Ref: **McC10538**

Neutral Citation No: [2018] NIQB 49

Judgment: approved by the court for handing down
(subject to editorial corrections)*

Delivered: 24 May 2018

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY ELIZABETH CONLON FOR JUDICIAL REVIEW

v

BELFAST CITY COUNCIL

McCLOSKEY J

The Markets Community of Belfast

[1] The Markets area of Belfast, occasionally known as the "Market Quarter" and, putatively, enjoying the formal town planning designation of "*area of character* ", in the (still unadopted) Belfast Metropolitan Area Plan 2015 ("BMAP"), is located in the centre of the city, to the southeast. While its main feature is a substantial settlement of inner city housing, located mainly (but not solely) to the eastern side of an important traffic artery, Cromac Street, it extends to the western side of the same thoroughfare where one finds a substantial residential quarter to the immediate east of one of the city's well known architectural landmarks, St Malachy's RC Church. On its northern side, the Market's area also embraces other well-known landmarks: St George's Market, the Waterfront Precinct which includes a conference and concert hall, a hotel and some modern office blocks, while to the east lies Central Railway Station.

[2] It derives its name from the market trading history of the city. Though there were once 14 markets in the area, only St George's Market, a striking Victorian building some 130 years old, remains. In a city with a population of some 340,000, with over one million people residing in the greater Belfast region, the population of

the Markets is (the court was informed) unknown. What is known is that the area consists of some 725 residential units, the majority being two and three storey terraced dwelling houses, supplemented by just over 200 flats and some 80 units of assisted living accommodation. The area was almost entirely rebuilt between two and three decades ago.

The Impugned Planning Decision

[3] On 05 June 2017 Belfast City Council ("*the Council*") acceded to the recommendation of its Planning Committee to grant full planning permission in respect of a major office development on a site bordering Stewart Street and East Bridge Street, Belfast ("*the site*"). The site abuts Central Station on its westerly boundary, is roughly square shaped and has an area of 0.8 hectares. It is unzoned ("white") land which has been disused and vacant for many years. The office development thereby permitted consists of four separate blocks ranging from three to fourteen storeys in height, four retail units, associated plant, underground car parking, an external plaza and associated landscaping. The development will tower over the Markets area, the easterly and north easterly boundaries whereof are at a distance of just some metres. The Council's grant of planning permission is the subject of challenge in these proceedings.

[4] "Sunshine not skyscrapers" has become the prominent and visible theme of the residents of the Markets area who oppose the proposed development. Elizabeth Conlon, the Applicant, has lived there for some 15 years. Her legal standing is not in issue. She brings these proceedings in substance in a representative capacity, the figurehead of the 231 formal objectors to the planning application and everyone else forming the opposition. Ms Conlon secured leave to apply for judicial review by order of this court dated 14 November 2017.

Dramatis Personae

[5] The protagonists in this affair are:

(a) Elizabeth Conlon, the Applicant.

(b) Kilmona Holdings Limited, the developer.

(c) Patrick Kearney, managing director of the developer.

(d) Belfast City Council (the "*Council*").

(e) The Planning Committee of Belfast City Council (the "*PC*").

(f) Emma Hanratty, the Council's Senior Planning Officer ("*SPO*").

(g) The Council's development management officer ("*DMO*").

Glossary

[6] The main abbreviations and acronyms employed in this judgment are:

(a) "ATC": Area of Townscape Character.

(b) "BMAP": The Belfast Metropolitan Area Plan 2015 (still unadopted).

(c) "BUAP": Belfast Urban Area Plan (2005).

(d) "CO": The Council's Case Officer, Ms Hanratty (*supra).*

(e) "The Council": Belfast City Council.

(f) "DMO": The Council's Development Management Officer.

(g) "DOE": Department of the Environment.

(h) "DOC": Department for Communities.

(i) "EIA": environmental impact assessment.

(j) "IDC": the Council's independent design consultant

(k) "LCA": Local Conservation Area. .

(l) "OP": Operating Protocol of the Council.

(m) "PAC": Planning Appeals Commission

(n) "PPS1": Planning Policy Statement No 1.

(o) "RIS": The Belfast City Centre Regeneration Investment Strategy 2015.

(p) "SOs": Standing Orders of the Council.

(q) "SOD": The Council's Scheme of Delegation to Chief Officers.

(r) "SPPS": Strategic Planning Policy Statement for Northern Ireland.

(s) "S 76": section 76 of the 2011 Act.

(t) "The 2011 Act": The Planning Act (NI) 2011

Chronology

[7] A brief timeline of the salient material dates and events:

(a) **10 October 2015 -** Lodgement of the proposal of application notice.

(b) **03 November 2015 -** Developer's public event in the Markets Community Centre.

(c) **18 February 2016** - *Ditto*.

(d) **2 March 2016** - Lodgement of the application for planning permission.

(e) **11 March 2016:** Judgment of the High Court: BMAP 2015 unlawfully adopted.

(f) **20 July 2016** - Lodgement of amended application for planning permission.

(g) **16 August 2016 –** PC's first public meeting, resulting in deferral.

(h) **31 August 2016 -** Site visit by certain PC members.

(i) **20 September 2016 –** PC's second meeting: application approved 'in principle', subject to execution of a 'section 76' agreement.

(j) **18 November 2016**: Remedies Order of the High Court.

(k) **19 December 2016-** PAP letter.

(l) **20 December 2016 -** Initiation of these proceedings.

(m) **2 March 2017** - leave hearing before Maguire J.

(n) **10 March 2017 –** Ruling and Stay Order of Maguire J (*infra)*.

(o) **18 May 2017** – BMAP Judicial Review, judgment of the Court of Appeal – BMAP 2015 unlawfully adopted.

(p) **18 May 2017** - S 76 agreement executed.

(q) **05 June 2017 –** BCC Decision Notice: grant of the impugned planning permission.

(r) **21 June 2017** - Application to remove the stay (see (n) above).

(s) **14 November 2017** - Leave to apply for judicial review granted and removal of stay ordered.

Timing

[8] At an early stage of these proceedings it was contended on behalf of the Council and the developer that there had been delay contrary to RCJ Order 53, Rule 4. When the proceedings were initiated, the target of the Applicant's challenge was the preceding decision of the Council's PC, dated 20 September 2016, recommending to the full Council approval of the development proposal. Proceedings were initiated precisely three months later, on 20 December 2016. Maguire J dealt with this issue at an *inter-partes* hearing in the early stages of these proceedings. In a reserved judgment he ruled that the proceedings had not been initiated promptly and that sufficient grounds warranting an extension of time had not been established. In a thoughtful order, noting in particular that the section 76 agreement had not been finalised, with the result that the final grant of planning permission had not materialised, he decided to stay the proceedings rather than dismiss them. Each of the events contemplated by the judge duly came to pass, stimulating an application by the Applicant, on 21 June 2017, for the stay to be removed. There was no dispute that this discrete step had been taken promptly and the court in due course acceded to it. This was followed by appropriate procedural steps and the grant of leave to apply for judicial review in the wake of a further *inter-partes* hearing on 14 November 2017.

Council Planning Decisions Generally

[9] It is both appropriate and convenient to reproduce at this juncture some of this court's recent analysis of this subject in Belfast City Council v Planning Appeals Commission [2018] NIQB 17 ("BCC v PAC") at [52] – [58] especially. The planning committees of councils do not compose essays documenting matters such as their understanding, insight, assessment of material considerations, evaluation of relevant planning policies and the reasons for their decisions. Rather, in brief compass, their decision making involves the receipt of a planning case officer's report, the consideration of the case papers at their option, the possibility of oral presentations at their public meetings, the receipt of legal and other advice if considered appropriate and a site visit if so advised. Ultimately their decisions are taken by vote, the manifestation being a show of hands. This is followed by a relatively formulaic letter informing the developer of the outcome, usually taking the form of one of the following: outline planning permission, unconditional permission, conditional permission or refusal. In a small number of cases the PC does not have the function of decision making. Rather it makes a recommendation and the final decision is made by the full council.

[10] The details of the foregoing synopsis are contained in the Operating Protocol ("OP") which every Council's PC must have. The OP of this Council, considered in conjunction with its Standing Orders ("SO's"), reveals that the membership of its PC consists of twelve Councillors, the quorum is six, decision making is by vote and decisions are made by simple majority.

[11] By reason of the decision making framework outlined above, the planning decisions of Councils are relatively inscrutable. One of the consequences of this is that the documents surrounding and pertaining to a planning decision assume considerable importance. In the event of a legal challenge one of the documents which will inevitably be scrutinised with some care is the case officer's report to the PC. Another consequence is that the question of adherence to the OP has the potential to arise with some frequency. I consider that one of the main purposes of the OP is to secure that the planning decisions of councils accord with the governing legal rules and principles.

The Impugned Decision Analysed

[12] As this court has observed recently in BCC v PAC, under the relatively new statutory arrangements for planning decision making in Northern Ireland there will normally be an intense focus on the report/s prepared by planning officers for the assistance of planning committees of councils: see [51] – [56]. I interpose here the not insignificant qualification that the legal context in which such exercises will be carried out by the High Court is one of supervisory superintendence. One contrasts this with the Planning Appeals Commission ("PAC"), whose function is that of merits appeals. In the present case the author of the relevant report was the Council's Development Management Officer ("DMO"). It is necessary to examine this in a little detail.

[13] This report took the form of a two page "Summary" which, in turn, attached the more detailed report of the Case Officer (the "*CO*"). The DMO's Summary contains the basic information relating to the proposed development, the developer and the site. It highlights the two "*very different urban forms of development*" to the west and north/north east of the site. It refers to the Belfast City Centre Regeneration and Investment Strategy (the "*Belfast Strategy*" – September 2015) which seeks to increase the employment population of Belfast City Centre, noting the developer's representations that there will be 350 construction jobs during a two year build programme, ultimately generating some 2,500 jobs and a rateable value of around £1.5 million per annum.

[14] The report continues:

> "*Given the urban city centre context, it is considered that the height of the buildings proposed on East Bridge Street are acceptable and would not harm the character of appearance of the immediate area. The form and height of the proposal*

> *establishes a presence that responds to the scale and massing of other commercial buildings in the immediate environment that is considered to be appropriate ….*
>
> *In terms of compatibility and the potential for dominance, the scale of the proposal has been reduced to take account of the local environment namely residential properties on Stewart Street to ensure that the character of the area and residential amenity is not compromised. The drop in scale and massing with proposed separation distances and additional planting buffer will ensure that the proposal will not cause an unacceptable adverse impact on neighbouring residential properties.*"

These passages encapsulate, in substance, the issues raised by the Applicant's challenge.

[15] The DMO's report then notes that the development proposal attracted no objections based on architectural design. Nor was there any objection in principle from statutory consultees. The report concludes:

> "*Having had regard to the development plan, relevant planning policies and all other matters raised by consultees and third parties, it is concluded that on balance the proposal would constitute an acceptable development at this location. The proposal would deliver the regeneration of a brown field site in the city centre ….*
>
> *The proposal is recommended for approval subject to conditions and subject to the completion of an Agreement under section 76 of the Planning Act (NI) 2011 in respect of developer contributions ….*"

The DMO's report may be considered something of a headline document. For its detailed outworkings it is necessary to examine the CO's report, which it attached.

[16] When considering certain aspects of the Applicant's challenge *infra*, it will be necessary to examine parts of the CO's report in a little detail. An outline suffices at this juncture. The topics addressed in the report are the proposed development; the development site; the planning history; the policy framework; consultation with both statutory and non-statutory consultees; representations (objections) received; and "other material considerations".

[17] The bulk of the CO's report is arranged under the rubric "Assessment". Within this section the CO addresses the issues of the principle of office and retail use at the subject location; height, scale, massing and design; landscape and visual; impact on the amenity of immediate and surrounding properties and the area;

traffic, movement and parking; "other environmental matters"; economic benefits; "pre-community" consultation; "consideration of representations"; and "developer contributions". Under the rubric "Summary of Recommendation", the CO states:

> "*The above matters are considered to be the main planning issues. All other matters raised by consulted and third parties have been assessed and are not considered to outweigh the conclusion that, on balance, the proposal is considered on balance to comply with the development plan and other relevant planning policy and would constitute an acceptable development at this location. The proposal would deliver the regeneration of a brown field site in the City Centre ….*
>
> *As such the application is recommended for approval with conditions as set out below.*"

[18] The DMO's report, incorporating the CO's report, was prepared for the meeting of the PC to take place on 16 August 2016. As the DMO's "Addendum Report" makes clear, the PC resolved to defer its decision:

> "*The Application was not presented, but deferred for a site visit by the Committee. The reason for this deferral was to ensure that the Committee, given the issues which had been outlined in the case officer's report regarding the height, scale, mass and its potential impact on neighbouring properties, had the opportunity to undertake a site visit to acquaint itself with the application location at first hand, including Stewart Street and Friendly Street before making a decision.*"

Continuing, the addendum report explains that this visit was conducted on 31 August 2016. It does not disclose who, or how many, attended. It records that there were amended plans, without indicating when these were received. The amendments involved, *inter alia*, increasing the height of one of the four proposed blocks while reducing that of another and "*pulling back*" the other two blocks from the site edge "*to allow a more continuous tree planting zone and a more continuous building line and building arrangement*". Another alteration would entail an additional "*landscape buffer*" along the Stewart Street boundary. The report continues:

> "*In summary the scale of the proposal has been reduced to take account of the local environment to ensure that the character of the area and residential amenity is not adversely affected. The reduction in scale and massing and proposed separation distances will ensure that neighbouring occupiers should not be adversely affected by the proposal.*"

According to the report, the unidentified "*independent design consultant*" offered no comments.

[19] The DMO's report then addresses separately the topics of detrimental impact on the physical and mental well-being of residents; segregation of residents from the city; access to the "Tunnels Project"; intrusion on "dwellings in the immediate vicinity"; loss of light; adverse noise and disruption; increased traffic and parking compromising safety; construction works disruption; excessive office space in Belfast City Centre; the desirability of social housing at the location; non-conformity with "SPPS" and "PPS1"; unacceptable design; lack of integration with the existing residential developments and the proposed "Tunnels Project"; and certain "BMAP" issues. In its conclusions the supplementary report rehearses that the site visit by "members" has taken place and that late objections have been "*taken fully into account*", maintaining the recommendation for approval of the development proposal.

[20] The impugned development proposal was first presented to the Council's PC at its meeting on 16 August 2016. The outcome was a deferral for the ostensible purpose of facilitating a visit by committee members to the location. Next, as documented in a brief record which the court has considered, on 31 August 2016 the Chairperson of the PC and seven PC members, accompanied by four Council officers, including the SPO, attended the site. According to the record:

> "*The Chairperson reminded the Committee that the application had been deferred specifically to enable the Committee to acquaint itself with the location and the proposal at first hand*"

The record, sparse in detail, notes that the visit had a duration of 45 minutes. It contains nothing else of significance.

[21] Sequentially, the next material event unfolded on 20 September 2016 when the PC considered the development proposal again at its formal, public monthly meeting. The records note that 137 additional letters of objection had been received and that there had been a previous refusal of planning permission to develop the site based on inappropriate scale, massing and design. It is common case that, by this stage, the total number of written objections had swollen to 231. The briefing of the PC noted that the height of the buildings proposed to front East Bridge Street had been reduced by four storeys at the Stewart Street intersection "*to break up the bulk of the building and address the relationship with residential properties on Stewart Street*". A similar drop in scale for the proposed "Block B", designed to reflect "*the transition in character from the front of the site at East Bridge Street to the rear along Stewart Street*" was also highlighted. A third group of the proposed buildings, Blocks C and D, fronting directly onto Stewart Street, had a proposed height of 3 storeys which was "*… considered to respond to the immediate 2 and 3 storeys (10.5 – 12.5 metres in height) residential properties along Stewart Street*". This is followed by the comment:

> "*The reduction in scale and massing and proposed separation distances will ensure that neighbouring occupiers should not be adversely affected by the proposal.*"

[22] Addressing the issue of the "*change in gradient in Stewart Street*", the briefing states:

> "*Changes in levels are considered to be minimal and follow the natural gradient of Stewart Street.*"

The briefing further notes:

> "*An additional landscape buffer is also proposed along Stewart Street and improvements to access to the site including widening the pedestrian entrance from East Bridge Street to give a more generous link into the proposal.*"

The source of this (as the evidence demonstrates) was the Council's Independent Design Consultant ("IDC") engaged by the Council and, notably, this new input was received on the day of the PC meeting. Next, compliance with the relevant planning policy requirement of satisfactory integration with the existing residential development (viz The Markets) and the proposed Tunnels Project was noted.

[23] The briefing of the PC then addresses the specific objection that, in accordance with the Belfast City Centre Regeneration and Investment Strategy (September 2015), prestige office development should be located "*within the traditional office core ……*". The response is:

> "*The document is not planning policy, however* [it] *is a material consideration in the assessment of the application. BMAP is clear in that Belfast city centre remains the first choice location for major office development (Policy OF1 of BMAP). The planning system has a key role in achieving a vibrant economy. The site is unzoned white land located within the city centre outside the primary retain core. The resulting regeneration must also be considered and balanced in the overall assessment of the application.*"

Next the briefing highlights:

> "*Relevant consultees did not raise any concern regarding detrimental impact on the built and natural environment and on the heritage assets of the area.*"

The briefing then records that the concerns regarding scale, massing and design raised initially by the Council's IDC had been assuaged by the amended plans. The terminology of this aspect of the briefing is to be noted:

> "*As detailed above independent design advice was sought on the proposal. Following the submission of amended plans to address concerns raised regarding the scale, massing and design, no further objection was offered to the scheme on design grounds from the Independent Design Consultant.*"

The evidence assembled included the IDC's written advice.

[24] The written briefing of the PC via the DMO's reports was supplemented by a combined oral and visual presentation by the same officer at the PC's public meeting on 20 September 2016. The DMO (Ms Hanratty) concluded her presentation in these terms:

> "*Having regard to the development plan and all material considerations, consultee responses and third party letters of objection, it is concluded that on balance the proposal would constitute an acceptable development at this city centre location. It is therefore recommended for approval subject to the conditions set out …….* [and] *…….. the section 76 planning agreement.*"

The minutes disclose that the building blocks of this omnibus summary included a careful examination of the main issues raised by the 137 additional letters of objection, namely: the previous rejection of a comparable development proposal for the site; the reduction in scale and massing which the developer's amended drawings entailed; the associated reduction in gross floor space; the IDC's favourable updated and revised assessment; the reduction in the proposed gross floor space of some 2000 square metres; sundry planning policy factors; integration and accommodation of the "Tunnels" project; the undersupply of Grade A office space in Belfast City Centre (cross referencing the Belfast City Centre Regeneration Investment Strategy 2015 – the "RIS"); the lack of three dimensional models; and the many visual aids and perspectives which <u>were</u> available. (See in this context [77] *infra*).

[25] The PC then received presentations from various individuals, including objector residents and Councillors who were not members of this committee. It is evident that a lively and well informed debate took place. As the deliberations progressed the PC considered, and rejected, a proposal to defer its decision further pending advice from the "Ministerial Advisory Group". I add only that the evidence relating to the latter entity is slender in the extreme and, while the Council's failure to consult it was one of the original grounds of challenge, this ultimately fell away.

The challenge

[26] I summarise the main issues raised in the affidavit evidence of the Applicant in the following way: excessive intrusion and adverse impact on the amenity of residents; incompatibility with the "Tunnels Project"; inadequate consideration of increased traffic; inadequate briefing of the PC, which included a misrepresentation relating to an asserted memorandum of understanding with the developer; deficient site inspection; inadequate input from the IDC; interference with the Markets residents' right to light and indecent haste in the Council's decision making.

[27] The Applicants' grounds, which have proved organic, were, in their final incarnation, the following:

(a) The Council was not adequately informed of, and failed to sufficiently consider, the impact of the proposed development on the area generally.

(b) Breach of the residents' rights under Article 8 ECHR, contrary to section 6 of the Human Rights Act 1998.

(c) Wrongly taking into account a non-planning consideration, namely the payment by the developer of £230,000 towards the cost of public infrastructure works.

(d) Inconsistency, having regard to a previous decision refusing to approve the development of a hotel at the location.

(e) Wrongly taking into account certain provisions of the Belfast Metropolitan Area Plan 2015 ("BMAP"), at all stages, on the (erroneous) premise that this was a lawfully finally adopted measure.

(f) In consequence of (e), failing to take into account the material consideration constituted by the Belfast Urban Area Plan 2001 ("BUAP"), thereby contravening section 6(4) of the Planning Act (NI) 2011 (the "*2011 Act*").

(g) Using the wrong reference point regarding height, in breach of planning policy.

(h) Disregard of a material consideration namely the unmet need for social housing in the Belfast Metropolitan Area generally and, more specifically, the view of the Planning Appeals Commission ("PAC") during the BMAP adoption process that the subject site should have been zoned for this development purpose.

I shall address these grounds of challenge *seriatim*.

[28] The cavalry charge was led by three reports of David Worthington, an appropriately qualified and experienced consultant. Mr Worthington's first report advocated that the impugned grant of planning permission is vitiated by error of law in respect of the section 76 agreement; breach of planning policy in disregarding the impact on St George's Market; breach of the EIA Regulations; and a consequential failure to assess the accumulation of the inter-related impacts of transportation, noise, air quality and microclimatic effects on the residential amenity of the adjoining neighbourhood.

[29] It is to be noted that the ultimate incarnation of the Applicant's challenge, as refined and focused in the formulation of the submissions of Mr McCollum QC (with Mr Henry), did not, as the summary in [27] above confirms, encompass either the third or fourth of Mr Worthington's four central criticisms in his first report.

[30] Increasingly energised as the proceedings advanced, Mr Worthington produced two further reports. The central theme of his second report, which may be linked to grounds (e) - (f) *(supra*) emerges from the following excerpts:

> "*There are differences between draft BMAP and ex adopted BMAP that should have led to the planning application being re-presented to the Planning Committee following the Court of Appeal BMAP judgment …*
>
> *Further there is a policy in the BUAP that became germane once the Court of Appeal had quashed the adoption of BMAP* [and] *should have been considered but was not.*"

As regards ground (g), Mr Worthington states:

> "*The case officer has misunderstood the location of the site within the Laganside South and Markets Character Area and has accordingly misapplied BMAP Policy UE1 and the Urban Design criteria. In particular the only adjoining building is Central Station at four storeys high* [and this] *should have formed the reference point for the consideration in accordance with the Urban Design criteria but did not. Instead the case officer erroneously appropriated and applied Urban Design criteria from a different character area that relates to the commercial development to the North. Had Policy UE1 and the Urban Design criteria been applied properly, the height and scale of the development proposed in the impugned permission would have to have been reduced.*"

[31] Mr Worthington's third report, evidently responding to the Council's affidavit evidence, in effect continued to promote grounds (f), (g) and (h) *(supra)* by developing his second report. He also augmented his critique of the s 76 agreement – ground (c) – contending that this was neither necessary nor directly related to the approved development, adding that "*.. planning conditions rather than a planning agreement could simply and easily deliver the public realm improvements envisaged and are in policy terms regarded as preferable*".

The BMAP/BUAP Ground

[32] This may be fairly characterised as the Applicant's central ground of challenge. The starting point is the statutory prescription contained in the Planning Act (Northern Ireland) 2011 (the "2011 Act"). Section 6, which regulates the topic of local development plans, provides in subsection (4):

> "*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.*"

It is necessary to consider also subsection (1):

> "*Any reference –*
>
> *(a) To a local development plan in this Act and in any other statutory provision relating to planning; and*
>
> *(b) To a development plan in any statutory provision relating to planning,*
>
> *Is to be construed as a reference to the development plan documents (taken together) which have been adopted by the Council or approved by the Department in accordance with section 16(6).*"

In passing, section 16(6) has no application in this litigation context. The next statutory point of reference is section 45(1):

> "*Subject to this Part and section 91(2), where an application is made for planning permission, the Council or, as the case may be, the Department, in dealing with the application must have regard to the local development plan, so far as material to the application, and to any other material considerations …*"

[33] Next I turn to the Belfast Urban Area Plan ("BUAP") 2005. Among the discrete planning policies which this enshrines is Policy CC12 which, under the rubric "High Buildings", states:

> "*High buildings must be sympathetic in scale to the traditional height of buildings in the city centre. Belfast does not have the tradition of high point or slab blocks, commercial or residential, normally associated with large urban areas. The centre has been built to a traditional height of mainly 4 to 6 storeys. The city has a unique hill setting and consequently tall buildings can be incongruous as well as blocking out sections of the hills, particularly as viewed from the approaches to the city centre …*
>
> *The scale of all new office development will normally be controlled by a plot ratio of 3 to 1 to discourage excessively high developments …*
>
> *The policy will therefore seek to ensure that high buildings do not mar or dominate the surrounding hills or the scale of attractive Belfast views; relate sympathetically in design to the urbane structure of the city; relate sympathetically to their immediate surroundings; relate sympathetically to buildings or groups of buildings of architectural and historic interest.*
>
> *In a footnote one finds the explanation that the plot ratio denotes a gross floor space of the proposed building normally no more than three times the net site area.*"

As of today, BUAP has not been formally repealed or superseded.

[34] Every urban development plan has a shelf life, albeit frequently not of concrete proportions. BUAP is such a measure. While it was formally adopted on 19 December 1989 with a projected lifespan expiring in 2005, as of today it remains unrepealed. This arises because of the circumstance that its intended successor, BMAP, remains unadopted. BMAP was the product of a process of over ten years duration, commencing around January 2001 and involving a public inquiry and ensuing report by the Planning Appeals Commission ("PAC") to the Department for Infrastructures's predecessor, DOE. While all of this culminated in an intended adoption year of 2015, a lawful act of adoption remains to occur.

[35] Following a lengthy period of ministerial and political wrangling, the DOE Minister purported to make a formal order, dated 03 September 2014, adopting BMAP. This was challenged by an application for judicial review by the Minister of Enterprise, Trade and Investment. The application succeeded. In a judgment

delivered on 11 March 2016 the High Court ruled that the adoption order of the DOE Minister was unlawful as it was in contravention of several provisions of the Northern Ireland Act 1998.

[36] The final order of the High Court, encompassing a declaration, was challenged successfully before the Court of Appeal on the ground that most of its provisions demonstrably exceeded the court's basic finding of illegality. The Court of Appeal substituted the following substantially narrower declaration:

> "***And it is further declared that*** *the decision made by the* [DOE Minister] *on 03 September 2014 to authorise and direct the Department …. to adopt the draft* [BMAP] *containing retail policy for Sprucefield Regional Shopping Centre … in the absence of discussion and agreement of that retail policy for* [Sprucefield] *by the Executive Committee was unlawful.*"

A fully informed analysis confirms that the words from "*containing*" to the second mention of "*centre*" are otiose and have the potential to mislead. The undisputed substance of the decision at first instance was that draft BMAP had been unlawfully adopted. The Court of Appeal, critically, endorsed this conclusion, while quashing all other elements of the remedies order of the High Court.

[37] The time line is not unimportant. As appears from the chronology in [6] above:

(i) The decision of the High Court that BMAP had been unlawfully adopted was contained in a judgment promulgated on 11 March 2016 (the proceedings having been commenced on 1 December 2014).

(ii) The "in principle" approval of the subject planning application was made by the Council's PC on 20 September 2016.

(iii) The remedies order of the High Court in the BMAP judicial review followed on 18 November 2016.

(iv) The decision and order of the Court of Appeal are both dated 18 May 2017.

(v) The Council's formal Notice of Decision impugned in these proceedings is dated 05 June 2017.

Given this singular sequence of events, the first question which arises is what, if any, consideration was given to the orders of the High Court and the Court of Appeal by the Council? And, to the extent that some attention to these orders occurred within

the Council, were they considered in a lawful manner, procedurally and/or substantively?

[38] The answer to the first of these two questions is provided in a document: "Addendum Note For File". While neither signed nor dated, it is not disputed – and I accept – that this was generated during the brief window between the Court of Appeal's decision and the issue of the formal decision notice and, further, was composed by the Council's Director of Planning and Place ("DPP"). At the outset, this note states that the adoption of draft BMAP was "*quashed*" by the Court of Appeal on 18 May 2017. While this is an incorrect characterisation of what was a declaratory remedial order, nothing of substance turns on this error. The text continues:

> "*As a consequence of this,* [BUAP] *is now the statutory development plan for the area.*"

Having referred to section 45(1) of the 2011 Act (*supra*), the note states:

> "*The BUAP does not contain any designation or zoning that affects the subject site …*
>
> *In Draft BMAP (November 2004) the site is identified as a development opportunity site (CC070). It is also located within the city centre, the main office area and within Laganside South and Markets character area (Designation CC017). The site is also situated within the Belfast Area of Archaeological Potential.*"

The document then turns to objections to the proposed designation of the subject site. There were four, the second being:

> "*An objection from the Markets Development Association generally sought the re-designation of this development opportunity site to include a suitable mix of housing types, including a social element to fulfil a local need. The PAC stated in the report that given the sustainable location of this site and conclusions regarding the significant shortfall in housing provision in the Belfast area, the PAC recommended …….. zoning for housing.*"

[39] The DPP's note then addresses the DOE Adoption Statement which, in material part, designated the subject site as unzoned land. The author then addresses the status of draft BMAP 2015:

> "*In general the weight that should be given to draft policy increases as it approaches the date of final publication. It*

> *is the view that the draft BMAP, in its most recent post-examination form, continues to exist. As the decision to adopt the BMAP has been quashed in its entirety, it is as though the draft BMAP has never been adopted. The Executive could, if it wished, take further steps to adopt the BMAP, but until it does so the draft BMAP remains the most advanced and up to date collection of development management policies for the City Council's Area, albeit that those policies do not carry the statutory force conferred upon an adopted statutory development plan by the 2011 Act.*"

The DPP then turns to the issue of weight:

> "*The policies in the version of draft BMAP which was purported to be adopted and not the one published in 2004 should be given considerable weight because the content of the draft BMAP has now reached the stage of being approved, subject to various amendments, following its examination. The draft BMAP is at the furthest possible stage that any draft development plan could have reached without being formally adopted …*
>
> *The version of draft BMAP which was purported to be adopted and not the one published in 2004 should be given substantial weight. In this case, the weight to be attached to draft BMAP is considerable and when considered together with all other material considerations. The recommendation to approve subject to conditions still remains.*"

The final sentence in the DPP's file note is:

> "*In consultation with advice from BCC legal services, it is considered that it is not necessary in this case to represent this application to Planning Committee.*"

[40] The evidence bearing on this discrete issue is augmented by an affidavit sworn by the City Solicitor (Mr Walsh), the person to whom reference is made in the quotation immediately above. Mr Walsh helpfully draws attention to the Council's Scheme of Delegation ("SOD"), to which I shall return *infra*. He relies on this instrument, specifically paragraph 3.9.6, in purported justification of an assessment that it was not necessary or appropriate to invite the Council's PC to consider its conditional decision of September 2016 that planning permission be granted. This assessment was made jointly by Mr Walsh and the DPP:

> "*I can confirm that the* [DPP] *and I agreed that it was not necessary to refer this application back to Committee in light of the Court of Appeal BMAP decision.*"

The affidavit continues:

> "*In deciding whether to refer a matter back to Committee I have regard to, inter alia, whether the officer's recommendation may have changed in light of new information. That was not the case in this instance.*"

Referring to paragraph 3.9.6 of the SOD, Mr Walsh avers:

> "*I believe that* [this] *provision …… provided delegated authority to me to assess whether it was necessary to refer this matter back to Committee for reconsideration following the Court of Appeal's decision in relation to BMAP. That required an assessment as to whether it was necessary to refer the matter back to Committee because new information had come to light which may have either changed the officer recommendation or caused the resolution to be unsound …*
>
> *As the recommendation would have remained the same it was not considered necessary to refer this matter back to Committee. In making that assessment, I was acting within the delegated authority provided to me and was not making a decision in relation to the substantive planning application.*"

Finally, Mr Walsh provides some important context to the BMAP judicial review proceedings, deposing that at that stage:

> "*The only issue of contention in BMAP was the bulky goods restriction at Sprucefield ….*
>
> *It is clear that the Department did not intend to make any change in relation to the zoning of particular sites in the greater Belfast area.*"

[41] The kernel of the Applicant's challenge under this ground is that the impugned decision of Council was based on, *inter alia*, the unlawfully adopted draft BMAP 2015, in disregard of the still extant BUAP 2001 and in further disregard of the social housing zoning proposal in the PAC report to the Department. This ground also embodies a significant *vires* dimension, expressed in the further argument advanced that the Council failed to act in accordance with the statutory requirements noted in [32] above. the Allied to this is the discrete objection that the

assessment made by the City Solicitor and the Council's DPP in tandem during the twilight post-Court of Appeal and pre-Notice of Decision period could only have been lawfully made by the Council's PC.

[42] The riposte of Mr McGleenan QC (with Ms Kiley) on behalf of the Council has a number of strands. First, reliance is placed on paragraph 3.9.6 of the SOD (*supra*). Second, Mr McGleenan emphasises the highly limited nature of the dispute relating to the contents of draft BMAP 2015 which was the stimulus for the 2016/2017 litigation activity: the Ministerial dispute was confined to the sole issue of whether Policy R4 relating to bulky goods restrictions at Sprucefield should be incorporated. Third, Mr McGleenan submits that the PO's report to the PC contained no material inaccuracy regarding the status of BMAP.

[43] In its judgment in BCC v PAC this court attempted to navigate the labyrinthine instruments which chart how the Council carries out its functions. Bearing in mind the present litigation context I refer to, without repeating, [53] – [55] (regarding the Operating Protocol and Standing Orders – "OP" and" SOs" respectively) and, in greater detail, [64] – [74]. The provisions of the Council's SOD which fall to be considered in this case are contained in Section 3, which is entitled "Specifically Delegated Functions to Individual Chief Officers". The term "Chief Officers" is defined in Appendix A and includes the City Solicitor and the DPP. The statutory underpinning of the SOD is section 31(1) of the 2011 Act (reproduced in the BCC v PAC Appendix). Section 3 of the SOD has a tailor made compartment detailing the functions delegated to the DPP. These are listed in paragraph 3.9.1. One of these functions is formulated in paragraph 3.9.2 in the following terms:

> "*Negotiating contributions from developers subject to obtaining Committee consent in respect of those agreements in which the contribution exceeds £30,000.*"

Paragraph 3.9.6 provides:

> "*The* [City] *Solicitor, in consultation with the* [DPP] *may refer a decision back to Committee for reconsideration.*"

[44] While there was no active argument on this discrete issue, I consider that the words "*a decision*" encompass the PC's provisional/conditional decision to approve the impugned development proposal in September 2016. Such decision is properly characterised conditional, or incomplete – both adjectives being employed in a non-technical sense - because the issuing of the ensuing legally binding instrument, namely the formal decision notice, was subject to the execution of a section 76 agreement between the Council and the developer. It was only when this later materialised that the formal decision notice emerged. To this I add that the word "*Committee*", in this context, controversially denotes the Council's PC.

[45] Mr McGleenan advanced two inter-related arguments on this subject. First, paragraph 3.9.6 applied to the assessment/decision of the City Solicitor and DPP addressed above. Second, emphasising the discretionary and empowering nature of the word "*may*", he contended that no public law infirmity in the aforementioned assessment has been demonstrated. Mr McCollum *contra* in addition to his primary *vires* challenge submitted that in the present context the "*decision*" to which paragraph 3.9.6 refers is the formal, final decision notice dated 05 June 2017.

[46] I resolve these competing arguments in the following way. The first point in the analysis is that the PC, by virtue of the delegation arrangements, is the Council's *alter ego*: BCC v PAC at [64] - [74]. Second, in making the impugned decision, the PC was legally obliged to take into account all material considerations. Third, the material considerations in this discrete context included the successive judicial decisions that the attempted adoption of BMAP had been unlawful. The related material consideration in this respect was the enduring status of BUAP as the adopted urban development plan for Belfast and, more specifically, Policy CC12. Provided that the PC took these considerations into account, by well-established principle the weight to be attributed to each was a matter for them, subject to challenge only via the intrinsically limited route of Wednesbury irrationality.

[47] The fact that the PC did not take these considerations into account is uncontentious. While the evidence establishes that these factors were weighed, carefully so, by the City Solicitor and the DPP, this could not, as a matter of law, be a valid substitute for the PC doing so as the statutory and common law duties in play rested exclusively on them. Furthermore, if and insofar as paragraph 3.9.6 of the Council's SOD provides a mechanism justifying or legitimising the course taken by the City Solicitor and DPP in this instance, it is of no effect as it cannot supplant or dilute the legal duties in play. I consider that, in any event, paragraph 3.9.6 had no application to the relevant factual matrix since, properly construed, "*a decision*" in this context must denote a decision of the DPP in the performance of one of the functions delegated to this officer by the SOD. This, in my view, is clear from Section 3 of the SOD as a whole. I refer also to the analysis in BCC v PAC at [64] – [74].

[48] In passing, the consideration which the City Solicitor and DPP gave to the matter in question was characterised by demonstrable care and attention on their part. However, the error of law which materialised was essentially threefold. First, they could not lawfully undertake an assessment which belonged exclusively to the domain of the PC. Second, a misconstruction of the SOD occurred. Finally, and most fundamentally, the legal consequence of this was that the PC erred in law by effectively treating BMAP as the adopted urban development plan for Belfast and failing to have regard to the enduring status of BUAP and, specifically, Policy CC12 thereof.

[49] It is appropriate to interpose at this juncture an indelible fact. Urban development and redevelopment have become prominent features of the Belfast

cityscape during the past two decades. This has included the development of major office blocks and kindred constructions, notably illustrations being the BT building and the Hilton Hotel, in the wedge sandwiched between the Waterfront building and the northerly side of East Bridge Street. The court does not shut its eyes to this reality.

[50] However, it is no function of this court to speculate as to the assessment which the PC might have made of the two factors in question had it taken them into account. Conjuncture about the weight, if any, which the PC might have ascribed to them is impermissible. Where a factor ranks as something material only the decision maker can decide what to make of it. This doctrinal axiom is linked to another, namely that the qualifying condition for attaining the rank of a material consideration is that the factor concerned is one to which the relevant statute requires attention to be paid and could have made a difference to the outcome. Possibilities feature at every stage of this analysis. Finally, it is appropriate to emphasise the function of the court which is one of supervisory superintendence.

[51] It follows from the foregoing that this ground of challenge succeeds.

The PAC Opinion

[52] The Applicant contends that the impugned decision is vitiated by a failure to take into account the PAC post – public inquiry proposal that the subject site should be designed in BMAP for social housing development. It is convenient to consider this free standing ground of challenge at this juncture, given its association with the BMAP/BUAP ground examined above. The PAC conducted its public inquiry between April 2007 and May 2008. Its ensuing report to the Department is dated 08 July 2011. In Part 2 of the report, it gave consideration to, *inter alia*, the designation of the so-called "Development Opportunity Site" ("DOS") at certain locations. One of the sites considered in this context was "CC070: Stewart Street", the location of the impugned proposed development. The PAC opined thus:

> "*Given the sustainable location of this site and our conclusions regarding the significant shortfall in housing provision in the Belfast area … we consider that the site should be zoned for housing rather than a DOS.*
>
> *Recommendation:*
>
> *We recommend that zoning CC070 is deleted and the land zoned for housing. The level of social housing is a matter that should be determined by the Department.*"

In thus recommending the PAC was acknowledging the merit in the representations of the organisation known as the Markets Development Association that this site should be designated "*…. to include a suitable mix of housing types, including a social element to fulfil a local need*".

[53] Accordingly, in summary and in sequence:

(i) BUAP the subject site was unzoned, or "white" land.

(ii) The Department's proposal that under the new urban development plan, viz BMAP, the site be re-designated as a "DOS" was rejected by the PAC.

(iii) The PAC unambiguously espoused the local community's preference for the development of social housing on the site.

(iv) In its final, though unadopted, incarnation BMAP espoused the maintenance of the BUAP designation, namely unzoned land.

[54] The contention on behalf of the Applicant is that the social housing designation proposed by the PAC for this site was a material consideration and, hence, something which the PC was bound to take into account. On behalf of the Council Mr McGleenan emphasised again the only enduring live contentious issue relating to BMA and, from the BMAP perspective, the uncontentious nature of the unzoned land designation pertaining to the subject site. The thrust of his submission was that in effect the dye had been cast for this site since at the time of the legally ineffective attempted adoption of BMAP and the ensuing litigation the only enduring contentious issue at ministerial decision making level was a discrete aspect of the uses proposed for Sprucefield.

[55] At the stage when the City Solicitor and the Council's DPP were giving consideration to the Court of Appeal's judgment (May 2017), the DPP, in his file note, drew attention to one of the objections considered by the PAC and identified in its report to the Department:

> "*Objection 427/6: An objection from the Markets Development Association generally sought the re-designation of this development opportunity to include a suitable mix of housing types, including a social element to fulfil a local need. The PAC stated in the report that given the sustainable location of the site and conclusions regarding the significant shortfall in housing provision in the Belfast area, the PAC recommended that zoning CC070 is deleted and the land zoned for housing …*
>
> *In the BMAP adoption statement, the Department did not accept this recommendation and stated that as the site had extant planning permission, the development opportunity site is deleted and the site be unzoned ….*"

Pausing, it is clear that both the City Solicitor and DPP considered the social housing suggestion for development of the subject site to be a matter of sufficient moment to warrant their attention and consideration.

[56] At this juncture it is necessary to examine how any of the constituent elements of this discrete issue were addressed in the DMO's reports to the PC. In summary the DMO's reports have the following features of note in this discrete context:

(i) An emphasis on increasing Belfast City centre employment population, coupled with anticipated economic benefits to be generated by the proposed development.

(ii) A suggestion, unparticularised, that there is a city centre deficit in Grade A office accommodation.

(iii) An acknowledgement of the (BUAP) unzoned designation of the subject site.

(iv) A summary of the 15 letters of objection received, including a description of one of these as "*no mix of affordable housing included within the proposal*".

(vi) Repeated references to predicted economic benefits.

The "social housing" objection is addressed in the following terms:

> "*The site is unzoned white land in BMAP. The application does not include social housing and the Planning Department has to assess the application as submitted. There is no policy requirement to provide social housing at this location.*"

In the DMO's second report to the PC mention is made of receipt of a substantially larger number of objections. The issues thereby raised are duly summarised and addressed. One of these issues was formulated as:

> "*Further recommendations in the Belfast City Centre Regeneration Investment Strategy 2015 include the identification of well supported, social housing opportunities along the major roads leading into the centre. It further states that planners should remedy key deficiencies in the city centre living environment, through improvement of food shopping, day care, open space and sense of security. This site is one that should be used for such purposes.*"

The report addresses this in terms identical to those contained in the first report (*supra*) with the addition of the following single sentence:

> "*The resulting regeneration must also be considered and balanced in the overall assessment of the application.*"

[57] I refer to, but do not repeat, the legal analysis in [50] above. I acknowledge that I have not found resolution of this issue altogether straightforward, mainly because of the vintage of the PAC designation proposal, its exclusion from the ultimate incarnation of draft BMAP and the continuing existence of the unzoned designation in BUAP. Furthermore, the material provisions of the city centre regeneration strategy were brought to the attention of the PC. However, in a context where the DMO's reports contain a notable emphasis on projected economic benefits and, further, refer to a suggested "*principle of office and retail use at this location*" in unambiguously positive terms, I consider that as a matter of law the PAC social housing designation proposal should have been weighed by the PC, on the elementary ground that this could have impelled the PC to the conclusion that such land use would be preferable at this location. This is reinforced by the simple analysis that the views of the PAC, the independent expert planning authority in Northern Ireland, could have lent weight and merit to the social housing objection and placed a more intense spotlight on the relevant provisions of the city centre regeneration strategy. If further reinforcement is required (which I reject), it is to be found in the attention which the Council's DPP, a person of presumptive expertise who was performing a key function at a critical moment, devoted to this discrete issue in the report which formed the basis of his dialogue with the City Solicitor and their ensuing decision. It follows that this factor, whether singly or in tandem with other facts and factors which plainly were considered, could have impelled the PC to refuse the planning application.

[58] Furthermore, it is uncontroversial that it was incumbent on the DMO to present to the PAC a fully rounded and balanced picture. I consider this the very essence of the doctrine of material considerations, namely the requirement that the public authority concerned make a fully informed decision by the mechanism of balancing all relevant factors. In my estimation the effect of the omission under scrutiny was to create an avoidable imbalance, culminating in the impugned decision of the PC which, in consequence, did not attain the standard of being fully informed. I conclude that this ground of challenge is sustained accordingly.

The developer's contribution ground

[59] The thrust of this ground is that the Council's decision is vitiated by taking into account the developer's willingness to contribute £230,000 to the cost of public infrastructure works as this was a legally impermissible consideration. I begin with the statutory overlay. Section 76 of the 2011 Act provides, in material part:

"*(1) Any person who has an estate in land may enter into an agreement with the relevant authority …*

(a) Facilitating or restricting the development or use of the land in any specified way …

(d) requiring a sum or sums to be paid to the authority on a specified date of dates or periodically …

(2) A planning agreement may -

(a) Be unconditional or subject to conditions;

(b) Impose any restriction or requirement mentioned in subsection (1)(a) – (c) either indefinitely or for such period or periods as may be specified and

(c) If it requires a sum or sums to be paid, require the payment of a specified amount or an amount determined in according with the instrument by which the agreement is entered into and, if it requires the payment of periodical sums, require them to be paid indefinitely or for a specified period."

The second element of the framework is Development Management Practice Note No 21 (the "DMPN"). This, entitled "Section 76 Planning Agreement", is a departmental instrument, published in January 2017. It contains various references to the Strategic Planning Policy Statement for Northern Ireland (the "SPPS"). One of these is found in paragraph 4.1:

"*The SPPS details that the Council or, as the case may be, the Department may consider the use of a planning agreement where what is required cannot be adequately addressed by the imposition of planning conditions and:*

- *Is needed to enable the development to go ahead;*
- *Will contribute to meeting the costs of providing necessary facilities in the near future;*
- *Is otherwise so directly related to the proposed development and to the use of the land after its*

> *completion that the development ought not to be permitted without it …"*

[60] In paragraph 4.4 of the DMPN the topic of "Developer Contributions" is addressed:

> *"The SPPS advises that contributions may be required in a variety of circumstances including:*
>
> - *Where a proposed development requires the provision of improvement of infrastructural works over and above those programmed in a Local Development Plan …*
>
> - *Where a proposed development is dependent upon the carrying out of works outside the site."*

Paragraph 4.5, under the rubric "Voluntary Contributions", states:

> *"In some circumstances community benefits may be offered on a voluntary basis by developers likely to be affected by a development. Whilst the Department is committed to ensuring that local communities benefit from development schemes in their area, such community benefits cannot be considered material considerations in decision taking and are distinct from developer contributions and planning conditions."*

[61] The exercise of understanding and evaluating the DMPN is aided and illuminated by resort to the SPPS. This step makes clear that these two policy instruments must be considered in conjunction with each other. The SPPS (paragraph 5.66 ff) highlights that recourse to the mechanism of a section 76 planning agreement may be appropriate, depending on the context –

> *"… to overcome obstacles to the grant of planning permission where these cannot be addressed through the use of conditions."*

In the passages which follow, the potential breadth of the planning agreement mechanism emerges with some emphasis. The SPPS distinguishes emphatically between "*developer contributions*" (on the one hand) and "*community benefits*" (on the other). It is stated *inter alia*:

> *"… community benefits cannot be considered material considerations in decision making and are distinct from developer contributions and planning conditions."*

What further emerges from these two policy instruments is that the two phrases under scrutiny, namely "developer contributions" and "community benefits", are clearly terms of art. It is also appropriate to clearly expose the legal context in play: both the DMPN and the SPPS are illustrations of policy instruments which permissibly complement, but cannot as a matter of law modify or dilute, the dominant statutory provisions to which they relate.

[62] The DMO's first report to the PC addresses the issue of "developer contribution" in the following terms:

> "Developer Contributions. *In this case it is considered appropriate that any planning approval should be subject to the developer entering a legal agreement with Belfast City Council.* ***The developer has offered a financial contribution of £225,000*** *to provide contributions to environmental improvements to the city and to mitigate impacts from the development as set out in this report.*"
>
> [Emphasis added.]

In the DMO's second report to the PC, compiled the following month, addressing the discrete topic of a projected marked increase in traffic and inadequate corresponding parking facilities, the following was stated:

> "*It is proposed to appoint a Travel Co-ordinator responsible for the promotion of cycling, walking and public transport for staff and visitors.* ***This requirement will form part of the Section 76 agreement with the developer***."

The foregoing excerpts are from the only two passages in the DMO's two reports dealing with the proposed section 76 agreement.

[63] In her affidavit the DMO (Ms Hanratty) responds to this discrete ground in these terms:

> "*My reports alerted the Committee to the fact that the development would necessitate an upgrade in services in the area … I advised that the intensification of use at the location will have an impact on service provision across the city. The proposal has the potential to bring 2500 additional people to the area. This would require upgrades to services, for example in relation to access to public transport, Belfast Bikes, access to wi-fi and other facilities. In addition, the public realm in the vicinity of the proposal will require significant upgrading. I advised that upgrades to these services could not be provided through*

conditions and would need to be provided for by an agreement …"

Pausing at this juncture, the above averments are a faithful reflection of the relevant passages in the DMO's first report. The deponent continues:

> "*The required upgrades could not be provided by conditions to the planning permission, because conditions attached to planning permission must* [be] *related to the area within the application site, as delineated by a red line marked on the location plan for the proposal. The nature of the required upgrades to services means that they will need to be made outside the curtilage of the development site, as they related to the services in the surrounding areas. It is therefore appropriate that a planning agreement provide for these. The section 76 agreement also enabled the Council to ensure detailed measures for the protection of the tunnels project ….*
>
> *The planning agreement provides that the developer will pay the total sum of £230,000 towards the costs of public realm improvement works …* [as defined] ….
>
> *The sum of £230,000 was agreed with the developer as being a fair and proportionate contribution, having regard to the scale and kind of development. The section 76 agreement contains a covenant by the Council to use the sum paid to it solely for the purpose of public realm improvement as described in the agreement.*"

[64] Mr Worthington's critique of the section 76 agreement, contained in his first report, is the following:

> "*I have formed the view based on the committee reports and my review of the application file that the financial contribution provided for by the section 76 agreement is not intended to address or provide for any form of mitigation required as a result of the development. The calculation of the sums to be contributed is not set out in the papers I have had access to …*
>
> *Accordingly, the contribution of £230,000 set out in the section 76 agreement is* ***a voluntary contribution made by the planning applicant*** *….*
>
> *Planning policy in the SPPS and guidance in PN21 are explicit: voluntary contributions lie outside the remit of*

> *section 76 and cannot be considered in decision making. Counsel officials have erred in including* [this] *consideration and the Planning Committee has erred in acting on it.*"

Mr Worthington's second main criticism is that the responsible authority for the "Streets Ahead Programme" identified in the agreement is the Department of Communities rather than the Council.

[65] The submissions of Mr McCollum concentrated heavily on the first of the aforementioned criticisms. He presented this ground of challenge in a simplified and refined way, focusing on the word "*offered*" in the DMO's first report – see [59] *supra* – and contending that the sum of £230,000 ultimately specified in the section 76 agreement constituted a developer's voluntary financial contribution outlawed by paragraph 4.5 of the DMPN. Mr McGleenan submitted that, properly and fairly analysed, what is disclosed by the evidence is a permissible developer contribution and not an impermissible developer's voluntary contribution designed to confer community benefits. The former falls four square within section 76.

[66] I consider that a developer's willingness to execute a section 76 agreement incorporating a financial obligation does not fall foul of DMPN 21. It is quite unremarkable that this willingness should be reflected in the planning officer's advice to the decision maker as it clearly sounds on both the propriety of applying the section 76 mechanism and the viability of doing so. In contrast, I consider that paragraph 4.5 of the DMPN is not concerned with section 76 agreements at all. An offer of a community benefit "*on a voluntary basis*" stands in stark contrast to a contractually binding mechanism enforceable in accordance with the enforcement provisions of section 76. Paragraph 4.5 of the DMPN contemplates, in my view, a voluntary gesture on the part of a planning applicant remote from the bespoke regime of section 76, central features whereof are a legally binding agreement and accompanying statutory enforcement mechanisms. I further consider that Mr Worthington's basic premise is confounded by the evidence considered as a whole, in particular the DMO's reports and the elaboration provided in the Council's affidavit evidence, considered above.

[67] Mr McGleenan buttressed his primary submission with the contention that, by reference to the section 76 agreement map, the developer's financial contribution to the contemplated public infrastructure works in the general vicinity of the subject site could not, as a matter of law, be secured by planning conditions as the works are to be executed beyond its boundaries. While this ground of challenge must fail on the basis of the analysis immediately above, I consider this further and free standing submission to be correct.

The inconsistency ground

[68] The essence of this discrete ground of challenge is that the impugned grant of planning permission is vitiated by one aspect of the planning history of the subject site, namely a decision of the Department dated 31 March 2015 rejecting a proposal to develop the site via a mixed use construction entailing an hotel with 126 bedrooms, office accommodation, 136 apartments and associated car parking and landscaping. The formulation of this ground of challenge in the amended Order 53 pleading describes this rejected development proposal as "*substantial but less intrusive*" involving the construction of two tower blocks, one of 12 storeys (on the East Bridge Street side) and the other of 6 storeys (on the Stewart Street side) draws attention to the reason for refusal – "*overly dominant and inappropriate in terms of scale, massing and design*" – and highlights two contextual features of the refusal, namely the over provision of office accommodation in Belfast and the under provision of office rooms. These building blocks coalesce into a complaint of the public law misdemeanour of Wednesbury irrationality.

[69] The evidence includes the Development Control Officer's 2009 report. This confirms, firstly, that the DMO's portrayal of this unsuccessful planning application in her reports to the Council's PC was accurate. In the report dated 21 July 2011 refusal was recommended for the following reason:

> "*The proposal is deemed to be unacceptable as insufficient information has been submitted to enable the Department to fully assess the impact of the proposed development.*"

Chronologically, the next document in the evidence is dated some four years later, **31 March 2015**. This, the formal notice of refusal, plainly relates to the same planning application. It enshrines two reasons for refusal:

> "1. *The proposal is contrary to* [PPS1] *in that the proposal, if permitted, would result in demonstrable harm to the character of the area and the residential amenity of nearby residents through inappropriate scale, massing and design.*
>
> 2. *The Applicant has failed to supply sufficient information … to enable the Department to fully determine this application.*"

[70] In a later passage the DMO's first report states that this refusal:

> "*.. provides guidance in defining the scale and form of what may be considered to be acceptable at this location. In this case a 12 storey building was proposed at the East Bridge Street end of the site and a 6 storey building along the Markets end. The 12 storey element onto East Bridge Street was considered an appropriate response to the high rise buildings located to the north of the site. However, the*

> *previous refusal on the site proposed a continuous 6 storey solid block facing the 2 and 3 storey properties on Stewart Street which was considered to be overly dominant and inappropriate in terms of scale, massing and design.*"

The DMO's second report explains that the amended proposal entailed some reduction of building heights, a situational re-arrangement of two of the proposed blocks, with particular reference to the Stewart Street frontage, enhanced landscaping at this location and certain "softer" (my appellation) design modifications. The summary provided was in these terms:

> "*In summary the scale of the proposal has been reduced to take account of the local environment to ensure that the character of the area and residential amenity is not adversely affected. The reduction in scale and massing and proposed separation distances will ensure that neighbouring occupiers should not be adversely affected by the proposal …*
>
> *Adequate separation distances (25 metres) between the proposal and the residential properties on Stewart Street combined with a 5 metre buffer of tree planting will minimise the potential for overlooking.*"

[71] The legal principles which this ground of challenge engages are well settled. First, the 2015 refusal decision maker constituted a material consideration which the Council's PC was obliged to take into account. Pausing, this duty was obviously acquitted and the contrary is not argued. Second, the 2015 refusal did not constitute a binding precedent tying the hands and fettering the discretion of the September 2016 decision makers. Third, the weight to be attributed to the 2015 refusal was a matter for the PC, subject to review on Wednesbury irrationality grounds. Fourth, as a matter of human experience, in the world of development control and land use it is in the highest degree unlikely that two situations will share precisely the same identity and features. Fifth, in the discharge of their duty to exercise discretionary decision making powers with an unfettered mind and taking into account all material factors bearing upon the instant situation, public authorities are entitled to form a view differing from that which they, or a predecessor, held on a previous occasion of some comparability. For an extensive treatise of these principles see Re Interface Europe's Application [1998] NIJB 26 at 232 – 233.

[72] Having scrutinised the material parts of the evidence with care, I am unable to identify any indicators of irrationality. The elevated threshold which this public law ground of challenge engages requires a lapse of significant proportions on the part of the decision making authority. The 2015 refusal was properly brought to the attention of the PC members and there was in my view, sufficient accompanying information to enable them to rationally determine whether this factor, either alone or in combination with others, should attract sufficient weight to impel to refusal of

a significantly different development proposal for the same site. This required of the decision makers the formation of an evaluative judgment involving a margin of appreciation. It may be said that the breadth of this margin of appreciation is the notional distance which separates the primary decision maker from the superintending court of review in matters of this kind. I conclude that irrationality is not demonstrated and this ground fails accordingly.

The height issue

[73] As presented, this aspect of the Applicant's challenge, which entails a complaint that the Council's PC improperly took into account the wrong reference point in considering the discrete issue of height, was subsumed within the BMAP/BUAP ground which I have resolved in the Applicant's favour. I shall nevertheless address it separately if and to the extent that it is to be regarded as a freestanding ground of challenge. Its essence entailed a complaint that a misunderstanding and misapplication of the building height policies enshrined within the aforementioned two instruments resulted from the concentration on the heights of buildings situated on the opposite side of East Bridge Street, rather than the immediately adjoining building, namely Central Station. This ground gains traction only if BMAP, to the outright exclusion of BUAP, is the operative urban development policy. Successive courts have held that it is not and I have evaluated the legal consequences of this in the context of this challenge.

[74] In the overview at the beginning of her first report, the DMO drew attention to the "*scale and massing of other commercial buildings in the immediate environment*" in addressing the issue of the "*character or appearance of the immediate area*". In a later passage the author described "*…. Two very different urban forms of development, the high rise commercial development to the north and the 2 – 3 storey residential scale and form of the Markets area to the south.*" In the passages which follow, both the boundary of the subject site with Central Station and the height of the latter – four storeys – are detailed. Thus neither Central Station nor its dimensions were overlooked.

[75] The key word in Policy CC014 of BMAP, in this context, is "*adjoining*". The Applicant's contention was that this adjective could not be applied to the existing high rise commercial buildings on the other side of East Bridge Street and beyond. Only Central Station, the argument ran, could satisfy this requirement. In my view this contention suffers from the frailty of applying something of a strait jacket to an ordinary member of the English language which falls to be construed in accordance with well-established principles. These principles, in general terms, eschew the narrow and the restrictive, favouring greater breadth and flexibility. Giving effect to these principles I consider that the intervention of a busy carriageway several metres in width does not sever and separate developments to the north of the subject site so decisively and clinically as to rob them of the description of "adjoining"

buildings. This I consider to be the effect of the governing principles: see in particular Re Wellworths Application [1996] NI 509 at 537 – 538. This ground of challenge has no merit accordingly.

The policy BH11 ground

[76] This ground of challenge is formulated in the amended Order 53 pleading in these terms:

> "*St George's Market – irrationality*
>
> *Failing to assess the impact the proposed development would have on St George's Markets setting, in accordance with the planning policies and guidance for listed buildings. It was irrational not to consider these relevant factors.*"

This is based on the following critique in Mr Worthington's first report:

> "*The decision to recommend approval to the Planning Committee and the subsequent planning permission was made without regard to planning policy and guidance in relation to the listed St George's Market. The development site is within the visual and functional setting of this listed building which is protected by planning policy from development that would adversely affect its setting. The policy requires the effects of the proposal on the listed building to be assessed but they were not.*"

[77] The planning policy to which this ground relates is Planning Policy Statement 6 ("PPS6"), entitled "Planning, Archaeology and the Built Heritage". This contains, in chapter 6, the following "general criteria" of note:

> "*The issues that are generally relevant to the consideration of all listed building consent applications and planning applications affecting a listed building are:*
>
> *(a) The importance ….*
>
> *(b) The particular ….*
>
> *(c) The building's setting ….*
>
> *(d) The extent to which ….*
>
> *… (including other listed buildings).*"

This is followed by several free standing policies, one of which is Policy BH11 "Development Affecting the Setting of a Listed Building". This contains the following general rule:

> "*The Department will not normally permit development which would adversely affect the setting of a listed building.*"

The policy continues:

> "*The economic viability as well as the character of listed buildings within such planned settings may suffer where inappropriate new development isolates them from their surroundings or degrades their landscape setting …..*
>
> *Any proposals for development which, by its character or location, may have an adverse effect on the setting of listed buildings will require very careful consideration …*
>
> *Development proposals some distance from the site of a listed building can sometimes have an adverse effect on its setting eg where it would affect views of an historic skyline, while certain proposals, because of the nature of their use, can adversely affect the character of the setting of a listed building or group of buildings through noise, nuisance and general disturbance.*"

Unsurprisingly, one of the central themes of this discrete policy is the proximity of the proposed development to the setting of any listed building, as the following passage demonstrates:

> "*The extent to which proposals will be required to comply with the criteria in Policy BH11 will be influenced by a variety of factors: the character and quality of the listed building; the proximity of the proposal to it; the character and quality of the setting; and the extent to which the proposed development and the listed building will be seen in juxtaposition.*"

Policy BH11 ends in these terms:

> "***Where it is considered that*** *a development proposal may affect the setting of a listed building, the Department will normally require the submission of detailed drawings which illustrate the relationship between the proposal and the listed building.*"

[My emphasis.]

[78] The DMO in her affidavit responds to this ground in the following way:

> "*The proposed buildings do not sit opposite, adjacent to or within the curtilage of any listed building. In my experience, the proposed scheme is sufficiently removed from any listed building not to result in a material impact. An examination of the area shows clearly a differentiation between the historic pattern of development sought of Oxford Street and the more contemporary East Bridge Street area north and east of Oxford Street. Therefore consultation with Built Heritage (Historic Environment Division) was not considered necessary in this case ….*
>
> *In any event … the Council did consult the Archaeology and Built Heritage Unit of DOE at both PAC stage and upon receipt of the application for planning permission and it confirmed that it had no objection to the proposed development …*
>
> *It is also of note that there were no representations to this application from any established or known heritage interest groups.*"

The evidence indicates that at its most proximate point, the distance between the proposed development and the closest point of St George's Market is some 150 metres.

[79] One of the important items of evidence bearing on this discrete ground is a Department of Communities publication which describes the "*setting*" of St George's Market in the following terms:

> "*Street fronted to all sides, the building occupies a highly developed urban environment to east of Belfast city centre. To north are the Law Courts, to east is a busy road junction and modern mix used development including the Waterfront Hall and Hilton Hotel. To west are a number of late 19th and early 20th century buildings of quality in addition to modern infill development and to south is modern social housing known as the 'Markets' area.*"

This is not, of course, a statutory or binding definition of the "setting" of St George's Market. Furthermore, it does not clearly either include or exclude the subject site from what is, properly analysed, the author's opinion of the St George's Market setting.

[80] I consider that lying at the heart of this discrete issue is a paradigm illustration of an evaluative planning judgment on the part of the officer concerned. In the officer's professional opinion an assessment of the projected impact of the proposed development on St George's Market was not required, by reason of the factors identified in the affidavit evidence (*supra*). Furthermore, weight was given to the absence of any objection from either a consultee of presumed expertise or any other source. The formulation of the Applicant's pleading (*supra*) recognises, correctly, that irrationality is the legal touchstone which this ground engages. Matters of planning judgment rarely succumb to this species of challenge. The breadth of the discretion available to the officer concerned is one of the prominent themes of the jurisprudence belonging to this field. This is reinforced by the highlighted words in the passage from the policy reproduced in [77] above. The rationality of the DMO's judgement about this matter is reinforced by the factors highlighted in her affidavit. Mr Worthington's opinion while doubtless respectable, albeit expressed in fairly lean terms, does not suffice to overcome the steep threshold which this ground of challenge involves. I conclude that it is without substance.

Fairness and balance generally

[81] "Fairness and balance generally" is the court's taxonomy of an eclectic mix of submissions which Mr McCollum drew together into a single thread. The thrust of this ground of challenge is that the DMO's reports to the Council's PC partook of an unfair imbalance favouring the planning applicant and prejudicing the Markets residents. Mr McCollum's submission on this issue ranged over a broad array of issues addressed in the two reports, which were criticised for their approach to and treatment of (inexhaustively) design, three dimensional models and computer aided visualisations, invasion of the residents' privacy and loss of residential amenity, the actual (as opposed to permitted) height of certain modern commercial developments in the vicinity, excessive emphasis on said buildings, insufficient emphasis on the character of the Markets area, inadequate emphasis on the "reshuffling" of the proposed buildings which the amended application entailed, a failure to highlight unused lower grade office space in Belfast city centre, an inaccurate reference to agreement on a measure (a 10 metres strip) designed to ensure access to the "Tunnels project" and excessive emphasis on projected economic benefits.

[82] Mr McCollum also drew attention to how the references in the DMO's reports to the issues of overshadowing, inadequate Grade A city centre office accommodation and other city centre streets were formulated. Mr McCollum's argument involved isolating a series of passages in the DMO's reports and subjecting same to criticism *seriatim*. The focus of his attack was the cumulative, rather than individual, impact of these.

[83] I consider that this ground is defeated by the following brief analysis. First, it is trite that the DMO's reports must be read broadly and as a whole and in the context of the totality of the evidence. As regards purely factual matters, such as the grade A office accommodation shortage, I do not consider that it was incumbent

upon the DMO to spell out the supporting evidence. This is a matter which lay within her margin of appreciation. Furthermore, the Applicant, on whom the onus rests, has adduced no evidence to demonstrate factual inaccuracy of such proportions as to overcome the legal threshold engaged, namely irrationality. If and insofar as intermittent imbalances, or ripples, and minor inaccuracies are demonstrable, these in my judgement fall measurably short of sustaining this discrete ground.

[84] *Ditto* the criticism levelled against the DMO's treatment of the issue of overshadowing. This was one element of a complex balancing exercise and, furthermore, it involved a matter of evaluative judgment. Applying the lens of supervisory review, I consider that there was nothing unfair, unbalanced or irrational in how this issue was treated in the DMO's reports.

[85] I further consider that, examined broadly and as a whole the DMO's reports do not suffer from any impermissible imbalance. The main pros and contras of the proposed development were identified, thus ensuring a properly informed decision on the part of the Council's PC. Third, the main targets of the Applicant's critique were, in my view, issues involving evaluative planning judgment on the part of the officer. The paradigm example of these is the issue of detrimental impact on residential amenity. This factor did not, either as a matter of legal principle or planning policy, constitute an absolute prohibition defeating the development proposal. Rather, it had the status of one of many factors to be weighed in the balance. The DMO was careful to portray this as an issue of unacceptable impact. The expression of the DMO's opinion on this issue did not infringe any legal rule or principle and was not binding on the decision makers.

[86] Furthermore, the decision makers took the responsible step of visiting the site in order to further inform the judgment which they had to make. In this way they became better informed on the issue of loss of residential amenity. While they did not, ultimately, have the benefit of aids such as three dimensional models or computerised visualisations it cannot in my view be said that these were essential pre-requisites to the formation of a rational evaluative judgement. It cannot be said that the absence of these aids equates to any identifiable public law misdemeanour, in particular the intrusion of an immaterial fact or factor, the disregard of a material fact or factor or irrationality.

[87] I consider that every planning officer compiling reports of this kind enjoys a certain margin of appreciation which extends to the expression of the officer's professional opinion on material issues. This margin of appreciation is of course the subject of certain constraints. These include the requirements of balance and impartiality. The planning officer is the key interface between developers and objectors (on the one hand) and decision makers (on the other). It may be said that the officer "holds the ring". I am satisfied in the present case that the DMO's reports withstand the detailed critique to which they were subjected. If and to the extent that some minor inaccuracies or imperfections can be demonstrated, I consider that

these do not undermine the ultimate product. Ultimately, the main submission advanced by Mr McCollum was that the PC was misled. For the reasons given I consider that this criticism is not made out.

Article 8 ECHR

[88] Article 8 ECHR, which must of course be considered in tandem with section 6 of the Human Rights Act 1998, has featured in the Applicant's case from the outset. However, I accept Mr McGleenan's submission that it has at all times done so at the level of the general and abstract. This is reinforced, firstly, by the formulation of the relevant pleading:

> "*There has been no or inadequate regard for the impact of the proposed development on the Article 8 rights of the Applicant and the other residents. The proposed development will cause a marked and disproportionate interference with the Applicant and other residents' Article 8 rights.*"

The immediate riposte to this formulation is that it suffers from the fallacy exposed by the decisions of the House of Lords in R (SB) v Governors of Denbigh High School [2007] 1 AC 100 and Belfast City Council v Miss Behavin' [2007] UKHL 19. This topic is considered *in extenso* in R(SA) v Secretary of State for the Home Department [2015] UKUT 536 (IAC). In short, the legal test is not whether the public authority concerned had regard to a person's Convention rights. Rather, the correct question is whether an infringement of the right/s concerned has been demonstrated.

[89] Mr McGleenan's submission is further reinforced when one juxtaposes the Order 53 pleading with the affidavits of the Applicant. Ms Conlon's averments do not formulate any specific Article 8 case personal to her and her circumstances. This extends to not disclosing her address in the affidavit with a related absence of any averments relating to building relationships, distances, angles, immediately surrounding environment and associated matters. There are frequent references, both express and implicit, to the residents of the Markets area and the local community. None of this is redeemed by vague and unparticularised references to the Applicant's "*right to privacy*" and "*right to a family life*".

[90] The effect of this analysis impels to the conclusion urged by Mr McGleenan, namely that the Applicant cannot be considered a "victim" of an alleged Convention rights violation within the meaning of section 7 of the Human Rights Act 1998. Furthermore, this harmonises with this court's assessment in [3] above that Ms Conlon "*… brings these proceedings in substance in a representative capacity, the figurehead of the 231 formal objectors ….*".

[91] Finally, even in the absence of the foregoing impediments, it is difficult to see how a disproportionate interference with the Applicant's right to respect for private life and/or family life could be established in light of the court's rejection of the discrete grounds of challenge considered in [59] – [87] above.

General

[92] While I am conscious that certain issues were raised in earlier formulations of the Applicant's Order 53 pleading, compliance with the EIA Regulations and inadequate traffic provision being prime examples, I have already observed that the challenge underwent significant transformation in the course of its lifetime, one feature whereof was that, ultimately, some of the issues raised earlier did not form part of the case as argued and presented. As a result, I have not addressed them in this judgment.

Conclusion and remedy

[93] On the grounds and for the reasons elaborated above, the Applicant's challenge succeeds. The remedy granted is an order of certiorari quashing the impugned grant of planning permission, with costs to the Applicant and the developer bearing its own costs.