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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY BARRY O'NEILL FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF DERRY CITY AND STRABANE COUNCIL

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William Orbinson KC and Fionnuala Connolly (instructed by Kelly & Corr, Solicitors) for the Applicant
Philip McAteer (instructed by Derry City & Strabane District Council Legal Services Department) for the Respondent
Christopher Coyle (instructed by Clarendon Legal, Solicitors) for the Notice Party

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SCOFFIELD J

Introduction

[1] By these proceedings the applicant seeks to challenge a decision of Derry City and Strabane Council (DCSC) ("the Council"), made on 18 February 2022, by which it granted planning permission (reference LA/11/2018/0641/F) to the notice party in these proceedings, Ms Catherine Feeney. The application giving rise to the impugned permission sought approval for the relocation of a dwelling and outbuildings 50m south of the former property known as No 93 Foreglen Road, with access onto Baranailt Road approximately 9m north of No 608 Baranailt Road.

[2] The proposed development was precipitated by the making of a vesting order, issued by the Department for Infrastructure (DfI), as part of the A6 Londonderry to Dungiven Dualling Scheme ("the A6 Scheme"). The A6 Scheme will, in two phases, upgrade to dual carriageway 30km of the A6 between Londonderry and Dungiven and construct a dual carriageway bypass of Dungiven. Phase 1, which is now complete, relates to the upgrade of a 25.5km section of the A6 between Dungiven and Drumahoe. The dual carriageway for Phase 1 was opened to

traffic on 6 April 2023. Phase 2, which relates to a section of the road between Caw and Drumahoe, is not relevant for the present purposes.

[3] The proposed development is approximately 156m northwest of a medium scale VESTAS V27 wind turbine owned and operated by the applicant, Mr Barry O'Neill, since 2009. The impact of the wind turbine on those residing at the proposed dwelling, both in terms of noise and 'shadow flicker' caused by the turbine, is a central aspect of the applicant's challenge. Shadow flicker refers to the effect of the sun shining through rotating wind turbine blades, periodically casting a shadow over neighbouring properties. If passing over a narrow opening such as a window, the light levels within the room will decrease and increase as the blades rotate.

[4] The applicant seeks an order quashing the planning permission on a variety of bases. These include that the Council misinterpreted and misapplied relevant planning policy; that its decision was *Wednesbury* irrational (in that it failed to carry out an adequate inquiry in relation to the impact of noise and shadow flicker from the wind turbine); and that it breached its statutory duty to re-advertise the application in accordance with section 41 of the Planning Act (Northern Ireland) 2011 ("the 2011 Act") and Article 8(1) of the Planning (General Development Procedure) Order (Northern Ireland) 2015 ("the 2015 Order"). In relation to the re-advertisement issue, the applicant contends that this resulted in procedural unfairness in that the public were misled as to the actual nature of the planning application. He also contends that the Council failed to take material considerations into account and that it acted irrationally in reaching the decision to grant planning permission.

[5] Mr Orbinson KC appeared with Ms Connolly for the applicant; Mr McAteer appeared for the respondent; and Mr Coyle appeared for the notice party. I am grateful to all counsel for their helpful written and oral submissions.

Basic chronology

[6] The parties helpfully agreed a chronology which was of significant assistance to the court and which forms the basis of the summary below:

(i) On 8 August 2017 the vesting order was made by DfI in relation to the A6 Londonderry to Dungiven Dualling Scheme in respect of No 93 Foreglen Road.

(ii) On 14 August 2017 there was a letter from DfI to Mr John Feeney, former owner of 93 Foreglen Road, notifying him of the vesting order and advising that ownership of the land which was the subject of that order would be vested by DfI in fee simple as from the operative date of 19 September 2017.

(iii) On 29 June 2018 planning application LA/11/2018/0641/F was lodged by the notice party with the respondent.

(iv) On 18 July 2018 the planning application was advertised.

(v) On 12 April 2019 the applicant sent a letter of objection in relation to the planning application. On 9 September 2019 the applicant sent in a further letter of objection.

(vi) On 25 September 2019 a consultation letter was issued to the Environmental Health Department (EHD) of the Council from respondent's planning department. EHD commented on the planning application in relation to noise and shadow flicker.

(vii) In November 2019 the DfI notified the notice party's family that it had until Christmas to vacate 93 Foreglen Road as the property was needed for the ongoing A6 Scheme works.

(viii) On 13 November 2019 the planning application was re-advertised.

(ix) In January 2020 the property at 93 Foreglen Road was demolished by DfI contractors in pursuance of the vesting order in order to carry out the road improvement scheme.

(x) On 13 February 2020 the applicant sent an email to the respondent again setting out objections. On 20 October 2020 the applicant sent a further letter of objection to the respondent.

(xi) On 21 December 2020 the applicant set out further objections by email to the respondent and, by separate email, his concerns on the content of a report by CD Consulting which had been submitted on behalf of the planning applicant.

(xii) On 13 January 2021 EHD issued its comments on the planning application.

(xiii) On 17 January 2021 the applicant lodged objections with the respondent by email in relation to both shadow flicker and the noise assessment.

(xiv) On 18 January 2021 Mr Paul McCahill, Planning Officer, acknowledged receipt of the applicant's correspondence dated 21 December 2020 and advised that the shadow flicker report was under review and that EHD had been consulted in relation to this report.

(xv) On 22 January 2021 the applicant set out by email further objections and referred to the EHD comments dated 13 January 2021.

(xvi) On 12 February 2021 the applicant submitted his own shadow flicker report to the respondent, prepared by Green Cat Renewables on his behalf ("the Green Cat report").

(xvii) On 25 February 2021 CD Consulting submitted a further report in relation to shadow flicker in response to the Green Cat report.

(xviii) On 20 March 2021 the applicant sent to the respondent via email a copy of a letter dated 11 March 2021 from him further setting out objections and concerns about the planning application.

(xix) On 22 March 2021 Deborah McMahon forwarded to the respondent's planning department emails from the applicant dated 20 March 2021 and 12 February 2021.

(xx) On 15 September 2021 the EHD issued further comments stating that it was not within its remit to assess or comment on technical reports describing the impact of shadow flicker on residential properties surrounding wind turbine development.

(xxi) The next day, on 16 September 2021, the applicant lodged an addendum to the Green Cat report.

(xxii) On 11 October 2021 the applicant lodged a noise assessment report, also prepared by Green Cat Renewables.

(xxiii) On 26 October 2021 EHD issued comments on that noise assessment report.

(xxiv) On 1 December 2021 there was a meeting of the respondent's Planning Committee. The Planning Committee resolved to support the Senior Planner's recommendation to approve the planning application.

(xxv) On 18 February 2022 the planning approval decision was issued, with the impugned planning permission granted subject to conditions.

[7] Several aspects of this basic chronology are elucidated in the discussion below.

Factual background

[8] The dwelling which previously stood at and was known as No 93 Foreglen Road was purchased by the notice party's father, Mr John Feeney, and her late grandmother, Ms Elizabeth Feeney, as joint tenants in fee simple on 7 September 1977. Following Elizabeth Feeney's death on 2 December 1984, the property was owned solely by John Feeney. The notice party has been managing her father's affairs, and all relevant matters connected to the application and grant of planning

permission in respect of the site, further to the execution of an enduring power of attorney on 6 October 2017.

[9] The property consisted of a semi-detached two-storey house, sheds that were used for agricultural purposes and a field. Throughout 2017, the notice party's aunt and uncle resided at the property, although she has averred that she visited the property almost daily with her father to tend to the animals and visit her family.

[10] On 8 August 2017, the DfI made a vesting order to acquire and purchase land in order to commence Phase 1 of the A6 Scheme. Notification of the vesting order was received by Mr John Feeney on 14 August 2017 which indicated that it would become operative and transfer the fee simple to the DfI on 19 September 2017.

[11] Following discussions with the DfI it became apparent that not all of the land which formed part of the 93 Foreglen Road site was required for the A6 Scheme. A request to vary the vesting order so that the notice party's family could retain a portion of land was accepted by DfI. When the vesting took effect, therefore, DfI erected a barrier between the vested and retained land and installed a 6ft barrier around the perimeters of both parcels of land. As DfI had no immediate need for the property, the family of the notice party continued to reside and use the agricultural sheds on the part of the site which was vested until being required to vacate the land by Christmas 2019.

[12] After struggling to find somewhere suitable to relocate in the local area that would be capable of meeting her father's care needs, the notice party sought to build a bungalow on the retained land for her father and aunt (her uncle having since passed away). She submitted the subject planning application on 29 June 2018 seeking permission for "the relocation of a dwelling and outbuildings at a site to the rear (50m south) of No. 93 Foreglen Road, with proposed access on to Baranailt Road (approximately 9m north of 608 Baranailt Road)." DfI had constructed a new lane from Baranailt Road which could be used to access the neighbouring properties. This lane was to remain under DfI's ownership and be maintained by it and was intended for use by anyone who retained a plot of ground there. The planning application was advertised on 18 July 2018.

[13] Prior to vesting and demolition by the DfI, also as part of the A6 Scheme, No. 101 Foreglen Road had been lived in by the applicant's parents, who have since relocated to Claudy town. No. 103 Foreglen Road, which was also demolished, consisted of a garage and retail units. The applicant owns and operates agricultural sheds and fields situated behind what used to be 101 and 103 Foreglen Road, and a wind turbine at approximately 156m northwest of the proposed dwelling in the planning application. It was previously 196m northwest of the dwelling at No. 93 Foreglen Road. The applicant lives on the Glenshane Road, approximately one mile away from the site.

[14] The applicant advised the respondent by letters dated 12 April and 9 September 2019 that he objected, as owner of the neighbouring property at 101 Foreglen Road, to the planning application. He set out a range of concerns. Many of these are issues – including issues about land ownership and access – have not been pursued in the course of these proceedings. The issue of the impact on residential amenity by reason of noise and flicker from the existing wind turbine was raised, albeit without Mr O'Neill stating clearly (at least initially) that he owned and operated this turbine.

[15] DfI notified the notice party's family, in early November, of the requirement to vacate the property by Christmas 2019. The planning application was re-advertised on 13 November 2019. The property was subsequently demolished in January 2020 in pursuance of the vesting order. It is common case that the respondent did not then re-advertise the planning application to notify the public that the subject of the planning application had been demolished.

EHD comments

[16] In response to consultation letters from the Planning Department dated 10 April 2018 and 12 April 2019, the EHD made several observations on the impact on residential amenity of the proposed dwelling of surrounding sources of noise. EHD stated that the proposed development is "approximately 140m from a medium scale VESTAS V27 wind turbine" and that this "would be one of the closest proposed residential properties to an operational turbine of this size that this department has considered in this district." EHD found that the noise from the wind turbine "would breach the ETSU-R-97 simplified noise criteria of 35 dB (Daytime) and 43 dB (Night-time) at the proposed site." A failure to meet *simplified* limits does not necessarily mean that ETSU-R-97 limits would be breached. Rather, turbine noise level comparison against simplified limits is used to determine if a detailed noise survey is required, which then involves carrying out "a site-specific background noise assessment." The background noise levels are then used to establish whether the turbine noise will breach the ETSU-R-97 relative or detailed noise limits. EHD advised that the background levels were not available at this site as the A6 dual carriageway was not fully operational.

[17] As an alternative, EHD reviewed two other nearby wind turbines in the vicinity to establish if there were background noise levels available which could be used as a proxy to determine the predicted cumulative noise impact of all three wind turbines. EHD predicted that the cumulative noise levels "may fall just underneath the proxy ETSU-R-97 limits." Despite this assessment, which itself had "a number of areas of uncertainty", EHD raised concerns that noise from the turbine "at this short distance would have an adverse impact on residential amenity at the proposed development." Whilst it was noted that the increased background levels associated with the A6 traffic would help mask noise from the turbine, EHD considered that turbine noise would be audible outside the property and could also be

distinguishable in the property with windows open for ventilation, especially between passing traffic at night.

[18] EHD further advised that the notice party and any future occupiers be made aware of the findings in *Lawrence and another v Fen Tigers Ltd* [2012] EWCA Civ 26. EHD explained that, following this case, any claim of statutory noise nuisance in relation to a nearby approved and pre-existing turbine would likely fail if it could be shown that the resultant nuisance only arose as a result of the applicant having changed the use of land, or built on it, and that the wind turbine was operating normally under its pre-existing planning permissions. (In fact, as discussed further below, that case had since been addressed on appeal by the UK Supreme Court.)

[19] EHD observed that given the site's proximity to the A6, traffic noise will impact the proposed development. Accordingly, it was recommended that the architect consider the building orientation, upgraded glazing and alternate means of acoustically-treated mechanical ventilation to habitable rooms of the property in order to maintain an acceptable internal and external acoustic environment. EHD also suggested that the Planning Department assess any potential impact of shadow flicker. It was indicated that it was outside the remit of EHD to comment further on that latter issue.

The CD Consulting Report and response

[20] On 17 December 2020, the notice party submitted a shadow flicker report, produced by CD Consulting ("the CD Consulting report"), and a letter consenting to any potential negative effects of shadow flicker in support of her application. The supplementary guidance for the planning assessment of wind turbines and shadow flicker impacts is contained within the Best Practice Guidance for PPS18. The guidance "recommends" that shadow flicker at "neighbouring offices and dwellings within 500m should not exceed 30 hours per year or 30 minutes per day."

[21] The CD Consulting report concluded that the wind turbine could produce, in a worst case scenario, a maximum of 40.28 hours of shadow flicker per annum, with up to 50 minutes of flicker per day; but with *expected* values of 6.35 hours per annum. CD Consulting also found that the potential impact of shadow flicker would only occur for a total of 64 days per year over four months. The report concluded that when broken down into "real-time", 6.35 hours over 64 days would result in an average daily impact of 3.35 minutes a day.

[22] Dissatisfied with the content of the CD Consulting report, the applicant, by email dated 21 December 2020, stated that it portrays "a biased view" and seems "to deliberately diminish the true effects of shadow flicker." The applicant challenged the conclusions reached by CD Consulting, noting that despite a flawed methodology, it still arrived at a calculation which exceeded the maximum shadow flicker policy recommendation of 30 hours per year or 30 minutes per day. The

applicant went on to commission a further shadow flicker model analysis and a professional review of the CD Consulting Report.

[23] In the meantime, the Council received EHD comments on the CD Consulting report on 13 January 2021. Since it considered itself unable to make observations on the accuracy of the report, EHD suggested that the Planning Department "may wish to engage the services of a competent consultant to comment on the accuracy of the predictions and acceptability or otherwise of predicted periods of shadow flicker." It further reiterated its concerns in relation to noise and lack of a detailed site-specific noise assessment. It noted that the topography of the intervening land between the development site and the new road had changed since it last submitted a consultation response, with the introduction of a 2-4m high soil berm along the new road. EHD submitted that this "will have an impact on noise levels at the development site and may result in changes to long term ambient noise levels, background noise levels and applicable ETSU-R-97 noise limits."

[24] The applicant, by further emails on 17 and 22 January 2021, supported EHD's comments and stated that no material planning weight should be attached to the notice party's acceptance of the negative impact of shadow flicker on the basis that it "does not future proof the negative impact on future residents."

The Green Cat report and response

[25] On 12 February 2021, the applicant in these proceedings submitted his own shadow flicker report, prepared on his behalf by Green Cat Renewables ("the Green Cat report"). It concluded that:

> "Although the number of hours per year of shadow flicker is likely to be less than the predicted worst-case level of over 44 hours, the potential remains for up to 55 minutes of shadow flicker occurring on up to 65 days of the year which exceeds the 30-minute threshold of significance placed on shadow flicker impacts.
>
> Opportunities for mitigation through screening have been explored but do not appear to give future residents any guarantee of protection, either in the short or longer term.
>
> Therefore, it is concluded that if the Local Planning Authority were to approve the dwelling house application, both the applicant's shadow flicker assessment and this report clearly show that future occupants are likely to experience an unacceptable level of flicker that they would have little power to mitigate and that it would be unreasonable to compel the turbine owner to reduce through mitigation."

[26] On 25 February 2021, CD Consulting provided the following reply on behalf of the notice party:

> "It is still our contention that while the worst-case scenario is over [the] 30 minutes per day threshold, that when you consider the real-time calculations of 6.35 hours this brings the figure down to real time potential impact averaging 6.17 minutes a day over 64 days, even using the Green Cat figure of 12.37 hours, we get a real-time figure of 11.8 minutes per day over this period.
>
> The contents of either report are not disputed but what is disputed is that the applicant having considered the real-time impact of shadow flicker is content for this impact in line with the findings which using either figure is well below 30 minutes per day over previously subscribed dates."

[27] On 16 September 2021, the applicant submitted an addendum to the Green Cat report, fundamentally disagreeing with the methodology adopted by CD Consulting. It maintained that:

> "The proposed property would experience a minimum of 14 days, of the 65 days of the year where shadow flicker was predicted, when the duration of shadow flicker would exceed the 30-minute threshold in breach of the Irish Planning Guidelines… This exercise demonstrates that declaring average shadow flicker duration to be less than 30 minutes, as reported by CD Consulting, both misunderstands and misrepresents the intent of the guidance."

Noise assessment

[28] A noise assessment report was also prepared by Green Cat Renewables and submitted to the Council by the applicant on 11 October 2021. It calculated that the predicted noise levels would exceed the simplified noise limits "by a clear margin" and therefore a background noise assessment was required to prove compliance with ETSU-R-97. The report cites three examples where planning applications were refused following the failure of an applicant to provide sufficient evidence to prove that demonstrable harm would not occur as a result of turbine noise. Reading this across to the present application, Green Cat recommended that the application "be refused on grounds of prematurity."

[29] The addendum report also took the opportunity to seek to rebut the findings contained in the planning officers' report (discussed below). In particular it suggested that the planning applicant had failed to provide the necessary evidence and that the proposed mitigation measures could not guarantee the absence of significant adverse impacts, whether borne by the planning applicant or a future occupant. It concluded that the application is therefore "in contravention of national planning policy."

[30] On 26 October 2021, EHD provided a comment on the noise assessment carried out by Green Cat. It stated that the noise predictions "closely align" with those carried out by EHD and accepted the assessment as "a reasonably accurate representation of the likely noise impact from the existing turbine on the development site." It noted again that a failure to meet simplified limits does not necessarily mean that ETSU-R-97 limits derived from site-specific background noise levels would be breached. EHD once again indicated that, without site specific information, it was "impossible to conclude with any certainty whether ETSU-R-97 limits would be met; or would be breached causing unreasonable disturbance at the proposed development." For reasons it had explained, the collection of typical ongoing site-specific background noise levels would "not be possible."

[31] EHD therefore summarised its position on the application, insofar as noise impact was concerned, by stating as follows:

> "It is difficult for Environmental Health to be supportive of this proposal given the close proximity of the development site to the existing turbine; combined with the remaining level of uncertainty as to whether or not compliance with ETSU-R-97 noise limits can be achieved and 'unreasonable disturbance' to any future occupants avoided.
>
> It is still the view of Environmental Health that whilst the increased daytime background levels associated with the traffic will help mask the noise from the turbine, this department would be of the view that turbine noise will certainly be audible outside the property; and given the small separation distance could also be distinguishable inside the property with windows open for ventilation, especially between passing traffic events at night."

The planning officers' report and the Planning Committee meeting

[32] The planning application was tabled for determination before the Council's Planning Committee on 1 December 2021. The Committee was furnished with, *inter alia,* a copy of the planning officers' report, which recommended that the application be approved. Members also received a presentation delivered by Senior Planning

Officer, Mr Malachy McCarron, which was largely based upon and followed the recommendations contained within the officers' report. The Committee heard representations from Mr Donaghy on behalf of the objectors to the application and from Mr Taggart in support of the application. The salient points considered in the meeting are summarised in the sections below.

Policy CTY3 - Replacement dwelling

[33] Mr McCarron identified Policy CTY3 of Planning Policy Statement 21 (PPS21) as the relevant policy for replacement dwellings. Members were advised that the structure to be replaced was demolished in order to accommodate the A6 Scheme. The officers' report notes that, at the time of the first visit, the structure exhibited the characteristics of a dwelling and the walls and roof were substantially intact. Mr McCarron explained to the Committee that the "original dwelling met these requirements." The reference in Policy CTY3 to recently destroyed dwellings was not expressly discussed in the officers' report or by the Committee in the meeting, although there was some discussion of the policy requirements set out under the policy. For instance, the Committee was made aware that Policy CTY3 generally seeks in situ replacements, but that "given the circumstances of the case" this was not possible. It was clear from the officers' report and the presentation to councillors that the property at No. 93 Foreglen Road had already been demolished.

Residential amenity in relation to noise

[34] In line with the Strategic Planning Policy Statement (SPPS), the Committee was advised that noise and shadow flicker impacts on residential amenity constitute material planning considerations. The Committee was informed that the proposed dwelling would be approximately 40m closer to the wind turbine than the original dwelling. The officers' report notes that "this would be one of the closest proposed residential properties to an operational turbine of this size that has been considered in the district."

[35] Mr McCarron took the Committee through EHD's assessment that noise from the turbine would breach ETSU-R-97 simplified noise criteria. Members were advised of the "significant evidential gap" resulting from the absence of a detailed noise survey. The officer's report adds that EHD:

> "… have not requested a noise report from the applicant and have consistently advised that the required data to produce any such report is not available. EHD have highlighted the probability of noise impact, based on proxy information and it is noteworthy that they have not advanced reasons for refusal."

[36] Whilst EHD did not advance reasons for refusal of the application, Mr McCarron did point out to the Committee that EHD held serious reservations

about supporting the proposal. He further noted EHD's comments that, although certain mitigation measures could be employed to mitigate noise from both the A6 and the wind turbine, "the effect of such measures could not be measured accurately at this stage" and that these would not address external noise impacts.

[37] The officers' report identified several factors which were considered to be material in weighing up whether the proposed development would be significantly affected, and demonstrable harm would be caused, as referred to in para 5.72 of the SPPS. These included the fact that the current proposal is only 40m closer to the turbine than the previous property; that there were no records of noise complaint arising from the turbine before the previous property was demolished; that the notice party had indicated that there was no prejudice and she was fully aware of the circumstances; that neither the notice party, EHD nor third parties could definitively show that demonstrable harm would occur, due to lack of evidence; that there were extenuating circumstances, such as the original dwelling being removed to accommodate a key strategic transport, with the notice party seeking a replacement opportunity as close as possible to the original dwelling; and the proposed mitigation measures.

[38] Having raised the foregoing matters for the Committee's consideration, Mr McCarron referred to the officers' conclusion that:

> "on balance… any potential adverse impacts arising from the existing [wind turbine] can be offset through an appropriate condition in relation to the provision of acoustic glazing and ventilation system and would give considerable weight to the matter that the existing dwelling was also most likely to have [been in] an area that would have breached the same test applied by the Environmental health assessment as well as the third party assessment."

[39] In order to seek to minimise the adverse impact of any noise from the A6 and the wind turbine, the Committee agreed with the planning officers' recommendation that a planning condition should be imposed requiring, prior to the commencement of any development, details of suitable fixed acoustic glazing with alternative ventilation systems to all habitable rooms to be submitted in writing for consideration and written approval by Council; and that the agreed glazing and ventilation system must be applied permanently.

Residential amenity in relation to shadow flicker

[40] The Committee was advised that the published guidance for shadow flicker impact recommends that shadow flicker on neighbouring offices and dwellings within 500m should not exceed 30 hours per year or 30 minutes per day.

[41] Mr McCarron discussed the findings of the two reports submitted by CD Consulting and Green Cat Renewables and the points of difference between them. He mentioned that both reports concluded that "there would be a degree of shadow flicker that will exceed the recommended threshold"; but that they differed on the extent of the flicker on a given day. The officers' report did not dispute the findings of these reports and accepted the fact that there would likely be exceedances at the proposed dwelling. However, officers' report, as explained to the Committee by Mr McCarron, gave greater weight to the fact that the original dwelling would have been within the area already affected by shadow flicker and that no complaints had been received in relation to shadow flicker from No. 93 Foreglen Road; the notice party's acceptance of the potential impact; the ability to self-mitigate, such as through additional planting of trees, re-orientation of main rooms and use of blinds; and the "very limited impact on a small number of windows… which are not the main living areas of the proposed dwelling."

[42] On balance, the officers considered that the residential amenity of the proposed dwelling would not be unduly affected by shadow flicker and that demonstrable harm would not be caused by the wind turbine.

[43] At the end of the presentation, Mr Donaghy was given the opportunity to make representations on behalf of the ten objectors. He cautioned against the precedent which may be set by the granting of such an application which (he contended) would give greater weight to the interests of the planning applicant over material planning considerations and would reduce the evidential burden on the planning applicant to demonstrate that no adverse harm is caused to residential amenity. Several questions were posed by Committee members, including one from Alderman Hussey who sought to draw a distinction between an application for a turbine and an application for a dwelling and outbuildings, the latter of which is generally not concerned with issues of shadow flicker and noise, particularly where "the applicant is content" with those effects. Mr Donaghy replied that the original dwelling was "a lot further away" and that with the relocation any increase in the size of the turbine, as part of the renewal climate agenda, or future development in and around that site, would be prejudiced by the proposal.

[44] After the discussion, a motion was proposed that the Committee accept the officers' recommendation to approve planning permission, subject to the proposed conditions outlined within the officers' report. This was passed unanimously. On 18 February 2022, the Council formally granted the planning permission subject to several conditions, including a stipulation aimed at mitigating the impact of noise. Judicial review proceedings were initiated by the applicant on 7 April 2022.

The relevant planning policies

[45] The key planning policies for present purposes are Policy CTY1 and Policy CTY3 within PPS21, 'Sustainable Development in the Countryside.' The overarching aim of PPS21, set out in para 3.1, is to:

> "… manage development in the countryside:
>
> - in a manner consistent with the strategic objectives of the Regional Development Strategy for Northern Ireland 2025; and
>
> - in a manner which strikes a balance between the need to protect the countryside from unnecessary or inappropriate development while supporting rural communities."

[46] Policy CTY1 provides that planning permission "will be granted for an individual dwelling house in the countryside in the following cases" which include "a replacement dwelling in accordance with Policy CTY3." Policy CTY1 also notes, however, the important caveat that all proposals for development within the countryside must meet, *inter alia,* "other planning and environmental considerations. Furthermore, where a proposal does not fall within one of the *types* of development which are considered acceptable in the countryside, planning permission "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."

[47] The kernel of Policy CTY3 is contained within the first sentence of the policy text, which is in the following terms:

> "Planning permission will be granted for a replacement dwelling where the building to be replaced exhibits the essential characteristics of a dwelling and as a minimum all external structural walls are substantially intact. For the purposes of this policy all references to dwellings will include buildings previously used as dwellings."

[48] The parties fundamentally disagreed on the interpretation of the fourth paragraph of Policy CTY3, which provides as follows:

> "In cases where a dwelling has recently been destroyed, for example, through an accident or fire, planning permission may be granted for a replacement dwelling."

[49] The Strategic Planning Policy Statement (SPPS), introduced pursuant to Part 1 of the 2011 Act, is now the principal statement governing planning policy in Northern Ireland. Paras 4.11 and 4.12 are of particular relevance:

> "**Safeguarding Residential and Work Environs**
>
> 4.11 There are a wide range of environment and amenity considerations, including noise and air quality, which should be taken into account by planning authorities when proposing policies or managing development. For example, the planning system has a role to play in minimising potential adverse impacts, such as noise or light pollution on sensitive receptors by means of its influence on the location, layout and design of new development. The planning system can also positively contribute to improving air quality and minimising its harmful impacts. Additional strategic guidance on noise and air quality as material considerations in the planning process is set out at Annex A.
>
> 4.12 Other amenity considerations arising from development, that may have potential health and well-being implications, include design considerations, impacts relating to visual intrusion, general nuisance, loss of light and overshadowing. Adverse environmental impacts associated with development can also include sewerage, drainage, waste management and water quality. However, the above mentioned considerations are not exhaustive and planning authorities will be best placed to identify and consider, in consultation with stakeholders, all relevant environment and amenity considerations for their areas."

[50] Annex A to the SPPS makes expressly clear that planning authorities should treat noise as a material consideration in the determination of planning applications, including for housing proposals in proximity to established noise-generating uses. It specifies that "planning authorities should seek to reach balanced decisions that consider noise issues alongside other relevant material considerations, including the wider benefits of the particular proposal." Annex A further suggests that consultation with the relevant authorities, such as Environmental Health, may be necessary where noise is identified as a significant issue and that planning conditions may be imposed in order to mitigate against excessive noise impacts.

[51] The overarching policy test to be applied by planning authorities when considering planning applications is stated, under the rubric of "Refusal of Planning Permission", at para 5.72 of the SPPS:

> "Planning authorities should be guided by the principle that sustainable development should be permitted, having regard to the local development plan and all other material considerations, unless the proposed development will cause demonstrable harm to interests of acknowledged importance. In such cases the planning authority has power to refuse planning permission." [underlined emphasis added]

Relevant legal principles

[52] The relevant legal principles setting out the boundary between the functions of planning authorities and the supervisory role of the courts are well-rehearsed and have been accompanied, particularly in recent times, by repeated judicial warnings against excessive legalism in this field. As I have previously indicated (see *Re Tesco Stores Ltd's Application* [2022] NIKB 9 at paras [16]-[17]), it is exceedingly difficult to improve upon some of the helpful summaries set out in the case-law of recent years, such as those provided by Lindblom LJ in *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2018] PTSR 746, at para [69] (drawing on his own earlier judgment in *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2017] PTSR 1283, at para [19]); and in *Mansell v Tonbridge and Malling Borough Council & Others* [2019] PTSR 1452, at paras [41]-[42]. McCloskey LJ referred to a range of cases in this jurisdiction which similarly summarise or expound the relevant legal principles in para [56] of his judgment in *Re Allister's Application* [2019] NIQB 79, one of the most useful and enduring remaining that of Girvan J in *Re Bow Street Mall's Application* [2006] NIQB 28, at para [43].

[53] It is trite that planning authorities have an obligation to correctly understand and take account of relevant planning policy; and to depart from an outcome dictated by the policy only where the authority does so consciously, rationally and on the basis of material planning considerations. As reiterated by McCloskey LJ in *McCann's Application* [2022] NICA 60 ("the *McCann* case"), the interpretation of planning policy is a question of law for the court: see para [14]. The principles applicable to the interpretive exercise were comprehensively set out by Lord Reed in the unanimous judgment of UK Supreme Court in *Tesco Stores v Dundee City Council* [2012] UKSC 13. At paras [18]-[19], Lord Reed explained that:

> "[18] … [Planning policies] are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained. Those considerations point away from the view that the meaning of the [area] plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of

> rationality. On the contrary, these considerations suggest that in principle, in this area of public administration as in others (as discussed, for example, in *R (Raissi) v Secretary of State for the Home Department* [2008] QB 836), policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context.
>
> [19] That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (*Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780 per Lord Hoffmann). Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean."

[54] Additional guidance was provided by McCloskey LJ in the *McCann* case, who considered the task of interpreting planning policy to be one of "objective judicial interpretation of the language used in the policy's contextual setting." McCloskey LJ continued (at para [15]):

> "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 (see *Re Sands Application* [2018] NIQB 80 at para [90] and compare *Re McNamara's Application* [2018] NIQB 22 at para [22]). Reflection on the governing principles also serves as a reminder that in judicial review proceedings the jurisdiction of the court is supervisory in nature. Judicial review does not equate to an appeal on the merits, emphatically so."

[55] The judicial approach to the interpretation of planning officers' reports is also neatly summarised in *McCann* by reference to the *Mansell* case, at para [42](2), which stated as follows:

> "The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge: see the judgment of Baroness Hale of Richmond JSC in *R (Morge) v Hampshire County Council* [2011] PTSR 337, para 36 and the judgment of Sullivan J in *R v Mendip District Council, Ex p Fabre* [2017] PTSR 1112, 1120. Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave: see the judgment of Lewison LJ in *R (Palmer) v Herefordshire Council* [2017] WLR 411, para 7. The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way—so that, but for the flawed advice it was given, the committee's decision would or might have been different—that the court will be able to conclude that the decision itself was rendered unlawful by that advice."

[56] McCloskey LJ added to the above that a "materially misleading" statement is not the only basis upon which a planning officers' report may give rise to judicial review proceedings and that the full panoply of recognised judicial review grounds applies: see *McCann*, para [18].

Misinterpretation and misapplication of relevant planning policy

[57] The first core argument made on behalf of the applicant is that the respondent erred in treating the planning application in this case as one for a replacement dwelling under Policy CTY3 and misunderstood the relevance of the "exception" under para 4 of that policy, so that it failed to apply the policy correctly. The applicant submits that Policy CTY3 generally applies to proposals for the replacement of *existing* buildings which exhibit the "essential characteristics of a dwelling and as a minimum has all its external structural walls substantially intact." As No 93 Foreglen Road had been demolished by DfI at the time when the planning

application was determined, the proposal failed, in the applicant's submission, to meet the core requirements of Policy CTY3. On the applicant's analysis, where there is no existing building a proposal for a replacement dwelling must fall within the 'exception' contained in para 4 of the policy for "recently destroyed" dwellings. The requirement for recency was not met in the applicant's view, as No. 93 Foreglen Road had been demolished 11 months prior to the Planning Committee's consideration of the proposal on 1 December 2021 which is "the moment at which the policy bites."

[58] The applicant does not interpret the phrase "has been… destroyed" as including intentional demolition by government authority. It is argued that the passive language of the exception itself, coupled with the examples provided within para 4 of the policy text (accident or fire) make clear that the intention was not to cover deliberate demolition, but that it is limited to unintentional destruction, for example by an act of God. The applicant raised further concerns that the respondent's interpretation of Policy CTY3, as covering deliberate demolition, was inconsistent with the aim and objectives of PPS21 as set out at parags 3.0 and 3.2. The applicant contends that the impugned decision sets "a very serious adverse precedent" insofar as future applicants can circumvent the requirement for an existing dwelling and the expressed preference for the retention and sympathetic refurbishment of non-listed vernacular dwellings rather than their replacement under CTY3.

[59] Mr Orbinson submitted that there is a fundamental difference in application between the relevant parts of Policy CTY3. Under the general limb, planning permission "will" be granted, whereas under para 4, planning permission "may" be granted. The upshot of this distinction, he submitted, is that a discretion must be exercised under the purported exception contained in para 4 of the policy wording. In the applicant's view, the planning officers' report and Mr McCarron's presentation to the Planning Committee fundamentally misunderstood this point and therefore "materially misled" the Committee as to the correct interpretation and application of the policy by wrongly treating the proposal as a replacement dwelling, without acknowledging the more limited exception. On this analysis, the reference to the para 4 exception in Mr McCarron's first affidavit constitutes ex post facto rationalisation. The relevant excerpt from that affidavit is in the following terms:

> "As is clear from the policy wording, policy CTY3 of PPS21 does not require a dwelling to be in existence at the time of decision. Rather, policy CTY3 of PPS21 states planning permission can be granted in certain cases where a dwelling has recently been destroyed, with evidence about the status and previous condition of the building and the cause and extent the damage necessary to be provided."

[60] McCloskey J's brief exposition of the relevant case law on ex post facto justification in *Re JR45's Application* [2011] NIQB 17 extracts, from those authorities, a well-established general rule that any ex post facto justification must be evaluated with care and circumspection by the court. In particular McCloskey J cited the following passage from the well-known case on this issue, *R v Westminster City Council ex parte Ermakov* [1996] 2 ALL ER 302:

> "The court can and, in appropriate cases, should admit evidence to elucidate or, exceptionally, correct or add to the reasons; but should, consistently with Steyn LJ's observations in *Ex parte Graham*, be very cautious about doing so. I have in mind cases where, for example, an error has been made in transcription or expression, or a word or words inadvertently omitted, or where the language used may be in some way lacking in clarity. These examples are not intended to be exhaustive, but rather to reflect my view that the function of such evidence should generally be elucidation not fundamental alteration, confirmation not contradiction. Certainly there seems to me to be no warrant for receiving and relying on as validating the decision evidence – as in this case – which indicates that the real reasons were wholly different from the stated reasons."

[61] A similar point was pithily expressed in the judgment of Hooper J in *R (Sporting Options plc) v Horse Race Levy Betting Board* [2003] EWHC 1943 (Admin), at para [197]:

> "Courts treat with caution witness statements explaining a decision for the obvious reason that there is a risk that albeit unconsciously, a decision maker may seek to remedy any apparent weakness."

[62] Here, the applicant argued that the respondent was clearly seeking to remedy a "glaring omission" in the Planning Committee's consideration of the planning application, by asserting that the 'exception' was applied only in subsequent affidavit evidence. Mr Orbinson made the final additional point that the impugned decision breached para 3 of Policy CTY1, which provides that all proposals "must meet planning and other environmental considerations", by failing to ensure that the noise impacts and shadow flicker issues complied with the recommended policy thresholds. I return to that issue below.

[63] In reply, Mr McAteer relied upon the fundamental principles which apply in planning challenges, including that the weight to be attached to any material consideration is a matter of planning judgment within the exclusive province of the decision-maker, provided it does not lapse into *Wednesbury* irrationality. He

submitted that all relevant information had been put before the Planning Committee and taken into account by it, including the background to the proposal and the cause of demolition, along with the essential characteristics of the previous dwelling. In his submission, from a global reading of the materials it could be seen that the Committee understood the nature of the proposal, properly considered it to fall within Policy CTY3, and exercised appropriate discretion in relation to whether the application should be granted. The respondent also cautioned against excessive legalism when interpreting planning policies and rejected the applicant's characterisation of para 4 of Policy CTY3 as an "exception" to be applied in a strict sense. In this regard, Mr McAteer drew attention to the express language of "exceptions" provided for in Policies CTY8 and CTY10, noting the absence of such language within Policy CTY3.

[64] The meaning of the terms "recently" and "destroyed" within Policy CTY3 were the subject of much debate between the parties. In relation to the former, the respondent contended that this is a discretionary element intended to guard against opportunistic proposals for dwellings destroyed many years prior to the lodging of a planning application, which would tend to undermine the policy's objectives. Mr McAteer argued that, given the circumstances of this case, it would have been *Wednesbury* irrational to refuse the application on the basis of the house having been demolished other than recently. He pointed to the fact that the planning application was made promptly once it became clear that the original property would be demolished; and that it was destroyed only during the course of the application. Whilst Policy CTY3 refers to the examples of an "accident or fire", the respondent argued that these were not prescriptive categories. Rather, it was submitted that the more reasonable interpretation is that the examples provided are indicative of situations where destruction occurs outside of the owner's control. Accordingly, as the applicant played no part in and had no control over the demolition of the dwelling, the respondent submitted that the proposal plainly fell within Policy CTY3.

[65] The respondent further rejected the characterisation of Mr McCarron's affidavit as ex post facto rationalisation. It submitted that the facts referred to in his affidavit were clearly known to, and considered by, the Committee. The relevant question, in the respondent's view, was therefore whether it was correct that the policy encompassed dwellings destroyed in the circumstances described.

[66] In my judgment, the applicant has sought to apply an overly legalistic interpretation to the text of Policy CTY3 both in terms of what was referred to as the 'exception' (or 'allowance') and the requirement of 'recency.' It is undoubtedly the case that the primary example of applications which will benefit from the policy are those where an existing dwelling, in place at the time of the planning determination, is to be replaced. However, the policy, in its fourth paragraph, also contemplates the grant of planning permission where a dwelling has recently been destroyed. I see no warrant for construing the word "destroyed" as applying exclusively to accidental destruction or destruction by fire. Indeed, the use of the words "for example" makes

clear that these specific instances are illustrative only and non-exhaustive. The purpose behind this provision within the policy is plainly that a planning applicant should not be unfairly or unduly prejudiced in certain circumstances where their dwelling has been destroyed but where they could, but for the destruction, have applied for a replacement dwelling in the countryside. At the same time, a planning applicant should not be able to put themselves in a better position by purposively demolishing their own dwelling (for instance, in cases where the character or condition of the building may have been in issue and then cannot be properly assessed; or where refurbishment under the second part of Policy CTY3 may have been appropriate instead of replacement).

[67] These competing interests and the policy intention can readily be catered for by the interpretation favoured by the respondent in this case, namely that the notion of "destruction" carries with it the implication that the dwelling was destroyed against the owner's wishes or in circumstances beyond their choosing where, otherwise, the building would have been retained as a dwelling. This does not exclude destruction by way of demolition (for instance, pursuant to a vesting order); but would exclude a case where the owner simply demolished their house of their own choosing.

[68] As to whether the destruction of the dwelling was 'recent', that appears to me to involve a question of planning judgment on the part of the planning authority, taking into account the intention behind the policy which is discussed above. A planning applicant should obviously move promptly if seeking to rely upon that part of the policy which applies to dwellings which have recently been destroyed. A planning authority will be perfectly entitled to refuse an application, even where the destruction of the dwelling was entirely outside the applicant's control, if there is a period of time between the destruction of the dwelling and the planning decision which is such as to call into question whether the dwelling is actually being replaced. In assessing this, however, the date of the planning application, whilst not completely determinative, will likely be a highly significant factor. I accept the respondent's submission that, in the present case, where the planning application was made before the dwelling was destroyed but in anticipation of that, it would have been perverse to refuse the application on the basis that the destruction of the dwelling was not sufficiently recent to represent a replacement application under Policy CTY3.

[69] I also consider that the applicant has placed undue reliance upon the suggestion that the fourth paragraph of the policy text in Policy CTY3 represents an "exception" to the main policy in respect of which a significantly different approach to the main policy (encapsulated in the first paragraph) is required. In truth, the fourth paragraph is not an exception to the policy but an extension of it. It allows a replacement dwelling to be built in limited circumstances where the dwelling to be replaced has been destroyed. It is significant that the fourth paragraph of the policy text also refers to planning permission being granted for a "replacement dwelling" where the original dwelling has been destroyed. The central questions for

consideration by the planning authority will be the same as under the first paragraph of the policy. The fourth paragraph is drafted in more equivocal terms ("planning permission *may* be granted") because, as the policy makes clear, "evidence about the status and previous condition of the building and the cause and extent of the damage must be provided." Only once satisfied that the building was a dwelling, that it has been recently "destroyed", and that (in accordance with the interpretation discussed above) this was outside the planning applicant's control, will the authority go on to consider whether it is appropriate to grant a replacement permission. Once this final stage has been reached, however, the policy does not demand a different approach than assessment under the first paragraph.

[70] In view of the above discussion, I do not find the applicant's complaints about misdirection in relation to planning policy to be made out. Nor do I consider that Mr McCarron's evidence should be considered to be impermissible ex post facto justification. He describes how the Committee was satisfied in relation to the pre-conditions set out in the fourth paragraph of the policy, having considered evidence about the status and previous condition of the building and the cause and extent of the damage to it. Having been so satisfied, they proceeded to determine whether it would be appropriate to grant permission for a replacement dwelling in the usual way. I find no error of law or misdirection in the way in which this issue was approached.

Duty of inquiry

[71] I turn next to the applicant's arguments based on the Council's alleged failure to conduct an adequate inquiry into certain material considerations. The extent of the inquiry required by a planning authority is governed by the normal public law principles established in *Secretary of State for Education v Tameside* [1976] 3 WLR 641 (referred to also by Girvan J in the *Bow Street Mall* case at para [43](f)). The authority must ask itself the right question and "take reasonable steps to acquaint itself with the relevant information to enable [it] to answer it correctly." An extremely helpful and now oft-cited summary of the principles to be drawn from the relevant authorities is contained in the judgment of Hallett LJ in *R (Plantagenet Alliance) v Secretary of State* [2014] EWHC 1662 (Admin) at para [100]. For instance, it was cited in recent times in this jurisdiction in the planning sphere by Humphreys J at para [108] of his judgment in *Re ABO Wind NI Limited & Energia Renewables Company 1 Limited's Application* [2021] NIQB 96. Hallet LJ's summary is as follows:

> "(1) The obligation upon the decision-maker is only to take such steps to inform himself as are reasonable.
>
> (2) Subject to a *Wednesbury* challenge, it is for the public body, and not the court to decide upon the manner and intensity of inquiry to be undertaken

(*R (Khatun) v Newham LBC* [2005] QB 37 at paragraph [35], per Laws LJ).

(3) The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision (per Neill LJ in *R (Bayani) v. Kensington and Chelsea Royal LBC* (1990) 22 HLR 406).

(4) The court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient (per Schiemann J in *R (Costello) v Nottingham City Council* (1989) 21 HLR 301; cited with approval by Laws LJ in (*R (Khatun) v Newham LBC* (supra) at paragraph [35]).

(5) The principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant, but from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion (per Laws LJ in (*R (London Borough of Southwark) v Secretary of State for Education* (supra) at page 323D).

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

[72] Thus, this element of the applicant's claim ultimately boils down to a form of *Wednesbury* challenge. It is submitted by the applicant that the respondent failed its duty of inquiry in three key respects. First, he contends that the Planning Committee proceeded to decide on the planning application without adequately investigating the noise impact of the wind turbine. The applicant draws particular attention to EHD's comments identifying the need for a detailed noise survey to be

conducted and the concerns acknowledged during the Planning Committee meeting that there was a "significant evidential gap" as a result. Therefore, in the applicant's view, the conclusion reached by the Committee that any potential adverse impacts can be mitigated through a planning condition requiring acoustic glazing and better ventilation is fundamentally flawed and not based on sound evidence.

[73] Mr Orbinson prayed in aid the Court of Appeal's decision in the *McCann* case. The appellant in *McCann* argued, *inter alia,* that the decision to grant permission for the development of a further education college at Lake Road in Craigavon was unlawful by reason of being in contravention of regulation 3(3) of the Habitats Regulations and/or Policy NH2 of PPS2 in that insufficient inquiry had been made to ascertain the possible presence of, and adverse effects on, otters at the development site. The respondent in that case granted planning permission on the basis of a survey conducted two years prior to the lodging of the application which had found there to be no otters present. This was despite it having been later advised of the potential presence of otters, since the lodging of the planning application, and receiving a recommendation that a full up-to-date otter survey be conducted (see paras [96]-[105] of the judgment). A planning condition was imposed which required the developer to carry out an inspection or assessment, prior to any works, to establish whether there were otters on the site. McCloskey LJ rejected the notion that a planning condition could "redeem a legally flawed grant of planning permission" (see paras [111]-[112]). Nor could such a condition result in the revocation of the planning permission granted, even if it discovered an unacceptable adverse effect: "The horse will already have bolted." In the present case, the applicant submits that, in light of the insufficient evidence, the planning application should either have been refused or suspended until after the A6 Scheme's completion, when it would then have been possible to conduct a site-specific background noise assessment.

[74] Second, the applicant argued that the respondent failed to adequately investigate whether mitigation would reduce noise impacts to acceptable levels, nor whether the impact on the amenity of external areas could not be mitigated by the proposed measures. Third, the applicant argued that the respondent failed to adequately investigate the shadow flicker issues by not obtaining the services of a competent consultant to comment on the issue as recommended by EHD; and that the planning officers' conclusion (that the residential amenity of the proposed dwelling "will not be unduly affected by shadow flicker and demonstrable harm will not be caused") was based on insufficient evidence. Mr Orbinson made the related point in his submissions that undue weight was afforded to the notice party's acceptance of the wind turbine's effects even though this did not protect against adverse impacts on future occupants of the proposed dwelling.

[75] On the other hand, the respondent argues that it possessed sufficient information to reach a "balanced decision" (as required by policy) which could not be said to have strayed into *Wednesbury* irrationality. Mr McAteer relied upon the guidance in paras 4.11, 4.12 and 5.72 of, and Annex A to, the SPPS. On foot of these

extracts, he argued that the planning authority was best placed to identify and consider the environmental and amenity considerations; that it was for the respondent to conduct a balancing exercise on a case-by-case basis; and that permission should be granted unless it will cause demonstrable harm. On the respondent's case, the test in para 5.72 SPPS for refusing a planning application, namely that the proposed development would cause demonstrable harm to interests of acknowledged public importance, was not met. On the issue of noise, Mr McAteer submitted that EHD's position was not that the Council had failed to investigate but, rather, that a detailed survey was simply not possible due to the ongoing road works. In relation to the alleged failure to investigate shadow flicker, Mr McAteer submitted that, although there is no requirement within PPS21 to assess the impact of existing factors such as shadow flicker, it was assessed as a material consideration in accordance with the PPS18 Best Practice guidelines.

[76] In summary, the respondent submitted that the Committee had before it all of the relevant information and weighed up the pertinent facts, of which the planning applicant's acceptance of any adverse impact from the wind turbine formed only a small part. It was noted that significant weight was also given to the wider benefits of the proposal; the fact that the difference in distance between the proposed dwelling and the previous dwelling at No. 93 Foreglen Road was only approximately 40m; that no mitigation measures had been in place at the previous dwelling; and that the notice party's family had not made any complaints in relation to either noise or shadow flicker since the wind turbine had been in operation.

[77] The applicant's complaint about the absence of a detailed noise assessment is superficially attractive. It is incumbent upon the decision-maker to take reasonable steps to inform itself in relation to issues which give rise to potential adverse impacts upon residential amenity. However, the difficulty in the present case is that the detailed noise assessment which was required was impossible to obtain in the circumstances. The relevant question therefore is essentially whether it was irrational not to defer a decision on the application (or refuse it) until such a time as the detailed noise survey could be completed, ie when the A6 development near the site was completed.

[78] On the one hand, the planning application was lodged in June 2018. It is now known that the dual carriageway was not open to traffic until April 2023. The decision was made in February 2022. The respondent argues strongly that it was not irrational to decide to progress the application in the absence of evidence that was impossible to obtain at that time. Otherwise, a determination on the application would have been delayed unreasonably. Relatedly, the Council argues that it acted in accordance with the relevant policies. Since demonstrable harm was not shown, albeit due to lack of evidence, the appropriate course was to allow the application. On this analysis, the planning applicant should not be penalised for a failure to adduce evidence which could not be adduced. In those circumstances, ultimately the decision-maker must reach a balanced decision. In this case it did so by clearly taking into consideration the material issues which were identified and making

efforts to minimise potential adverse impacts in line with SPPS (see para [49] above). The question for the court is whether this was irrational in the *Wednesbury* sense.

[79] The present case can be distinguished, in my view, from the *McCann* case. In that case, an arguably much more significant issue of environmental importance was at play, namely the protection of otters as a European protected species. The relevant planning policy at issue in that case was also more prohibitive: under PPS2, planning permission "will only be granted for a development proposal that is not likely to harm a European protected species" (see paras [90]-[95] of *McCann*). In other words, planning permission should be refused unless there was confidence that the protected species would not be likely to be harmed. In the present case, the presumption in favour of sustainable development means that planning permission should be granted unless harm to an interest of acknowledged importance will be caused. It was also possible for the respondent in the *McCann* case to have conducted an otter survey. There were no technical barriers to obtaining the relevant information. In contrast, the present case is also somewhat unusual given the circumstances of the vesting order; the desire for a replacement dwelling in those circumstances; and the difficulties with obtaining the relevant information faced by the respondent at the time given the anticipated delay in the A6 development. It was therefore not possible at the time of the decision for the Council to complete the steps necessary to achieve any degree of certainty in relation to noise assessment. The question is whether, in those circumstances, it was entitled to give the planning applicant the benefit of the doubt (discussed further below at paras [103]-[117]).

[80] In relation to the issue of noise, the ETSU-R-97 guidelines are generally applied to planning applications for renewable energy developments in accordance with PPS18. In this case, the applicant is seeking to rely on those guidelines outside their typical context (ie where a resident is objecting to a new windfarm development). The Planning Committee clearly understood this to be the case. Even so, ETSU-R-97, according to the Best Practice Guidance to PPS18 at para 1.3.46, "describes a framework for the measurement of wind farm noise and gives indicative noise levels calculated to offer a reasonable degree of protection to wind farm neighbours, without placing unreasonable restrictions on wind farm development." It was plainly proper therefore for the respondent to consider the guidelines where the compatibility of these two neighbouring land uses was in issue. Where those indicative levels are breached, however, there is no absolute requirement to refuse a relevant planning application, albeit the determination that the adverse impact is acceptable will require unusual circumstances. Each case will depend upon its own facts in determining whether a proper balance has been struck between the protection of neighbours from nuisance and the avoidance of unreasonable restriction on wind energy development. Although the indicative levels will generally be determinative, there must exist discretion for an unusual case. That is how the Planning Committee approached the present case. I consider further below whether it was rational and lawful to grant the planning permission in those circumstances.

[81] However, faced with the situation before it – where EHD had done all it could but had indicated that the detailed noise assessment it would generally seek was not possible at that stage – it does not appear to me to have been *Wednesbury* irrational for the Committee to proceed on the basis of the best evidence it had at that point. Put another way, although the Committee might conceivably have decided to refuse the application or defer it until the portion of the A6 near the site was constructed and open, that was not the only approach they could rationally take in the circumstances.

[82] In relation to the issue of shadow flicker, it was again not irrational in my view for the Council to determine that it could proceed without instructing its own expert. EHD had advised only that the Planning Department "may wish" to engage the services of another consultant. The findings of the two third-party reports were, notwithstanding the disagreements over interpretation, broadly similar in substance and accepted by the planning officers who conveyed the findings to the Committee. They both indicated that there would be (what the officers termed) "exceedances" of the recommended shadow flicker thresholds. The Council was entitled to proceed on the basis of the expert evidence before them without having to instruct yet a further expert in order to avoid acting unlawfully. The more pertinent issue is whether the Council could rationally conclude that there was no unacceptable amenity impact such that the two neighbouring land-uses were incompatible. I return to that below (see paras [119]-[123]).

Illegality and procedural fairness – the failure to readvertise the application

[83] The applicant additionally contends that, once the original dwelling at No 93 Foreglen Road was demolished, the respondent had a statutory duty pursuant to section 41 of the 2011 Act and Article 8(1) the 2015 Order to readvertise the planning application, which it failed to do. Section 41 of the 2011 Act, under the heading 'Notice, etc., of applications for planning permission', provides as follows:

> "(1) A development order may make provision requiring notice to be given of any application for planning permission and provide for publicising such applications and for the form, content and service of such notices.
>
> (2) A development order may require an applicant for planning permission to provide evidence that any requirements of the order have been satisfied.
>
> (3) An application for planning permission must not be entertained by a council or the Department unless any requirements imposed by virtue of this section have been satisfied."

[84] Detailed provision in relation to publicising planning applications is therefore to be made in a development order. In turn, Article 8(1) of the 2015 Order, under the same heading, provides as follows:

> "Subject to Article 3, where an application for planning permission is made to the council or, as the case may be, the Department, the council or, as the case may be, the Department shall—
>
> (a) publish notice of the application in at least one newspaper circulating in the locality in which the land to which the application relates is situated;
>
> (b) serve notice of the application to any identified occupier on neighbouring land in accordance with paragraph (2);
>
> (c) where it maintains a website for the purpose of advertisement of applications, publish the notice on that website; and
>
> (d) not determine the application before the expiration of 14 days from the date—
>
> (i) on which the notice is first published in a newspaper in pursuance of sub-paragraph (a),
> (ii) stipulated on the notice to any identified occupier issued under sub-paragraph (b), or
> (iii) on which the application is first published on the website in pursuance of sub-paragraph (c), whichever date is the later or latest."

[85] Article 8(2) sets out the requirements in relation to the notice to be given. It is in the following terms:

> "The notice to be given in accordance with paragraph (1)(b) must—
>
> (a) state the date on which the notice is sent;
>
> (b) include the reference number given to the application by the council, or as the case may be, the Department;

(c) include a description of the development to which the application relates;

(d) include the postal address of the land to which the development relates, or if the land in question has no postal address, a description of the location of the land;

(e) state how the application, plans or drawings relating to it and other documents submitted in connection with it may be inspected;

(f) state that representations may be made to the council or, as the case may be, the Department and include information as to how any representations may be made and by what date they must be made (being a date not earlier than 14 days after the date on which the notice is sent);

(g) include a statement as to how information explaining the manner in which applications for planning permission are handled and the procedures which are followed in relation to such applications can be obtained; and

(h) where the development to which the application relates is a class of development prescribed for the purposes of section 27 (pre-application community consultation) of the 2011 Act, include a statement that notwithstanding that comments may have been made to the applicant prior to the application being made, persons wishing to make representations in respect of the application should do so to the council or, as the case may be, the Department in the manner indicated in the notice."

[86] The central issue of contention in relation to this aspect of the applicant's challenge is whether the requirement at Article 8(2)(c) has been properly complied with, namely that there was adequate publicity in relation to "a description of the development to which the application relates."

[87] Several authorities within this jurisdiction address what is required of local planning authorities in the sphere of statutory advertisements of planning applications. In *Morelli v Department of the Environment* [1976] NI 159, the court considered an application advertised as "Structural alterations to Existing Dwelling" which was in fact an application to make structural alterations to an existing café by

constructing an amusement arcade. The advertisement was found to be defective because it "made no reference whatever to an important part of the development for which permission was sought in the First Application viz. the change of use from a café to an amusement arcade." Murray J considered that the relevant statutory duty required:

> "… a notice whose terms bring home to the mind of a reasonably intelligent and careful reader both (i) the nature of any building engineering, mining or other "operations" for which permission is sought in the relevant application and (ii) any "material change in the use of any buildings or any other land" for which permission is so sought… A notice which omits any reference to a change in use sought is, in my view, a notice of part only of the relevant application and is not a notice of the relevant application."

[88] In *R (Thallon) v Department of the Environment* [1982] NI 26, the court held that an adequate notice of an application for planning permission is a condition precedent to a grant of permission. In that case, the court considered that the notice published by the Department gave a seriously misleading and inadequate description of the proposed development by referring to an "extension to hotel" where no previous permission had existed for a hotel. In *McHenry's Application* [2007] NIQB 22, Gillen J cited with approval the following passage from the judgment in *Thallon*:

> "The purpose of a notice published pursuant to Article 15(a) (of the 1972 Order) is to give interested members of the public proper notice of the planning application, and this purpose is not carried out if the notice is seriously misleading as to the nature of the development proposed, whether or not the planning application itself contains the inaccuracy which is published in the notes. I therefore hold that because the notice which the Department purported to publish pursuant to Article 15(a) was seriously misleading, the planning permission of 1977 was invalid. I have held the notice in this case to be seriously misleading; I consider that some minor inaccuracy in a notice which does not mislead the public would not render the notice a nullity and the subsequent permission invalid …"

[89] Gillen J considered that the passage above captured "the gravamen of the legal issue." He went on to consider, therefore, whether, in the case before him, the error in the map was "seriously misleading" and would frustrate the purpose of the statutory requirement or whether, on the other hand, it could "be characterised as a

minor inaccuracy which did not mislead the public" (see paras [7]-[8] of the judgment in *McHenry*).

[90] More recently, in *Re Doyle's Application* [2014] NIQB 82, Treacy J offered the following observation at para [10] in relation to earlier statutory provisions to the same effect as those now under consideration:

> "The clear legislative purpose underpinning Art 21 and Art 32(6) of the 1991 Order is that following the prescribed public advertisement any member of the public with an interest in the application/appeal has been given a reasonable opportunity to become aware of it and make representations if they so wish."

[91] Finally, in *Re Newry Chamber of Commerce and Trade's Application* [2015] NIQB 65 Treacy J rejected the applicant's submission that the Department had failed to adhere to the relevant statutory requirements by failing to refer to the proposed River Newry bridge when advertising a planning application for a mixed-used development in Newry. He underlined that the statutory scheme does not require the advertisement to specify every individual element of the development which the application proposes. The judge's attention having been drawn to the cases discussed above, he applied both formulations of the test in *Morelli* and *Thallon* (see paras [117] and [118]), asking whether the advertisement was seriously misleading; whether it frustrated the purpose of the statutory obligation; and whether it informed the intelligent and careful reader of the substance of what was proposed.

[92] The core of Mr Orbinson's submission on this point was that the notice published by the respondent was seriously misleading as it failed to accurately reflect the material change in circumstances on the ground in that No 93 Foreglen Road had been demolished after the planning application had been lodged and that the proposal could not therefore properly be portrayed as a relocation or replacement proposal. The applicant further contended that this was a fundamental issue of procedural fairness. Planning authorities have a duty to deal with applications in accordance with the requirements of procedural fairness, which "extends to objectors and may require the respondent to provide objectors with an opportunity to make additional representations" (see *Re Rowesome's Application* [2004] NI 82, at para [19]). The applicant's case amounts to an assertion that the public were misled as to the actual nature of the proposal, so that individuals were deprived of the opportunity to make full representations as to the application of CTY3. Mr Orbinson submitted that one could not relocate (or replace) something which no longer existed.

[93] The respondent's riposte is that – applying either the formulation espoused in *Morelli* or *Thallon* – it cannot be said that members of the public were misinformed about the substance of the application. In the Council's submission, the application remained the same in substance after the property's demolition; there was no

material change in use; and members of the public were not deprived of the opportunity to make representations in a manner analogous to those discussed in the cases above where procedural unfairness was found. Mr McAteer pointed to the 30 objections which had been made by some ten different individuals. He argued that these did not challenge the application of Policy CTY3 to the proposal, nor did they raise the concerns about this policy which have been pursued in these proceedings; but that it was clear that the objectors had a full opportunity to object to the proposal.

[94] I have little difficulty in accepting the respondent's submissions in relation to this element of the applicant's case. The applicant's argument in relation to procedural fairness rests upon the foundation – which I have rejected above – that there is a radical difference between planning applications advanced on the basis of the first paragraph of Policy CTY3 and those advanced on the basis of the "exception", applying a different policy test, contained within the fourth paragraph of the policy. I consider this to be a mistaken and overly legalistic analysis. Rather, in each case, the policy test is the same, namely whether it is appropriate to grant permission for a replacement dwelling. The difference in the latter case is simply that the dwelling to be replaced will have been recently destroyed. As mentioned above (see para [69]), it is noteworthy that the fourth paragraph of the policy text also refers to planning permission being granted "for a replacement dwelling." This indicates, contrary to the applicant's submission, that, even where the building to be replaced has recently been demolished, the nature of the application and the necessary consideration is essentially the same as under the first paragraph of the policy text.

[95] In the present case, the notice party's proposal throughout was that a new dwelling would be built and that planning permission should be granted for a replacement dwelling under Policy CTY3 on the basis of the status and condition of the previous dwelling at the site. It may have been prudent for the description of the proposal to have used the words "replace" or "replacement", so mirroring the wording of the relevant policy, rather than the word "relocation." However, I consider this to be within the category of minor inaccuracy, if indeed it is an inaccuracy at all. I do not consider that anyone would be, or would have been, seriously misled about the nature of the proposal. Further, given that the policy justification remained the same whether the original dwelling was soon-to-be demolished or had recently been demolished, I do not consider that there was any material change in the application which required re-advertisement. Those who wished to object in relation to the substance of the proposal, including the applicant himself, were at liberty to do so and did so.

Irrationality and failure to take into account material considerations

[96] The final area of challenge in relation to the substance of the decision making are the applicant's contentions that the Council reached an irrational decision on the

merits and, in doing so, failed to take into account several relevant material considerations, namely:

(a) the application of the exception to Planning Policy CTY3 to the proposal;

(b) that the replacement dwelling opportunity was no longer extant on the ground at the proposal site and the implications of that factual development regarding the application of Policy CTY3 on replacement dwellings;

(c) whether, in consequence of (b) above, the proposal satisfied the exception to Policy CTY1 of PPS21 because, since the proposal was not for a replacement dwelling, it was necessary to "demonstrate overriding reasons why the development is essential" (which were not advanced); and

(d) that even if the proposal were deemed to satisfy the exception it remained a matter of discretion whether the Planning Committee should then grant permission.

[97] The reasoning in earlier sections of this decision is sufficient to dispose of these complaints. In my judgment, the Committee properly considered the application to fall within Policy CTY3, which is to be read as a whole rather than in the disjointed manner proposed by the applicant. Having considered that the proposal was acceptable in principle in line with Policy CTY3, the Council was not required to fall back on the "overriding reasons" exception within Policy CTY1. The Council was well aware that the original dwelling had been demolished but properly considered the nature and condition of the dwelling at the time the application was lodged. It considered all relevant aspects of the proposal before determining whether permission should be granted.

[98] The applicant further contends that the Council's decision to grant the application was irrational in light of where the evidence stood on the noise and shadow flicker issues. Ultimately, this is the nub of the challenge if one accepts (as I have) that it was rational for the respondent to determine that it should not seek further expert evidence on either of these issues.

[99] Albeit the notice party indicated in strong terms that she was content with any likely adverse effects which might be caused by the turbine at the new dwelling, this does not address the issue of the protection of future residents against any adverse impacts. The notice party's consent to any adverse impacts cannot therefore be determinative of whether, in planning terms, those impacts are acceptable or unacceptable, although I would not go so far as to say that it was unlawful to take this into consideration.

[100] The applicant, as windfarm owner, is concerned about being protected in future from nuisance complaints. This is mitigated in part by the fact that the notice party has accepted any risk (which would make it very difficult for her to mount or

sustain any such claim). However, future occupants will not have done so. The applicant relies upon the proposition that, in light of the Supreme Court judgment in *Coventry and others v Lawrence and another* [2014] UKSC 13, it is not a defence to a claim in nuisance to show that the claimant acquired or moved into their property after the nuisance had started. That is correct in general terms (see para [47] of the judgment of Lord Neuberger). However, the position is not entirely straightforward for a variety of reasons. Each case will, of course, turn on its own facts. It may be a defence to a claim of nuisance, at least in some circumstances, that it is only because the claimant has built on or changed the use of their land that the defendant's pre-existing activity is claimed to have become a nuisance: see paras [53]-[58] of the judgment of Lord Neuberger (with whom the rest of the court agreed). Prima facie, that would appear to include a case where a nuisance affecting the senses has arisen because a dwelling has been moved closer to a pre-existing lawful use on neighbouring land.

[101] Any nuisance claim on the part of a future occupier of the permitted dwelling is unlikely to be straightforward, even leaving aside any question of prescription which might arise, when taking into account issues such as the character of the neighbourhood and the 'give and take as between neighbouring occupiers of land' referred to by Lord Neuberger at para [55] of his judgment. The former of these considerations is discussed in further detail at paras [59]-[76] of Lord Neuberger's judgment in the *Coventry* case. The fact that Mr O'Neill has planning permission for the operation of the wind turbine, and indeed the planning authority's ultimate view on the compatibility (or lack of incompatibility) between the two neighbouring land-uses, could also be considered relevant in this context (see paras [96]-[97] of Lord Neuberger's judgment and paras [166] and [169] of those of Lords Mance and Clarke). Although Lord Neuberger considered that, generally, the mere grant of planning permission to a defendant in a nuisance claim for the carrying out of the relevant activity would not assist him, the circumstances of the present case have involved a careful balancing of the rights of both landowners.

[102] The Council was not, therefore, bound to conclude that, in granting permission, it would inevitably be creating a situation where the applicant would face nuisance claims in the future, much less unanswerable claims. For the reasons mentioned above, any such claim, if one emerged in the future, would be far from straightforward in my view. The applicant would also be wrong to assume that even a successful claim would result in an order restraining the operation of the turbine. (On this, Lord Sumption's observations at paras [156]-[157] of his judgment in the *Coventry* case seem apposite.) I should also say that, insofar as the applicant seeks to rely upon future applications he might (or might not) make for enhancement of his wind turbine, I consider that the Council was entitled to ignore this as entirely speculative. I therefore turn back to the question of whether, on the evidence before it, the Council acted irrationally in declining to refuse the application.

[103] In relation to noise, the applicant submits that the case officer's conclusion that any potential adverse noise impacts could be mitigated by imposing a condition requiring acoustic glazing and better ventilation lacked any evidential basis, since the relevant information necessary to make that assessment was unknown. He relies upon the fact that the statutory consultee had expressed serious reservations and concerns in relation to noise impact, finding it difficult to be supportive of the proposal in light of its close proximity to the turbine, uncertainty over compliance with ETSU-R-97 noise limits, and the audibility of noise in external areas. Relatedly, he contends that the case officer was wrong to attach significant weight to the fact that there had been no previous noise complaints in relation to the turbine. In summary, he contends that there was no evidential basis for the conclusion that noise impacts would be acceptable and compatible with ETSU-R-97 limits.

[104] The respondent submitted that all relevant matters had been taken into account and that, as such, the decisions as to whether further inquiries were necessary and planning permission should be granted reduced to matters of planning judgement which were exclusively matters for the decision maker, challengeable only on the basis of an exceptionally high hurdle which the respondent submits had not been overcome in this case.

[105] The case officer's report correctly identified that EHD had expressed concern that "the dwelling may be subject to noise and disturbance from the existing wind turbine and the A6 but have not recommended refusal." The report also notes EHD's advice that there is potential for shadow flicker but that this was a matter for the planning authority to consider. Since there was a range of objections, mostly (but by no means exclusively) from the applicant, the Council had to consider, and did consider, the main issues raised by objectors. The case was removed from the Committee schedule at an earlier point so that the officers' report could specifically deal with the Green Cat report of September 2021 and EHD could be reconsulted.

[106] As to noise, the officers' report noted that EHD had not requested a noise report from the planning applicant and that it had "consistently advised that the required data to produce any such report is not available." EHD had highlighted "a probability of noise impact, based on proxy information" but the officers considered it "noteworthy that they [EHD] have not advanced reasons for that."

[107] The issue of residential amenity in relation to noise and shadow flicker is addressed in some detail, by reference to the SPPS, in section 11 of the planning officers' report. The Committee were aware that the dwelling for which permission was sought would be one of the closest proposed residential properties during operational turbine of that size which had been considered in the district.

[108] The Committee was also aware that according to the EHD calculation noise from the turbine would breach the ETSU-R-97 *simplified* noise criteria at the proposed site. That would indicate that a detailed noise survey should be sought. However, as discussed above, a detailed noise survey was not carried out as EHD

advised that the background levels for the turbine were not available. Because the A6 was not fully operational, EHD was limited in the advice that it could provide. The Committee was appraised of EHD's concerns that turbine noise would be audible outside the property but potentially also distinguishable inside the property especially between passing traffic events at night; and that it would be difficult to sustain a statutory noise nuisance complaint later if the planning authority decided to proceed. However, in the absence of a detailed noise assessment (which was not carried out for the reasons already discussed) the officers' report noted that both the EHD's and the objector's assessment did "not advance the position in relation to a conclusive finding in relation to a detailed noise assessment, which is the standard normally applied in such cases."

[109] The Committee was fully aware therefore that there was a lack of available data and were advised that, in the circumstances, "there is no reasonable prospect of the applicant providing an evidential basis that EHD or planning officer [sic] could stand over." In the powerpoint presentation in relation to this, the Committee members were told that there was a "significant evidential gap" as detailed noise limits could not be confirmed. In the final analysis however, EHD had not provided reasons for refusal. It had indicated that it had serious reservations about supporting the proposal and the Committee was aware of that. The committee was further aware that mitigation measures would not assist in relation to external areas due to the distance from and height of the turbine. There was greater scope for mitigation internally particular by way of fixed acoustic glazing with alternative ventilation systems to habitable rooms. Again, however, the Committee was advised that the effect of such measures could not be measured accurately at that stage.

[110] The officers' report shows that the key consideration was whether the proposed development would be "significantly affected" and "demonstrable harm would be caused" as required by para 5.72 of the SPPS. In all circumstances, it seems that the decisive factor was that (in the words of the planning officers' report): "neither the applicant, EHD or third parties can definitively demonstrate that demonstrable harm will occur due to the lack of evidence." The report went on to note that para 4.11 of the SPPS states that the planning authority has a role to play in minimising potential adverse impacts. Taking this together with what were considered to be clear "extenuating circumstances brought about by the nature of the application", on balance it was considered that any potential adverse impacts arising from the turbine could be offset through an appropriate condition and that, in those circumstances, it was appropriate to grant planning permission.

[111] In my judgment this is a case where the presumption in favour of sustainable development, coupled with the policy test in relation to residential amenity in the SPPS, means that the respondent's decision is defensible. Under para 5.72 of the SPPS (see para [51] above), planning authorities should be guided by the principle that sustainable development should be permitted unless the proposed development "will cause demonstrable harm to interests of acknowledged importance." To some

degree this is tautologous because development will not be "sustainable" where it does cause unacceptable harm to interests of acknowledged importance. What interests of acknowledged importance are relevant, and the level of harm to those interests which will justify the refusal of permission, is in large measure set out in planning policy, although this will frequently also involve an exercise of planning judgment.

[112] As discussed above, in the present case, the governing policy is paras 4.11 and 4.12 of, and Annex A to, the SPPS. These provisions are not particularly detailed or restrictive in terms of when adverse noise impacts should result in a refusal of permission. Such impacts must be taken into account and the planning system has a role to play in minimising potential adverse impacts. However, planning authorities are best placed to assess the significance of such impacts and whether they are unacceptable, such as to warrant the refusal of planning permission. Annex A to the SPPS ultimately indicates that the authority should seek to reach a "balanced decision" considering noise issues alongside other material considerations.

[113] In a borderline case, the presumption in favour of development in para 5.72 of the SPPS may result in planning permission being granted because the requisite harm to residential amenity (or some other relevant interest) has not been demonstrated, whether by an objector or otherwise. In addressing this issue, it is important to distinguish between cases where a particular planning policy imposes an obligation upon the planning applicant to demonstrate that the requisite harm will *not* be caused in order for permission to be granted; and cases where the presumption in favour of development means that permission should be granted unless it is shown that the requisite harm *will* be caused, warranting refusal of the application.

[114] The effect of a presumption in favour of development is discussed in the *Encyclopedia of Planning Law and Practice* (Sweet & Maxwell), Volume 1, at section 1.002.13. The impact of the presumption is much reduced in a plan-led system, where a planning control decision must be taken in accordance with the area plan unless material considerations indicate otherwise. Where, however, the area plan is effectively silent on the subject matter of an application, the presumption may still have some significance.

[115] As noted above (see para [79]) the *McCann* case relied upon by the applicant involved a policy (Policy NH2 of PPS2) which placed an onus on the planning applicant to show that harm to protected species would not be caused. To similar effect, Policy NH5 of PPS2 also imposes an obligation on the planning applicant to show that an unacceptable adverse impact on certain environmental features is not likely (or that any such impact is outweighed by the benefits of the proposed development). That policy was recently considered by the Court of Appeal in *Re Duff's Application (Re Glassdrumman Road, Ballynahinch)* [2024] NICA 42, which emphasised the importance, in applying such a policy, of the decision-maker addressing its mind to the matter and having the necessary data to make a

determination (see paras [73]-[79] of the judgment of Treacy J). Where such a policy applies, demonstrable harm warranting refusal of the application arises unless and until the planning applicant can demonstrate compliance with the policy (or, exceptionally, that some other material consideration outweighs non-compliance). Interestingly, Policy RE1 within PPS18 indicates that, where an application is made for planning permission for a windfarm, the onus will be on the planning applicant to show that this will not result in unacceptable adverse impact on residential amenity.

[116] In the present case, however, the onus was not on the notice party to show that there would be no unacceptable impact on residential amenity (or, viewed from the other perspective, no unacceptable impact on the operation of the applicant's wind turbine). Rather, the onus was on the objector to show that the application would give rise to demonstrable harm to an interest of acknowledged importance. I reject the applicant's submission that the portion of Policy CTY1 which states that, "All proposals for development in the countryside must be sited and designed… to meet other planning and environmental considerations…" radically alters the position so that the onus falls on the planning applicant to show that no amenity issues arise. This statement is merely a reminder that there may be other policies and material considerations which require to be addressed. It does not operate to displace the effect of the SPPS discussed above.

[117] Whilst it may well have been a rational course for the Council to decline to determine the application at this stage on the basis that it did not have sufficient information, it was also not irrational in my view for the Council to decide that it would proceed to determine the application and, on the evidence as it stood, conclude that the application should be granted in all of the circumstances.

[118] The applicant was particularly critical of the planning officers' conclusion that "any potential adverse impacts" arising from the noise of the wind turbine "can be offset" through an appropriate condition in relation to the provision of acoustic glazing and a ventilation system. To some degree this is a predictive assessment. It might be the case that glazing and ventilation is sufficient to obviate wind turbine noise impact, with background A6 noise, inside the permitted dwelling. Whether or not that is so, I do not consider it irrational for the Council to have considered that internal noise impact would be mitigated or reduced ("offset") by these measures. The report was candid that, although these mitigation measures would help, their effect could not be measured accurately at this time. Reading the officers' report fairly and as a whole, I also do not consider the officers to have been advising the Committee that glazing and ventilation would reduce external noise impact (ie any noise impacts from the turbine in the garden of the dwelling). Not only is that a matter of commonsense but, elsewhere, the report is clear that "external areas will not be aided by mitigation measures." The tenor of the report is that, in relation to the external noise impacts, these were insufficient to cross the threshold of demonstrable harm.

[119] The issue of shadow flicker was also considered in some detail in section 11 of the planning officers' report. The report noted that, when planning permission for the wind turbine had been granted without conditions relating to noise or shadow flicker, it seemed that the Department had not assessed these factors as having an unacceptable adverse impact on 93 Foreglen Road, even though the property would have been close to the turbine and within the area that may be affected by shadow flicker. The report also noted the fact that no complaints had ever been received or recorded from 93 Foreglen Road in relation to the operation of the turbine. Again, it was noted that EHD, whilst not having responsibility for assessing shadow flicker, had highlighted potential impacts on the proposed dwelling.

[120] The Committee was referred to the Best Practice Guidance related to PPS18, which was considered to provide useful guidance on what level of effect may be considered as having an adverse impact on the dwelling, even though, in the present case, the application was for a dwelling in proximity to a turbine rather than the other way round. It was noted that the guidance *recommends* that shadow flicker in neighbouring offices and dwellings within 500 m should not exceed 30 hours per year or 30 minutes per day. The committee was appraised of the conflicting reports and that, on the objector's case, the potential remained for up to 55 minutes of shadow flicker occurring on up to 65 days of the year, which exceeds the 30 minute threshold; with the latest report indicating that the proposed property would experience a minimum of 14 days of those 65 days of the year when the duration of the shadow flicker would exceed the 30 minute threshold. The officers summarised the position by indicating that both reports concluded that there would be a degree of shadow flicker that may exceed the recommended threshold, albeit they differed on the extent of that flicker on the given day.

[121] The officers noted that the elevation that may be subject to the shadow flicker was the rear elevation, which included a bedroom window, a bathroom window and the kitchen door. These were not the main living areas within the dwelling. This was considered to be "an important material consideration in assessing the impact of shadow flicker on any dwelling."

[122] Since the guidelines in the PPS18 Best Practice Guidance were recommended thresholds, the officers considered that that would suggest that "a degree of weighting could be applied on a case-by-case basis." Given the circumstances of this case – including that the planning applicant was aware of the potential impact and could provide some of their own mitigation, as well as the position of the rooms at the rear of the property (thereby minimising any impact on the proposed occupants) – it was recommended that, on balance, the residential amenity of the proposed dwelling would not be unduly affected by shadow flicker and "demonstrable harm will not be caused by the current operational wind turbine." Appropriate mitigation measures were suggested in order to minimise potential adverse impacts. No previous complaints in relation to the issues of shadow flicker (or indeed noise) were recorded which, given the proximity of the proposed dwelling to the previous

dwelling, provided some evidence that shadow flicker issues, particularly with the mitigation measures suggested, would not cause demonstrable harm.

[123] Again, I do not consider that the Council was irrational in addressing the matter as it did. Its conclusion was essentially that, although there was likely to be significant adverse impact in relation to shadow flicker on a number of days of the year which exceeded the recommended threshold, this was not an unacceptable impact on residential amenity in the particular circumstances of the case. The nature of the rooms which would likely be affected by this was obviously an important consideration, as was the fact that there was some potential mitigation open to the occupants of the house. Whilst it may have been rationally open to the Council to reach the contrary conclusion, it was not irrational for it to reach the conclusion which it did.

Standing

[124] Finally, I should say something about the issue of standing. The notice party adopted in full the respondent's arguments on the core issues in the case, only making submissions on the additional issue of standing, which was addressed at the substantive hearing. I have little hesitation in holding that the applicant has standing to pursue this application. A number of the authorities in this area were considered in *Re Duff's Application (Re Glassdrumman Road, Ballynahinch)* [2022] NIQB 37, in which it was considered that the applicant had standing to bring the claim, even though he had no personal interest in the application, on the basis that he was "heavily involved in the planning process as an objector" on environmental grounds. In this case, Mr Orbinson described Mr O'Neill as "the lead objector" and noted his heavy involvement in the planning process. The applicant is also defending a legitimate commercial interest, insofar as the proposal will or may (he submits) prejudice any future development of his wind turbine and/or leave him potentially exposed to future private law nuisance claims.

[125] Mr Coyle relied upon a prior decision concerning Mr Duff, in which he was held by the High Court not to have standing in light of his absence of any personal substantive interest in the grant of the planning permission concerned (and his non-involvement in the planning process in that case). That decision was overturned on appeal (following the substantive hearing in this case: see *Re Duff's Application* [2023] NICA 22) but, in any event, is distinguishable from the present case.

[126] The fulcrum of the notice party's case on this point was that consideration of the question of standing is not purely confined to the leave stage and can be relevant in relation to the relief the court will grant. That is evident from another case in which Mr Duff was concerned: see *Re Duff's Application* [2024] NIKB 31, at paras [54]-[57]. The notice party took issue with the fact that Mr O'Neill failed to disclose any commercial interest in the planning application or throughout the discovery process. He does not personally live near the site and would not personally

therefore be affected by any nuisance claim. Mr Coyle referred to the advice of the EHD to that effect. As I suggested during the hearing, Mr Coyle's criticism that the applicant failed to disclose his commercial interest in the turbine could have been remedied had the issue of the applicant's standing been raised at the leave stage, which would have allowed the applicant to prepare an affidavit in response.

[127] In light of my conclusions on the substance of the applicant's claim, the notice party's objection in relation to his standing to obtain a quashing order does not require to be determined. However, had I considered the applicant to have made out any of his grounds of judicial review, I would also have considered that he had sufficient standing to achieve the primary relief he sought. That flows both from his personal interest in the outcome of the application (as owner of the turbine) and the fact that he was an objector involved in the planning process raising at least some of the issues relied upon in these proceedings.

Conclusion

[128] For the detailed reasons given above, I have not considered any of the applicant's grounds of judicial review to be made out. The arguments about misinterpretation of Policy CTY3 and failure to re-advertise the application were creative but, in my view, essentially contrived and unduly legalistic. There was more substance to the concerns raised about how the planning authority dealt with the issues of noise and shadow flicker. It was an unusual planning application where the respondent plainly had some sympathy for the position faced by the notice party in light of the impact of the vesting order on the property. Whilst the Council could rationally have adopted a number of courses – including waiting for further information in relation to noise impacts or refusing the application on the basis of shadow flicker – the mere fact that it might rationally have determined the application in a different way does not mean that it was not legally entitled to determine it in the way in which it did.

[129] The application for judicial review is dismissed.