Neutral Citation No: [2022] NIQB 36 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **SCO11855** *ICOS No:* **19/059411/01** *Delivered:* **24/05/2022**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY PORTINODE ENVIRONMENTAL LIMITED FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF FERMANAGH AND OMAGH DISTRICT COUNCIL

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Mr Conan Fegan (instructed by Phoenix Law, Solicitors) for the applicant
Mr Philip McAteer (instructed by Derry City & Strabane District Council Legal Services Department) for the respondent
The notice parties (Ian and Hilary Robinson) filed evidence but were not represented at the hearing

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SCOFFIELD J

Introduction

[1] This is an application for judicial review in which the applicant challenges the grant of planning permission by Fermanagh and Omagh District Council ("the Council") for the construction of six self-catering holiday cottages in a rural location beside Lough Erne. I granted leave on limited grounds against an unusual procedural backdrop: see [2021] NIQB 31.

[2] I am grateful to Mr Fegan who appeared for the applicant, and to Mr McAteer who appeared for the respondent, for their helpful written and oral submissions.

Factual background

[3] The applicant challenges the grant of planning permission (reference LA10/2018/0832/F) by the Council on 21 March 2019, whereby it authorised the construction of six self-catering holiday cottages, including alterations to existing

vehicular access at the junction of the public road, on land immediately surrounding 665 Boa Island Road, Portinode, Kesh.

[4] The planning application was made on 28 June 2018. The planning applicants (who are notice parties in these proceedings) are Hilary and Ian Robinson; but the application was managed for them by a planning agent. It was considered and approved at the Council's Planning Committee meeting on 20 March 2019; and the formal planning permission was issued the following day. The application had previously been included on a list of recommendations to approve in February 2019 but had been 'called in' for determination by the committee.

[5] In advance of the meeting and in the usual way, the Council's professional planning officers compiled a report on the application ("the officers' report"), which was considered in some detail at the hearing of this application for judicial review. Their recommendation was to approve the application. The summary of the proposal contained in the officers' report was as follows:

> "The proposal is for 6 holiday chalets located in the countryside. The development adjoins an existing tourism chalet development of 10 units to the east and a guest house to the west.
>
> PPS 16 permits one or more new self-catering units within the grounds of an existing or approved hotel, self-catering complex, guest house or holiday park. Whilst the current proposal is not within the grounds of the existing tourism development, it shares a common boundary and adjoins an existing tourism chalet development of 10 units to the east and a guest house to the west. It will also share the same access as the existing tourism units and it will appear visually as a natural extension to it, subsidiary in scale and ancillary to it. On this basis, the principle of the proposal is acceptable, and it complies with the aims, objectives and general thrust of PPS 16 and PPS 21.
>
> The proposals will integrate well on site due to a combination of the landform and surrounding vegetation within and beyond the site. The design and scale of the units are modest and cottage like in appearance and with its clachan style cluster. The design, scale and layout will also deter permanent residential accommodation and is in keeping with and reflective of, the nearby existing 10 chalet development. The emphasis is on informality with a minimum of structured layout and parking provision.

> A number of objections have been received raising a number of material considerations. These have been considered but not sustained for the reasons listed within the report."

[6] There was a significant number of objections to the proposal. 24 letters of objection were received, including representations from the owners of the adjacent holiday cottages and Tudor Farm, which is the guest house to the northwest of the application site.

[7] The relevant policies were considered in further detail in sections 6.0 and 7.0 of the officers' report, headed 'Assessment against Development Plan' and 'Assessment against planning policy and other material considerations' respectively. It is potentially significant that a site visit was conducted in this case, with several officers (including the Head of Planning, the Principal Planning Officer and the Democratic Services Officer) attending the site on 12 March 2019 with five of the elected council members. Committee members had access to the officers' report in advance of the Planning Committee meeting, as well as to a range of other materials (such as the consultation responses, all of the representations received and the relevant plans, maps and drawings).

[8] In addition, at the committee meeting, a PowerPoint presentation relating to the application was given by officers, a copy of which has been provided by the respondent in evidence in these proceedings. The committee members also heard representations, including from the agent on behalf of the notice parties in this case and from a variety of objectors. The meeting was recorded and a transcript of the exchanges at the committee meeting in relation to the application has been made available. The decision to approve the application was on the basis of a vote, with five councillors voting to grant permission and no councillors voting against, but with four abstentions.

[9] It is a condition of the impugned permission that the development approved shall not be used for permanent residential accommodation; and that the self-catering cottages shall be used for holiday-letting accommodation only. The reason for this condition is stated to be because the proposal is located in a rural area and does not meet the criteria within Policy CTY1 of PPS21 for permanent residential accommodation and is only approved on the basis of its tourism use. In addition to this condition, there is a further condition that, notwithstanding the usual permitted development rights which would arise in this regard under the Planning (General Permitted Development) Order (Northern Ireland) 2015, no walls, railings or fences shall be erected within the site to sub-divide it. The reason for this was to preserve the amenity of the countryside and ensure that the development is used only for tourism use and not divided into individual plots.

Relevant policies

[10] The planning policies relevant to determination of the application, and on which the present applicant for judicial review focuses, are the provisions of Planning Policy Statement 16, *Tourism Development* (PPS16); and Planning Policy Statement 21, *Sustainable Development in the Countryside* (PPS21), insofar as it relates to 'ribbon development'.

[11] Within PPS16, proposals for tourism development in the countryside are to be facilitated through the application of Policies TSM2 to TSM7. The officers' report in this case identified that Policy TSM5 of PPS16 was material. Policy TSM5 applies to 'Self Catering Accommodation in the Countryside'. Such development will generally not be permitted in the countryside, save where it complies with the terms of Policy TSM5, which provides the following exceptions:

> "Planning approval will be granted for self-catering units of tourist accommodation in any of the following circumstances:
>
> (a) one or more new units all located within the grounds of an existing or approved hotel, self-catering complex, guest house or holiday park;
>
> (b) a cluster of 3 or more new units are to be provided at or close to an existing or approved tourist amenity that is/will be a significant visitor attraction in its own right;
>
> (c) the restoration of an existing clachan or close, through conversion and/or replacement of existing buildings, subject to the retention of the original scale and proportions of the buildings and sympathetic treatment of boundaries. Where practicable original materials and finishes should be included.
>
> In either circumstance (a) or (b) above, self-catering development is required to be subsidiary in scale and ancillary to the primary tourism use of the site.
>
> Where a cluster of self-catering units is proposed in conjunction with a proposed or approved hotel, self-catering complex, guest house or holiday park and/or tourist amenity, a condition will be attached to the permission preventing occupation of the units before the primary tourism use is provided and fully operational."

[12] As to PPS21, a number of its policies are potentially relevant in this case and are discussed below. The applicant's primary focus in submissions, however, was Policy CTY8, which relates to 'ribbon development'. It provides:

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

[13] The 'Justification and Amplification' text related to this policy offers further guidance as to what constitutes ribbon development at para 5.33:

> "For the purposes of this policy a road frontage includes a footpath or private lane. A 'ribbon' does not necessarily have to be served by individual accesses nor have a continuous or uniform building line. Buildings sited back, staggered or at angles and with gaps between them can still represent ribbon development, if they have a common frontage or they are visually linked."

[14] It also includes a strong statement as to why ribbon development is not permitted, at para 5.32:

> "Ribbon development is detrimental to the character, appearance and amenity of the countryside. It creates and reinforces a built-up appearance to roads, footpaths and private laneways and can sterilise back-land, often hampering the planned expansion of settlements. It can also make access to farmland difficult and cause road safety problems. Ribbon development has consistently been opposed and will continue to be unacceptable."

[15] Para 6.73 of the 'Strategic Planning Policy Statement for Northern Ireland' (SPPS) was also relied upon (the relevant portion being the fifth bullet point) and is in terms consistent with Policy CTY8.

Summary of the applicant's case

[16] The applicant's case, as presented by Mr Fegan, was commendably focused on the questions of whether the appropriate planning policies have been correctly understood and applied. The applicant's case is that the two key policies set out above (Policy TSM5 and Policy CTY8, augmented by Policy T7 in the Fermanagh Area Plan (FAP)) have been left out of account; misunderstood; or departed from without adequate reason, so that the Council fell into irrationality. In relation to Policy TSM5, it is alleged that none of the circumstances in which this policy envisages the grant of such permission are engaged but that this was not appropriately recognised; and that there has been no demonstration of exceptional benefit from the proposal to the tourism industry (and that, on the contrary, the proposal will represent unwelcome competition for already struggling tourism businesses). In relation to Policy CTY8 and para 6.73 of the SPPS, it is submitted that the permitted development will create ribbon development; and that, particularly when read with Policy T7 of the FAP, it was not appropriately recognised that the development is in a sensitive zone and that it would not be sensitive to the characteristics of the area.

Legal principles

[17] As I observed in the course of my ruling on the application for leave in this case, the law in this area is now well settled. A pithy summary was provided by McCloskey J in *Re McNamara's Application* [2018] NIQB 22, at para [17]:

> "The interpretation of any planning policy is a question of law for the Court; exercises of interpretation should not treat planning policies as a statute or contract or any comparable instrument; a similar approach to the reports of planning case officers is to be adopted; and decisions involving predominantly matters of evaluative judgement are vulnerable to challenge on the intrinsically limited ground of *Wednesbury* irrationality only."

[18] I also added the further observation that, where a planning authority is departing from policy, it should appreciate that it is doing so and provide valid planning reasons as to why any failure to comply with relevant policy is not to be given determining weight in the circumstances of the case. The first element of this assessment – to acknowledge that there is a breach of policy which would *prima facie* suggest refusal of the application – is part of the authority's legal obligation to correctly understand and take into account material considerations. The legal principles in this area, which have been summarised in a variety of recent cases in the courts in this jurisdiction and in England and Wales (for instance, in para [19] of the decision of Lindblom J in *Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin)), were not in serious

dispute in the course of the hearing in this case. The issue is how they apply on the facts of this case; and how the relevant planning policies are to be interpreted and applied, including how a number of those policies interact with each other.

The Council's consideration of PPS16 and Policy TSM5

[19] In granting leave in this case, it seemed to me that there was an arguable case that the Council had wrongly assumed, or proceeded on the erroneous basis that, Policy TSM5 of PPS16 was complied with when considering the notice parties' application. The officers' report which was before the Council when the impugned permission was granted at first blush appears to recommend granting the application on the basis that it was compliant in substance with Policy TSM5, para (a). It states:

> "Whilst the current proposal is not within the grounds of the existing tourism development, it shares a common boundary and adjoins the self-catering units and Tudor Farm guest house. It will also share the same access as the existing tourism units and it will appear visually as a natural extension to it, subsidiary in scale and ancillary to it. It allows for new development in the countryside and avoids random development throughout the countryside whilst safeguarding the value of the tourism assets. On this basis, the principle of the proposal is acceptable, and it complies with aims, objectives and general thrust of PPS 16 and PPS 21."

[20] The applicant (rightly) contends that "it is obvious that the application does not fit within the eligibility criteria" of Policy TSM5, para (a) (nor indeed para (b) or (c)). As to para (a), the proposed development is not "within the grounds of" the existing guest house or the existing self-catering chalets. The applicant further submitted that, if the application does not comply with the policy, this should be clearly recognised. Instead, however, the officers' report has glossed over the non-compliance with the policy and impermissibly relied instead on the "aims, objective and general thrust of PPS16", giving the impression of policy compliance. It is therefore not clear – the applicant submitted – whether the Council wrongly thought Policy TSM5 was complied with or, on the other hand, correctly identified that it was not complied with but failed to address itself properly to whether that non-compliance was outweighed (and by what). In either event, the applicant submitted that the relevant policy has not been properly interpreted and applied.

[21] In addition, the applicant contended that, even if the officers' report was permitted to move past the policy wording and rely instead on the amplification text related to the policy, or its general thrust, they nonetheless further misdirected themselves (and the Council) by contending that the development is ancillary to an appropriate "primary tourism use" which could or would justify its scale, which is a

further policy requirement. The applicant contended that the proposed development is merely *close to* a guest house and the existing self-catering chalets, the owners of which have objected to the application; and that there is no tourist amenity in the area identified to justify further populating the area with tourism accommodation. Although the question of whether the new development would be "subsidiary in scale and ancillary" to the primary tourism use of the site may involve an exercise of planning judgement, the applicant contended that the Council misdirected itself (a) as to whether one of the elements relied upon – the existing self-catering chalets – were properly to be regarded as an existing tourism use; and (b) as to whether the new development could be ancillary to a use of the site when it is unrelated to any existing tourism uses in the area and not on the same site as them.

[22] This is a case where the precise way in which the decision-maker approached the issue has been significantly illuminated by the affidavit evidence which it has filed in the proceedings after the grant of leave, including in particular by the provision of the transcript of the relevant Planning Committee meeting. The Council's deponent was a Principal Planning Officer, Mr McDermott. His affidavit states the following in relation to the question of whether Policy TSM5 was met:

> "The Case Officer's report recognised that the proposal was not within the grounds of an existing approved hotel, self-catering complex, guesthouse or holiday park, and therefore did not meet the terms of the policy but noted that it shares a boundary and adjoins the existing 10 holiday chalets to the East and the guesthouse to the West and shares the same access with the existing chalets, would appear visually as a natural extension to the existing development, subsidiary in scale and ancillary to it. While the precise terms of the policy were not met the development complied with the aims, objectives and general thrust of PPS16 and PPS21 and was considered acceptable for all the reasons set out in the report (see in particular paras 1.2 and 7.0 of the report)."

[23] The averment to the effect that the committee did not wrongly conclude that Policy TSM5 was met – but, rather, proceeded in the knowledge that the proposal did not comply with the policy – is also supported by a number of statements which were made by the presenting officer at the meeting and which are clear from the transcript which has been made from the recording of the relevant parts of that meeting. The presenting officer commented that, "I think that the report clearly sets it out that the Planning Department is not saying that [the proposal] falls within the policy tests." He pointed out that there was "no debate" that the proposal was not within the grounds of an existing tourist development, which was accepted; but that what the officers' report was saying was that the proposal "meets the aims and objectives and the spirit of what the policy is trying to achieve", that was to say,

linking new tourist development with existing tourist nodes. In the course of the debate on the application at the committee meeting, it is again clear that it was acknowledged that the proposal did not meet the relevant planning policy. In light of the full picture which is available from the evidence now provided, the applicant cannot sustain a case that the Council wrongly considered Policy TSM5 to be complied with. It was clearly acknowledged that the proposal was *not* compliant with that policy.

[24] That does not mean, of course, that the application for permission therefore required to be refused. Planning policy is a guide and not a straitjacket: see, for instance, the well-known observation of Carswell LCJ to this effect in *Re Stewart's Application* [2003] NICA 4, drawing on Woolf J's judgment in *EC Gransden & Co Ltd v Secretary of State for the Environment* [1986] JPL 519 at 521. Indeed, this very principle was cited by the presenting officer in his opening review of the application for the committee. Having recognised that the proposal was not compliant with Policy TSM5, was it nonetheless a lawful exercise of planning judgement that it was appropriate to depart from the policy and grant planning permission in this case? That involves a consideration – discussed further below – of whether any other policy stepped in as the *prima facie* determining policy once it was recognised that the Policy TSM5 tests were not met. For the moment, however, I propose to consider the situation in principle without reference to the provisions of PPS21.

[25] Viewed in that way, I consider that it would (or could) be a legitimate exercise of planning judgement for the councillors to take the view that there were planning reasons which were adequate to justify their granting planning permission notwithstanding that the proposal did not fall within the four corners of Policy TSM5; and I have certainly not been persuaded by the applicant that this exercise of planning judgement was irrational so as to permit the court to intervene on that basis.

[26] In the course of discussing the application, the presenting officer referred to the proposal to permit the application as the "rounding off of an existing [tourist] node that is there". The comments of councillors who spoke in support of the proposal in the course of the debate emphasised the importance of tourism to the area's economy; the value in increasing visitor numbers and enhancing the existing facilities; and a desire to encourage and promote tourism opportunities in the area, where this is appropriate. Reading the officers' report and the exchanges before the committee fairly and in the round, it is clear that the Planning Committee was ultimately persuaded that the material considerations which lie behind the permissive policy for certain tourism development in the countryside in Policy TSM5 justified the grant of planning permission in this case notwithstanding that the proposal did not comply with the policy tests set out in TSM5. Those considerations included the promotion of sustainable tourist accommodation and sustainable economic benefits; supporting wider tourism initiatives; and avoiding random development throughout the countryside and safeguarding the value of tourism assets by focusing such development in existing nodes of tourism activity. They also

included the objectives of contributing to the growth of the regional economy and the local economy, and sustaining the local rural community, by facilitating tourism growth but doing so in a way considered to be of an appropriate nature, location and scale. These are objectives which are generally pursued by PPS16 (see para 3.1 of that policy statement).

[27] Mr Fegan objected that many of these material considerations – which are mentioned in the justification and amplification text related to Policy TSM5 – are catered for *by* that policy and cannot therefore be used as a reason for justifying the grant of permission *outside* that policy. They were already 'priced into' the strict policy tests in Policy TSM5 (including that new development under sub-para (a) should be "within the grounds" of an existing tourism development). He categorised this as applying the justification text rather than the policy wording; or allowing the accompanying text to trump the policy.

[28] However, I do not discern any legal error in the Council's approach in this regard, since (as I have held above) it is clear that the committee was properly appraised of the fact that the proposal did not comply with Policy TSM5. It decided that, on the particular facts of this application, the planning merits of the proposal outweighed its non-compliance with that policy. Those planning merits – provided they are material considerations capable of lawfully being taken into account – do not have to be material considerations entirely separate from those which underpin the most relevant policy. The Council was entitled – provided it did not misdirect itself in relation to policy and subject to falling into *Wednesbury* irrationality – to give those planning merits such weight as to outweigh the policy non-compliance in this case, which it did. I do not consider this to be irrational. The benefits of such tourist development in their district is classically a matter to be weighed by the elected councillors. In addition, the proximity of the development to other tourist development, with which it would cluster and integrate (notwithstanding that it was not on the same site as that development), was such that the Council was entitled to take the view that there would be limited or no adverse impact on the character of the area arising out of the grant of permission. In Mr McAteer's vivid phrase, although the committee recognised that Policy TSM5, sub-para (a) was not complied with in this case, it was not irrational for it to take the view that it was "as near as makes no difference" in terms of their assessment of the relevant considerations.

[29] As noted above at para [21], two further objections raised by Mr Fegan were (i) that, in fact, the existing chalet development to the east of the proposal site was *not* an existing tourism development and that the officers' report and the councillors were wrong to treat it as such (and, relatedly, that the new cottages would therefore not be subsidiary in scale and ancillary to the primary tourism use of the site, even if the 'site' was approached in the expanded manner envisaged by the report); and (ii) that the new use could not be ancillary to a use on an entirely separate site. These criticisms are focused on the passage of the officers' report set out at para [19] above and, in particular, on the reference to the 10 existing chalets as 'tourism units.'

[30] I do not consider the Council to have fallen into a material legal error in this regard for a number of reasons. The first and most basic point is that those requirements are requirements of Policy TSM5 and, as discussed above, the Council granted planning permission in the express knowledge that the tests within that policy were not met. It granted permission notwithstanding that Policy TSM5 was *not* complied with, on the basis of its assessment of the benefits of the proposal and the lack of adverse impact or environmental harm it would cause. If the applicant were correct that some other element of the policy test was not complied with, that would not affect the Council's basic assessment in this case.

[31] Secondly, it is entirely clear that the guest house located immediately to the northwest of the application site, whose site it adjoins, and to which the proposed holiday cottages are more proximate, is a tourist use. There can be no doubt about that. Thirdly, it also appears to me that the Council was entitled, as a matter of planning judgement, to consider the ten existing holiday chalets collectively to represent a tourist use, notwithstanding that they are in private, individual ownership. The chalet development was granted planning permission as a whole; but then the units were later sold off individually. Most if not all of these appear to be second homes. They are described as "holiday cottages" in the representations provided to the Council by the agent for their owners who objected to the grant of permission in this case. There is evidence to the effect that some of them are rented out as (what would classically be understood to be) tourist accommodation, in the same manner that it is proposed the six new chalets will be rented out. Indeed, it seems that three of the properties are registered with or certified by the Northern Ireland Tourist Board. The applicant's earlier evidence in these proceedings refers to the lettings as "a minor amount of Airbnb lets to tourists in the summer by about two of the holiday home owners"; but later discloses that five of the ten chalets have been let out to tourists in recent years. Even assuming, however, that the majority of the existing holiday cottages are simply used as second homes – or, more informally, as 'holiday homes' – that may still fall within the definition of a tourism use.

[32] Insofar as PPS16 purports to set out a definition of a tourism use, it is contained in para 1.1 of the policy statement, along with a glossary of terms contained in Appendix 1 to the statement. The position is not entirely straightforward. However, para 1.1 says this:

> "Tourism is defined by the World Tourism Organisation (WTO) as comprising the activities of persons travelling to and staying in places outside their usual environment for not more than one consecutive year for leisure, business and other purposes. The WTO further explains that 'Tourism' refers to all activities of visitors including both 'tourists (overnight visitors)' and 'same-day visitors'. This definition has been adopted by the UK Government and the WTO definition of tourism is therefore used for the purpose of the PPS."

[33] In Appendix 1, 'Tourism' is defined in similar terms:

> "The activities of persons travelling to and staying in places outside their usual environment for not more than one consecutive year for leisure, business and other purposes (World Tourism Organisation)."

[34] Para 1.2 of PPS16 goes on to emphasise the breadth of the concept:

> "Tourism encompasses a very wide range of activities. It can include travel and visits for business, professional and domestic purposes as well as for holidays and recreation. Often, more than one purpose may be involved. The duration of tourist trips is also highly variable as it can include the annual family holiday as well as a wide range of shorter visits, weekend breaks and day trips. Tourism is therefore an extremely diverse form of activity which is subject to changing trends in the types, distribution and duration of tourist activity."

[35] Provided that the owners of the existing holiday chalets stay in them "outside their usual environment" for leisure purposes, that use appears capable of falling within the concept of tourism for the purpose of PPS16. The officers' report variously describes the existing development as "an existing tourism chalet development", "10 detached holiday chalets" and "adjacent holiday cottages." It is clear that several of the chalets would not meet the formal definition of "tourist accommodation" in Article 2 of the Tourism (Northern Ireland) Order 1992, since the sleeping accommodation is not provided by way of trade or business. Those which have been rented out in this way to tourists might well properly be classified as tourist accommodation for the purposes of that Order. Those which have not been so rented out would not be considered as a "tourism development" within the meaning of that term as defined by the glossary in PPS16 (since they are not a tourist amenity or tourist accommodation); but could nonetheless fall within the wide concept of tourism use which is said, in para 1.1, to be the definition "used for the purpose of the PPS." Going back to the text of Policy TSM5, the reference there is to the proposal being "ancillary to the primary tourism *use* of the site", rather than requiring any particular type of tourism use.

[36] On the material before them (and before me) I consider the Council to have been entitled to view the existing chalet development as representing a tourism use; and, therefore, to view it, in conjunction with the nearby guesthouse, as an existing node of tourism activity (in the language of para 7.24 of PPS16). The issue is not entirely clear-cut but the Council's approach appears to me to be within the field of its legitimate planning judgement; and not to represent either a misdirection as to policy or error of established and material fact.

[37] Since that was a valid exercise of planning judgement, it is then also clear that the Council was entitled, in a further exercise of such judgement, to consider the six new cottages to be subsidiary in scale and nature to the existing tourism use at the expanded site (incorporating the guest house and the ten existing holiday cottages).

[38] I do not accept the submission that the Council could only consider the proposal to be "ancillary to the primary tourism use of the site" in circumstances where it was on the same site as the established tourism use and supported by the owner or developer of the site with the established tourism use. In proposals falling within sub-para (a) of Policy TSM5, that will of course generally be the case. However, this requirement under the policy also applies to sub-para (b), which relates to new development which is provided close to an existing or approved tourist amenity which is or will be a significant visitor attraction in its own right. I do not consider it likely to be necessary for the planning applicant in such a case to also be the owner or operator of the visitor attraction. Of course, the word "ancillary" in this context does generally suggest that the new development will in some way *serve* the existing development. There is limited, if any, evidence that this is likely to be so in the present case; although those staying at the new cottages on some occasion may seek to use the facilities at the guest house or to stay there, or in one of the existing chalets which is rented out, at some future point. However, the officers' report in this case addressed the issue of the new development being "ancillary" primarily as one of visual impact ("it will *appear* visually as a natural extension to it, subsidiary in scale and ancillary to it"). That was an assessment open to the Council. In any event, as observed at para [30] above, even if the new development will not be ancillary to the existing development in the way envisaged by the policy, that would simply be to underscore the proposal's non-compliance with the policy tests in Policy TSM5, of which the committee was already aware.

[39] Looking at the matter simply in terms of how the Council addressed PPS16, for the reasons given above I do not consider the applicant to have made out its case in this regard. The Council knowingly, but rationally, determined that it was prepared to grant planning permission notwithstanding that Policy TSM5 was not complied with.

[40] Nonetheless, I should not leave this aspect of the case without acknowledging that the planning officers' report could, and indeed should, have dealt with the question of whether Policy TSM5 was complied with or not with more care and precision. The report does not spell out as clearly as occurred in the course of the committee meeting that the policy tests were *not* met. (This was one of the key reasons why leave to apply for judicial review was granted in this case.) The section of the report quoted at para [19] above does not address this specifically but, rather, gives the impression that there is policy compliance. In section 4.0 of the report, there is a specific statement (as a comment on one of the issues of objection which had been raised) that, "The proposal is considered to meet the relevant tourism policy tests for the reasons listed within the report." I consider that that was

potentially, if not actively, misleading – because it could easily be read as suggesting that the proposal *did* fully comply with the policy tests in Policy TSM5. Albeit that section 7.0 of the report went on to point out that the proposal was "not within the grounds of the existing tourism development", from which the councillors would likely have understood that it did not meet the relevant policy tests, it was not as clearly spelt out as it ought to have been that this was a case where the officers were recommending approval notwithstanding that the policy tests were *not* met. Adopting the approach to such matters which is required by authority (see, for instance, my own comments in *Re Hartlands (NI) Limited's Application* [2021] NIQB 94, at paras [32]-[33]), I do not consider that the Planning Committee was ultimately misled on these issues; largely because they were clarified and corrected in the course of the discussion about the application before the committee.

The Council's consideration of PPS21 and Policy CTY1

[41] The position is complicated, however, by the potential relevance of a number of policies within PPS21 to the application. If PPS16 was the only applicable policy in this field, for the reasons given above I would have had little hesitation in dismissing the application for judicial review. The permissive policy of TSM5 was not directly engaged but, provided this was recognised, it would nonetheless be an entirely lawful exercise of planning judgement to grant planning permission. But, since Policy TSM5 is not directly engaged, is there a further policy test which then requires to be considered and addressed?

[42] The primary policy within PPS21 in order to restrict development in the countryside is Policy CTY1. It sets out "a range of types of development which in principle are considered to be acceptable in the countryside" and then sets out details of those. It goes on to explain that:

> "Other types of development will only be permitted where there are overriding reasons why that development is essential and could not be located in a settlement, or it is otherwise allocated for development in a development plan".

[43] Usually, Policy CTY1 will be the first port of call in relation to any development in the countryside in order to see whether the proposal falls within a category of development which is in principle acceptable (requiring reference to some of the further 'gateway' policies within PPS21 or other planning policy statements) or whether planning permission can only be justified through Policy CTY1 on one of the 'fall-back' bases, namely that (i) overriding reasons can be shown as to why the development is essential and could not be located in a settlement ("the 'overriding reasons' basis") or (ii) the proposal is allocated for development in a development plan ("the 'development plan' basis").

[44] This case concerns the interaction between PPS21 (and Policy CTY1 in particular) and PPS16. CTY1, formulated in June 2010, states that: "Planning permission will be granted for non-residential development in the countryside in the following cases: … tourism development in accordance with the TOU Policies of PSRNI". Such development (where "in accordance with" those policies) was in principle – that is to say, subject to matters such as siting, design and integration – considered to be acceptable in the countryside and as contributing to the aims of sustainable development. The reference to 'PSRNI' is a reference to 'A Planning Strategy for Rural Northern Ireland', which was published by the Department of the Environment in 1993. It contained a number of planning policies relating to tourism. Policy CTY1 essentially provided that tourism development in compliance with those policies was acceptable in the countryside.

[45] The relevant tourism policies in PSRNI were the fore-runners of the tourism policies now contained in PPS16. For instance, Policy TOU3 in relation to tourist accommodation was a policy broadly now replaced by Policies TSM3 and TSM5 within PPS16. The policy text of Policy TOU3 was in very brief terms, namely: "To give favourable consideration to proposals for hotels, guesthouses and elf-catering accommodation in existing settlements and in appropriate rural locations." What this policy did make clear however, when read in conjunction with Policy CTY1, is that self-catering accommodation provided for tourism purposes was viewed as non-residential development for the purposes of CTY1, notwithstanding its broadly residential nature. For this purpose, residential development seems to be equated or closely linked to permanent or full-time residence.

[46] However, the tourism policies within PSRNI were superseded by the tourism policies within PPS16, when it was issued in June 2013. The Preamble to PPS16 makes this clear in the following terms:

> "When issued in final form, the policies of this Statement will supersede Tourism Policies SP10 and TOU 1 to TOU 4 of the Planning Strategy for Rural Northern Ireland (PSRNI) and also policy CTY 1 of PPS 21 as it relates to the tourism policies of PSRNI. Policies in PPS 21 offering scope for tourism development in the countryside are not duplicated in PPS 16 and will be applied as appropriate to individual proposals. The policies of this Statement will also supersede Coastal Policies CO 5, CO 6 and CO 7 of PSRNI and also those elements of the remaining coastal policies insofar as they relate to tourism development or the protection of tourism assets from inappropriate development. Where the above policies are referred to elsewhere in PSRNI, the policies of this statement will take precedence."

[47] The supersession of tourism policies in PSRNI by tourism policies in PPS16 poses no difficulty. The former have dropped away and the latter now apply instead. However, there is more difficulty in discerning the precise meaning and effect of the statement that the policies of PPS16 "will supersede… Policy CTY1 of PPS 21 as it relates to the tourism policies of PSRNI". Does that simply mean that the reference in Policy CTY1 to PSRNI's TOU policies should now be read as a reference to PPS16's TSM policies? Or does it mean that Policy CTY1 now has no application at all to tourism proposals in the countryside? Or something in between? The answers to these questions are potentially relevant in the present case in light of the recognition by the Council that the proposal before it did not fall within the strict policy terms of TSM5. Does that mean that the planning applicants ought to have been driven back to the CTY1 requirement to show "overriding reasons why that development is essential and could not be located in a settlement" (or to seek to persuade the Council to depart from Policy CTY1 if there were no such overriding reasons)? Or, since the Council accepted that the proposal complied with the aims, objectives and thrust of PPS16 (and, therefore, PPS21) was that sufficient to establish this proposal as acceptable in principle without the need for further reference to Policy CTY1?

[48] The officers' report deals with Policy CTY1 only very briefly, in the following terms: "As the proposal represents one of the specified types of development considered acceptable in principle in the countryside, then the application complies with Policy CTY1." However, Policy CTY1 views proposals as acceptable in the countryside where they are tourism development "in accordance with" the TOU policies of PSRNI (now, the TSM policies of PPS16). Can a proposal be said to be one of the specified types of development considered acceptable in principle where it is not strictly "in accordance with" Policy TSM5 but merely "complies with the aims, objectives and general thrust of PPS 16" (*per* the officers' report)?

[49] Section 5.0 of PPS16 is entitled, 'Existing Policy Provision for Tourism Development in the Countryside'. It states, at para 5.1, as follows:

> "Proposals for tourism development in the countryside will be facilitated through PPS 16 (policies TSM 2 to TSM 7) and other planning policy documents that provide scope for tourism development in the countryside. Tourism development will also be facilitated through local tourism policies contained in some adopted and emerging development plans. A summary of provision that is potentially available through the land use planning system to meet opportunities for various forms of tourism development in the countryside is set out below."

[50] I have not found this issue straightforward to resolve – although, for the reasons given below, it is unnecessary for me to do so finally in order to dispose of this application. One possible reading of the Preamble of PPS16, taken together with

para 5.1 (set out above), is that PPS16 is now designed to be a comprehensive code for proposals for tourism development in the countryside, which entirely dis-applies any relevance which Policy CTY1 of PPS21 has in respect of such proposals. That appears to have been the approach of McCloskey J in *Re Alexander's Application* [2018] NIQB 55, at paras [89]-[91]. With respect, my own view is that the better and more natural reading of those provisions within PPS16 is simply that the tourism policies within PPS16 should now be considered in place of the tourism policies previously contained in PSRNI for the purposes of Policy CTY1 but that, otherwise, Policy CTY1 still remains in principle relevant to a proposal of this type. That is because, although the Preamble to PPS16 refers to its policies 'superseding' Policy CTY1, that is only "as it [CTY1] relates to the tourism policies of PSRNI" rather than more generally. In addition, this reading appears to me to conform more closely to the purposes behind both PPS21 and PPS16 and the Department's function more generally of formulating and coordinating policy for securing the orderly and consistent development of land.

[51] Policy CTY1 is designed to allow for certain types of development in the countryside which are acceptable in principle *because* they meet the policy tests in more detailed, permissive policies. Sometimes those permissive policies are in PPS21 itself (in Policies CTY2a to CTY10); and sometimes they are in other planning policy statements (with PPS4, PPS6, PPS7, PPS8, PPS12 and PPS18 all being mentioned, as well as PRSNI). In each case, however, the development is considered acceptable in principle where it is "in accordance with" those other policies; and Policy CTY1 envisages a high level of environmental protection for the countryside outside the circumstances where a proposal is in accordance with a planning policy such as to bring it within one of the CTY1 development gateways. It does so by directing the decision-maker to the 'overriding reasons' basis for the grant of permission (unless permission can be granted on the basis of specific provision in a development plan). This interlocking system would be undermined if, in respect of tourism proposals in the countryside, the fall-back test of "overriding reasons" in Policy CTY1 was excluded. Had that been the purpose and intent of the provisions in PPS16 to which I have referred, one would have expected that to have been more clearly spelt out in the more recent policy. When considering whether a proposal which does *not* meet the tourism policy tests which replace those of PSRNI should be granted permission, CTY1 is no longer being considered "as it relates to the tourism policies of PSRNI".

[52] The result of this analysis in the present case is as follows:

(a) The Council should first have considered whether the proposal was "in accordance with" Policy TSM5 of PPS16 and, so, acceptable in principle under Policy CTY1 of PPS21. The words "in accordance with" in this context must mean compliant with the policy tests set out in Policy TSM5 (rather than merely conforming to the aims and general thrust of that policy).

(b) Having answered that question in the negative, the Council should then have asked whether the proposal was otherwise permissible under Policy CTY1, *either* because there was an overriding reason why the development was essential and could not be located in a settlement *or* because it was allocated for development in a development plan. It is unlikely that the former of these tests would or could have been considered to be met. In order to serve the planning purposes identified in the discussion in committee, it may be tolerably clear that the proposal could not be located in a settlement. But even then, no basis was put forward for saying that the development was essential. The only route to the grant of permission through Policy CTY1, therefore, was if the proposal was "allocated for development in a development plan".

(a) Assuming the Council considered that it was not appropriate to grant permission on the basis of an application of the development plan policies – which may be a matter of some debate (see paras [63]-[68] below) – it would still have been open to the Council to depart from Policy CTY1 and grant planning permission, notwithstanding that the proposal was not acceptable in principle through being in accordance with Policy TSM5, *nor* justified on one of the fall-back bases. To do so would not simply involve departing from the terms of Policy TSM5 but also the more restrictive terms of Policy CTY1. In addressing whether or not it was appropriate to grant planning permission when Policy CTY1 was not complied with, the Council would have had to have considered the strength of the CTY1 policy wording and the fact that the expressly catered for exceptions within that policy also did not apply. To depart from the policy in those circumstances would still be permissible as a matter of law, if done for valid planning reasons (such as are discussed at paras [26]-[28] above) and on a rational basis, but the scope for rational departure may be more limited given the terms of the policy and the non-availability of the in-built exceptions. In any event, the analysis would be different from proceeding on the basis, as the officers' report did, that the application "complies with Policy CTY1".The application would only comply with CTY1 if *either* it was strictly within the terms of Policy TSM5 (rather than merely the general thrust of that policy) *or* it was appropriate to grant permission on one of the fall-back bases involving overriding reasons or the development plan.

[53] On this basis, I am concerned that the Council misdirected itself as to the meaning and effect of Policy CTY1 of PPS21. The proposal's non-compliance with TSM5 was not necessarily fatal to the application; but it required the Planning Committee to consider a further layer of reasoning before determining that it was nonetheless appropriate to grant planning permission. Unlike the issue of whether or not Policy TSM5 was or was not complied with, this particular aspect of the consideration was not clarified and corrected in the course of the committee's discussion on the application.

[54] I have addressed this issue in the judgment since it was raised in oral argument and is an issue on which it seemed to me some guidance might be of assistance to the Council (or other councils considering tourism proposals in the countryside). However, I do not propose that it should form the basis of any grant of relief in the case. That is because, firstly, although I differ from the conclusion reached by McCloskey J on the effect of the wording in the Preamble to PPS16 on Policy CTY1 in PPS21, I am not persuaded that his view is clearly wrong and, therefore, ought not to depart from it. Second and in any event, in considering again the basis on which leave was granted in this case after a contested hearing, I do not consider the argument on this issue which was raised orally (albeit briefly) to fall within the limited grounds on which leave to apply for judicial review was granted: see para [81](b) of the leave ruling in this case. The grounds on which leave was granted were those set out in the applicant's skeleton argument filed at that stage and were directed towards the Council's consideration of Policy TSM5, addressed above; and Policy CTY8, to which I now turn. There was no application to expand the grounds on which leave had been granted to include misdirection as to Policy CTY1 and, had such an application been made at the hearing, I would not have granted it given (i) how late in the proceedings it would have been made, (ii) the delay which had already arisen in the proceedings by reason of the way in which they were initially brought, which is discussed in detail in the leave ruling, which is a factor weighing heavily against the exercise of discretion in favour of the applicant, and (iii) the fact that leave was consciously sought and secured on a limited basis against that background.

The Council's non-consideration of Policy CTY8

[55] The applicant separately contended that the Council wrongly failed to take into account Policy CTY8 of PPS21. It was effectively common case that this policy was not considered because, in addition to not being expressly referred to in the officers' report, Mr McDermott's affidavit stated that the application had been considered by reference to Policy TSM5 of PPS16 "and not by reference to… policy CTY8 of PPS21".

[56] Policy CTY8 was considered by McCloskey J in the *McNamara* case (*supra*): see, in particular, paras [18]-[24]. The applicant relies on this case as authority that Policy CTY8 can apply to ribbon development arising on a private roadway (indeed, that also appears clear from para 5.33 of PPS21). The applicant contends that, in this case, it is evident that the development permitted by the impugned permission will create or add to a ribbon of development along the front of a roadway, albeit a private laneway. In terms of the Council's consideration of the application, the applicant observes that Policy CTY8 (and Policy T7 of the FAP) were not mentioned in the officers' report. Accordingly, it is submitted, there was a failure to take material considerations into account or, alternatively, the decision to grant permission in the face of these policies was unreasonable.

[57] This is not a case where the Council granted planning permission on the basis of the proposal representing 'infill' development under Policy CTY8. The Council did, however, consider that the proposal "integrated well" with the surrounding existing development, with which it would "cluster and consolidate"; and that the design and layout would "ensure that views of the development will be very limited" and were such that the proposal was "appropriate to the rural location and would not detract from the area". In relation to Policy T6 of the FAP, the officers' report considered that "the landscape has the capacity to absorb this new development without any detriment to the visual amenity of the area or to any features of natural or manmade heritage or conservation". When looking at Policy T7 of the FAP, the officers' report further noted that:

> "The development is considered as clustering and consolidating the existing development locally and will not have an adverse visual impact or detract from the sensitive characteristics of the area."

[58] Although Policy CTY8 was not separately considered, Policies CTY13 and CTY14 on integration and rural character respectively were each considered; with a short section specifically devoted to each of them in the officers' report. In particular, the following may be found in relation to Policy CTY14:

> "For the reasons listed previously, the site consolidates and clusters with the existing buildings and uses locally and will not result in any change to the rural character of the area. The proposal meets CTY14."

[59] Significantly, Policy CTY14, which is relevant in every case of proposed development in the countryside where the proposal is acceptable in principle, requires the decision-maker to address the rural character of the area. It provides:

> "Planning permission will be granted for a building in the countryside where it does not cause a detrimental change to, or further erode the rural character of an area.
>
> A new building will be unacceptable where:
>
> (a) it is unduly prominent in the landscape; or
>
> (b) it results in a suburban style build-up of development when viewed with existing and approved buildings; or
>
> (c) it does not respect the traditional pattern of settlement exhibited in that area; or

(d) it creates or adds to a ribbon of development (see Policy CTY8); or

(e) the impact of ancillary works (with the exception of necessary visibility splays) would damage rural character."

[60] The basic structure of this policy is that, as far as rural character is concerned, a building which is acceptable in the countryside in principle will be granted permission where it does not cause a detrimental change to, or further erode, the rural character of an area. This is a matter of planning judgement; but, pursuant to the policy, such an application will be approved where it causes no harm to rural character. Conversely, planning permission will be refused where the proposal suffers from one of the features identified in sub-paras (a) to (e), each of which describes a species of harm to rural character because of the impact of the proposal. Again, whether or not this is the case will be a matter of planning judgement.

[61] But the significance of Policy CTY14 for present purposes is that, since it was plainly considered by the planning officers in the course of their consideration of the application, the issue of whether the proposal was unacceptable because it created or added to a ribbon of development must necessarily have been considered. That is because this is one of the negative features, which would render a proposal unacceptable, which must be considered within the context of Policy CTY14. In this regard, the reference back to Policy CTY8 in sub-para (d) of Policy CTY14 is a reminder to the reader and the decision-maker that what constitutes ribbon development is described and explained in Policy CTY8 (and that, where development would otherwise create or add to a ribbon, it is nonetheless permissible under that policy if it meets the test for 'infill development'). Ribbon development is plainly intended to be something conceptually different from, and separate to, the other unacceptable impacts listed in the remaining sub-paras of CTY14. It cannot simply be equated with "suburban style build-up" for instance, although a proposal may represent both such build-up and ribbon development.

[62] I conclude that the planning officers in the present case, and thus the Council, considered the issue of whether the proposal created or added to a ribbon of development in this case in the course of their consideration of Policy CTY14. Certainly, there is no proper basis for concluding that, having considered that policy generally, they ignored sub-para (d) of the policy; and the applicant has not discharged the evidential burden of showing that the issue of 'ribbon development' was left out of account. Policy CTY8 did not have to be separately considered and assessed provided that this issue had been considered in substance through Policy CTY14. Having considered it, there is no proper basis for concluding that the officers' view, on the basis of their assessment of the site (including through a site visit) and exercise of planning judgement, that the proposal did not create or add to a ribbon of development was *Wednesbury* irrational. Indeed, the conclusion was that the proposal integrated well; would not give rise to any detriment to visual amenity

or have any adverse visual impact; and would not result in any change to the rural character of the area. Those conclusions plainly incorporate a conclusion that the particular species of detriment to rural character constituted by ribbon development (as described at para 5.32 of PPS21) did not arise in this case. That is a conclusion which was open to the planning authority. Indeed, although this is not a matter for me, consideration of the design concept layout would not immediately give rise to concern about a 'ribbon' of development being created in this case.

The Council's consideration of Policy T7

[63] In conjunction with its complaint about the proposal representing ribbon development, the applicant also relied on the Fermanagh Area Plan 2007 to suggest that the protection of the environment should be placed at a premium at this location. That is because the FAP, in Policy T7, divides Lough Erne into 13 zones with strategic guidance on the potential for tourism or recreational development for each. The application site with which these proceedings are concerned relates to land within zone 12 – Boa Island/Kesh – which is classified as a 'sensitive zone.'

[64] Policy T6 relates to 'Tourism Development in the Countryside' and provides that proposals for tourism development in the Fermanagh Countryside would be assessed according to the capacity of the landscape to absorb new development; the effect of the proposal on the rural character of the locality when considered together with existing and approved developments; the contribution of the proposal to the economy and job creation; and the impact on nature conservation interests and the manmade heritage. The supporting text emphasises that there are opportunities for "suitably sited well designed tourism development", which can make an important contribution to rural regeneration. It then states: "Since it is anticipated that most demand for new tourism developments will be focused on the shore and immediate hinterland of Lough Erne, additional strategic guidance is provided for this area in Policy T7." The strategic guidance provided is said to be "intended to assist prospective developers in choosing appropriate locations for tourism or recreational development in the vicinity of Lough Erne, by advising on the relevant issues in each zone", with individual planning applications to be treated on their merits, in the light of the strategic guidance provided. The landscape character and capacity of each zone was assessed, together with the nature conservation interest, the man-made heritage, existing facilities, potential pressure and opportunities; and each zone was then designated as either a Conservation Zone, a Sensitive Zone or an Opportunity Zone.

[65] In relation to sensitive zones, the FAP provides that:

> "In these zones the character of the landscape, the conservation interest or the existing level of development are such that whilst there may be scope for development, proposals must be sensitive to the particular characteristics of the zone. Sympathetic development,

> which by its nature and scale would not be damaging to nature conservation interests or the man-made heritage and which is sensitive to the landscape could be acceptable at some locations. The cumulative impact of proposals will be a particular consideration."

[66] Policy T7 of the FAP was, in fact, mentioned and discussed in the officers' report – such that it is clear that the Council had regard to this policy. It is identified as a relevant policy in section 6.0 of the officers' report. That section indicates that the officers had regard to the principles of good design and landscaping; to the natural and man-made features of the site; to the layout and use, including the scale, size and setting of the proposed development; and the landscape setting. A judgement was made that the landscape had "the capacity to absorb this new development without any detriment to the visual amenity of the area or to any features of natural or manmade heritage or conservation." Policy T7 was specifically addressed and the site's location within the relevant designation recorded. In particular, the report concluded as follows on this issue:

> "The FAP does not impose an embargo on development in Zone 12. Rather, it is permissive in respect of appropriate tourism development. The development is considered as clustering and consolidating the existing development locally and will not have an adverse visual impact or detract from the sensitive characteristics of the area. It is considered to meet these policy tests.
>
> For the reasons listed and having regard to the other relevant policies and material considerations within Paragraph 7.0, the proposal meets the Policy tests within the FAP."

[67] The applicant's suggestions that Policy T7 was not addressed, was not applied, or was misunderstood are unsustainable. The policy was carefully considered. It permitted appropriate tourism development in that zone and the Council carefully considered the issues to which it was directed and concluded that Policy T7 in fact supported the grant of planning permission. The applicant's real quibble is that it does not agree with the substance of the officers' assessment that the proposal was sensitive to the particular characteristics of the zone or to be considered as sympathetic development, which would not be damaging to the environment. However, those were matters of assessment for the Council.

[68] In light of the above it is arguable that Policy CTY1 *may* have been complied with on the 'development plan' basis; namely that, because of the Council's conclusion that Policy T7 was supportive of this proposal at this location within a designated zoning which had "scope" for such development, the proposal could be seen as "otherwise allocated for development in [the] development plan." That does

not appear to me to be an issue which was considered in the officers' report. Indeed, as noted above (see paras [48] and [53]), Policy CTY1 was not addressed in any detail at all. Compliance with CTY1 on this basis might be considered to be an ambitious argument; but it is a matter which might well have been explored more carefully if there had been an appropriate focus on Policy CTY1 once it was acknowledged that Policy TSM5 was not a directly applicable gateway to the development being acceptable in principle.

Conclusion

[69] In summary:

(b) The applicant was granted limited leave to apply for judicial review, having significantly refined its earlier much more widely (and too widely) pleaded case. It was granted leave only on two points, namely those relating to (i) the Council's treatment of Policy TSM5 in PPS16; and (ii) the Council's treatment of Policy CTY8 in PPS21 (in conjunction with its treatment of Policy T7 in the FAP).

(c) I do not consider that the applicant has made out its challenge on either of these grounds:

(i) As to Policy TSM5, the Planning Committee correctly understood that that policy was *not* complied with at the time of making its decision. Although this could have been more clearly addressed in the officers' report in this case, the committee was not materially misled at the time when it reached its decision on the application. In principle, it was a legitimate exercise of planning judgement to grant the application notwithstanding that the tests in Policy TSM5 were not each met by the proposal, provided the Council recognised (as it did) that it was doing so.

(ii) As to Policy CTY8, the Council was not required to expressly direct itself to this policy as a separate consideration provided that it considered the question of whether the proposal created or added to a ribbon of development and was therefore unacceptable, as it did through its consideration of Policy CTY14 which also encompasses this issue. Its conclusion that Policy CTY14 did not point to refusal of the application was, again, a legitimate exercise of its planning judgement.

(d) I do have a concern that the Council misdirected itself in relation to Policy CTY1 by not considering, having correctly understood that the application was not in strict compliance with (or "in accordance with") Policy TSM5, whether there were overriding reasons why the development was essential and could not be located in a development *or* whether the proposal was otherwise allocated for development in a development plan. In my view, the

Council ought to have addressed these issues before considering whether Policy CTY1 was or was not complied with and, in the event that it was not complied with, whether planning permission ought nonetheless to be granted for the reasons it had already identified as being appropriate to warrant the grant of permission notwithstanding non-compliance with Policy TSM5.

(e) Notwithstanding the concern I have in relation to this issue, which was raised in oral argument, I am satisfied that it falls outside the limited grounds on which leave to apply for judicial review was granted and that, therefore, it is not a proper basis for finding against the respondent in this case and/or for granting any relief. In light of the fact that leave was not granted in relation to it, detailed evidence and argument on the issue was not presented by the respondent. Further, in light of the way in which this case was initially brought and progressed (set out in detail in my leave ruling in the case) it is clearly not a case where the applicant should be permitted to expand upon the limited grounds on which leave was granted, even if an application to this effect had been made (which it was not). Finally, my view on this issue is (I recognise) at odds with previous authority at High Court level which I am not persuaded is clearly wrong. It may be that this is an issue which may require to be returned to, perhaps by the Court of Appeal, if it happens to arise directly in some later case.

(f) In any event, I would also have been provisionally inclined to refuse the grant of any relief in this case even if a ground of review was sustained on which leave had been granted. That is because of the delay which arose from the way in which the case was initially brought (again, discussed at length in the leave ruling in this case) and as a result of other issues such as the pandemic (which were no fault of the notice parties), and the prejudice to the notice parties which has arisen from that delay as a result of their deteriorating health and personal circumstances in the meantime, the details of which do not require to be set out for present purposes. This was an issue which was expressly left open for further consideration at the substantive hearing, should it become relevant, in the leave ruling: see paras [64]-[67].

[70] By reason of the foregoing, I propose to dismiss the application for judicial review. I will hear the parties on the issue of costs.