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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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

AND IN THE MATTER OF A DECISION OF ANTRIM AND NEWTOWNABBEY BOROUGH COUNCIL

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David Elvin KC and Philip McAteer (instructed by Carson McDowell LLP, solicitors) for the applicant
Paul McLaughlin KC and Denise Kiley (instructed by Antrim and Newtownabbey Borough Council Legal Services Department) for the respondent
Stewart Beattie KC and Simon Turbitt (instructed by A&L Goodbody, solicitors) for the notice party

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SCOFFIELD J

Introduction

[1] By this application for judicial review the applicant, Tesco Stores Limited ("Tesco"), challenges a decision on the part of Antrim and Newtownabbey Borough Council (ANBC) ("the Council") made on 16 February 2021. The decision in question was to grant planning permission (reference LA03/2018/0842F) to a competitor of Tesco, ASDA Stores Limited ("Asda"), for a new supermarket and filling station. More particularly, planning permission was granted for demolition of the existing building at the site, which is at the Monkstown Industrial Estate on the Doagh Road in Newtownabbey, and replacement of those buildings with a Class A1 Foodstore and associated eight-bay petrol filling station, with associated works including car parking, access from the Doagh Road, a click-and-collect facility and landscaping.

[2] There is a variety of pleaded grounds upon which leave has been granted but they resolve to two broad areas of challenge. First, the applicant contends that the respondent addressed the issue of sequential site selection under the Strategic

Planning Policy Statement for Northern Ireland ("SPPS") incorrectly, in particular in relation to its consideration of the availability of another site and, having wrongly concluded that that site was not available, its failure to investigate and consider the questions of suitability and viability. Second, the applicant contends that the respondent failed to properly apply Policy PED7 within Planning Policy Statement 4.

[3] Mr Elvin KC and Mr McAteer appeared for the applicant; Mr McLaughlin KC and Ms Kiley appeared for the respondent; and Mr Beattie KC and Mr Turbitt appeared for Asda as a notice party. I am grateful to all counsel for their helpful written and oral submissions. The applicant in particular is to be commended for focusing its challenge on two key issues on which its case was plainly arguable rather than, as is regrettably common in applications of this type (where a commercial rival challenges the grant of planning permission to one of its competitors), taking a scattergun approach, including by pursuing points which are little more than a thinly disguised challenge to the merits of decision-making.

[4] This case was identified for participation in the Northern Ireland Court Service's E-Bundle Pilot Scheme; and, to reiterate what I said at the conclusion of the hearing, the court is especially grateful to the parties' instructing solicitors for their efforts and assistance in putting both the case papers and authorities into the required electronic format. In a paper-heavy case of this nature, the preparation and use of an e-bundle was a significant endeavour, but one which was in my view very successful.

Relevant planning policy

[5] Before turning to the factual position which forms the backdrop to the proceedings, it may be helpful to say something about the relevant policy tests which the respondent was required to consider.

The SPPS

[6] The SPPS was a material consideration in the determination of the planning application which is the subject matter of these proceedings. At paras 6.271 to 6.273 it adopts a 'town centres first' approach, involving the application of "a sequential approach to the identification of retail and main town centre uses in Local Development Plans ("LDPs") and when decision-taking." It is the so-called 'sequential assessment' of an alternative site which is the focus of the applicant's first main ground of challenge.

[7] Para 6.271 of the SPPS provides that the regional strategic objectives for town centres and retailing include objectives to "secure a town centres first approach for the location of future retailing and other main town centre uses" and to "adopt a sequential approach to the identification of retail and main town centre uses." By virtue of para 6.272, the following strategic policy must be taken into account in the determination of planning applications. Para 6.273 states simply that: "Planning

authorities must adopt a town centre first approach for retail and main town centre uses." Para 6.297 states that, "Retailing will be directed to town centres, and the development of inappropriate retail facilities in the countryside must be resisted."

[8] Para 6.280 of the SPPS is of particular relevance. It states as follows:

> "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 preferable site or sites exist within a proposal's whole catchment, an application which proposes development on a less sequentially preferred site should be refused."

[9] The SPPS goes on to give guidance as to how a sequential site assessment should be carried out. The hierarchy is set out in paragraph 6.281 which unsurprisingly prioritises main town centre uses at sites within a centre's primary retail core; thereafter in town centres; thereafter in "edge of centre" sites; and, lastly, at out of centre locations (although only where such sites are accessible by a choice of good public transport modes).

[10] Para 6.289 of the SPPS is also an important provision in the context of this application. It states:

> "Flexibility may be adopted in seeking to accommodate developments onto sites with a constrained development foot print. For example, through use of creative and innovative design 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."

Policies relating to the retention of economic development lands

[11] This case also raises an issue about the interpretation and application of a particular policy within Planning Policy Statement 4, 'Planning and Economic Development' ("PPS4"). Policy PED7 within that planning policy statement is entitled, 'Retention of Zoned Land and Economic Development Uses.' The second part of that policy deals with unzoned lands in settlements and is in the following terms:

> "On unzoned land a development proposal that would result in the loss of an existing Class B2, B3 or B4 use, or

> land last used for these purposes, to other uses will only be permitted where it is demonstrated that:
>
> (a) redevelopment for a Class B1 business use or other suitable employment use would make a significant contribution to the local economy; or
>
> (b) the proposal is a specific mixed-use regeneration initiative which contains a significant element of economic development use and may also include residential or community use, and which will bring substantial community benefits that outweigh the loss of land for economic development use; or
>
> (c) the proposal is for the development of a compatible *sui generis* employment use of a scale, nature and form appropriate to the location; or
>
> (d) the present use has a significant adverse impact on the character or amenities of the surrounding area; or
>
> (e) the site is unsuitable for modern industrial, storage or distribution purposes; or
>
> (f) an alternative use would secure the long-term future of a building or buildings of architectural or historical interest or importance, whether statutorily listed or not; or
>
> (g) there is a firm proposal to replicate existing economic benefits on an alternative site in the vicinity.
>
> A development proposal for the re-use or redevelopment of an existing Class B1 business use on unzoned land will be determined on its merits."

[12] The justification and amplification text in para 5.32 of PPS4 is relevant to this policy. It states:

> "Planning permission will not normally be granted for the change of use, or the redevelopment for other uses, of unzoned sites or premises in settlements used or last used for industrial and storage or distribution purposes, except in the circumstances outlined in the policy above. For

> instance, the redevelopment of an existing industrial or storage and distribution site with a mixed use scheme, as a specific regeneration initiative to meet the needs of a particular locality and providing a significant element of employment or community uses are integrated into the overall development scheme.

[13] In the present case Asda's development site is unzoned land which was last used for a relevant Class B purpose and therefore the further development of it for a different (Class A) purpose will only be permitted where one of the identified exceptions applies. The applicant contends that none of them do.

[14] Returning to the SPPS for a moment, the policy rationale underpinning Policy PED7 is also set out in para 6.89, in the following terms:

> "It is important that economic development land and buildings which are well located and suited to such purposes are retained so as to ensure a sufficient ongoing supply. Accordingly, planning permission should not normally be granted for proposals that would result in the loss of land zoned for economic development use. Any decision to reallocate such zoned land to other uses ought to be made through the LDP process. While the same principle should also apply generally to unzoned land in settlements in current economic development use (or land last used for these purposes); councils may wish to retain flexibility to consider alternative proposals that offer community, environmental or other benefits, that are considered to outweigh the loss of land for economic development use."

[15] There was also a Planning Advice Note ("PAN") issued by the Department of the Environment in November 2015, shortly after publication of the SSPS, which is relevant to this issue, entitled 'Implementation of Planning Policy for the Retention of Zoned Land and Economic Development Uses.' Paragraph 17 of the PAN says this:

> "A development proposal on land or buildings not zoned in a development plan but currently in economic development use (or last used for that purpose), which will result in the loss of such land or buildings to other uses, will not normally be granted planning permission. Planning authorities may wish to retain flexibility to consider alternative proposals that offer community, environmental or other benefits that are considered to outweigh the loss of land for economic development use.

> Planning officers should be fully satisfied that it has been clearly demonstrated how the special circumstances of a particular case outweigh the preferred option of retaining the land or buildings for economic development use."

Relevant legal principles

[16] I do not propose in this judgment to set out any detailed exposition, or even any significant summary, of the legal principles which apply in public law proceedings challenging the grant of a planning permission. These are by now well-known and, for present purposes, relatively uncontentious. It would be impossible for me to improve upon some of the helpful summaries set out in case law of recent years, to include (for instance) those provided by Lindblom LJ in *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2018] PTSR 746, at para [69] (drawing on his own earlier judgment in *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2017] PTSR 1283, at para [19]); and in *Mansell v Tonbridge and Malling Borough Council & Others* [2019] PTSR 1452, at paras [41]-[42]. The principles are designed to illuminate the limits of the respective functions of planning authorities on the one hand and supervisory courts on the other; and they have been accompanied, particularly in recent times, by repeated judicial warnings against excessive legalism in this field.

[17] McCloskey LJ referred to a range of cases in this jurisdiction which similarly summarise or expound the relevant legal principles in para [56] of his judgment in *Re Allister's Application* [2019] NIQB 79, one of the most useful and enduring remaining that of Girvan J in *Re Bow Street Mall's Application* [2006] NIQB 28, at para [43]. As to the obligation on the part of a planning authorities to properly understand and take into account relevant planning policy, departing from it only consciously and in reliance on contrary material planning considerations, the judgment of the UK Supreme Court in *Tesco Stores v Dundee City Council* [2012] PTSR 983 remains the touchstone (see, in particular, the judgment of Lord Reed at paras [17]-[18]).

Factual background

Events up to 15 February 2021

[18] The planning application with which these proceedings are concerned was lodged on 18 September 2018. The application site was noted to be at 229-233 Doagh Road, Monkstown Industrial Estate in Newtownabbey; the present use of the land was described as, "Employment building and associated land." The description of the development proposal was in the following terms:

> "Demolition of existing building and replacement with Class A1 Foodstore and associated eight-bay Petrol Filling Station and associated works including car parking,

> Click-and-Collect facility and landscaping. Access from Doagh Road facilitated by new roundabout to replace Doagh Road and Monkstown Road junction; and off-site road improvement works at Doagh Road / Station Road / O'Neill's Road junction (Revised Description)."

[19] As appears above, the proposed development is on a site located within the Monkstown Industrial Estate. It is within a settlement limit but in what is known as an 'out of centre location.' A variety of expert reports and assessments were provided either with the planning application or during the course of its consideration, as follows:

(a) There was a Planning, Retail and Economic Statement prepared by Savills on behalf of Asda in July 2018 ("the Savills retail report").

(b) In August 2018 there was a Development Appraisal and Viability Report prepared by Colliers ("the Colliers viability report").

(c) After submission of the planning application, there was then a Retail Audit prepared by Nexus Planning for the respondent in December 2018 ("the Nexus report") to assist it in its consideration of the application and its appraisal of the materials submitted by the planning applicant.

(d) There was then a Planning and Retail Addendum Report prepared by TSA Planning on behalf of Asda in February 2019 ("the TSA addendum"); and a Retail Impact Assessment and Quantitative Need Addendum Statement produced again by Savills ("the Savills addendum report").

(e) There was then a Supplementary Retail Audit prepared by Nexus Planning for the respondent in April 2019 ("the Nexus supplementary report").

(f) This was followed by a Planning Response prepared by TSA Planning on behalf of Asda in October 2019 ("the TSA planning response").

[20] Each of these reports has been placed before the court. There is no need to summarise their contents in detail, save insofar as is set out below in the context of discussion of the consideration of the planning application.

[21] As part of Asda's sequential site assessment, a site at Abbey Trading Centre ("ATC") was identified as a potential alternative site for its proposal. This site ("the ATC 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 ("NITHC") (which is sometimes referred to as 'Translink'), 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 ("dBMAP").

[22] As noted above (at para [10]), the SPPS provides that planning applicants will be expected to demonstrate why sequentially preferable alternative sites are not suitable, available and viable. Asda's position was set out in the TSA addendum, in which it was contended that, although the ATC site was being marketed, it would not be able to accommodate the Asda proposal.

[23] The Council's professional planning officers first produced a planning report in respect of the application in August 2020. Later, there were updated versions of this report, including in particular a version prepared in advance of the key Planning Committee meeting of 15 February 2021. The application had initially been scheduled to come before the committee for a decision on 17 August 2020. The officers' report compiled in anticipation of that meeting was both published and provided to elected members in advance of the meeting. It included a recommendation for approval, including consideration of how the sequential test had been considered and taking into account the work undertaken by Savills and Colliers on behalf of Asda and the Council's advice from Nexus.

[24] The Savills retail report concluded that the ATC site was neither suitable nor viable for the development proposed by Asda. The Nexus report considered that Asda should demonstrate more flexibility in its design when attempting to demonstrate that the ATC site was neither suitable nor viable for a superstore development: as noted at para [10] above, para 6.289 of the SPPS refers to flexibility in seeking to accommodate development onto sites with a constrained footprints. In excluding a site as unsuitable, a retailer cannot simply rely on the fact that the site is unable to accommodate an entirely self-serving wish-list.

[25] The TSA addendum was then submitted on behalf of Asda by TSA Planning, which sought to address the view expressed by Nexus about the need for flexibility in design. The TSA addendum also concluded that the ATC site was neither suitable nor viable for the development. The recommendation in the officers' report in August 2020 was that Asda had appropriately addressed this issue and demonstrated that the ATC site was neither suitable nor viable to accommodate the development proposed. At that time, the issue was being addressed on the understanding (on the part of all parties) that the ATC site was on the market for sale and was therefore available. The officers' report also looked at the potential for other alternative sites within the catchment of the proposal and no other potential alternative sites were identified within other relevant centres or at edge of centre locations. The application of the sequential test therefore turned on the assessment of the ATC site which was (at that point) considered available but *not* suitable or viable for Asda's proposal.

[26] Albeit that there was a recommendation for the grant of permission in August 2020, with the officers' report published and recommending approval, Tesco did not

at that time challenge the conclusion on the part of Asda's consultants or the Council's professional planning officers that the ATC site was neither suitable nor viable. Indeed, the respondent in these proceedings places some emphasis on the fact that no objection on this issue was received from Tesco until many months later, on the afternoon of 15 February 2021, the very day of the meeting of the Planning Committee at which the application was to be decided.

[27] A decision on the application was not made, as originally intended, at the Council's Planning Committee meeting of 17 August 2020 because, very shortly prior to that meeting, the Department for Infrastructure (DfI) ("the Department") served a notice under Article 17 of the Planning (General Development Procedure) Order (Northern Ireland) 2015 preventing the Council from determining the application until it (the Department) had considered whether to exercise its call-in powers. Although the Department ultimately decided not to call in the application, its intervention had a number of consequences. First, there was some delay in the determination of the application from what had originally been anticipated; and, second, the Council was then required to conduct a pre-determination hearing (PDH) under section 30 of the Planning Act (Northern Ireland) 2011 and regulation 7 of the Planning (Development Management) Regulations (Northern Ireland) 2015.

[28] The PDH was held on 3 December 2020. A planning agent for Tesco, Mr Martin Robeson, had become involved by that stage, having sent a letter of objection on Tesco's behalf on 16 August 2020, the day before the Planning Committee meeting at which the application had been due to be determined. That letter focused largely on the issue of retail impact. Mr Robeson attended the PDH in December and made representations. In the course of that meeting, the planning agent for Asda stated that the ATC site was no longer available. The respondent has noted that that comment went unchallenged at the meeting by Mr Robeson on behalf of Tesco, although that is obviously not in any way determinative of the issue (and, I was told, is not accepted by Tesco). In any event, the respondent's record of the PDH notes that Mr Stokes of TSA planning on behalf of Asda made the following point: "Translink now intend retaining the Abbey Trading site." Mr Stokes has averred in respect of this as follows:

> "It was only around the time of the Pre-Determination Hearing in December 2020 that the issue of the ATC site no longer being available first emerged. At this time, it became clear that the ATC site was no longer available at all as it was being considered by the DFI and NITHC as being required in conjunction with the Belfast Rapid Transit Scheme. I confirmed my understanding of this factual situation at that hearing."

[29] Consideration of the planning application and a decision on it were then scheduled for the Planning Committee's meeting on 15 February 2021, with an updated officers' report being prepared by the Council's Head of Planning

(Mr John Linden) for that meeting. That updated version of the report was published on 10 February 2021.

[30] The respondent's initial case officers' report had acknowledged that the ATC site was available; but concluded (in line with the developer's case) that it was not viable or suitable for the proposed development. The relevant advice to the respondent was in the following terms:

> "… it is on balance concluded that [the ATC site] is neither viable nor suitable for the development being applied for and it is therefore reasonable to discount this from the sequential site analysis as an alternative site appropriate to accommodate the development proposed."

[31] After the developments described above however, the final officers' report additionally noted that the ATC site was not being marketed and "as a consequence it does not therefore at this point in time constitute an available site." Thus, it maintained the position that the ATC site was neither suitable nor viable for Asda's proposed development for the reasons which had previously been given but also noted that the ATC site now appeared no longer to be available either.

The events of 15 February 2021

[32] Tesco's agents then sent a letter dated 12 February 2021 (which was actually sent on 15 February 2021, at 12.49 pm) raising the issue of the respondent's consideration of planning policy relating to the retention of land zoned or used for economic development. This issue was addressed in some detail. For the first time, the Tesco objection also included a feasibility site layout for a food store development at the ATC site in order to seek to show how (on Tesco's case) an Asda superstore could be accommodated at the ATC site, contrary to the position which Asda's expert reports had presented. The letter said that the ATC site was "now vacant" and was "available and given its location and history of neighbouring retail uses, it is suitable." Significantly, even though Tesco's agent had been at the PDH and was therefore aware of the Asda contention that the ATC site was no longer available, and was also aware of the contents of the updated officers' report, the Tesco objection letter, whilst contending that the ATC site *was* available, did not include any evidence of that fact, nor make any representations as to how the issue of availability should be further considered by the Council.

[33] The question of whether or not the ATC site was available would have been a matter of much less moment if it was entirely clear-cut that, even if available, it was not suitable for the developer's proposal. As noted above, the Council had initially considered that to be the case. However, Tesco's objection letter of 12 February 2021 was designed to also put that issue into contention by including the plan regarding the potential site layout of a retail store at the ATC site. Tesco contended that these plans demonstrated that that site could comfortably accommodate the Asda proposal

– a contention strongly opposed by the notice party in these proceedings. In an important averment, the Council's Head of Planning has stated that, following receipt of this late objection, he "recognised that the issue of the suitability and viability of the ATC site might require further assessment." He also recognised, in light of the additional analysis provided on behalf of Tesco, that "the issue of availability could become more important."

[34] Mr Linden's response to the Tesco letter was to undertake some further enquiries that afternoon in an effort to obtain further information on the issue of the availability of the ATC site prior to the scheduled Planning Committee meeting later that day. In particular, Mr Linden discussed the issue with Ms Majella McAlister, the Council's Director of Economic Development and Planning and a member of the Belfast Rapid Transit ("BRT") Project Board. His affidavit evidence on this discussion is in the following terms:

> "She [Ms McAlister] advised me that in September 2020, she attended a briefing provided to members in respect of plans for the extension of the BRT scheme. She advised me that the issue of the availability of the ATC site had been raised expressly in the course of the meeting during questions by elected members who were in attendance. The Director informed me that her recollection was that it had been confirmed to elected members that the site was not available for alternative use as it was being considered by the owners as part of the options and business plan for expansion of the BRT project."

[35] There had indeed been a presentation, or briefing, in September 2020 to certain members of the Council – those representing the Glengormley Urban and Macedon District Electoral Areas – in relation to Phase 2 of the BRT Project. This was provided by senior officials from the Department for Infrastructure (led by Mr John Irvine, the Director of Major Projects and Procurement and the Senior Responsible Officer ("SRO") for the BRT Project). Mr Linden's evidence – albeit second-hand (coming from members and other Council officers who attended the briefing) – is that Departmental officials "confirmed during the briefing that, following clearance works, the ATC site was no longer on the open market as alternative options regarding its future use linked to the BRT project were being actively considered by the Department in liaison with the NI Transport Holding Company."

[36] Mr Linden goes on to aver that Ms McAlister advised him on the afternoon of 15 February 2021 that, due to her involvement in the BRT Project Board and her attendance at the September 2020 briefing, she was aware that the owner of the ATC site, NITHC, "did not intend to make any decision as to the future of the site until the full business case in respect of the expansion of the BRT scheme was known." She considered that the site could not therefore be considered to be available until such

time as NITHC had made that decision, *ie* the decision as to whether or not it would require to retain the site for its BRT scheme. Mr Linden accepts that, on this basis, he advised the members of the Planning Committee that the ATC site was no longer available. He has also made the point that, in making these enquiries of Ms McAlister he advised her that the question of the site's availability was of relevance to the determination of the Asda application and the late objection from Tesco which had challenged the officers' assessment of the site's suitability and viability. I am satisfied, therefore, that the two officers involved understood the potential significance of the issue under discussion to the determination of this important planning application.

[37] In the course of the discussion, Ms McAlister also advised Mr Linden that she recalled one of the Council's elected members (Councillor Robert Foster) asking a question about the ATC site during the September briefing meeting referred to above. In light of this, Mr Linden also telephoned Cllr Foster, who confirmed to him that he (Cllr Foster) had been in attendance at the briefing and elected members had been advised that the site was no longer available for sale as it was under consideration for use as part of the BRT scheme (possibly as a hub or 'park and ride' facility).

[38] Based on that information, the Planning Committee meeting proceeded later that day as scheduled. On the issue of the sequential test, Mr Linden accepts that he advised committee members that the ATC site was no longer available. This is confirmed by the relevant portion of the transcript of the meeting, which was recorded. Mr Linden did comment that he thought the planning applicant could "confirm later on" in the meeting that this was the case, namely "that the ATC site is no longer available, it's not on the market, indeed the Northern Ireland Transport Holding Company, I think, made a recent presentation to this Council indicating that they had alternative plans for that site." Mr Linden's affidavit evidence has also explained that his use of the words "I think" (in the averment quoted above) did not connote any ambiguity on his part as to *whether* a briefing had taken place but, rather, *by whom* the briefing had been given. (At that time he thought the briefing had been made by officials from NITHC, the site owner, although he later came to understand the briefing had in fact been given by DfI officials.)

[39] When this issue was addressed at the Planning Committee meeting, Mr Linden's evidence is that he recalls one of the members (Alderman Brett) nodding in agreement with him when he referred to the non-availability of the ATC site during his presentation. Alderman Brett had been in attendance at the September 2020 briefing on the BRT project. Mr Linden is also now aware that Cllr Webb, another member of the Planning Committee who voted on the application, also attended the September 2020 DfI briefing.

[40] Ms McAlister was present at the Planning Committee meeting but was not questioned further about her knowledge of the issue. However, her evidence in these proceedings confirms that she was satisfied with the basis on which the issue

was outlined. The applicant also says that Asda's purported 'confirmation' of the position was confined to a statement by its planning consultant regarding a meeting (the September briefing) at which he was not present. Asda's senior counsel, who represented it at the committee hearing, also indicated that his instructions (and his client's "understanding") were that NITHC had an alternative use for the site so that "it's gone", although no documentary evidence of this was made available.

[41] Ms McAlister's own evidence on affidavit in these proceedings is that it was "clear" to her that the ATC site was not currently available at that time. This was based upon the September briefing (discussed above) and the response which had been provided to Cllr Foster's question; as well as *her own understanding* of the situation from her experience on the Project Board. She has averred that she advised the Head of Planning of her "clear view" and that she considered that "the planning application could, on this basis, proceed to be determined by the Council's Planning Committee."

[42] Mr Robeson 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 (in his words) "drawn up a scheme to meet very realistic requirements."

[44] After the presentation made on behalf of Tesco at the meeting, 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…"

[43] 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 PDH 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 said "Indeed, furthermore, this site is now no longer available. I understand the Council received a presentation to do with alternative uses from [NITHC] so the site is neither viable, suitable, or available." He was followed by senior counsel for Asda, who made the comments noted at para [40] above.

[44] At the conclusion of the discussion of the application, a vote was taken and the proposal that planning permission be granted was passed by seven votes to two.

Events after 15 February 2021

[45] The plot thickened somewhat when, on 28 April 2021, well over two months after planning permission had been granted to Asda, Mr Michael Pierce, a

commercial property agent acting on the instructions of the applicant, sent an email to NITHC enquiring as to whether the ATC site was available for purchase or lease. This was followed by a telephone call between Mr Pierce and John Moore (Estates Surveyor at Translink Estates Department) of NITHC the same day, in which Mr Moore indicated that whilst the site was not on the market and had been considered for internal operational uses, it was still available to purchase. This exchange was followed up by an email exchange, in which Mr Moore said the following:

> "As discussed Abbey Retail Park is available for sale but subject to internal decisions in respect of operational requirements and potential medium to long-term revenue generation or land banking.
>
> As advised you will need to provide more detail prior to raising this with senior leadership team for consideration…"

[46] This representation formed a key plank of the applicant's case that the ATC site was, in fact, available at the time of the Council's decision. It has, however, been significantly qualified – indeed perhaps even entirely retracted – in the course of further enquiries which followed, which I discuss below (see para [61]).

Site availability

[47] One of the applicant's central points is a simple one, namely that, just because a site is not (presently) being marketed does *not* mean that it is not available in terms of the relevant policy test under para 6.289 of the SPPS. Tesco relies upon a relatively recent decision of the Planning Inspectorate in England (App/W3005/18/3204132 and App/W3005/W/20/3265806) in which it was stated as follows:

> "… The question of whether the site is being actively marketed seems to me to be a peripheral matter. Active marketing is not a prerequisite for a site being available through other channels. Lack of current marketing may indicate no hurry to dispose of the land, but not unwillingness."

[48] In addition, the applicant contends that there was no evidence available to show that the ATC site was unavailable; or to assess the prospect of its use in connection with the BRT scheme. The site *had* been marketed for sale (unsuccessfully) as recently as 2016, as appears from a copy of a sales brochure seeking expressions of interest for the purchase of the site which the court has seen (and which was appended to the TSA Planning report of February 2019).

[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].)

[50] However, the applicant's submissions in relation to the significance of the ATC site not being on the open market proceed on the premise that the respondent treated its marketing status as determinative of the question of availability. I do not accept that submission. It was grounded on the following passage in the officers' report:

> "In addition to the officer consideration outlined above it should be noted, as indicated at the recent pre-determination hearing, that it now appears the vacant ATC site at the Abbey Centre is no longer being marketed by the current owners and <u>as a consequence</u> it does not therefore at this point in time constitute an available site."
> [underlined emphasis added]

[51] However, I am satisfied – in light of the evidence before the court as to the enquiries made with regard to the availability of the site and the corporate knowledge which was brought to bear on this issue – that the mere fact that the ATC site was not being marketed was not treated as determinative of (or given a *Wednesbury* irrational degree of weight in) the assessment of whether the site was available. In this case the relevant site had been marketed unsuccessfully for several years. It was a consideration which the Council was permitted to take into account that, after a long period of active marketing, the site has been taken off the market. However, viewed fairly and in the round, the Council's assessment of the issue went well beyond a mere enquiry into whether the site was currently being marketed for sale.

[52] I accept the respondent's submission that the terms used in the sequential test ("availability", "suitability" and "viability") do not admit of a single mandatory definition which will be applicable in every case. They are terms which naturally involve some degree of flexibility and judgment in the particular factual context in

which they come to be considered (cf. Lord Reed's comment in the *Tesco Stores v Dundee City Council* case, at para [19], that "many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment"). On balance, I have not been persuaded that the Council's consideration of the 'availability' issue suffered from any legal error, for the reasons set out below.

[53] As noted above, the Council was aware that the ATC site was not on the market but did not treat this as determinative. The Planning Committee was advised by the Head of Planning that the site was no longer available *and* was not on the market, adding that the NITHC had "made a recent presentation to this council indicating that they had alternative plans for the site." Indeed, it was the knowledge about NITHC's attitude to future use of the site which, it seems to me, was the factor which resulted in the conclusion on the part of the officers that the ATC site was not available within the meaning of the relevant policy test.

[54] The applicant challenges that conclusion on two principal bases, namely (a) that it was a material error of fact; and (b) that it was the product of insufficient inquiry. I do not consider the contention that this was a material error of fact to be the appropriate analysis since, as noted above, the availability of a site now (or, more particularly, in the future) is not always a black and white factual issue. In some cases it may be; but in others it will require a more nuanced assessment involving an element of judgment. Indeed, in *R (CBRE Lionbrook (General Partners) Ltd) v Rugby Borough Council* [2014] EWHC 646 (Admin), at para [164], Lindblom J observed that the issues of availability and suitability in the sequential site assessment "are matters of planning judgment", the decision-maker's judgment on which would be vulnerable to challenge on *Wednesbury* grounds only. I have not been persuaded that, at the time when the Council made the decision impugned in these proceedings, it was an established fact that the ATC site was available, much less that the Council's view that it was unavailable was *Wednesbury* irrational. On the contrary, for the reasons given below and in light of the full evidence on the issue now before the court, I am satisfied that the availability of the site was a matter which was properly resolved against Tesco.

[55] In relation to the adequacy of inquiry point, there are essentially two limbs to that argument also: first, that the Council (and, in particular, members of the Planning Committee) did not have sufficient information before them to resolve the issue as it then stood; and, second, that inadequate inquiry was made as to whether the site was likely to become available again within a reasonable period. If what the Council knew (and asked) in this case was sufficient, Mr Elvin argues, it will simply be too easy for developers of sites which are not sequentially preferable to avoid the operation of the SPPS policy by obtaining a letter from the alternative site owner simply denying availability without reasonable information.

[56] A helpful synopsis of the public law principles relating to the duty upon a decision-maker to make enquiries is set out in the now often-quoted judgment of

Hallett LJ in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2015] 3 All ER 361, at para [100]:

> "The following principles can be gleaned from the authorities:
>
> 1. The obligation upon the decision-maker is only to take such steps to inform himself as are reasonable.
>
> 2. Subject to a *Wednesbury* challenge, it is for the public body, and not the court to decide upon the manner and intensity of inquiry to be undertaken (*R (Khatun) v Newham LBC* [2005] QB 37 at paragraph [35], per Laws LJ).
>
> 3. The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision (*per* Neill LJ in *R (Bayani) v Kensington and Chelsea Royal LBC* (1990) 22 HLR 406).
>
> 4. The court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient (*per* Schiemann J in *R (Costello) v Nottingham City Council* (1989) 21 HLR 301; cited with approval by Laws LJ in (*R (Khatun) v Newham LBC* (*supra*) at paragraph [35]).
>
> 5. The principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant, but from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion (*per* Laws LJ in *R (London Borough of Southwark) v Secretary of State for Education* (*supra*) at page 323D).

6. The wider the discretion conferred on the Secretary of State, the more important it must be that he has all relevant material to enable him properly to exercise it (*R (Venables) v Secretary of State for the Home Department* [1998] AC 407 at 466G)."

[57] This is not a case where the availability of the ATC site was determined on the mere say-so of the planning applicant or its agent; nor simply on the basis of a vague recollection on the part of Mr Linden as to something reported to him in relation to the September briefing of which he had no direct knowledge. Mr Linden has rejected on oath the contention that the information he gave to the committee on the availability of the ATC site "was based on vague, unsupported recollections." Rather, he says that his presentation to the committee on this issue was based on clear information provided by the Director (Ms McAlister) and verified by Cllr Foster, of whom he also made specific enquiries, which was then in turn confirmed by Alderman Brett (who also had relevant knowledge). It is true that Cllr Foster's and Alderman Brett's knowledge both emanated from the same source, namely the DfI September 2020 briefing; but that was a recent briefing given by the Department to the Council which addressed the very issue which was the impediment to the site being available. To some degree, Ms McAlister's knowledge was based on this briefing as well; but, significantly, she also relied upon her wider knowledge and experience as part of the BRT Project Team.

[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.

[59] The Tesco objection letter provided on 15 February was circulated to all councillors ahead of the Planning Committee meeting. Members of the committee

were therefore able to understand Tesco's contention that the site was suitable and viable; and, importantly, were aware of the Tesco contention that the ATC site was also available. It was a matter for them to consider whether, and the extent to which, they wished this issue to be enquired into further. It was not irrational for the Council to proceed on the basis of the information it had at that point without making any further enquiries.

[60] The Tesco assertion at the Planning Committee meeting that the site was available was essentially a bald assertion made without evidence. Although Mr Robeson mentioned that it was part of the brief of those employed by Tesco to consider these matters to ensure that they were in touch with what was 'happening on the ground' – that is to say to monitor issues of this nature in the vicinity of Tesco stores – there was no positive evidence of availability provided by Tesco, whose submissions focused instead on the issues of viability and suitability. I accept the respondent's submission that Tesco had more than adequate notice of the position of Asda and the Council officers in relation to the availability of the ATC site and had a fair opportunity to mount an evidenced case against this. They were represented at the meeting by senior counsel, a planning agent and other representatives. They did not request an adjournment of the meeting in order for this issue to be considered and investigated further; nor did they present evidence (such as they sought some months later through Mr Pierce's enquiry) that the ATC site was indeed available for purchase. There was no unfairness to them in the Council considering that it had sufficient information to proceed on the issue.

[61] The enquiry made by Tesco's agent, Mr Pierce, by virtue of which he was told on 28 April 2020 that the ATC site was still available to purchase, allowed Mr Elvin to present his case on the availability of the alternative site with some verve and rhetorical flair. However, in the final analysis, I do not consider it to be of any great assistance to the applicant in these proceedings for the following reasons:

(i) First, it occurred *after* the Council had taken its decision. This was not information which was before the Planning Committee at the material time (despite the fact that Tesco *could* have made the enquiry earlier).

(ii) Second, I have not been provided with the full detail of the terms of the telephone discussion in which the key statement on the part of NITHC is said to have been made. It was not recorded. In any event, the position was addressed shortly afterwards in an email in which NITHC's position was far from unqualified (see para [45] above). The availability of the site for sale was said to be "subject to internal decisions" involving operational requirements (which is consistent with NITHC considering that the site may be required for the BRT scheme) and potential medium to long-term revenue generation or land banking. In short, the site may well not have been available. Mr Moore himself later referred to his response to Mr Pierce as having been "caveated."

(iii) Third, where there is even a remote *possibility* that a seller may wish to bring a site to the market at some point in the future, indeed even if it only wishes to keep its options open, it will be dis-incentivised from sending an apparently interested purchaser away with a rebuff; but a failure to rule out future sale is not necessarily indicative of present availability.

(iv) Fourth, and perhaps most importantly, Mr Robin Totten of NITHC, the Head of Strategic Network Design & Business Change in Translink, later confirmed to Ms McAlister that her understanding (that the site was not available until final decisions about its use within the BRT expansion had been made) was correct "and that the site was unavailable." Mr Totten offered to clarify Translink's position in writing. Mr Moore did so by way of an email of 17 May 2021 in which he informed Mr Pierce that he had consulted colleagues and could "formally confirm that Abbey Retail Park owned by NITHC is not available for purchase or rental", adding that he hoped this clarified the position. Mr Clive Robinson, DfI Transport Programme Manager, also confirmed to Ms McAlister that he understood that the site was unavailable at that time, and that no decision would be made on the future of the site until the business case for the BRT expansion had been completed, with the ATC site featuring in one of the route options upon which DfI was about to publicly consult.

(v) The correctness of the position set out in Mr Moore's email of 17 May 2021 was underscored by that email being forwarded to Ms McAlister by Mr Totten, noting that it confirmed the current Translink position in relation to the ATC site.

[62] Accordingly, when the formal position was ultimately confirmed, NITHC was not prepared to part with the ATC site. It was not available, notwithstanding the salesman's equivocation which had been contained in Mr Moore's initial exchanges with Mr Pierce. I am satisfied that, had further formal enquiries been made (as Tesco now contends were required) immediately after the Planning Committee meeting of February 2021, this is the position which would have been reached.

[63] Of course, that does not dispose of the applicant's final point relating to the availability of the ATC site. Tesco asserts that the mere fact that the owner of the ATC site was apparently *considering* alternative plans for it (having recently failed to sell it) did not constitute a proper basis for concluding that the site was not available either then or, more importantly, in the foreseeable future. The SPPS policy would be undermined, the applicant submits, if the planning authority does not also assess whether a suitable and viable alternative site will shortly *become* available. That is consistent with what the Court of Appeal in England and Wales said in *Warners Retail (Moreton) Ltd v Cotswold District Council and Others* [2016] EWCA Civ 606, at paras [11]-[12]; and, similarly, what Lindblom J said in the *CBRE Lionbrook* case, at paras [120]-[121].

[64] The respondent correctly observed that those two authorities were dealing with English policy guidance which is not in force in this jurisdiction and which is in materially different terms to the relevant policy in the SPPS discussed above. In the two cases cited, the English courts were addressing the meaning and effect of the National Planning Policy Framework ("NPPF") and related guidance in a Department for Communities and Local Government publication entitled 'Planning for Town Centres – Practice Guidance on Need, Impact and the Sequential Approach' ("the DCLG guidance"). In particular, the guidance defined the concept of availability as "whether sites are available now *or are likely to become available for development within a reasonable period of time* (determined on the merits of a particular case, having regard to inter alia, the urgency of the need)" [italicised emphasis added]. I understand that that guidance has now been withdrawn but that a more recent version of the NPPF now adopts a similar approach, in wording which is different to that used in the SPSS in this jurisdiction, by referring to whether alternative "suitable sites are not available (or expected to become available within a reasonable period)."

[65] The SPPS provides no such guidance on the meaning of the concept of availability; but I accept 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). 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. However, it is fair to say 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 actually available at the time the relevant development control decision is made. (An early assertion in the Savills retail report that the availability of alternative sites falls to be determined by reference to the position at the time when the planning application is submitted, rather than when it is determined, was plainly wrong and has rightly been disavowed by Mr Beattie on behalf of Asda.) The starting point will be whether the alternative site is available at the time when the relevant planning decision is made. Nonetheless, I also accept Mr Elvin's submission that this assessment may require to be forward looking to some degree, in order to ensure that the clear policy intention is not undermined and material considerations are properly taken into account.

[66] Thus, if a suitable alternative site is not available when the planning authority determines an application but, by some unusual happenstance, it is known that the site will be put on the market in a week's time, it would plainly be wrong for the authority to consider that the site was unavailable within the meaning of relevant planning policy. In that instance, the alternative site may well be available for the purposes of the development proposal, having regard to the timescales for build and delivery. Future site availability may be relevant depending upon the circumstances of the application and, in particular, the timeframe of the proposed development and

any factors relating to urgency or need. On the contrary, if an alternative site was considered likely to become available only in several years' time, the authority is highly likely to be entitled to take the view that it was unavailable for the purpose of the application before it (unless perhaps, for some other reason, the proposed development could not in any event commence for many years or was so strategic that it was plainly reasonable that it be delayed to await a site which was much preferable). Each case must be considered in context and on its own merits, having regard to the timing of the alternative site coming to the market (if that is anticipated), the degree of certainty of that occurring, the appropriate development timescales and other material considerations such as the need for the proposal. It is not every possibility of an alternative site becoming available in future which will prove fatal to an application which engages the sequential test. Some element of judgment on the part of the decision-maker is required as to whether the site will become available within a reasonable time (and what may constitute a reasonable time in the context of the particular application before it). As I have also said, the wording of the policy in the SPPS, which differs from the policy guidance in England, must also be respected to the extent that current unavailability must be taken as a strong starting point.

[67] In the present case, when the impugned decision was made, the ATC site was plainly unavailable in my view. It was not being marketed but, much more importantly, was purposely being retained by NITHC for its own purposes, at least in the short term. The Council was entitled to reach its decision on the basis that NITHC was unwilling to dispose of the ATC site at that point, as it required to bank the land for its own purposes, pending a final decision on whether or not it would be used within the Glider scheme. This was confirmed by the later enquiries made in this regard.

[68] Moreover, there was no indication of when the ATC site may become available for sale again, if ever. It is well known that planning functions have been conferred on district councils partly because of the local knowledge which elected members will bring to bear on matters which come before them for consideration. In this case, I am satisfied that the councillors were aware of the connection between the availability of the ATC site and the proposals for the expansion of the Glider project as part of the BRT scheme; that they were also aware that the process of route selection was ongoing and to be the subject of a future consultation process; and that they were further aware that it was not guaranteed that the ATC site would be required for the BRT project indefinitely, depending upon the outcome of the route selection process. The extension of the BRT scheme to this part of North Belfast would be a significant development in respect of which local councillors were fully engaged, particularly in light of the fact that there was some contention about the possible routes which might be used. Since DfI had not at that stage commenced the process of public consultation, the Council and its members would have been aware that the site may not ultimately be required to be retained for the BRT scheme; but they would also have been aware that the position in respect of the site was unlikely to change in the immediate or short term. As it happens, DfI launched a consultation

on the BRT scheme on 26 July 2021, some 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. At the time of hearing, no decision on the route to be adopted (which might of course itself be subject to legal challenge) had been made or was even in prospect.

[69] On the question of whether the site might become available within a sufficiently short timescale which would then pose a difficulty for the planning applicant in terms of the sequential test, I do not accept that the Council was unsighted on the relevant factual background in light of the unusual circumstance that the impediment to site disposal was a matter in which the Council itself would have had a considerable interest and its own knowledge. Further enquiry on this would in my view have yielded no further benefit: NITHC was intent on retaining the site until it was known whether it was needed for the BRT scheme and no-one knew when this would be clarified. There was a significant chance that the site would be required and so would never be available for purchase or lease again. In addition, as the respondent has submitted, it was a requirement of policy in this case that Asda submit an analysis of retail need in the area (because of the absence of an up-to-date local development plan: see para 6.282 of the SPPS). The report which had been provided on behalf of Asda, and which was analysed by Nexus Planning on behalf of the Council, demonstrated (as summarised in the officers' report) that there was a quantitative need which existed in the area for further retailing of this type; as well as a qualitative need having been demonstrated in relation to comparison goods provision (albeit to a lesser degree). The Council would have been entitled to take into account this retail need in assessing whether the availability of the ATC site – even if it could be assumed – would occur within a reasonable time.

[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. However, 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. As Lady Hale emphasised in *Morge v Hampshire County Council* [2011] UKSC 2, at para [36], 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. I also bear in mind the comments made by the Court of Appeal in England and Wales in relation to the requirements of a planning officer's report to committee in *R (Oxton Farms) v Selby District Council* [1997] EWCA Civ 4004. 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." Judge LJ took the view that an application for judicial review based on criticisms of the planning officers' report would "not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left

uncorrected at the meeting of the planning committee for the relevant decisions taken" [underlined emphasis added]. 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.

[71] In light of the discussion above, my overall conclusions are that the Planning Committee was not significantly misled on the availability issue in any material respect; that it was not obliged to conduct any further inquiry into the issue; that, had it done so, that enquiry would have confirmed that the ATC site was unavailable and would be for the foreseeable future, pending route selection in the BRT project, of which the councillors would have been aware in any event; and that the Council's decision would inevitably have been the same as that which was adopted at the Planning Committee meeting which made the impugned decision.

[72] Tesco was of course correct to submit that the onus lies on the planning applicant to show that a viable and suitable alternative site is *not* available. Nothing in this judgment should be taken as an indication that, where it is unclear whether an alternative site is available or not, the planning authority is entitled to proceed on a hunch that it is not available. However, in the present case – which was somewhat unusual in that Council members and officers had their own direct knowledge which was relevant to the issue – there was sufficient information available to the Council for it to lawfully and rationally conclude that the ATC site was not then available; and it was not irrational for the Council to consider that it did not require to carry out additional enquiries in order to further investigate that issue. It is right that the SPPS states that the planning applicant will be expected to "*fully demonstrate* why alternative sites are not suitable, available and viable." However, it is important to read this context. This must be fully demonstrated *to the planning authority's satisfaction*, and not merely for the sake of it.

[73] The applicant in this case has raised an entirely legitimate concern about developers being able to bring forward for development sites which are not sequentially preferable merely by producing letters from the owners of alternative sites which purport that those sites are unavailable without providing reasonable information. Planning authorities will no doubt be alive to the possibility of developers seeking to game the system in that way; and so they should. There will be circumstances where the court would consider that it was irrational for the authority not to make further enquiries or seek further details. But the present case is not in that category, in my view. There is no suggestion that the Department or NITHC was acting in bad faith in informing the Council that it was holding the ATC site back for possible use in the BRT scheme.

[74] Finally, on this issue, the applicant complains that the councillors gave no consideration to whether, even if the ATC site was used by its owner in the potential manner identified, the BRT facility *and* an Asda store might be able to co-exist at the site. Even recognising that the suitability of a site in the application of the sequential test does not depend on self-serving statements from the planning applicant as to its

own requirements but, rather, an objective assessment, I consider this aspect of the applicant's case to be far-fetched. It is a contention which was never raised at any time by any party during the course of the Council's consideration of the planning application. The alternative design proposal submitted by Tesco with its 15 February letter showed the Asda superstore occupying the entire site, so that it is not clear where Tesco contends a park-and-ride facility transport hub could also be accompanied within the site. The notice party contends that even that design was totally unrealistic (although that is not for me to assess). I do not consider there to be any illegality arising from the Council's failure to consider the even more belated contention that an Asda foodstore *and* the Glider facility could *both* be accommodated on the ATC site at some point in the future.

Suitability and viability

[75] The applicant complains that, once the ATC site had been discounted on the basis of non-availability, the site was not considered in full, in terms of assessing its suitability and viability, because it was simply ruled out of account; and that this was so despite the applicant pressing in its further representations for the issue of its suitability for the Asda proposal to be revisited and addressed.

[76] I accept the thrust of the applicant's point on this. The issue of availability was treated as determinative. The evidence provided by Tesco at a very late stage on the question of the suitability and viability of the ATC site for a food superstore was not addressed in any substance, although the officers' view up to that point had been that Asda had also demonstrated that the ATC site was unsuitable for its proposals.

[77] In the notice party's submissions, it is said that the respondent also had comprehensive information before it to determine that the ATC site was also unsuitable and unviable and that, at no point, did the Council move away from the consistent position its officers had taken up until the Planning Committee meeting, namely that the ATC site was so constrained that it could not accommodate a development of the nature under consideration. This had been addressed in great detail in Asda's experts' analyses. There may well be force in the notice party's argument in this respect; but in light of the respondent's averments on this issue, it seems to me that if the Council had erred in law in its assessment of the availability issue it would not have adequately addressed the issues of suitability and viability in the particular circumstances of this case.

[78] Mr Beattie invited me to conclude that the Planning Committee proceeded on the basis of that section of the report which maintained that the ATC site could not accommodate the Asda proposal. In the notice party's submission, the last-minute scheme submitted by Tesco was wholly unrealistic and failed to take into account a variety of constraints on the ATC site. Again, that may well be correct but I could not possibly begin to determine this, which would be intruding into the merits of the planning decision-making. I am not satisfied that the committee proceeded on the basis that it was convinced the ATC site was unsuitable for an Asda superstore,

notwithstanding receipt of the Tesco plan purporting to show that this could be accommodated. I could not safely conclude that to be the case in light of Mr Linden's averment that following receipt of the late Tesco objection, he "recognised that the issue of the suitability and viability of the ATC site might require further assessment." Indeed, his oral presentation to the committee seems to have focused on this issue.

[79] However, I accept the respondent's submission that in order to result in a presumptive refusal of an application, a sequentially preferable site must be suitable, available and viable. An unsuitable alternative site is obviously no impediment to a development, even if it might be available. By the same token, an unavailable site is no bar to development even if it might be suitable and viable, were it to be available. Provided the Council lawfully concluded that the ATC site was not available and could therefore be excluded – as I have held it did – the respondent was not required to go on to determine whether that site would or would not have been suitable for the Asda proposal.

Retention of land for economic development

[80] Policy PED7 of PPS4 governs the circumstances in which the development or redevelopment of land resulting in the loss of Class B2, B3 or B4 use, or land last used for those purposes, will be permitted. The applicant contends that, in concluding that the development sought by Asda should be granted permission notwithstanding the resulting loss of land last used for economic development (and a portion of which was still occupied and used for that purpose at the time of the grant of the impugned permission), the respondent misdirected itself. It is argued that the Council did so on the basis that it considered that the *buildings* on the site were unsuitable for modern industrial, storage or distribution purposes for the purpose of Policy PED7(e), when the appropriate focus was not upon the condition of the buildings currently erected on the site but, rather, on the site itself. In advancing this case, the applicant draws attention to what it submits is a clear contrast in sub-paragraphs (e) and (f) of Policy PED7 respectively between consideration of the "site" and "buildings." The applicant submits that the focus of the policy is on the sustainability of the land for employment use, rather than the specific infrastructure which is currently present on the land.

[81] The applicant further relies upon the amplification text within PPS4, relating to Policy PED7, at para 5.29, which is in the following terms:

> "The retention of economic development land in urban locations and elsewhere can not only make a substantial contribution to the renewal and revitalisation of towns but can also provide employment opportunities accessible to large sections of the urban population and the rural hinterland. The existence of redundant business premises and derelict industrial land can be an important resource

> for the creation of new job opportunities in areas of high unemployment, particularly small businesses, and can help reduce the demand for greenfield sites."

[82] Policy relating to loss of industrial or business use land was dealt with at some length over ten pages in the officers' report for the Planning Committee. The Council rejected the planning applicant's reliance upon sub-paragraph (d) of Policy PED7, namely that the present use of the application site in Monkstown had "a significant adverse impact on the character or amenities of the surrounding area." The application site was formerly occupied by Nortel, a telecommunications component manufacturer. The Council considered that the buildings on site were currently in a run-down state, with several of them being vacant, although part of the building complex was currently leased to a company for use as a recovery centre to be used as office space in an emergency situation. That lease was however due to expire in May 2021. Nonetheless, the existing use of the application site was considered to fall within the 'Part B: Industrial and Business Uses' category of the schedule to the Planning (Use Classes) Order (Northern Ireland) 2015. It was acknowledged that the planning application being considered was seeking to redevelop the site for use as a food store which fell within 'Part A: Shopping and Financial and Professional Services (Class A1: Shops).' This would therefore result in the loss of this area of industrial or business land, which was governed by PED7 and which would be contrary to that policy if one of the relevant exceptions was not engaged.

[83] The Council correctly identified that there were relevant policy provisions in relation to the site in the adopted and extant Belfast Urban Area Plan (in which the land was unzoned), the draft Belfast Metropolitan Area Plan, the SSPS and PPS4. In this context the Council also considered in detail the Colliers viability report which had been submitted on behalf of Asda looking at the condition of the application site.

[84] As noted above, the Council did not consider that sub-paragraph (d) of Policy PED7 was engaged. Although it considered that there was little doubt that the current state of the Nortel complex diminished the character and appearance of the local area and that the unoccupied premises on the site had "an air of dereliction", with the proposed redevelopment due to bring life back to the locality and improve the appearance of the site, officers also considered that redevelopment for more modern employment purposes could equally improve the site. It was considered that it was "debatable" whether the present building complex had a significant adverse impact on the character or amenities of the surrounding area or whether that was more a result of a lack of investment in the premises. On balance, it was concluded that it had not been shown that the present use had a significant adverse impact on the character or amenities of the surrounding area.

[85] That left Asda relying upon sub-paragraph (e) of Policy PED7, namely that the site is unsuitable for modern industrial, storage or distribution purposes. The bases

upon which Asda contended that the test in sub-paragraph (e) was met were summarised in the officers' report as follows:

> "With reference to policy test (e) which considers whether the site is unsuitable for modern industrial, storage or distribution purposes, the applicant considers this test is met for the following reasons:
>
> 1. The existing Nortel building complex is unsuitable for modern industrial/employment usage and it would be economically unviable to rehabilitate the existing complex.
>
> 2. A 'Notional Scheme' for Storage and Distribution usage drawn up by the applicant demonstrates that redevelopment of the site for industrial/employment usage would not be economically viable.
>
> 3. The submitted statistical based analysis justifying the loss of employment lands is a robust and comprehensive means of justifying the loss of existing industrial/employment land; and
>
> 4. That there are identifiable social, economic and environmental benefits associated with this development proposal."

[86] The report went on to analyse each of these reasons, noting that a considerable amount of information had been provided by Asda in support of its contentions relating to Policy PED7. Mr McLaughlin was right to draw attention to the fact that *part* of the application site (which is in use as office space) was a B1 use, in respect of which the restrictive provisions of Policy PED7 did not apply: see the portion of the policy set out at para [11] above which says, "A development proposal for the re-use or redevelopment of an existing Class B1 business use on unzoned land will be determined on its merits." The officers' report recognised this issue, and considered that there were significant benefits which would arise from the Asda proposal, but this aspect of the Council's consideration is of little assistance to the respondent more generally on this limb of Tesco's challenge, since it related to such a small part of the application site.

[87] Tesco argues that the focus of both Asda's submitted case and the Council's consideration of it was wrongly on the existing *building* complex and the state of the buildings on the site, with Asda asserting that the buildings were not suitable for retention for industrial use or for financially viable refurbishment. In its argument, the applicant in these proceedings was driven to accept, however, that the third

reason advanced by Asda did relate to employment land, rather than simply focusing on the buildings on the Nortel site; and so too did the third bullet point on page 33 of the officers' report summarising the contents of the Colliers viability report (namely that, "There have been no enquiries from the market seeking either to lease or to acquire the Nortel complex and there have been no approaches from the market for floorspace"). In Asda's submission, it is in fact only the first of the reasons set out above which relates to the condition of the extant buildings on the site.

[88] The consideration section of the officers' report which deals with this issue is argued also to have focused on the existing buildings and to have only considered one notional option for the use of the site, ignoring other possible employment uses or mixed uses. On Tesco's case, the site remains suitable for modern industrial, storage or distribution purposes, as it was previously, having regard in particular to the scale of the site and its location in close proximity to the strategic road network.

[89] In my judgment, there is considerable force in the submission made by Mr McLaughlin on behalf of the respondent that this element of the applicant's case is in fact a complaint about the application of planning policy to a development proposal (which is a matter of planning judgment within the province of the planning authority), rather than a complaint about misinterpretation of the policy. In so far as it is properly a complaint of the latter character, the applicant's case appears to me to adopt an unduly artificial and legalistic approach to the meaning and effect of the relevant policy. Put very simply, the buildings on the site are *on the site*. Any reuse or development of this site will involve either re-use of the existing buildings (to the extent to which they can be refurbished and reused) or removal of those buildings (in which case the suitability of the site for modern use has to require some assessment of the economic viability of doing so). The reference to the suitability of the site for "modern" uses of this type permits, if not inevitably requires, some consideration of these issues. I accept the submission made in respondent's skeleton argument in the following terms:

> "An assessment of the suitability of the site for modern, industrial, storage or distribution purposes cannot be divorced fully from consideration of the current structures on the site and the measures that would be required to realise any of the named possible future uses on the site. The Council's assessment of the site therefore necessarily included the current condition of the buildings and the works which may be required for the site (including the buildings) to be used for modern, industrial, storage or distribution purposes. However, it was not limited only to the assessment of the buildings."

[90] It is perhaps no surprise that the letter of 12 February 2021 sent on Tesco's behalf (referred to at paras [32]-[33] above) made the case that the *building* on the site

"appears to be of reasonable quality and of modern construction." Although that letter made the point (which was therefore before the Council) that criterion (e) had wrongly been interpreted to relate to the building rather than the site, Tesco nonetheless made its own points about the condition of the building. I reject the contention that looking at the suitability of the site taking into consideration the condition of the buildings erected on the site is to take into account an immaterial consideration. Consideration of the site includes (although was not limited to) the buildings which are on the site. The applicant's case in this regard also runs up against the averment on behalf of Mr Linden that the assessment of the site was not limited to the conditions of the buildings currently on it.

[91] The Tesco letter of 12 February also made the point that there had been, in its view, no assessment of a range of enhancement or refurbishment options which had been put forward for review and that only one notional scheme (for a large, single distribution unit) was assessed, with other options not having been put forward for review. The Council did consider at least one notional option for the re-use of the site. It also addressed its mind to the question of the marketing of the site. Although it is correct that active marketing of the site is likely to have been impacted at some point on the basis of Asda's approach, in considering whether the site remains suitable for modern industrial, storage or distribution purposes, it was plainly open to the Council to consider whether and to what extent a site which was lying vacant had been capable of being successfully marketed for such a use (particularly in circumstances where the site owner was content for some of the buildings to be used for the purpose referred to in paragraph [82] above).

[92] It is also correct that an earlier application for a food store at this site was recommended for refusal, in part for a failure to comply with policy PED7 (application LA03/2015/0243/O). That application related to a different red-line area, albeit it overlaps with the current application site. It was also for mixed use development, in contrast to the development permitted in the impugned decision. The earlier refusal of the application for outline planning permission for the site is considered in the officers' report. The earlier application which had been recommended for refusal was then subsequently withdrawn prior to consideration by the Planning Committee, so there was no formal determination in relation to it. The officers' report nonetheless notes various differences between the previous outline application and the planning application which forms the basis for these proceedings, including the fact that the present application (as an application for full planning permission) was accompanied by a range of detailed reports and also that there had been a change the in local development plan context with the quashing of the adopted BMAP. The policy protection provided to unzoned land for industrial use is less strong than that for zoned land. As a result of these various differences, the officers' report advised the committee that "the current application stands to be assessed on its individual merits."

[93] I have not been persuaded that there has been any error in the respondent's consideration of Policy PED7 which would justify this court intervening to quash the

grant of planning permission, or entitle it to do so. Whether the application site was "unsuitable" for modern industrial, storage or distribution purposes is a classic instance of a question of planning judgment. The level of inquiry into this issue which the Council pursued is also a matter for it, subject to irrationality. For the reasons given above, I do not consider that the respondent misdirected itself in relation to the meaning of the relevant policy or took an irrelevant consideration into account. It considered potential re-use of the site for the relevant purposes and reached a conclusion on suitability which it is not for this court to second guess. It was not irrational for it to determine the issue on the basis of the analysis which had been presented; nor to reach a judgment in relation to this application which may appear at odds with an earlier approach taken in respect of a different application in different circumstances.

[94] An interesting argument was raised in the course of Mr Beattie's submissions, with which I have some sympathy, namely that the policy in para 6.89 of the SPPS referred to at para [14] above is in materially different terms from the more restrictive policy in Policy PED7 of PPS4 and requires a less prescriptive approach to be taken where, as here, the application site is on unzoned land. In those circumstances, there is a good argument that para 6.89 of the SPPS is in conflict with that portion of Policy PED7 applying to unzoned land which is discussed above with the result that, pursuant to para 1.12 of the SPPS, the retained policy in PPS4 should be displaced in favour of the provisions of the SPPS. On this approach, the Council was not required to consider whether sub-paragraph (e) of Policy PED7 was engaged but, rather, was entitled to simply apply a flexible approach, asking whether the Asda proposal offered community, environmental or other benefits which were considered to outweigh the loss of land for economic development use. The third and fourth reasons advanced by Asda and quoted at para [85] above may be thought to focus on just these issues.

[95] In light of the conclusions in the officers' report that "the proposal meets with the relevant policy provisions of the SPPS and PED7 of PPS 4 and will result in the loss of only a small area of land in employment use overall" and that "the proposed redevelopment offers demonstrable benefits, including local job creation, that outweigh the loss of the existing industrial/business use of the site", I would have no hesitation in concluding that, if this was the correct analysis, the challenge based on Policy PED7 must fail for that further reason. However, I do not need to decide this issue, and decline to do so in the absence of full argument, having determined that the respondent's application of PED7 on its own terms was not unlawful. Both the applicant and respondent proceeded on the basis that PED7 did require to be applied; and there is also a respectable argument that it is not displaced by para 6.89 of the SPPS on the basis of that part of para 1.12 of the SPPS which says "… where the SPPS is… less prescriptive on a particular planning policy matter than retained policies this should not be judged to lessen the weight to be afforded to the retained policy."

Observation on timing of Tesco objections

[96] 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.

Conclusion

[97] For the reasons given above, none of the applicant's grounds of judicial review are made out, and I dismiss the application for judicial review.

[98] I will hear the parties on the issue of costs but, provisionally, consider that there is no reason to depart from the usual approach in such cases, namely that costs should follow the event as between the principal parties and that there should be no order in respect of the costs of the notice party.