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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND KING'S BENCH DIVISION (JUDICIAL REVIEW)

Between:

TESCO STORES LTD

Applicant/Appellant

and

ANTRIM AND NEWTOWNABBEY BOROUGH COUNCIL

Respondent

and

ASDA STORES LTD

Notice Party

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IN THE MATTER OF AN APPLICATION BY TESCO STORES LTD FOR JUDICIAL REVIEW

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Mr Elvin KC with Mr McAteer (instructed by Carson McDowell LLP, Solicitors) for the Appellant
Mr McLaughlin KC with Ms Kiley (instructed by Antrim & Newtownabbey Borough Council Legal Services) for the Respondent
Mr Beattie KC and Mr Turbitt (instructed by A&L Goodbody, Solicitors) for the Notice Party

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Before: Keegan LCJ, Horner LJ and Colton J

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KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] This is an appeal from a decision of Mr Justice Scoffield ("the judge") of 3 October 2022, in which he dismissed the appellant's judicial review. The appellant is a large supermarket chain, Tesco Stores, who objected to the grant of planning

permission to a rival supermarket chain, Asda, for a new store and petrol station within the Antrim and Newtownabbey Borough Council ("the Council") at the Monkstown Industrial Estate on the Doagh Road in Newtownabbey.

[2] The Abbey Trading Centre ("ATC") was identified as a potential alternative site as part of this planning proposal. This site is situated at Longwood Road, Newtownabbey, at the Abbey Centre Shopping Complex ("Abbey Centre"). This is a large site which is owned by the Northern Ireland Transport Holding Company (referred to as Translink in this judgment) which has been used for retail purposes for many years until the recent clearance of the site. Significantly in the present context, the ATC site is located within the Abbey Centre District Centre, which is a designated retail centre within the draft Belfast Metropolitan Area Plan ("BMAP"). Asda's position was that the ATC site would not be able to accommodate the Asda proposal.

[3] This case is also framed by a separate proposal for the expansion of the Glider project to North Belfast as part of the Belfast Rapid Transport ("BRT") scheme. The Department for Infrastructure ("DfI") launched a consultation on the BRT scheme on 26 July 2021, four months after the decision which is impugned in this case. It proposed two routes, one of which would involve a park-and-ride facility or interchange at the ATC site. Subsequently, the then Minister for Infrastructure announced that the preferred route was not in fact that encompassing the ATC site.

[4] Within the above context this appeal is mounted on one discrete point which invokes the simple question for this court - whether the judge was right in his assessment of how the Planning Committee dealt with the issue of availability of an alternative site before granting planning permission for the site in question.

Relevant Facts

[5] The facts which we adopt are comprehensively set out in the judge's ruling between paras [18] to [46]. It is unnecessary to add to this narrative save to highlight some relevant material from the chronology which has been filed by the parties and which refers to the relevant planning meetings, particularly the decision-making meeting of 15 February 2021. We refer in brief to these matters as follows.

[6] From the factual background we can see that the planning application dates from July 2018. The application for planning permission was first made by Asda on 18 September 2018. At that juncture a body of evidence was produced to support the application. This included a Developers Planning, Retail and Economic Statement produced by Savills and a Developers Development Appraisal and Viability report. There followed a quite lengthy period of further reporting on the viability of the planning application. Objection was raised by the appellant by letter of 16 August 2020.

[7] On 17 August 2020, the planning application was to be considered by the Planning Committee of the Council. This meeting did not proceed because of a notice

from DFI pursuant to Article 17 of the Planning (General Development Procedure) Order (Northern Ireland) 2015. By virtue of the statutory notice the Council was directed not to grant planning permission until further advised by the Department. The application was therefore deferred pending consideration by DFI.

[8] That consideration duly took place. By correspondence of 28 October 2020, DFI confirmed that it had decided not to call in the application. Notwithstanding this course, a pre-determination hearing had to take place by law and was attended by all members of the Council. The meeting which occurred on 3 December 2020 was followed by the Planning Committee meeting on 15 February 2021 at which the impugned decision was made. On 16 February 2021 the planning permission was formally granted.

[9] Of relevance is the fact that on 23 September 2020 a briefing was provided to the Council members about the BRT Scheme 2. The case made by the appellant is that the alternative site, namely the ATC, was available, as it did not, as originally planned, form part of the BRT plan.

[10] As we have said the only issue in this appeal is whether the Planning Committee considered the issue of the availability of an alternative site. The legal basis for this claim is encapsulated in the appellant's skeleton argument at paras [48] and [49], expressed as follows:

> "48. The Planning Committee was thereby deprived of the opportunity to make a properly informed decision as to whether to grant planning permission, refuse permission or defer the decision or require further enquiries to be made. Material considerations were left out of account. Immaterial considerations were, misleading, incomplete and/or inaccurate information was relayed to committee members and taken into account, including that the site was unavailable and that confirmation that the site was unavailable had been or would be provided.
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> 49. The Planning Committee members were therefore misdirected and misled when they were informed that the planning applicant would confirm that the ATC site was no longer available and was not on the market and contrary to policy, erroneously made an assumption, on plainly inadequate information, that the sequentially appropriate site of the ATC was not available rather than requiring the planning applicant to fully demonstrate that was the position."

Fresh evidence

[11] We admitted fresh evidence from both sides by way of affidavit relating to the alternative site/BRT plans. The appellant filed affidavit evidence on this issue from Gary McGhee dated 12 January 2023 and Martin Guy Robeson, undated. In summary this evidence refers to the fact that the decision of the former Minister for Infrastructure made on 21 October 2022 announced the preferred route for Phase 2 of the Glider BRT Service to North and South Belfast as along the Antrim Road, Belfast.

[12] The reply from Majella McAlister is dated 6 April 2023. She is a member of the BRT Scheme Phase 2 Project Board. She avers that from her own knowledge, further decisions are required in respect of the BRT route. This she states is explained in a reply from the Permanent Secretary DFI on 16 March 2023. That reply refers *inter alia* to the fact that "once this ongoing work has been completed and the outline business case process has concluded, a further decision will be required in relation to the extent of the route."

[13] The correspondence also refers to the fact that:

> "The Department's current focus is on completing the work outlined above. At this stage, it remains too early to advise on the precise timings for completion of the detailed design.
>
> As a minimum, it is anticipated that a further ministerial decision will be required in relation to the findings of the route extension feasibility work. If a Minister is not in place when this feasibility work concludes, I may consider the matter in the context of the Northern Ireland (Executive Formation etc) Act 2022."

Relevant legal and policy considerations

[14] Section 6(4) of the Planning Act (Northern Ireland) 2011 ("the 2011 Act") provides that:

> "(4) Where, in making any determination under this Act, regard is to be had to the local development plan, the determination must be made in accordance with the plan unless material considerations indicate otherwise."

[15] Section 45 of the 2011 Act further provides, *inter alia*, that:

> "45—(1) … where an application is made for planning permission, the council … in dealing with the application, must have regard to the local development plan, so as far as material to the application, and to any other material considerations."

[16] The Strategic Planning Policy Statement ("SPPS") is a material consideration in the determination of planning applications. In particular, the relevant portion of the policy requires what is described as a "town centres first" approach to this type of development and a sequential approach to the identification of retail and main town centre uses in local development plans. Therefore, a sequential site assessment must be undertaken in an application of this nature which essentially means that a comprehensive scoping of alternatives must be undertaken by the planning applicant for the application to succeed.

[17] For present purposes we need only refer to several core paragraphs of the SPPS which impact on this case. Firstly, para 6.280 reads as follows:

> "6.280 A sequential test should be applied to planning applications for main town centre uses that are not in an existing centre and are not in accordance with an up-to-date LDP. Where it is established that an alternative sequentially preferrable site or sites exist within a proposal's whole catchment, an application which proposes development on a less sequentially preferred site should be refused."

[18] Para 6.289 refers as follows:

> "Flexibility may be adopted in seeking to accommodate developments on to sites with a constrained development footprint. For example, through use of creative and innovative designs schemes, including multi-level schemes, or smaller more efficient trading floors/servicing arrangements. Applicants will be expected to identify and fully demonstrate why alternative sites are not suitable, available, and viable."

[19] The legal principles in play are well-travelled ground and do not require lengthy repetition. Suffice to say that we have been referred to and considered *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2018] PTSR and the seminal judgment of *Bloor Holmes East Midlands Ltd v Secretary of State for Communities and Local Government* [2017] PTSR 1283. In addition and of particular value to us is the decision of Lindblom LJ in *Mansell v Tonbridge and Malling Borough Council and others* [2019] PTSR 1452 paras [41]-[42] which refer to the test to be applied by a court dealing with a planning judicial review as follows:

> "41. The Planning Court—and this court too—must always be vigilant against excessive legalism infecting the planning system. A planning decision is not akin to an adjudication made by a court: see para 50 of my judgment

in Barwood v East Staffordshire Borough Council. The courts must keep in mind that the function of planning decision-making has been assigned by Parliament, not to judges, but—at local level—to elected councillors with the benefit of advice given to them by planning officers, most of whom are professional planners, and—on appeal—to the Secretary of State and his inspectors. They should remember too that the making of planning policy is not an end in itself, but a means to achieving reasonably predictable decision-making, consistent with the aims of the policy-maker. Though the interpretation of planning policy is, ultimately, a matter for the court, planning policies do not normally require intricate discussion of their meaning. A particular policy, or even a particular phrase or word in a policy, will sometimes provide planning lawyers with a "doctrinal controversy." But even when the higher courts disagree as to the meaning of the words in dispute, and even when the policy-makers own understanding of the policy has not been accepted, the debate in which lawyers have engaged may turn out to have been in vain—because, when a planning decision has to be made, the effect of the relevant policies, taken together, may be exactly the same whichever construction is right: see para 22 of my judgment in Barwood v East Staffordshire Borough Council. That of course may not always be so. One thing, however, is certain, and ought to be stressed. Planning officers and inspectors are entitled to expect that both national and local planning policy is as simply and clearly stated as it can be, and also – however well or badly a policy is expressed – that the court's interpretation of it will be straightforward, without undue or elaborate exposition. Equally, they are entitled to expect - in every case - good sense and fairness in the court's review of a planning decision, not the hypercritical approach the court is often urged to adopt.

42. The principles on which the court will act when criticism is made of a planning officer's report to committee are well settled. To summarise the law as it stands:

(1) The essential principles are as stated by the Court of Appeal in *R v Selby District Council, Ex p Oxton Farms* [1997] : see, in particular, the judgment of Judge LJ. They have since been confirmed several times by this court, notably by Sullivan LJ in *R (On*

the application of Siraj) v Kirklees Metropolitan Borough Council [2010] EWCA Civ 1286, para 19, and applied in many cases at first instance: see, for example, the judgment of Hickinbottom J in *R (On the Application of Zurich Assurance Ltd (trading as Threadneedle Property Investments)) v North Lincolnshire Council* [2012] EWHC 3708 (Admin) at [15].

(2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge: see the judgment of Baroness Hale of Richmond JSC in *R (On the Application of Morge) v Hampshire County Council* [2011] UKSC 2, para 36 and the judgment of Sullivan J in *R v Mendip District Council, Ex p Fabre* [2000] P&CR 500 at p 509. Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave: see the judgment of Lewison LJ in *R (Palmer) v Herefordshire Council* [2016] EWCA Civ 1061, para 7. The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way—so that, but for the flawed advice it was given, the committee's decision would or might have been different— that the court will be able to conclude that the decision itself was rendered unlawful by that advice.

(3) Where the line is drawn between an officer's advice that is significantly or seriously misleading—misleading in a material way—and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see,

> for example *R (On the Application of Loader) v Rother District Council* [2016] EWCA Civ 795, or has plainly misdirected the members as to the meaning of a relevant policy: see, for example, *R (Watermead Parish Council) v Aylesbury Vale District Council* [2017] EWCA Civ 152. There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law: see, for example, *R (On the Application of Williams) v Powys County Council* [2017] EWCA Civ 427. But unless there is some distinct and material defect in the officer's advice, the court will not interfere."

[20] Re-emphasising this approach Lord Reed in *Tesco Stores v Dundee City Council* [2012] PTSR 983 also made the following comments which are of relevance to us in our consideration of this case.

> "17. It has long been established that a planning authority must proceed upon a proper understanding of the development plan: see, for example, *Gransden & Co Ltd v Secretary of State for the Environment* (1985) 54 P & CR 86, 94, … The need for a proper understanding follows, in the first place, from the fact that the planning authority is required by statute to have regard to the provisions of the development plan: it cannot have regard to the provisions of the plan if it fails to understand them. It also follows from the legal status given to the development plan by section 25 of the 1997 Act.
>
> 18. In the present case, the planning authority was required by section 25 to consider whether the proposed development was in accordance with the development plan and, if not, whether material considerations justified departing from the plan. In order to carry out that exercise, the planning authority required to proceed on the basis of what Lord Clyde described as a proper interpretation of the relevant provisions of the plan. … The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of

> administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained.
>
> 19. That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. ... In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse: *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780, per Lord Hoffmann."

[21] The definitive statement of Lord Hoffmann in *Tesco Stores* cited in the above quotation also refers below to the well-settled principle that matters of planning judgment are exclusively matters within the province of the local planning authority:

> "Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into Wednesbury irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. … If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State."

The decision of Scoffield J at first instance

[22] We refer to some relevant portions of the judgment and the judge's analysis as follows. First, at para [49] the judge provides his analysis of what an available alternative site means. He states:

> "[49] It seems to me that, in assessing whether a sequentially preferable alternative site is available, the following propositions are matters of common sense. First, if a site is being marketed for sale, it is *prima facie* available to the planning applicant. Its suitability and viability are separate matters; but if the planning applicant could bid for the site on the open market, in the absence of some exceptional and compelling basis to consider that it would

> not actually be available, the site should be considered to be available for sale for the purposes of sequential site assessment. Second, if a site is *not* being marketed for sale, that is *some* indication that it is not presently available, and perhaps an indication that it may not be available at all; but it is by no means determinative of the question of availability. Sites can be marketed quietly; and sometimes a landowner is open to the possibility of sale notwithstanding that they are not actively seeking to sell their property. (I made similar observations in relation to the question of availability, albeit in a slightly different context, in *Re Hartlands (NI) Ltd's Application* [2021] NIQB 94, at para [57].)

[23] The judge decided that the Planning Committee had not been misled, that there was no material error of fact, that there was no failure to make sufficient enquiry, and ultimately that the decision could not be impugned on *Wednesbury* grounds. At paras [59]-[60] the judge expressed his view that members of the Planning Committee were aware of the Tesco contention that the ATC site was suitable, available, and viable. It was a matter for them to consider whether and to what extent, they wished this issue to be enquired into further. He said that it was not irrational for the Council to proceed based upon the information that it had.

[24] The judge went on at paras [61]-[62] to find that whatever doubt had been raised about the site's availability because of the post decision enquiries by Tesco, the Council's assessment that the site was not available was ultimately demonstrated to be entirely correct. He found that the owner of the site was not prepared to part with the site at a time when uncertainty remained about whether the site would be required for use in the Glider expansion. At the time of the Council's decision there was no indication of when the ATC site might become available for sale again, if ever. In considering whether the availability of the ATC site would occur within a reasonable time, the Council would be entitled to consider the established quantitative need which existed in the area in relation to retail of this type.

[25] At para [65] the judge refers to the fact that the SPPS provides no guidance on the meaning of the concept of availability, but he accepted that construed in a common-sense way, it must implicitly incorporate some notion of availability within a reasonable time, even though that is not made explicit as it is in some of the English policy documents. The judge said that just as some flexibility may be required on the part of the developer in relation to scheme design when considering alternative sites, so too some flexibility on the timeframe for scheme delivery might legitimately be required. The judge acknowledged that the Northern Irish policy lays more emphasis on the current position as to the availability of an alternative site than does the analogue provision in English Planning Policy; that is to say, whether the potential alternative site is available at the time the relevant developmental control is made.

[26] The judge went on to describe what happened at the planning meeting and at para [70] states:

> "[70] It would undoubtedly have been better if Mr Linden had explained to the committee members present the enquiries which he had made that afternoon and the precise basis upon which his assessment was that the ATC site was not available.

[27] Having made this assessment the judge found as follows:

> "I do not consider that his failure to do so was such as to mislead the committee members in any material respect in the circumstances of this case. … It is the 'overall fairness of the report' which must be considered; and it must also be borne in mind that 'there is usually further opportunity for advice and debate at the relevant Council meeting and the members themselves can be expected to acquire a working knowledge of the statutory test.' … In assessing the overall fairness of the report to councillors, it is also relevant to consider the terms and timing of the Tesco assertion that the ATC site was available."

[28] The judge also relied upon the corporate knowledge of Council members as to the BRT plan. Specifically in this regard he said at para [58] as follows:

> "[58] So this was not a case where (cf. para [43](f) of *Re Bow Street Mall's Application*) the Council made *no* inquiries in relation to this issue. A variety of strands of evidence converged to form the basis of the assessment presented by the officers, and accepted by Planning Committee members, that the ATC site was not available. This commenced with Mr Stokes' presentation at the PDH hearing in December, which seems to have resulted from knowledge, which was independent of the September 2020 briefing, but which positively asserted that Translink was intending to retain the site. There was then the direct knowledge on the part of various councillors and Ms McAlister of the information conveyed at the September 2020 briefing: this included at least three councillors on the Planning Committee (Cllr Foster, Cllr Webb, and Alderman Brett). This was underscored by the information gleaned by Mr Linden in his enquiries on the date of the Planning Committee meeting, including Ms McAlister's independent knowledge from her role on the BRT Project Team. In turn, this was supplemented by the

> planning applicant's confirmation of its understanding of the position, which accorded with the corporate knowledge within the body of elected members as to the BRT Project more generally. In light of these various strands of information, the Council was entitled to take the view that, at that point, the ATC site was unavailable because NITHC wished to retain control of the site at least until the BRT North route was settled upon and possibly indefinitely thereafter.

[29] In his concluding paras the judge also refers to the timing of the objections, providing the following comments:

> "An unsettling element of this case is the fact that the applicant in these proceedings, the objector in the planning process, made extremely late interventions on both occasions when the application was due to be considered by the respondent's Planning Committee. The committee was first due to consider the application on 17 August 2020; and a detailed letter of objection on Tesco's behalf was provided to the Council the day before, on 16 August 2020. On the day of the crucial later Planning Committee meeting in February 2021, Tesco's further detailed letter of objection was provided only on the day of the committee meeting."

> "It is difficult to discern whether the timing of these objection letters was specifically designed as a spoiling tactic, although the court can quite see why the notice party in this case may harbour significant suspicions in that respect. In any event, the provision of detailed submissions so late in the day – which planning officers were then expected to deal with and committee members expected to read and assimilate – plainly does not serve the interests of good administration."

The arguments raised by the parties on appeal

[30] We commend all sets of counsel for the high-quality written arguments provided to us which have been supplemented by oral submissions. The following is a summary of the written arguments which we have read.

[31] Mr Elvin, on behalf of the appellant, essentially raised five core points:

(i) There were material facts unknown regarding the availability of the alternative site. Therefore, a partial account was given and so the Planning Committee was misdirected and/or did not make reasonable enquiry and was not effectively allowed to consider the deferring of their decision.

(ii) Availability in this case was determinative of the decision, so the decision should be quashed.

(iii) It was wrong of the judge to rely on the corporate knowledge of the BRT plan.

(iv) The judge was wrong to predict what would the Planning Committee have decided on full and proper evidence.

(v) The decision, therefore, should be reconsidered on full and proper evidence as to the availability of the Abbey Trading Centre alternative site.

[32] Mr McLaughlin, in reply, made four core submissions:

(i) The Council made sufficient enquiry illustrated by the longevity and detail associated with this process.

(ii) The Planning Committee were not materially misled as the BRT Scheme was known at the time. It was specifically raised at the Planning Determination hearing as a factor and, again, raised at the Planning Committee meeting.

(iii) The decision was lawful and rational and, as such, does not meet the test for judicial review.

(iv) The post-decision evidence confirms that there can be no certainty as regards the ATC site, so in any event, the decision is unimpeachable.

Discussion of the issues

[33] The context of this case is important to state. This was a planning application which came to be determined after a long series of detailed reports were compiled, after a preliminary determination hearing and with the benefit of a substantial discussion at a Planning Committee. The burden was upon the planning applicant to prove that there was no alternative site for a development of this nature as it is out of town and so particular scrutiny is required. The planning applicant was put to proofs as the original evidence as to the alternative site was deemed to be insufficient.

[34] We can see that further and better evidence on this central issue was provided over a considerable time-period. As is the usual course, there were objections and particular interest from the notice party, a commercial competitor. Clearly, significant time, effort and expense was applied by the notice party to try to convince the Planning Committee that the alternative site was viable and suitable. This included presenting

plans to show that the ATC could be adapted by way of a two-storey development with car parking underneath the retail space to accommodate a supermarket. Against that there was substantial evidence militating against the viability and suitability of the ATC site produced by the planning applicant and discussed in the planning officer's report.

[35] We agree that the other policy requirements of suitability and viability of the planning application clearly became less prominent in this case once the non-availability of the alternative site was put forward. It is accepted that this was the determinative factor, even though there appear on the face of it, to be strong indicators as to viability and suitability based broadly on issues of space, car parking, and rights of way. We need say no more as to this aspect of this case however because the decision in fact turned on availability of the site rather than viability and suitability. It is to that issue that we now turn.

[36] As to the meaning of availability we cannot improve on the judge's analysis which we have set out above and his conclusion that the meaning is wider and not simply related to open market availability. In fact, in this hearing there was no real challenge to the judge's common-sense view on this issue. We, therefore, need say no more about that. The outcome of this case does not depend upon any legal issues relating to interpretation of policy or otherwise. Rather it is rooted in its own facts and what transpired at the core decision making meetings. The real question is whether the evidence before the Planning Committee was sufficient to allow the Committee to make an informed decision.

[37] In this regard we agree with the judge that a clearer exposition of the issue of availability of the ATC site relative to the BRT could have been given. As the judge said it would undoubtedly have been better if Mr Linden had explained to the committee members present the enquiries which he had made that afternoon and the precise basis upon which his assessment was that the ATC site was not available. However, the failure to do so was not such as to mislead the committee members in any material respect in the overall circumstances of this case.

[38] In arriving at this conclusion we reiterate the view expressed by the Supreme Court in *Morge v Hampshire County Council* [2011] UKSC 2, at para [36], that the courts should not impose too demanding a standard upon planning officers' reports, for otherwise their whole purpose (of the council's professional officers investigating and reporting to the councillors in a summarised format) would be defeated.

[39] By way of amplification, Mr McLaughlin referred to the core decision making steps which are explained in the affidavit evidence of Mr John Linden, Head of Planning at the Council. His submissions convince us as to the legality and overall fairness of the process adopted. We think it important that the ATC issue was specifically raised at the pre-determination hearing. It was also raised at the Planning Committee meeting at which several councillors asked questions as to the planning application.

[40] Mr McLaughlin rightly stressed the point that there was corporate knowledge of this issue. As such it cannot realistically be said that the Planning Committee were unsighted on it. We accept the evidence of Mr Linden as the first instance judge did on this and note that there is no allegation of bad faith on his part. With the benefit of hindsight, he or Ms McAllister could have said more on the actual position with the BRT plan however their reticence is not fatal taking an overall view of the process. This is a case where the BRT issue was live, and the Planning Committee had the benefit of extremely comprehensive planning reports and the attendance of numerous witnesses including senior counsel. No one suggested a deferral of the decision.

[41] We do not think that the judge has gone too far in importing some corporate knowledge of BRT to the Planning Committee. Taking a realistic and common-sense view it is correct to say that there was some corporate knowledge of the Belfast Rapid Transport Plan by virtue of the briefing which took place in September 2020. This was also clearly discussed at the pre-determination hearing, at which planning committee members were present.

[42] We do not think that the Planning Committee were therefore materially misled into thinking that there was some other avenue that needed further enquiry or that they had the wrong information. In fact, we think that this case comes down to a matter of judgement. Having had the benefit of a substantial objection from Tesco and having had the benefit of extensive and detailed planning officers' reports, the Planning Committee was entitled to reach its own view.

[43] The decision was made after informed debate, with the objections fully considered, and on a vote of seven in favour two against. On the basis of the material we have seen there was clearly a substantial discussion which addressed the question of availability of the site. For instance, Mr Robeson for the objector Tesco, at the Planning Committee meeting said that:

> "Asda accept, or they did until very very recently, that land at the Abbey Trading Centre is available and as far as we are concerned it still is."

He then went on to address its suitability for a large food store and that, applying flexibility, Tesco had "drawn up a scheme to meet very realistic requirements."

[44] After the presentation made on behalf of Tesco, Alderman Smyth raised a question. He asked why Tesco was so opposed to the proposal but also commented that Tesco's agent was "maybe … not aware that the site at Abbey Centre is no longer available." In the course of his answer, Mr Robeson repeated that "The land at the Abbey Centre is, as far as we are aware, available …"

[45] Mr Stokes on behalf of the planning applicant maintained the position at the Planning Committee meeting that there were no viable or suitable alternative sites to

accommodate the proposal. In relation to the ATC site, he said that that had been gone through in detail at the pre-determination hearing and that Asda had "robustly demonstrated why this is not viable or suitable due to legal rights of way, challenging levels and huge site constraints." He then referred specifically to the Council briefing on the BRT scheme and said that:

> "Indeed, furthermore, this site is now no longer available. I understand the Council received a presentation to do with alternative uses from Translink, so the site is neither viable, suitable, or available."

[46] The above discussion of what actually happened at the Planning Committee reinforces our view that the decision makers were not misled or misinformed.

[47] The fact that the objection by Tesco was late in the day is also part of the overall context. This is highly unsatisfactory as the first instance judge said. However, as Mr Elvin remarked, once the issue was raised and once the letter, late though it was from Tesco, was accepted the matter did have to be dealt with. In the real world given that these were commercial competitors we can see that objections are bound to be made and that strategies will be adopted which support commercial interests. Save to say that late applications are unsatisfactory all round we cannot add to what the judge said about this issue.

[48] The commercial element of this case is amply demonstrated by the emails between representatives of the appellant and representatives of Translink after the planning decision. Tesco's agent pursued a process of enquiry as to whether the ATC site was available to purchase after the Council had taken its decision. We accept that there was some equivocation initially as to whether the ATC site was available on the open market. However, we do not find this particularly surprising arising as it did in the commercial sphere.

[49] Ultimately, when considered in the round there was no firm expression of market availability given. This is confirmed in the email from Mr Moore of 17 May 2021 in which he informed Mr Pierce that he had consulted colleagues and could not formally confirm that Abbey Retail Park owned by Translink is not available for purchase or rental. This ties in with the fact that whilst the plan for BRT remained unconfirmed no firm decision could be made. Therefore, this argument cannot be determinative of the point at issue.

[50] Accordingly, we do not consider that viewed in the round the Planning Committee were misled, misinformed, or needed to make further enquiries. In addition, the decision does not meet the high standard for *Wednesbury* unreasonableness or irrationality. A planning judgment was made which we do not consider can be impugned. Having reached this conclusion we do not consider that it is necessary to predict what would have happened if more information was put before the Committee because a committee must be satisfied at a point in time in relation to

the strength of any planning application, otherwise the planning system would grind to a halt. This is quintessentially a case where a valid planning judgment was made.

[51] In any event the additional fresh evidence that we have admitted in this appeal confirms the view articulated by Mr McLaughlin that, in fact, there can be no real certainty as to the availability or future use of the alternative ATC site for the simple reason that there is still more work to be done in relation to the BRT corridor before there can be any certainty as to the decisions which will be made. This means that with the benefit of hindsight there is, in fact, no injustice wrought by the decision made. To our mind, it would be invidious if the planning system went into freeze frame until as complicated a process as approval for the BRT scheme was completed.

Conclusion

[52] For reasons which broadly accord with those of the judge at first instance, we do not find merit in any of the limbs of challenge raised by the appellant. We, therefore, dismiss this appeal. We will hear the parties as to costs.