff has been under significant stress and pressure, as well as having expended huge amounts of time and money, in order to do what he felt was right. He describes himself as being "exhausted fighting for the environment." In my disposal of these cases, I have also taken into account the effect of these matters on Mr Duff's own health and well-being, albeit that this was not an issue which he himself relied upon in any respect.

[41] None of the issues raised by Mr Duff has persuaded me that it would be appropriate to let his cases – or even some of them – proceed at this point, in circumstances where the Council has indicated a willingness to quash the impugned decision and undertake a fresh reconsideration of the matter and where the relevant interested party has not objected to this course.

Keegan J's decision in similar circumstances

[42] Keegan J dealt with a similar issue in her decision in *Re Rural Integrity (Lisburn 01) Ltd's Application and Re Donaldson's Application* [2017] NIQB 133. In that case the applicant company, represented by Mr Duff, brought a challenge to a decision to remove a planning condition requiring holiday occupancy for a holiday home development of 58 apartments in Hillsborough. Sometime afterwards, Dr Donaldson, Mr Burns' predecessor as Chief Executive of LCCC, brought an application again on behalf of the Council seeking to quash its own decision on a limited ground (on that occasion because a number of members of the Planning Committee had failed to declare an interest in the application in breach of the protocol for the committee's operation). The notice party – the beneficiary of the permission – did not object to the quashing of the permission in the circumstances. As in this case, Mr Duff wished to proceed with his grounds of challenge, of which there were several, and have them aired and determined.

[43] Keegan J heard full argument on both leave applications. Again, as here, Mr Duff contended that the Chief Executive's application was "designed to stymie him making his case and to try to draw a blanket over the flawed decision-making." The judge took into account both the public interest and also the overriding objective, particularly in relation to the need to avoid unnecessary public expenditure (see para [15] of her decision). She further considered that there was some weight to Mr Duff's arguments "that there was an element of damage limitation in the bringing of the second application" (see para [18]). On this basis, she declined to extend time for the bringing of Dr Donaldson's application on behalf of LCCC, particularly when the Council could simply have conceded the one ground upon which it relied in order to have its decision quashed when that ground had been relied upon by Mr Duff in his earlier application.

[44] Nonetheless, Keegan J simply quashed the decision on the basis of the Council's one conceded ground. Notwithstanding that Mr Duff raised a number of other arguable points, she considered that these therefore became academic and did not require to be addressed: see paras [20]-[23] of the judgment. The issues faced by Keegan J have a strong resonance with the approach which has been urged upon me on behalf of Mr Burns in the present cases. The circumstances are not entirely on all fours – partly because none of Mr Burns' applications are out of time (so requiring an extension of time) and partly because at least some of his applications pre-date, rather than post-date, Mr Duff's corresponding application in relation to the same permission. However, Keegan J's approach – of quashing the decision only on the limited ground conceded by the Council and declining to consider the remainder of Mr Duff's grounds, on the basis that they had become academic and would in any event be considered in the course of the Council's further reconsideration of the matter – reflects the approach I intend to take in relation to the present cases, for essentially the same reasons. Keegan J was particularly influenced by the need to safeguard public funds and to move matters along quickly in the interests of legal certainty. I consider that the approach she adopted in that case supports the approach I have settled upon in the cases with which this ruling is concerned.

The response of the planning applicants

[45] It is also appropriate to say something further about the position of those who have the benefit of the impugned planning permissions. (I should further mention at this point that the court is indebted to Mr Martyn and Ms Smyth of Cleaver Fulton Rankin, Solicitors, for their efforts in communicating with the various interested parties and their solicitors and agents in relation to these cases; and recording and updating their details and responses in an extremely helpful 'case tracker' tool which made assimilation of this information much easier.)

[46] When these cases initially came to be case managed together, there was a further planning permission under challenge, relating to a site at 6 Edentrillick Hill. The interested parties in that case – Ms Shaw and Ms Lavery – provided a range of written representations and appeared as litigants in person before the court on a number of occasions at review hearings. On the first two occasions on which they appeared, the distress caused, and emotional toll taken, by having to deal with the proceedings (from both Mr Duff and Mr Burns) challenging the planning permission which had recently been granted and the threat of that permission being overturned were evident. There were very particular circumstances of personal hardship in that case, which I need not rehearse for present purposes but which the court may well have been required to take into account in relation to any question of remedy if either case had proceeded, as well as issues giving rise to an asserted urgency which had caused the court to list the matters for a rolled-up hearing on an expedited basis. In the event, both Mr Duff and Mr Burns determined that their respective applications would be withdrawn. In Mr Duff's case, this followed an initial decision not to challenge the reserved matters approval recently granted but, instead, to focus on an

outline planning permission granted some time ago. In any event, as each case was withdrawn, the two applications for leave were dismissed with no order as to costs in a separate court order made last week.

[47] As noted above, the vast majority of planning applicants affected by Mr Burns' applications have consented to their permission being quashed, or expressly raised no objection to this, on the basis that a further reconsideration and decision will follow expeditiously. There have been varying degrees of reluctance, disappointment and frustration expressed by those concerned. In only one case has no reply or representation has been received in response to the invitation to the beneficiary of the relevant permission to make clear their position in relation to Mr Burns' proposal and the reasons for it. In that case, I have treated the absence of a reply as an absence of objection, since I am satisfied that appropriate steps were taken to put the relevant party on notice of the application and to afford them an opportunity to participate or make representations. In particular, in addition to having been served with the proceedings when they were issued by Mr Burns, his solicitor (and the solicitor for the Council) contacted the planning applicants on a number of occasions, at the court's suggestion, advising them of the case management of the applications and inviting their representations in relation to the course proposed. In one other case, the response is expressly neutral.

[48] In one case – relating to the planning permission (reference LA05/2020/0346/F) at 1A Moss Lane – there remains an objection to the permission being quashed on behalf of the planning applicant. The planning applicant in that case has made representations through their planning consultant, Mr Stephens of Matrix Planning. In those representations, it is said that this case is unique and falls into a separate category from the other cases dealt with in Mr Burns' applications for two reasons. First, the relevant decision by the Planning Committee was taken before the PAN had been issued by the Department, albeit the permission itself was formally issued after the PAN had been promulgated (with this being delayed for quite some time during which, inter alia, a section 76 planning agreement was entered into); and, second, the application relates to a replacement dwelling in the countryside, in respect of which (Mr Stephens contended) there was no additional relevant guidance provided in the PAN (although Mr Duff disputes this). For those reasons, it was submitted that the PAN was not a relevant consideration. In light of these points, and the planning applicant's objection, I do not propose to quash this permission on Mr Burns' application. Rather, his application for leave to apply for judicial review, and Mr Duff's application relating to the same planning permission, will have to be listed for a leave hearing and considered more fully on their merits. I make no order in respect of those cases for the moment therefore.

[49] I have carefully considered the representations made in the other cases. In some cases, there has been little more than an indication that the planning applicant is content to proceed as Mr Burns has proposed, sometimes expressed as being "happy to co-operate" or in equivalent terms. In a number of other cases, however, the planning applicant has made clear that their consent (or absence of objection) is

begrudging and/or given on an entirely pragmatic basis. I acknowledge the disappointment and inconvenience that many such persons will experience in circumstances where, having secured a planning permission, they now find themselves in a position where that is being quashed and the matter is being reconsidered. I have no doubt that this will give rise to additional time and cost in many cases and considerable additional worry or stress in some. In one case, a significant health issue has been attributed, at least in part, to the ongoing legal proceedings. In a small number of cases work has commenced on the site. In others, the legal challenges are interfering with plans to build or to market the site.

[50] I recognise these concerns. It is a necessary feature of our legal system, however, that decisions taken in an unlawful fashion (including by leaving a material consideration out of account) are liable to be set aside if a court challenge is made within time and by a party with the relevant standing, as I consider Mr Burns has. Particularly where development occurs or expenditure in reliance on a permission are incurred within the timeframe for bringing a judicial review (that is to say, within three months of the issue of the permission), to some degree the developer must be considered to have proceeded at risk.

[51] In a small number of instances, Mr Duff effectively asked me to be cautious about granting relief because of the prejudice which might be caused to the beneficiary of the planning permission (including, for instance, the risk that, in the Council's reconsideration of their case, they might not secure a fresh permission or might face additional hurdles in doing so). It was difficult to discern whether these points were made *entirely* altruistically or as a means of seeking to ensure that some of Mr Duff's *own* challenges to these permissions were allowed to proceed on broader grounds. However, I must proceed on the basis that those interested parties who have not objected to their planning permission being quashed have done so after full consideration of their circumstances and having taken, or at least having had the opportunity to take, their own professional advice on the matter. Indeed, many had the assistance of planning consultants, architects and/or solicitors advising them. In the absence of Mr Burns withdrawing his application (in circumstances where, in most cases, Mr Duff is still seeking to advance his application), there is little I can do other than rule upon it.

[52] Many of the planning applicants, whilst indicating consent or no objection to the course Mr Burns proposed, requested that the Council reconsider their application as soon as practicable. As noted above, the Council has committed to this and, in remitting the planning applications where the decision is to be quashed back to the Council for further reconsideration, I will direct that this occurs as expeditiously as possible.

Candour

[53] In his opposition to the course Mr Burns has proposed, Mr Duff has relied upon the well-known exposition of the duty of candour on a public authority in judicial

review proceedings in *R v Lancashire County Council, ex parte Huddleston* [1986] 2 All ER 951. In his submission, the 'damage limitation' exercise upon which the Council has embarked by seeking to have its own decisions quashed on a limited ground rather than being fully scrutinised is in breach of its obligation to "put before the Court the material necessary to deal with the relevant issues." Mr Duff relies upon the observations in that case that public authorities should act in partnership with the courts in pursuit of a common aim, namely the maintenance of the highest standards of public administration; and that it is not discreditable to get something wrong but it *is* discreditable to be reluctant to explain fully what has occurred and why.

[54] This is a persuasive submission to a point. However, I do not consider that it compels the grant of leave in any of Mr Duff's cases for a number of reasons. Although it is clear that the duty of candour applies in advance of the grant of leave – including, for instance, in respect of responses to pre-action correspondence – and at the leave stage itself (see Fordham at section 10.4.8), it does not preclude a public authority from resisting the grant of leave on some or all grounds where in good faith it considers this to be appropriate. A public authority's duty of cooperation with the court also embraces a duty to try to resolve the dispute (Fordham, section 10.1.5); and requires it to assist the court with full and accurate explanations of all the facts relevant to the issues *which the court must decide* (Fordham, section 10.4.4). An applicant's duty of cooperation with the court also requires him or her to conduct an ongoing and responsive evaluation of their case in light of developments (Fordham, section 10.1.23). In this case, for the reasons given above, including those mentioned at para [39], I do not consider that the court must decide any wider issues (at least for the moment) than that it is appropriate for relief to be granted on the ground relied upon by Mr Burns in his applications.

Conclusion

[55] By reason of the foregoing, I will quash the relevant planning permission in each of the applications brought by Mr Burns (save for the Moss Lane case); and remit the issue to the Council for further consideration and determination in each case, to be conducted as expeditiously as possible. I will dismiss all of Mr Duff's applications with which this ruling is concerned (again, save for his application in the Moss Lane case) on the basis that they are therefore academic.

Costs

[56] In relation to costs, I do not propose to make any order for costs against Mr Duff in his applications which are being dismissed. Mr Duff has not been successful in those applications, but I do not intend to depart from the court's usual (although not invariable) practice of not awarding costs against an unsuccessful applicant for leave to apply for judicial review.

[57] Indeed, there is an argument that Mr Duff should be awarded the costs of his own applications, or alternatively his costs as an interested party in Mr Burns' applications, on the basis that, in substance, he has been successful in having the

impugned permissions quashed (albeit this was secured as a result of Mr Burns applying to have them quashed in response to Mr Duff's pre-action correspondence or proceedings). However, I also do not consider that such an order would meet the justice of the situation. Mr Burns has applied to have these permissions quashed on a limited basis. There has otherwise been, and is presently to be, no adjudication on the merits of Mr Duff's challenges in the dismissed cases. In a significant number of cases, Mr Duff issued his proceedings after it was clear that the Council was seeking to have the permission set aside on its own application through Mr Burns. There is also a line of authority suggesting that, where a proposed or actual respondent to judicial review proceedings concedes the case at an early stage, it should not be penalised in costs for so doing if it has acted promptly and responsibly. Further, Mr Duff opposed the course proposed by Mr Burns and has ultimately been unsuccessful in that opposition.

[58] Taking all of these considerations into account, I consider that the most appropriate exercise of the court's discretion in relation to costs is to make no order for costs as between the parties on any of the applications.

Annex

List of judicial review applications relevant to this ruling

Planning reference	Date of decision	Location	David Burns application	Gordon Duff application	Planning applicant
LA05/2021/0292/F	12 August 2021	79 Magheraconluce Road, Hillsborough	2021/74672/01 *Stamped 24 September 2021*	2021/75474/01 *Stamped 27 September 2021*	Mr Walker (consents)
LA05/2019/0619/O	15 September 2021	118 Saintfield Road, Lisburn	2021/080006/01 *Stamped 12 October 2021*	2021/95529/01 *Stamped 2 December 2021*	Mr McMullan (consents)
LA05/2018/0862/F	9 September 2021	26 & 30 Magheraconluce Road, Hillsborough	2021/90649/01 *Stamped 19 November 2021*	2021/77108/01 *Stamped 4 October 2021*	Glebe Homes Ltd (no objection)
LA05/2021/0480/F	14 September 2021	98 - 100 Lough Road, Boardmills	2021/90121/01 *Stamped 18 November 2021*	2021/95386/01 *Stamped 6 December 2021*	Mr Elliot (no objection)
LA05/2021/0276/RM	12 October 2021	75 Dromore Road, Hillsborough	2021/90214/01 *Stamped 19 November 2022*	2022/00813/01 *Stamped 5 January 2022*	Mr Latewood (consents)
LA05/2021/0054/O	15 September 2021	53 Clarehill Road, Moira	2021/97710/01 *Stamped 14 December 2021*	2021/97584/01 *Stamped 13 December 2021*	Mr & Mrs McGrann (no objection)
LA05/2021/0665/F	15 September 2021	83 Halftown Road, Lisburn	2021/97707/01 *Stamped 14 December 2021*	2021/97672/01 *Stamped 14 December 2021*	Mr Gillespie (consent)
LA05/2021/0721/RM	14 September 2021	254 & 260 Hillhall Road, Lisburn	2021/97300/01 *Stamped 13 December 2021*	2021/97594/0 *Stamped 13 December 2021*	Ms Simpson (no objection)
LA05/2020/0346/F	31 August 2021	1A Moss Lane, Stoneyford	2021/94653/01 *Stamped 2 December 2021*	2021/93170/01 *Stamped 30 November 2021*	Mr Morrow (objects)
LA05/2021/0458/F	09 September 2021	57 & 59 Cockhill Road, Lisburn	2021/95621/01 *Stamped 9 December 2021*	2021/96348/01 *Stamped 8 December 2021*	Mr & Mrs Kennedy (consent)
LA05/2021/0083/O	15 September 2021	5A Sycamore Road, Dundrod	2021/97708/01 *Stamped 14 December 2021*	None submitted	Mr Watson (no objection)
LA05/2019/0794/F	21 September 2021	29 Old Coach Road, Hillsborough	2021/99064/01 *Stamped 20 December 2021*	2021/98568/01 *Stamped 17 December 2021*	Mr Cottney (no objection)
LA05/2021/0569/O	28 September 2021	111 Mealough Road, Carryduff	2021/99369/01 *Stamped 21 December 2021*	2021/100083/01 *Stamped 23 December 2021*	Ms Hughes (no objection)
LA05/2021/0710/F	06 October 2021	16 Magheradartin Road, Hillsborough	2021/99671/01 *Stamped 22 December 2021*	2021/98577/01 *Stamped 17 December 2021*	Mr & Mrs Smyth (no objection)
LA05/2021/0099/F	06 October 2021	730 Saintfield Road, Carryduff	2021/99676/01 *Stamped 22 December 2021*	2022/807/01 *Stamped 5 January 2022*	Mr & Mrs Osborne (consent)

LA05/2021/0053/O	12 October 2021	55 Clarehill Road, Moira	2021/99373/01 *Stamped 21 December 2021*	2022/761/01 *Stamped 5 January 2022*	Mr & Mrs McGrann (no objection)
LA05/2021/0117/O	06 October 2021	26 Bailliesmills Road, Lisburn	2021/99376/01 *Stamped 21 December 2021*	2022/805/01 *Stamped 5 January 2022*	Mr & Mrs Magowan (no response)
LA05/2021/0156/O	07 September 2021	212 Mealough Road, Drumbo	2021/95618/01 *Stamped 7 December 2021*	2021/95382/01 *Stamped 6 December 2021*	Mr Haffey (no submission)