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Judgment: approved by the Court for handing down (subject to editorial corrections)*	***Delivered: 12/10/18***

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

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IN THE MATTER OF AN APPLICATION BY COLUM SANDS FOR JUDICIAL REVIEW

-V-

NEWRY AND MOURNE DISTRICT COUNCIL

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Glossary

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AONB:	Area of Outstanding Natural Beauty
ASSI:	Area of Special Scientific Interest
BNMAP:	Banbridge, Newry and Mourne Area Plan
CEMP:	Construction Environmental Management Plan
CPO:	Chief Planning Officer
DAERA:	Department of Agriculture, Environment and Rural Affairs
DoE:	Department of the Environment
DRD:	Department for Regional Development
EcIA:	Economic Impact Assessment
EIA:	Environmental Impact Assessment
EPS:	European Protected Species
ES:	Environmental Statement
HBU:	Historic Buildings Unit
HED:	Historic Environment Division
HMU:	Historic Monuments Unit
HRA:	Habitats Regulations assessment
LDP:	Local Development Plan
LLPA:	Local Landscape Policy Area
LRM:	Land and Resource Management Unit
MAG:	Ministerial Advisory Group for Architecture and the Built Environment
MRL:	Milligan Reside Larkin architects
NIEA:	Northern Ireland Environment Agency
NM&DDC:	Newry, Mourne and Down District Council
PAD:	Pre-Application Discussions
PC:	Planning Committee of the Council
PPO:	Principal Planning Officer
PPS:	Planning Policy Statement
SAC:	Special Area of Conservation
SCA:	Special Countryside Area
SOD:	Scheme of Delegation
SPA:	Special Protection Area
SPPS:	Strategic Planning Policy Statement

(The terms "Case Officer" and "Principal Planning Officer" [PPO] are employed interchangeably throughout this judgment.)

MCCLOSKEY J

Introduction

[1] There are three protagonists in this judicial review challenge. The first is Colum Sands of 50 Shore Road, Rostrevor, County Down, being his place of residence which is located in proximity to the site of a contentious proposed development at 68 – 72 and 74 Shore Road ("*the site*"). The second protagonist is Newry, Mourne and Down District Council ("*the Council*") which made the decision authorising the contentious development. Thirdly, there is the developer, JC Campbell, Mr Sands' immediate neighbour and owner/operator of the existing business on the site, who has participated in these proceedings, making a material contribution through his solicitor and counsel.

[2] The site, of 1.051 hectares, is located within the Mourne Slieve Croob Area of Outstanding Natural Beauty ("AONB"). Further, it is adjacent to or borders a series of other sites which have specially conferred designations: a protected park with lodge and demesne of special historical interest, an "ASSI" wood, a designated "Protected Route" (the A2 carriageway), a designated Special Countryside Area ("SCA"), a designated Local Landscape Policy Area ("LLPA") and along the entirety, and within metres, of its southern boundary the Carlingford Lough Area of Special Scientific Interest/Special Area of Conservation ("ASSI"/"SAC"). The existing, well established uses of the site are a car showroom, extensive parking hardstanding; a substantial vehicle repair operation, a vehicle refuelling facility; a car wash installation and the developer's dwelling. The site is co-called "white" land, having no specific development designation. Opposite the site and bordering the lough lies a fuel depot.

Chronology

[3] The developer's interest in developing the site dates from 2008. Since then he and his agents have interacted with successive planning authorities, submitting a total of three planning applications. At this juncture it is convenient to interpose an agreed chronology, which is an abbreviated version of its detailed (and agreed) counterpart in the Appendix to this judgment. I have confined what follows to what I consider to be the salient dates and events in what is a rather protracted history.

(a) 26.10.09 Developer submits planning application to DoE.

(b) 29.10.09 EIA screening determination by DoE.

(c) 27.11.09 - Consultation response by environmental health officer including on contaminated land.

(d) 11.12.09 - Northern Ireland Environment Agency ("NIEA") expressed concerns, stated that a Habitats Regulation Assessment ("HRA") was required, and recommends refusal.

(e) 14.12.09 - NIEA Historic Monuments consultation response.

(f) 14.01.10 - NIEA Historic Buildings Unit consultation response.

(g) 28.04.11 – Case Officer's report recommends refusal.

(h) 28.03.12 - Roads Service: full transport assessment not required.

(i) 28.05.12 – Second planning application form submitted to DoE.

(j) 13.06.12 - Further consultation response from Roads Service.

(k) Oct. ' 12 – Tree survey and report.

(l) Oct. '13 – Adoption of the Banbridge / Newry and Mourne Area Plan

(m) 14.10.14 – NIEA considers proposed development to be contrary to Habitats Regulations in the absence of a CEMP

(n) 15.01.15 - HRA carried out by NIEA, which found that the proposed development would likely have a significant effect on European sites. Recommended conditions if approval were to be granted.

(o) 01.04.15 – Planning powers transferred to local councils.

(p) 04.04.16 – MAG response, favourable in principle.

(q) 15.06.16 – Meeting attended by Respondent, MRL, the developer and various councillors: compromise possibility canvassed.

(r) 17.08.16 – Case Officer recommended that proposal be refused.

(s) 31.08.16 – First Case Officer's report. MRL and Developer presented second application unamended to Respondent's Planning Committee (the "PC"). Adjourned to allow a site visit by Committee members.

(t) 02.11.16 – Meeting attended by Respondent's officials, MRL and developer at the site.

(u) 15.11.16 – Site visit by members of the Respondent's PC.

(v) 21.12.16 – Application form for the amended scheme for the application site.

(w) Feb. '17 – Planning Statement for proposed development prepared by MBA Planning.

(x) 05.04.17 - Historic Environment Division consultation response on listed buildings and archaeology.

(y) 26.04.17 – Second Case Officer's report; 2016 amended planning application presented to Respondent's PC; developer and MRL made presentations to PC and Applicant made objections. PC resolved to approve the proposal.

(z) 18.05.17 - Letter from the Woodland Trust pursuing buffer of native woodland planting.

(aa) 04.06.17 - Applicant issued pre-action correspondence to Respondent challenging the PC's decision to approve the proposal in the absence of an Economic Impact Assessment ("EcIA"). [*The PC later rescinded its April 2017 decision]*

(ab) Sept. '17 – EcIA provided to Respondent. The Case Officer again recommended refusal.

(ac) 04.09.17 - Respondent's Full Council resolves that the application should be reconsidered by the PC in the light of further information.

(ad) 10/11.17 – NIEA officers suggested a fresh HRA.

(ae) 08.11.17 – Third Case Officer's report. PC again resolved to approve the proposal, as revised.

(af) 19.12.17 - Note to File from Planning Officers regarding HRA.

(ag) 20.12.17 – Formal Notice of Decision granting planning permission for the proposed development.

The Impugned Decision

[4] Whereas the impugned grant of planning permission is dated 20 December 2017, the story begins in 2009. During the period October 2009 to December 2016 the developer submitted a total of three applications for permission to develop land to the Council and its predecessor planning authority. The first of these applications, received on 26 October 2009, sought permission for the following development:

> "*Sheltered housing and communal facilities in one block of 13 apartments, a 70 bed nursing home each with site works and parking and 46 apartments with site works, parking and basement parking.*"

The existing land uses at the four postal addresses in question were described in these terms:

> "*Numbers 52 and 74 are dwelling houses with associated access and garden areas. Numbers 68 to 72 is a car showroom and garage with associated hard standing and parking.*"
>
> (Hereinafter "*the first planning application*".)

At a stage when the first planning application remained undetermined the developer submitted a second application ("*the second planning application*"), on 28 May 2012. This proposed the following development:

> "*Sheltered housing and communal facilities in one block of 10 apartments, a 70 bed nursing home each with site works and parking and 41 apartments with site works, parking and basement parking.*"

Thus the proposed numbers of apartments in the two buildings in question had been reduced by three and five units respectively.

[5] On 21 December 2016, with the first and second applications undetermined, the developer submitted a third application ("*the third planning application*") embodying the following development proposal:

> "*Proposed new 70 bed nursing home together with 41 two and three bedroom apartments with associated site works, landscaping and car parking (including at grade and under croft car parking).*"

Thus the sheltered housing proposal entailing a block of ten apartments was no longer advanced.

[6] The impugned decision of the Council is contained in a formal Notice dated 20 December 2017. This refers only to the first of the three successive planning applications. It describes the development proposal in the terms of the third planning application. This is explained by the Council's stance that the second and third planning applications (merely) amended the first, neither falling to be treated as a new application. This is one of the issues which the court will have to address in determining the first ground of challenge: see [9]. The Notice expresses the

Council's approval of this proposal and the grant of planning permission subject to an extensive series of conditions.

[7] It is appropriate to highlight at this juncture three particular features of the impugned decision. First, the Case Officer recommended to the Council's Planning Committee (the "PC") that the application (as amended) be refused on the ground that he considered it to be "*contrary to*" certain planning policies. Second, the impugned decision was preceded by an earlier decision of the PC some months previously, also resolving to approve the proposed development, which was subsequently rescinded upon receipt of legal advice. Third, the PC voted unanimously against this recommendation and, in determining to approve the application subject to specified conditions, expressed a series of reasons which are recorded in the minutes of the relevant meeting (*infra*).

The Applicant's Challenge

[8] Following the usual PAP correspondence exchange, the Applicant initiated these proceedings on 15 March 2018. The initial order of the court dated 20 March 2018 gave rise to an amended Order 53 Statement, on 28 March 2018. This refined and condensed the Applicant's grounds to the following:

(i) Non-compliance with the Planning (Environmental Impact Assessment) Regulations (NI) 1999.

(ii) Non-compliance with Regulation 43 of the Conservation (Natural Habitats) Regulations (NI) 1995 ("*the Habitats Regulations*").

(iii) Breach of Section 6(4) of the Planning Act (NI) 2011 ("*the 2011 Act*").

(iv) Breach of Articles 38 and 40 of the Environment (NI) Order 2002 ("*the 2002 Order*") and Article 4 of the Nature Conservation and Amenity Lands (NI) Order 1985 ("*the 1985 Order*").

(v) Breach of Regulation 3 of the Habitats Regulations, in conjunction with Article 12 of the Habitats Directive 92/43/EEC ("*the Habitats Directive*").

(vi) Misinterpretation of specified planning policies, namely policy QD1(c) [within PPS 7- Quality Residential Environments] and Policy LC1 (an addendum to PPS 7).

(vii) Failure to provide adequate reasons.

(viii) Irrationality.

I shall consider each ground in turn.

The EIA Regulations Ground

[9] This ground has three limbs. First, it is contended that the negative EIA screening decision in October 2009, relating to the first of the three planning applications, was unlawful. Second, it is argued that the Council erred in law in treating the third planning application as a (mere) amendment of its predecessors, the effect of this error being that the third application was not subjected to EIA screening. Third, it is contended that even if the Council's amendment assessment were correct it erred in law by failing to undertake an updated EIA screening exercise required by the effluxion of time and certain other factors.

[10] I shall begin with the statutory framework. This consists of three instruments of subordinate legislation. This arises by virtue of the fact that there were two significant legislative alterations during the eight year lifetime of this planning application. The first of these three instruments is the touchstone for adjudication of the Council's "EIA conduct" (my shorthand) at the beginning of the eight year period. The third provides the bench mark for the legality of the Council's "EIA conduct" during the final phase of the assessment and decision making process viz following receipt of the third planning application. Given the presentation of the parties' respective cases, the second of the three statutory instruments has no real relevance.

[11] At the time when the first planning application was submitted, the relevant legal instrument was the Planning (Environmental Impact Assessment) Regulations (NI) 1999 (the "EIA Regulations 1999"). This contained the following material provisions.

The EIA Regulations 1999

Regulation 2 (2)

> *"(2) In these regulations –*
>
> *'the 1991 Order' means the Planning (Northern Ireland) Order 1991 and references to Articles are references to Articles of that Order;*
>
> *'the Commission' means the Planning Appeals Commission;*
>
> *'the Department' means the Department of the Environment;*
>
> *'developer' means a person carrying out or proposing to carry out development;*
>
> *'the Directive' means Council Directive 85/337/EEC as amended by Council Directive 97/11/EC;*

'documents' includes photographs, drawings, maps and plans;

'EIA application" means an application for planning permission for EIA development;

'EIA development' means development which is either –

(a) Schedule 1 development; or

(b) Schedule 2 development which is likely to have significant effects on the environment by virtue of factors such as its nature, size or location;

'environmental information' means the environmental statement, including any further information, any representations made by any body required by these regulations to be consulted and any representations duly made by any other person about the likely environmental effects of the proposed development;

'environmental statement' means a statement that includes such of the information referred to in Part I of Schedule 4 as is reasonably required to assess the environmental effects of the development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile, but which includes at least the information referred to in Part II of Schedule 4;

'exempt development' means development which comprises or forms part of a project serving national defence purposes or in respect of which the Department has made a direction under regulation 3(b);

'further information' has the meaning given to it in regulation 15(1);

'the General Development Order' means the Planning (General Development) Order (Northern Ireland) 1993;

'the land' means the land on which the development is to be carried out or, in the case of development already carried out, the land on which it has been carried out;

'Schedule 1 application' and 'Schedule 2 application' mean an application for planning permission for Schedule 1 development and Schedule 2 development;

'Schedule 1 development' means development other than exempt development of a description mentioned in Schedule 1;

'Schedule 2 development' means development other than exempt development of a description mentioned in column 1 of the table in Schedule 2 where –

(a) any part of that development is to be carried out in a sensitive area; or

(b) any applicable threshold or criterion in the corresponding part of column 2 of that table is respectively exceeded or met in relation to that development;

'selection criteria' means the criteria set out in Schedule 3;

'sensitive area' means any of the following –

(a) an area of special scientific interest, that is to say, land so declared under Article 24 of the Nature Conservation and Amenity Lands (Northern Ireland) Order 1985;

(b) an area of outstanding natural beauty, that is to say an area so designated under Article 14(1) of the Nature Conservation and Amenity Lands (Northern Ireland) Order 1985;

(c) a National Park, that is to say an area so designated under Article 12(1) of the Nature Conservation and Amenity Lands (Northern Ireland) Order 1985;

(d) a property appearing on the World Heritage List kept under Article 11(2) of the 1972 UNESCO Convention for the Protection of World Cultural and Natural Heritage;

(e) a scheduled monument within the meaning of the Historic Monuments and Archeological Objects (Northern Ireland) Order 1995;

(f) a European site within the meaning of regulation 9 of the Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995.

(3) Subject to paragraph (4), expressions used both in these regulations and in the 1991 Order have the same meaning for the purposes of these regulations as they have for the purposes of the said Order.

(4) Expressions used in these regulations and in the Directive (whether or not used in the 1991 Order) have the same meaning for the purposes of these regulations as they have for the purposes of the Directive."

Regulation 4

"4.—(1) Planning permission shall not be granted for EIA development, where the application is received on or after the date these regulations come into operation, unless the Department or the Commission, as the case may require, has first taken into consideration environmental information.

(2) The Department or the Commission, as the case may require, shall when granting planning permission in respect of an application to which paragraph (1) applies, state in the notice to the applicant of its decision, that it has taken environmental information into consideration."

Schedule 3, paragraph 1

"1. The characteristics of development must be considered having regard, in particular, to—

(a) the size of the development;
(b) the cumulation with other development;
(c) the use of natural resources;
(d) the production of waste;
(e) pollution and nuisances;
(f) the risk of accidents, having regard in particular to substances or technologies used."

[12] The EIA Regulations 1999 were superseded by the Planning (Assessment of Environmental Effects) Regulations (NI) 2015. It is agreed that, ultimately, the regime which applied to the planning application when it was finally determined was the Planning (Assessment of Environmental Effects) Regulations (NI) 2017 (the "*EIA Regulations 2017*"). This measure superseded and repealed the aforementioned 2015 instrument. The main changes effected by the EIA Regulations 2017 are found in Schedule 3 which, in common with its two predecessors, specifies a series of "selection criteria" which must be applied in making the initial determination of whether a proposed development is "EIA Development", defined as "*Schedule 2 Development likely to have significant effects on the environment by virtue of factors such as its nature, size or location*". The assessment which this definition requires is made by applying the Schedule 3 selection criteria. It is appropriate to reproduce Schedule 3 in full:

The EIA Regulations 2017

Schedule 3, paragraph 1

"1. ***Characteristics of development***

The characteristics of development shall be considered having regard, in particular, to –

(a) the size and design of the whole development;
(b) the cumulation with other existing development and/or approved development;
(c) the use of natural resources, in particular land, soil, water and biodiversity;
(d) the production of waste;
(e) pollution and nuisances;
(f) the risk of major accidents and/or disasters which are relevant to the development concerned, including those caused by climate change, in accordance with scientific knowledge;
(g) the risks to human health (for example due to water contamination or air pollution)."

Schedule 3, paragraph 2

"2. ***Location of development***

The environmental sensitivity of geographical areas likely to be affected by development shall be considered, with particular regard to –

(a) the existing and approved land use;
(b) the relative abundance, availability, quality and regenerative capacity of natural resources (including soil, land, water and biodiversity) in the area and its underground;
(c) the absorption capacity of the natural environment, paying particular attention to the following areas –

(i) wetlands, riparian areas, river mouths;
(ii) coastal zones and the marine environment;
(iii) mountain and forest areas;
(iv) nature reserves and parks;
(v) areas classified or protected under national legislation and areas designated pursuant to Council Directive 92/43/EECon the conservation of natural habitats and of wild fauna and flora(1) and Council Directive

2009/147/EC on the conservation of wild birds;

(vi) areas in which there has already been a failure to meet the environmental quality standards laid down in Union legislation and relevant to the development, or in which it is considered that there is such a failure;

(vii) densely populated areas;

(viii) landscapes and sites of historical, cultural or archaeological significance."

Schedule 3, paragraph 3

"3. ***Characteristics of the potential impact***

The likely significant effects of development on the environment shall be considered in relation to criteria set out under paragraphs 1 and 2 of this Schedule, with regard to the impact of the development on the factors specified in regulation 5(2), taking into account –

(a) the magnitude and spatial extent of the impact (for example geographical area and size of the population likely to be affected);

(b) the nature of the impact;

(c) the transboundary nature of the impact

(d) the intensity and complexity of the impact;

(e) the probability of the impact;

(f) the expected onset, duration, frequency and reversibility of the impact;

(g) the cumulation of the impact with the impact of other existing and/or approved development;

(h) the possibility of effectively reducing the impact."

[13] It is common case that the proposed development was "Schedule 2 Development" within the meaning and compass of the EIA Regulations in their successive incarnations. The effect of this was that a full blown "environmental statement" ("ES") was not automatically required. Rather it was incumbent upon the Council's predecessor, the Department of the Environment ("the Department"), to determine whether the proposal was likely to have significant effects on the environment and to do so in accordance with the relevant requirements of the 1999 Regulations. By virtue of regulation 9(4) it fell to the Department to make what is conventionally termed this "screening decision" within four weeks from the date of receipt of the planning application.

[14] The Department's formal screening decision is dated 29 October 2009, three days following receipt of the original planning application. It is recorded in an "EA Determination Sheet". This requires careful examination:

(i) First, it determines that the proposed development falls within Schedule 2 to the EIA Regulations 1999.

(ii) In response to the question "*what are the likely environmental effects of the project?*" it is stated:

> "*The site is likely to have implications in terms of visual impact, potential for increased traffic, increased noise, potential detrimental impact on flora and fauna, increased run-off.*"

(iii) Third, it is recorded that no consultations were considered necessary in order to make this assessment.

(iv) The question "*Are the environmental effects likely to be significant?*" is not specifically answered.

(v) The "recommended determination" is "*an Environmental Statement is not required for the following reasons …..*".

(vi) The reasons stated are:

> "*The application has included several reports namely Transport Assessment Report, Flora and Fauna Survey and Bat Survey. It is considered that much of what would be included in an Environmental Statement has been considered in these reports and any further information could be requested and considered through the processing of the application. Consideration has also to be given to the fact that this site is currently developed.*"

(vii) The determination further noted that the site falls within the Mourne Area of Outstanding Natural Beauty ("*AONB*").

(viii) Finally, the determination is signed by the Case Officer and two other planning officers, evidently of senior, supervisory rank: this was the joint decision of three officers.

[15] The EIA screening decision contains a discrete section dealing with the statutory selection criteria. These were all ticked with the capital letter "N", with the exception of three "N/A"'s in respect of selection criteria which are not controversial.

[16] Mr Honey developed a four pronged attack on the negative screening decision, submitting that the key question had not been answered; the reasons given were unsustainable in law; there was a failure to identify all possible environmental effects by virtue of the omission of contamination of land and surface water and the historic landscape adjoining the site; and either the Schedule 3 selection criteria were not applied or there was a failure to provide adequate reasons.

[17] The main authority on which this limb of the Applicant's challenge is founded is the decision of the House of Lords in R (Berkeley) v Secretary of State for the Environment [2001] 2 AC 603. There the Court of Appeal, having found that the Secretary of State had acted in breach of the relevant EIA Regulation by failing to carry out a screening exercise, declined to quash the impugned grant of planning permission on the ground that an environmental assessment would have made no different to the decision. One of the central themes of the decision of the House of Lords is that, in the context of this kind of EU measure, "*… the prescribed procedure has in all essentials been followed …*" (per Lord Bingham at 608d). The Secretary of State's "substantial compliance" argument was rejected. The cornerstone of the decision was that on the particular facts of that case an ES was required. All that was stated, in particular by Lord Hoffmann, in relation to inclusive, transparent and democratic procedures flows therefrom: see 615-618.

[18] Mr Honey's argument, in substance, is that the decision in Berkeley is determinative of the question of the legality of the negative screening decision and must lead ineluctably to an assessment of illegality by the court. Given that in Berkeley the central issue was the quite different one of whether a collection of sundry, disparate documentary materials could constitute a lawfully composed Environmental Statement ("ES") I reject the parallel advanced. The *ratio* of Berkeley simply does not apply to the quite different context of the negative screening decision made in the present case. I consider that in the present context, in which the focus is on whether a negative screening decision was lawfully made, the main significance of the Berkeley decision – and echoed in the CJEU jurisprudence - is its emphasis on the requirement to adhere to the prescribed statutory procedure in all essential respects.

[19] While the reasons pronounced in the negative 2009 screening decision must be scrutinised with some care, they must not be unduly parsed or salami sliced. As stated by Lindblom LJ in Mansell v Tonbridge BC [2017] EWCA Civ 1314 at [41], it is incumbent on the court to be "*vigilant against excessive legalism*" when reviewing conduct belonging to the realm of functions and duties assigned by the legislature to local councillors. Elegant and elaborate reasoning is not required: R (Bateman) v South Cambridgeshire DC [2011] EWCA 157 at [11] and [20] – [21] and R (Long) v Monmouthshire CC [2012] EWHC 3130 Admin at [10] (ii). Furthermore, "*good sense and fairness*" are to be preferred to the "*hypercritical approach the court is often urged to adopt*". I acknowledge, on the other hand, that the court must bear in mind that every EIA screening decision is rooted in solemn legal duty and is a measure having

legal effects and consequences. Thus any suggested parallel with the reports of planning officers is at best inexact.

[20] As regards the first of the asserted defects, I concur with the submission of Mr McAteer (of counsel) on behalf of the Council that the exercise of reading the impugned determination as a whole readily yields the conclusion that a "no" answer was supplied to the critical question "*Are the environmental effects likely to be significant?*". No other construction can sensibly or reasonably be applied. It may be said that the pro-forma might be better designed, by the inclusion of a specific "Yes/No" selection. It could also be said that the failure to insert the word "No" immediately following the key question was careless. However, the venial fault of carelessness does not equate with illegality.

[21] Furthermore, considered in the full context of the document and its surrounds, I consider it clear that the boxed "N" response to virtually all of the questions denotes "nothing significant" or "not significant". In contrast, the three "N/A" boxed responses clearly indicated that the specific issue, or question, simply did not arise. I can identify no incompatibility with the statement of the CJEU in Kraaijeveld (C-72/95) [1997] Env LR 265 at [31] that, in the context of a measure of EU law wide in scope and with a broad purpose, all necessary measures should be taken to ensure that projects are examined by screening to determine whether they are likely to have significant effects on the environment and, in the event of an affirmative answer to this question, are subjected to a full environmental impact assessment. I would add that this statement of principle cannot be isolated from the well - established EU law test of manifest error of assessment: see [43] *infra.*

[22] Turning to the second of the asserted defects, counsel's argument was based on that aspect of Berkeley entailing rejection of the "substantial compliance" contention. This, in my estimation, does not avail the Applicant in the different context of the present case. Unlike Berkeley, this case entails a negative screening decision and has no element of a collection of reports *et al* being said to constitute in combination an ES. Properly understood, and bearing in mind that the reasons section of the impugned determination is not to be construed via the approach which would be apt in the case of a statute or legal instrument, I consider it clear that the author was simply stating that the negative answer to the critical statutory question was substantially informed by the series of reports accompanying the planning application. This constituted nothing more, and nothing less, than taking into account information, namely the consultants' reports accompanying the planning application, which was both relevant and available. Indeed the public law misdemeanour of disregarding material considerations would have been committed if the decision making officials had done otherwise. Unlike Berkeley these reports were not a surrogate for a statutory ES. This approach I consider unimpeachable.

[23] As regards the third defect advanced, I agree with Mr McAteer that the Wednesbury principle provides the appropriate standard of review. Thus the question is not the simple factual one of whether specific possible environmental

effects were not identified. Rather the correct question is whether there was an irrational failure to identify them. Evidentially, the completed EA determination sheet indicates that consideration was given to (*inter alia*) the size of the development, the production of waste, pollution and nuisances, coastal zones, forest areas, parks and landscapes of historical significance. Each of these attracted a "N" (ie "nothing significant" *supra*) assessment. This in my judgement confounds the Applicant's specific contention that the Carlingford Lough SPA and the Rostrevor Wood SAC were not considered: they were. This discrete complaint founders accordingly.

[24] The fourth, and final, defect said to legally contaminate the negative screening decision is an asserted failure to apply the Schedule 3 selection criteria. The relevant statutory measure in this context is the EIA Regulations 1999. Schedule 3 divides the obligatory selection criteria into "characteristics of development", "location of development" and "characteristics of the potential impact". Within each of these three categories there is a series of criteria. The impugned screening decision took the form of the completed pro-forma noted in [14] – [15] above. None of the statutory criteria was omitted, all were addressed. Insofar as the Applicant contends that some were not addressed, this is confounded by the evidence. On the other hand, if the real complaint is that some were not properly addressed, this entails a Wednesbury challenge engaging the threshold of irrationality which the Applicant does not advance. Considered in its full statutory and evidential context the negative screening decision would, in my view, withstand a challenge of this *genre* in any event. Furthermore, the Applicant's alternative complaint of inadequate reasoning, blunt and unparticularised, in my view travels nowhere. The negative screening decision, construed as outlined above and considered in its full context, cannot be condemned as unintelligible or incoherent, in whole or in part. In this context I refer to, but do not repeat, the court's more detailed evaluation of the discrete reasons issue in its consideration of the discrete reasons challenge at [109]–[121] *infra*.

[25] The second limb of the Applicant's EIA ground entails the contention that the second and third planning applications should have been treated as new applications rather than mere amendments of the first application, thus triggering the requirement to make a fresh screening decision. The most extensive treatise on this issue and on which all parties relied is found in the first instance decision of British Telecom v Gloucester City Council [2002] 2 P&CR 33. The exposition of the governing principles by Elias J conveniently incorporates the most authoritative statement (of the House of Lords) on this topic, at [33]:

> *"33. It is inevitable in the process of negotiating with officers and consulting with the public, that proposals will be made or ideas emerge which will lead to a modification of the original planning application. It is plainly in the public interest that proposed developments should be improved in this way. If the law were too quick to compel applicants to go through all the formal stages of a fresh application, it*

would inevitably deter developers from being receptive to sensible proposals for change. In my view the following observations of Lord Keith in Inverclyde District Council v. Lord Advocate and Others (1981) 43 P. & C.R. 375 are relevant, albeit made in a different context:

> *'This is not a field in which technical rules would be appropriate; the planning authority must simply deal with the application procedurally in a way just to the applicant in all the circumstances. There was no good reason why amendment of the application should not be permitted at any stage if that should prove necessary in order that the whole merits of the application should be properly ascertained and decided on'."*

He continued at [34]–[35]:

> *"34. I would add that of course the interests of the public must also be fully protected when an amendment is under consideration. They were, however, fully protected in this case by the detailed consultation that took place in respect of the amendments.*
>
> *35. A highly practical approach to the question of amendments was adopted by Sir Douglas Frank, Q.C., sitting as a deputy High Court judge, in Britannia (Cheltenham) Ltd v. Secretary of State for the Environment and Tewkesbury Council . He is reported to have said this: "He further thought it was competent for the applicants and the planning authority to agree a variation of an application at any time up to the determination of the application. To take any other view would fly in the face of everyday practice and make the planning machine even more complicated than it was, for it was common practice for an application to be amended by agreement following negotiations between the applicant and the planning officer."*

And next, at [36] – [37]:

> *"36. Applying those principles, the only question is whether the decision to permit the matter to be dealt with by an amendment was one that could properly be taken. In my judgment it plainly could. Mr Scott addressed the matter and concluded that the change was not substantial*

in all the circumstances, including the fact that further consultation would take place. I have no doubt that that was a decision open to him. There were some changes of significance, but not such as to compel the conclusion that a fresh application should be submitted. Indeed, in many, and perhaps most, cases I would not have thought that it is necessary for the planning authority, or the officer to whom the power to accept amendments is delegated, formally to ask whether or not a fresh application is required. The answer will so obviously be "no" that the issue does not arise. Even where it does arise, provided there is a proper opportunity given for adequate consultation, and that any other potentially relevant matters are taken into account, such as whether the amendment requires the modification of an environmental impact statement, it is difficult to see in most cases what prejudice is suffered by permitting the change to be effected by way of amendment. No doubt there will be cases where the amendment is so far reaching that it is not sensible or appropriate simply to consult over the changes themselves. This will be the position, for example, where the original consultation exercise is, as a consequence of the amended proposals, of little or no value. The appropriate approach then is simply to start again.

37. Exceptionally, the distinction between an amended application and a fresh one will have wider significance even where there is full consultation over the amendments. It may be that legislation has been introduced which would catch a fresh application but not an amendment. (That would have been the position here if the amendments made in 2001 were substantial since a fresh application would then have fallen under the 1999 Environmental Regulations rather than the earlier 1988 Regulations.) Even then, in my judgment the question remains whether the change is so substantial that the application can only be considered fairly and appropriately, bearing in mind both the interest of the applicant and potentially interested members of the public, by requiring a fresh application to be lodged. If the planning officer considers that it can be fairly and appropriately considered by an amendment, and that is not an unreasonable conclusion in the circumstances, the court should not interfere."

The decision of Elias J was cited with approval by the Northern Ireland Court of Appeal in Re HM's Application [2007] NICA 2 at [52] – [55].

[26] The question of whether a subsequent planning application simply amends an earlier application or is to be treated as constituting a new one requires an

exercise of evaluative judgement on the part of the decision maker. The formulation of this proposition points to the Wednesbury principle as being the appropriate standard of review. Though not expressly articulated, this principle clearly permeates much of what Elias J stated in British Telecom and is implicit in the speech of Lord Keith in Inverclyde DC v Lord Advocate [1982] 43 P&CR 375, at 395 – 397. Taking into account the nature of the evolution in the development proposal via the second and third planning applications, outlined in [3] – [5] above, it is in my view impossible to say that this discrete attack on the Council and its predecessor overcomes the elevated threshold of irrationality.

[27] The foregoing conclusion is not dispositive of this issue since it is also necessary to consider the question of whether the non-classification of the second and/or third of the planning applications as new applications superseding the first inflicted any disadvantage on the public at large. I am inclined to treat this as a free standing, additional test. In HM Kerr LCJ posed the question of whether an amended planning application gave rise to some "disadvantage", suggesting implicitly that an affirmative answer would (at least normally) generate a duty to treat it as a new application, superseding its predecessor. What standard of review does the application of this test entail? This in my view is a hard edged question which does not attract the Wednesbury standard of review. Rather, in common with any issue of procedural fairness, or irregularity of process, the court answers the question for itself. I consider that the correct answer is indicated by two main facts. The first is the progressive physical reduction of the proposed development via the second and third applications. The second is that the normal neighbour notification and advertisement processes were applied to both the second and third applications. In this respect it seems to me that the parallel with [34] of British Telecom is unmistakable and Mr Honey's submissions contained no argument of substance to the contrary.

[28] I conclude, therefore, that there was no error of law in not treating either the second or the third planning application as a new application. Thus I reject the second limb of this ground of challenge.

[29] The third, and final, limb of this ground of challenge anticipates the conclusion expressed immediately above. It entails the contention that if there is no legal deficiency in the Council's treatment of the third planning application as an amended version of its two predecessors the Council was nonetheless obliged, as a matter of law, to make a fresh EIA screening decision. As the passages from the decided cases reproduced below demonstrate, this submission is based on a well established implied requirement of the EIA directive and its domestic law counterpart.

[30] The juridical truism is that a negative screening decision is not necessarily a once and for all act of indefinite legal validity. Rather, it is implicit in the EIA Directive and its domestic law counterpart that decisions of this kind may, in certain circumstances, require reconsideration and remaking. See R (CBRE) v Rugby BC

[2014] EWHC and the extensive treatment of this issue in R (Milton etc) v Ryedale DC and Anor [2015] EWHC 1948 (Admin) at [40]–[43]. In R (Barker) v Bromley LBC [2007] 1 AC 470 at [24] – [25], in the context of a structural challenge to the relevant instrument of subordinate legislation, the EIA Regulations 1988, the House of Lords stated:

> *"24. As the European court [2006] QB 764 said in para 48 of its judgment, however, the competent authority may be obliged in some circumstances to carry out an EIA even after outline planning permission has been granted. This is because it is not possible to eliminate entirely the possibility that it will not become apparent until a later stage in the multi-stage consent process that the project is likely to have significant effects on the environment. In that event account will have be taken of all the aspects of the project which have not yet been assessed or which have been identified for the first time as requiring an assessment. This may be because the need for an EIA was overlooked at the outline stage, or it may be because a detailed description of the proposal to the extent necessary to obtain approval of reserved matters has revealed that the development may have significant effects on the environment that were not anticipated earlier. In that event account will have to be taken of all the aspects of the project that are likely to have significant effects on the environment which have not yet been assessed or which have been identified for the first time as requiring an assessment. The flaw in the 1988 Regulations was that they did not provide for an EIA at the reserved matters stage in any circumstances."*

[31] What is the trigger for the legal duty to revisit an earlier negative screening decision? The decided cases, unsurprisingly, have shrunk from any attempt to provide a prescriptive answer. The common theme is the open textured test of whether a new formal screening process would generate a realistic prospect of a different outcome: see for example CBRE at [47] and Mageean v SSCLG [2011] EWCA Civ 863 at [21]. I canvassed with Mr Honey the question of whether a mere failure to actively review an earlier negative screening decision could vitiate in law a later grant of planning permission. Mr Honey was in agreement, correctly in my view, that this would not suffice. Rather, something further is required. This I consider to be implicit in the decision in Milton and other formulations of the test and, to this extent, I concur with Dove J. The factor common to Milton and the present case is the failure of the planning authority prior to and at the time of granting planning permission to actively consider whether the initial negative EIA screening assessment should be reconsidered.

[32] The next issue to be addressed is the appropriate standard of view. In a case of neglect, or disregard (i.e. the present), the answer requires some thought. I consider that two differing types of case may be hypothesised. In the first, the question of whether to make a fresh screening decision is actively considered and gives rise to a negative answer. This plainly entails the formation of an evaluative judgment on the part of the decision maker, inviting the application of the Wednesbury principle. In the second hypothetical case, of which Milton is an example, the relevant authority, having made a negative screening decision, gives no active consideration to making a fresh one subsequently. Taking into account that this failure *per se* does not, in my view, vitiate the preceding negative screening decision, or the later grant of planning permission, what is the standard of review to be applied?

[33] The answer to this question, in my estimation, is facilitated by the terms in which Mr Honey's submission was formulated. He submitted, focusing (correctly) on the period 2009 – 2017, that the Council was obliged, as a matter of law, to make a fresh screening decision by virtue of (in summary) the emergence of certain additional items of information and developments in the law during the aforementioned period. The latter comprised the new EIA Regulations (2015 and/or 2017) and the developing jurisprudence noted inexhaustively above. In my view there is no question of right answers or wrong answers in this discrete sphere. Nor does any hard edged legal test fall to be applied. On the contrary, evaluative judgement looms large, with the result that the Wednesbury principle represents the appropriate standard of review.

[34] This assessment is reinforced by the judicial decisions in which the question of reconsideration of an anterior screening decision has arisen. From these cases the test which emerges with some clarity and consistency is whether later developments, such as the presentation of a revised development proposal or intervening environmental changes (inexhaustively), give rise to a realistic prospect of a different screening outcome: see R (Friends of Basildon Golf Court) v Basildon DC [2010] EWCA Civ 1432 at [62], CBRE at [47], Mageean at [21] and Milton at [41] and [61].

[35] It follows that in a case where a planning authority gives consideration to whether a previous EIA screening decision should be substituted by a new updated one and decides not to do so, the question is whether the latter decision is vitiated by irrationality. But what is the correct question in a case – this case – where the authority undertakes no reconsideration at all? As I have already stated the mere failure to reconsider is not *per se* unlawful. In my view the question for the court in such a case is whether the authority, had it reconsidered, could rationally have decided that an updated screening decision was not required. I can identify no reason in principle why the standard of review applicable to the two situations should differ.

[36] Ultimately, even in reply, Mr Honey did not formulate any competing standard of review. Furthermore, while I have noted how this question was approached in Milton at [61], where one finds the terminology of "*the factual question*", the appropriate standard of review to be applied to a case of omission was neither examined nor identified. Approached in this way, there is no difference in principle between a conscious decision not to re-screen and a failure to make any such decision. The practical difference between the two cases is that in the former the court is likely to have the benefit of the authority's reasoning and assessment. These by definition will be absent from the latter case, with the consequence that the court's task may be somewhat more difficult. However this does not alter the doctrinal reality that for the court the exercise is one of supervisory review and not merits appeal.

[37] There are certain discernible facts and factors pulling in different directions: the lapse of nine years was on any view substantial; the Bat Survey Report suggested an updated survey, though not in unqualified terms i.e. only in certain specified circumstances; it is far from clear that possible impacts on bats fall within the realm of likely environmental effects in any event; and the development proposal had been revised and re-submitted twice, with progressively reducing size and scale. Furthermore, while Mr Honey submitted, correctly, that with the advent of the EIA Regulations 2017 the "selection criteria" to be applied at the screening stage had become more exacting (per Schedule 1, paragraphs 1–3) and intervening developments in the relevant jurisprudence had clarified the correct approach to this issue, the non-retrospective effect of the new statutory regime cannot be overlooked and no case of substance on this ground was developed. In effect this discrete submission was presented in a vacuum.

[38] Continuing this analysis, there is no evidence of any material environmental change either within the site or in the *environs* of its boundaries in any of the areas foreseeably affected by the development; the total information accumulated by November 2017 was substantially greater than that available some eight years previously; the proposal ultimately determined by the Council had been twice reduced in scale during the intervening period in a manner which entailed diminished physical construction with associated reduced human and vehicular usage and occupancy; both objectively and sensibly the latter pointed in the direction of shrinking, rather than increasing, environmental impact; the issue of possible land contamination was addressed extensively by specialised consultants; there was nothing in the responses from statutory consultees, who included agencies with environmental expertise, indicating the desirability of revisiting the 2009 screening decision; and there was nothing to suggest that the 2009 decision was suffering from some flaw or deficiency and/or had not been made in accordance with the EIA Regulations 2009. Balancing all of these considerations I conclude that if the Council had applied its mind to the question any ensuing decision not to make a fresh screening decision would have withstood an irrationality challenge.

[39] If my espousal of the Wednesbury principle in the manner expounded above as the correct standard of review applicable to this discrete limb of the Applicant's challenge is incorrect, I consider that the same conclusion is reached via a different, alternative route. This entails the assumption that the competing approach is that the application of the "realistic prospect" test poses a hard edged question for the court to answer. Pausing momentarily, this would require the court to formulate and substitute its opinion, an exercise which is normally considered illegitimate in the world of planning law and judicial review generally. However, assuming this to be the correct standard of review the same conclusion is readily made. Applying the analysis and reasoning in the immediately preceding paragraphs I consider that the test invites a negative answer.

[40] The final riposte to this discrete aspect of the Applicant's challenge involves the application of a different lens which switches the focus from the conduct of the Council's planning officers throughout the processing phase to the conduct of the actual decision makers, i.e. the six unanimous members of the Council's PC. While the "omission" analysis in [31]–[39] above holds good vis-à-vis the officials, it is necessary to consider separately the position of the PC members. The conduct of this exercise exposes the not insignificant fact that at the critical public meeting on 08 November 2017 it is recorded that the Applicant specifically made representations relating to the EIA screening decision of the Council's predecessor and its vintage. In response the Case Officer – whose recommended grounds of refusal did not incorporate this discrete objection – did not agree with the Applicant. The thrust of his response, as recorded, was that updated assessments and information were not in his opinion required.

[41] It matters not in my view whether this response was confined to the issue of the vintage of the protected species (bats) survey report or was of broader import. The important fact is that the PC members were in substance alerted to the contention that the negative EIA screening decision should be revisited by reason of its vintage and asserted inadequacies ("*confused*"). When one grafts onto this framework the history of previous deferral decisions of the PC, I consider the inference that the members considered, but were not in favour of, a further deferral for the purpose of an updated EIA screening decision is properly made. This is supported by the further inference, properly made from a consideration of all material evidence, that the PC members were anything but relaxed or indifferent to the performance of their civic duties in determining this application. While expedition, in the context of a heavily delayed final decision, was one of the factors they considered this cannot be condemned as an alien consideration: the contrary case was not advanced. The contention that the only rational course available to them was a deferral of their final decision to enable a further EIA screening assessment to be undertaken must, in my view, fail. The elevated threshold for the imposition of the extreme stigma of Wednesbury irrationality is not in my view, overcome. And see further the court's more detailed examination of the discrete Wednesbury ground of challenge at [122]–[131] *infra*.

The First Habitats Regulations Ground

[42] It is uncontroversial that the development proposal generated a requirement to carry out a Habitats Regulations assessment ("HRA"). This ground asserts non-compliance with regulation 43(1) of the Habitats) Regulations, reflecting Article 6(3) of Directive 92/43/EEC (the "Habitats Directive"), provides:

> *"43.—(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—*
> *(a)is likely to have a significant effect on a European site in Northern Ireland (either alone or in combination with other plans or projects), and*
> *(b)is not directly connected with or necessary to the management of the site,*
> *shall make an appropriate assessment of the implications for the site in view of that site's conservation objectives."*

The "European site" potentially affected by this development proposal is the Rostrevor Wood SAC.

[43] In National Trust's Application [2013] NIQB 60 Weatherup J neatly summarised the legal requirements at [41]:

> *"[41] In relation to habitats the Directive finds its domestic form in the Conservation (Natural Habitats) Regulations (Northern Ireland) 1995. The scheme provides for protected sites by designating Special Areas of Conservation, in the present case the North Antrim Special Area of Conservation and the draft Skerries and the Causeway Coast Special Area of Conservation. A determination has to be made as to whether or not the proposed development is likely to have significant effect on the Special Area of Conservation. For this purpose an 'appropriate assessment' of the implications of the proposal has to be undertaken and the developer provides such information as the Department reasonably requires. No planning permission can be granted unless the development will not adversely affect the Special Area of Conservation. The habitats scheme therefore differs in structure from the environmental impact assessment scheme."*

He continued, at [42]:

> *"[42] Further the habitats Regulations provide for protected species. There are European Protected Species of*

> *animals, such as bats and otters, and strict protection of the protected animals. Similarly, there are European Protected Species of plants, again subject to strict protection. The Department must have regard to the Directive in relation to the grant of planning permission."*

And at [58]:

> *"[58] Similarly in relation to habitats, it is for the developer to provide the information reasonably required by the Department. The Department will decide if sufficient information has been provided by the developer. The Department may have other relevant information. The Department will make an appropriate assessment of likely significant effect of the development. In each instance the Department's conclusion is subject to the Wednesbury rule."*

It is perhaps otiose to add that, agreeing with Weatherup J, I consider it clear that the Wednesbury principle provides the appropriate standard of review for this ground of challenge mainly because of the clearly identifiable factor of evaluative judgement and assessment. In the context of statutory measures of this kind, which have their genesis in EU law, the Wednesbury principle is the domestic law equivalent of the EU law standard of manifest error of assessment.

[44] In Sweetman v An Bord Pleanala (Case C-258/11) the CJEU provided the following guidance on Article 6(3) of the Habitats Directive, at [40]:

> *"Authorisation for a plan or project, as referred to in Article 6(3) of the Habitats Directive, may therefore be given only on condition that the competent authorities – once all aspects of the plan or project have been identified which can, by themselves or in combination with other plans or projects, affect the conservation objectives of the site concerned, and in the light of the best scientific knowledge in the field – are certain that the plan or project will not have lasting adverse effects on the integrity of that site. That is so where no reasonable scientific doubt remains as to the absence of such effects (see, to this effect, Case C404/09 Commission v Spain, paragraph 99, and Solvay and Others, paragraph 67)."*

[45] The Court added, at [41]:

> *"It is to be noted that, since the authority must refuse to authorise the plan or project being considered where uncertainty remains as to the absence of adverse effects on the integrity of the site, the authorisation criterion laid down in the second sentence of*

Article 6(3) of the Habitats Directive integrates the precautionary principle and makes it possible to prevent in an effective manner adverse effects on the integrity of protected sites as a result of the plans or projects being considered. A less stringent authorisation criterion than that in question could not ensure as effectively the fulfilment of the objective of site protection intended under that provision (Waddenvereniging and Vogelbeschermingsvereniging, paragraphs 57 and 58)."

The court held at [48]:

> *"It follows from the foregoing considerations that the answer to the questions referred is that Article 6(3) of the Habitats Directive must be interpreted as meaning that a plan or project not directly connected with or necessary to the management of a site will adversely affect the integrity of that site if it is liable to prevent the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority natural habitat whose conservation was the objective justifying the designation of the site in the list of SCIs, in accordance with the directive. The precautionary principle should be applied for the purposes of that appraisal."*

[46] Further guidance to a court of supervisory review is provided by the decision of the Supreme Court in R (Champion) v North Norfolk DC [2015] UKSC 52. Per Lord Carnwath JSC, at [41]:

> *"41. The process envisaged by article 6(3) should not be over-complicated. As Richards LJ points out, in cases where it is not obvious, the competent authority will consider whether the "trigger" for appropriate assessment is met (and see paras 41-43 of Waddenzee). But this informal threshold decision is not to be confused with a formal "screening opinion" in the EIA sense. The operative words are those of the Habitats Directive itself. All that is required is that, in a case where the authority has found there to be a risk of significant adverse effects to a protected site, there should be an "appropriate assessment". "Appropriate" is not a technical term. It indicates no more than that the assessment should be appropriate to the task in hand: that task being to satisfy the responsible authority that the project "will not adversely affect the integrity of the site concerned" taking account of the matters set in the article. As the court itself indicated in Waddenzee the context implies a high standard of investigation. However, as Advocate General Kokott said in Waddenzee [2005] All ER (EC) 353 , para 107:*

> *'the necessary certainty cannot be construed as meaning absolute certainty since that is almost impossible to attain. Instead, it is clear from the second sentence of article 6(3) of the Habitats Directive that the competent authorities must take a decision having assessed all the relevant information which is set out in particular in the appropriate assessment. The conclusion of this assessment is, of necessity, subjective in nature. Therefore, the competent authorities can, from their point of view, be certain that there will be no adverse effects even though, from an objective point of view, there is no absolute certainty.'*
>
> *In short, no special procedure is prescribed, and, while a high standard of investigation is demanded, the issue ultimately rests on the judgment of the authority."*

This latter statement provides still further support for applying the Wednesbury principle to this ground of challenge.

[47] In R (Lee Valley Regional Park Authority) v Epping Forest DC [2016] EWCA Civ 404, the English Court of Appeal observed at [65] that the Habitats Directive is –

> *"… intended to be an aid to effective environmental decision making, not a legal obstacle course …*
>
> *Judging whether an appropriate assessment is required in a particular case is the responsibility not of the court but of the local planning authority, subject to review by the court only on conventional Wednesbury grounds."*

Another principle which emerges from the corpus of decided cases is that a litigant who claims that there has been a failure to consider some particular risk has the onus of adducing credible evidence that there was a real, rather than a hypothetical, risk which should have been considered: R (Boggis) v Natural England [2010] PTSR 725, at [37]–[38]. To like effect, Sullivan J stated in R (Hart DC) v Secretary of State [2008] EWHC 1204 (Admin), at [81]:

> "*Merely expressing doubt without providing reasonable objective evidence for doing so is not sufficient …*"

I refer also to Smyth v Secretary of State for Communities and Local Government [2015] EWCA Civ 174 at [56]–[62] and [78]–[85], which is to similar effect and, further, reiterates with some emphasis the principle that the authority concerned –

where it rationally chooses to do so (my emphasis) – is entitled to attribute substantial weight to the views of a presumptively expert consultee.

[48] I turn to the main ingredients of the factual matrix to which the above principles are to be applied. The salient piece of evidence bearing on this discrete ground of challenge is the NIEA consultation response to DOE, dated 15 January 2015. This, *inter alia*, acknowledges receipt of the Construction Environmental Management Plan ("CEMP") dated November 2014 and continues:

> "*NIEA has undertaken a Habitats Regulations assessment ("HRA") stage 2 Appropriate Assessment on this proposal. This has concluded that there will be* ***no likely significant effects*** *on the integrity of the site, provided conditions are attached to any Decision Notice.*"
>
> [Emphasis added.]

There followed a series of recommended conditions and informatives. The recommended conditions included:

(i) A requirement that the Construction Environmental Management Plan ("CEMP") should contain all previously specified "*mitigation and avoidance measures*" and be strictly observed during the construction period.

(ii) An obligation to execute appropriate soil and ground water contamination checks at the site clearance stage, coupled with the provisions of a "*remediation verification report*", for the following expressed reason:

> "*Protection of environmental receptors to ensure no likely significant impact on Carlingford Lough SPA/ASSI or Rostrevor Wood SAC/ASSI.*"

(iii) A requirement for a piling risk assessment, for the same reason.

(iv) A duty to stop construction work in the event of identifying new contamination or risks, for the same reason.

(v) The provision of a "*verification report*" dealing with remediation and remedial objectives at a later stage, for the same reason.

The recommended informatives noted *inter alia* the statutory obligations enshrined in the Environment (NI) Order 2002.

[49] On 24 October 2017 (some two weeks in advance of the final PC meeting) a NIEA official advised the Council's Senior Planning Officer ("SPO"), in writing, that a revised HRA should be undertaken, stating further:

> "*Could you re-consult NED on this one please so that we can provide updated advice to the competent authority to undertake the HRA?*"

The SPO replied, on 30 October 2017:

> "*Thanks for your email. When we received it, we had already scheduled the application for the next Planning Committee meeting as a refusal.* ***Given that there are likely to be no changes to the HRA, we do not wish to reopen the consultation process at this stage as the decision is now in the hands of the Committee.*** *However, should you wish to provide further advice by email, it will be placed on file and actioned if there is any change in opinion.*"

The NIEA official rejoined, on 08 November 2017:

> "*A new HRA will be required if the application ends up going for approval or is appealed.*"

The final communication in this chain of exchanges, dated 16 November 2017, reproduced the text of regulation 43 and reiterated:

> "*The HRA that was previously undertaken was for a proposal which is not reflective of the current plans and should therefore be revised.*"

The Council's Planning Department's final position on this issue is recorded in a file note dated 19 December 2017:

> "*The Planning Department has considered this matter further, following the Planning Committee meeting on 08 November, in the light of the comments from NIEA. It sought a legal opinion on the way forward, as part of this consideration. The Planning Department agrees with the legal opinion provided. It considers that as there has been no enlargement of the red line of the application site and the revised proposal represents a reduced scheme, a revised HRA would not be required. Weight has also been attached to the stated view of NIEA that the revised proposal is highly likely to pass a revised HRA. In these*

> *circumstances it would be unreasonable to delay the formal decision.*"

The formal decision notice issued the following day.

[50] Consideration of one particular aspect of the decision making legal framework is necessary at this juncture. The Council operates a Scheme of Delegation ("SOD") made under section 31 of the Planning Act (NI) 2011. This provides *inter alia* that the functions delegated to the Chief Planning Officer ("CPO") include:

> "*The screening of and determination decisions on development proposals required under the Environmental Impact Assessment or Habitats Regulations.*"

The CPO, together with the Case Officer, is the author of the assessment recorded in the file note dated 19 December 2017, noted in [39] above. It is well established that a document of this nature is not to be mercilessly passed under a notional microscopic glare. See for example R (Morge) v Hampshire CC [2011] UKSC 2 at [36] and [44], per Baroness Hale JSC. The observations in those passages related to planning officers' reports to the decision making councillors and, if anything, apply *a fortiori* to a mere file note. I consider that, in the memorable words of Lord Wilberforce in Secretary of State for Education and Science v Tameside MBC [1976] 3 WLR 641, at 666, this file note is to be read and construed "*fairly and in bonam partem*".

[51] The approach and the reasoning of the Council as disclosed in the file note (see [49] above), considered in its full context, are in my view both readily ascertainable and uncomplicated. In summary, the views of NIEA were both understood and taken into account; the passage of time – some two years – was explicitly acknowledged; the amendments to the development proposal were noted and considerable weight was attributed to two particular factors, namely the reduction in size and scale of the development proposal and the NIEA view that "… *the revised proposal is highly likely to pass a revised HRA*". Furthermore the sensible precaution of seeking legal advice which, in the event, supported the decision being made had been taken. Properly and fairly construed, I consider that the reference to avoiding further delay – by undertaking a revised HRA – is not a contaminant in public law terms. Rather this was simply a comment reasonably and logically consequential upon the immediately preceding reasoning.

[52] Mr Honey's submissions did not really engage with the court's analysis in [43]–[47] above. Nor did they confront the "*credible evidence*" principle *supra*. Analysis of Mr Honey's written reply highlights the failure to identify clearly any competing standard of review. I find it impossible to identify any semblance of irrationality in the Council's approach to this issue. The decision not to require an updated HRA was clearly one lying within the band of reasonable decisions

available to the Council. Furthermore, I accept Mr McAteer's submission that the Boggis "credible evidence" test is not satisfied. Properly analysed, this ground resolves to the Applicant's assertion of a subjective, inexpert opinion.

[53] Giving effect to the foregoing analysis and reasoning I conclude that this ground of challenge has no merit.

The Second Habitats Regulations Ground

[54] This is an illegality challenge which juxtaposes Article 12 of the Habitats Directive with Regulation 3 of the Habitats Regulations. The latter provides:

> *"Implementation of Directive*
>
> ***3.*** *– (1) These Regulations make provision for the purpose of implementing, for Northern Ireland, Council Directive 92/43/EEC(**1**) on the conservation of natural habitats and of wild fauna and flora (referred to in these Regulations as "the Habitats Directive").*
>
> *(2) The Department shall exercise its functions under the enactments relating to nature conservation so as to secure compliance with the requirements of the Habitats Directive.*
>
> *Those enactments include –*
>
> - *Parts V and VI of the Nature Conservation and Amenity Lands (Northern Ireland) Order 1985(**2**);*
> - *Part II of the Wildlife (Northern Ireland) Order 1985(**3**); and these Regulations.*
>
> *(3) In relation to marine areas any competent authority having functions relevant to marine conservation shall exercise those functions so as to secure compliance with the requirements of the Habitats Directive.*
>
> *This applies, in particular, to the functions under the following enactments –*
>
> - *Foyle Fisheries Act (Northern Ireland) 1952,*
> - *Fisheries Act (Northern Ireland) 1966,*
> - *Section 2(2) of the Military Lands Act 1900 (provisions as to use of sea, tidal water or shore),*
> - *Harbours Act (Northern Ireland) 1970(7),*
> - *Articles 20 and 21 of the Nature Conservation and Amenity Lands (Northern Ireland) Order 1985 (marine nature reserves),*
> - *Water Act (Northern Ireland) 1972,*

- *Water and Sewerage Service (Northern Ireland) Order 1973,*
- *Drainage (Northern Ireland) Order 1973, and these Regulations.*

(4) Without prejudice to the preceding provisions, every competent authority in the exercise of any of its functions shall have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions."

The provision of the Habitats Directive (92/43/EEC) which the Applicant invokes is Article 12. This provides in material part:

> "*Member States shall prohibit deliberate disturbance of* [protected] *species, particularly during the period of breeding, rearing, hibernation and migration.*

In brief compass, the combined effect of these two provisions was to oblige the Council to have regard to the specific requirement of the Directive requiring prohibition of deliberate disturbance of protected species particularly during the periods of breeding, rearing, hibernation and migration.

[55] The Applicant's case is that the Council failed to comply with regulation 3, in conjunction with Article 12 of the Directive. It is argued that in a context of evidence of the presence of bats on the site, the Council did not so much as acknowledge this fact. This failure, it is submitted, cannot be redeemed by recourse to the NIEA consultation response as this was confined to the so-called "*European Sites*", did not extend to any European protected species and made no mention of bats.

[56] The Council's main affidavit acknowledges that the issue of bats on the site was exposed at the very outset of the planning process via the Bat Survey Report accompanying the first planning application in 2009. It is convenient to reproduce the remaining relevant averments:

> "*The planning authority consulted the relevant body with a specific statutory role in relation to this issue, NIEA Natural Environment Division. All relevant reports were available. NIEA ……. in its consultation response dated 11 December 2009 acknowledged receipt of the …… Flora and Fauna Survey Report. In the penultimate paragraph it confirmed, following assessment of the Flora and Fauna Survey Report, it was content that 'there is limited biodiversity interest directly on the site. We note that no bat roosts were detected during the bat survey and that bat foraging and commuting activity was concentrated in the woodland habitat to the north of the*

site.' It requested no further information. In a final consultation response dated 15 January 2015 it confirmed no objections and suggested appropriate planning conditions to be attached to the formal approval notice."

The relevant passage in the Bat Survey Report of 2009 states:

*"It has been confirmed that the existing buildings on the site present **potential** opportunities as a bat roost, in addition suitable foraging habitat exists, notably in adjacent areas ….*

It should be noted that bats are both cryptic and highly mobile and the presence of absence of bats from a potential roost site does not guarantee that bats will be absent from the site in the future. Bat roosts deep within a structure may be completely undetectable from the outside if the bats do not emerge on the evening the survey is carried out. It is therefore good practice to resurvey the site immediately prior to development works being carried out if demolition works or other works likely to affect bats are envisaged ….

A potential bat roost was identified at the time of survey, within the derelict residence to the west of the site. No bats were observed leaving the building however and it was in reasonable repair …

Several mature trees line the outer perimeter of the site. Within the semi-natural broad leafed woodland habitat, potential also exists to be used as transient roosts. If works are envisaged which will result in the damage to or the removal of these trees, they should be resurveyed immediately prior to these works and European Protected Species Licences sought if required. If the trees are to be left intact or will be undisturbed by survey works, these surveys are superfluous. ….

The majority of habitats on site are unsuitable for use by bats. The site is brightly lit and well maintained, detracting from its suitability for bats. The derelict house to the west of the site appears to be the most suitable as it is less well maintained and is not lit at night. The site is surrounded by mature woodland which provides ideal habitats for bats."

The report recommended that a further survey be undertaken if the demolition of the buildings on site was to be executed between the months of August and October. The report makes a clearly discernible distinction between on-site (or "resident") bats and foraging bats, identifying the differing considerations pertaining to these two groups.

[57] The Case Officer's affidavit (at [56] above) summarises the consideration given on behalf of the Council to the issues thrown up by this ground of challenge. Moving beyond sworn averments, the evidential matrix includes the following:

(i) The Flora and Fauna Survey Report and the Bat Survey Report accompanying the first form P1.

(ii) The NIEA consultation response of 11 December 2009 which stated *inter alia*:

> "*Following assessment of the Flora and Fauna Survey Report we are content that there is limited biodiversity interests directly on the site. We note that no bat roosts were detected during the bat survey and that bat foraging and commuting activity was concentrated in the woodland habitat to the north of the site.*"

Notably, in this response NIEA specifically highlighted the lack of specified information for the purposes of Article 6 of the Habitats Regulations: this did not apply to either of the aforementioned reports.

(iii) The most up to date NIEA contribution was that of 15 January 2015: this has been noted in [3] and [56] above.

(iv) The unequivocal acknowledgement in the third Form P1 (reiterating previous acknowledgement) of the bats issue.

(v) The records of the PC meeting of 08 November 2017 confirm that the issue of protected species and bats specifically was ventilated during the presentations and debate before the decision makers.

[58] The court's search for authoritative guidance leads to one of the few reported cases in this sphere, R (Morge) v Hampshire CC [2011] 1 WLR 268, which contains the following statements of note:

> "*29. In my judgement this goes too far and puts too great a responsibility on the planning committee whose only obligation under regulation 3(4) is, I repeat, to "have*

regard to the requirements of the Habitats Directive so far as [those requirements] may be affected by" their decision whether or not to grant a planning permission. Obviously, in the days when the implementation of such a permission provided a defence to the regulation 39 offence of acting contrary to article 12(1) , the planning committee, before granting a permission, would have needed to be satisfied either that the development in question would not offend article 12(1) or that a derogation from that article would be permitted and a licence granted. Now, however, I cannot see why a planning permission (and, indeed, a full planning permission save only as to conditions necessary to secure any required mitigating measures) should not ordinarily be granted save only in cases where the planning committee conclude that the proposed development would both (a) be likely to offend article 12(1) and (b) be unlikely to be licensed pursuant to the derogation powers. After all, even if development permission is given, the criminal sanction against any offending (and unlicensed) activity remains available and it seems to me wrong in principle, when Natural England have the primary responsibility for ensuring compliance with the Directive, also to place a substantial burden on the planning authority in effect to police the fulfilment of Natural England's own duty.

30. Where, as here, Natural England express themselves satisfied that a proposed development will be compliant with article 12 , the planning authority are to my mind entitled to presume that that is so. The planning committee here plainly had regard to the requirements of the Directive: they knew from the officers' decision report and addendum report (see para 8 above and the first paragraph of the addendum report as set out in para 72 of Lord Kerr of Tonaghmore JSC's judgment) not only that Natural England had withdrawn their objection to the scheme but also that necessary measures had been planned to compensate for the loss of foraging. For my part I am less troubled than Ward LJ appears to have been (see his para 73 set out at para 16 above) about the UBS's conclusions that 'no significant *impacts to bats are anticipated' – and, indeed, about the decision report's reference to "measures to ensure there is no significant adverse impact to [protected bats]". It is certainly not to be supposed that Natural England misunderstood the proper ambit of article 12(1)(b) nor does it seem to me that the planning committee were materially misled or left insufficiently informed about this matter. Having regard to the considerations outlined in para 29 above, I cannot agree*

with Lord Kerr JSC's view, implicit in paras 75 and 76 of his judgment, that regulation 3(4) required the committee members to consider and decide for themselves whether the development would or would not occasion such disturbance to bats as in fact and in law to constitute a violation of article 12(1)(b) of the Directive.

36. Some may think this an unusual and even unsatisfactory situation, but it comes about because in this country planning decisions are taken by democratically elected councillors, responsible to, and sensitive to the concerns of, their local communities. As Lord Hoffmann put it in R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295, para 69: 'In a democratic country, decisions about what the general interest requires are made by democratically elected bodies or persons accountable to them.' Democratically elected bodies go about their decision-making in a different way from courts. They have professional advisers who investigate and report to them. Those reports obviously have to be clear and full enough to enable them to understand the issues and make up their minds within the limits that the law allows them. But the courts should not impose too demanding a standard upon such reports, for otherwise their whole purpose will be defeated: the councillors either will not read them or will not have a clear enough grasp of the issues to make a decision for themselves. It is their job, and not the court's, to weigh the competing public and private interests involved.

…

44. It is quite clear from all of this that separate consideration was being given both to the effect upon European protected species and to the effect upon the protected sites, that both were being considered under the Habitats Regulations, and that the applicable policy on protected species, which also refers to the Habitats Regulations 1994, was being applied. It is true that the report does not expressly mention either regulation 3(4) or article 12 of the Directive. In my view, it is quite unnecessary for a report such as this to spell out in detail every single one of the legal obligations which are involved in any decision. Councillors were being advised to consider whether the proposed development would have an adverse effect on species or habitats protected by the 1994 Regulations. That in my view is enough to demonstrate

> *that they "had regard" to the requirements of the Habitats Directive for the purpose of regulation 3(4). That is all they have to do in this context, whereas regulation 48(1)(a) imposes a more specific obligation to make an "appropriate assessment" if a proposal is likely to have a significant effect upon a European site. It is not surprising, therefore, that the report deals more specifically with that obligation than it does with the more general obligation in regulation 3(4)."*

[59] Being a decision of the United Kingdom Supreme Court Morge is binding on this court. Placing due emphasis on the "*have regard to*" phraseology of regulation 3 of the Habitats Regulations, the Supreme Court has identified this as one of the less onerous, or exacting, duties enshrined in that regime. The resolution of this ground of challenge requires of the court an assessment of all of the evidence bearing thereon. I have outlined above the main elements of this evidence. It is trite that it must be considered as whole, applying the legal principles which I have identified. Approached in this way I consider that the evidence establishes clearly that the "*have regard to*" duty was discharged by the Council. This ground of challenge fails accordingly.

The Fourth Ground: Section 6(4) of the Planning Act (NI) 2011

[60] The thrust of this ground is that the impugned decision is in breach of section 6(4) of the Planning Act (NI) 2011 (the "*2011 Act*") which provides:

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

The focus of this ground of challenge is three discrete policies contained within the Newry and Mourne Local Development Plan (the "LDP"), each of which I shall consider *infra*. I begin with the uncontroversial statement that, in effect, section 6(4) establishes a statutory presumption in favour of the development plan (the "LDP"): see City of Edinburgh Council v Secretary of State for Scotland [1997] 1 WLR 1447 at 1458 – 1459.

[61] Mr Honey drew attention to the following statement of the English Court of Appeal in BDW Trading v Secretary of State for Communities and Local Government [2016] EWCA Civ 493 at [21] and [23]:

> *"21 First, the section 38(6) duty is a duty to make a decision (or "determination") by giving the development plan priority, but weighing all other material considerations in the balance to establish whether the*

decision should be made, as the statute presumes, in accordance with the plan (see Lord Clyde's speech in the City of Edinburgh Council case [1997] 1 WLR 1447, 1458–1459. Secondly, therefore, the decision-maker must understand the relevant provisions of the plan, recognising that they may sometimes pull in different directions: see Lord Clyde's speech in the City of Edinburgh Council *case, pp 1459D–F, the judgments of Lord Reed JSC and Lord Hope of Craighead DPSC in Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening) [2012] PTSR 983, respectively at paras 19 and 34, and the judgment of Sullivan J in* R v Rochdale Metropolitan Borough Council, Ex p Milne (No 2) (2000) 81 P & CR 27*, paras 48–50. Thirdly, section 38(6) does not prescribe the way in which the decision-maker is to go about discharging the duty. It does not specify, for all cases, a two-stage exercise, in which, first, the decision-maker decides "whether the development plan should or should not be accorded its statutory priority", and secondly, "if he decides that it should not be given that priority it should be put aside and attention concentrated upon the material factors which remain for consideration": see Lord Clyde's speech in the* City of Edinburgh Council *case, at p 1459–1460. Fourthly, however, the duty can only be properly performed if the decision-maker, in the course of making the decision, establishes whether or not the proposal accords with the development plan as a whole: see R (Hampton Bishop Parish Council) v Herefordshire Council [2015] 1 WLR 2367, para 28, per Richards LJ and Tiviot Way Investments Ltd v Secretary of State for Communities and Local Government [2016] JPL 171, paras 27–36, per Patterson J. And fifthly, the duty under section 38(6) is not displaced or modified by government policy in the NPPF. Such policy does not have the force of statute. Nor does it have the same status in the statutory scheme as the development plan. Under section 70(2) of the 1990 Act and section 38(6) of the 2004 Act, its relevance to a planning decision is as one of the other material considerations to be weighed in the balance: see the* Hampton Bishop Parish Council *case, para 30, per Richards LJ.*

23. On the same theme Richards LJ said in the Hampton Bishop Parish Council case [2015] 1 WLR 2369*:*

> *'28. … It is up to the decision-maker how precisely to go about the task, but if he is to act within his powers and in particular to comply with the statutory duty to make the determination in accordance with the development plan unless material considerations indicate otherwise, he must as a general rule decide at some stage in the exercise whether the proposed development does or does not accord with the development plan …'*
>
> *Richards LJ added, at para 33, that if the decision-maker does not do that he will not be in a position to give the development plan what Lord Clyde described in the* City of Edinburgh Council *case as its "statutory priority". He went on (in the same paragraph) to recall Lord Reed JSC's observation in the Tesco Stores Ltd case [2012] PTSR 983, para 22 that "it is necessary to understand the nature and extent of the departure from the plan … in order to consider on a proper basis whether such a departure is justified by other material consideration"."*

This decision concerned the equivalent English statutory provision, which is section 38(6) of the Planning and Compulsory Purchase Act 2004. Mr Honey also invokes the decision in R (St James' Homes Limited) v Secretary of State for the Environment [2001] JPL 1110, which held that this duty obliges the decision maker to consider the relevant development plan policies irrespective of whether they have been brought to its attention.

[62] Section 6(4) of the 2011 Act does not impose the relatively gentle duty of merely having regard to the LDP. On the contrary, it obliges the deciding authority – in this case the Council – to determine planning applications in accordance with the LDP unless it considers that material considerations indicate otherwise. In this way LDPs are given primacy and as noted in [60] above attract a statutory presumption in their favour. I consider that a challenge based on section 6(4) of the 2011 Act obliges the court to both identify and construe the relevant provisions within the LDP. The identification issue is not contentious in the present case: I have noted above the LDP policies which this ground of challenge engages. The construction issue attracts the well-established principle that the exercise of construing planning policies is a question of law for the court.

[63] Mr Honey highlighted particularly the absence of any mention of the section 6(4) duty in the Case Officer's reports to the Council's PC. Similarly, the reports fail to indicate that the site is adjacent to land designated in the development plan as a local landscape policy area ("LLPA") and a special countryside area ("SCA"). Nor is it indicated that the A2 road is a protected route. This ground focuses on three of the discrete policies enshrined in the LDP, namely Policy CDN3, Policy BH6 and Policy AMP3 (within PPS3).

[64] The riposte of Mr McAteer is founded on the Council's affidavit evidence, considered in conjunction with the various reports and their addenda provided to the PC. The Case Officer's main report under the umbrella heading "Planning Policy Material Considerations" identified, *inter alia*, the Banbridge, Newry and Mourne Area Plan 2015 (the "*Area Plan*"). This is accompanied by the following text:

> "*The site is within the settlement limited of the village of Rostrevor as designated in the statutory area plan. It is on a white land site, not zoned for any specific purpose. Applications within designated settlement limits must comply with relevant regional planning policy. In summary the application proposes a high density development consisting of a total of 51 apartments and a 70 bed nursing home on a site consisting of 1273 hectares. The Planning Department has carefully assessed the proposal in the context of the planning policy context above and considers that it is contrary to a number of relevant planning policies.*"

[65] The other main elements of the evidence bearing on this ground are the following:

(a) In mid-2017 there was an exchange of correspondence between the Woodland Trust and the Council's PPC relating to the Trust's representation that there should be a barrier of native tree species between the edge of the Rostrevor SAC wood and the boundary of the proposed development.

(b) The PPO's letter in reply.

(c) The incorporation in the Case Officer's report to the PC of 5 recommended refusal reasons, one of which was that the proposed development was contrary to Policy NH6 (being the case officer's stated position as of 17 August 2016).

(d) The reiteration of this advice in the Case Officer's second report to the PC in April 2017 and in his later third, and final, report.

(e) The consultation response to the Department for Communities, Historical Environmental Division ("HED") dated 05 April 2017, which was that in the consultee's opinion the listed building concerned would be unaffected by the proposed development by reason of distance and that having "… *reviewed the amended proposal in the context of SPPS and PPS6 archaeological requirements* [HED was] *content that the current proposal meets policy requirements ….*"

(f) The communication of the immediately preceding HED advice to the PC in the Case Officer's second report.

(g) The advice to the PC in the Case Officer's first report that Transport NI had confirmed that it had no objections to the proposed access arrangements and road layout, in the specific context of PPS3 (which embraces Policy AMP3).

(h) The evidence relating to the visual and other features of the presentation to the PPS at its final meeting, when the impugned decision was made.

(i) The final, considered position of DoE Roads Service, communicated to the Council's predecessor, that a transport assessment was not required.

[66] Turning to the constituent elements of this ground, the first of the LDP policies which features is Policy CVN3. This policy is material because Rostrevor is a designated "Local Landscape Policy Area" ("LLPA"). It states, in material part:

> "*Within designated LLPAs, planning permission will not be granted to development proposals that would be liable to adversely affect their intrinsic environmental value and character … **where proposals are within and/or adjoining a designated LLPA, a landscape buffer may be required to protect the environmental quality of the LLPA.***"

I have highlighted the discrete passage on which the Applicant's challenge is founded. I consider that this discrete component of the Applicant's challenge is devoid of merit and substance for the reasons which follow.

[67] The only "landscape buffer" which arose for consideration in the processing of this planning application was that proposed by the Woodland Trust, noted in [65] above. As the map specially prepared at the request of the court demonstrates, the woodland buffer proposed by the Trust would engulf vast swathes of the site to the extent of rendering the envisaged development impossible. The Trust's suggestion

may be viewed as absurd or, alternatively, tongue in cheek. It was not replicated, to any extent, by any of the statutory consultees, in particular those possessing environmental specialism. The PPO's letter, also noted in [65] above, demonstrates clearly full engagement on the part of the Council with this suggestion. In a demonstrably informed and reasoned response, he highlighted in particular the planning conditions recommended by NIEA, the site circumstances and the current site uses. In the terms of the policy, this constituted a reasoned case for not requiring a "landscape buffer". This provides the first riposte to the Applicant's contention.

[68] Second, properly exposed, the Applicant's contention is that the proposed development could be lawfully executed only if it entails a "landscape buffer", whether volunteered or imposed by condition. This flies in the face of the terms of the policy which, in classic open textured language, simply suggests that this measure "*may be required*". The impugned grant of planning permission does not stipulate this measure. I find it impossible to conclude that by reason of its absence the planning permission is not "*in accordance with*" the LDP. Furthermore, I consider that the absence of any mention of the section 6(4) duty in the Case Officer's reports to the PC does not indicate a different conclusion. The question for the court is whether a breach of section 6(4) has been demonstrated; the question is not whether PC members were mindful of the statutory words. In a brusque rejection of a comparable argument in Morge (*supra*), Baroness Hale stated at [44]:

> "*In my view, it is quite unnecessary for a report such as this to spell out in detail every single one of the legal obligations which are involved in any decision.*"

[69] Third, the submissions of Mr Honey contain an unmistakable emphasis on what was not taken into account (it is contended) by the Council's PC. This emphasis, in common with counsel's observation that section 6(4) was not mentioned in any of the Case Officer's reports, suffers from the fallacy of ignoring and/or distorting the plain statutory language, which I have highlighted in [61] above. I consider that any challenge based on section 6(4) involves the court in an audit of legality. I repeat: the question is not whether specified LDP policies were identified and taken into account. Rather, section 6(4) requires the court to address, and answer, the pure question of law of whether the impugned grant of planning permission is in accordance with the LDP. This is a classic "terminus" question, an objective and dispassionate exercise, to be contrasted with one of "process". Debates about what was – and what was not – considered by the decision maker, focusing as they do on the surrounding and underlying evidential matrix, seem to me remote from the clinical task of examining the impugned decision through the "*in accordance with*" statutory prism.

[70] Giving effect to the reasoning in [67] – [69] above, this discrete aspect of this ground of challenge must fail.

[71] The second of the LDP policies featuring in this ground of challenge is Policy BH6. Its subject matter is "The Protection of Parks, Gardens and Demesnes of Special Historic Interest". The policy states, in material part:

> "*The Department will not normally permit development which would lead to the loss of, or cause harm to, principal components or settings of parks, gardens and demesnes of special historic interest. Where planning permission is granted this will normally be conditional on the recording of any features of interest which will be lost before development commences …*
>
> *In addressing proposals for development in or adjacent to parks, gardens and demesnes of special historic interest, particular attention will be paid to the impact of the proposal on:*
>
> - *The archaeological, historical or botanical interest of the site;*
> - *The site's original design concept, overall quality and setting;*
> - *Trees and woodland and the site's contribution to local landscape character;*
> - *Any buildings or features of character within the site including boundary walls, pathways, garden terraces or water features; and*
> - *Planned historic views of or from the site or buildings within it.*"

The relevance of this policy is that the site of the proposed development borders Rostrevor SAC wood.

[72] I turn to examine particular elements of the factual framework. In a file note compiled following receipt of the first planning application the Council's predecessor displayed clear alertness to the "*historic landscape*" bordering the site and the corresponding engagement of Policy BH6. The importance of consulting the Historic Buildings Unit ("HBU") of NIEA was emphasised. Having noted other historic features and designations of the surroundings, the views of the Historic Monuments Unit ("HMU") of NIEA regarding design of the buildings and retention of a chimney of historic value were noted.

[73] At a later stage of the processing of this development proposal, the appropriate agency, by now the Historic Environment Division ("HED") of the Department for Communities was consulted, following receipt of the third planning application. The consultation request invited comment on "… *impact of proposal on HB/16/06/0072 and historic park and demesne of Kilbroney Forest Park*". The HED response stated in material part:

> *"HED Historic Monuments has now reviewed the amended proposal in the context of SPPS and PPS6 Archaeological Policy requirements. We are content that the current proposal meets policy requirements and welcome the retention of the brick chimney within the development."*

In the first of his three reports to the PC, the Case Officer recommended that the application be refused for a series of reasons. One of these was that the proposed development was considered to contravene Policy BH6 as it would be –

> *".. detrimental to the overall quality and setting of this historic landscape and the adjacent Registered Demesne by virtue of the scale, density and form of the proposed development."*

In the first of his two addendum reports the Case Officer withdrew this proposed refusal reason:

> *"In terms of the impact on the setting of the adjacent parks, gardens and demesne of special historic interest, 'The Lodge', the relevant statutory authority, Historic Environment Division, has now confirmed no objection in relation to this issue."*

The argument developed on behalf of the Applicant was that this was a misstatement of the HED consultation response set forth in [73] above.

[74] I reject this argument. It invites the court to supply a technical and strangulated meaning to the words "*SPPS and PPS6 Archaeological Policy requirements*". Policy BH6 is a component of a policy entitled "Planning, Archaeology and the Built Heritage". Similarly, the discrete section of the SPPS addressing "Historic Parks, Gardens and Demesnes" belongs to a free standing chapter entitled "Archaeology and Built Heritage". Both the individual policies concerned and the terms of the consultation response are to be understood in their full policy context. Applying this prism and avoiding the error of excessively technical and legalistic interpretation of the HED consultation response, I identify no disharmony between such response and the corresponding passage in the Case Officer's addendum report (*supra*).

[75] Moreover, I consider that, properly analysed, Mr Honey's submission in effect invites the court to conclude that this specialised consultee misunderstood the terms of the consultation request. I can identify no evidential basis for doing so. Even if this assessment is wrong, I consider that the Applicant has failed to demonstrate that the proposed development is not in accordance with Policy BH6. There is no evidence that any "*features of interest … will be lost before development commences*". Nor is there any evidence that the appropriate level of attention was not paid to *inter alia* the historic landscape adjoining the site. In reality, this discrete ground resolves to bare assertion on the part of the Applicant. The above assessment is reinforced by the terms of Mr Honey's principal submission and reply, neither of which at any stage grappled with the statutory requirement of "in accordance with". Rather, counsel developed the argument that the Case Officer and/or the PC were guilty of asserted failures of consideration. This side steps the statutory requirement and is simply not to the point.

[76] The third of the LDP policies featuring in this ground of challenge is Policy AMP3 a component of PPS3 which is incorporated by reference in the LDP. The subject matter of this policy is "Access to Protected Routes". It states, in material part:

> "*The Department will restrict the number of new accesses and control the level of use of existing accesses onto Protected Routes as follows ..*
>
> *Planning permission will only be granted for a development proposal involving direct access, or the intensification of the use of an existing access …*
>
> *(b) In the case of proposals involving residential development* [where] *it is demonstrated to the Department's satisfaction that the nature and level of access onto the Protected Route will significantly assist in the creation of a quality environment without compromising standards of road safety or resulting in an unacceptable proliferation of access points.*"

This policy is relevant because the front of the site borders the A2 which is a designated "Protected Route".

[77] The Applicant's attack under this discrete heading focusses on the policy phraseology "*new accesses ….* [and] *…….. the intensification of the use of an existing access …*". The photographic evidence demonstrates clearly that the present access from the A2 road to the existing car showroom and its adjoining open areas is via a so-called "*dropped kerb*", situated at the frontage and of considerable length (or breadth, depending on one's perspective). The various drawings also show clearly the proposed single access into the envisaged development, which will be of very

considerably narrower dimensions than the extant dropped kerb layout. All of this is clearly identifiable in the various visual depictions and plans accompanying the briefing note specifically prepared by the developer's agents for the PC.

[78] In the Case Officer's first report to the PC it was stated *inter alia*:

> "*Transport NI has confirmed no objections to the proposed access arrangements and road layout on the basis that the layout will remain unadopted.*"

This was stated in the specific context of considering PPS3 ("Access ….. etc"), which enshrines Policy AMP3. Elaborating in his affidavit the Case Officer details the proceedings of the PC, which included a power point presentation –

> "*… which contained slides outlining details of the proposal description, application site boundary, location of proposed development in the contexts of the village of Rostrevor, landscape context, contextual photographs and a map extract from the statutory plan for the area … showing planning policy context for the application site …*
>
> *A narrative was given to the Members introducing the application. Members were taken through the presentation, explaining and outlining what the proposal is for and where this is located. Members were then taken through the photographs …*"

This presentation was made on 31 August 2016 and resulted in a PC decision to defer its determination *inter alia* to facilitate a visit to the site. This materialised some two months later, with ten members in attendance. The evidence includes the various visual aids described in the Case Officer's affidavit. I have also considered the evidence confirming that DRD Roads Service, in its consultation response, intimated that it had no objection to the proposed development subject to the inclusion of specified conditions.

[79] Also included in the evidence is a traffic impact report prepared by the developer's consultants at the stage when the only development proposal on the table was that contained in the first planning application. This concluded that there would be a notable reduction in vehicular movements into and from the site in the event of the development proceeding. It is clear by inference that this report was considered by DRD Roads Service and informed the favourable consultation response of that agency. I have noted the suggestion in one part of the evidence that the development would generate <u>increased</u> traffic. However, as Mr Beattie QC highlighted, this is clearly confounded by the expert traffic impact report furnished by the developer and the DRD response.

[80] Insofar as elaboration of the clearly expressed terms of the traffic impact report is required, this is provided in the affidavit of its civil engineer/traffic consultant author to which Mr Beattie QC made particular reference in his submissions. This evidence also discloses the close interaction between the author and DRD Roads Service during the relevant period. One of the outcomes was an acceptance by Roads Service that a full transport assessment would not be necessary; nor would a right turn lane be required. The totality of the evidence demonstrates clearly that during the careful consideration given to roads, traffic and access issues, the possibility of a breach of Policy AMP3 was at no time canvased from any quarter.

[81] None of the Case Officer's reports to the PC recommended refusal of the planning application on the ground of non-conformity with Policy AMP3. As the foregoing summary of the evidence bearing on this issue readily shows, the officer was unassailably correct in this respect. Whether viewed through the review standard of irrationality or a less exacting public law threshold and bearing in mind the terminology of the policy an irresistible conclusion emerges: the proposed development entails, in simple terms, a substantial modification and reduction of an existing access to the site, together with a predicted decrease in traffic density. The Applicant has failed to demonstrate that the impugned decision is not in accordance with this discrete policy within the LDP. It follows that I reject this ground of challenge.

The' Other Statutory Requirements' Ground

[82] This ground is based on the various designations applicable to the site and its surrounds, noted at the outset of this judgment. The Applicant relies on three statutory provisions. First, Article 38 of the Environment (NI) Order 2002 (the "*2002 Order*"). This provides:

> *"38. - (1) A public body shall have the duty set out in paragraph (2) in exercising its functions so far as their exercise is likely to affect the flora, fauna or geological, physiographical or other features by reason of which an ASSI is of special scientific interest.*
>
> *(2) The duty is to take reasonable steps, consistent with the proper exercise of the body's functions, to further the conservation and enhancement of the flora, fauna or geological, physiographical or other features by reason of which the ASSI is of special scientific interest.*
>
> *(3) In this Part "public body" means-*
>
> *(a) a Northern Ireland department;*
> *(b) a department of the Government of the United Kingdom;*

(c) a district council;
(d) a statutory undertaker (within the meaning of the Planning Act (Northern Ireland) 2011); or
(e) any other body established or constituted under a statutory provision."

Second, Article 40 of the 2002 Order:

"Public bodies: duties in relation to authorising operations

40. - (1) This Article applies where the permission of a public body is needed before operations may be carried out.

(2) Before permitting the carrying out of operations likely to damage any of the flora, fauna or geological, physiographical or other features by reason of which an ASSI is of special scientific interest, a public body shall give notice of the proposed operations to the Department.

(3) Paragraph (2) applies even if the operations would not take place on land included in an ASSI.

(4) The public body shall wait until the expiry of the period of 28 days beginning with the date of the notice under paragraph (2) before deciding whether to give its permission, unless the Department has notified the body that it need not wait until then

(5) The body shall take any advice received from the Department into account-

(a) in deciding whether or not to permit the proposed operations, and

(b) if it does decide to do so, in deciding what (if any) conditions are to be attached to the permission.

(6) If the Department advises against permitting the operations, or advises that certain conditions should be attached, but the public body does not follow that advice, the body-

(a) shall give notice of the permission, and of its terms, to the Department, the notice to include a statement of how (if at all) the body has taken account of the Department's advice,

(aa) shall, in granting permission, impose conditions sufficient to ensure that the requirements set out in paragraph (6A) are complied with; and

(b) shall not grant a permission which would allow the operations to start before the end of the period of 21 days beginning with the date of that notice.

(6A) The requirements are –

(a) that the operations are carried out in such a way as to give rise to as little damage as is reasonably practicable in all the circumstances to the flora, fauna or geological, physiographical or other features by reason of which the ASSI is of special scientific interest; and

(b) that the site will be restored to its former condition, so far as is reasonably practicable, if any such damage does occur.

(7) In this Article "permission", in relation to any operations, includes authorisation, consent, and any other type of permission.

(8) This Article does not apply where the public body whose permission is needed is the Department."

Third, Article 4 of the Nature, Conservation and Amenity Lands (NI) Order 1985:

"4. - (1) In exercising functions relating to land under any statutory provision, public bodies shall have regard to the need to conserve the natural beauty and amenity of the countryside and the need to protect (so far as reasonably practicable) flora, fauna and geological and physiographical features of the countryside from any harmful effects which might result from the exercise of such functions.

(2) In paragraph (1) the expression "public bodies" includes government departments, district councils and statutory undertakers, and any trustees, commissioners, board or other persons who, as a public body and not for their own profit, act under any statutory provision for the improvement of any place or the production or supply of any commodity or service."

It is not in dispute that the development proposal engaged each of these statutory provisions. In very brief compass, they enshrine a duty to take reasonable steps of a certain kind, a duty of notification to DAERA followed by (where appropriate) a duty to take any ensuing DAERA advice into account and a duty to have regard to a specified conservation objective. The Applicant's case is that the impugned grant of planning permission is non-compliant with each of these three statutory requirements.

[83] The evidence bearing on this ground of challenge includes that concerning the bat survey and the woodland dimension: I have outlined this in [37] and [56] - [57] above. In short, the processing of the successive planning applications involved consideration of *inter alia* the Flora and Fauna Report and the Bat Survey Report. The Case Officer's affidavits include the following material averments:

> "[DAERA/NIEA] *was a statutory consultee in this application. It was given notice of and consulted in relation to the proposed development and its consultation response was taken into account. I do not believe that it was necessary to issue a separate formal notice explicitly under Article 40 undertaking the same exercise ….*
>
> [An official of NIEA] *confirmed to me that the Department was satisfied that the requirements of the 2002 Order had been fulfilled through the formal consultation process and that a further formal notification to the Department would have resulted in an unnecessary doubling of work … the site falls outside the boundary of an ASSI and there would be no impact on the adjacent oak woodland.*"

[84] I shall address firstly Article 38 of the 2002 Order. In doing so I have considered the decision in R (Friends of the Earth) v The Welsh Ministers [2015] EWHC 776 (Admin) in which the challenge was based *inter alia* on an English statutory provision of equivalent import, section 28G of the Wildlife and Countryside Act 1981: see [3] and [125] of the judgment. Notably, in this first instance decision, the court was evidently satisfied that this duty was performed by the mechanism of having appropriate regard to the desirability of preserving and protecting the SSSI and considering any potential harm thereto and available mitigation measures: see [135] – [137].

[85] I consider that, as a matter of straightforward construction, the duty enshrined in Article 38(2) of the 2002 Order is triggered only where the condition specified in Article 38(1) is satisfied, namely (in this instance) that the Council's decision to approve the proposed development is "*likely to damage*" the flora, fauna or geological, physiographical or other features of the ASSI concerned. Having regard to the unchallenged affidavit evidence of Mr Rooney, outlined above,

coupled with the Council's interaction with NIEA and the consultation responses of this agency, I consider that this condition was not satisfied.

[86] The argument developed on behalf of the Applicant failed to engage with this issue. Rather, it proceeded on the impermissible assumption that the "*likely to damage*" pre-requisite, or condition, was satisfied. Independently, it seems to me that a negative assessment of any authority under Article 38(1), entailing as it does a strong element of evaluative judgement, would normally be vulnerable to challenge only on Wednesbury grounds. If and insofar as there is any error in my conclusion that the Article 38(1) condition was not satisfied in this instance, my alternative conclusion is that the Applicant's challenge falls manifestly short of establishing the contaminant of irrationality.

[87] As regards the Article 40 challenge, there is nothing in this statutory provision, express or implied, either enquiring that the notification stipulated is to be in a particular form or requiring a repeat notification to DAERA in a context where an earlier notification has been made. The Applicant's complaint that the Council failed to make "*a proper Article 40 notification*" to NIEA is, duly analysed, devoid of meaning. The Applicant grafts onto this a contention that the NIEA consultation response of 02 March 2013 and the issues raised in the 2009 Bat Survey Report had to be "*grappled with*" by the Council pursuant to this duty. This submission in my estimation strays further and further away from what is required by Article 40. This statutory provision imposes a requirement of notification, followed by a waiting period of specified dimensions and, ultimately – and only where appropriate - a duty to take into account the statutory consultee's "*advice*". I consider that the Applicant's arguments fail to grapple with the requirements spelled out in Article 40. The ultimate question for the court is whether there has been compliance in substance with Article 40 in this instance. This invites an unhesitating affirmative answer.

[88] As regards Article 4 of the 1985 Order, the Applicant's contention must in my view founder essentially on the same basis as the Article 38 challenge. Once again the argument presented on behalf of the Applicant evades the statutory language. The focus of the Applicant's challenge is the second part of Article 4(1) of the 1985 Order viz the "*need to protect ….*" clause. But the statutory duty is to have regard to this specific need, as qualified by the words in parenthesis, only where the qualifying condition is satisfied. Satisfaction of this condition requires a positive assessment of "*harmful effects which might result from the exercise of*" the statutory function of granting planning permission. This requirement is overlooked entirely by the Applicant's challenge: there was no such assessment. In short, the Applicant makes a case which is manifestly detached from the clear statutory language and the corresponding evidential matrix.

[89] Further and in any event, the question of whether harmful effects on flora and fauna "*might result from*" the grant of planning permission plainly requires an evaluative assessment attracting the Wednesbury standard of review. The

Applicant's challenge fails to grapple with this juridical reality and does not make an irrationality case. I consider that the extreme condemnation of irrationality would not be appropriate in any event having regard to the evidence highlighted above. This ground of challenge fails accordingly.

Misinterpretation Of Planning Policies

[90] This ground of challenge features the following two planning policies:

(a) Policy QD1(c), which is within PPS7, "Quality Residential Environments"; and

(b) Policy LC1, contained in the Addendum to PPS7, "Safeguarding the Character of Established Residential Areas".

I remind myself at the outset that, by well-established principle, the interpretation of any planning policy is a question of law for the court: see for example Tesco Stores v Dundee City Council [2012] UKSC 13, per Lord Reed at [18]. The exercise is one of objective judicial interpretation of the language used in the policy's contextual setting. The court must also take cognisance of the correct approach to planning policies generally. It has been stated repeatedly in the jurisprudence bearing on this topic that planning policies are measures of guidance and direction, not to be construed by applying the tools and standards appropriate to the construction of a statute or legal instrument.

[91] I shall consider first Policy QD1(c). The "Introduction" section of PPS7 states *inter alia* (at paragraph 1.5):

> "*This Statement seeks to achieve residential developments, on both brown field and green field sites, which promote quality and sustainability in their design and layout, are more in harmony with their townscape or landscape setting and which ultimately will make a positive contribution to the character and appearance of our settlements. In essence, the Statement is about the creation of quality residential environments ….*"

Policy QD1 is a discrete policy within PPS7. Its subject matter is "Quality in new residential development". It begins:

> "*Planning permission will only be granted for new residential development where it is demonstrated that the proposal will create a quality and sustainable residential environment. The design and layout of residential development should be based on an overall design concept that draws upon the positive aspects of the character and appearance of the surrounding area.*"

Policy QD1 continues:

> "*All proposals for residential development will be expected to conform to all of the following criteria:* ……
>
> *(a) Adequate provision is made for public and private open space and landscaped areas as an integral part of the development. Where appropriate, landscaped areas or discrete groups of trees will be required along site boundaries in order to soften the visual impact of the development and assist in its integration with the surrounding area.*"

In later passages this policy dilates on "Public Open Space" and "Private Open Space". Within these paragraphs the adjectives "*pleasant*", "*attractive*" and "*landscaped"* feature.

[92] In his main report to the Council's PC, the Case Officer expressed his views relating to the compatibility of the proposed development with specified planning policies. As regards Policy QD1, he opined that there would be incompatibility as the development would not "*… create a quality and sustainable residential environment*". His reasons related mainly to setting, surrounds, scales, massing and visual impact. He added:

> "*Adequate provision has not been made for open space and landscaped areas as an integral part of the development. The proposed layout incorporates an area of open space in the centre of the layout. This will be largely screened from view from the Shore Road by proposed residential units. There are other areas of grassed amenity space on the periphery of the site boundary. It is considered that insufficient open space and landscaping has been provided to create an attractive, sustainable and varied residential environment. This was also highlighted in a review of the proposal by the Ministerial Advisory Group.*"

In the first addendum to his report, the Case Officer, responding to the developer's agent, added the following:

> "*It is important to emphasise, in response, that the Planning Department accepts that the amount of proposed open space would be sufficient to satisfy prevailing policy requirements, in particular Policy OS2 of PPS8. However the location and distribution of that open space*

> *is inadequate to create an attractive, sustainable and varied residential environment as required by Policy QD1 of PPS7.*"

He repeated:

> "*It is considered that the layout and location of the proposed areas of open space is unacceptable in planning policy terms …*"

[93] The Ministerial Advisory Group ("MAG") Advisory Review Panel, a quango peculiar to the arrangements for government in Northern Ireland, in its report of April 2016 stated *inter alia*:

> "*The panel felt that there was a narrowness at the edges of the site, partly due to the fragmented nature of the plan, which did not allow for usable amenity space; there was a concern that access routes and semi-private open space should be carefully designed in a considered way that would take into account the needs of all users, particularly elderly people, given the programme for the buildings. In other words, these spaces should be gardens, pleasant, sheltered and connected to each other.*"

This discrete passage cannot be isolated from the remainder of the MAG report, including its conclusion:

> "*The proposal to recreate a densely planned node at the quayside in Rostrevor with the intention of emulating the former 19th century complex of buildings was supported by the panel. The panel encouraged the team to have a less fragmented and more confident approach to the architectural expression and pointed out the benefits to the landscaping and amenity of the scheme of a more compact plan. The retention of existing fragments of walls and earlier buildings on the site and the remaking of a 'gateway' to the town was also supported by the panel.*"

[94] The main response to this discrete ground of challenge was led by Mr Beattie QC, whose submissions highlighted and were buttressed by the evidence provided on behalf of his client, the developer. The materials generated by the developer during the pre-decision phase included the "Planning Statement" of February 2017 composed by its agent, a planning consultant. The stimulus for this was the refusal recommendation contained in the Case Officer's main report. This document contains extensive photographic material, both real and virtual. It contains the following noteworthy passage:

> "*The proposal draws largely on the scale and form of the attractive historic development that once occupied the application site and seeks to restore some quality architectural design to the area. The nursing home reflects the scale of the Great Northern Hotel and the apartments to the south are similar in character and appearance to that of the various other commercial and residential buildings that once occupied that area of the site.*"

This is followed by a virtual aerial image depicting in colour the main areas of public open space part of which the agent describes as "*a generous communal landscaped garden in the centre of the apartment development*". Elaborating on this theme, he continues:

> "*PPS7 Policy QD1 criterion (c) requires adequate provision of public and private open space. PPS8 Policy OS2 recommends the provision of a minimal of 10% of the total site area should be public open space, although a reduced amount is acceptable where the site is close and accessible to areas of existing public open space, or where it provides accommodation for the elderly …*
>
> *There are two principal areas of public open space within the development: the balcony and garden area to the front of the nursing home (550 sqm) and the landscaped court yard and associated walkway within the south of the site (850 sqm). Various other pockets and bands of open space are provided within the remainder of the site. The total open space provision within the development is approximately 3050 sqm, which is 30% of the total site area …..*
>
> ***The level of open space provision is therefore substantially greater than the minimum recommended by relevant policy and guidance.***"

[95] The agent, in addition to preparing the aforementioned document, made a presentation to the Council's PC. In his affidavit he deposes:

> "*During my presentation to the Committee, I explained that the open space provision was suitably spread throughout the development and accessible to all residents and I exhibited the proposed site plan and three dimensional computer generated images of the proposed development on slides 1 – 3 of each presentation in order to illustrate this. The fact that Kilbroney Park is in close proximity to the site and that this would justify a*

> *reduction in the minimum standard of on-site open space provision was also discussed by the Committee members …*
>
> *The issue was discussed at length ….*"

These averments are not contested. The minutes of the PC meeting confirm that oral presentations were made by this agent, the developer, another professional representing the developer and the Applicant. Within the minutes there is a section documenting seven reasons for the unanimous decision of the PC members to reject the Case Officer's refusal recommendation. The first of these is:

> "*The proposed plan would provide more than 3000 square metres of open space on the site, this equates to 30% which is 20% more than that required.*"

[96] The nub of the argument advanced on behalf of the Applicant is that the PC construed "*adequate provision*" in Policy QD1 by reference to the quantity, rather than the quality, of the open space proposed for the development. This, it was submitted, gave rise to a policy interpretation which was too narrow.

[97] Having regard to the very specific terms in which the aforementioned argument is couched, the immediate quest is to ascertain whether it has any evidential foundation. The first step in this exercise is straightforward. There is no primary evidence that the PC engaged in the interpretation exercise asserted on behalf of the Applicant. It seems to me that the next step must entail consideration of the relevant documentary evidence with a view to determining whether by reasonable inference this occurred.

[98] The documents on which this ground of challenge turns, principally the Case Officer's reports to the PC and the minutes of the PC meeting, are, by well established principle, to be viewed through a particular lens. Neither microscopic parsing nor a construction exercise more appropriate to a statute or a legal instrument is permissible. The documents are to be read broadly, fairly and *in bonam partem*. I do not demur from Mr Honey's starting point, which is that quality is one of the ingredients of the policy in question: it clearly is. However, in his main report to the PC, the Case Officer said nothing negative about quality or, indeed, quantity. His reservation was that a significant part of the overall space provision was inappropriately located. He repeated this specific concern in the first supplement to his main report: his concern related to "*the location and distribution of* [the] *open space*". Once again, he expressed no reservations about the quality of the proposed open space provision for the development.

[99] What this exercise demonstrates is that open space quality was not a live or controversial issue. This suggests to the court that it is most unlikely that the PC, unprompted and on its own initiative, embarked upon a policy interpretation

exercise and reached a conclusion about its meaning in some opaque, concealed and unexpressed way.

[100] Furthermore, having regard to the policy wording, the terms of the Case Officer's reports, the planning policy statement, the site visit, the successive presentations of the proposal to the PC, the visual aids and, finally, the PC's expressed reason for rejecting the relevant refusal reason I find it impossible to conclude by inference that the decision makers misinterpreted this policy. No misinterpretation was placed before them and they were not misled in any material way. The inference which in my view **is** appropriate from considering all the evidence is that the PC members appreciated the requirements of the policy. Moreover they were not merely entitled, but obliged, to critically question the Case Officer's recommendation if they considered this appropriate and to form their independent view.

[101] I consider that, evidentially, this ground of challenge must fail. I would add that in my view the real issue which Policy QD1 raised in the context of the PC's decision making was that of evaluative assessment, thereby engaging the Wednesbury principle, belonging to the realm of how the Council applied this policy, to be contrasted with how they interpreted it. The Applicant did not advance an irrationality case in this context.

[102] The second limb of this ground of challenge concerns Policy LC1. The subject matter of this policy is "Protecting Local Character, Environmental Quality and Residential Amenity". Using, and repeating, the phraseology, "*established residential areas*" this policy enshrines restrictions on (*inter alia*) "*the redevelopment of existing buildings*". The language of the policy also includes "*established residential areas, villages and smaller settlements*". Annex E of the policy provides a definition of "*established residential area*". It contains the following general statement:

> "*Established residential areas are normally taken to mean residential neighbourhoods dominated by medium to low density single family housing with associated private amenity space or gardens. These areas may include buildings in commercial, retail or leisure services use, usually clustered together and proportionate in scale to the size of the neighbourhood being served.*"

The following passage is also noteworthy:

> "*In smaller towns, villages and other settlements established residential areas generally display a more intimate character and spatial scale. There is often more local variety in architectural styles and treatments, with building lines, property sizes, plot ratios and road layouts being much more changeable. Residential developments in these locations may have a close spatial relationship*

> *with land used for other purposes such as for employment, local schools and other local services.*"

[103] The Applicant's case is that the Council misinterpreted this policy by failing to recognise that the site of the proposed development is embraced by the definition set forth above. Once again, the argument was formulated in very specific terms. Mr Honey submitted that the PC construed the phrase "*established residential areas*" as embracing only "*the site and the surrounding plots*" and, in doing so, interpreted Policy LC1 too narrowly.

[104] I consider that the analysis and conclusion in [100] above apply fully to this ground and I do not repeat same. Accordingly, I turn to consider whether by inference the evidence establishes that the PC conducted the interpretation exercise and committed the aberration which the Applicant asserts.

[105] The Case Officer's report to the PC contains a section dealing specifically with this policy. Incompatibility with this policy was one of the recommended reasons for refusal. The officer highlighted the issues of harmony with local character, residential amenity, proposed density, form, scale, massing and layout. The officer's reasoning is summarised in the following passage:

> "*It is considered that this proposal …. would be detrimental to the local character, environmental quality and residential amenity of the established residential area. It is also considered that it would not be sensitive in design terms to people living in the existing neighbourhood nor would it be in harmony with the area.*"

The report described the site as lying within the settlement limits of Rostrevor village, 0.8 kilometres from the centre, "*an outlier from the main village core*". What did the Case Officer consider to be the "*established residential area*" within the meaning and compass of Annexe E of Policy LC1? One simply does not know. The report makes no attempt at definition. Rather, it simply proceeds on the premise – unexpressed, unparticularised and unreasoned – that the site is located in an "*established residential area*". While the case officer has sworn an affidavit, this contains no elucidation or elaboration of this matter.

[106] The minutes of the key meeting (held on 08 November 2017) indicate that the second expressed reason for the PC's determination to reject the Case Officer's refusal recommendation was the following:

> "*The proposed plan was not in keeping with Policy LC1 in that:*
>
> - *It was not in an established residential area.*

- *Historically there was a four storey hotel with shops located on the site and the proposed design was of a similar scale and mass.*

- *Locally sourced Mourne Granite would be used in the build and the use indigenous materials would not have a harmful affect – this has been confirmed by NIEA.*"

This discrete item of evidence falls to be considered in the broader context which I have identified above. It is illuminated in particular by the extensive photographic evidence contained in the Planning Statement and available to the court. Some judicial probing elicited the agreed position that in all of the photographic depictions there are but two visible residences namely those of the Applicant and the developer. These are located adjacent to, and to the west of, the site. There is no other residence in the extensive area depicted in the multiple photographs. There are a couple of other residences in the general vicinity, noted in the evidence presented to the PC. I have noted also the brief reference to another dwelling, unoccupied, evidently towards one extremity of the site. These basic facts would have been apparent to the PC members from a combination of this evidence, their site visit and such familiarity with the area as they possessed.

[107] Properly analysed – and in common with my rejection of the first element of this ground of challenge – I consider that the PC's approach to this discrete issue did not entail any interpretation, much less any misinterpretation, of Policy LC1. The Applicant's case, properly exposed, entails the proposition that the only legally permissible option open to the PC was to conclude that the site is located within an "*established residential area*" – without definition or particulars - within the meaning of the policy. This, in my view, is quite untenable. The phraseology of the policy, considered in full, required of the decision makers an evaluative assessment. This follows inexorably from the open textured and non-prescriptive language of the policy. As this analysis quickly demonstrates, the conduct of the PC entailed applying, rather than interpreting, this policy. Contrary to the Applicant's contention, the policy wording did not dictate only one possible outcome of this exercise. From this it follows that the real issue thrown up by the PC members' approach to this issue is that of rationality, given the unavoidable engagement of the Wednesbury principle. The Applicant makes no case of irrationality. This, as with the first limb of this ground, is a wise choice since an irrationality challenge would have been doomed to fail.

[108] My reasons for rejecting the second limb of this ground essentially mirror those applicable to the first: see [99] – [101] above. This ground of challenge fails accordingly.

The Reasons Challenge

[109] The starting point, in the context of the present case, is uncontroversial. It is accepted, correctly in my view, that the Council had a legal duty to provide adequate reasons for the impugned decision. I add, parenthetically, that it is difficult of any planning decision which does not attract this duty. The leading authorities are well known: South Buckinghamshire DC v Porter (No 2) [2004] 1 WLR 1953 and R (CPRE) v Dover DC [2017] UKSC 79. I have noted further (though belonging to a different context) the recent decision of the English Court of Appeal in Hallam Land Management v The Secretary of State for Home Department & Anor [2018] EWCA Civ 1808.

[110] What is the applicable legal standard? While this has been expressed in elaborate and erudite terms, fundamentally the decision maker's reasons must be adequate and intelligible. It is trite that the question of whether the requisite standard has been observed in any given case will be sensitive to the context in which it arises. As Lord Brown stated in Porter in the most comprehensive and authoritative formulation of the legal standard in play, at [36]:

> "*Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision …*
>
> *The reasons need refer only to the main issues in the dispute, not to every material consideration …*
>
> *Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced.* ***A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.***"
>
> [My emphasis.]

Thus a challenge of this *genre* requires the demonstration of a defect of substance, to be contrasted with the trivial or technical. While I have highlighted certain sentences in the relevant evidence, I have of course considered the passage as a whole. In CPRE, Lord Carnwath JSC espoused as the ultimate test the question of whether there is genuine doubt as to what the authority has decided and why: see [42].

[111] Lord Carnwath's observations in CPRE, in tandem with those of Baroness Hale in Morge, both noted above, express in different ways what this court stated in Re Belfast City Council's Application for Judicial Review [2018] NIQB 17 at [52] – [58] :

"[52] Prior to 01 April 2015 the status and role of Councils in the Northern Ireland planning system had been that of consultee. With effect from 01 April 2015 a radical change was introduced. Councils became responsible for devising their own local development plans, determining individual planning applications and making decisions on enforcement action. This major development was marked by, inter alia, the publication of the DoE "Application of the Councillor's Code of Conduct with regard to planning matters" (February 2015). This publication, notably, acknowledges (at paragraph 5), that these new functions "may seem daunting at first …". It also contains an interesting passage (at paragraph 19) relating to the "PAD" process, which includes the recognition that:

> *'Such pre-application discussions can be of considerable benefit to both parties and are generally encouraged.'*

The remaining provisions of this instrument are unremarkable in the context of these proceedings.

[53] Venturing beyond the foregoing preamble, some reflection on the decision making processes of Councils in this new era is appropriate. I begin with some general observations. The planning committees of councils do not compose essays documenting matters such as their understanding, insight, assessment of material considerations, evaluation of relevant planning policies and the reasons for their decisions. Rather, in brief compass, their decision making involves the receipt of a planning case officer's report, the consideration of the case papers (usually, one assumes), the possibility of oral presentations at their public meetings, debate and discussion in the same forum – albeit constrained by the requirements and limitations of Standing Orders ("SO's") - the receipt of legal and other advice if considered appropriate and a site visit if so advised.

[54] Ultimately their decisions are taken by vote, the manifestation being a show of hands. This is followed by a relatively formulaic letter informing the developer of the outcome, usually taking the form of one of the following: outline planning permission, unconditional permission, conditional permission or refusal. There is obvious potential for variations in practice between one case and

another. For example, in certain instances, the reasons for the Council's decision will be clear to the developer as a result of "PAD" meetings and communications. Equally, in other cases the developer and objectors will entertain little doubt about the basis of the decision as a result of the public proceedings of the PC – in particular the presentations made and the questions and interventions of councillors. On the other hand, some cases may not partake of either of these features either meaningfully or at all. These reflections *serve to emphasise the importance of the Council providing coherent and intelligible reasons for its planning decisions in accordance with the principles in* South Bucks District Council v Porter (No 2) *[2004] UKHL 33.*

[55] Much of the foregoing synopsis is distilled from the Operating Protocol ("OP") which every Council's PC must have. The OP of this Council, considered in conjunction with its Statutory Orders ("SOs"), reveals that the membership of its PC consists of twelve Councillors, the quorum is six, decision making is by vote and decisions are made by simple majority. I shall examine this topic in a little further detail infra. It suffices to observe here that the question of adherence to the OP has the potential to arise with some frequency. I consider that one of the main purposes of the OP is to secure that the planning decisions of councils accord with the governing legal rules and principles.

[56] One feature of the decision making framework outlined above is that the planning decisions of Councils may sometimes be relatively inscrutable. One of the consequences of this is that the documents surrounding and pertaining to a planning decision assume considerable importance. In the event of a legal challenge one of the documents which will inevitably be scrutinised with some care is the case officer's report to the PC. This engages certain familiar principles. In particular, reports of this nature are not to be equated with the judgment of a court or other judicial decision. Nor are they to be construed as a statute, contract or other legal instrument. Rather they must be read and interpreted with a degree of latitude appropriate to the legal and factual context in which they are generated. I consider that none of these principles precludes a penetrating examination of the text which is reasonable, balanced and properly informed.

[57] In formulating the approach outlined above, I take into account that in R The Mendip DC, ex parte Fabre [2000] 80 PCR 500 Sullivan J stated, at p 509:

> *'Whilst planning officers reports should not be equated with inspectors decision letters, it is well established that, in construing the latter, it has to be remembered that they are addressed to the parties who will be well aware of the issues that have been raised in the appeal. They are thus addressed to a knowledgeable readership and the adequacy of their reasoning must be considered against that background. That approach applies with particular force to a planning officer's report to a committee. Its purpose is not to decide the issue, but to inform the members of the relevant considerations relating to the application. It is not addressed to the world at large but to council members who, by virtue of that membership, may be expected to have substantial local and background knowledge. There would be no point in a planning officer's report setting out in great detail background material, for example, in respect of local topography, development planning policies or matters of planning history if the members were only too familiar with that material. Part of a planning officer's expert function in reporting to the committee must be to make an assessment of how much information needs to be included in his or her report in order to avoid burdening a busy committee with excessive and unnecessary detail.'*

Any temptation to apply this statement with a broad sweep should, in my judgement, be resisted, not least because the new planning decision making system in Northern Ireland is still in its infancy.

[58] While the statement of Sullivan J undoubtedly merits respect, it invites the following analysis. First, it was made in a first instance decision of the jurisdiction of England and Wales which, ipso facto, does not have precedent effect. Second, it was made in a legal context which differs from that prevailing in this jurisdiction.

> *Third, I consider that it does not fall to be construed as a statement of immutable legal principle. Fourth, it may be considered an expression of judicial impression or opinion not readily related to an underlying evidential substratum. Fifth, it must inevitably be calibrated by reference to the Northern Ireland context highlighted in [51] – [54] above. In short, Councils in Northern Ireland became planning decision makers on 01 April 2015, reflecting a reform which was radical in nature. There is no evidential basis available to the court which warrants the generous degree of latitude and deference, based on presumed experience and expertise, espoused by Sullivan J in Fabre. This may of course change with the passage of time."*

[112] All of the foregoing draws attention to the essentially prosaic reality that in a context where the decision maker is not a judicialised body subject to a common law duty to provide a properly reasoned, written judgment two considerations, in particular and inexhaustively, apply. The first is that the quest to ascertain a council's reasons on key issues in a planning case will almost invariably require consideration of an amalgam of documentary sources, sometimes supplemented by affidavit evidence. The proposition that all such evidence must be considered in its entirety and not in isolated fragments is uncontroversial. The second main consideration is that the documents on which the glare of the spotlight is likely to be most intense – in particular Case Officer's reports, notes of site visits and minutes of PC meetings – are not to be read and construed through the prism applicable to the decisions of a judicialised body. Rather a broader and more elastic approach is appropriate. This is nothing more and nothing less than the "*fairly and in bonam partem*" exhortation of Lord Wilberforce: see [50] *supra*. To summarise, the applicable legal framework is one in which excessive legalism and rigid prescription are intruders.

[113] The factual matrix to which the legal framework sketched above falls to be applied is scattered throughout this judgment. Inexhaustively, its main components are the persistent, and consistent, views of the Case Officer that planning permission should be refused; the salient documentary materials generated by the proposal and brought to the attention of the PC, whether through the Case Officer's reports or otherwise; the site visit undertaken by certain PC members; the oral and visual presentations to the PC at its successive meetings, in particular the critical final meeting; the progressively diminishing scale of the developer's proposal; and the minutes of the final PC public meeting.

[114] At this juncture it is appropriate to reproduce in full the following passage from the minutes of the PC meeting:

> "*Councillor [X] proposed and Councillor [Y] seconded to issue an approval …. contrary to officer recommendation on the basis of the following:*

1. *The proposed plan would provide more than 3000 square metres of open space on the site, this equates to 30% which is 20% more than that required.*

2. *The proposed plan was in keeping with Policy LC1 in that:*

    - *It was not in an established residential area.*

    - *Historically there was a 4 storey hotel with shops located on the site and the proposed design was of a similar scale and mass.*

    - *Locally sourced Mourne Granite would be used in the build and the use of indigenous materials would not have a harmful affect* [sic] *– this has been confirmed by NIEA.*

3. *The proposal would add to the character of the area.*

4. *The economic appraisal showed that the proposal would create a benefit to the local and wider area and add to the long term sustainability of the area. It would also provide benefits in terms of jobs during the construction phase.*

5. *There was an aging population with an increasing risk of higher instances of Alzheimer's and Dementia and the residential home would be a much needed facility.*

6. *The proposal would have minimal impact on tourism and the environment.*

7. *There would be an improvement to road safety with the reduction in the number of entrances."*

It is recalled that that the Committee members voted unanimously in favour of the proposal.

[115] The Applicant's challenge recognises that everything contained in the foregoing passage is properly characterised reasons for the impugned decision. The complaint is that these reasons are manifestly inadequate. While the asserted inadequacies were in their pleaded form more extensive, in both oral and written argument Mr Honey focused on the following: the impact of the development on the character of the area; the basis on which the development was thought to be appropriate in the AONB and adjacent to the two protected sites; and the basis on which the facilities to be provided by the development were considered to be needed.

[116] The court's assessment of each of these complaints is made by reference to the legal framework outlined above and the evidence considered as a whole. I shall consider each in turn.

[117] First, having regard to the extensive evidence relating to the design, appearance and landscaping of the proposed development, juxtaposed and contrasted with the existing land use, with its manifest lack of character and visual attraction, I consider that no reasonable person could fail to understand why the proposed development would, as a minimum, add to the character of the area, being the site and its surround. The Council's legal duty, as expounded above, required nothing more in my judgement.

[118] Second, the Case Officer in his reports to the PC expressed his subjective opinion that the proposed development was not (he considered) "*appropriate to ….. [inter alia] ….. the special character of the Area of Outstanding Natural Beauty in general ….*" This was based on his assessment, contained in an earlier passage of his report, that the proposal "*… remains contrary to Policy NH6 of PPS2 in that its scale, size and design are not sympathetic to the AONB, for the reasons outlined above and in the case officer's report and does not respect local architectural styles and patterns.*" This represented, quintessentially, an expression of personal, subjective opinion. It did so in the context of a policy framework which did not impose any inflexible restriction tantamount to an absolute prohibition on the proposed development.

[119] Notably, in each of the Case Officer's three reports (ie principal report and two supplements) to the PC, the Policy NH6 treatment was confined to an outline of the main policy elements and a conclusionary statement of the officer's opinion on compatibility. While there is nothing unusual about this in the world of land use and permitted development, it reflects the factual and legal truism that in a context where detailed analytical and reasoned essays are not required as a matter of law short treatises and conclusionary statements will inevitably feature. Through the medium of the passage from the PC's minutes reproduced in full in [114] above, committee members, in clear terms, expressed the rationale underpinning their departure from the Case Officer's refusal recommendation. It forms no part of the Applicant's case that any element of this reasoned rejection is unsustainable in law. Rather the Applicant complains that the reasoning is inadequate. Evaluating this reasoning in its full context, I conclude that this complaint is without merit.

[120] The third central element of the Applicant's inadequate reasons challenge has as its target the Council's assessment that the facilities to be provided by the development were needed. This, once again, is quintessentially a complaint relating to a matter of evaluative judgement. Within the aforementioned passage, the PC members explicitly highlighted the factors of economic benefit and ageing population: both had ample factual foundation. I conclude that nothing more was required. The rationale underpinning the "need" argument was clearly expressed.

[121] Giving effect to the analysis and reasoning above, I conclude that this ground of challenge is not sustained.

The Irrationality Challenge

[122] As this, the final, ground of challenge initially had the appearance of an optimistic makeweight, the court directed that particulars be provided. In an amended Order 53 pleading, the revised and extended formulation of this ground was that having regard to the repeated refusal recommendation of Council officers, the impugned decision was irrational as it failed to address the proposed refusal reasons relating to (a) the quality and design of the development, (b) the density and pattern of the development, (c) the appropriateness of the development to the special character of the AONB and the locality and (d) the effect of the development on the townscape of Rostrevor and the character of the surrounding area. The amended pleading ends with:

> "*Had the committee properly taken account of officer's concerns on the above matters it could not reasonably have granted permission.*"

[123] The Wednesbury principle has generated multiple linguistic formulae at the highest judicial levels. It involves the court in asking questions such as whether the impugned decision defies reason and logic. In Secretary of State for Education and Science v Tameside BC [1977] Ac 1014, at 1074h – 1075a – C, Lord Russell cautioned:

> "*It is quite unacceptable …. to proceeding from 'wrong' to 'unreasonable' …*
>
> *History is replete with genuine accusations of unreasonableness when all that is involved is disagreement, perhaps passionate, between reasonable people … 'unreasonably' is a very strong word indeed …*
> "

Lord Hailsham had earlier stated:

> "*Two reasonable* [persons] *can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable ….*

> *Not every reasonable exercise of judgement is right and not every mistaken exercise of judgement is unreasonable."*

(In Re W (An infant) [1971] AC 682 at 799D-E)

[124] The simpler, unvarnished formulations of the Wednesbury principle invite the court to ask whether the impugned decision lay within the range of reasonable decisions open to the decision maker: see for example Boddington v British Transport Police [1999] 2 AC 143 at 175H (per Lord Steyn). Adjectives such as "outrageous", "absurd" and "perverse" feature in decisions of the highest judicial authority. In R v Secretary of State for the Home Department, ex parte Brind [1991] 1 AC 696 one finds emphatic statements in the speeches of Lord Ackner and Lord Lowry that the test is not whether the impugned decision was objectively reasonable: see 757H – 758B and 766B. The nature of the subject matter and the context are of self-evident importance: R v Secretary of State for the Home Department, ex parte Daly [2011] 2 AC 532, per Lord Cooke at [32]. This includes the statutory context: R (Javed) v Secretary of State for the Home Department [2002] QB 129 at [49] per Lord Philips MR.

[125] These latter considerations prompt reflection on what has already been noted above. Planning decisions are the product of the exercise of a relatively wide discretion which the legislature has conferred on democratically elected councillors. The planning and environmental compartment of public law is replete with the phenomenon of evaluative judgement and its corresponding standard of review, irrationality. This is an area where the Wednesbury principle imposes an unmistakably elevated threshold.

[126] In recent jurisprudence the scale of the irrationality threshold in public law has featured much in debates surrounding the principle of proportionality. In Keyu v Secretary of State for Foreign and Commonwealth Affairs [2015] UKSC 69, Lord Kerr drew together some of the threads at [271] – [273]:

> *"271. Lord Neuberger PSC has said that it would not be appropriate for a five member panel of this court to reach a final conclusion on the question whether proportionality should supplant rationality as a ground of judicial review challenge at common law. I tend to agree, although I suspect that this question will have to be frankly addressed by this court sooner rather than later. As Lord Neuberger PSC has said, it is possibly a matter of some constitutional importance, although it is perhaps not as great as many commentators believe. Lord Neuberger PSC also suggested that a change from irrationality to proportionality had implications which might be "very wide in applicable scope". This could very well be true but I believe that some*

of these have been overestimated in the past. Indeed, the very notion that one must choose between proportionality and irrationality may be misplaced.

272. Without rehearsing all the arguments which swirl around this issue and keeping in mind the perils of over simplification, it is important to start any debate on the subject with the clear understanding that a review based on proportionality is not one in which the reviewer substitutes his or her opinion for that of the decision-maker. At its heart, proportionality review requires of the person or agency that seeks to defend a decision that they show that it was proportionate to meet the aim that it professes to achieve. It does not demand that the decision-maker bring the reviewer to the point of conviction that theirs was the right decision in any absolute sense.

273. It should also be understood that the difference between a rationality challenge and one based on proportionality is not, at least at a hypothetical level, as stark as it is sometimes portrayed. This was well expressed by Lord Mance JSC in Kennedy v Information Comr (Secretary of State for Justice intervening) [2015] AC 455 . At para 51, he said:

> *'The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called Wednesbury principle: see Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223 . The nature of judicial review in every case depends on the context. The change in this respect was heralded by Lord Bridge of Harwich … in R v Secretary of State for the Home Department, Ex p Bugdaycay [1987] AC 514 , 531 where he indicated that, subject to the weight to be given to a primary decision-maker's findings of fact and exercise of discretion, 'the court must … be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines'."*

I would also highlight the following passage in the judgment of Lady Hale, dissenting, at [308]:

> *"308. One of the reasons given by the claimants for adopting proportionality instead of Wednesbury unreasonableness or irrationality is Professor Craig's view that "cast in its correct terms it could almost never avail claimants" (Administrative Law, 7th ed (2012), para 21–027) and that "it is difficult to think of a single real case in which the facts meet this standard": "The Nature of Reasonableness" (2013) 66 CLP 131, 161."*

[127] A review of the judgments in Keyu also serves as a reminder of the "sliding scale" jurisprudential approach to the Wednesbury principle which has evolved during recent years and which has involved the emergence of the doctrine that in certain contexts judicial scrutiny which has been variously described as heightened, intense and anxious is appropriate. This approach has been applied in, for example, cases involving fundamental human rights. I draw attention to this not least because it is not suggested that rigorous judicial scrutiny belonging to the upper end of the notional scale is appropriate in the present case.

[128] Having regard to the features of planning decision making already noted, the court will always pay close attention to surrounding and underpinning materials: (inexhaustively) the Case Officer's reports, any "Planning Statement" or its equivalent, site visits by decision makers, records of presentations, notes of key meetings and visual aids and depictions. These materials have a clear function in the court's adjudication of contentions that something material was left out of account or something immaterial was permitted to intrude. They will also assist in informing the court's adjudication of an irrationality challenge. The court, in what is essentially an exercise of judicial evaluative assessment, will always be conscious that its role is one of supervisor superintendence.

[129] Turning to the present context, the Applicant's case is that the PC members concerned made the impugned decision "*without addressing*" certain concerns raised in the Case Officer's report. It is for the Applicant to make good this assertion. I consider that he has failed to do so for want of evidence, direct or inferential, supporting his claim. Having considered all the evidence in the round I find no indications of the irrationality asserted. On the contrary, the key extract from the minutes of the PC meeting when the impugned decision was unanimously made, reproduced in [114] above, is strongly suggestive of careful consideration and appropriate attention on the part of the decision makers: the antithesis of the irrational. Furthermore, as this passage demonstrates, contrary to the Applicant's assertion the PC members did engage with the issues of design, scale, mass, quality, setting and surrounds and impact on the environment.

[130] The final element of the Applicant's particularised Wednesbury ground is to the effect that a refusal of planning permission was the only rational option at the disposal of the PC members. This exposes starkly the hurdle which this ground

attempts to overcome. On the grounds and for the reasons elaborated above I consider that it falls measurably short of doing so.

[131] Giving effect to the foregoing I conclude that the final ground of challenge has no merit.

Omnibus Conclusion

[132] For the reasons given the application for judicial review is dismissed.

[133] Having considered the parties' submissions on costs:

(a) The Applicant shall pay the Respondent's costs, not to exceed £5000 as specified in the protective costs order.

(b) The Respondent shall pay the Applicant's costs incurred in bringing the protective costs application (the summons and affidavit) on the standard basis.

APPENDIX: DETAILED CHRONOLOGY

c. 1986 – Declaration of Mournes and Slieve Croob Area of Outstanding Natural Beauty ("AONB") within which application site sits.

c. 1996 – Carlingford Lough Area of Special Scientific Interest ("ASSI") declared adjacent to application site.

c. 1997 – Rostrevor Wood ASSI declared adjacent to application site.

18.03.08 – MRL architects informs the Department of the Environment ("DoE") Planning Service of Developer 's intention to develop application site.

08.05.08 – Pre-application discussion ("PAD") held in respect of the proposed development.

11.06.08 – DoE corresponds with MRL outlining key points arising out of PAD.

28.07.09 - Survey for Corvus Consulting flora and fauna report.

Aug/Sept '09 Surveys for Corvus Consulting bat report.

26.10.09 – Developer submits planning application to DoE.

29.10.09 – EIA screening determination by DoE.

27.11.09 - Consultation response by environmental health officer including on contaminated land.

11.12.09 - Northern Ireland Environment Agency ("NIEA") expressed concerns, stated that a Habitats Regulation Assessment ("HRA") was required, and recommends refusal.

14.12.09 - NIEA Historic Monuments consultation response.

14.01.10 - NIEA Historic Buildings Unit consultation response.

c. 2011 – Preliminary transport assessment by Lisbane Consultants regarding the proposed development.

28.04.11 – Case Officer's report into proposed development recommends refusal.

08.12.11 – Roads Service asks for full Transport Assessment.

07.02.12 – Directive 2011/92/EU (Environmental Impact Assessment) came into force.

05.03.12 – MRL contends a Transport Assessment is not required; submits Trips report.

13.03.12 – The Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2012 came into force.

28.03.12 – Roads Service corresponds with DoE stating that a fill Transport Assessment was not required.

17.04.12 – Meeting between DoE, Roads Service, local Councillors and MRL on proposed development.

28.05.12 – Second planning application form submitted to DoE.

13.06.12 - Further consultation response from Roads Service.

June '12 – Correspondence between DoE and MRL concerning second application.

Oct. ' 12 – Tree survey and report produced.

09.12.12 - WYG Land Contamination Preliminary Risk Assessment.

01.02.13 - Environmental Health consultation response on contaminated land.

02.03.13 - NIEA objected and stated that a HRA was required.

04.07.13 - DoE Planning Service seeks additional information including on land contamination.

16.10. 13 - WYG Generic Qualitative Risk Assessment on contamination produced.

Oct. '13 – DoE adopted the Banbridge / Newry and Mourne Area Plan as a statutory development plan.

29.01.14 – NIEA expressed concerns and stated that a HRA was required.

19.02.14 – Further information provided to NIEA on behalf of Developer .

21.02.14 - NIEA LRM Unit consultation response on contamination.

23.05.14 – NIEA required a Construction Environment Management Plan ("CEMP") and assessment by Waste Management of the proposed development.

11.07.14 - WYG provide further information on contamination.

14.10.14 – NIEA considers proposed development to be contrary to Habitats Regulations in the absence of a CEMP. NIEA expresses serious nature conservation concerns and says development contrary to Habitats Regulations.

30.10.14 - DoE officer advises that permission cannot lawfully be granted without HRA.

Nov. '14 – CEMP by WYG Environment provided, identifying key environmental risks with proposed development.

15.01.15 – HRA carried out by NIEA, which found that the proposed development would likely have a significant effect on European sites. Recommended conditions if approval were to be granted.

24.02.15 – DoE informs MRL that application file was transferred to Respondent.

01.04.15 – Planning powers transferred to local councils.
The Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2015 came into force.

15.06.15 – Meeting between Respondent and MRL regarding the Respondent's concerns with the proposed development including with massing and density of the proposals.

07.07.15 – Further meeting between Respondent and MRL in which Respondent's concerns were reiterated.

28.07.15 – MRL corresponds with Respondent requesting they reconsider their position.

23.03.16 – MRL presented proposals to Ministerial Advisory Group ("MAG").

04.04.16 – MAG responded with suggested alterations to proposal.

15.06.16 – Meeting between Respondent, MRL, Developer and various Councillors requesting that Respondent's planners and MRL agree a compromise and the application be determined as soon as possible.

17.08.16 – Respondent's Planning Case Officer recommended that proposal be refused.

31.08.16 – First officer's report. MRL and Developer presented second application unamended to Respondent's Planning Committee; this was adjourned to allow a site visit by Committee members.

02.11.16 – Meeting between Respondent's planners, MRL and Developer on proposed development.

15.11.16 – Site visit by members of the Respondent's Planning Committee.

21.12.16 – Application form for the amended scheme for the application site.

Feb. '17 – Planning Statement for proposed development prepared by MBA Planning.

05.04.17 - Historic Environment Division consultation response on listed buildings and archaeology.

26.04.17 – Second officer's report. 2016 amended planning application presented to Respondent's Planning Committee. Developer and MRL made presentations to Committee and Applicant made objections known to Committee. Committee resolved to overturn Case Officer's recommendation for refusal.

16.05.17 – the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2017 came into force. Also, Directive 2014/52/EU (Environmental Impact Assessment) came into force.

18.05.17 - Letter from the Woodland Trust pursuing buffer of native woodland planting.

04.06.17 – Applicant issued pre-action correspondence to Respondent challenging the Planning Committee's approval of the proposal without there having been an Economic Impact Assessment completed.

Sept. '17 – Economic Impact Assessment provided to Respondent. The Case Officer again recommended refusal, noting almost 50 objections to the proposal at this stage.

04.09.17 Respondent's Full Council resolves that the application should be reconsidered by the Planning Committee in the light of further information.

24.10.17 – NIEA officer (Lisa Maddox) recommended that a fresh HRA be carried out in respect of the proposed development.

30.10.17 – Another NIEA officer (Janice McCool) advised that Respondent should determine if a fresh HRA is required.

08.11.17 - NIEA officer (Lisa Maddox) advises that a new HRA will be required.

08.11.17 – Third officer's report. Respondent's Planning Committee resolved to overturn the Case Officer's recommendation for refusal and to approve the scheme.

16.11.17 - NIEA officer (Lisa Maddox) advised that HRA should be revised.

19.12.17 - Note to file from planning officers in relation to revised HRA.

20.12.17 – Planning permission for the proposed development granted.

28.12.17 – Applicant issued pre-action correspondence to Respondent challenging the grant of planning permission.

19.01.18 – Respondent responds to Applicant's correspondence stating that it was entitled to conclude and decide as it had.

06.03.18 – Further pre-action correspondence issued to Respondent.

14.03.18 – Respondent responds that grant of planning permission was lawful.

15.03.18 – Applicant filed application for leave to apply for judicial review.