Neutral Citation No: [2022] NIQB 37	*Ref:*	SCO11856
	ICOS No:	21/055065/01
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	24/05/2022

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 APPLICATION BY GORDON DUFF
(RE GLASSDRUMMAN ROAD, BALLYNAHINCH) FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF NEWRY, MOURNE AND DOWN DISTRICT COUNCIL

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The applicant, Mr Duff, appeared in person
Philip McAteer (instructed by Belfast City Council Legal Services Department) appeared for the respondent
William Orbinson QC and Fionnuala Connolly (instructed by O'Hare Solicitors) appeared for the notice party, Mr Carlin
Stewart Beattie QC and Philip McEvoy (instructed by Cleaver Fulton Rankin, Solicitors) appeared and intervened (by written submissions only) for Lisburn and Castlereagh City Council

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SCOFFIELD J

Introduction

[1] In these proceedings the applicant, Mr Gordon Duff, challenges the decision of Newry, Mourne and Down District Council ("the Council") to grant outline planning permission (reference LA07/2020/1292/O) on 9 April 2021 for two detached 'infill' dwellings and garages at lands located between Nos 2 and 10 Glassdrumman Road, Ballynahinch.

[2] Mr Duff appeared as a litigant in person. Mr McAteer appeared for the respondent. Mr Orbinson QC appeared with Ms Connolly for the notice party, Mr Carlin. (Unusually, the notice party in this case seeking to defend the permission was a planning consultant. However, I understand that his participation was on behalf of his client, the relevant landowner and ultimate beneficiary of the permission, Mrs Miskelly, who hopes to build houses on the application site for her

daughters to live in. No objection was made to Mr Carlin acting in this capacity.) Mr Beattie QC also appeared, with Mr McEvoy, for Lisburn and Castlereagh City Council (LCCC) as an intervener, whose interest in the proceedings arises by virtue of the fact that the applicant has issued a range of judicial review challenges against LCCC relating to the application of the same planning policy which is at the heart of this case. I am grateful to all counsel for their written and oral submissions; and, indeed, to Mr Duff for the way in which he politely and cogently put his case both orally and in writing.

The applicant's other judicial review challenges

[3] In his Order 53 statement, the applicant has described himself as someone who "has consistently challenged the cumulative destruction [of the environment] and classes himself as an environmental protector." Other recent judgments of the court have described a range of applications which have been brought by Mr Duff in this regard, many of which focus on the policies contained within Planning Policy Statement 21 (PPS21), entitled 'Sustainable Development in the Countryside', and, in particular although not exclusively, Policy CTY8 within PPS21. By way of example, see the court's judgment in *Re Burns' and Duff's Applications* [2022] NIQB 10 ("*Burns and Duff*"), at paras [3] and [36]; and *Re Duff's Application (East Road, Drumsurn)* [2022] NIQB 11, at para [52].

[4] The court granted the applicant leave to apply for judicial review in this case on 30 October 2021. A number of other cases raising essentially the same issues but against different planning authorities have been stayed pending the outcome of these proceedings which have been treated as something of a 'lead case' on the issues of interpretation of planning policy which lie at the heart of most of Mr Duff's challenges. Many of his applications for judicial review have been dealt with by way of the orders following upon the court's judgment (mentioned above) in *Burns and Duff,* where the relevant planning applications are now being reconsidered by LCCC; but there remains a range of cases which await the outcome of this application (or, as may be the case, the decision on any appeal from this judgment). Those cases include applications against the Planning Appeals Commission (PAC) and a number of other district councils.

The applicant's grounds of judicial review

[5] When leave to apply for judicial review was granted in this case, Mr Duff's pleaded grounds were significantly modified and 'slimmed down' by means of a direction pursuant to RCJ Order 53, rule 3(4) that the applicant's Order 53 statement be amended. This was on the basis that the previously pleaded grounds were unduly prolix and repetitious and, to some degree, simply repeated submissions or factual assertions which had been made to the proposed respondent. The grounds on which leave were granted were considered by the court to represent a synopsis of the key issues raised by the applicant's pleaded case which had surmounted the leave threshold.

[6] There are now therefore only three grounds of challenge to be addressed, namely (i) illegality; (ii) the leaving out of account of material considerations; and (iii) irrationality. Aside from an issue about hedgerow removal, the applicant's challenge centres upon the Council's interpretation and application of Policy CTY8 of PPS21.

[7] The illegality ground is in the following terms:

> "... [T]he respondent erred in law in its interpretation of Policy CTY8 and/or CTY14 of PPS21 and/or of paragraph 6.73 of the SPPS [Strategic Planning Policy Statement] and thereby failed to apply them properly or at all."

[8] The material considerations ground is in the following terms:

> "… [T]he impugned decision is vitiated because the respondent wrongly left out of account the following considerations:
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> - relevant supplementary planning guidance in 'Building on Tradition'; and
>
> - the extent of hedgerow removal involved in the proposed development and/or Policy NH5 of PPS2 in relation to hedgerows."

[9] And the irrationality ground is in the following terms:

> "… [T]he respondent's view that Policy CTY8 was complied with was irrational in the *Wednesbury* sense in that the respondent wrongly:
>
> - considered there to be a "substantial and continuously built-up frontage" at the site;
>
> - considered the 'gap' to be infilled to be a "small" gap;
>
> - considered that permitting the development would not amount to creating or adding to ribbon development; and
>
> - reached its view on this issue without properly informing itself of material considerations by conducting a site visit to the application site."

[10] The bullet points set out in the last of these grounds draw attention to a range of concepts within the relevant planning policy which Mr Duff contends are regularly misunderstood or misapplied in planning decisions in this jurisdiction dealing with Policy CTY8.

Factual background to this case

[11] The application relates to a decision to grant planning permission for two detached infill dwellings and garages at lands located between Nos 2 and 10 Glasdrumman Road, Ballynahinch. According to the report provided to the Council's Planning Committee by its professional planning officers ("the officers' report") the application site is 0.47ha and comprises the front portion of a field which lies between the two properties mentioned. There is mature vegetation along the roadside boundary. The surrounding land is predominantly domestic and agricultural in use, with a number of dwellings along the immediate stretch of road. The site is located within the rural area, outside any designated settlement areas.

[12] The planning application was advertised in the local press on 30 September 2020 and the usual neighbour notification was carried out. There were 18 objections received in relation to the proposal, including three from elected members of the Council. The substance of these is listed in the officers' report. Many aspects of the relevant policy and guidance were addressed in the course of the objections, some of which were from the applicant in this case.

[13] Mr Duff objected to the planning application by way of letter dated 30 September 2020, which has been exhibited to his grounding affidavit. The Planning Committee of the Council 'called in' the application to be determined by it; and it was dealt with at the committee's meeting of 16 December 2020. As is usual, the officers' report on the application was presented to the committee. Mr Duff was granted speaking rights at the meeting and presented his arguments, which were in similar terms to those set out in his letter of objection. He did, however, also raise the issue of a site visit and argued that the committee could not properly make a decision without having visited the site. The committee put that issue to a vote and determined that it was not in favour of having a site visit. The committee also voted on the substance of the planning application and voted to approve it, with eight votes cast for approval and two votes cast against.

[14] Mr Duff was unhappy with the decision, which he has described as appearing to him to be "an obviously bad decision which did not comply with policy." He sent pre-action correspondence to the Council the day after the committee's decision, on 17 December 2020. For its part, the Council did not respond in substance to the pre-action correspondence but, instead, rescheduled the application for further consideration before the Planning Committee on 8 April 2021. Before this meeting occurred, the planning officer prepared and presented an addendum to his original report. This addendum did not mention Mr Duff's pre-action correspondence but,

instead, related to issues of flood risk and historic interests which had arisen separately. This is because, after the first committee meeting, the officers appreciated that consultation had not been carried out with the Rivers Agency and with the Historic Environment Division, each of which subsequently responded with no objections.

[15] The application was considered again by the committee on 8 April 2021. Before this meeting, on 26 March, Mr Duff (who had again been granted speaking rights) submitted a short statement for the benefit of the committee.

[16] At the meeting on 8 April the committee considered the matter again and heard from the planning applicant's agent (Mr Carlin) and from Mr Duff. The committee once again voted to approve the application (with eight members voting in favour; none against; and one abstention). The planning permission itself was issued on 9 April 2021. Mr Duff thereafter sent further pre-action correspondence to the Council but issued his application for leave to apply for judicial review on 8 July 2021 in order to comply with the time limit in RCJ Order 53, rule 4.

The relevant planning policies

Policy CTY8 within PPS21

[17] The key policy for present purposes is Policy CTY8 of PPS21. The nub of the policy is contained within the first sentence of the policy text, which is in the following terms:

> "Planning permission will be refused for a building which creates or adds to a ribbon of development."

[18] This is in materially similar terms to the consideration which is required in respect of the same issue under Policy CTY14 of PPS21, which provides that:

> "A new building [in the countryside] will be unacceptable where… it creates or adds to a ribbon of development (see Policy CTY8)…"

[19] Put simply, PPS21 views ribbon development in the countryside as a bad thing: where a proposal creates or adds to a ribbon of development, applying the policies just mentioned, it will be refused planning permission. The justification text related to Policy CTY8 makes this explicit (at para 5.32):

> "Ribbon development is detrimental to the character, appearance and amenity of the countryside. It creates and reinforces a built-up appearance to roads, footpaths and private laneways and can sterilise back-land, often hampering the planned expansion of settlements. It can

> also make access to farmland difficult and cause road safety problems. Ribbon development has consistently been opposed and will continue to be unacceptable."

[20] A similar sentiment is expressed in para 5.80 of PPS21, which is part of the text supporting Policy CTY14, in the following terms:

> "It is considered that ribbon development is always detrimental to the rural character of an area as it contributes to a localised sense of build-up and fails to respect the traditional settlement pattern of the countryside."

[21] It is, of course, always open to a planning authority – provided it does so consciously, on proper planning grounds and in a manner which is not *Wednesbury* irrational – to depart from a policy. (That is an elementary statement of legal principle in this field: see, for example, *Re Bow Street Mall and Others' Application* [2006] NIQB 28, at para [43](e); and *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13, at para [18]). However, PPS21 gives a very strong steer against development which creates or adds to a ribbon of development. Precisely what "a ribbon of development" means is discussed further below. That concept is also addressed in the justification and amplification text related to Policy CTY8. Whether a proposed development would create or add to a ribbon of development will be a matter of planning judgment.

[22] Aside from the possibility of departing from policy (that is to say, permitting development which will create or add to a ribbon of development, notwithstanding that fact, because the environmental harm so caused is outweighed on the facts of the application by other planning merits, such that the authority decides to depart from the policy), Policy CTY8 itself admits of exceptions to the general rule. The first of those – which is relevant for present purposes – is in the following terms:

> "An exception will be permitted for the development of a small gap site sufficient only to accommodate up to a maximum of two houses within an otherwise substantial and continuously built-up frontage and provided this respects the existing development pattern along the frontage in terms of size, scale, siting and plot size and meets other planning and environmental requirements. For the purpose of this policy the definition of a substantial and built-up frontage includes a line of 3 or more buildings along a road frontage without accompanying development to the rear."

[23] In addition, the policy also envisages the infilling of a small gap site with economic development, rather than housing development. This further exception is couched in the following terms:

> "In certain circumstances it may also be acceptable to consider the infilling of such a small gap site with an appropriate economic development proposal including light industry where this is of a scale in keeping with adjoining development, is of a high standard of design, would not impact adversely on the amenities of neighbouring residents and meets other planning and environmental requirements."

[24] The reference to the infilling of "*such* a small gap" appears to be a reference back to a small gap site "within an otherwise substantial and continuously built-up frontage" in the preceding paragraph. Such a gap may therefore, consistently with the policy and provided the requirements in relation to matters such as scale and design are met, be filled either by appropriate housing development or economic development. The description of infill housing in accordance with the policy as an "exception" makes clear that it applies to proposals which would otherwise be thought to create or add to a ribbon of development. In the limited circumstances described in the second and third paragraphs of the policy, infill development which would otherwise be precluded by the first paragraph of the policy may be granted planning permission.

[25] It is important to bear in mind, however, that the primary focus of Policy CTY8 is on avoiding ribbon development, save where one of the two exceptions is engaged. Since Policy CTY8 is referred to in Policy CTY1 of PPS21 as being one of those policies pursuant to which development may in principle be acceptable in the countryside, there may be a temptation to view it primarily as a permissive policy. However, unlike Policies CTY2, CTY3, CTY4, CTY6, CTY7, CTY10, CTY11 and CTY12, it does not begin by setting out that planning permission "will be granted" for a certain type of development (or "may be granted" in the case of Policies CTY5 and CTY9). Rather, Policy CTY8 begins by explaining that planning permission "will be refused" where it results in or adds to ribbon development. It is an inherently restrictive policy, which admits of two exceptions. Bearing this in mind is important in construing the policy.

[26] I accept the submission made by the notice parties in this case that the drawing of the exceptions within Policy CTY8 represents the policy-maker striking a balance as to what represents sustainable development in the countryside such that, where a proposal falls within one of the exceptions, it may be considered to represent sustainable development which ought to be encouraged. However, in construing the policy tests which require to be met in order for a proposal to engage one of the exceptions, it is proper to bear in mind that the exceptions within Policy

CTY8 represent a concession in the face of a strong general rule against ribbon development, such that they ought not to be widely construed.

The Strategic Planning Policy Statement

[27] It is also necessary to consider a short excerpt from the Strategic Planning Policy Statement for Northern Ireland (SPPS). Para 6.73 of the SPPS, in material part, states as follows:

> "The following strategic policy for residential and non-residential development in the countryside should also be taken into account in the preparation of LDPs and determination of planning applications.
>
> …
>
> - **Infill/ribbon development**: provision should be made for the development of a small gap site in an otherwise substantial and continuously built-up frontage. Planning permission will be refused for a building which creates or adds to a ribbon of development; …"

[28] Although any conflict between the SPPS and any policy (such as PPS21) which is retained under the transitional arrangements must be resolved in favour of the provisions of the SPPS (see para 1.12 of the SPPS), I do not consider that to arise in the present case. There was some debate about whether the SPPS altered the position set out in Policy CTY8 by referring to "provision" being made for the development of small gap sites, rather than referring to an "exception" to the general rule; and/or by its referring to such provision before, rather than after, stating the general prohibition against ribbon development. However, I do not discern any conflict between this short-hand expression of the position in the SPPS and the more detailed policy set out in Policy CTY8 (and Policy CTY14). There is nothing whatever to suggest that there was any intention in the SPPS to change policy direction or clarify or refine the applicable policy in this field. In particular, I am unpersuaded by the submission that the exceptions set out within Policy CTY8 have been swept away by the different wording used in the SPPS. Rather, in my view, the respondent was correct to rely on that portion of para 1.12 of the SPPS which makes clear that, where it is silent or less prescriptive on a particular planning policy matter than the relevant retained policy, this should not be judged to lessen the weight to be afforded to the retained policy. In short, I do not consider that the SPPS was intended to, or did, herald any move away from the approach required by careful application of the terms of Policy CTY8 itself. The second sentence in the bullet point quoted above is to be read along with, and subject to, the first sentence.

Supplementary Planning Guidance

[29] Para 6.78 of the SPPS, relating to the implementation of the 'Development in the Countryside' section of the SPPS, states that:

> "Supplementary planning guidance contained within 'Building on Tradition': A Sustainable Design Guide for the Northern Ireland Countryside' must be taken into account in assessing all development proposals in the countryside."

[30] This supplementary planning guidance ("*Building on Tradition*") is referred to in further detail below. It was published in 2012, *after* PPS21 (which was published in June 2010), and was obviously designed to explain more fully precisely how the policy concepts in CTY8 were to be interpreted and applied in practice. The relevant portions for the purpose of Policy CTY8 are contained at pp 70-77 of *Building on Tradition*. Particularly relevant excerpts from this supplementary guidance are discussed below. Such supplementary guidance generally also continues to apply, notwithstanding the introduction of the SPPS, pursuant to paras 1.10 and 1.14 of the SPPS.

[31] In addition, further such guidance was contained in a planning advice note (PAN) issued by the Department for Infrastructure in August 2021 – although later withdrawn in October 2021. I have addressed this PAN at some length in my decision in *Burns and Duff* (*supra*), at paras [17]-[21]. Although the PAN pre-dates the grant of permission in the present case and was and is, therefore, irrelevant to the Council's consideration of the application which is at issue in these proceedings, I mention it because it was designed to elucidate and re-emphasise the original intention behind Policy CTY8 which is at the centre of these proceedings. Again, the appropriate portions of the PAN (paras 20-23) are referred to further below where appropriate.

Policy NH5 of PPS2

[32] Finally, Mr Duff has also relied upon Policy NH5 of PPS2 on Natural Heritage. Policy NH5, entitled 'Habitats, Species or Features of Natural Heritage Importance', provides as follows:

> "Planning permission will only be granted for a development proposal which is not likely to result in the unacceptable adverse impact on, or damage to known:
>
> - priority habitats;
> - priority species;
> - active peatland;
> - ancient and long-established woodland;

- features of earth science conservation importance;
- features of the landscape which are of major importance for wild flora and fauna;
- rare or threatened native species;
- wetlands (includes river corridors); or
- other natural heritage features worthy of protection.

A development proposal which is likely to result in an unacceptable adverse impact on, or damage to, habitats, species or features may only be permitted where the benefits of the proposed development outweigh the value of the habitat, species or feature.

In such cases, appropriate mitigation and/or compensatory measures will be required."

The substance of Mr Duff's objections

[33] The applicant has a number of basic points which he made in opposition to the application for planning permission with which these proceedings are concerned. First, he contends that the approved sites are not within a substantial and continuously built-up frontage. Second, he contends that the gap which is to be infilled is not small. Third, he contends that No 12 Glassdrumman Road does not have a frontage to that road. Fourth, he contends that a number of policies prohibit creation of, or addition to, ribbon development, in which the approval of this planning application results and that this is an absolute prohibition. Fifth, he also contends that the Planning Committee fell into error or acted unlawfully in failing to conduct a site visit in this case. Sixth, he has raised issues about the removal of hedgerows which will be involved in the implementation of the impugned permission. Each of these issues is addressed in further detail below.

The planning report in this case

[34] The officers' report in this case correctly identified the relevant policies and supplementary guidance to be considered, including the Regional Development Strategy 2035; the SPPS; the Ards and Down Area Plan 2015; PPS3; Policies CTY1, CTY8, CTY13, CTY14 and CTY15 of PPS21; and *Building on Tradition.* The core elements of Policy CTY8 were summarised. The assessment of the application against these policies was carried out by a case officer and approved by a senior planning officer, as well as the file being reviewed by the Council's Chief Planning Officer in advance of the relevant committee meetings. The Chief Planning Officer is Mr Anthony McKay, who was also the respondent's deponent in these proceedings.

[35] In relation to the assessment of whether the proposed site was a small gap site within a substantial and continuously built-up frontage, the officers' report was in the following terms:

> "The proposed site has a frontage of 111m onto the Glassdrumman Road. To the south-east of the site lies No 2 which is a dwelling with detached garage, both with frontage onto the road. To the north-west of the site is a dwelling at No 10 also with frontage to the road. Further along the road lies a ménage which is in association with No 12 Glassdrumman Road and two further dwellings beyond, with frontage to Glasdrumman Road. Officers are satisfied that the site comprises a small gap site within a substantial and continuously built-up frontage."

[36] The report went on:

> "With regard plot size. No 2 Glassdrumman Road has a plot width of 46m, No 10 has a plot width of 54m and No 12 has a plot width of 68m. While a large portion of this frontage width is occupied by a ménage, this is viewed to be in association with the domestic property at No 12 rather than being considered undeveloped land, given the fencing and hardstanding and therefore is counted as part of the frontage width. The average of these three plot sizes is 56m. The site subject of this application has a frontage width of 111m. As there would be two dwellings within this application site, they would both have a plot width of 55.5m.
>
> Officers are therefore satisfied that the proposed plot sizes would be in keeping with the development on either side. The proposal therefore respects the existing development pattern along this stretch of the Glassdrumman Road.
>
> While it is acknowledged that building-to-building distance is greater than the average plot width, from a visual perspective on the ground it is considered that the site frontage and the lands outlined in red are large enough to accommodate 2 dwellings which respect the existing development pattern, plot sizes and character of the area."

The McNamara decision

[37] A significant focus on the part of the applicant in these proceedings is the decision of McCloskey J (as he then was) in *Re McNamara's Application* [2018] NIQB 22. The applicant has argued that this is a "poor decision which needs qualified." In advancing this case, he refers to a transcript of a hearing before Weatherup LJ on 7 June 2018 in which he (Mr Duff) was granted leave to apply for judicial review in another case. Mr Duff contends that, in granting leave in that case, Weatherup LJ accepted that the *McNamara* decision may require to be looked at again. I have considered the transcript of Weatherup LJ's remarks and, as it seems to me, the height of what he was saying was that the guidance contained in *Building on Tradition* had not been referred to in the *McNamara* judgment (nor was it referred to in the decision under challenge in that case) and that a further consideration of the approach to Policy CTY8, fully taking into account the text of *Building on Tradition* and argument in relation to it, may be appropriate. I would not take the judge's observations in the course of exchanges following an oral ruling on a leave application to be intended, without more, to cast doubt on the correctness of the reasoning or result in *McNamara*.

[38] The applicant's central complaints about the *McNamara* decision are that it misinterpreted the planning policy at issue and encouraged the use of evaluative judgment in cases concerning that policy (which would then be extremely hard to challenge by way of judicial review) in ways which "ignore policy prohibitions"; and, in addition, that the judgment focused on Policy CTY8 without considering other relevant policies and construing Policy CTY8 in its proper context. In the event, the further case in which Mr Duff had been granted leave by Weatherup LJ and which he had hoped would be the vehicle through which the *McNamara* decision could be re-examined was dismissed without adjudication on the merits because the applicant failed to lodge a sum in court as security for costs, as directed. In any case, the present application has allowed the applicant to make his case as to the correct approach to Policy CTY8 with the benefit of full argument on the assistance to be gained by reference to the SPPS and *Building on Tradition*, neither of which were discussed in the judgment in *McNamara*.

[39] The applicant contends that para [18] of the *McNamara* judgment is in error, in that it refers to Policy CTY8 "enshrining a general, *not inflexible*, rule that a development proposal entailing the construction of a building "which creates or adds to a ribbon of development" will *normally* be refused" [my emphasis in italics]. Mr Duff argues that Policy CTY8 does not itself contain any such flexibility but, rather, is in absolute terms: "Planning permission *will* be refused for a building which creates or adds to a ribbon of development" [again, my emphasis in italics]. Nor, he contends, does para 6.73 of the SPPS contain any flexibility on its face; nor indeed, the relevant portion of Policy CTY14 (see para [18] above). In light of this, Mr Duff contends that McCloskey J failed to recognise the "absolute prohibition" and "non-negotiable harmful outcome" which flows from these policy provisions.

[40] In my view, the applicant's complaint against the judgment in the *McNamara* case fails to properly set the criticised portion of the judge's comments in context. It is true that the first sentence of Policy CTY8 is expressed in unequivocal terms. However, it must be understood in the context both of the legal effect of planning policy generally and the rest of the text contained within the remainder of that policy. As to the first, any planning policy can only ever be a general and not inflexible rule because of its status as *policy*, which is a guide and not a straitjacket, and which may therefore lawfully be departed from (see para [21] above). As to the second, Policy CTY8 itself provides an "exception" to the general rule where something which would otherwise constitute the exacerbation of ribbon development is countenanced. McCloskey J was not suggesting, nor should he be taken as having suggested, that a planning authority can simply turn a blind eye where a proposal before it will create or add to a ribbon of development in the countryside (once it has determined, as a matter of planning judgment, that that is the case). In such a circumstance, it may apply the exception within Policy CTY8 relating to infilling where that is engaged, or may lawfully depart from the policy (to permit such development notwithstanding its unacceptable nature as a matter of policy) where it can rationally conclude that other material planning merits outweigh the acknowledged policy non-compliance. Absent those two instances however, Policy CTY8 – or, indeed, that portion of Policy CTY14 which is in materially similar terms – should result in the refusal of the application. McCloskey J plainly recognised both of these instances as being those where departure from the normal result would be legally permissible.

[41] Insofar as Mr Duff contends that there is a complete prohibition on ribbon development within policy which either bars a planning decision-maker from departing from policy as a matter of law, negates the exceptions expressly catered for in Policy CTY8, and/or requires a strained or unnatural interpretation to be given to the words "adds to" within that policy, I reject those submissions.

[42] Mr Duff also contends that the judgment in *McNamara* is an error at para [21] by again asserting that there is no outright prohibition against the creation or enlargement of a ribbon of development in the countryside. In the applicant's submission, there is indeed such an outright prohibition. Further, the applicant submits that the *McNamara* judgment is also "misleading" at para [24].

[43] These complaints are really further formulations of the initial complaint, namely that the learned judge failed to recognise that there was an absolute prohibition on the creation of, or addition to, ribbon development. As I have explained above, there is a clear prohibition on such development; but that must be understood as subject to three things. First, it is a matter of planning judgment in the first instance as to whether a proposal *does* create or add to a ribbon of development. Second, there is an exception (infilling a small gap site either in accordance with the second or third paragraph of the policy) where such development is permissible. And, third, even if the proposal represents ribbon development and does not fall within the exception, it is always open to a planning

authority to consciously depart from the prohibition where it is outweighed by other material considerations. This case concerns the question of whether the Council properly directed itself in relation to the in-built exception within Policy CTY8.

[44] McCloskey J's reference to the balance to be struck between protection of the countryside and the permission of *some* development "in the furtherance of the goal of sustaining a strong and vibrant rural community" and to Policy CTY8 itself being a "juggling act" does no more than to recognise the reasons behind the express provision of exceptions within the policy and that these same considerations may, in an appropriate case, justify a departure from the policy. It is not to water down or misconstrue the first paragraph or sentence of Policy CTY8. It is merely to describe its effect in its full policy and legal context.

[45] Finally, the applicant objects to McCloskey J having described Policy CTY8 as entailing "a significant element of evaluative planning judgment." But his reference to that, in para [24] of his judgment, was simply observing that, in determining whether there was a ribbon of development and (perhaps more importantly) determining whether the exception to the general prohibition applied, the planning authority would have to assess the proposal and the relevant site and judge whether a number of the concepts referred to in the policy were engaged. The facts of this case highlight just such an exercise. McCloskey J was not, to my mind, suggesting that there was any significant *balancing* to be undertaken between competing objectives in the application of the policy itself; but that, rather, in striking that balance itself, the policy used a number of terms which called for the application of planning judgment.

Further discussion of the 'exception' within Policy CTY8

[46] Mr Duff has seized on the fact that the word "exception", which is used in Policy CTY8 in relation to infill sites, is *not* used in the SPPS which, instead, refers to making "provision" for the development of a small gap site in an otherwise substantial and continuously built-up frontage. I do not consider that anything turns on this. In my view, it is entirely clear from the wording of Policy CTY8 that its second para (and, indeed, its third para) are designed to operate as exceptions to the general rule which are set out in its first para. The wording in the SPPS that "provision should be made for the development of a small gap site in an otherwise substantial and continuously built-up frontage" is merely a shorthand reference to the permissive provisions set out in the second and third paras of Policy CTY8. As I have already observed at para [28] above, there is nothing to suggest that the reference in the SPPS was designed to materially change, much less supersede, those provisions of policy within PPS21.

[47] I do however agree with Mr Duff's submission to the effect that, as exceptions to the general rule, the provision made for development within small gap sites should be narrowly construed bearing in mind the policy aim behind Policy CTY8 (and, indeed, PPS21 more generally). In short, I further agree with the thrust of Mr

Duff's submission that the exceptions provided for infill development are designed to allow for further development where (in colloquial terms) the damage has already been done by the prior development of the substantial and continuously built-up frontage. I said as much in *Re Rural Integrity (Lisburn 03) Ltd's Application* [2021] NIQB 32, at para [11]. The reference to there already being an *otherwise* substantial and continuously built-up frontage (*i.e.* to such a frontage existing already, without the addition of the application proposal) supports this interpretation. Planning applicants should not be eager to stretch the exception for infill sites beyond breaking point; much less so, planning authorities.

[48] Nonetheless, as discussed further below, the scope for a more expansionist approach to the exception for infill sites is increased by some of the text within Policy CTY8 itself; as well as some of the supplementary guidance within *Building on Tradition*. Taken together, these indicate, for instance, that phrases such as "small gap site" and "continuously built-up frontage" were contemplated as having a meaning and possible application which goes beyond the ordinary and natural meaning of those words as they might appear at first blush.

Discussion

Would the development create or add to ribbon development?

[49] The first question under Policy CTY8 is whether the proposal involves a building which creates or adds to a "ribbon of development." As McCloskey J observed in para [18] of *McNamara*, this concept is not expressly defined. It is a matter of planning judgment; but what was meant by a "ribbon of development" can be understood further by reference to additional parts of the policy and its supporting text. I agree with McCloskey J's observation that, at its simplest, it denotes a *strip* of development; and, at that, one which is by its nature detrimental to the character, appearance and amenity of the countryside as it creates and reinforces a built-up appearance. From para 5.32 of the supporting text, one can see that the concerns about ribbon development relate mainly to its effect on rural character but also to the potential sterilisation of back-land behind the ribbon. In light of the purpose of the policy, the concept of a ribbon of development should not be interpreted narrowly; but it is nonetheless a matter of assessment for the planning authority. A ribbon might well consist of buildings which have a common frontage but that is not necessary if they are visually linked (see para 5.33 of PPS21).

[50] If the planning authority is of the view that the proposal does not create or add to ribbon development, neither Policy CTY8 nor sub-paragraph (d) of Policy CTY14 will point to its refusal (although it will still require to be permissible in principle under Policy CTY1 or as an exception to that policy). Where the proposal *will* create or add to ribbon development, the planning authority should go on to consider whether it is permissible under the infill exception provided within Policy CTY8; or, if not, whether it is appropriate on planning grounds to depart from the

policy, recognising the strength of the language in which the policy is expressed and the fact that it incorporates an exception which does not apply.

[51] In the present case, there appears to be no dispute that the proposed development will create or add to a ribbon of development, since the application was presented to the Council, and accepted by it, under the infill housing exception within Policy CTY8.

Is it a "small gap site" within a "continuously built-up frontage"?

[52] The exception where a proposal may be permissible under Policy CTY8 even though it would create or add to a ribbon of development relates to "the development of a small gap site… within an otherwise substantial and continuously built-up frontage." These are related concepts but it is logical to ask first whether there is a substantial and continuously built-up frontage (SCBUF); before then asking whether there is a small gap site within that frontage. Again, whether there is an otherwise substantial and continuously built-up frontage is a matter of planning judgment. In this case, there *does* have to be a common *frontage*. It is plainly not restricted to a terrace of houses and, therefore, must be capable of being constituted by more substantial houses on their own plots (see, for instance, the reference to "plot size" within the policy); but the frontage should be continuous. The definition of this concept expressly includes "a line of 3 or more buildings along a road frontage without accompanying development to the rear."

[53] A key issue for the applicant in these proceedings is the question of whether a SCBUF can contain any type of break and, in particular, a visual break. In short, his contention is that a visual break within a frontage means that it cannot be considered a SCBUF for the purposes of the Policy CTY8 exception. I do not accept that the concept of SCBUF can be constrained in such absolute terms.

[54] An important point to remember is that Policy CTY8 refers to a small gap site within an *otherwise* substantial and continuously built-up frontage, that is to say, which is continuously built- up *but for* the gap which is under consideration as a development site.

[55] Para 5.34 of PPS21 states that:

> "Many frontages in the countryside have gaps between houses or other buildings that provide relief and visual breaks in the developed appearance of the locality and that help maintain rural character. The infilling of these gaps will therefore not be permitted except where it comprises the development of a small gap within an otherwise substantial and continuously built-up frontage."

[56] The wording of this text is perhaps ambiguous. On the one hand, it could be suggested that the reference to "these gaps" in the second sentence relates back to gaps which "provide relief and visual breaks", so that the policy-maker clearly envisaged gaps which provide a visual break nonetheless being infilled. On the other hand, it could be suggested that the second sentence is emphasising that only that category of 'gaps' which do *not* provide a visual break will come within the exception. I do not consider the second interpretation to be the correct one for a number of reasons. First, it is not the more natural reading of the text. Second, the next portion of para 5.34 goes on to refer to accommodating two houses on a gap site (as does the policy itself). This is plainly permissible under the policy in some circumstances; and the likelihood of sites which could accommodate two houses being gaps which provide a visual break is high. Third, *Building on Tradition* does *not* suggest that sites which provide a visual break *cannot* come within the CTY8 exception. Beneath the illustration on p 72 it is noted that, "*Some* gaps are not suitable for infilling if they frame a view or provide an *important* visual break in the development" [italicised emphasis added]. The text at paras 4.5.0 and 4.5.1 further explains the following:

> "There will also be some circumstances where it *may* not be considered appropriate under the policy to fill these gap sites as they are judged to offer an important visual break in the developed appearance of the local area.
>
> As a *general* rule of thumb, gap sites within a continuous built-up frontage exceeding the local average plot width may be considered to constitute an important visual break. Sites may also be considered to constitute an important visual break depending on local circumstances. For example, if the gap frames a viewpoint or provides an important setting for the amenity and character of the established dwellings."
>
> [italicised emphasis added]

[57] In summary, there is no indication within the policy text itself that a gap which provides a visual break in the developed appearance of the locality *cannot* be a small gap site for the purposes of CTY8. The supplementary planning guidance supports the view that gaps which provide a visual break may be suitable for infill development but, on the other hand, there may be sites (described as offering an "important" visual break) which are not. This requires an assessment by the planning authority of the value of the break which the site offers. If a site offers an important visual break the loss of which will result in a material change in the developed appearance of the local area, that may be a reason for refusing planning permission for infill development at the site. That *might* be because the planning authority reaches the view that, as a matter of judgment, the site could not properly be described as a small gap site in the context of the frontage in which it sits; but may also be because, even if the site *is* a small gap site, the loss of the important

visual break could not be said to meet "other planning and environmental requirements" (as the proposal is also obliged to do under Policy CTY8). In such a circumstance, the harm to rural character involved in granting such a permission would not be such as is contemplated and considered acceptable within the balance struck by Policy CTY8. Whether a site offers a visual break of such importance or significance is, again, a matter of planning judgment; but it is a matter of common sense, and consistent with the guidance contained in *Building on Tradition*, that the larger the site, the more likely it is to offer an important visual break. As the reference to framing viewpoint illustrates, however, the size of the gap alone will not be determinative. As the text at the bottom of p 73 of *Building on Tradition* also indicates, an important visual break may arise from (for instance) mature trees which stand in the gap, such that there is "no scope for infill in such a ribbon."

[58] In the present case, the applicant asserts that there was no investigation of whether Nos 2, 10 and 12 Glassdrumman Road were part of the same continuous frontage, given the fact that the gaps between Nos 2 and 10 are greater than the combined width of the curtilages. The applicant further asserts that the impact of the visual and physical break provided by the substantial hedge to the south-east of No 10, which stretches from No 2 Glasdrumman Road, has not been taken into account. Nor, he submits, is there any explanation as to how the site could be regarded as part of a substantially built-up frontage, given that it looks entirely undeveloped and rural.

[59] Mr Duff further contends that *Building on Tradition* and Policy CTY8 require investigation of whether the gap is a visual break and therefore whether it should be developed at all. The applicant contends that the Council did not objectively investigate this issue at all. He also contends that there is no explanation as to how a very substantial field between two houses, separated by approximately 150m, could be classed as a "small" gap site. Whether a gap site is small is at least partly informed, the applicant submits, by objectively viewing the site and assessing whether it would *look* small. Mr Duff further submits that the gap with which this application is concerned "is considerably more than twice the average size of the first 5 houses on the south side of Glassdrumman Road." He contends that the Council erred in considering that the 'yard' between No 10 and No 12 Glassdrumman Road was part of the curtilage of No 12 (which then "heavily skewed the average frontage size"). Mr Duff's evidence is that he has inspected this yard carefully and that it may at one time have been a ménage for horses; that it is now a yard; but that, on any view, it is not part of the domestic curtilage, and is separated from No 12 by a farm gate with a fence and access laneway to a field to the rear. He has also provided a historic Ordnance Survey map showing that the now yard (then a ménage) was built in a field entirely separate from the home at No 12. In addition, Mr Duff contends that No 12 Glasdrumman Road does not have a frontage to that road. It is accessed by a short laneway and "has no frontage of its own." There are two small sheds or stables with their own access, in front of No 12. It is these two sheds, the applicant submits, which are located along the frontage; not the house. If indeed it is these small buildings which are part of the frontage, the development

proposals clearly do not respect the existing development pattern; and, moreover, they have development to the rear (the house at No 12) so that they should not be considered to be part of the 'qualifying frontage.'

[60] As to whether the gap site is a "small gap site", at first glance it would not appear to be. However, that is not a matter for the court to determine. It is a matter of planning judgment. As Mr Duff accepts, what does (or does not constitute) a 'small' site will also be site-specific to some degree, having regard the size of the plots of the buildings which form part of the frontage. *Building on Tradition* indicates (at para 4.5.1, quoted above) that, as a general rule of thumb, gap sites exceeding the local average plot width may be considered to constitute an important visual break. This is *not* saying that gap sites exceeding the local average plot width are not, or cannot be, small gap sites. It is simply drawing the decision-maker's attention to the need to consider the quality of the visual break which would be lost to development. On p 71 of *Building on Tradition*, it is said that, "When a gap is more than twice the length of the average plot width in the adjoining ribbon it is often unsuitable for infill with two new plots." Again, this is not saying that such a gap will never be capable of being considered a small gap site; simply that this will *often* be unsuitable for development. That may be because it is not, properly viewed, a small gap site; or may also be because, even if it is a small gap site, it is not an appropriate site for permission to be granted because of the additional damage to rural character which will be occasioned by the loss of an important visual break, or because any proposed development will not respect the existing development pattern along the frontage. In the present case, although Mr Duff disputes the methodology, the Council considered that the new plots would be (very marginally) less than the average plot width in the adjoining frontage. This ties in with a further portion of the guidance set out in the last bullet point of p 71 of *Building on Tradition*, which states, "A gap site can be infilled with one or two houses if the average frontage of the new plot equates to the average plot width in the existing ribbon."

[61] In particular, the respondent relies upon the illustrative plan at the top of p 71 of *Building on Tradition* (which relates to cluster development under Policy CTY2a but is under the heading of, and beside text relating to, 'Infilling Gaps and Frontage Development'); and the illustrative plan at the bottom of p 76 of *Building on Tradition* (as well as the further such illustration at the bottom of page 77). Mr McAteer submitted that these illustrations clearly indicate that two-house infill development is permissible where the new houses are well sited, well scaled and reflect traditional siting patterns, as in this case. The latter of these illustrations is provided as an example of good practice, or at least permissible practice, applying Policy CTY8 and, the respondent asserts, bears a similarity to the proposal which was allowed in the present case. For instance, it demonstrates that two seemingly large detached dwellings each in a substantial site are permissible as infill development where these are not out of character with other dwellings in the 'otherwise substantial and continually built-up frontage'; and, correspondingly, that what would appear to be a large gap between such buildings sufficient to accommodate two such dwellings is not precluded from being considered to be a 'small gap site.'

[62] To my mind, *both* parties in this case have made the mistake of using the guidance in *Building on Tradition* in a mechanistic or arithmetical way to seek to support their position, when this guidance was never intended to be used as a scientific formula to produce a firm result on what is ultimately a matter of judgment. Mr Duff argues that the gap is the gap between the relevant buildings (here, the domestic properties at Nos 2 and 10 respectively) and that that gap is wider than two times the average plot width. That requires refusal, he suggests. The Council focuses on the plot width of the new houses and say that they are (just) less than the average plot width of the houses forming the rest of the ribbon, which therefore points to grant, it suggests. Both approaches are too rigid bearing in mind the nature of the exercise and the purpose and nature of the guidance in *Building on Tradition.*

[63] Having regard to the design guidance in *Building on Tradition*, as well as to the reference in Policy CTY8 itself to infill sites accommodating a maximum of two houses, I have reached the following conclusions on this aspect of the applicant's case:

(a) Although I might myself have concerns as to whether the development site in this case should properly be described as a "small gap site", I do not consider the Council's conclusion that it was such a site to be *Wednesbury* irrational (*ie* to be so unreasonable that no reasonable Council could form that view), having regard to the additional policy text and supplementary guidance which indicate that sites which might accommodate two houses may in principle fall within the Policy CTY8 exception.

(b) Likewise, I do not consider that the Council's view that the houses on the Glassdrumman Road (the three on which the evidence focused and an additional two further dwellings further up the road past No 12) form an "otherwise substantial and continuously built-up frontage" to be *Wednesbury* irrational, so permitting the court to intervene. This conclusion is one I reach with some reticence, since it appears to me that there is force in Mr Duff's argument that the Council's assessment has been 'skewed' to some degree by treating the ménage (or former ménage or yard) as part of the curtilage and frontage of No 12. By doing so, the average plot size of the ribbon was significantly increased; No 12 is then viewed as having greater frontage onto Glassdrumman Road than would otherwise be the case; and the continuity of the frontage is maintained rather than being broken by this development feature. However, ultimately, the treatment of this portion of land, and whether it is to be read as part of the frontage of No 12 ("in association with" No 12, as the officers' report says) rather than as a separate planning unit or as a break in the frontage, is one of planning judgment. Mr Duff effectively invited me to take my own view on this issue and hold (a) that the Council's planning officers were wrong in their assessment and (b) that the frontage guidance in *Building on Tradition* was not met. However, it is not the role of

the court – other than in cases of irrationality or clear cases of error as to established and material fact (which this case is not) – to engage in the merits of the planning assessment.

(c) I have also not been persuaded that the Council – having lawfully taken the view that the application site, in the context of the surrounding development, represented a small gap site in an otherwise substantial and continuously built-up frontage – was irrational in to failing to conclude that the gap site offered an important visual break which required the application to be refused in light of the harm to rural character which the proposed development would cause. It would have been preferable if this issue had been addressed and grappled with expressly; but the onus lies on the applicant to establish that it was not considered or, with more difficulty, that an irrational conclusion was reached. I do not consider that either onus has bene discharged.

[64] I am satisfied that the Council took the relevant policy tests into account and also took into account the supplementary guidance in *Building on Tradition*. A decision to refuse permission on a variety of bases might well have been defensible, had the Council judged some of the issues before it differently. Indeed, the grant of permission at this site might well be considered to lie at the outer edge of what might rationally be considered to comply with the Policy CTY8 exception. However, much of Mr Duff's challenge was more appropriate to argument which would have been better directed towards a third party appeal against the grant of permission on the merits. Indeed, Mr Duff lamented the absence of availability of such an appeal route in our planning system in some of his submissions.

The absence of a site visit

[65] The applicant contends that many of the matters which are raised above are issues to be considered after having visited the site and having looked carefully at its appearance in order to properly assess the detail of the local context, the general area, and the proposed site in particular. He submits that these matters cannot be assessed by an academic assessment alone or by way of desktop analysis. Mr Duff describes himself as having pleaded for the Planning Committee to visit the site to gather the visual information necessary for an objective decision to be made. This suggestion was rejected by vote of the committee. In Mr Duff's further evidence he has submitted a range of photographs but contends that these "still do not do the rural character and agricultural nature of this site justice"; and that this can only be properly appreciated by physical attendance at the site.

[66] It is a well-known feature of planning law that the decision-maker must not only ask itself the right question but must also take reasonable steps to acquaint itself with the relevant information to enable it to answer the question correctly (usually referred to as the *Tameside* principle). This is reflected, for instance, in para [30] of the decision in *Dover District Council v CPRE Kent* [2017] UKSC 79.

[67] The respondent's evidence emphasises that the councillors on the Planning Committee had the benefit of the presentation given by the planning officials, which included a PowerPoint presentation which contained various maps, plans and photographs, and that they also had presentations from the parties during the course of the meeting and the opportunity to raise any questions or queries that they wished.

[68] The respondent's Planning Committee has an operating protocol, which deals with the issue of site visits at para 71 in the following terms:

> "Site visits may be arranged subject to Committee agreement. They should normally only be arranged when the impact of the proposed development is difficult to visualise from the plans and other available material and the expected benefit outweighs the delay and additional costs that will be incurred."

[69] At the meeting on 16 December 2020, having heard representations, the chairman asked for a proposal and two councillors proposed that the Planning Committee should undertake a site visit. That proposal was put to the committee and declared lost in a vote of eight votes to two. Mr Duff again raised the issue at the Planning Committee meeting of 8 April 2021. Notwithstanding the points made by him on that occasion, the committee was still content to proceed without conducting a site visit.

[70] Mr McAteer reminded me of what was said in para [43](g) of Girvan J's summary of the relevant principles in this area in the course of his judgment in *Re Bow Street Mall and Others' Application* (*supra*):

> "If a planning decision maker makes no inquiries its decision may in certain circumstances be illegal on the grounds of irrationality if it is made in the absence of information without which no reasonable planning authority would have granted permission (*per* Kerr LJ in *R v Westminster Council, ex parte Monahan* [1990] 1 QB 87 at 118b-d). The question for the court is whether the decision maker asked himself the right question and took reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly (*per* Lord Diplock in *Tameside*)."

[71] This was plainly not a "no inquiries" case, in his submission; and the Council could not be said to have acted unlawfully merely because it determined that this application could be decided without the committee members physically attending the site. I accept that submission. It was not *Wednesbury* irrational for the Council to

determine that it could proceed to deal with the application without a site visit, particularly in circumstances where the Council's planning officers had visited the site in order to formulate their report and, *inter alia*, had taken a number of pictures at the site which were made available to the elected members in the course of the officers' presentation.

[72] I would add, however, that the court recognises the significant benefits in contentious planning applications of councillors themselves visiting a site. As is evident from the above, the application of Policy CTY8 does involve decision-makers engaging with a number of concepts which entail the exercise of planning judgment. The policy is fundamentally concerned with rural character, which is likely to be best assessed by a visit to the locus and consideration of the site from critical viewpoints. In terms of assessing whether infill development in a gap site will result in the loss of an important visual break, such that it goes beyond the impact on rural character 'priced into' the policy exception, a site visit may well be of considerable assistance. The court recognises, however, that such visits take time and can result in delay and cost, which is why planning authorities have leeway in assessing whether they are necessary.

Removal of the hedgerow

[73] Finally, the applicant contends that the Council has not assessed whether development of the gap site in this case "meets other policy and environmental requirements" as required by Policy CTY8: in particular, he submits that the environmental impact of removal of hedgerow was not investigated at all. Mr Duff is concerned that a significant portion of hawthorn hedge will be removed which would have an abundance of berries in the autumn which are eaten by both mammals and birds. In addition to providing habitats for all kinds of wild flowers, bees, birds and small mammals, the applicant has drawn attention to the fact that hedges are also critical wildlife corridors (since open fields often offer no protection to animals moving from place to place). He has provided photographs of the significant hedgerow along the front of the application site, some of which will be removed to provide access if the development proceeds. In advance of the judicial review hearing, the hedgerow was significantly cut back; but an established hedge nonetheless remains along the frontage to the Glassdrumman Road at the site.

[74] Mr Duff contends that the site plan and site layout plan are of insufficient quality to make it obvious how much hedgerow is to be removed when the permission is built out. The impact of creating necessary sightlines to facilitate access to the proposed dwellings will be to remove a very long section of hedgerow, he submits. In his second affidavit he has exhibited the Department for Infrastructure roads consultation response and, looking at the required visibility splays, estimates that around 50 metres of hedgerow will be required to be removed. He does not consider that this was adequately addressed by the Council's Planning Committee; or that it can now be addressed adequately at the reserved matters stage.

[75] In support of this aspect of his case, the applicant has relied on supplementary guidance issued by the Department of the Environment in April 2015 entitled, 'Hedgerows: Advice for Planning Officers and Applicants Seeking Planning Permission for Land Which May Impact on Hedgerows.' In fact, updated guidance, in materially similar terms, was issued by the Department for Agriculture, the Environment and Rural Affairs (DAERA) in April 2017 ("the DAERA hedgerow guidance"). This guidance emphasises that all hedgerows are a priority habitat due to their significant biodiversity value, which relates not only to the specific plant species within the hedgerow but to their wider value for foraging, providing shelter, and corridors for movement of large numbers of species. It emphasises the value of hedgerows. It references Policy NH5 of PPS2 (set out at para [32] above) and notes that: "The degree of impact depends on the net loss involved, the proportion of connectivity lost and the species richness and structure of the hedges that are lost or fragmented. There may also be protected and priority species impacts that also have to be considered."

[76] The respondent submits that Policy CTY1 of PPS21 lists a range of types of development which are considered to be acceptable in principle in the countryside (including infill development in accordance with Policy CTY8). It is said that it is inevitable that there will be some loss of hedgerows as a result of such development. This is not generally likely to result in an unacceptable adverse impact on known priority habitats. Indeed, the respondent also points to the fact that the removal of hedgerows does not itself require the grant of planning permission, such that the hedgerows in question in this case could perfectly lawfully have been removed by the planning applicant in advance of submitting a planning application.

[77] This last point is at first blush a powerful one. A landowner is quite entitled, without having to seek planning permission, to cut down a hedge on their land. However, in my view that is to miss the point. There is no reason to suppose that the landowners in this case were likely to remove significant portions of hedgerow unless and until they were granted planning permission. It is the building of the dwellings permitted by the impugned permission which is likely to be the catalyst for significant hedgerow removal. Indeed, Policy NH5 and the DAERA hedgerow guidance proceed on the common sense basis that hedgerow removal should be taken into account in considering planning applications because – notwithstanding that it might be permissible to remove hedges without planning permission – the grant of planning permission, in the knowledge that the proposed development will require hedgerow removal, renders such removal much more likely.

[78] The respondent's better point is that this issue was before the Committee and necessarily considered by them in the course of their consideration of the application. The issue of hedgerow removal was expressly referenced in the officers' report in this case, when summarising the objections received. It noted the objection that development "would block off a wildlife corridor" between Nos 2 and 10 Glassdrumman Road and that the hedgerow to be removed for visibility splays "provides shelter for wildlife." The issue was raised by Mr Wilson in his letter of

objection which was before the committee, as well as by the present applicant. In addition, the issue was raised by Mr Duff before the Planning Committee (as is reflected in the minutes of its meeting of 16 December 2020, which specifically notes the issue of the existing hedgerow being a wildlife habitat as one of the issues raised) and in the applicant's written statement of 26 March 2021. It was also raised by the other objector, Mr Wilson, at that time.

[79] The proposed site layout plan which formed part of the PowerPoint presentation to councillors did not provide a huge amount of detail (as one might expect at the outline approval stage) but was sufficient to show an indicative sightline at the entrance to the new dwellings. In any event, it would have been obvious to the councillors involved that access from the road would be required; and they would be well aware that sightlines would be necessary (particularly in circumstances where some of the objectors raised road safety issues and an objection that the 'double entrance' to serve both proposed dwellings was too large). It could not have been lost on them that hedgerow removal would be required to facilitate access to the site, which is why objectors were raising the issue. The Council accordingly granted permission in this case with its eyes open as to concerns in relation to hedgerow removal.

[80] Policy NH5 provides that planning permission will only be granted for a development proposal which is not likely to result in unacceptable adverse impact on, or damage to known, priority habitats, species or other features of natural heritage importance. Indeed, even where a development proposal *is* likely to result in an unacceptable impact on such habitats, species or features, it may still be permitted in compliance with the policy if the decision-maker considers that the benefits of the proposed development outweigh the value of the habitat, species or feature (with appropriate mitigation and/or compensatory measures being required).

[81] Albeit the DAERA hedgerow guidance makes clear that all hedgerows meeting the definition in that advice (which I do not take to be in dispute in this case) are a priority habitat, it was open to the Council to conclude that the proposal in this case was not likely to result in unacceptable adverse impact on or damage to that habitat. I have not been persuaded that the Council was insufficiently informed of the likely net loss of hedgerows which would be involved in the proposal, for the reasons summarised above. There was nothing in this case to indicate that an extended habitat survey was required. This was not a hedgerow with large trees; or where there was evidence of it being species rich; and it did not form a town boundary. Accordingly, it was not a case where a survey of protected and priority species was necessary under the DAERA guidance. That guidance sets out a number of principles to be applied, which contain a significant degree of discretion (such as to "replace 'like for like' when replanting", "retain connectivity where possible", "integrate hedgerows into the development…", etc.). The respondent also relies on the fact that planning permissions for development in the countryside will generally contain conditions relating to landscaping matters; and, in this case,

conditions 3 and 6 of the impugned permission *inter alia* reserve details including the means of access and landscaping to be approved at the reserved matters stage and preclude development from commencing until a landscaping plan has been submitted, which might properly include mitigating measures.

[82] Taking all of this together, the applicant has not made out his case that this issue was not properly addressed by the Council. It is to the credit of the applicant and the other objectors that they raised the issue of hedgerow loss before the Council. Having done so, however, it was a matter for the Council as to how deeply it enquired into that matter. I have not been satisfied that the Council left this issue out of account; nor that its conclusion (that the loss of hedgerow which was necessarily involved in the grant of this outline application was acceptable) was irrational.

[83] It would have been helpful if the Council's planning officers had specifically directed councillors' attention to Policy NH5 of PPS2; and may well have been helpful for some further photographs of the hedgerow at the site to have been provided (which could, of course, also have been provided by the objectors at the time of the Council's decision-making). Mr Duff is concerned about the *cumulative* loss of hedgerow, as well as cumulative development in the countryside more generally. His grounding affidavit suggests that there are over 2,000 one-off houses approved for development in the countryside in Northern Ireland every year. He has drawn this from planning statistics released by the Department. He contends that a significant proportion of these permissions relate to 'infill' housing. This results in a huge amount of investment in building in the countryside, rather than focussing such investment in urban regeneration. Even if development of the average rural house resulted only in removal of 20m of hedgerow, 2,000 rural houses *per* year would result in the annual removal of some 40km of hedgerow. This is, of course, a well-made point. Although each application coming before a planning authority must be addressed on its own merits, planning policy in relation to countryside development is generally in restrictive terms because each new development, whilst of limited effect on its own, adds to the overall impact of development in the countryside. Policies which require decision-makers to carefully consider issues such as hedgerow removal, which might seem marginal in any one particular case, should therefore be taken seriously. For the reasons I have given, I consider the issue *was* considered in substance by the Council in this case, largely through the emphasis placed on the point by objectors; but planning authorities should be alive to this issue even where it is not raised by objectors.

Standing

[84] In granting leave to apply for judicial review, the court considered that the applicant *at least arguably* had sufficient interest in the matter have standing for the purposes of section 18 of the Judicature (Northern Ireland) Act 1978 and RCJ Order 53, rule 3(5). Indeed, submissions on behalf of the interested party (Mr Carlin)

accepted this to be the case in light of the fact that the applicant had been an objector in the course of the planning application process.

[85] However, the respondent continued to contend that the applicant does not have a sufficient interest in the matter to which the application relates. Notwithstanding the applicant's participation in the process before the Council's Planning Committee, the Council contends that he is not directly affected by the outcome of the decision. On that basis it is submitted that he has insufficient standing to be granted any intrusive relief. The respondent relies heavily, in support of this submission, on *Walton v Scottish Ministers* [2012] UKSC 44.

[86] As noted above, the applicant has described himself as an environmental campaigner or protector of the environment. In recent times he has become a regular and frequent litigant before the court (in one way or another) in cases which seek to raise issues about the interpretation and application of planning policy, usually in relation to policies within PPS21. He has made the point that, in his view, the Department has abandoned its role in maintaining the integrity of the planning system and that he feels that, in those circumstances, he is filling a necessary void as the only person willing to do so.

[87] In fairness to Mr Duff, he has enjoyed some measure of success in at least some of the cases which he has brought or supported. I addressed his position, in relation to the question of standing, in detail in the case of *Re Duff's Application (East Road, Drumsurn)* (*supra*). For the reasons identified in that case, I consider the applicant does have standing to bring the present application. Albeit he has no personal interest in the outcome (over and above his general concern for the environment), he was heavily involved in the planning process as an objector, including by way of written representation and appearance, having been granted speaking rights, at two meetings of the Council's Planning Committee.

[88] Mr McAteer's point was a more nuanced one, namely that a different or separate analysis of Mr Duff's interest was appropriate for the purposes of the grant of *relief*, even if he had sufficient interest to litigate the issues in these proceedings in the first case. In light of the conclusions I have reached on the substance of the challenge, this issue does not need to be addressed in this judgment.

Summary and overall guidance in relation to the approach to Policy CTY8

[89] In my assessment, Mr Duff wishes to apply a number of guidance statements within *Building on Tradition* as if they were rigid rules which preclude the grant of permission pursuant to Policy CTY8 in a range of cases. He also seeks to present the policy tests within the exception provided in CTY8 as straightforward matters of fact for the court to determine, wrongly denying or seeking to minimise the scope for the exercise of planning judgment in cases involving proposed infill development. On the other hand, in this and a range of other cases which have been highlighted by him, I consider that one can discern a somewhat relaxed and generous approach to

the grant of planning permissions under the infill exception in Policy CTY8 which may be thought to have lost sight of the fundamental nature of that policy as a restrictive policy with a limited exception. In the words of the Department's Planning Advice Note of April 2021, there is a case that decisions have been taken which "are not in keeping with the original intention of the policy" which will then "undermine the wider policy aims and objectives in respect of sustainable development in the countryside."

[90] The scope for the exercise of planning judgment in respect of a number of concepts contained within the policy is such that there may be planning control decisions made pursuant to it which appear to some to be 'bad' decisions. But the role of the court is emphatically not to substitute its own view on the planning merits. Planning authorities are trusted to make these judgments partly on the basis of their expertise and, in the case of elected district councillors, on the basis of their local knowledge and democratic accountability. Where the exercise of planning judgment, as has arguably occurred in relation to this policy, results in a greater number of grants of planning permission than the original policy intention may have suggested, the correct approach to deal with that is unlikely to be by way of litigation in the courts (where the court's role is necessarily limited) but, rather, by way of the regional planning authority (the Department) either re-emphasising the original policy intention (as it sought to do through the PAN) or, as necessary, changing planning policy. A further option may be seeking to 'tighten up' the approach to policy through the issue of further supplementary planning guidance. However, both notice parties in this case have rightly emphasised the fundamental distinction between planning policy and supplementary guidance. In any event, if the policy is being implemented in a way which does not reflect the original balance it intended to strike between protection of the countryside and enabling sustainable development, that is a matter for the Department to consider and address.

[91] In light of the amount of litigation which has been generated in relation to Policy CTY8 and the designation of the present case as being in the nature of a 'lead' case in relation to Mr Duff's applications, I venture the following summary which (I hope) will be of assistance to decision-makers in this field:

(i) Where planning permission is sought on the basis of the infill housing exception contained within Policy CTY8 (being one of those instances where development in the countryside is in principle acceptable for the purposes of Policy CTY1), the first question is whether the proposal would create or add to ribbon development. If the answer to that question is 'no', the exception within CTY8 is not relevant. Whilst this means the proposal would not fall foul of the first sentence of Policy CTY8, or sub-paragraph (d) of Policy CTY14, it also means that the exception within Policy CTY8 will not provide a basis for the grant of permission. Whether a proposal will create or add to a ribbon of development is a matter of planning judgment but, in light of the purpose of the relevant policies, this concept should not be restrictively interpreted.

(ii) Where the proposal *will* create or add to ribbon development, it is in principle unacceptable. It will only be permissible to grant permission if the development falls within one of the exceptions set out in Policy CTY8 (either for infill housing development or infill economic development) *or* where, exceptionally, the planning authority rationally considers that other material planning considerations outweigh the non-compliance with Policy CTY8 and Policy CTY14 in this regard (taking into account the strength of the wording of those policies *and* the fact that Policy CTY8 contains an express exception which is not engaged in the case).

(iii) In the second of these instances, where the only basis for the argument that the proposal is acceptable in principle for the purposes of Policy CTY1 is the infill exception, and the planning authority is satisfied that the infill exception is not engaged, the authority should also direct itself to whether Policy CTY1 also requires refusal of the application. Where Policy CTY1 also points to refusal, there is a very strong policy presumption in favour of refusal and the planning authority should only grant permission if satisfied, on proper planning grounds, that it is appropriate to disregard breach of Policies CTY1, CTY8 and CTY14 because those breaches are outweighed by other material considerations pointing in favour of the grant of permission, again bearing in mind both the strength of the policy wording and the fact that the proposal does not fall within the specified exceptions built into the relevant policies.

(iv) Where the infill exception is relied upon, the next question is whether there is a substantial and continuously built-up frontage. This concept is not identical to a 'ribbon of development' and is more narrowly defined. Whether there is such a frontage is also a question of planning judgment but, in light of the purpose of the policy, this concept should be interpreted and applied strictly, rather than generously.

(v) Where the planning authority is satisfied that there is a substantial and continuously built-up frontage, the next question is whether there is a small gap site. Although the policy text and supplementary guidance recognises that such a site may be able to accommodate two infill dwellings which respect the existing development pattern, it should not be assumed that any site up to that size is necessarily a small gap site within the meaning of the policy. The issue remains one of planning judgment, and one which should be approached bearing in mind the over-arching purpose of the policy.

(vi) Where there is a small gap site, the authority should nonetheless consider whether, by permitting that site to be infilled, it is acting in accordance with, or contrary to, the purpose of the exception within the policy (which is to permit development where little or nothing is lost in terms of rural character because of the existing substantial and continuously built-up frontage). Consistently with the guidance in *Building in Tradition*, this should include

consideration of whether the grant of permission will result in the loss of an important visual break in the developed appearance of the local area. That, again, is a matter of planning judgement.

Conclusion and costs

[92] For the detailed reasons given above, I do not consider any of the applicant's grounds for judicial review to have been made out and dismiss the application.

[93] In his Order 53 statement, the applicant contended that this was an application for judicial review of a decision, act or omission all or part of which are subject to the provisions of the Aarhus Convention, and therefore an Aarhus Convention case within the meaning of the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 (as amended) and, accordingly, sought a protective costs order (PCO) in the terms that any costs recoverable from him should not exceed £5,000 in total. As there was no opposition to the suggestion that the proposed application was an Aarhus Convention case, the court made a PCO in the standard terms, namely that the costs recoverable from the applicant should not exceed £5,000 (exclusive of VAT); and the costs recoverable from the respondent should not exceed £35,000 (exclusive of VAT). Subject to any further submissions on the issue, I propose to make a costs order against the applicant in favour of the respondent, such costs to be taxed in default of agreement but, in any event, not to exceed the sum of £5,000 exclusive of VAT (or £6,000 inclusive of VAT).