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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF APPLICATION BY HARTLANDS (NI) LIMITED FOR JUDICIAL REVIEW

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

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Dessie Hutton QC and Helena Wilson (instructed by Downey Property Solicitors) for the Applicant
Paul McLaughlin QC and Philip McAteer BL (instructed by Derry City and Strabane District Council Legal Services Department) for the Respondent

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SCOFFIELD J

Introduction

[1] This is an application for judicial review of a decision of Derry City and Strabane District Council ('the Council') brought by Hartlands (NI) Limited, a development company. The decision under challenge is a decision notice dated 30 July 2020 indicating refusal of a planning application (reference LA11/2019/0329O) for development of a site for social and affordable housing.

[2] The application raises a number of interesting and important issues in relation to the procedures to be adopted by district councils in the determination of planning decisions after the development control function was passed to them pursuant to the Planning Act (Northern Ireland) 2011 ('the 2011 Act').

[3] The applicant was represented by Mr Hutton QC, appearing with Ms Wilson of counsel; and the respondent was represented by Mr McLaughlin QC, with Mr McAteer of counsel. I am grateful to all counsel for their helpful written and oral submissions.

Factual Background

The planning application

[4] The applicant, Hartlands (NI) Limited ('Hartlands') made an application for outline planning permission in respect of a site on the Springtown Road in Derry/Londonderry for the development of 258 social and affordable housing dwellings. The application site abuts, but is outside, the established City development limit in the Derry Area Plan 2011 (DAP) and was therefore considered by the Council's planning officials to be in the countryside. The application was submitted on 15 April 2019. In addition to the social and affordable housing, the proposal also involved development of a community centre and various road improvements and associated works.

[5] The planning application was made in the name of both the applicant in these proceedings, Hartlands, and Apex Housing Association ('Apex'), a registered housing association and non-profit organisation operating on social enterprise principles. Apex was envisaged as being the ultimate purchaser and landlord of the housing in the proposed development, if and when it was built out. As is normal for a proposed development of such a scale, the planning applicants engaged a variety of specialist consultants to assist in the preparation of the application and supporting documents, such as plans, drawings, landscaping proposals, transport assessment and environmental studies. The planning application fee was in excess of £20,000.

[6] The planning applicants, and the applicant before this court, strongly emphasised what they contend is a recognised need for social housing in Derry City. They say that this need has been recognised by the Northern Ireland Housing Executive (NIHE), which provides social housing in the area; and that the urgent need for increased social housing has been recognised more generally in the Department for Social Development's policy document, 'Facing the Future: The Housing Strategy for Northern Ireland 2012-2017.'

[7] The Council undertook a number of statutory consultations, as it is obliged to do. The applicant emphasises that a variety of the consultation responses raised no objection to the application and that some others raised only issues which were matters of detail to be addressed at the later 'reserved matters' stage, given that the present application was one for outline planning permission only. The applicant places particular reliance on the consultation response from the NIHE dated 13 May 2019 confirming its support for the application and noting that the development proposal was "located in an area of acute housing need within the Westbank Housing Area", which had a housing need projection for over 2,000 units over the period 2018 to 2023.

[8] The application was tabled before the planning committee of the Council ('the Planning Committee') on 8 January 2020. However, on that occasion the application was deferred for a site visit to take place. The site visit took place on 16 January

2020, with seven council members attending. The application was then further considered at a Planning Committee meeting on 5 February 2020, at which it was unanimously decided that a pre-determination hearing should be held. This was at the request of the planning applicants. The pre-determination hearing subsequently took place on 12 March 2020 and was attended by twelve council members. It lasted around one and a half hours and was addressed by planning officials and a number of people making oral representations on behalf of the planning applicants.

The Planning Committee's initial decision

[9] The decision on whether to grant or refuse the application was taken by elected members of the Council sitting on the Council's Planning Committee, after receiving advice and a recommendation from the Council's professional planning officers. The Council's officers recommended refusal of the application. Whilst other reasons were relied upon, the applicant says that "*the core reason for the recommended refusal*" was that the application site was in the countryside and that the grant of permission at this site was contrary to planning policy. In particular, it was said to be contrary to the DAP, which did not make policy provision for housing developments such as this outside of the settlement limit. The officers also referred to section 6(4) of the Planning Act (Northern Ireland) 2011, discussed further below.

[10] The applicants, through their agent, accepted that the proposed development was contrary to the area plan and other policies but relied on the contention that the application was exceptional and would make provision for social and affordable housing in an area of the City where sites were not available for such housing and where such sites were very much needed. In support of this contention, the applicant emphasised to the Council that the project had support from NIHE. It also relied upon the current lack of social housing provision in the City; the lack of sites in the area that could deliver housing in the near future; the problem with delivery of houses in the West Bank of the City generally, which the applicant linked to 'land-banking'; and the problem with delivery of social and affordable houses due to the price of zoned land, which was then either not released to the market or not released at prices which made social/affordable housing economically viable as a development project on the site. On the applicants' case, it followed that the lack of availability of land for social housing, where there was an identified need for such housing, represented a material consideration that could be considered alongside and weighed against the DAP and other material planning considerations. In short, the planning applicants contended that the Council could, and ought to, consider that acute housing need outweighed any policy objections.

[11] The applicant in these proceedings is heavily critical of the advice which the elected councillors received. This included advice that certain councillors could not vote on the applicant's application (due to the operation of the Council's 'Protocol for Operation of Planning Committee of Derry City and Strabane District Council (Revision 3) January 2019' – 'the Planning Committee Protocol'), as well as advice from planning officers on the substantive planning considerations.

[12] A number of councillors followed the Planning Committee Protocol, and/or the advice based on it, and therefore did not vote when the proposal was considered at the crucial Planning Committee meeting of 29 July 2020. The remaining councillors are considered by the applicant to have followed or given weight to the other planning-related advice provided by the officers, namely that the application should be refused, which is criticised for the reasons discussed below. Ultimately, the vote to refuse the planning application was by four votes in favour of refusal, to three votes in favour of grant. Accordingly, the application was refused permission on a narrow margin. It is for this reason that the applicant contends that the operation of the Planning Committee Protocol, which precluded certain councillors on the committee from voting, was potentially crucial to the outcome.

The process, and engagement with the applicant, after the Committee meeting

[13] After the initial decision by the Planning Committee, the applicant sought to have the refusal decision reconsidered. In due course, it asked the Council to initiate an internal 'call-in' or review of the decision, so that it could be looked at again by councillors in accordance with the procedure set out in section 41 of the Local Government Act (Northern Ireland) 2014 ('the 2014 Act'). The Council declined to do so in a decision of 6 October 2020, relying in part on provisions of its Standing Orders in Order 21. The applicant also challenges this decision.

[14] As noted above, the Planning Committee made its decision at its meeting on 29 July 2020. Shortly after this meeting, on the same date, Mr McAteer, a director of the applicant company, sent an email to the Council officers expressing disappointment with the outcome of the meeting "and the process by which it was arrived at" and asking for a copy of the written decision. He received a response on 30 July 2020 from the Council's Business Services Officer advising that the decision notice would issue at some time over the next few days and would be posted to him as soon as possible.

[15] Mr McAteer emailed the Council again on Sunday 2 August 2020 raising concerns about the procedure adopted at the Planning Committee meeting and asking that the issuing of any decision notice be deferred so that the matter could be brought back before the committee again. In particular, he said that he was concerned that a number of comments which were made at the committee meeting "corrupted the proper process" and said that he had made a complaint to one of the members of the committee. (That was a reference to a letter sent to Cllr McClintock). Mr McAteer also said that he would be writing to the Chairman of the committee requesting that the issue be brought back before it. His email made reference to a number of further (unspecified) procedural irregularities in respect of which he would be seeking clarification.

[16] Mr McAteer received a response by email dated Monday 3 August 2020 which advised that any concerns arising out of the Planning Committee meeting

should in the first instance be addressed to the Council and not to individual elected members. He was also advised that the issue of the decision notice following the meeting was an administrative function and, as no issue had been identified to the Council, the decision notice had been issued in that day's post.

[17] The court has obviously been provided with a copy of the formal notice refusing the application for planning permission. It is dated 30 July 2021. The expressed reasons for refusal include that the proposal is contrary to the DAP, as the proposed site lies outside the limit of development and is located on a greenfield site in the rural countryside; that the proposal is contrary to the Regional Development Strategy 2035, Policies RG8 and SFG7, since it would not promote the drive to provide more housing in existing urban areas and is not a sustainable form of development; and that the proposal is contrary to the Strategic Planning Policy Statement for Northern Ireland and PPS12, on the basis that it lies outside the development plan's limit of development and undermines sustainable development by proposing residential development at an out-of-town greenfield site when there is an adequate resource of existing undeveloped land in zoned land within the existing development limit. There is obviously a high degree of overlap between the considerations sustaining these refusal reasons. On a similar basis, the application was also refused as representing a breach of policies contained within PPS21, 'Sustainable Development in the Countryside.' The reasoning in relation to PPS21 expressly noted that there were no overriding reasons why the development was essential in the rural location and could not be located within a settlement.

[18] There were also two roads-related refusal reasons. Refusal Reason 8 noted that the proposal was contrary to PPS3, 'Access, Movement and Parking', in that a satisfactory access from the Springtown Road to the site had not been demonstrated; and Refusal Reason 9 noted that the works required to provide the visibility splays and access to the site would have a detrimental impact on existing residential amenity and safety and design quality of 44-50 Derrymore in terms of loss of front amenity space and boundary walls.

[19] Having received the decision notice, Mr McAteer emailed the Council again on 15 August 2020, providing a 'report' which raised a number of procedural concerns and asking that the matter be referred back to the Chairman of the Planning Committee for further directions.

[20] The applicant received a further letter from the Council dated 4 September 2020 which advised that the Council considered the matter closed; that it had no concerns about the processing of the application, which had been determined by the committee; that they would no longer correspond with Mr McAteer in relation to it; and that the planning applicants had a right of appeal to the Planning Appeals Commission (PAC) if they wished to challenge the Council's decision on the application.

[21] The applicant was undeterred. It persisted in seeking to raise its concerns with the Council, with further correspondence of 3 October 2020 being sent in which it asked that the committee's decision of 29 July 2020 be called in pursuant to the procedure set out in section 41(1)(a) of the 2014 Act, on the ground that it was not arrived at after proper consideration of the relevant facts and issues. A variety of complaints were made about issues in respect of which the applicant considered members of the committee to have been misled and in respect of a variety of matters which have also emerged as grounds for challenge in these proceedings.

[22] On 6 October 2020 the Council's Lead Legal Services Officer, acting on behalf of the Chief Executive of the Council, wrote to the applicant in relation to its call-in application, informing it that it would not be possible for the call-in request to be complied with for a number of reasons. I set these out below:

> "Firstly, a request for a call-in can only be made by elected members. Secondly, the time limit for submission of a call-in request has passed. There is no mechanism for this time to be extended. Thirdly, by virtue of Standing Order 21.1(2)(a) a decision on a regulatory or quasi-judicial function which is subject to a separate appeal mechanism (such as a decision on a planning application) shall not be subject to call-in."

[23] The applicant characterises this response as an unlawful "refusal by the Council's officers to engage in a canvass of Members" for the purposes of considering whether the decision should be called in pursuant to section 41 of the 2014 Act. Further correspondence followed, including a swift escalation to formal pre-action correspondence preceding this application for judicial review.

Summary of the applicant's grounds

[24] The applicant has grouped its grounds of challenge in the following way:

(a) First, the applicant challenges the Council's Planning Committee Protocol which prevented councillors present at the 29 July 2020 meeting from voting in respect of the planning application. Arising out of this challenge, the applicant also challenges the decision notice of 30 July 2020 on the basis that various councillors who ought to have voted were wrongly prohibited from voting.

(b) Second, the applicant also challenges the decision notice of 30 July 2020 as being unreasonable or irrational on various planning-related grounds, related to (what it contends was the flawed) advice given to councillors by the Council's planning officers.

(c) Third, the applicant challenges the provisions in Order 21 of the Council's Standing Orders, upon which the Council relied in refusing to engage the 'call-in' process, on the basis that the relevant provisions of the Standing Orders were *ultra vires*. It accordingly challenges the decision of 6 October 2020 which declined to revisit the earlier decision of the Planning Committee.

[25] I propose to deal with the challenge on planning grounds first; and to then deal with the applicant's procedural grounds.

The challenge to the Council's consideration of material planning factors

[26] Before addressing the applicant's various complaints about the way in which the Council took into account (or failed to take into account) certain planning considerations, it is helpful to refer briefly to the material planning policies which the Council was called upon to consider and apply; and to set out some key portions of the planning officers' report which was before the relevant committee.

Relevant planning policies

[27] As noted above, the current area plan for the area is the Derry Area Plan 2011. The key feature of the application site as regards the DAP is that it lies outside the development limit of the City identified in that plan and, therefore, is located in the countryside. Paragraph 2.6 of the DAP provides that, beyond the city limits, there is a presumption against further urban development. The function of the plan is to provide sufficient land to facilitate growth, whilst protecting the open countryside from urban sprawl (see paragraph 3.1). In addition, the DAP further states that "… within the countryside there will be a *clear presumption* against any new building and new use of land which might create a demand for more buildings and no other development will normally be allowed unless there are *overriding reasons* why that development *is essential and could not be located in a town*" [italicised and underlined emphasis added] (see paragraph 3.3). The questions of whether it was essential for the housing proposed in the Hartlands' application to be built at this particular location and why that housing could not be located within the City development limit were therefore plainly matters the Council was going to have to consider.

The Council's planning officers' report

[28] The key portion of the officers' report for present purposes is in the following terms:

> "In the context of Derry, there is a surplus amount of available zoned housing land which has not yet been developed within the limits, much of which has planning permission or current planning applications. This includes a considerable amount located within the west bank of the city. The latest Housing Monitor Report

(2017) shows that there remains land for approx. 10,000 houses within the city, so there is clearly not a justification for permitting this housing outside the development limits.

Chapter 5 in the Environmental Statement states alternative sites were considered as part of devising the proposals, which was carried out between November 2018 and March 2019. The sites identified include:

H2 Housing zoning – outline permission was granted for approximately 3,500 houses on lands at Buncrana Road in December 2017. The agent considers this is not a reasonable alternative to the application site as it is not available on the "open market." Officers would advise Members that this is not a material planning consideration. In planning policy there remains more than an adequate amount of available land within the settlement limits of the city to accommodate this major proposal for 258 units. H2 is located within an area of Housing Need in an accessible location in the Westbank which would adequately accommodate this proposal. Additionally, as part of the Section 76 Legal Agreement for the H2 zoned housing lands an obligation was provided to allow for up to 30% of the site for social housing. The Housing Association could therefore liaise with the developers of H2 as provision has been made for social housing within this zoning. H2 could easily accommodate this development proposal in zoned housing land, inside the limits of development.

H3 Housing Zoning (Lands at Creggan) – Part of this zoning remains undeveloped. This site is also accessible and located within the area of housing need. The agents advise this site is not available to purchase due to the reluctance of the land owner to release the lands for development. Planning officers would advise that no evidence has been provided to ascertain if this is the case; however this is not a material planning consideration. Adequate land is available within the city's development limits and within the Westbank which could accommodate the proposal and address the housing need."

[29] The officers also considered a number of other potentially available sites but the focus of submissions at hearing focused on the two zonings – H2 and H3 –

mentioned in the extract of the officers' report set out above. The officers noted that there may also be other sites which were available which had not been considered by the planning applicants' agents. They concluded:

> "This fundamental departure from the Plan would create an undesirable precedent for similar housing developments on other lands outside the development limit – with many such potential sites all around the development limit of Derry, or indeed, around any of the other settlements in the District. There are no over-riding reasons why the development is essential and could not be located within the defined limits of the city. This is further supported by policy CTY1 of Planning Policy Statement 21 Sustainable Development in the Countryside as set out later in this report.
>
> Therefore, to allow this housing development outside of the Area Plan's development limit, would also be contrary to Section 6(4) of the Planning Act."

[30] A further important section of the officers' report related to the applicants' reliance on social housing need was in these terms:

> "The letter from the NIHE has been considered and whilst Planning officials acknowledge that the Housing Executive supported the general need for social housing in the Westbank, it is considered that this does not outweigh the policy constraints for this proposed housing development of 258 units within the countryside, as set out and detailed above in this report. Whilst it is acknowledged that there is a need for social housing for the city and in particular the Westbank, there is no need to build it in the countryside as there is an ample supply of zoned housing land existing within the limits of the development which can accommodate any housing in a more sustainable manner. The supporting information and assessment of sites has also been considered as advised earlier in the report and officers consider that the supporting information including health and well-being strategy as submitted, do not outweigh this significant and fundamental departure from the Area Plan and planning policy including the RDS and SPPS. Planning has approved several hundred houses in the last few years, specifically for social housing. Major construction is ongoing on H1C with approx. 1200+ social houses built on this site; a major housing approval on H1B with an

> approved concept for approx. 1400 for which Members recently approved the first reserved matters for almost 300 social houses; major outline approval granted by Members on the H2 zoned housing land which is located in the Westbank for approx. 3500 houses in which the S76 made allowance for up to 30% of these units for social housing. Members will also be aware that significant numbers of dwellings including those for social housing have been granted full permission in recent years. Officers are therefore satisfied there is adequate supply for private and social housing within the city limits. This application will set an undesirable precedent for other housing or development proposals outside any settlement limits and not complying with the Area Plan and Regional and Strategic Planning Policy."

Relevant Legal Principles

[31] The principles applicable in a judicial review challenge to the decision of a planning authority are now well settled and have been repeatedly summarised by the courts in recent times, for instance in this jurisdiction in *Re Bow Street Mall's and Others' Application* [2006] NIQB 28, at paragraph [43]; and, more recently, in the now oft-cited synopsis of Lindblom J in *Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin), at paragraph [19]. I do not propose to rehearse those principles in this judgment. Suffice to say that the court's role is supervisory in nature and that, in matters involving planning judgment, it is notoriously difficult for a judicial review applicant to succeed in judicial review.

[32] I address in some detail below the role of local councillors in making planning decisions; but in the context of this challenge it is necessary to say something also about the role of officers. As Lady Hale noted in *Morge FC v Hampshire County Council* [2011] 1 All ER 744, democratically elected bodies have professional advisers who investigate and report to them; and "those reports obviously have to be clear and full enough to enable them to understand the issues and make up their minds within the limits that the law allows them…" The extent to which a judicial review challenger can rely upon alleged errors or misdirections in reports of professional planning officers has been addressed in a number of authorities recently. In particular, officers have a duty not to provide incorrect or misleading advice to Councillors (including by not relying upon factors which are immaterial considerations or discounting material considerations). At the same time, experience and authority cautions against reading officers' reports with the precision or rigidity with which one might approach legal drafting: see generally *R (Mansell) v Tonbridge and Malling Borough Council* [2019] PTSR 1452, at paragraph [42], *per* Lindblom LJ (planning officers' reports "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"); and, in this jurisdiction, *Re Sands' Application* [2018] NIQB 80, at paragraph [112], *per* McCloskey J (case officers' reports "are not to be read and construed through the prism applicable to the decisions of a judicialised body" and "a broader and more elastic approach is appropriate").

[33] I consider that the approach adopted in previous authority to officers' written advice set out in their planning reports for elected members of local authorities must also apply (*a fortiori*) to their oral comments and advice in the course of committee hearings. In particular, as set out in paragraph [42] of the *Mansell* case (*supra*):

> "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.
>
> … Where the line is drawn between an officer's advice that is significantly or seriously misleading—misleading in a material way—and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it… But unless there is some distinct and material defect in the officer's advice, the court will not interfere."
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> [underlined emphasis added]

[34] It is also worth briefly setting out the terms of section 6(4) of the 2011 Act. I do so in particular because Mr McLaughlin QC on behalf of the Council makes the powerful overarching point that the applicant's central contention is that it was unlawful in the circumstances of this case for the Council to *follow*, rather than depart from, the extant area plan. Section 6(4) provides as follows:

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

[35] Although the reference to the local development plan in this provision is generally to be construed as a reference to the plan strategy and local policies plan (taken together) which have been adopted by the relevant council or approved by

the Department in accordance with section 16(6) of the 2014 Act (see section 6(1) and (2)), in the absence of a local policies plan having been so adopted or approved under the new planning regime, an extant departmental development plan such as the DAP, even where this is significantly past its expiry, is to be construed as the appropriate local development plan for this purpose (see regulation 32 of, and paragraph 2 of the Schedule to, the Planning (Local Development Plan) Regulations (Northern Ireland) 2015).

The applicant's planning complaints

[36] Against that backdrop, the applicant has raised a range of complaints about the way in which certain planning considerations were treated by the Council. At hearing, these were helpfully grouped by Mr Hutton QC into four areas:

(a) The need for social housing and the (lack of) availability of land for social housing development;

(b) The way in which the committee dealt with the forthcoming local development plan (LDP), including in particular its housing allocations and policies;

(c) The taking into account, or giving of weight to, the economic impact that 'de-zoning' land might have on the economic interests of some landowners; and

(d) The way in which the officers' advice addressed an issue in respect of roads access to the site, which (it is contended) failed to make clear that the Department for Infrastructure's Roads Division had advised that the applicants' proposal was capable of delivery with regards to access to the Springtown Road.

[37] The first three of these issues are clearly related and overlap. The fourth is discrete.

Housing need and the land available to meet it

[38] The applicant's case before the Planning Committee was essentially that there was a social housing crisis in the West Bank area of Derry, which required the provision of social housing as a matter of urgency. It relied on figures indicating that, in 2020, the number of houses scheduled to be built in the City was not sufficient to provide for the identified need. As appears further below, a large element of the applicants' case was that possible alternative sites for development of the nature which it proposed were not actually available (that is to say, on the market); and, indeed, had not been made available since the previous area plan process many years ago. The applicant in these proceedings contends, *inter alia*, that the Council's planning officers failed to properly identify the relevant planning need

and/or to properly and fairly assess the likelihood of that need being met any time soon. The factor of unmet social housing need was the key consideration which the planning applicants contended ought to have outweighed non-compliance with the area plan. The applicant submits (on the authority of *Mitchell v Secretary of State for the Environment and another* (1994) 2 PLR 23), and I accept, that an established need for housing may be a material consideration in planning terms, as may a need for a particular type of housing in certain circumstances. Nor did the respondent dispute this. However, whether any such need in fact outweighs policy objections in any particular case will be a matter of planning judgment, potentially involving a wide range of considerations.

[39] The applicant also relied on the fact that immediately adjacent to the application site (to the east of it) is a newly constructed development (known as Derrymore) which is a housing development of 53 houses which was approved by the Council's Planning Committee in 2016. Although that housing development is also located outside the city development limits, planning permission was granted by the committee on the basis that it was acceptable as "rounding off" the development limit, which would present "a new defendable edge to the city." Hartlands, with Apex, had also been the planning applicants in relation to the Derrymore development site. They had, in 2015/16, contended that the grant of planning permission for that site was justifiable on the basis of the then social housing need in the catchment area. Notwithstanding the grant of that planning permission, the applicant contends that little had changed since that time in terms of meeting the urgent social housing need. The grant of permission at the Derrymore site was a precedent for the Council permitting housing development outside the development limit in order to meet that need. As noted above, in the present case the NIHE was supporting the proposal, again on the basis of pressing housing need. On the other hand, any reliance on the grant of permission at the Derrymore site highlighted one of the issues of concern for the Council in this application, namely the precedent value of permitting new housing development in the countryside which was then relied upon in later applications to render the settlement limit (and related policy) meaningless.

[40] In considering the issue of housing need and housing land supply, the Council took into account a consultation response from the local development plan (LDP) team. That is the team working on the Council's own development plan which will, at some point in the future, be adopted under Part 2 of the 2011 Act. The LDP team has the responsibility, *inter alia*, for the monitoring of housing land, which includes monitoring progress of committed housing developments and also outlining the remaining development potential in terms of housing units and areas. In its response, the LDP team noted that the proposal site was outside the city development limit and that, in such a location, there was a presumption against further urban development pursuant to the DAP. It also emphasised that there was very significant remaining potential for the development of housing units within the current development limit (approximately 10,000 units), with an approximate remaining potential of 29 hectares of land which might be used for housing. This

figure excluded potential urban capacity land and windfall potential which, if included, raised the figure to approximately 16,500 units. In summary, the LDP team said that "there is more than adequate land available within the current development limits to meet demand/housing need for the city." Put bluntly, there was no need to build houses in the countryside when there was sufficient land available within the City to cater for the acknowledged housing need.

[41] Hartlands and Apex joined strong issue with the LDP team's analysis. The first and most basic point made is that the potential capacity which was identified by the LDP team was not specific to *social* housing, and that there is an acute shortage of that particular type of housing, especially within the catchment area of the proposal site. In addition, the applicants' agent advised that a variety of alternative sites had been considered for development of the type proposed in Hartlands' planning application. This assessment concluded that there were only limited development opportunities available to deliver social housing for the Springtown Road community, such that lack of alternative sites (it was contended) should be a material consideration in determining the application; and the community benefits of the proposal should be considered to outweigh the loss of agricultural land.

[42] In my judgment, these matters are classically questions of planning judgment: firstly, in terms of the weight the planning authority wishes to give to the countryside protection set out in policy (bearing in mind that the policy itself uses language presumptively indicating a high level of protection); secondly, in terms of the authority's assessment of housing need generally, including how urgent and acute that is; thirdly, in terms of its view of the likelihood of other sites being able to meet that housing need; and, fourthly, in terms of how widely or narrowly it wishes to focus its consideration, as respects both the type of housing concerned and the catchment area to be considered. On the very last of these issues, the planning applicants obviously wished to focus in narrowly on land available within the immediate Springtown Road area, whereas the Council could properly consider that the issues of housing need and alternative available sites should be considered in a wider context. All of these factors are relevant to the central thrust of the planning applicants' case which was that, notwithstanding that their proposal was contrary to a variety of planning policies, this was an exceptional case where the meeting of acute housing need should outweigh those policy contraventions.

[43] Much of the debate before the Council, and indeed in the evidence filed in the present case, relates to whether other sites which the Council considered to be potentially available to meet the housing need on which the planning applicants relied were, in fact, available or likely to be developed for housing at any time in the near future. The applicant's basic point in this respect is that landowners who enjoy the benefit of a zoning which is consistent with housing development often 'land bank' their sites in order to secure a greater return when the site is released to the market at some later point (having increased market demand through lack of supply); and that the nature of such land transactions is that the landowner will naturally seek the best market price available for their site, which almost inevitably

renders development for social or affordable housing uneconomic for the purchaser (who will also, in any event, generally wish to maximise their own commercial returns). In summary, there was considerable contention between the planning applicants and the Council's planning officers about the accuracy of the latter's view that the acknowledged need for *social* housing in the City (and, in particular, in the West Bank) did not need to be met by building in the countryside as there was an ample supply of zoned housing land existing within the city development limits which could accommodate that need in a more sustainable manner.

[44] It is unnecessary to go into great detail about the discussion which occurred at the Council's Planning Committee in relation to these matters. Some indication of this is given in the open minutes of the committee meeting. Although that is plainly not a verbatim record, as it happens a record which is verbatim (or very close to it) is also available because the Planning Committee's meeting was recorded and has been transcribed. It is enough to observe that some councillors appear to have been sympathetic to the applicant's suggestion that the land zoned for housing would not be sufficient and/or was not now or soon-to-be readily available to meet the significant housing need relied upon, such that this need was a proper basis for departing from the area plan policies. My reading of the materials provided to the court suggests that this is very likely the basis on which the applicants secured three of the seven votes of those members of the Planning Committee who voted on the application.

[45] It is also clear that the Council's professional officers understood the central argument advanced on behalf of the planning applicants, namely that the urgent need for social housing in the West Bank area of the City was a material consideration which was capable of outweighing, and should outweigh, the policy constraints about which the officers were concerned. The applicant has not satisfied me that there was any failure to take this consideration into account, nor any material misdirection on the part of the officers in outlining this case to the elected members. Indeed, as noted above, it seems likely that those councillors who voted for the grant of permission were persuaded to deal with the question of weight in the way in which the applicants had urged them to. The councillors will have understood the arguments being made and will have brought their own local knowledge to bear on the issues being aired before them. The councillors were also clearly aware of the point made strongly by the planning applicants that the DAP was out-dated. As explained above, it is nonetheless still the extant area plan, although its antiquity may go to the weight which planning authorities may wish to give it. Again, I have not been persuaded that there was any material misdirection either in the officers' report on this issue or in the councillors' consideration of it.

[46] As to the applicant's challenge to the Council's conclusion (as expressed in the formal refusal reasons) that "there is an adequate resource of existing undeveloped land and zoned land within the existing development limit" for housing, I also reject that ground of challenge. The court is in no position to conclude that the Council's view on that matter was *Wednesbury* irrational. It is plainly a matter of planning

judgment, and to some degree of predictive assessment, which is within the proper remit of the planning authority, with all of its expertise and local knowledge. As I have acknowledged above (see paragraph [42]), the approach to that question involves consideration of a range of other factors which involve questions of judgment, including whether the Council wished to focus in on the need for social housing in a small and defined area of the City, or thought it appropriate to widen its focus to housing need more generally or to social housing need in a larger area. Indeed, even focusing in on zoned land available in relatively close proximity to the application site, there was a rational basis in my view for the conclusion that the area plan should not be departed from.

[47] The members of the Planning Committee were well aware of the case made by the applicants that the mere zoning of land for housing, or even the grant of planning permission for housing, did not mean that the housing envisaged for any particular site would actually be built, or that it would be built anytime soon. That was a central thrust of the points made on the applicants' behalf. On the other hand, as a matter of planning law and policy, it was obviously relevant for the officers to point out to councillors the existing zonings for housing, which were in principle available for that purpose, and any extant planning permissions. The overall aim of the planning system is the orderly, consistent and sustainable development of land. That aim was in mind when the existing area plan, which made provision for the anticipated housing need in the City, was formulated and adopted. Whether the provision made in the DAP was not working out and required to be jettisoned was a matter squarely and fairly placed before the members of the Planning Committee in the materials relating to this application. Its (majority) decision not to abandon the approach set out in the extant area plan, at least for now, was not irrational.

[48] In addition to a straight rationality challenge, the applicant also contends that the respondent failed in its duty of inquiry by failing to fully and properly investigate the circumstances of a number of alternative housing sites and the prospects of them actually being developed for housing at some point in the near future. Again, this is an area where the court will not readily intervene since authority establishes that the level of inquiry required is itself a matter of judgment for the decision-maker, subject only to *Wednesbury* review (see *R (Khatun) v Newham LBC* [2004] EWCA Civ 55, at paragraph [35]; and *R (Plantagenet Alliance) v Secretary of State for Justice* [2015] 3 All ER 261, at paragraph [100]). As appears from the discussion below, the Council had a range of material before it relating to the use or prospective use of other potential housing sites, including the councillors' own local knowledge and the materials and representations placed before them by the planning applicants. I do not consider that it was irrational for the Council to make its decision without seeking further evidence on these matters.

[49] Perhaps the element of this aspect of the applicant's challenge which is the hardest-edged is the suggestion that the officers misled committee members by suggesting that there was "no evidence" to justify the applicant's contentions that land would not be released for housing in circumstances where the applicant

contended that such evidence was available. This contention descends into the detail of what was or was not happening, or likely to happen, in particular in relation to zoning H3 (although it was not the only available site which was considered relevant by the Council's planning officers).

[50] A summary of the respondent's approach to the issue of other sites being available, or being used, to meet the housing need relied upon by the applicants is set out below:

(a) It relied on the fact that the NIHE estimated a need for 2,009 social housing units in the West Bank area over the period 2018-2023.

(b) In December 2017, permission for 3,500 units had been granted on the zoned H2 site. The section 76 planning agreement made provision for the developer to allocate up to 30% (i.e. 1,050 units) for social housing needs.

(c) Zoned site H3 could accommodate a development of the type and size proposed by the planning applicants, and was undeveloped. The applicants were unable to purchase it; but the Council's planning officers felt that the applicant had provided insufficient evidence to support the claim of non-availability for the nature of the proposed development.

(d) Zoned site H1A was also in the area and remained undeveloped. Officials again felt that insufficient evidence had been provided about its unavailability.

(e) Other undeveloped zoned sites in the West Bank had not been considered by the planning applicants (for example, site H1B). Approvals for 1,400 units had previously been granted on the H1B site and the first reserved matters approval had recently been granted, including 300 social housing units.

(f) Major construction was currently underway on zoned site H1C, with 1,200 or more social housing units on the site.

(g) There were also additional lands available for housing within the city limits (mentioned above in relation to the LDP team's consultation response).

[51] In relation to the H2 site, I was told that Apex had negotiated in relation to those lands and that it would be building there in future years; but that there were a lot of reserved matters issues to be addressed; and that the housing being built on that site would be phased, with the 250 social housing units only being provided in 2026. Mr Forbes of Apex made some comments in relation to that transaction at the

pre-determination hearing but was unable to go into details because of commercial confidentiality. He emphasised that the purchase had been very complicated and that, due to the phasing, after Apex had finished a programme at H1B, it would have no major sites for the next three years; so that the Hartlands site would be critical to Apex in terms of keeping their momentum going. In terms, the H2 site would make some provision to meet the social housing need but Apex contended that it was too little and not soon enough. It is correct that the planning agreement appears to provide for "up to" 30% social housing, which is not a minimum requirement. However, in the course of the hearing, I was also informed that the first reserved matters approval had been granted, since the commencement of these proceedings, and that 793 houses had been approved, of which 469 were social housing – greater than those anticipated at the time of the affidavit evidence being filed.

[52] Much of the dispute centred on the lands zoned at H3, known as 'Hatrick's Farm.' I was told that Apex had approached Mr Hatrick; and that he did not wish to allow development. The applicant also pointed out that large parts of this zoning were undeveloped. At the pre-determination hearing, Mr Forbes of Apex had stated that it would "love to" buy Hatricks' land "but you need a willing buyer and a willing seller." At the Planning Committee hearing, a letter from Apex was brought to the committee's attention, to similar effect. It noted that Apex had registered the remaining land at H3 with the Social Development Programme but that the landowner had confirmed the desire to continue to farm in the coming years. As such, the Apex letter said that "there is not reasonable prospect of homes being delivered on these lands."

[53] The evidence also contained some details of a Housing Land Availability Survey ('the HLA Survey') carried out by the Council's LDP, by which it sent landowners a questionnaire seeking details of the likelihood of various zoned lands becoming available for development. This was designed to give the Council some insight into how landowners envisaged their lands being used in the future, and when, and whether they wished to maintain the zonings contained in the DAP. Mr David Hatrick responded to indicate that he *did* intend to develop or promote all or part of his lands in the H3 housing zoning before 2032; although also that he considered that it would come forward for development in 10+ years' time (rather than 0-5 years or 6-10 years). His brother, Mr John Hatrick, replied in similar terms, although with an expectation that development would come forward sooner, within 6-10 years.

[54] At the time the planning officers' report was prepared, it seems to me that the officers were entitled to observe that "no evidence has been provided to ascertain" (*i.e.* to prove to their satisfaction) that the H3 site was not available. The observation in the report relates to the planning applicants' agents' assertion that the site was "not available to purchase due to the reluctance of the land owner to release the lands for development." The applicants had not shown this to be the case; and the onus was on them to establish it, in light of the case they were making that the area plan should be departed from. Mr Forbes' evidence on this at the pre-determination

hearing was neither particularly clear, nor conclusive. Taking the Apex letter (considered at the committee hearing) and the responses to the Council's HLA Survey together, a picture emerges of the H3 lands being unlikely to be available for development for several years (at least six years); but in circumstances where the owners – there being two with slightly different expectations in relation to timescales – did consider these lands would be developed for housing in due course. The planning applicants' case that they were not able to purchase the lands at that point and that there was no indication of them becoming available for many years was fairly put before the committee through the Apex letter.

[55] The main point made by the Council's officers in the section of the report which the applicant strongly criticizes is that the fact that the H3 land was not available for sale *at that particular time or to Apex as a particular purchaser* was not significant. It said, "Adequate land is available within the city's development limits and within the Westbank which could accommodate the proposal and address the housing need." The Council was looking at a range of other sites (including H2, H1A and sites elsewhere in the City) which could accommodate the development, as well as the land which was in principle available at H3. The report could certainly have been more clearly worded, in my view, in relation to the position in respect of the H3 lands. In particular, further detail could have been provided to councillors about the Hatricks' responses to the HLA Survey (although recognising that one of the respondents did not wish the information provided to become publicly available), which supported the contention that the H3 lands were unlikely to be released for development for some years to come. However, I do not consider the observation of which the applicant complains to represent a clear error of established fact; nor to represent such a material misdirection as to warrant the quashing of the Council's decision, applying the approach set out in *Mansell* and noted at paragraph [33] above.

[56] I also reject the applicant's argument, insofar as it is made, that the Council misdirected itself by failing to focus on the lack of alternative housing sites *for these particular planning applicants*. The Council was required to assess the application against prevailing planning policy, which directs it to the adequacy of available housing land supply in general rather than for any particular housing provider. It is rare in planning law for the very particular circumstances of the applicant for planning permission to be a material consideration, given the focus of the planning system on land use issues. Whilst the identity or particular circumstances of a planning applicant can occasionally be material planning consideration, I do not consider that there was any irrationality on the approach of the Council in failing to focus in on the needs and aspirations of Hartlands and/or Apex in the manner which is being suggested. This analysis is supported, by way of example, by the reasoning in *Aldergate Properties Ltd v Mansfield DC* [2016] EWHC 1670 (Admin). In that case – which concerned the sequential test for retail development – the availability of a suitable alternative site was held not to refer to its availability *to a particular retailer*, but rather to its being available more generally for the type of retail

use for which permission was sought (see paragraph [42] of the judgment of Ouseley J).

[57] Relatedly, I do not accept the applicant's contention that the advice on the part of the Council's planning officers, to the effect that the alternative sites not being on the 'open market' was not a material consideration, renders the committee decision liable to be quashed. In planning terms, it is principally the zoning (or in certain cases the extant permission) for housing which is the central factor in terms of suitability for a particular land use. Where full permission has been granted, the development may proceed without further recourse to planning control. Where the site benefits from a housing zoning, in principle planning permission for housing is likely to be granted. The mere fact that a particular site is not presently on the open market is plainly not determinative of how that land will be used; and does not establish that it will never, nor even that it will not soon, be used for the purpose for which it is zoned. By way of example, a landowner may choose to develop their site for housing themselves without putting it on the open market at all; or may happen to put the site on the market at some date shortly after the council's planning decision has been made. They might be in private discussions for sale or development; they may have a particular objection to sale to a particular party or at particular time for some commercial or other reason; and their plans and intentions may change. The precise, present market status of alternative sites is something which the planning authority would plainly be entitled to take into account in making its overall assessment of how and when housing need might be addressed; but it is plainly not determinative.

[58] I read the officers' advice in this case to mean that the fact that an alternative housing site was not on the market at that point does not mean that it can be discounted (as the applicants appear to have been urging). But, in any event, the present non-market availability of the relevant sites was a point which was clearly driven home by the planning applicants in their representations to the Council, of which they were aware. Again, the officers' report might have been better expressed in this regard; but I am not persuaded that any advice provided by them on the market status of alternative sites was such as to materially mislead councillors to the extent that quashing the decision would be appropriate.

The LDP process and the interests of landowners with zoned land

[59] A further matter raised by the Council officers is the effect which the grant of planning permission for substantial housing development on land presently not zoned for that purpose might have on present housing zonings in due course. Put simply, if sites such as the application site were granted permission for significant housing developments, when the new local development plan came to be formulated and adopted there may be a significant risk that sites which were previously zoned for housing would no longer be required for that purpose. In such circumstances they may be de-zoned for housing or re-zoned for something else.

Precisely how these issues should be addressed would have to be considered in the course of the new local development plan process.

[60] In discussing this issue at the Planning Committee meeting, one of the Council's officers noted that such a result "could set in store difficult conversations for the Council and the plan", in an apparent reference to the disappointment or anger which landowners may feel if a potentially highly lucrative zoning of their land was changed or reversed. The applicant's response to this is threefold. First, it says that the economic interests of landowners is an immaterial consideration. Second, it says that such landowners in any event would have only themselves to blame for failing to release their land to the market in order to meet housing need but, instead, 'banking' it in the hope of higher returns at some later point when demand has peaked. Third, it says that a basic requirement of the planning system, namely that land should be zoned and developed in order to meet community needs in the public interest, would be thwarted by allowing this approach. At its simplest, the approach urged upon the planners and the court is that a landowner benefiting from housing zoning must either use their land for that purpose or run the risk of losing it because the housing need has to be met elsewhere in the meantime.

[61] I accept the applicant's contention that fear of adverse reaction from a landowner who benefits from a zoning which is later removed for good planning reasons in a subsequent local development plan process is an immaterial consideration. The plan process must be addressed on its planning merits, as must each planning application which comes before the Council. It is well known that the planning system is designed to meet the public interest, rather than catering for the private economic interests of particular landowners. The landowner who benefits from a zoning in an area plan must also know that the lifespan of the plan is limited. In the case of the DAP, it remains the extent area plan for the moment but, on its face, expired in 2011. It is inevitable that, when the Council comes to adopt a new local development plan, there will be some change in anticipated land uses and zonings given the passage of time in the meantime and constantly evolving community needs.

[62] On the other hand, it is a well-known feature of planning law and policy that a decision-maker is entitled to take into account the issue of prematurity when granting a planning permission which may significantly impact upon and in some way pre-determine issues being considered, or soon to be considered, in the course of the development of more strategic planning policy. Accordingly, it was legitimate for the Council to take into consideration the impact of this development proposal (if granted) on the ongoing LDP process, provided that this was done in the correct way by reference to planning considerations of public interest rather than the private interests of landowners.

[63] The applicant complains that the relevant councillors should have been advised that the future LDP was not set in stone (either as to timetable or as to content) and that, in due course, a range of objections to it would require to be

considered so that its adoption was so far off that no weight could should be given to it or its housing proposals. I reject the submission. In the first instance the members of the Planning Committee would obviously have been aware, in my view, of the nature of the area planning process. They did not need to be advised that the plan was subject to change and would only be adopted after full consideration and argument. Notwithstanding that, it was still for them to make a judgment as to the weight which should be afforded to potential prejudice to the plan *process* by approving a very significant housing development outside the existing city development limits at this point.

[64] The respondent's evidence makes clear that the relevance of the LDP to the decision before the Council was not related to any emerging policies in the Local Policies Plan, since that was not yet in draft. Rather, the concern was a more general prematurity concern about the Council making decisions which were better suited to be made in the course of the LDP process itself or which would significantly pre-judge, or restrict consideration of, issues which would arise for consideration in the area planning process. I cannot accept the applicant's submission, which is what its case boils down to on this issue, that it was wrong for the officers to introduce the future LDP process into the committee's consideration at all. The officers' report indicates that the planning applicants were advised at the pre-application discussion stage that the proper procedure for the application site to be considered for housing was for it to be included within the development limits through the LDP process which was underway. That was a rational view to take given the significance of the proposed development and the fact that it was outside the City's development limits.

[65] The respondent has also averred that no weight was placed on the economic impact which de-zoning land might have on landowners; and that this was not regarded as a material consideration. Mr Hutton made the point that it was impossible for the officer who averred to this to make plain what was in the mind of the various councillors who voted against the grant of permission. However, as set out in the *Mansell* case (at paragraph [42]), unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officers' recommendation, they did so on the basis of the advice that the officers gave. In fact, in this case, the Planning Committee minutes record that the proposal to refuse the application was based on the reasons outlined in the officers' report (which made no mention of any concern about landowners having their lands de-zoned for housing). Considering the matter in the round, I am not persuaded that there was any material misdirection in the observations made in relation to the possible reaction of landowners who may later have their land de-zoned for housing or that this was taken into account in a way which infected the decision-making process with illegality.

Conclusion in relation to the housing issues

[66] Ultimately, my conclusion on these issues is that the current applicant has forensically (and with Mr Hutton's usual diligence and skill) fastened upon a number of isolated comments or observations in the course of the planning officers' report, or indeed in the course of the discussion of the application at committee, in order to fashion them into a contended error of law or error of established fact. However, in doing so, the applicant has trespassed further into the merits of the planning assessment made than is appropriate in the judicial review forum; has elevated observations made in the cut and thrust of debate to a status which, read fairly and in context, they do not properly warrant; and has fallen foul of the warnings in case-law that excessive legalism in these matters is to be avoided. The planning applicants' case on housing need was properly articulated and fully considered. It appears to have persuaded some councillors who voted but did not persuade others. Their conclusion that the applicants' case for departure from the area plan had not been made out was one which was rationally open to them; and I do not consider that that conclusion was infected by illegality on the bases discussed above.

Roads issues

[67] Turning to the roads issue, it was accepted that, in order to provide the required access to the proposed development, two residential buildings (four apartments at Nos 40-43 Derrymore) would require to be demolished. The remaining issue was whether the houses at Nos 44-50 would be unacceptably affected by the provision of visibility splays at the access which would require to cut into their properties.

[68] The Council's planning officers initially recommended refusal of the application, in part, because a satisfactory access from Springtown Road to the site had not been demonstrated. The applicant relies on the fact that the relevant officer within the Roads Section of the Department for Infrastructure (DfI), Mr Roulston, in a subsequent consultation response of 24 June 2020, having considered further materials provided on behalf of the planning applicants, indicated that, "If Council chooses to approve this application, it is capable of delivery with regards to access on the Springtown Road and the traffic calming alterations following amendments to the plans as detailed above." On the basis of this consultation response, the applicant contends that it was then clear that a satisfactory access from Springtown Road into the site had been demonstrated – or at least a satisfactory access in principle, the details of which could be ironed out at the reserved matters stage.

[69] The applicant further contends that, when the Council's planning officers updated their planning report for committee members to consider at the July 2020 meeting, the up-to-date position set out in the DfI consultation response of 24 June was not included. Rather, the officers maintained as a recommended refusal reason that the proposal was contrary to PPS3, 'Access, Movement and Parking' in that a

satisfactory access from the Springtown Road to the site had *not* been demonstrated. The applicant's deponent, Mr McAteer, has averred that he updated the committee in respect of the "recently announced concession" from DfI on this issue in his oral representations to the committee (which are set out in a speaking note which has been provided to the court).

[70] When it is considered carefully, Mr Roulston's consultation response on behalf of DfI Roads of 24 June 2020 was still raising a number of issues of concern about the Springtown Road access. For instance, in commenting on the proposed layout drawing which had been provided he stated that:

> "The boundary treatment along the frontage of the existing dwellings at 44-50 Derrymore will require setting back. This will have a significant impact on these dwellings. In particular, there may not be sufficient space between the rear of the visibility splay from the proposed development and the front of No.'s 44 & 45 to provide a boundary wall and railings whilst still retaining access."

[71] Mr Roulston was also critical of the level of detail which had been provided in the architects' drawing in relation to this access. He said that, "Although a note has been added specifying the boundary detail to the frontage of No.'s 44-50 Derrymore, no detail has been shown on the plan to indicate if it is practical or deliverable and does not adversely impact on the dwellings, with regard to the ability to carry out routine maintenance operations etc. for example." His later observation in the conclusion of this response (on which the applicant relies) that, "If the Council chooses to approve this application, it is capable of delivery with regards to access onto Springtown Road and the traffic calming alterations following amendments to the plans as detailed above" must be read in this light.

[72] In my view, a sensible reading of this consultation response is that, in order to provide the required access (with the necessary visibility splays), the boundary of existing properties would have to be pushed back; and that Mr Roulston was saying that, whilst this was technically possible, (a) it would have a significant impact on the dwellings concerned; and (b) he did not have enough detail to see precisely how it would or could be delivered in practice. In short, the plans needed amendment to illustrate this; but, in any event, it was a matter for the Council (as the planning authority) to determine whether the impact on the Derrymore houses was acceptable. This latter judgment was a planning matter, rather than a technical roads matter, which was for the Council rather than the statutory roads consultee.

[73] The issue was summarised in the updated officers' report for the July Planning Committee meeting, as follows:

> "For these external road works and a safe access to the site to be provided this requires the existing walls along the

> frontage of the Derrymore development along Springtown Road to be set back to accommodate the visibility splays. The existing boundary walls therefore of properties no 44-50 Derrymore will have to be set back. DFI Roads has advised that there may not be sufficient space between the rear of the visibility splay from the proposed development and the fronts of properties 44 and 45 to provide a boundary wall and railing whilst still retaining access to these properties. It has not been shown on the plans if it is practicable or deliverable and does not adversely impact on the existing dwellings e.g. with regards to the ability to carry out routine maintenance operations. This is also unacceptable to planning officers and at the time of assessment of that application (Derrymore) the walls including the front amenity space was required to provide a quality development, adequate amenity and an acceptable frontage along Springtown Road."

[74] As Mr McLaughlin pointed out in oral submissions, there is nothing incorrect in this characterisation of the DfI input. In my judgment, the eighth refusal reason cited by the Council is a rational and acceptable reflection of the position which had been reached even after Mr Roulston's June consultation response. It is in these terms:

> "The proposal is contrary to the Department's Planning Policy Statement 7 Quality Residential Environments, in that the submitted details fail to demonstrate that a satisfactory layout can be achieved in accordance with Creating Places and there is insufficient information to assess impacts on access, visibility and infrastructure works required as a result of the development."

[75] That is not to say that these issues might not have ultimately been bottomed out to the planning authority's satisfaction; but, in light of Mr Roulston's view that the architects' plans were not sufficiently detailed and required amendment, the Council was perfectly entitled in my view (even in an application for outline permission) to determine that it had not at that stage been demonstrated in principle that the issue identified in relation to the Springtown Road access was surmountable. Although the applicant in the present proceedings noted that Apex was the owner of the relevant housing (and so could have 'sacrificed' a number of further Derrymore units in order to secure planning permission in this case), that was not what was being proposed at the time. The Council was entitled, on the materials before it, to take the view that the suitability of the access had not yet been established in principle, since that was ultimately left by DfI to the Council for the exercise of its planning judgment on the acceptability of eating into the frontage of Nos 44-45 Derrymore, in circumstances where the space to the front of those

properties had been considered necessary at the time when the Derrymore planning permission was granted in order to comply with the appropriate planning standards.

Conclusion on the planning issues

[76] For those reasons, I would dismiss the applicant's challenge based on the Council's consideration of the planning issues discussed above. I address below the Council's submission that, on these issues, the applicant had a viable and suitable alternative remedy by way of appeal against the refusal of planning permission to the Planning Appeals Commission (even if that did not represent an adequate alternative remedy on the applicant's remaining grounds of challenge). There may well be force in that submission. However, in light of my conclusion below that the Planning Committee's decision should be quashed and remitted to it, it seemed to me appropriate to express my conclusions on the applicant's planning-related grounds in order to give some legal guidance to the Committee in any future consideration of this issue (without prejudice to its further assessment of the planning merits of any of the issues addressed above) and in light of the time and expense expended by both parties in making, and meeting, these points respectively.

Relevant statutory provisions

[77] Before turning to the applicant's procedural complaints about the way in which the Council's decision-making occurred, both before and after the Planning Committee meeting of 29 July 2020, it will be helpful to set out a number of key statutory provisions which govern the Council's processes in this regard; and to also set out those portions of the Council's Planning Committee Protocol with which the applicant takes issue, as well as some relevant portions of the Council's Standing Orders.

[78] There are a number of Acts of the Northern Ireland Assembly which are particularly relevant to the issues raised for consideration by the court in these proceedings. The first is the Local Government Act (Northern Ireland) 2014 ('the 2014 Act'). The second is the Planning Act (Northern Ireland) 2011 ('the 2011 Act').

[79] The 2014 Act sets out the basic structure of local government decision-making. Section 7(1)(a) provides that a council may arrange for the discharge of any of its functions by a committee, a sub-committee or an officer of the council. Section 11 deals with the appointment of committees, etc. for the purpose of discharging functions. By section 11(2), subject to the 2014 Act, the number of members of a committee appointed, their term of office, and the area within which the committee is to exercise its authority must be fixed by the appointing council. Detailed provision for the appointment of councillors to committees is made in Schedule 2 to the 2014 Act, with a view to ensuring the fair sharing out of committee places between parties represented on the council.

[80] The key issue of decision-making is addressed in sections 39-40. Section 39 is in the following terms:

> "(1) Subject to this Act and any other statutory provision, every decision of a council must be taken by a simple majority.
>
> (2) In the case of an equality of votes in relation to a decision which must be taken by a simple majority the person presiding has a second or casting vote.
>
> (3) In this section "simple majority" in relation to a decision of a council means more than half the votes of the members present and voting on the decision.
>
> (4) This section applies to a committee or sub-committee of a council and to a joint committee or a sub-committee of a joint committee as it applies to a council."

[81] Thus, reading section 39(1) and (4) together, subject to any provision of the 2014 Act and any other statutory provision to the contrary effect, every decision of a committee such as the Council's Planning Committee must be taken by a simple majority (meaning more than half of the votes of the members present and voting).

[82] Section 40, in a departure from the usual simple majority approach set out in section 39, provides that standing orders must specify decisions which are to be taken by qualified majority (meaning 80% of the votes of the members present and voting on the decision). Again, this also applies to committees. However, the requirement for qualified majority voting does not arise in the circumstances of this case.

[83] Section 41, which is relevant to the applicant's challenge to the Council's failure to 'call in' the decision on its planning application, makes provision for decisions to be reconsidered in certain circumstances. Section 41(1)(a) provides that:

> "Standing orders must make provision requiring reconsideration of a decision if 15 per cent. of the members of the council (rounded up to the next highest whole number if necessary) present to the clerk of the council a requisition on either or both of the following grounds—
>
> (a) that the decision was not arrived at after a proper consideration of the relevant facts and issues; …"

[84] Section 41(4) provides a number of definitions relevant to the preceding sub-sections. A 'decision' for the purpose of section 41(1) includes a decision of a committee of the council, so meaning that committee decisions such as that at issue in the present case may be required to be reconsidered. 'Reconsideration' in the case of a committee decision means either consideration by the council or any specified committee of the council (with 'specified' meaning specified in standing orders).

[85] The 2011 Act sets out a detailed statutory code for the exercise of planning functions in this jurisdiction, including their determination by district councils as planning authorities. Pre-determination hearings in relation to a planning application are provided for in section 30 of the 2011 Act. Section 30(1) provides that regulations or a development order may provide that, before determining an application for planning permission for certain prescribed classes of development, a council must give the applicant an opportunity of appearing before and being heard by a committee of the council. That is to say, the Department (then the Department of the Environment (DoE), which previously had responsibility for planning functions, which have now transferred to DfI) may make pre-determination hearings mandatory in certain cases. However, section 30(4) provides that councils may nonetheless voluntarily use them:

> "In relation to an application other than is provided for in regulations or a development order under subsection (1), a council may elect to give the applicant and any other person an opportunity such as is mentioned in that subsection; and if the council does so elect, subsections (2) and (3) apply accordingly."

[86] The procedures to be used in respect of a pre-determination hearing are provided for in sub-sections (2) and (3), in the following terms:

> "(2) The procedures in accordance with which any such hearing is arranged and conducted (including, without prejudice to the generality of this subsection, procedures for ensuring relevance and avoiding repetition) and any other procedures consequent upon the hearing are to be such as the council considers appropriate.
>
> (3) Any right of attendance at the hearing (other than for the purpose of appearing before and being heard by the committee) is to be such as the council considers appropriate."

[87] Section 30(2) is a key provision in the context of this case, which is relied upon heavily by the respondent. It allows a council to determine the procedures which it

considers appropriate both in respect of the pre-determination hearing itself and also "any other procedures *consequent upon* the hearing."

The Council's Planning Committee Protocol

[88] The Council has, quite sensibly, adopted a protocol to explain the role of the Planning Committee and how it will operate. This is designed to assist both elected members and members of the public, including planning applicants and objectors, in relation to the procedures which will be adopted by the committee. Part of the rationale for having such a protocol is to seek to ensure that decisions are taken by members of the planning committee in a way which is legally robust and defensible.

[89] The Planning Committee Protocol notes that, although the Council comprises 40 councillors, it has resolved that the Planning Committee shall consist of not more than fourteen members. The quorum for the Planning Committee is seven members who are present and eligible to vote. The format of Planning Committee meetings is dealt with, amongst other things. For present purposes, the relevant portion of the Protocol is that dealing with pre-determination hearings (PDHs). It explains that such hearings are mandatory in some circumstances but that, in addition, the Council may also hold pre-determination hearings at its discretion where this is considered necessary to take on board local community views, as well as those in support of the development.

[90] The key provisions of the Protocol for the purposes of these proceedings are in the following terms:

> "The intention [of holding a pre-determination hearing] is to make the application process for major applications more inclusive and transparent by giving applicants and those who have submitted representations the opportunity to be heard by council before it takes a decision.
>
> …
>
> When holding a Pre-Determination Hearing, the procedures (PDH Guidance Procedures) will be the same as the normal Planning Committee meetings. The Planning Officer will produce a report detailing the processing of the application to date and the planning issues to be considered. The number of individuals to speak on either side, time available, etc. will be agreed prior to the meeting. <u>Non-attendance by Members at PDH means that Members cannot vote on the planning decision.</u> Members at Planning Committee can participate, probe ask questions [*sic*] but not vote in the

> decision making process. It is not recommended that the PDH is held on the same day as the application is to be presented with a recommendation as the Decision making process will be separate."
>
> [underlined emphasis added]

[91] Also relevant is the portion of the Protocol which deals with the committee members' decision on a proposal which has been tabled at the Planning Committee meeting proper. It includes the following text:

> "The members take a vote on whether or not to agree with the Officer's recommendation. The Chair has a casting vote.
>
> Members must be present in the council chamber for the entire item, including the Officer's introduction and update; otherwise they cannot take part in the debate or vote on that item."

The Council's Standing Orders

[92] A variety of provisions of the Council's Standing Orders are relevant. For present purposes, the key section is Order 21 which deals with the call-in process. Order 21.1 sets out the decisions which are subject to call-in. Significantly, section 21.1(2) purports to set out a range of decisions which are not subject to call-in, in the following terms:

> "The following decisions shall not be subject to call-in –
>
> (a) a decision on a regulatory or quasi-judicial function which is subject to a separate appeal mechanism;
>
> (b) a decision which is deemed to be a case of special urgency in accordance with regulation 26 of the 2014 Executive Arrangements Regulations;
>
> (c) a decision where an unreasonable delay could be prejudicial to the council's or the public's interests;
>
> (d) a decision taken by an officer or officers which is not a key decision;
>
> (e) a decision by the executive which serves only to note a report from or the actions of an officer or officers."

[93] Assuming that a decision is in principle subject to call-in, the admissibility of a call-in request is provided for in Order 21.2. In particular, section 21.2(1) provides that:

> "A call-in shall be submitted in writing to the clerk by 10am on the fifth working day following issue of the draft minute of the decision to which the call-in relates. If a call-in is received after the specified deadline, it shall be deemed inadmissible."

[94] A number of additional requirements for the submission of a valid call-in request, and how such a request should then be dealt with, are set out in the remainder of that section of the Council's Standing Orders.

The voting issue

[95] The applicant contends that the Planning Committee's decision is vitiated in law because several members who were present and legally entitled to vote were wrongly disenfranchised as a result of the operation of the Council's Planning Committee Protocol. This is essentially a challenge to the *vires* of the Protocol on this point.

[96] It appears that the issue raised in relation to the Protocol was particularly acute in the circumstances of this case. That is because, between the pre-determination hearing on 12 March 2020, and the Planning Committee meeting on 29 July 2020, there had been a significant change in the constitution of the Planning Committee in terms of elected members. That meant that several of those who had attended the pre-determination hearing in March as members of the Planning Committee were no longer members of that committee by July; and that, conversely, a number of the members of the Planning Committee in July had not been members of that committee in March and therefore would have had no reason to attend the pre-determination hearing.

[97] The application of the Protocol in those circumstances meant that, of the twelve elected councillors who attended the Planning Committee meeting on 29 July 2020, there were only seven of them who were permitted to vote. One councillor withdrew from the discussion by reason of a conflict of interest. The remaining four committee members, whilst entitled to participate in the discussion under the terms of the Protocol, were not permitted to vote in terms of the actual decision. This is common case and is clearly set out in the open minutes of the meeting which records the Chair having informed newly appointed members of the committee that they would not be permitted to vote on the proposal because they were not present at previous meetings when the applications were discussed. The transcript of the meeting also supports the contention that clear advice was given that members who were present and would otherwise be eligible to vote were precluded from so voting where they had not been present at the pre-determination hearing. The transcript

also shows that a number of councillors accepted this advice and expressed themselves to have "no vote", or words to that effect.

[98] The applicant's objection to this is straightforward. Those committee members 'deprived' of a vote because of their non-attendance at the PDH were elected members entitled to vote in the Council's decision making processes. That is a matter of basic fairness and local democracy and, more particularly, a basic entitlement of an elected councillor which can only be removed from him or her for good reason and with a clear legal basis.

[99] The Council has noted that the portion of the Protocol with which the applicant takes issue in these proceedings was introduced in response to a previous application for judicial review which, ironically, had also been brought by Hartlands and was a challenge to the planning decision in respect of the Derrymore site in which it was contended that members who had not attended earlier sessions dealing with the application should *not* have been permitted to vote on the proposal when it came to full consideration at committee.

The role of elected councillors in making planning decisions

[100] In mounting this aspect of its challenge, the applicant has focused heavily on the rationale for entrusting planning decision-making to local district councils and, in particular, the role of individual councillors in bringing their own local knowledge and assessment of local needs (for which they were elected and are democratically accountable) to planning decisions. In this regard, the Explanatory Notes to the 2011 Act (at paragraph 3) explain the basic policy objective behind the transfer of the majority of planning functions from central government to local government in the following terms:

> "The Act also gives effect to the local government reform changes which will transfer the majority of planning functions and decision making responsibilities for local development plans, development management plus planning enforcement to councils. This will make planning more locally accountable, giving local politicians the opportunity to shape the areas within which they are elected. Decision making processes will be improved by bringing an enhanced understanding of the needs and aspirations of local communities."

[101] The applicant has also drawn the court's attention to extracts from the 'Third Report of the Nolan Committee on Standards in Public Life, Standards of Conduct in Local Government in England, Scotland and Wales' (CM3702, July 1997). This report examines the role of local councillors in making planning decisions. *Inter alia*, it makes the following points at paragraphs 280-290. Councillors exercise two roles in the planning system: determining applications using planning criteria and excluding

non-planning considerations but *also* acting as representatives of public opinion in their communities. Although there is some tension in this dual role, provided councillors confine themselves to proper planning considerations, they are particularly well placed to make planning decisions because of their representative role and local knowledge; and they are entitled to reach decisions against the advice of their planning officers by attaching different weight to the relevant planning considerations.

[102] In the applicant's submission, the present case (involving local housing needs of which councillors will be acutely aware and which will have been impressed upon them by constituents) is a "prime example" of the very type of local issues which the localisation of planning functions was designed to address.

[103] A number of authorities which address the particular role of local councillors in making planning decisions were also opened to the court. For instance, in *R (Lewis) v Redcar and Cleveland Borough Council* [2009] 1 WLR 83, a case concerning a challenge for apparent bias and predetermination, the English Court of Appeal emphasised that councillors determining a planning application were not in a judicial or quasi-judicial position. Rather, as democratically accountable decision-takers, they were entitled to determine applications in accordance with their political views and policies provided that they acted lawfully (including by having regard to all, and only, material considerations and giving fair consideration to all points raised): see paragraphs [62] and [69] of the judgment of Pill LJ; and paragraph [94] of the judgment of Rix LJ. In *Morge FC v Hampshire County Council* (*supra*), Lady Hale (at paragraph [36]) also observed that "planning decisions are taken by democratically elected councillors, responsible to, and sensitive to the concerns of, their local communities."

[104] The Council's Planning Committee Protocol in the present case is clearly designed to seek to minimise legal risk to the Council in some respects. As noted above, it was introduced as a result of a previous legal challenge from the present applicant essentially arguing an opposite point to that which is raised in these proceedings. Although I can see why the respondent may be somewhat galled at this turn of events, the issues must be addressed on their merits and the applicant's position is, quite simply, that the Council has *over*-reacted to the issues raised in the previous judicial review. As to the question of managing legal risk, the applicant contends that it is well established that it is for individual councillors to exercise their own judgment upon when they should participate in Council proceedings to which they are entitled to contribute and when, on the other hand, they are required to withdraw. Councils may give elected members advice and guidance in this regard, even in strong terms, but may not seek to deprive them of their vote without clear statutory authority.

[105] Some support for this is to be found in advice issued by the Department of Environment entitled 'Application of the Councillors' Code of Conduct with regard to Planning Matters.' This document provides guidance on the Northern Ireland

Local Government Code of Conduct for Councillors ('the Code of Conduct'). Parts 1 and 8 of the Code of Conduct came into force in May 2014 and Part 9, which deals specifically with planning matters, came into force on 1 April 2015 when planning functions were transferred to councils. The DoE guidance makes clear that a councillor must withdraw from a council meeting where matters are being discussed in which they have a pecuniary interest or any significant private or personal non-pecuniary interest in the matter arising at the meeting. The guidance emphasises that this is a matter of the councillor's own personal responsibility to determine, having regard to council advice and guidance. Similarly, the guidance makes clear that planning committee members who wish to support their own constituents' views regarding a particular planning application may cross the line from an impartial decision-maker to an advocate for the proposal, in which case they ought not to take part in the decision-making of the planning committee in relation to that application. Again, however, there is a strong element of personal judgment to be exercised by the individual councillor. I return to this issue below.

Alternative remedy

[106] The applicant has drawn attention to the particular role of locally elected councillors in making planning decisions for two reasons in relation to this application for judicial review. First, the applicant contends that it is no answer to this application to submit (as the respondent has) that the applicant has an adequate alternative remedy by way of appeal to the Planning Appeals Commission. Second, the applicant seeks to bolster his case that it was procedurally irregular, unfair and unlawful for democratically elected councillors who sat on the Planning Committee, who were *prima facie* entitled to participate in the decision-making for the reasons discussed above, to be excluded from the decision-making.

[107] On the question of alternative remedy, in the particular circumstances of this case I do not consider that the availability of a right of appeal on the planning merits to the PAC represents an alternative remedy which ought to debar the applicant from pursuing this claim by way of judicial review. I emphasise that that is the conclusion reached in the particular circumstances of this case only. In the vast majority of cases where a disappointed planning applicant seeks to challenge the refusal of planning permission by a council or the Department, the right of appeal to the Commission will not only represent an adequate alternative remedy but will be required to be pursued before this court would countenance any application for judicial review. Had the applicant's grounds of challenge been only those related to the Council's consideration of planning matters (addressed at paragraphs [26]-[76] above), I would have had little hesitation in concluding that the applicant ought to have appealed the Council's decision in preference to mounting judicial review proceedings. Those are precisely the type of matters on which the Commission enjoys expertise and which it is able to address on their merits.

[108] The key reason why, in this case, I have concluded that the applicant should not be ruled out of judicial review at this point is that I consider there to be some

force in its argument that it has been deprived of a proper first instance determination of its application on the planning merits. I also consider that there is likely to be some force in the applicant's suggestion that, in a case of this kind where the planning applicants acknowledged that they were seeking a departure from clear planning policy but invited the Council to approve this on the basis of exceptional housing need, the applicants were perhaps more likely to receive favourable consideration from elected councillors on this basis than the Commission. If the applicant is correct in its case that, by reason of the procedures adopted by the Council, it did not receive the locally accountable hearing and determination to which it was entitled under the 2011 Act, it seems to me that it should be permitted to have its bite at the cherry in that respect before being required to spend further time and costs in pursuing an appeal which might have less prospect of success (because of the understandable likelihood of a greater reticence on the part of a commissioner to see clear planning policy outweighed on essentially political grounds, albeit those grounds are capable of consideration as a material planning factor). For completeness, I should say that I do not in the same way accept the applicant's contention that local councillors would be better placed to consider the weight that ought to be given to the DAP 2011 in light of its antiquity and/or prematurity concerns in relation to the forthcoming LDP process. These seem to me to be matters which fall squarely within the Commission's expertise.

[109] In any event, the respondent did not press the suggestion that an appeal to the Commission represented an alternative remedy on the two procedural questions raised by this case: the operation of the Planning Committee Protocol to preclude certain councillors from voting and the failure to call the decision in under section 41 of the 2014 Act. This case is, accordingly, an instance of the rare category (of which *Re UK Waste Management Ltd's Application* [2002] NI 130 is another: see at 139J-140F) where the availability of an appeal to the Planning Appeals Commission should not act as a bar to the court entertaining a challenge to the validity of the first instance planning decision by way of judicial review.

Resolution of the voting issue

[110] The outcome of the applicant's challenge on the voting issue turns on questions of pure statutory construction: in particular, whether the ability of the Council to adopt such procedures as it considers appropriate "consequent upon" a pre-determination hearing under section 30(2) of the 2011 Act allows it to restrict the right of elected members to vote in a later Planning Committee meeting.

[111] Elected councillors' right to participate and vote in council meetings is not addressed directly in the 2014 Act. Rather, it is assumed. This is an entirely natural assumption, since councillors are elected to make decisions in council (and in any of the committees to which they are appointed through which a council exercises its functions). The 2014 Act refers on a number of occasions to councillors being "present and voting." It seems to me that it is a basic premise of that Act that councillors are entitled to vote in council, or in committees to which they have been

appointed, and that the question of whether or not they should vote is, at least in general, a matter for their own individual judgment (subject always to sanction for breach of the Code of Conduct and, ultimately, to electoral accountability for their actions).

[112] Although this question is not entirely clear cut, ultimately I accept the applicant's contention that section 30(2) of the 2011 Act does *not* provide adequate statutory authority for a council to deprive an elected member of his or her vote in circumstances where they wish to exercise it. Any such authority would, in my view, require to be clearly stated, given that it is such a significant departure from the basic democratic principles to which the 2014 Act gives effect. Reading section 30 of the 2011 Act as a whole, it appears to me that the word "procedures" is referring to the practical arrangements for a pre-determination hearing and the conduct of the hearing – to include matters such as attendance, venue, timing, speaking rights, etc. – rather than the substantive decision-making process which the council (or committee) will ultimately have to undertake. Put another way, as the applicant submitted: "… the right to vote is not a matter of procedure. Procedures precede the vote. The vote is the decision, not the procedure before it."

[113] It also seems to me that this approach is broadly consistent with authority, which emphasises the personal responsibility upon councillors not to exercise their right to vote in circumstances where to do so would be improper or significantly increase the risk of successful legal challenge to the decision in which they were participating.

[114] In *R (Ware) v Neath Port Talbot County Borough Council* [2008] LGR 176, the council's monitoring officer had advised members of its planning committee that they should not participate in the debate and decision-making in relation to a planning application if they had not attended a site visit in relation to it. In that case, unlike the present, the officer concerned emphasised that she was not seeking to prevent members from voting if they had not attended the visit but gave them the advice mentioned above on the basis that participation of members who had not attended might call into question the decision-making on the application. The council's principal solicitor also strongly advised against voting in these circumstances but made clear to the councillors concerned that it was their decision whether to do so or not. A number of councillors withdrew and did not participate in the decision-making on this basis. The resulting decision was challenged on the basis that those councillors had been wrongly advised by the council officers.

[115] The Court of Appeal upheld the decision, on the basis that all of the councillors concerned had been left to make their own decisions and to exercise their own judgment about whether or not they should vote on the decision. There was nothing wrong with the officers' advice about an increase in legal risk if the councillors participated without having been at the site visit. They had not been directed or pressurised by council officers to abstain from voting or to leave the meeting. (The applicant in the present case draws a distinction here as, it submits,

the relevant councillors in this case *were* directed to abstain from voting or told that they were disqualified from doing so.) Mummery LJ, at paragraphs [40]-[41], noted that the councillors were clearly advised that it was for them to make their own decisions about whether to vote, adding:

> "They were not prevented from voting at it, if they so wished. In deciding individually not to vote the councillors were exercising their own judgment in the light of the advice that was given. None of the advice given to them was wrong or amounted to an immaterial consideration giving rise to a procedural irregularity or to unlawfulness in the granting of the consents.
>
> It follows that there was no procedural irregularity vitiating the grant of the consents. Having received correct advice the councillors decided not to vote on the resolution. This was their decision and it has not been demonstrated that it was affected by immaterial considerations, such as wrong advice…"

[116] It seems implicit, if not explicit, in the above observations that, had the councillors been advised that they could not vote or been precluded from so doing, so overriding their own individual judgment (albeit with the benefit of advice) on the question of whether or not they should vote on the motion, that would have amounted to a decision taken in misdirection of law or on a procedurally irregular basis.

[117] *R (Etherton) v Hastings Borough Council* [2009] EWHC 235 (Admin) is a decision of the High Court of England and Wales with perhaps more obvious parallels to the present case. In that case, the council operated a planning protocol which indicated that councillors were expected to attend site visits and, where they had not done so, were "expected to sit back from the table and not take part in debate and voting on the matter when it comes up for consideration, unless the member can confirm that they have sufficient relevant knowledge of the site (from other sources) to form the basis for a decision." Thus, the matter was again left to the councillor's own judgment, albeit with a strong steer against participation and a requirement to announce to the committee why they felt they had sufficient knowledge of the site to participate, without having attended the site visit. In the circumstances of that case, there had been a mix-up in the administrative arrangements informing councillors of the site visit, so that many of the planning committee members had not attended and felt unable therefore to participate in the decision-making. In giving judgment, Sir Michael Harrison referred to the judgment of Collins J at first instance in the *Ware* case mentioned above, citing with approval his observations that as a matter of principle it was difficult to see how a committee could bind its members so that individual members who had not (perhaps for good

reason) been able to attend a site visit could not participate in the decision. Collins J said that "at most they can indicate that it is desirable, and it must be for the individual member to decide whether, on the facts, the fact that he has not been able to attend the site should disqualify him."

[118] *R v Flintshire County Council, ex parte Armstrong-Braun* [2001] EWCA Civ 345; [2001] LGR 345 is another decision of the Court of Appeal of England and Wales which appears relevant. That case did not specifically involve a planning issue but did raise the question of whether and to what extent a council, by means of standing orders, could limit the right of an individual elected councillor to exercise his local mandate. In that case the council made a standing order which prevented any councillor from putting a matter on the agenda for discussion at the council meeting without it having been seconded by another council member. This replaced the former rule that a single member could move a motion for discussion simply on giving a certain number of days' notice. The applicant sought judicial review of the standing order on the ground that the prohibition on an elected member putting business before the council went beyond the "regulation of proceedings and business" which was the purpose for which standing orders were to be made under the governing statute. In particular, the applicant was concerned that a councillor who was not a member of a party or group would be excluded from raising matters of concern for his constituents if he could not obtain the support of any other councillor.

[119] The Court of Appeal allowed the application for judicial review holding that, while the relevant standing order might be regarded as having been made for the regulation of the council's proceedings and business within the wording of the empowering provision, the dangers that can arise in preventing an individual council member from raising matters at council meetings had to be considered. The council had not given proper consideration to the full democratic implications of the new standing order (which it had simply considered as a 'tidying up' measure designed to prevent time wasting). Given that the full implications of the new measure had not been properly considered, including the damage which it would cause to local democracy, the council's decision to adopt the new standing order was quashed.

[120] Shiemann LJ considered that the issues raised by the case went "to the heart of the democratic process" (see paragraph [3]). He endorsed the desirability of the aim which the standing order was designed to pursue but considered that, had it been necessary to address this issue, he would have considered that there was force in the submission that the standing order ran against the policy and objects of the 1972 Act (see paragraph [37]). In the course of his judgment, Sedley LJ, who took a different view on the *Padfield* issue provided the relevant standing order was adopted on relevant, logical and sufficient grounds (see paragraph [50]), nonetheless made the observation at paragraph [53] that:

> "… Every councillor's voice and vote is equal. It follows that the proceedings and business of the council cannot lawfully be arranged so that (however innocent the intent) particular councillors are unjustifiably silenced or otherwise disadvantaged in doing what they have been elected to do."

[121] Although Sedley LJ did not consider this to be a matter of councillors' rights, since the rights which were involved were those of the electors of the council, he did consider the issue to be one of the possible abuse of power by local authority acting collectively (see paragraph [54]).

[122] Albeit arising in a different context (that of councillors wrongly abdicating their personal responsibility by voting strictly on party lines), *R v Waltham Forest LBC, ex parte Baxter* [1988] QB 419 is a further example of the courts emphasising that each elected councillor has "a personal and individual duty to consider the issues involved and to reach his own decision whether to vote for or against the resolution or to abstain" (*per* Sir John Donaldson MR at 422).

[123] These authorities reinforce my view that, in order to empower a council to deprive an elected member appointed to the Planning Committee of his or her vote on an issue at a meeting at which they were present and desirous of voting, section 30(2) of the 2011 Act would have had to have been in much clearer terms. The Council was and is entitled, either through its officers or collectively adopted procedures, to give strong advice to a member about the wisdom of voting in particular circumstances where doing so may increase the risk of successful legal challenge; but it was not entitled to purport to legally disqualify members from voting in the circumstances of this case. I do not need to decide, nor do I, whether standing orders or the common law might permit such a disqualification in certain other circumstances which have not arisen for consideration in these proceedings. Generally, however, where a councillor is to be disabled from voting on a particular issue, one would expect this to be clearly spelt out in statute, as, for example, in section 28(1)(a) of the Local Government Act (Northern Ireland) 1972 (where the member has a pecuniary interest in the matter being considered).

[124] Mr McLaughlin's submissions gave me pause for thought on this issue, particularly because, as he observed, the procedures to be adopted by a council which holds a pre-determination hearing as a matter of discretion under section 30(4) of the 2011 Act are precisely the same as those where a council is obliged to hold a pre-determination hearing by virtue of section 30(1). In the latter case, the pre-determination hearing is a statutorily mandated part of the decision-making process. On this basis, Mr McLaughlin submitted that there was an obvious advantage (and likely requirement) that those who participated in the ultimate decision must have been present at the pre-determination hearing. He accordingly submitted that the procedures which the Council was entitled to set under section 30(2) must include regulating which councillors did and did not have a right to vote

in the final decision-making process. Attractive though that submission is, I cannot accept it. Firstly, for the reasons given above I consider that any restriction on voting would have to be spelt out much more clearly in the statutory language. Secondly, section 30(1) requires only that the applicant (and any person so prescribed or specified in regulations or a development order) be given "an opportunity of appearing before and being heard by *a committee* of the council" [underlined emphasis added]. There is no requirement in the 2011 Act that the ultimate decision on a planning application be made by this committee or the planning committee of the council. Some councils may choose to make planning decisions corporately rather than through a planning committee; or to retain corporate decision-making authority over some or all planning decisions which have in the first instance been delegated to committee. In other words, provided that the substance of the pre-determination hearing is properly taken into account, there is no requirement on the face of section 30 of the 2011 Act for only those present at the pre-determination hearing to participate in the subsequent, substantive voting on the application. Indeed, the text of section 30(1) appears to me to contemplate the contrary position.

[125] In addition, it seems to me that the term "procedures" in section 30(2) of the 2011 Act has generally been understood to relate to practical or administrative arrangements for the meeting and debate, rather than the substance of the voting process, in previous departmental publications. For instance, in the DoE 'Best Practice Protocol for the Operation of Planning Committees' (January 2015), when discussing pre-determination hearings at paragraph 27, it is noted that the PDH "procedures can be the same as for the normal planning committee meetings." The following examples are then given: "number of individuals to speak on either side, time available to speakers etc." Similarly, the DfI publication, 'Development Management Practice Note: Pre-Determination Hearings' (November 2016) contains the same text (at paragraph 3.4). At paragraph 4.2 of the DfI Practice Note, referring in particular to the power to set procedures under section 30(2) of the 2011 Act, it is noted that: "This may include: the order of proceedings; the maximum number of speakers on either side; time limits for contributions; opportunities for contributors to respond to others' comments; question/cross examination by elected members and other contributors; members seeking technical advice." This is of course not determinate; but supports Mr Hutton's argument that the reference to "procedures" in section 30(2) would not ordinarily be construed as included regulation of the voting process.

[126] In the event that I was wrong about the *vires* of the Council to disentitle councillors from voting as a matter of principle, the applicant contends that the Protocol should nonetheless be set aside on the basis that it is either irrational or disproportionate. This submission is advanced principally because a pre-determination hearing may be minuted or (as it was in this case) transcribed. In this way, the applicant submits, the concern that councillors voting on the planning application will not be fully appraised of the matters addressed at the pre-determination hearing can be addressed. In fact, in the present case, the transcript from the pre-determination hearing was appended to the officers' report.

The applicant also notes that there is no prohibition within the Protocol on councillors who have not attended a site visit later participating in a pre-determination hearing or in the decision-making committee meeting. Attendance at site visits is expressly noted to be optional, although recommended.

[127] I would not have held that the provision made in the Protocol as to attendance at pre-determination hearings was *Wednesbury* unreasonable. Notwithstanding my conclusion on the *vires* issue, the purpose which the Council was seeking to secure through the impugned provisions of the Protocol is clear and rational. I have been satisfied that the Protocol was approved by elected members (and not, as the applicant initially suggested, merely drawn up and imposed by officers) after careful consideration and to meet legitimate concerns. One such concern is to ensure that those participating in the vote at Planning Committee were fully informed; and another was to ensure that the purpose of pre-determination hearings was not undermined by councillors viewing them as optional and failing to prioritise attendance. The challenged provision is a rational response to these concerns. I have some sympathy with the suggestion that – at least in some cases – the operation of the Protocol may be disproportionate; but that is not the appropriate standard of review in this field, where there is no reliance on Convention rights (notwithstanding some *obiter* comments of Sedley LJ in the *Armstrong-Braun* case which might possibly be read to the contrary). Therefore, had I considered the Protocol to be *intra vires* the Council's powers under section 30(2), I would not have been inclined to otherwise find it unlawful.

[128] In summary on this issue, however, on the basis outlined above I consider that the decision of the Planning Committee on 29 July 2020 was reached on the basis of a material error of law, namely that certain councillors who were members of the committee were not lawfully permitted to vote on the outcome of the application. I do not consider that it was lawful for the Council to disqualify certain members from voting on the basis that they had not attended the pre-determination hearing. The Council would certainly have been entitled to provide advice to councillors that it would be better if they did not vote in these circumstances (although I also accept the applicant's submission that any legal risk in that course was significantly mitigated by the provision of a transcript of the pre-determination hearing to all members of the committee along with the officers' report). However, the evidence satisfied me that a number of councillors considered that it would not be open to them to exercise their vote. I propose to quash the Council's decision on this basis. I have not been persuaded – nor did the respondent seek to persuade me – that councillors who considered themselves to be disqualified from voting would not have voted if they had been presented with the opportunity and had merely been advised against voting in the circumstances; nor that the outcome of the vote would inevitably have been the same in that instance.

[129] None of this, of course, should be taken as a charter for councillors to take a relaxed approach to attendance at pre-determination hearings. The purpose of such a hearing, where it is held, is obviously to promote well-informed, quality

decision-making in relation to the application. In the present case, the Council was entirely correct to identify that participation in the ultimate decision-making by an elected member who had not attended the pre-determination hearing increased the risk of legal challenge to the resulting decision. In my view, so too would non-attendance at a site visit which was considered necessary or appropriate in relation to a planning application for some reason. In the former case, the risk can of course be mitigated by the taking of certain other sensible steps to ensure that an elected member who was unable to attend the pre-determination hearing for good reason was not thereby significantly disadvantaged. In this case, the preparation and provision of a detailed written transcript of the hearing was one such step. As I hope I have already made clear, a council would be perfectly entitled to provide councillors with strong advice and guidance in this regard. In making any decision to participate in a vote against the recommendation of officers, councillors should of course be aware of the potential consequences for the council (for instance, if a legal challenge happened to be successful on the ground related to their actions) and should bear in mind their own responsibilities under the Code of Conduct, as well as the possibility of recovery by the Local Government Auditor of a loss caused by wilful misconduct (under section 20 of the Local Government (Northern Ireland) Order 2005).

[130] Finally on this aspect of the case, I can see some considerable force in a number of the submissions made on behalf of the Council to the effect that councillors should not be permitted to vote if they have been absent from a substantial pre-determination hearing in which significant evidence has been presented and oral representations made, particularly in those councils were such meetings are not recorded and/or transcribed. If, however, it is to be within the power of a council to remove an individual elected member's right to vote, it seems to me that this should be clearly spelt out in statute. If this was the intention of the department with responsibility for the 2011 Act, or of the department with current responsibility for local government legislation, that is something which it may wish to reconsider.

The call-in issue

[131] I can deal with the call-in issue more briefly. Section 41(1) of the 2014 Act makes clear that the Council's Standing Orders "must make provision requiring reconsideration of the decision" if 15% of the members of the Council (rounded up to the next highest whole number if necessary) presented the Clerk of the Council a requisition on either or both of the statutory grounds for reconsideration. It is clear that decisions of committees are also subject to reconsideration on the same basis. A natural reading of section 41(1) suggests that, where a committee's decision is to be requisitioned for reconsideration, the requisition must be presented by 15% of the members of the council, rather than 50% of the members of the committee. In any event, it is clear that decisions of council committees are included within the mandatory call-in process.

[132] It is also clear from section 41 that the required reconsideration is to be triggered by the members of the council concerned. It is a facility for such elected members to require reconsideration on the basis of one or both of the statutory grounds. Section 41 does not, in my view, nor was it intended to, confer rights directly on other persons (such as members of the public, inhabitants of the council's district or, as in this case, disappointed planning applicants) to have a council reconsider decisions with which they are unhappy. It is a mechanism by which council members themselves may ensure that decisions in their name have been taken only after proper consideration and reflection (including, in the case of a section 41(1)(b) call-in, consideration of disproportionate adverse effect on any section of the inhabitants of the district).

[133] The requirement that *standing orders* must make provision requiring reconsideration allows councils some leeway as to the procedural mechanism by which the requisition mentioned in section 41 should be presented, provided the basic requirements of the mechanism contemplated by section 41 are observed. In my judgment, a time limit for the presentation of such requisition is plainly the type of matter which is appropriate to be addressed in standing orders. Not only is this the type of procedural issue which one would ordinarily expect to be addressed in standing orders, the requirements of legal certainty are such that the facility to require reconsideration of a decision must necessarily be time-limited. Otherwise, neither the council concerned nor third parties could have any confidence that a decision, potentially affecting the legal rights and interests of many, was final and could be relied upon.

[134] In the present case, the applicant cannot escape the fact that no members of the Council appear to have taken up his encouragement to seek reconsideration under section 41(1). As explained above, it was only that they who could do so, not the applicant. They were also required to do so within the time limit set by the Council's Standing Orders. That also did not occur. In short, no valid requisition request was received within time.

[135] In my view, the applicant's case in respect of this aspect of its complaint is both strained and contrived. At points, it may be the case that the correspondence following the Planning Committee's decision between the applicant and its directors on the one hand and the Council on the other hand was at cross purposes. However, I do not consider that the applicant was in any way unlawfully precluded from lobbying councillors and seeking to persuade them that they should present a requisition for reconsideration under section 41 of the 2014 Act. The applicant was at liberty to, and did, write to a number of councillors following the Planning Committee meeting. It rather seems that its focus at that point was not on seeking to persuade them to make a call-in request but, instead, to more generally take issue with certain aspects of the Planning Committee's process, discussion and reasoning.

[136] Had the applicant so wished, it could immediately have written to a wide variety of councillors asking them to present a call-in requisition on the basis of a

number of the points it was raising at that time. It did not do so. Indeed, I formed the clear impression that the attempt to rely on section 41 was somewhat of an afterthought on the applicant's part. I make no criticism of it in this regard; but do not think its characterisation of the Council officers' behaviour (for the purposes of these proceedings) as being an unlawful attempt to thwart the call-in process is either fair or warranted. I also do not consider, insofar as it is contended, that there is some obligation on a council corporately (even where a member of the public has taken issue with its decision-making) to in some way "canvass" elected members in order to see whether they wish to initiate a call-in. The onus is on councillors, if they wish a decision of their council or a relevant committee to be reconsidered, to request that in the appropriate way.

[137] The applicant also initially contended that the relevant portions of the respondent's standing orders were not operative at the material time when its concerns were raised – although this point was not pressed at hearing. That was a sensible approach given the inherent weakness of the point but also its potentially self-defeating nature. Section 41 of the 2014 Act requires provision for call-in to be made in standing orders. Mr McLaughlin made the point – which it is unnecessary for me to decide and on which I express no view – that if the applicant was correct that the relevant Council standing order was inoperative, not only would that remove the restrictions on call-in with which the applicant took issue, but so too would it remove the whole call-in procedure which it wished to invoke.

[138] It may nevertheless be helpful to provide some of the background to the argument which the applicant raised in this regard, since it illuminates a number of the further observations made below about the Council's Standing Orders (which I understand may be common to many councils in Northern Ireland). The applicant initially made the argument that the relevant standing order had not been brought into force by the Council on the basis of wording which appears in the title of Standing Order 21 in the following terms: "'Call-in' Process [MANDATORY wef [with effect from] operation of the Local Government (Standing Orders) Regulations (Northern Ireland) 2014]." As a result of this wording, it was contended, the relevant Order would not come into effect until the 2014 Regulations referred to had come into effect and, since those Regulations never came into effect, neither did Order 21. On this basis, the applicant initially contended that it was improper for the Council to rely on the provisions of Standing Order 21 relating to the exclusion of decisions in respect of which a right of appeal lay and/or on the time limit for the lodging of a call-in request.

[139] I accept the respondent's case that the wording referred to above in the title of Standing Order 21 did *not* mean that that Order was inoperative at the relevant time. The relevant wording of the Order would have been mandatory if the 2014 Regulations (which were not passed by the Assembly) had come into effect. However, the standing order was properly adopted by the Council and the wording in square brackets beside the title was not intended to operate as a commencement provision. Rather, it was simply intended to make clear that, had the anticipated

Regulations been made, the content of Standing Order 21 would have been mandatory, being required by way of regulation made under section 38 of the 2014 Act, and not subject to amendment. As it happens, the draft Local Government (Standing Orders) Regulations (Northern Ireland) 2015, which were subject to affirmative resolution in the Assembly, which was not secured, never came into force. The Council's Standing Orders in this case reflect the provision made in Part 2 of Schedule 2 to those draft Regulations.

[140] Mr Hutton still maintained that, even though the relevant standing order may have been operative, the time limit for requisitioning a call-in and the limitation on the type of decisions which could be called-in were *ultra vires* section 41. On being pressed, he was prepared to concede that standing orders might impose a time limit on a call-in request; but nonetheless submitted that this should be an extendable time limit (including by way of extension made after expiry of the time limit) and that any time limit must be consistent with the purpose of the empowering legislation. As I have already said, a time limit for the requisitioning of a call-in is precisely the type of thing for which standing orders may provide. A decision which is subject to a call-in is necessarily provisional to some degree until the call-in period has expired (or the decision has been reconsidered on foot of a call-in). To my mind, that favours the use of a relatively short call-in window. A time limit which was so short as to effectively destroy the essence of the call-in facility would be a different matter; but there is nothing unlawful in the Council maintaining a strict time limit for decisions to be called in for reconsideration.

[141] I will dismiss this element of the applicant's challenge since, by the time the applicant raised the issue of call-in, the time for requesting it had passed; and I do not consider that there is any illegality in the Council's Standing Orders in that regard. Since I intend to allow the applicant's application for judicial review on the voting issue, this issue is in any event academic (at least as far as the July 2020 decision is concerned).

[142] Before leaving this topic, however, it is appropriate to make some further comments. That is because, had the requisite number of councillors decided that they wanted to request a call-in with time, whether of their own motion or at the applicant's urging, it appears that they would have been met with a response on the part of the Clerk of the Council to the affect that a planning decision could not be called in for reconsideration under the Council's Standing Orders. It is also possible that this apprehension may have been responsible, wholly or partly, for the absence of any request for a call-in in this case. That is because – as set out at paragraph [92] above – the Council's Standing Orders do not allow for call-in of "a decision on a regulatory or quasi-judicial function which is subject to a separate appeal mechanism." A planning decision which is subject to appeal to the PAC is considered to be one such type of decision.

[143] Returning to the text of section 41 of the 2014 Act, there appears to me to be no basis for a council excluding certain categories of decision from the mandatory

reconsideration process. That section requires that standing orders "must make provision requiring reconsideration of the decision", where the word 'decision' for this purpose is expressly defined, without limitation, as meaning "a decision of the council or a committee of the council…" If it were open to a council to exclude from its call-in processes, required under section 41, any category of decisions it wished, this would plainly undermine the statutory purpose. In fact, it could render nugatory the purpose and effect of the call-in process which the legislature has determined should be mandatory in respect of large swathes of its decision-making. Tellingly, section 40(1) of the 2014 Act (in relation to the use of qualified majority voting) provides that, "Standing orders must *specify* decisions which are to be taken by a qualified majority" [emphasis added]. There is no equivalent provision in section 41(1) allowing councils, in their discretion, to specify which decisions will or will not be subject to call-in. I also note in passing that, in a different but analogous context, an exception to the procedures in section 20 of the Northern Ireland Act 1998 whereby certain ministerial decisions are 'called in' for decision-making in the Executive Committee, to exempt some "quasi-judicial" decisions and planning decisions, is expressly set out in section 20(5)-(7). No such carve-out is provided for in section 41(1) of the 2014 Act.

[144] In the Council's defence, I understand that the standing orders which it has adopted in relation to the call-in process reflect model standing orders promulgated by the relevant department for adoption by district councils for this very purpose; and, indeed, also reflect provision made in the Schedule to the 2015 draft Regulations which could not secure Assembly agreement. It also seems to me that there may be decisions which might properly be excluded from eligibility for call-in for a variety of reasons. Some of these reasons are evident from the standing order adopted by the Council in this case and set out above: such as urgency or the availability of a further appeal which might cure any lack of proper consideration of first instance. I accept the point made by Mr McLaughlin that planning decisions are decisions where the call-in process may be particularly ill-suited given the potential interference with third party rights. (Accordingly, if the analysis here is correct, any decision to grant planning permission should be considered as provisional, without a formal decision notice issuing, until after the call-in window has expired.)

[145] However, any limitation on the right to requisition a call-in appears to me clearly to be a question for the legislature. On the basis of section 41 as it presently stands, had it fallen for direct consideration in this case, I would have held that it is not lawful for a council to decide itself that it will disallow an otherwise valid call-in requisition under section 41(1) simply on the basis that the decision in question falls within a category which it considers ought not to be amenable to call-in. No such exceptions are identified or countenanced within the governing statutory provision, which specifically defines the word 'decision' for this purpose.

Conclusion

[146] For the reasons given above:

(i) I allow the applicant's application for judicial review on the voting issue for the reasons set out at paragraphs [110]-[125] and [128] above. I will quash the Planning Committee's decision and the resulting decision notice and remit the matter back to the Council for reconsideration. For the avoidance of doubt, this requires a further decision to be taken on the planning applicants' application for permission which, as a result of the court's quashing order, will stand undetermined. The committee should therefore consider the matter afresh in light of all material considerations as they now stand.

(ii) I reject the remainder of the applicant's application for judicial review. In particular, the applicant has not satisfied me that the committee erred in its assessment of the planning merits or was materially misled to an extent which would otherwise warrant the quashing of its decision. That should not be read as any indication, in respect of the further determination which will now be required, of how the committee should resolve the issues which are before it. Those are matters of planning judgment for the committee, subject to the legal constraints analysed above.

(iii) As is apparent from the above, I also do not consider that there is merit in the applicant's complaint about the procedure adopted immediately after the Planning Committee's decision of 29 July 2020 as regards potential call-in. By the time this issue was substantively raised by the applicant, the deadline for any call-in request had expired. I do consider, however, that there is a significant legal vulnerability in the Council's Standing Orders as presently drafted, in that they purport to exclude planning decisions from the call-in procedures set out in section 41(1) of the 2014 Act, when that provision does not appear to allow for decisions to be insulated from the call-in mechanism at a council's choosing.

[147] I will hear the parties on the issue of costs.