

June 27th, 2017

Notice Of Meeting

You are invited to attend the Planning Committee Meeting to be held on **Thursday, 29th June 2017** at **10:00 am** in **Boardroom, District Council Offices, Monaghan Row, Newry.**

The Members of the Planning Committee are:-

Chair: Councillor G Craig

Vice Chair: Councillor K Loughran

Members:	Councillor C Casey	Councillor W Clarke
	Councillor L Devlin	Councillor G Hanna
	Councillor V Harte	Councillor M Larkin
	Councillor J Macauley	Councillor D McAteer
	Councillor M Murnin	Councillor M Ruane

Agenda

1.0 Apologies.

2.0 Declarations of Interest.

Development Management - Planning Applications for determination

3.0 LA07/2016/0821/F - C Canning - change of house type to that previously approved under R/2012/0323/F (further amended plan received: clarification re: finishes and levels) - 24 Ringhaddy Road, Killinchy. (Case Officer report attached).

Rec: APPROVAL

- A request for speaking rights has been received from The Steering Committee for Concerned Ringhaddy Area Residents objecting to the application. **(Submission attached)**.
- A request for speaking rights has been received from Andy Stephens, agent, in support of the application. **(Submission attached)**.

📄 <i>LA07-2016-0821-F C Canning.pdf</i>	<i>Page 1</i>
📄 <i>Item 3 - submission of objection (C Canning).pdf</i>	<i>Page 7</i>
📄 <i>Item 3 - additional objection information.pdf</i>	<i>Page 9</i>
📄 <i>Item 3 - submission of support (C Canning).pdf</i>	<i>Page 14</i>

4.0 LA07/2015/0714/F - Mr and Mrs Byrne - proposed farm dwelling - 180m NW of existing farm buildings adjoining 28 Ballyclander Road, Downpatrick. (Case Officer report attached).

Rec: REFUSAL

- A request for speaking rights has been received from Brigin Byrne, Applicant & Agent, in support of the application. **(Submission attached)**.

📄 <i>LA07-2015-0714-F Mr and Mrs Byrne.pdf</i>	<i>Page 42</i>
📄 <i>Item 4 - submission of support (Mr & Mrs Byrne).pdf</i>	<i>Page 50</i>

Invitees

Cllr Terry Andrews	terry.andrews@nmandd.org
Cllr Naomi Bailie	naomi.bailie@nmandd.org
Cllr Patrick Brown	patrick.brown@nmandd.org
Cllr Robert Burgess	robert.burgess@nmandd.org
Cllr Stephen Burns	stephen.burns@nmandd.org
Lorraine Burns	lorraine.burns@nmandd.org
Cllr Pete Byrne	pete.byrne@nmandd.org
Cllr Michael Carr	michael.carr@nmandd.org
Cllr charlie casey	charlie.casey@nmandd.org
Cllr William Clarke	william.clarke@nmandd.org
Cllr Garth Craig	garth.craig@nmandd.org
Cllr Dermot Curran	dermot.curran@nmandd.org
Ms Alice Curran	alice.curran@nmandd.org
Cllr Laura Devlin	laura.devlin@nmandd.org
Ms Louise Dillon	louise.dillon@nmandd.org
Cllr Sean Doran	sean.doran@nmandd.org
Cllr Cadogan Enright	cadogan.enright@nmandd.org
Cllr Gillian Fitzpatrick	gillian.fitzpatrick@nmandd.org
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Mr Liam Hannaway	liam.hannaway@nmandd.org
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Cllr Harry Harvey	harry.harvey@nmandd.org
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Cllr David Hyland	david.hyland@nmandd.org
Cllr Liz Kimmins	liz.kimmins@nmandd.org
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Cllr Jill Macauley	jill.macauley@nmandd.org
Cllr Kevin Mc Ateer	kevin.mcateer@nmandd.org
Cllr Declan McAteer	declan.mcateer@nmandd.org
Colette McAteer	colette.mcateer@nmandd.org
Cllr Oksana McMahan	oksana.mcmahan@nmandd.org
Cllr Andrew McMurray	andrew.mcmurray@nmandd.org
Eileen McParland	eileen.mcparland@nmandd.org
Cllr Roisin Mulgrew	roisin.mulgrew@nmandd.org
Cllr Mark Murnin	mark.murnin@nmandd.org
Mrs Aisling Murray	aisling.murray@nmandd.org
Cllr Barra O Muiri	barra.omuiri@nmandd.org
Cllr Pol O'Gribin	pol.ogribin@nmandd.org
Cllr Brian Quinn	brian.quinn@nmandd.org
Cllr Henry Reilly	henry.reilly@nmandd.org

Cllr Michael Ruane	michael.ruane@nmandd.org
Cllr Gareth Sharvin	gareth.sharvin@nmandd.org
Cllr Gary Stokes	gary.stokes@nmandd.org
Sarah Taggart	sarah-louise.taggart@nmandd.org
Cllr David Taylor	david.taylor@nmandd.org
Caroline Taylor	Caroline.Taylor@downdc.gov.uk
Cllr Jarlath Tinnelly	jarlath.tinnelly@nmandd.org
Cllr John Trainor	john.trainor@nmandd.org
Cllr William Walker	william.walker@nmandd.org
Adam Wilkinson	adam.wilkinson@nmandd.org

ITEM NO	8			
APPLIC NO	LA07/2016/0821/F	Full	DATE VALID	20/06/2016
COUNCIL OPINION	APPROVAL			
APPLICANT	C Canning 22 Ringhaddy Road Killinchy BT23 6TU	AGENT	HR Jess Architecture Planning & Management 1 Jordanstown Road Newtownabbey Co Antrim BT37 0QD 028 9036 4615	
LOCATION	24 Ringhaddy Road Killinchy			
PROPOSAL	Change of House type to that previously approved under R/2012/0323/F. (Further amended plan received: clarification re: finishes and levels)			
REPRESENTATIONS	OBJ Letters	SUP Letters	OBJ Petitions	SUP Petitions
	56	0	0	0
			Addresses Signatures	Addresses Signatures
			0 0	0 0



Comhairle Ceantair
an Iúir, Mhúrn
agus an Dúin

**Newry, Mourne
and Down**
District Council

Application Reference: LA07/2016/0821/F

Date Received: June 2016.

Proposal: Full planning permission is sought for a Change of House type to that previously approved under R/2012/0323/F, on lands at 24 Ringhaddy Road, Killinchy.

Applicant: Mr C Canning

Location:

The site is located in the countryside several mile north of Killyleagh in an AONB and Area of Constraint on Mineral Developments as identified in the Ards and Down Area Plan 2015. The site is also adjacent to Quarterland Bay and appears to be within/adjacent Strangford Lough Ramsar site, SPA, SAC, Marine Nature Reserve and ASSI. This Ringhaddy Road is a relatively narrow rural road which extends from the Ballymorrán Road and Killyleagh Road down to the shore and bay, whereby this area is largely characterised by agricultural lands although also comprises a number of roadside dwellings and holdings.

Site Characteristics & Area Characteristics:

The site is located towards the bottom end of Ringhaddy Road, adjacent to the shore (Quarterland Bay) and comprises a portion of land (field) adjacent to the dwelling of no.22 and its associated curtilage, buildings and lands, whereby development has commenced for the construction of a new dwelling, approved under application R/2012/0323/F.

The site for this dwelling is low lying, whereby the lands rise from the shore towards no.22. This site is accessed via the existing access serving no.24

Site History:

A history search has been carried out for the site and surrounds whereby it is noted there have been a number of applications within and adjacent to the site, however having account the nature of this proposal, the most relevant history observed

includes:

R/2012/0323- 70m north west of 22 Ringhaddy Road, Killinchy, New dwelling and double garage, Full, Approval, 12-02-14, Applicant: Mr Canning.

(This approved dwelling was located towards the lower lying portion of the field and comprised a single storey dwelling with detached double garage with store above. This dwelling shared the access point onto the Ringhaddy Road with no.22.

It is noted there was significant local opposition to this proposal while consultation was also undertaken with TNI, NIW, WMU, Rivers Agency, DAERA, PHB, PHM, and Natural Heritage)

Consultations:

Having account the nature of this proposal (change of house type) and constraints of the site and area, consultations have been carried out with Rivers Agency, NIEA and Shared Environmental Services, who offer no objections in principle. A HRA screening exercise was also undertaken as part of this application.

The comments from the respective consultees are noted, and having account the nature of this application, namely, a Change of house type, to an extant permission, in the same location, it is not considered necessary to seek further information or comments from any other body to determine this application.

Objections & Representations

Having account the red line of the application site, neighbour notification was carried out with several properties along Ringhaddy Road initially in June 2016, however further neighbour notification letters were issued again in Sept, Oct and Dec 2016 and again in Jan 2017, following receipt of amended plans and additional information. The application was also advertised in the local press in July 2016.

In excess of 50 objections have been received to date (08-02-17) from properties along Ringhaddy Road, Ballymorrán Road, Ringdufferin Road, Lusky Road, Quarterland Road, Rathcunningham Road, Whitecherry Road (Killinchy), The Spires Grove (Killinchy), Donaldson Planning on behalf of Concerned Ringhaddy Area residents, the Concerned Ringhaddy Area Residents themselves, and also RSPB, whereby the main issues raised include:

- the dwelling proposed is substantially bigger in height, width, depth and footprint (scale, height, mass and intrusiveness) along with a unnecessarily large and inappropriate garage,
- the design is ill-proportioned with an incongruous mix of elements and is wholly inappropriate, and will destroy the very special and unique landscape of this sensitive location,
- the fenestration is out of keeping with the area,
- the quality of the information submitted is inadequate,
- the proposal is contrary to PPS2,
- the proposal is contrary to policies CTY13 and CTY14 of PPS21,
- request that NIEA are consulted,

- queries were raised regarding the timing of the application and period afforded to comment on it,
- the history of the site, namely the previously approved dwelling and associated opposition and complaints are referred to,
- 3D images have been provided.

See file for full content of representations received, as the above s only a summary of the main issues raised.

Policy- RDS, Ards & Down Plan 2015, SPPS, PPS2, PPS3, PPS6, PPS11, PPS15, PPS21 and supplementary guidance.

As stated above the site is located in the countryside, thus PPS21 applies.

PPS21 sets out the planning policies for development in the countryside (any land lying outside of development limits as identified in development plans), whereby Policy CTY 1 sets out the range of types of development which in principle are considered to be acceptable in the countryside and that will contribute to the aims of sustainable development.

It is clear from the history outlined above there is a previous extant Full permission for a new dwelling on this site (R/2012/0323), the details of which are set out above. As such it is considered the principle of a dwelling has already been accepted and established for this site in accordance with the provisions of PPS21, subject to conditions.

The purpose of this report is to consider the change of house type proposed and not to re-visit the principle of development.

As outlined above neighbour notification has been carried out on a number of occasions since this application was first received in June 2016.

The original scheme and change of house type (June 2016) comprised a part 1 and part 2 storey dwelling with several returns and projections, whereby the Planning Dept queried where the agent had based the design of this dwelling having account the context of the guidance document Building on Design and also existing character of the area.

In response to this query amended plans were received in Sept whereby the tower/turret feature was removed while the elevations and finishes were also amended. As such a further round of neighbour notification was undertaken in Sept to advise neighbours and interested parties of these changes and affording an opportunity to comment.

However further amended plans were then received in Oct reverting back to the original scheme, which required a further round of neighbour notifications to be undertaken.

Following the expiry of the neighbour notification period these amended plans from Oct were considered and had been recommended for Refusal in Nov, with a view to being presented to the Planning Committee in Dec 2016.

However a further set of amended plans were then received from the agent in Dec, again removing the tower/turret feature and amending the house type/elevations. Receipt of these amended plans required a further round of neighbour notification. Further amended site layout plans were then received in Dec and again in Jan regarding the levels of both the site and dwelling. These again required further rounds of neighbour notifications to be undertaken.

It is clear from the above how this application for a change of house type has been amended on a number of occasions over the period of 7 months. These amendments have caused delays in the processing of the case, and have also been frustrating for all parties involved including neighbours/interested parties who have received a number of letters, whereby a number of interested parties have taken the time to make representations on each set of amendments, however the Planning Dept has a duty to consider amended plans received.

This situation is unfortunate for all parties involved, however this report is now based on the most recent plans received including the site layout plan date stamped 18th Jan 2017 and detailed plans date stamped 19th Dec 2016. (The site location plan and garage details have remained unaltered and are date stamped 20th June 2016).

The dwelling (change of house type) now proposed will be part single storey and part 2 storey, and will again include a number of projections.

This change of house type will be sited in the same place as that previously approved, whereby part of this previously approved dwelling has been constructed. It is noted the single storey portion of the dwelling comprising the sitting, dining, kitchen, bathroom and bedroom 3 are the same as that previously approved.

The dwelling previously approved was single storey with simple form, although it is noted there are a mix of house types, sizes and designs in this area.

While it is acknowledged the dwelling now proposed is larger than that previously approved, it is considered the size including height and scale, and also design and appearance are acceptable in this sensitive rural location, the zonings of which are outlined above.

The house type now proposed has been simplified from an earlier version whereby the central tower/turret feature and also end upper floor projection have been removed. The finishes proposed include a black natural slate roof, white upvc windows, painted cladding walls and black RWG's.

As stated above the dwelling will be sited in the same place, whereby the access, driveway, garage, levels, garden area, extent of curtilage and boundary planting will all largely remain as previously approved.

(As outlined above the levels will remain as previously approved. It is noted from the levels and drawings of the previous approval parts of the site were to be dug out and levelled with a retaining wall and bank being provided along the rear of the dwelling and garage. This will again be replicated whereby the height of which can be conditioned if considered necessary).

As such it is considered these change of house type proposal, will not result in any significant increased or unacceptable impact on the character of this area or any

adjoining property, on this low lying site, and complies with the applicable policy context including policy CTY13 and CTY14 of PPS21, and also NH6 of PPS2 and the SPPS.

It is noted there is considerable opposition to this application, and with regards to the representations received, it is considered that while there may be ongoing complaints, this is not a justifiable reason to hold the progressing of this application. The design of the dwelling now proposed has been outlined and considered above. This application was submitted in June, whereby there is no current restriction in place as to what day or month any application can be submitted. The history of this site is noted, however this application only deals with this current proposal for a change of house type to that previously approved, whereby the principle of a dwelling has already been considered acceptable at this location.

Taking into account the above, Approval is recommended, subject to conditions. (Conditions to include: substitution of previous approval, removal of permitted development rights, planting, height of retaining wall, NIEA comments, while also having account the conditions attached to the previous approval (R/12/0323)).

Recommendation: Approval.

LA07/2016/0821/F**Oral Submission****21 June 2017****With powerpoint presentation - from 123 Concerned Ringhaddy Area Residents**

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We are speaking to you on behalf of 123 members of a campaign group which has been trying to protect this Ringhaddy area of Strangford Lough from excessive development by one developer over the last ten years. The group includes residents, locals, farmers and students. **We are inclusive** of all ages, gender, religion, race, classes and cultures.

The Ringhaddy/Quarterland area was previously one of the few unspoilt and undeveloped bays on the western coast of Strangford Lough. Sadly, that all changed over the last ten years when Ombudsman-proven '**maladministration**' by Planning Service, kick-started the development of these former green fields. Two major oversights by planners, ten years ago, laid the site open to incremental overdevelopment by a series of additional, damaging, discretionary approvals such as the one recommended today.

We appeal to Councillors to use your own judgement and discretion, to bring reason and common sense to bear on this out-of-control situation. Break the chain of environmental damage and refuse this application today.

Slide 1 – Strangford view

Strangford Lough is an incredibly beautiful place where locals, visitors, young and old, enjoy leisure activity and water sports and where visitors and tourists enjoy the scenery and the shoreline. But this environment is fragile and easily exploited.

Slide 2 - AONB sign

British, Irish and European legislation recognises the uniqueness of Strangford Lough by protecting it with some of the toughest laws available. Put any toxin into its waters and you will quickly feel their wrath. But most of this protection ends at the high-water mark and it is left only with the designation – **Area of Outstanding Natural Beauty**, to protect the shoreline and surrounding scenery. A designation which planners consistently appear to ignore.

Slide 3 – Fragile Environment

The natural environment needs protection from development because **planning legislation and practice has failed to protect the AONB**. It needs your support because it cannot defend itself.

Slide 4 – Building Sites in the country

Development, is a one-way street which is quickly rolled out across virgin fields and countryside,. **When scenery and the shoreline is scarred, it is scarred forever, because it never heals.**

Make no mistake – **this application is about 'Development'** and here is the proof:-

Slide 5 – PROW -Trespassers Prosecuted Sign

The planning applicant describes himself as a '**self-employed builder/developer**'. In 2011, he blocked and closed a **Public Right of Way** along the foreshore, which has been in existence for hundreds of years.

Slide 6 –Keep Out Sign

In **unsuccessfully** defending his actions, at a special Council meeting in October last year, his legal team told Councillors that he, "**sought to develop the land**" and that the right of way was "**blighting the development potential of the land**".

What does this tell you about the likely future for this AONB?

The public right of way was **affirmed by Council** and is now going to the High Court for final ratification - yet these fences and notices remain in place.

Slide 7 – Before and After Development

The history of these 10 acres of land since they were purchased by the applicant in 2003, is all about **Development** which has been unsuccessfully fought by locals, residents and farmers ever since that purchase. Almost all of the many planning applications have been approved, no matter what the arguments put forward by bodies such as the National Trust, the Green Party, Friends of the Earth, the Ulster Federation of Rambling Clubs and ourselves.

Slide 8 – NIPSO Report

The Northern Ireland Public Service Ombudsman, following a three-year investigation, produced a report in October, last year, **which cannot be shared with you, because of confidentiality restrictions**. It clearly stated that evidence was found of ‘**maladministration**’ by the Planners, which laid the area open to overdevelopment at 22 Ringhaddy Road. **Maladministration** for which the now re-named, Department for Infrastructure was told to apologise, in writing, to our Group, **but where the decisions were not to be changed due to the passage of time!**

Slide 9 – Scenic view - Ringhaddy Road

Excessive development brings noise and light pollution as well as visual disruption. When you made your site visit last month, did you hear the birdsong from Geese, Curlew, Redshank and Oyster Catchers? This is all **at risk** from increased human activity. Even a helicopter landed at 22 Ringhaddy Road recently – what does that do to the birdsong?

Slide 10 – Development view – Ringhaddy Road

The huge increase in height and size application for which approval is recommended, is to a ‘**farm dwelling**’ approved by the flawed planning legislation of PPS21, which allows almost anyone to be a farmer **yet does not insist that ‘farm dwellings’ are lived in by farmers**.

Slide 11 – Existing partly built

We ask councillors to consider what ‘farming need’ is helped or sustained by **more than doubling** the size **and value** of this partly built ‘farm’ dwelling?

Slide 12 – proposed Farm Mansion

This is an aerial view of the proposed enlargement. Is this an essential ‘farm dwelling’ or a **Mansion** in the country? Who will live in the **Mansion** when it is finished? **There is no farming restriction on its use. It can be sold to any one, at any time, for any price** – but what price is put on the environment it would be damaging?

Slide 13 – Environmental Legacy – Strangford View

The environment can be either defended or destroyed.

We appeal to Councillors to use your own judgement and discretion, to bring reason and common sense to bear on this out-of-control situation. Break the chain of environmental damage and refuse this application today.

Thank you

5 Minutes

Submission Ref LA07/2016/0821/F

Ringhaddy Residents to Colette.McAteer@nmandd.org

*Ref Application LA07/2016/0821/F - Submission to Refuse Planning Approval –
Special Meeting called at short notice on Thursday 29 June 2017*

Dear Planning Committee Member and Councillor

*We feel that we must respond to the supporting submission for the above application put in by one of the planning applicant's professional planning consultants for this development site, **Matrix**. We ask you to note these comments for Thursday's meeting.*

- 1. Re Zurich case law. We cannot dispute that the applicant has a **valid** fall-back position of a 'Farm Dwelling' having been approved. Whilst it may be **valid**, it is **environmentally immoral** because it is based on the flawed legislation of PPS21 and this farm dwelling should never have been approved. Please note planners comments in the attached 'example refusal' where the farm business was deemed to be 'inactive' – something almost impossible under PPS21. It informs our overall case concerning **permanent visual damage to the AONB** and the huge impact of this and all previous planning approvals upon what is **openly admitted and proven to be a Development Site within the AONB**.*

*In anybody's language, this is unnecessary '**intensification**' of building and development on this site.*

- 2. Matrix refers to the applicants 'permitted development rights'. This is disingenuous and misleading, **because it is in an AONB. Permitted development rights are more tightly controlled in an AONB.- ie single storey extensions only - so the proposed two storey element which increases the scale of the house considerably, would not be acceptable as 'permitted development'.***
- 3. This application is for a complete **change of house** within the AONB which is why this '**Farm Mansion**' has been proposed, but why is it **needed** for farming? Where is the case for or **justification** of this monstrosity, more than two times larger than the existing 'Farm Dwelling'. It will also be more than two times more valuable on the open market, at any time, for sale to any purchaser, of any occupation.*

There is clear precedent for refusing this application.

Please see the attached 'refusal' of Application LA07/2015/0165/F where one of the principal reasons for refusal was due to it being in an AONB. The other reasons are all also pertinent and relevant to LA07/2016/0821/F, referring to scale and form and prominence in the landscape, ref CTY13 and 14. Both major issues for the proposal being considered which is in a much more scenic location and being considerably taller with two storeys. The dwelling refused was approx. 180 SqM. The dwelling almost built is approx. 110 SqM. The Farm Mansion proposed is approx. 250 SqM

4. *The final and most relevant point made by Matrix, is that the recommendation is **a matter of planning judgement**. Mr Stephen's submission contains **implied threats of legal action against your person**. But you and the planners **would have no case to answer, should you use your reasonable judgement** to refuse this application which would be in the best interests of the environment and of this AONB.*

Please do not be intimidated by empty threats of legal action.

*Please exercise your reasonable judgement and vote **against** this ill-conceived and misguided recommendation to approve.*

Yours most sincerely

*Concerned Ringhaddy Area Residents
(123 Signatories on this date)
C/O 50 Ringhaddy Road
Killinchy, Newtownards
Co Down, BT23 6TU
Protecting Strangford Lough*

Liam Hannaway
Chief Executive



Comhairle Ceantair
**an Iúir, Mhúrn
agus an Dúin**
**Newry, Mourne
and Down**
District Council

11

REFUSAL OF PLANNING PERMISSION

Planning Act (Northern Ireland) 2011

Application No: LA07/2015/0165/F

Date of Application: 15th April 2015

Site of Proposed
Development:

**50m west of No 16 Grange Road
Kilkeel**

Description of Proposal:

**Proposed Dwelling and Detached Garage (Dwelling on a
farm)**

Applicant: Liam Rooney
Address: C/O Agent

Agent: Feargal Carolan
Address: 40 Larchmount
Newry
BT35 6TX

Drawing Refs: 01 – 03

Council in pursuance of its powers under the above-mentioned Act hereby

REFUSES PLANNING PERMISSION

for the above-mentioned development for the reasons stated:

1. The proposal is contrary to paragraph 6.73 of the Strategic Planning Policy Statement for Northern Ireland and Policies CTY1 and CTY10 of Planning Policy Statement 21, Sustainable Development in the Countryside and does not merit being considered as an exceptional case in that it has not been demonstrated that: the farm business is currently active; and the proposed new building is visually linked or sited to cluster with an established group of buildings on the farm.

**Oifig an Iúir
Newry Office**
O'Hagan House
Monaghan Row
Newry BT35 8DJ

**Oifig Dhún Pádraig
Downpatrick Office**
Downshire Civic Centre
Downshire Estate, Ardglass Road
Downpatrick BT30 6GQ

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0300 200 7830 (Planning)
council@nmandd.org
www.newrymournedown.org

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and South Armagh**

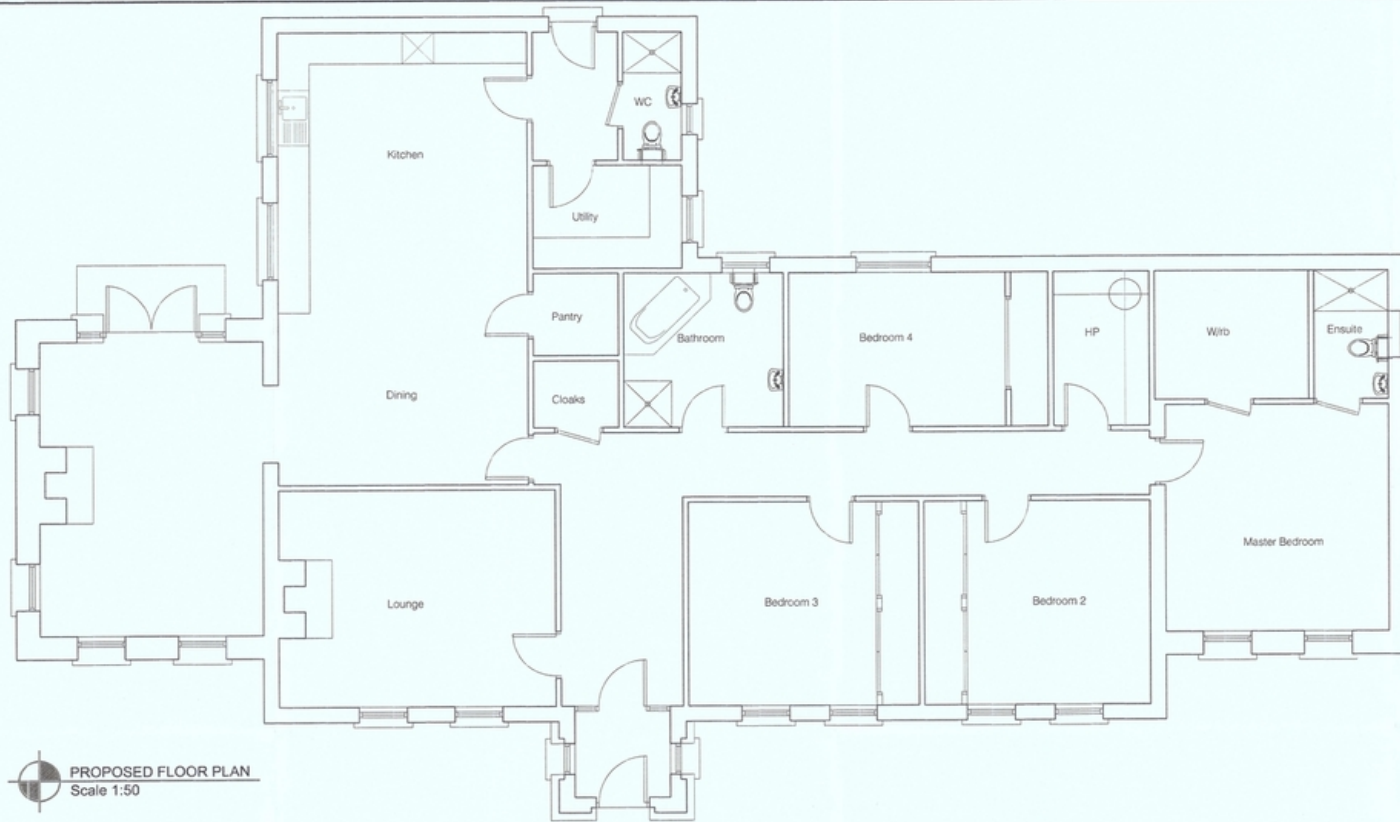


2. The proposal is contrary to Policy CTY13 of Planning Policy Statement 21, Sustainable Development in the Countryside, in that: the proposed building is a prominent feature in the landscape; the proposed site lacks long established natural boundaries/is unable to provide a suitable degree of enclosure for the building to integrate into the landscape; the proposed building relies primarily on the use of new landscaping for integration; the proposed dwelling is not visually linked or sited to cluster with an established group of buildings on the farm and therefore would not visually integrate into the surrounding landscape.
3. The proposal is contrary to Policy CTY14 of Planning Policy Statement 21, Sustainable Development in the Countryside in that: the buildings would, if permitted, be unduly prominent in the landscape; the buildings would, if permitted result in a suburban style build-up of development when viewed with existing and approved buildings; the buildings would, if permitted not respect the traditional pattern of settlement exhibited in the area; and would therefore result in a detrimental change to the rural character of the countryside.
4. The proposal is contrary to paragraph 6.107 of the Strategic Planning Policy Statement of Northern Ireland and Policy FLD 1 of Planning Policy Statement 15: Planning and Flood Risk, in that the proposed dwelling and garage are located in a flood plain, the proposal does not meet any of the stated exceptions where development in the flood plain is acceptable, and it is not of overriding regional importance.
5. The proposal is contrary to paragraph 6.187 of the Strategic Planning Policy Statement for Northern Ireland and Policy NH6 of Planning Policy Statement 2, Natural Heritage, in that the siting of the proposal is not sympathetic to the special character of the Mourne Area of Outstanding Natural Beauty in general and of the particular locality.

Dated: 20th May 2016

Authorised Office





PROPOSED SIDE ELEVATION
Scale 1:100

SCHEDULE OF FINISHES

- Walls - Smooth sand/cement render with raised plaster plinth.
Natural Granite to areas indicated.
- Windows - White upvc/tiler windows.
- Doors - Hardwood doors painted select colour.
- Vehicle door - Select colour roller door.
- Roof - Black/blue slate/tila
- Rainwater goods - Round profile black upvc



PROPOSED SIDE ELEVATION
Scale 1:100

Rev.	Reason	Date

Project
727 - Planning Application

Client
Carroll, Gordon & Co Ltd
15 APR 2015

Job Description
Proposed dwelling and garage 50m West of No.16 Grange Road, Kikeel, Co Down.

Title
Proposed Dwelling Layout and Elevations

Date
03.2015

Scale
1:50-1:100

Feargal Carolan
Architectural & Planning Services

Feargal Carolan
Architectural & Planning Services
403 Lakeside, Newry, BT16 4TL
Tel: 02839 5789 Fax: 02839 5796
Email: feargal@feargalcarolan.com

FILE REF	DRAWING No	REVISION
727	727.P01	

**Democratic Services**

Newry, Mourne & Down, District Council
Downshire Civic Centre
Downshire Estate
Ardglass Road
Downpatrick
BT30 6GQ

14th June 2017

Dear Democratic Services

Speaking Request for Item 8 - Planning Application Reference – LA07/2016/0821/F**Location – 22 Ringhaddy Road, Killinchy, BT23 6TU****Change of House type to that previously approved under R/2012/0323/F. (Further amended plan received: clarification re: finishes and levels)**

This submission seeks to **support** the policy interpretation of the professional officers in their recommendation to approve the above application at the Planning Committee Meeting of 21st June 2017.

This is the third time the application has been brought forward to Committee. It is apparent that there have been no material changes in policy or a change in professional opinion in the intervening months to justify any further delay or deferrals.

In this regard it is significant to note paragraph 17 of the revised Scheme of Delegation dated February 2017 states that: *"The Committee will generally only defer an application once".*

In this circumstance it is apparent that there have a two deferrals including the recent site visit.

It is important to highlight this position should the applicant wish to pursue a case of prejudice against members of the Planning Committee for the addition costs incurred, as a result of multiple deferrals being granted.

I also note that if members were **not present for the initial discussion/debate or did not attend the site visit** then they **cannot participate** in the discussion or vote when the application is presented to Committee.

Schedule for 7/12/2016

Initially the application was recommended for refusal, however an amended design was received and it was removed for from the schedule for further consideration.

Schedule for 1/03/2017

The application was presented on the addendum list with a recommendation to approve, but was removed at the request of Cllr Hanna for full consideration by the Planning Committee.

I note that Mr Andrew Ryan of Tughans in his letter of 1/03/2017, protests of the late inclusion of the application and the prejudice to his clients, as they did not request speaking rights.

However I can assure the Council that the Schedule was in the public domain on 17/02/2017, when I drew the applicant's attention to it being recommended as an approval.

Notwithstanding that Mr David Donaldson has been representing the objectors from the outset and it would be common practice to monitor Council Schedules and advise interested parties accordingly.



Schedule for 15/03/2017

The application was re-presented with a recommendation to approve to the Planning Committee.

I note that Mr Ryan, spoke against the proposal on behalf of CRAR. Unfortunately there are no notes of his comments for consideration.

I would hope that Mr Ryan advised the Committee that despite threatening to Judicial Review the earlier decision (R/2012/0323/F) and sending a pre-action letter on 4/04/2014 no legal challenge ensued.

Therefore it can only be accepted that there was no legal basis for challenge. The previous decision is lawful and the applicant has a valid fallback position, which is the starting position for consideration.

Cllr Larking and Ruane voted to endorse the decision to approve, but the proposal was lost by 7 votes to 4. A counter proposal was then put forward by Cllr Hanna and seconded by Cllr McAteer to defer the application for a members site visit.

The member's site visit took place on Monday 22/05/2017 and Mr Pat Rooney and Ms Annette McAlarney were in attendance and addressed members questions and queries.

The application has now been returned to the Planning Committee with the same recommendation to approve.

Planning History & Legal Fallback

The site benefits from a full planning consent under R/2012/0323/F, which is referenced in the proposal description.

The principle of a farm dwelling was deemed acceptable, as per the prevailing planning policies contained within PPS21 (CTY1 and CTY 10) and granted permission on 12/02/2014, subject to a number of conditions.

A detailed design was provided as part of this permission and deemed to acceptable as per policies CTY 13, CTY 14 and CTY 15. This planning approval is extant and does not become time expired until 12/02/2019. In any case it has lawfully commenced

It therefore represents a valid fallback position for the applicant, as indicated in our previous email dated 21/03/2017. The relevant legal judgement is *Zurich Assurance Ltd T/A Threadneedle Property investments v North Lincolnshire Council & Simons Developments Ltd*, which may be of assistance to the Council moving forward (It is attached again for convenience).

This judgement reinforces the Council's approach is the correct one and that only the changes to R/2012/0323/F are considered. Fallback scenarios are considered at paragraph 75, where it states that:

*"The prospect of the fall back position does not have to be probable or even have a high chance of occurring; it has to be only more than a mere **theoretical prospect**. Where the possibility of the fall back position happening is "very slight indeed", or merely "an outside chance".*

Therefore the approach of the objectors that this is a re-consideration of R/2012/0323/F is misplaced and incorrect. They chose not to judicially challenge it after having the benefit of legal input from Mr Ryan at the time and as per his pre-action letter sent to the DOE and the applicant's agent.



The Proposal

The applicant commenced development within the specified timeframes and only Condition 2 & 4 sought to apply pre-development conditions to be discharged prior to commencement. These have both been discharged and no party has expressed a view to the contrary.

On that basis only the net differences are considered. The applicants permitted development rights were not removed on R/2012/0323/F.

Therefore the applicant can make a number of alterations to R/2012/0323/F without the need for planning consent at all and weight must be attached to that point, as per the *Mansi Principle*.

The changes proposed are not so significant to justify refusal when taking account of R/2012/0323/F and the nature and scale of alterations and the extent of the alterations that can be made without going through the statutory process.

The application site has not increased or altered and the siting is the same as that deemed acceptable under R/2012/0322/F. There are no significant alterations being proposed to the earlier consent.

On that basis the planning officer is entirely correct to only consider this as a change of house.

Conclusions

Despite the proposal representing a change of house type the professional officers have consulted with Rivers Agency, NIEA and Shared Environmental Services, who offer no objections in principle.

A HRA screening exercise has been undertaken and the application has been screened out for any significant environmental effects.

There are no environmental impacts that could reasonably be argued when taking account of the legal fallback position and the lack of any increase in the site area.

It is significant that no 3rd party has argued there has been an error in the processing or determination.

The consideration and recommendation is a matter of planning judgement, which has clearly taken account of all of the material considerations and attached significant weight to the R/2012/0323/F, which remains a valid and legal fallback. The alterations when considered against that context are not significant.

We support the recommendation and would indicate that there are no reasons for continued delay as previously stated.

If you require anything further then please do not hesitate to contact me.

Yours sincerely



Andy Stephens
BA Hons, MSc
Planning Consultant

CC. Mr Chris Canning, Mr Hadleigh Jess

Case No: CO/4764/2012

Neutral Citation Number: [2012] EWHC 3708 (Admin)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT IN LEEDS

Leeds Combined Court,
1 Oxford Row, Leeds, LS1 3BG

Date: 20/12/2012

Before:

MR JUSTICE HICKINBOTTOM

Between:

THE QUEEN on the application of
ZURICH ASSURANCE LIMITED trading as
THREADNEEDLE PROPERTY INVESTMENTS

Claimant

- and -

NORTH LINCOLNSHIRE COUNCIL**Defendant**

- and -

SIMONS DEVELOPMENTS LIMITED**Interested**
Party-----

Paul G Tucker QC and Anthony Gill (instructed by Nabarro LLP) for the Claimant
Vincent Fraser QC and Alan Evans (instructed by Legal Services Department,
North Lincolnshire Council) for the Defendant
Christopher Katkowski QC and Graeme Keen (instructed by Gordons LLP)
for the Interested Party

Hearing date: 17 December 2012

Judgment

Mr Justice Hickinbottom:**Introduction**

1. The Claimant (“Zurich”) is the owner of the Foundry Shopping Centre, which lies within the primary shopping area in the centre of Scunthorpe, the largest town in North Lincolnshire. The shopping centre comprises 19,000 sq m of retail floorspace in 45 units.
2. The Interested Party (“Simons”) has an option to purchase the Trent Valley Garden Centre, Doncaster Road, Gunness (“the Site”), which is about 2.5 kilometres from Scunthorpe town centre.
3. On 26 March 2012, the Defendant (“the Council”), which is the relevant local planning authority, granted planning permission to Simons to demolish the garden centre and its associated structures, and construct a retail park with four retail units and associated access roads, car parking, servicing area and landscaping.
4. In this claim, issued on 8 May 2012, Zurich challenges that decision, with the permission of His Honour Judge Gosnell sitting as a judge of this court granted on 23 July 2012.
5. At the substantive hearing, Zurich was represented by Paul Tucker QC and Anthony Gill, the Council by Vincent Fraser QC and Alan Evans, and Simons by Christopher Katkowski QC and Graeme Keen.

Factual Background

6. The Site has been a garden centre since the mid-1980s: on 17 January 1985, planning permission was granted for a change of use of the land, and to erect appropriate buildings. That permission was subject to a condition (Condition 2) that limited the goods that could be sold to a prescribed list which, in general, excluded food and clothes. However:
 - i) full planning permission was granted on 3 April 1986 to retain a restaurant, lounge and patio area;
 - ii) outline planning permission was granted on 9 August 1990 to erect buildings to create a non-food retail warehouse park (although that was never implemented, and has of course long since lapsed); and
 - iii) there is significant evidence that the Site has in fact been used for very wide retail use – far wider than allowed by Condition 2 – for some considerable time (e.g. the Secretary of State’s decision letter of 9 August 1990 refers to the garden centre having “already some... 4,500 sq m of retail floorspace used for the sale of a wide range of goods”).
7. On 22 August 2011, Simons made a further application for planning permission for a new retail park on the Site, initially proposing six retail outlets, but later reduced to four namely one large unit (4,645 sq m) and three smaller units. Accompanying the application was a screening opinion dated 22 July 2011 under Regulation 4 of the Town and Country Planning (Environmental Impact Assessment) (England and

Wales) Regulations 1999 (SI 1999 No 293), to the effect that a full environmental impact assessment was unnecessary. The application was validated by the Council on 31 August 2011.

8. Two letters of objection were lodged by planning consultants representing Zurich (Indigo Planning Limited, "Indigo"). However, on 14 December 2011, the application was considered by the Council's Planning Committee, which resolved in favour of granting it subject to the completion of a satisfactory Section 106 planning obligation. The application was referred to the Secretary of State, who indicated that the matter would not be called-in for decision by him.
9. On 23 December 2011, a letter before claim was sent to the Council by an informal group of local businesses and residents opposed to the project, known as "Keep Scunthorpe Alive" ("KSA"), challenging the decision to grant permission; and further letters of objection were sent by Indigo. As a result, the Council's case officer (Mr David Wordsworth) prepared a further report for the committee which, rather than merely updating the earlier report to deal with the objections received, was a comprehensive report covering all of the ground again including the contents of the objections to which I have referred ("the Main Report") with an addendum of its own responding to two late, further letters of objection from Indigo and KSA ("the Addendum Report"). It is therefore unnecessary for me to consider the earlier report further.
10. On 7 March 2012, on the basis of the Main Report and the Addendum Report, the Council's Planning Committee reconsidered the application, and again resolved to grant permission subject to referral and a satisfactory Section 106 obligation, in the following terms:

"Resolved - (a) That the committee is mindful to grant permission for the development; (b) that the application be referred to the Secretary of State in accordance with statutory procedures to enable him to consider whether or not to intervene; (c) that in the event of the Secretary of State deciding not to intervene, the Head of Development Management be authorised to grant permission subject to the completion of a formal agreement under Section 106 of the Town and Country Planning Act 1990 providing for off-site highway improvements, Scunthorpe town centre protection, protected species translocation and maintenance and a contribution towards improving the existing footpaths in the vicinity of the site, and to the conditions contained in the report, and (c) [sic] that if the obligation is not completed by 7 June 2012, the Head of Development Management be authorised to refuse the application on the grounds of the adverse impact upon the vitality and viability of Scunthorpe town centre, adverse impact upon highway safety and levels of congestion within the locality, adverse impact upon protected species and their habitat, and non-compliance with Policy EC16 of PPS 4, policies T2 and T6 of the North Lincolnshire Local Plan, and policies C14, C25 and CS17 of the North Lincolnshire Core Strategy."

(The voting being equal on the above matter, ... the chairman used his second and casting vote in favour of the motion).”

That resolution very much followed the wording of the officer’s formal recommendation at pages 63-4 of the Main Report.

11. The Secretary of State did not call-in the decision. A Section 106 agreement was completed, and full planning permission granted, on 26 March 2012.
12. It was a condition of the grant of planning permission (Condition 38) that the first tenant of the large unit should be a retail company within the Marks and Spencer plc group of companies (“Marks & Spencer”). Marks & Spencer had had a 949 sq m shop in High Street, Scunthorpe from 1931 to early 2011 when it closed, commercial non-viability being given as the reason for closure.
13. It is that grant of planning permission on 26 March 2012 that Zurich now challenges.

Legal Principles

14. This case hinges largely upon criticisms of the officer’s Main and Addendum Reports to the Council’s Planning Committee, seen in the light of national and local planning policy. The relevant legal principles relating to such reports and policy were agreed by the parties, and are uncontroversial.
15. Each local planning authority delegates its planning functions to a planning committee, which acts on the basis of information provided by case officers in the form of a report. Such a report usually also includes a recommendation as to how the application should be dealt with. With regard to such reports:
 - i) In the absence of contrary evidence, it is a reasonable inference that members of the planning committee follow the reasoning of the report, particularly where a recommendation is adopted.
 - ii) When challenged, such reports are not to be subjected to the same exegesis that might be appropriate for the interpretation of a statute: what is required is a fair reading of the report as a whole. Consequently:

“[A]n application for judicial review based on criticisms of the planning officer’s report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken” (Oxton Farms, Samuel Smiths Old Brewery (Tadcaster) v Selby District Council (18 April 1997) 1997 WL 1106106, per Judge LJ as he then was).
 - iii) In construing reports, it has to be borne in mind that they are addressed to a “knowledgeable readership”, including council members “who, by virtue of that membership, may be expected to have a substantial local and background knowledge” (R v Mendip District Council ex parte Fabre (2000) 80 P & CR

500, per Sullivan J as he then was). That background knowledge includes “a working knowledge of the statutory test” for determination of a planning application (Oxton Farms, per Pill LJ).

16. The principles relevant to the proper approach to national and local planning policy are equally uncontroversial:
- i) The interpretation of policy is a matter of law, not of planning judgment (Tesco Stores Ltd v Dundee City Council [2012] UKSC 13).
 - ii) National planning policy, and any relevant local plan or strategy, are material considerations; but local authorities need not follow such guidance or plan, if other material considerations outweigh them.
 - iii) Whereas what amounts to a material consideration is a matter of law, the weight to be given to such considerations is a question of planning judgment: the part any particular material consideration should play in the decision-making process, if any, is a matter entirely for the planning committee (Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759 at page 780 per Lord Hoffman).

The Relevant National and Local Guidance

17. At the relevant time, national planning policy was contained in Planning Policy Statement 4: Planning for Sustainable Economic Growth (“PPS4”), supplemented by Planning for Town Centres: Practice Guidance on Need, Impact and Sequential Approach (“the PPS4 Practice Guidance”), both published by the Secretary of State for Communities and Local Government. (For the sake of completeness, it should be said that PPS4 was replaced on 27 March 2012, i.e. the day after the relevant planning decision in this case. However, the National Planning Policy Framework, which replaced PPS4, has no relevance to this claim.)
18. PPS4 identifies the Government’s overreaching objective for a prosperous economy as “sustainable economic growth” (paragraph 9). To help achieve that, the Government’s more particular objectives for planning include building prosperous communities by improving the economic performance of towns, delivering more sustainable patterns of development, and promoting the vitality and viability of towns and other centres as important places for communities (including the focusing of new economic growth and development of main town centre uses in existing centres) (paragraph 10).
19. One policy to that end is the requirement for sequential assessment for planning applications for main town centre uses that are not in an existing centre and not in accordance with an up-to-date development plan (Policy EC14.3). Such sequential assessments must be performed in accordance with Policy EC15, which provides:
- “15.1 In considering sequential assessments required under Policy EC14.3, local planning authorities should:
- a. ensure that sites are assessed for their availability, suitability and viability.

- b. ensure that all in-centre options have been thoroughly assessed before less central sites are considered.
- c. ensure that where it has been demonstrated that there are no town centre sites to accommodate a proposed development, preference is given to edge of centre locations which are well connected to the centre by means of easy pedestrian access.
- d. ensure that in considering sites in or on the edge of existing centres, developers and operators have demonstrated flexibility in terms of:
 - i. scale: reducing floorspace of their development;
 - ii. format: more innovative site layouts and store configurations such as multi-storey developments with smaller footprints;
 - iii. car parking provisions; reduced or reconfigured car parking areas; and
 - iv. the scope for disaggregating specific parts of a retail or leisure development, including those which are part of a group of retail or leisure units, onto separate, sequentially preferable, sites. However, local planning authorities should not seek arbitrary sub-division of proposals.

15.2 In considering whether flexibility has been demonstrated under policy EC15.1.d above, local planning authorities should take into account any genuine difficulties which the applicant can demonstrate are likely to occur in operating the proposed business model from a sequentially preferable site, for example where a retailer would be limited to selling a significantly reduced range of products. However, evidence which claims that a class of goods proposed to be sold cannot be sold from the town centre should not be accepted.”

- 20. Policy EC16.1 requires planning applications for main town centre uses that are not in a centre and not in accordance with an up-to-date development plan to be assessed against a number of identified impacts on centres, including “the impact of the proposal on town centre vitality and viability...” (Policy 16.1.b). Policy EC10.2 requires such applications also to be assessed against a number of other considerations, including the impact on economic and physical regeneration (Policy EC10.2.d) and the impact on local employment (Policy EC 10.2.e).
- 21. Policy EC17 is of particular importance in this claim. It provides as follows:
 - “EC17.1 Planning applications for main town centre uses that are not in an existing centre and not in accordance with an up to

date development plan should be refused planning permission where:

- a. the applicant has not demonstrated compliance with the requirements of the sequential approach (policy EC15); or
- b. there is clear evidence that the proposal is likely to lead to significant adverse impacts in terms of any one of impacts set out in policies EC10.2 and 16.1 (the impact assessment), taking account of the likely cumulative effect of recent permissions, developments under construction and completed developments.

EC17.2 Where no significant adverse impacts have been identified under policies EC10.2 and 16.1, planning applications should be determined by taking account of:

- a. the positive and negative impacts of the proposal in terms of policies EC10.2 and 16.1 and any other material considerations; and
- b. the likely cumulative effect of recent permissions, developments under construction and completed developments.

EC17.3 Judgments about the extent and significance of any impacts should be informed by the development plan (where this is up to date). Recent local assessments of the health of town centres which take account of the vitality and viability indicators in Annex D of this policy statement and any other published local information (such as a town centre or retail strategy), will also be relevant.”

22. The effect of Policy EC17, and the requirements it places on a local authority applying it, are clear – and again uncontentious as between the parties to this claim.
- i) Where a planning application is for development of main town centre uses not in a centre and not in accordance with an up-to-date development plan, then it is for the applicant to demonstrate compliance with the requirements of the sequential approach (confirmed in paragraph 5.6 of the PPS4 Practice Guidance).
 - ii) The question as to whether the applicant has demonstrated compliance is logically binary, i.e. it is capable of only one of two answers, “yes” or “no”. Compliance has either been demonstrated, or it has not.
 - iii) If it has been demonstrated, and no significant adverse impacts have been identified under Policies EC10.2 or 16.1, then the application is determined by the planning committee performing a balancing exercise, taking account of the positive and negative impacts of the proposal in terms of those two policies and any other material considerations. That balancing exercise takes place within the four corners of the policy: the policy requires it to be performed.

- iv) If it has not been demonstrated, or if it has been demonstrated but there is clear evidence that the proposal is likely to lead to significant adverse impacts set out in Policies EC10.2 and 16.1, then the policy is that the application should be refused. However, that national policy (of refusing an application in these circumstances) is capable of being displaced if the planning committee considers that it is outweighed by other material considerations. That too requires the committee to perform a balancing exercise, but this exercise is performed outside the four corners of the policy: it is required because of the *nature* of the policy, not because of its *terms*. However, one negative factor that must be taken into account in this exercise is of course the fact that it is the national policy to refuse an application in these circumstances.
23. That is the relevant national policy. Turning to local policy, the development plan for North Lincolnshire comprises three elements:
- i) The Yorkshire and Humber Plan (Regional Spatial Strategy to 2026): The Localism Act 2011 enables the revocation of regional policies, but that has not been fully implemented yet. Policy YH4 identifies Scunthorpe as a sub-regional town which should be the prime focus for facilities (including retail shopping) in the region.
- ii) Those parts of the North Lincolnshire Local Plan that were saved by a direction of the Secretary of State dated 17 September 2007: Policy S8 (Out-of-centre Retail and Leisure Development) reflects the national sequential approach, by only permitting out-of-centre retail development where (amongst other things):
- a clear need for the development can be demonstrated;
 - a developer can demonstrate that there are no sites for the proposed use within or at the edge of the town centre that are suitable, viable for the proposed use and likely to be available within a reasonable time period; and
 - the proposal will have no adverse impact on the vitality and viability of existing district centres and the rural economy;
- iii) The Council's Core Strategy, adopted in June 2011 as part of the North Lincolnshire's local development framework, which sets out the spatial planning framework to 2026.
24. Mr Tucker particularly relied upon the Core Strategy. It stresses (paragraphs 10.7 and 10.9):
- “The improvement of Scunthorpe town centre is priority for both the Sustainable Community Strategy and the [Local Development Framework]....
- As part of the Scunthorpe Urban Renaissance Programme the town centre will be subject to considerable change and

redevelopment that reinforces its role as North Lincolnshire's main centre as well as enhancing its role regionally.”

25. Policy CS14.1 states:

“To fulfil its sub-regional role, identified in the [Regional Spatial Strategy], Scunthorpe town centre will be main location for all new retail, leisure, cultural and office development.... New development should make a positive contribution to improving the town centre's viability and vitality, support the creation of a comfortable, safe, attractive and accessible shopping environment, and improve the overall mix of land uses in the centre and its connectivity to adjoining areas.”

26. Directly reflecting PPS4 and the sequential approach required by that national policy, paragraph 10.25 provides:

“New retail development is an important part of the continued growth in North Lincolnshire. In particular it will have an important role to play in helping to regenerate Scunthorpe town centre. In choosing the location of new retail development, it should be done in line with the sequential test as set out in PPS4, which is as follows:

- Existing centres, where the development is appropriate in relation to the role and function of the centre, then
- Edge of centre locations, which are well-connected to the existing centre and where the development is appropriate to the role and function of the centre, and then
- Out of centre sites that are well serviced by a choice of means of transport.”

Application of the Policies to this Application

27. In respect of Simons' August 2011 application, the planning committee had the benefit of advice from two consultants in retail development, HOW Planning LLP (“HOW”, instructed by Simons) and England & Lyle (instructed by the Council itself).
28. HOW and England & Lyle agreed that the proposed development would not have any significant adverse impact on Scunthorpe town centre, the predicted diversion of trade being no more than 5.5% (see Main Report, at page 59).
29. On the other hand, there was evidence that the development would bring significant economic benefits to the area, with estimates of a claw back of retail trade of £20m, and the creation of approximately 300 part-time and full time jobs (Main Report, page 49). The evidence of the Council's Head of Economic Development and Area Renaissance included the following (Main Report, page 62):

“Whilst we recognise that there may be some negative impact on the town centre of the development, the employment growth, increased local disposable income and stemming the leakage of retail spend outside of North Lincolnshire will result in a net positive impact on Scunthorpe and North Lincolnshire.

It is recognised that female unemployment is currently rising faster than male unemployment in North Lincolnshire. The additional new jobs created, due to their part-time nature, will provide needed employment opportunities particularly for female unemployed.

A global, well-respected firm such as [Marks & Spencer] will provide Scunthorpe with a positive marketing opportunity and may help raising the profile and aspiration of not only Scunthorpe as a town but of North Lincolnshire as a whole.”

30. With regard to the sequential test, HOW concluded that there were no sequentially preferable sites within or on the edge of Scunthorpe. However, England & Lyle examined the potential for the proposed Marks & Spencer store to be split into (i) a non-food (clothes and household goods) store which might be accommodated in a 3,884 sq m unit in Cole Street in the town centre, previously occupied by T J Hughes, and (ii) a food-only store which might be accommodated in the unit in the High Street formerly occupied by Marks & Spencer. The advisers considered that, if the T J Hughes unit was to be discounted, then “there needs to be a clearer justification as to why it is not suitable for use by Marks & Spencer” (paragraph 8.8 of November 2011 Report). Furthermore, if the proposed Marks & Spencer retail operation could be accommodated thus, “the sequential assessment does not adequately assess whether the floorspace of the other retail units could be located on separate sequentially preferable sites to comply with Policy EC15” (paragraph 8.14).
31. HOW responded that Marks & Spencer did not have a business model of stores limited to clothes and household goods, and they considered that they needed a store offering a full range of their goods to make it commercially viable.
32. England & Lyle were still cautious. In their response to HOW’s further comments, they said:

“There may be advantages in creating a critical mass of retail development on the application site but these advantages should be treated as positive benefits of the scheme, not part of the sequential approach. Policy EC17 justifies refusal of planning permission where an applicant has not demonstrated compliance with the requirements of the sequential approach. In this instance we suggest that it is better for the Council to make its own judgement about whether sequentially preferable sites are available, suitable and viable for retail development – including the former T J Hughes unit, West Street car park, land surrounding Church Square, Winterton Road, Glebe Pit and Brigg Road. We would simply comment that, regarding the former T J Hughes unit, the argument seems to be that it

would not be viable for Marks & Spencer to operate a store selling clothing and homewares, and have a separate Simply Food store. But the qualitative need that has been claimed is for an improved retail offer in clothes shopping. It may be viable for Marks & Spencer to operate a store selling clothes and food in the T J Hughes unit, which is significantly larger than the former [Marks & Spencer] store in the High Street. The Council needs to be satisfied that the business model proposed by Marks & Spencer is the most appropriate one for Scunthorpe, such that it justifies an out-of-centre location.”

33. In fact, by that stage, of the possible alternatives mentioned, the T J Hughes unit was the only available site in the town centre, the issue consequently focusing on whether that site was suitable and viable.
34. It was the view of Marks & Spencer, shared by the applicant Simons, that splitting their proposed operation between the T J Hughes unit and other premises was not commercially viable. The Main Report of the officer accepted that justification for not splitting the Marks & Spencer operation, but it did not accept that the smaller units could not be disaggregated, in the following terms:

“The applicants have stated that the closure of [Marks & Spencers’] in-centre operation in 2010 on viability grounds, which was a more typical clothing and food offer, demonstrates that this is a challenging catchment for the retailer from a commercial perspective. This position has led [Marks & Spencer] to establish that ‘to create a commercially viable store within the catchment area, a clothing, homeware, food and hospitality offer needs to be provided under one roof in order to give shoppers a comprehensive brand offer and critical mass of retailing that would make them want to return, and therefore seeks to ensure that the store remains commercially viable’. Furthermore, whilst [Marks & Spencer] do trade from convenience goods focused Simply Food units, they do not have a business model comprising solely clothing and homeware goods. This additional justification provided by the applicants does explain how the viability of the [Marks & Spencer] business model is an important consideration, and justifies why neither the T J Hughes site or the Southgate units are suitable given that the clothing and food offer at the [Marks & Spencer] town centre site failed to be viable.” (page 55).

“In summary, the applicants have adequately justified the sequential approach taken by assessing sites within and on the edge of Scunthorpe town centre for their availability, suitability and viability. On the issue of disaggregation, whilst the applicants have provided a justification why the [Marks & Spencer] (unit 1) cannot be disaggregated, they have not demonstrated flexibility in terms of disaggregating the smaller units of the proposal (units 2, 3 and 4) onto separate, sequentially preferable sites. For this reason it is felt that the

sequential test has not been passed and therefore fails to comply with all the requirements of policy EC15 of PPS4.” (page 57)

35. It is common ground between the parties that Simons, as the applicant, failed to demonstrate compliance with the requirements of the sequential approach in Policy EC15, for the reasons given in that report, i.e. that it had failed to demonstrate the flexibility required by Policy EC15.1.d.iv, in that it had not demonstrated that the three smaller units could not be disaggregated into separate, sequentially preferable sites.

The Grounds of Challenge

36. Zurich, through Mr Tucker, relied upon six grounds of challenge.
37. I can deal with two grounds very shortly, because Mr Tucker properly conceded that, in this court, they are bound to fail by dint of authority binding on me. They were Grounds 5 and 6 in the Statement of Facts and Grounds, namely:
- i) Ground 5: The Highways Contribution Planning Obligation: The Section 106 agreement included an obligation to pay the sum of £300,000 for capacity road improvements. It was submitted that the committee erred because they were not advised that they could only take this proposed obligation into account if it was justified by Regulation 122(2) of Community Infrastructure Levy Regulations 2010 (SI 2010 No 949). However, Mr Tucker accepted that, on the current state of the law and in particular Derwent Holdings v Trafford Metropolitan Borough Council [2011] EWCA Civ 832, even if he were to persuade me that that was so, that would not be a basis upon which the planning permission challenged could be quashed.
 - ii) Ground 6: Legal Error in the Screening Opinion: It was submitted that the screening opinion dated 22 July 2011 (referred to in paragraph 7 above) was unlawful, as it relied upon future documentation which did not exist at the time of the opinion. However, it was not suggested that there was any evidence that, if the opinion had been prepared in accordance with the correct procedure, the resulting decision in relation to the planning permission would have been any different. Consequently, Mr Tucker conceded that, as the challenge advanced was based upon a procedural not substantive defect, following R (Berky) v Newport City Council [2012] EWCA Civ 378, that basis of challenge would be bound to fail in this court.
38. In those circumstances, whilst preserving the Claimant’s position, Mr Tucker did not actively pursue either ground. I formally dismiss them.
39. Mr Tucker did actively rely on four other grounds, which I will deal with in turn.

Ground 1: Misapplication of Policy EC17

40. As I have indicated (paragraph 22(ii) above), the question as to whether an applicant has demonstrated compliance with the requirements of the sequential approach is capable of only one of two answers, “yes” or “no”. If it has not demonstrated

compliance, then there is a presumption raised by Policy EC17 that the application will be refused. In this case it is common ground that Simons failed to demonstrate compliance with the requirements of the sequential approach in the manner I have described (paragraphs 34-5 above).

41. However, Mr Tucker submitted that the planning committee were led into error by the officer's Main Report which, at page 62, said:

“PPS4 is clear in its advice that local planning authorities must consider both the sequential approach and impacts upon retail centres when determining out-of-centre retail development proposals. The applicants have followed the sequential approach and assessed whether sites are suitable, viable or available but have not displayed flexibility by looking at the issue of disaggregation, particularly with regard to the smaller units (units 2, 3 and 4). Consequently policy EC15 of PPS4 is not fully complied with.”

42. That reference to the policy not being “fully” complied with is repeated in the Addendum Report, at page 1, which says in response to the further letters of objection:

“In response, it should be noted that it is accepted that the retail proposal at [the Site] does not fully comply with the sequential approach...”

That report goes on to say, at page 3, that:

“In this case, it is felt that the economic benefits of the development are material considerations which outweigh the development plan and any non-compliance with the sequential test under the provisions of PPS4”.

43. Mr Tucker submitted that those passages displayed a fundamental misunderstanding and misapplication of Policy EC17 – because the policy does not admit of partially meeting of the sequential test. The committee, instead of being told in unequivocal terms that where there was (any) failure to meet the sequential test the national policy directed refusal of the application, were led to believe that the partial breach of the test should merely be weighed against the positive material considerations, notably the economic benefits of the development. That was a legal error with regard to the proper approach to Policy EC17, as a result of which the planning permission should be quashed.
44. Forcefully as that submission was made, I do not find it compelling. The passages relied upon must be seen in their full context: I am not persuaded that the Main and Addendum Reports, when viewed fairly as a whole, do betray any misunderstanding or misapplication of Policy EC15.
45. The Main Report shows the following.

- i) Mr Tucker accepted – as he had to do – that the relevant PPS4 national policies are comprehensively and accurately set out on pages 21 and following of the Main Report. On page 24, Policy EC17.1 is accurately set out, thus:

“Planning applications for main town centre uses that are not in an existing centre and not in accordance with an up-to-date development plan should be refused planning permission where... the applicant has not demonstrated compliance with the requirements of the sequential approach (Policy EC15)...”.

That is repeated on page 51.

- ii) Policy EC15 is set out in full on page 54; and that test is immediately applied to the circumstances of this case on pages 55-7. The conclusion of the report on that issue, set out in the passage quoted above (paragraph 34) was that “the sequential test has not been passed...”. That conclusion is clear and unequivocal.
- iii) However, that is not the end of the planning committee’s exercise; because, having found that the applicant had not satisfied the sequential test (thereby giving rise to a national policy presumption of refusal), the committee still had to decide whether there are any other material considerations which displace that presumption. The report proceeds, properly, to consider the other material considerations, both positive and negative: the impact of the development on Scunthorpe town centre and other retail centres within the catchment area (pages 57-9), highway issues (pages 59-61), residential amenity (pages 61-2), economic considerations (page 62) and ecology (page 62).
- iv) There is then a section headed “Balance of Considerations”, which includes the first quoted passage upon which Mr Tucker relies. That needs to be placed in its particular context: it forms part of the following passage:

“Under the provisions of Section 70(2) of the Town & Country Planning Act 1990 local planning authorities are required, when determining applications, to have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations. Government guidance and the contents of Planning Policy Statements are material considerations but local planning authorities need not follow Government guidance if other material considerations outweigh this.

PPS4 is clear in its advice that local planning authorities must consider both the sequential approach and impacts upon retail centres when determining out-of-centre retail development proposals. The applicants have followed the sequential approach and assessed whether sites are suitable, viable or available but have not displayed flexibility by looking at the issue of disaggregation,

particularly with regard to the smaller units (units 2, 3 and 4). Consequently policy EC15 of PPS4 is not fully complied with.

Under policy EC17.1a of PPS4 planning applications that fail to demonstrate compliance with the sequential approach (policy EC15) should be refused.” (emphasis added).

- v) The report then proceeds to consider the other material considerations to which it has already referred, of which it considers that the economic benefits of the development should be attributed particular weight in a period of serious economic downturn:

“The attraction that a [Marks & Spencer] store and other retailers would have in potentially stimulating the local economy is a key driver in reducing the leakage of expenditure to neighbouring centres such as Doncaster and Meadowhall”

The other particular factor which is identified is “the fall back position of the existing use of the site, which enables 4,500 sq m gross of retailing from the site”. I return to this factor below (paragraphs 65 and following below: see especially paragraph 68).

- vi) There is then consideration of how the adverse impact on the town centre, albeit not significant, might be diminished by a Section 106 obligation (again referred to below: paragraphs 79 and following below: see especially paragraph 84).
- vii) The final conclusion (and the report’s recommendation) was:

“It is considered that the positive benefits outweigh the negative and what negative impacts have been identified have been mitigated to an acceptable degree. Consequently the recommendation is one of approval subject to the conditions and the completion of a Section 106 agreement”.

46. It may be that a Parliamentary or other legal draftsman might have drafted some of those passages differently – but, in my judgment, it is clear what is going on here. The applicant having failed to persuade the officer that the sequential test is passed, the officer performs the exercise which he must perform to see whether the presumption of refusal mandated by PPS4 is outweighed by other material considerations (see paragraph 22(iv) above). With respect to Mr Tucker’s submission, it is evident that, as part of that exercise, the national policy directing refusal in these circumstances is clearly taken into account, expressly, in the italicised passage set out in paragraph 45(iv) above. I agree with Mr Katkowski’s submission: *at this stage*, when the positive and negative factors are being balanced to determine whether the presumption is displaced, the extent and consequences of the breach of the sequential provisions may be relevant. That is so because, as well as the breach of

those provisions raising a presumption of refusal, the extent of the breach may be relevant to the question whether the presumption so raised is overcome in the circumstances of the particular case. The scope of the breach in this case comprised the failure on Simons' part to demonstrate that the three smaller units could not be disaggregated into separate, sequentially preferable sites (see paragraph 35 above).

47. The officer considered that the presumption of refusal was displaced in this case by, at least primarily, the economic benefits that this development would bring to the area (briefly described in paragraph 29 above). That was a conclusion based on planning judgment to which the officer was entitled to come, and which the planning committee were entitled to follow.
48. I do not consider that the Addendum Report takes matters any further. The references, early in the report, to the proposal not "fully" complying with the sequential approach and the economic benefits of the scheme outweighing "the non-compliance with this part of PPS4" appear to me to be no more than a reference back to the wording of the main report, rather than a new decision. Mr Tucker relied upon the words "with this part of PPS4" which, he submitted, showed that the officer had improperly suggested that there could be partial compliance with the sequential approach; but, as I have described, the officer had, by this stage, moved on. He had previously unequivocally indicated that the national policy sequential approach had been breached, and was now considering whether other material considerations outweighed the policy directive to refuse the application. In that exercise, it was appropriate for him to consider the nature and scope of the breach of that policy.
49. The report then goes on to list the material factors once again, before concluding that:

"In this case it is felt that the economic benefits of the development are material considerations which outweigh the development plan and any non-compliance with the sequential test under the provisions of PPS4."
50. The final conclusion of the Addendum Report, much in the terms of the conclusion to that in the Main Report, is set out in the penultimate paragraph. Taken as a whole, the Addendum Report says, in substance, that the fresh representations do not change the picture: the officer makes the same conclusion on the same grounds as he does in the Main Report.
51. In my judgment, the committee was not tempted into any forbidden line of thinking, on the basis that there had been a partial compliance with the sequential approach. I appreciate that, contrary to that which was urged by Judge LJ in Oxton Farm (see paragraph 15(ii) above), I have responded to Mr Tucker's submissions on Ground 1, which were based upon a somewhat detailed textual analysis, in kind. In this case, the officer's reports are robust enough to bear that analysis. In any event, in relation to this ground, Mr Tucker has failed by some distance to persuade me that the overall effect of the report was significantly to mislead the planning committee about material matters. In my judgment, the approach of the officer, followed by the committee, was correct, and lawful.
52. For those reasons, I do not find that the first ground is made good.

Ground 2: Misapplication of the Sequential Test

53. In applying the sequential test, an applicant must demonstrate that it has applied an appropriate degree of flexibility including, by virtue of Policy 15.1.d.iv, the disaggregation of specific parts of the proposal into separate, sequentially preferable sites. The PPS4 Practice Guidance states (at paragraph 6.33):

“While there is no policy requirement to demonstrate need, an operator claiming that it is unable to be flexible about its chosen ‘business model’ would be expected to demonstrate why a smaller store or stores could not meet a similar need.”

As indicated in this passage, the burden of demonstrating this falls on the applicant.

54. In this case, submitted Mr Tucker, Marks & Spencer merely asserted that to disaggregate their proposed operation into a non-food store (which could be accommodated in the T J Hughes unit) and a food-only store (which could be accommodated separately elsewhere, for example in the old Marks & Spencer High Street unit) was not viable. There was no evidence upon which the officer or committee could have been satisfied, as they purported to be, that the applicant had demonstrated flexibility in accordance with the terms of Policy 15.1.d.iv.
55. Mr Fraser submitted that this ground adds nothing of substance to Ground 1; because, in relation to that ground, it is uncontentious that Simons failed to demonstrate the flexibility required by Policy EC15.1.d.iv, in that it had not demonstrated that the three smaller units could not be disaggregated into separate, sequentially preferable sites. There is therefore a breach of the sequential approach, in any event. It would add nothing of substance if there were a second breach of that same requirement, in relation to the disaggregation of the proposed Marks & Spencer operation.
56. There is obvious force in that submission with regard to the policy-internal question of whether there is a breach of the sequential approach, which triggers the policy directive to refuse the application; because that is a binary question. However, whether there is a further breach may be relevant to the balancing exercise required thereafter, in which the question of whether other material considerations outweigh the policy presumption of refusal. In that exercise, for the reasons I have given (see paragraph 46 above), the scope of the breach or breaches might be relevant. I therefore need to consider the merits of this ground.
57. However, I am unpersuaded by those merits, for the following reasons.
58. I have recited the relevant background (see paragraphs 33 and following above). The Main Report (at page 55) makes clear that the only available Scunthorpe town centre opportunity for Marks & Spencer was the T J Hughes unit. In terms of the whole of its proposed operation at the Site, that unit was discounted by Marks & Spencer on account of its size, its total floorspace being 3,884 sq m as opposed to the 4,645 sq m proposed in the development at the Site. The T J Hughes unit could only possibly be appropriate by “disaggregation”, i.e. splitting the non-food part of the proposed store from the food part and house them in separate premises. However, in sequential assessments, Policy EC15.1.a requires planning authorities to ensure that sites are assessed for, not only availability, but also viability and suitability. Marks & Spencer

considered such a proposal for split premises neither suitable for their commercial requirements or business model, nor commercially viable. Its position was that this was a commercially challenging catchment for retailers – evidenced by their commercial failure in early 2011 at the (admittedly small) High Street store – and to create a commercially viable store a full range of goods needed to be provided under one roof with a critical mass of retailing.

59. It was that evidence of non-viability that the officer accepted as an explanation as to why Marks & Spencer did not consider a split site in the town centre was feasible. Further, at the planning committee meeting on 7 March 2012, a representative from Marks & Spencer gave evidence that:

“... the company’s position remained unchanged. It would only develop sites that it considered commercially viable and there were no such sites in Scunthorpe town centre”.

60. In my judgment, it is simply incorrect to say that there was no evidence before the officer and committee that (i) the T J Hughes unit was too small to create an economically viable Marks & Spencer food and non-food store, or (ii) it was not economically viable to split the operation into two parts, one of which might be housed in the T J Hughes unit. The evidence was that Marks & Spencer had considered the T J Hughes unit, and in their opinion they could not use that unit (or, indeed, any unit in Scunthorpe town centre) for an economically viable operation. For that reason, they had no interest in any available site other than the Site, as the representative at the hearing made clear. That was evidence that the committee could properly take into account. It is unrealistic to expect a commercial operator to reveal its precise commercially sensitive and valuable calculations as to why it considers possible alternatives to the development proposal not to be commercially viable; and it is unnecessary for them to do so to enable a planning authority to come to a view on viability.

61. It is also important to mark that developers, and planning authorities, work in the real world. Marks & Spencer had assessed the only available town centre alternative to the Site, and had concluded that a development that was smaller than that proposed, or one with a more restricted range of goods, was neither commercially viable nor suitable for their commercial requirements. On the basis of that assessment, emphasised by their representative who spoke at the planning committee hearing, the officer and committee knew that, if this planning permission was refused, then Marks & Spencer would not locate into Scunthorpe town centre. As Lord Reed said in Tesco v Dundee, at [29]:

“Provided the applicant has [given consideration to the scope for accommodating the development in a different form and to have thoroughly assessed sequentially preferable locations]... the question remains... whether an alternative site is suitable for the proposed development, not whether the proposed development can be altered or reduced so that it can be made to fit an alternative site”:

to which Lord Hope perceptively added, at [38]:

“[T]he context indicates that the issue of suitability is directed to the developer’s proposals, not some alternative scheme which might be suggested by the planning authority. I do not think that this is in the least surprising, as developments of this kind are generated by the developer’s assessment of the market that he seeks to serve. If they do not meet the sequential approach criteria, bearing in mind the need for flexibility and realism to which Lord Reed refers..., they will be rejected. But these criteria are designed for use in the real world in which developers wish to operate, not some artificial world in which they have no interest doing so.”

62. Working in the real world, the committee were entitled (and, indeed, bound) to take into account the evidence that any arrangement in which Marks & Spencer used the T J Hughes unit (the only available unit in Scunthorpe town centre) would not be commercially viable, and that, because of that lack of viability, Marks & Spencer would not locate to Scunthorpe town centre in the event that this application for the Site was refused. On the basis of that evidence, in the committee’s view, the applicant had demonstrated flexibility in terms of the sequential approach so far as the possible disaggregation of the Marks & Spencer operation was concerned. They were entitled to come to that conclusion on that evidence.
63. For those reasons, I am quite satisfied that there was evidence upon which the committee could be satisfied (as, in the event, they were) that Simons had demonstrated flexibility in accordance with the terms of Policy 15.1.d.iv so far as the disaggregation of the Marks & Spencer operation is concerned.
64. This ground therefore fails.

Ground 3: Fall Back as an Immaterial Consideration

65. Mr Tucker submitted that, because such a comparison may be a material consideration, a planning committee should compare the development for which planning permission is sought on the one hand, with what the applicants could do with the land and premises on the basis of the planning position as it stands without that planning permission (“the fall back position”). However, such a comparison is only proper if there is a realistic possibility of the fall back position happening. Those propositions, which I accept, derive from Snowden v Secretary of State for the Environment [1980] JPL 749.
66. In this case, the fall back position used stems from Section 4 of the England & Lyle Report of November 2011. The report, after referring to the fact that the garden centre “trades freely as open Class A1 retail floorspace...” (paragraph 4.1) and reciting the Secretary of State’s decision letter in 1990 (quoted at paragraph 6(iii) above), says:

“Our interpretation of the planning status of the existing garden centre is that there is an established open A1 retail use of the existing building which has a floorspace of 4,500 sq m gross. The planning consent is subject to conditions on the range of goods allowed to be sold. The consent represents a fall back

position that is relevant to the current application. A retail development with a total floorspace of up to 4,500 sq m gross could be developed on the site. This could apply to either the Marks & Spencer store or the other retail units.”

67. That is reflected in the officer’s Main Report, at page 50:

“... The planning status of the existing garden centre is that there is an established A1 retail use of the existing building which has a floorspace of 4,500 square metres gross. The planning permission is subject to conditions on the range of goods allowed to be sold. Whilst the goods sold at the Trent Valley Garden Centre do not now conform with the list or the condition, and the range of goods sold for a number of years is much wider than the condition allows, the permission does represent a fall back position that is current to the relevant planning application in that a retail development with a total floorspace of up to 4,500 square metres gross could be developed on the site.”

68. That is the fall back position that appears to be taken into account as a material consideration on page 63 of the Main Report:

“Other material considerations to be attributed weight include: the economic benefits that the scheme would have during this serious economic downturn; additionally, *the fall back position of the existing use of the site , which enables 4,500 square metres gross of retailing from the site...*” (emphasis added).

69. Mr Tucker submitted that the way in which the fall back position was taken into account erred in law, in two respects.
70. First, he submitted that the officer and committee were wrong to take into account the fall back position, of any form of open Class A1 retailing use, in the absence of a lawful development certificate issued under Section 191 of the Town and Country Planning Act 1990. That provision enables an application to be made to the relevant local planning authority for a certificate of lawfulness of existing use or development, to ascertain “whether any existing use of buildings or land is lawful” (section 191(1)(a)). Mr Tucker submitted that, without such a certificate, the comparison cannot in law amount to a material consideration.
71. I do not accept that proposition. Before the committee, there was significant evidence that the Site had had open Class A1 use of the Site for many years: there was, for example, the evidence of the Secretary of State’s decision letter of 9 August 1990 (see paragraph 6(iii) above) and the opinion of the Council’s own planning advisers that there was established open A1 retail use of the existing 4,500 sq m building on the Site (see paragraph 66 above). It was open to the committee to take into account that evidence, and give it the weight that they considered appropriate.

72. The second error was, contended Mr Tucker, that the committee were not advised that they could only take the fall back position into account if it were a realistic possibility that the fall back scenario would happen.
73. Mr Fraser and Mr Katkowski submitted that the “fall back position” here was not a true fall back position at all, because the comparator used was not something that might happen to use of the land in the future but rather the use to which it is currently being put as a garden centre enterprise. I do not accept that submission. It is clear from the passages I have quoted above (paragraph 66) from both the officer’s Main Report (“... a retail development with a total floorspace of up to 4,500 square metres gross *could be developed* on the site” (emphasis added)), and the planning adviser’s report from which it was derived (“A retail development with a total floorspace of up to 4,500 sq m gross *could be developed* on the site” (again, emphasis added)), that the comparator was not simply the garden centre continuing to sell a wide range of goods, but the Site being prospectively “developed” with a total retail floorspace of up to 4,500 sq m gross (i.e. with a development of similar size and planning use to the current garden centre). Unlike the adviser’s report, the officer’s report does not suggest that that prospective development would be restricted to a Marks & Spencer store, or three smaller retail units, as proposed in the development of the Site with which this permission is concerned. But it is clear from the language used, that the Main Report was looking at the prospect of the land being developed with such a retail development, even if this application were not granted.
74. Curiously, the Addendum Report is in slightly different terms from page 63 of the Main Report, referring to “the fall back position of the existing use of the site, which enables 4,500 square metres gross of retailing *in the garden centre building*” rather than “... *from the site...*”, which is more suggestive of another retailer trading from the existing building on the Site rather than a redevelopment. Nevertheless, in the Claimant’s favour, I accept that the reports together suggest a comparator involving a redevelopment.
75. However, I remain unpersuaded by Mr Tucker’s ground of challenge. The prospect of the fall back position does not have to be probable or even have a high chance of occurring; it has to be only more than a merely theoretical prospect. Where the possibility of the fall back position happening is “very slight indeed”, or merely “an outside chance”, that is sufficient to make the position a material consideration (see Samuel Smith Old Brewery (Tadcaster) v Secretary of State for Communities and Local Government [2009] EWCA Civ 333 at [20]-[21] per Sullivan LJ). Weight is, then, a matter for the planning committee.
76. In this case, the report did not address the gamut of possibilities for use of the Site if this application were not granted. However, in addition to the possibility that the garden centre would continue to use the Site for 4,500 sq m of open Class A1 retail use, it was obviously a possibility that they would use the existing use to redevelop the Site for a building of similar size with a similar use for some retailer. The officer’s Main Report suggested no more than that. It did not suggest the prospect that Marks & Spencer would use the existing buildings or limited redevelopment of the site to trade.
77. In any event, although Mr Tucker submitted that the planning decision was a close thing – the chair used his casting vote (see paragraph 10 above) – it is clear from the

Addendum Report that the material considerations which in practice outweighed the negative material considerations (including the development plan and non-compliance with the sequential approach) were, perhaps understandably, the economic benefits that the scheme would bring (see paragraph 3 of the Addendum Report, which states that in terms).

78. In all the circumstances, I am not persuaded that, in relation to this ground, the officer's report significantly misled the committee about material matters.
79. Consequently, this ground fails.

Ground 4: The Proposed Restriction on Letting

80. Mr Tucker submitted that the Section 106 obligation with regard to protection of the town centre – by imposing the restriction on tenants of town centre retail premises taking lettings in the new development that it did impose – did not reflect the degree of protection required by the resolution on the planning committee.
81. That resolution (set out at paragraph 10 above), on this point, was brief. The committee resolved to grant permission, authorising the Head of Development Planning to grant permission subject to the completion of a Section 106 agreement

“... for off-site highway improvements, *Scunthorpe town centre protection*, protected species translocation and maintenance and a contribution towards improving the existing footpaths in the vicinity of the site, and to the conditions contained in the report...” (emphasis added).
82. If the obligation was not completed within three months, the Head of Development Management was authorised to:

“... refuse the planning application on *the grounds of the adverse impact upon the vitality and viability of Scunthorpe town centre*, adverse impact upon highway safety and levels of congestion within the locality, adverse impact upon protected species and their habitat, and non-compliance with Policy EC16 of PPS 4, policies T2 and T6 of the North Lincolnshire Local Plan, and policies C14, C25 and CS17 of the North Lincolnshire Core Strategy.” (emphasis again added).
83. Mr Tucker submitted that the sanction for non-completion of the agreement showed the great seriousness with which the committee viewed the obligation for the protection of the town centre that was to be contained in it, described by Mr Tucker as the matter which tipped the balance for the grant of permission; but I do not find any great force in that submission. The Section 106 obligations were of course an important part of the planning consent; but the obligations were many and various, and I do not consider that the resolution suggests that the proposed agreement concerning protection of the town centre was any more balance-tipping than, say, the obligation to pay the Council a sum within 14 days in respect of vole translocation (which appears as paragraph 4.2.5 of the Section 106 agreement). The draconian

sanction of non-compliance after three months was, in the usual way, to ensure swift compliance and prompt commencement of the development.

84. Mr Tucker relied upon the history of how this provision arose. As I have indicated, both HOW and England & Lyle were agreed that the proposed development would not have a significant adverse impact on Scunthorpe town centre (see paragraph 28 above). However, England & Lyle's advice to the Council was nevertheless to consider conditions that would protect the town centre from any adverse impact that the development might entail. They raised the possibility of the smaller units being restricted by a bulky goods condition or, if the committee considered that unnecessary, conditions "on the maximum size of units, the prevention of subdivision and on the amount of convenience goods floorspace allowed in the scheme" (see Addendum Report, page 3).
85. However, the officer's Main Report addressed the issue in a different way (page 63):

"England & Lyle considered if a bulky goods condition would be a way of protecting Scunthorpe's town centre, however the applicants have stated that such a condition would make the development unviable. The developer proposes to enter into an agreement under section 106... which, amongst other things, will give greater certainty to [the Council] that Scunthorpe's town centre would not have its vitality or viability reduced by the proposed development to a degree that would cause harm. A list of over 30 town centre retailers has been compiled and are referred to as regulated tenants with the Section 106 agreement. The developer has agreed that only one regulated tenant will be able to occupy any of the smaller units (2, 3 or 4) for the first five years of the development opening and that retailer must retain a town centre presence for the first five years of the development opening. Whilst it is accepted that there will be some impact upon the town centre, the legal agreement carries significant weight in minimising the less than significant impact that is predicted."

86. The officer's recommendation was therefore that the Council enter into a Section 106 obligation with the owner/developer that prohibited the occupiers of town centre shops from letting any of the development units – which would, of course, be very substantial comfort in respect of the vitality and viability of the town centre – subject to just one exception, namely that one of those town centre unit owners could also occupy a development unit, provided that that retailer also maintained a town centre presence for the first five years. All of that was to be done through the Section 106 agreement between owners/developers and the Council.
87. In the event, that agreement contained the following covenant by the owner/developer (paragraph 4.1):

"... not to let a Unit to a Regulated Tenant during the Regulated Period SAVE THAT in the case of one Unit only there shall be permitted one first letting to a Regulated Tenant where such tenant shall prior to the date of his Occupation

covenant with the Owner and/or Developer (as the case may be) that it will Maintain Representation in the Town Centre for a continuous period of five years commencing from the date of his Occupation.”:

“Regulated Tenant” is defined in terms of a list of 32 town centre traders. “Regulated Period” is “a period of five years commencing on the date when the first Unit opens to the public for trade” (paragraph 3).

88. Mr Tucker’s submission was succinct. The resolution of the committee was made on the basis that only one town trader would be allowed to let one of the smaller units in the development (Condition 38 required Marks & Spencer, who were not in the town centre, to let the large unit: see paragraph 12 above), on the basis that that tenant would also be required to maintain its presence in the town centre for five years; but the Section 106 agreement did not give the Council the ability to enforce that restriction. The Council could only require there to be a covenant between the owner/developer and the relevant tenant. It could not enforce that covenant against the tenant - only the owner/developer could do so. The planning consent was therefore granted without the requisite protection required by the committee having been obtained.
89. However, again I am unpersuaded by this ground, which amounts to an argument that the officer who entered into paragraph 4.1 of the Section 106 agreement did so without due authority. The resolution itself merely required the completion of a Section 106 agreement “for... Scunthorpe town centre protection”: it did not specify how that was to be achieved. In the event, in accordance with the recommendation of the officer’s report, the Section 106 agreement forbade 31 of the 32 relevant retailers from letting any unit in the development: that, of course, was the heart of the protection given to the town centre. However, Mr Tucker complains that the restriction on the 32nd retailer is not as tight as it might have been.
90. For my own part, I am not convinced that the covenant between the owner/developer and the tenant would not be enforceable by the Council, for whose obvious benefit the covenant is made – although I did not hear full argument on that point, and express no concluded view nor do I found my rejection of this ground on that basis.
91. But, leaving that aside:
 - i) The planning committee knew that the restriction was to be included in a Section 106 agreement between the owner/developer and the Council, and so were aware that the relevant tenant would not be a direct party to that agreement.
 - ii) The fact that the restriction is not as legally watertight or certain of enforcement as it might have been does not make the planning permission unlawful. The real protection for the town centre lay in the unchallenged restriction that prevented all but one of the town centre retailers letting a unit in the development at all, and ensured that three out of the four units in the development (including the larger unit, required by Condition 38 to be let to Marks & Spencer) would be let to retailers who had no presence in the town centre at all. There is no evidence that the committee intended there to be a

guaranteed legally watertight and enforceable right in the Council to ensure that any tenant taking advantage of that exception would maintain a particular presence in the town centre. Indeed, no such guarantee could possibly have been given. Further, in none of the reports was there any consideration of the extent of presence that might be required to be maintained in the town. That suggests that the resolution left the precise form of the proposed restriction to the officer dealing with the Section 106 obligation. The fact that Mr Tucker believes that he could have drafted a better provision on behalf of the Council – and I have no reason to doubt him – does not, as a matter of law, invalidate the grant of planning permission.

92. For those reasons, Mr Tucker has not persuaded me that, by imposing a restriction on tenants of town centre retail premises taking lettings in the new development, the Section 106 obligation failed to reflect the degree of protection of the town centre required by the resolution on the planning committee. This final ground, too, consequently fails.

Conclusion

93. By reason of the above, I do not consider any of the grounds of challenge are made good; and I dismiss the claim.

ITEM NO	4			
APPLIC NO	LA07/2015/0714/F	Full	DATE VALID	30/07/2015
COUNCIL OPINION	REFUSAL			
APPLICANT	Mr and Mrs Byrne 28 Ballyclander Road Downpatrick BT30 7DZ	AGENT	Brigin Byrne 21 Guinness Road Ballynahinch BT24 8QN NA	
LOCATION	180m north west of existing farm buildings adjoining 28 Ballyclander Road Downpatrick BT30 7DZ			
PROPOSAL	Proposed farm dwelling and garage			
REPRESENTATIONS	OBJ Letters	SUP Letters	OBJ Petitions	SUP Petitions
	0	0	0	0
			Addresses	Signatures
			0	0 0 0

- 1 The proposal is contrary to the Strategic Planning Policy Statement for Northern Ireland (SPPS) and Policies CTY1 and CTY10 of Planning Policy Statement 21, Sustainable Development in the Countryside and does not merit being considered as an exceptional case in that it has not been demonstrated that the proposed new building is visually linked or sited to cluster with an established group of buildings on the farm.
- 2 The proposal is contrary to the Strategic Planning Policy Statement for Northern Ireland (SPPS) and Policy CTY13 of Planning Policy Statement 21, Sustainable Development in the Countryside, in that the proposed dwelling is not visually linked or sited to cluster with an established group of buildings on the farm.



Comhairle Ceantair
**an Iúir, Mhúrn
agus an Dúin**

**Newry, Mourne
and Down**
District Council

Application Reference: LA07/2015/0714/F

Date Received: 30th July 2015

Proposal: Proposed farm dwelling and garage

Location: The site is located approximately 4km to the southeast of Downpatrick in the open countryside. The site address is 180m NW of existing farm buildings adjoining 28 Ballyclander Road, Downpatrick



Site Characteristics & Area Characteristics:
Characteristics of Site

The site is located approximately 4km to the southeast of Downpatrick. The site is cut out of an agricultural field located approximately 180m to the northwest from the

existing farm buildings at no 28 Ballyclander Road, Downpatrick. The site is currently in agricultural use and is undefined along the northern and eastern boundaries. The southern and western boundaries are defined by a 2m high thorn hedge. Ballyclander Road is located to the west of the site.

There is a large mature tree located along the southern boundary of the site. The site slopes steeply upward from south to north.

Characteristics of Area

The area is characterised by open undulating countryside with sparsely located dwellings and farms. There site is surrounded by agricultural land in every direction.

Site History:

There is no history specific to this site. A farm dwelling was granted in 1974 on the farm under R/1974/0151.

Planning Policies & Material Considerations:

I have assessed the proposal against the following relevant policies:

- Regional Development Strategy (RDS)
- Strategic Planning Policy Statement for Northern Ireland (SPPS)
- The Ards and Down Area Plan 2015
- Planning Policy Statement 3 – Access Movement and Parking
- Planning Policy Statement 21 – Sustainable Development in the Countryside
- Building on Tradition

Development Plan – The Ards and Down Area Plan 2015

The site is located within the open countryside and outside any defined settlement area. There is an archaeological site located approximately 200m to the northeast of the site.

Consultations:

Consultation Type	Consultee	Response
Statutory	DARDNI	No objections
Statutory	Transport NI	No objections
Statutory	NI Water	No objections

Statutory	NIEA – WMU	No objections
Advice and Guidance	Environmental health	No objections

Objections & Representations

No neighbours were notified as there are no neighbouring properties.

The application was advertised on 30th July 2015

Consideration and Assessment:

NB. The gable window to bedroom 4 and ground floor utility room window is missing from the floor plans.

The proposal is an application for full planning permission for a dwelling on a farm. The key policy to be considered is PPS21.

Under CTY1 of Policy PPS21 a dwelling on a farm will be permitted where it meets the criteria of CTY10, CTY 13, CTY14 and CTY16.

Under Policy CTY 10 of PPS21 a dwelling can be erected on a farm where it meets all the criteria.

The applicant has provided a DARD business ID. DARDNI have been consulted and have confirmed that the farm business has been in existence for more than 6 years and that single farm payments or other allowances have been claimed in the last 6 years.

It is considered that criteria (a) have been met.

The applicant has stated in the P1C forms that no development opportunities or dwellings have been sold off since November 2008. A search on EPIC has not revealed any other planning applications in connections with the business ID, nor any other developments being sold off. The assessor is satisfied that criteria (b) has been met.

Criteria (c) states that the proposed dwelling is to be visually linked or sited to cluster with an established group of buildings, and where practical access to the dwelling should be obtained from an existing lane.

The proposed dwelling would be located approximately 180m the northwest of the existing farm cluster. There are no existing farm buildings in close proximity to the site. It is not considered that the dwelling would cluster with an established group of buildings on the farm.

With regards to visual link, there are limited views of the main farm cluster due to the varied topography of the surrounding area and its position down a long lane accessed from Ballyclander Road. There are views of the proposed site when approaching along Ballyclander Road from the south; however it is not possible to view the site and the existing farm buildings together from this position due to the thick hedges lining Ballyclander Road. When approaching along Ballyclander Road from the north, it is not possible to view the main farm buildings due to the hill and high hedges. The proposal involves the replanting of hedges along the western boundary of the site to create visibility splays, however it is not considered that a visual link could be established between the proposed dwelling and the farm buildings due to the topography of the surrounding land and limited views of the farm from Ballyclander Road.

It is considered that a 2 storey farm dwelling would become visible when approaching the site from the north, however, without being able to view the main farm buildings in conjunction. The only way to view the site and the main farm together was to climb the verge and look over the hedge which defines the western boundary of the site. The proposed dwelling does not utilise the existing laneway to the farm but proposes a new access onto Ballyclander Road. This proposed access would be located in the southwest corner of the site, approximately 190m to the north of the existing access lane leading to the farm.



(View approaching from the south)



(View approaching from the north)

The existing farm can be viewed from the top of the existing access lane onto Ballyclander Road, however views of the proposed site would be screened by a hill from this position. Views of the site would only become available further north along Ballyclander Road, at which point, views of the existing farm would not be available.

The applicant has provided 2 examples of previous approvals for farm dwellings which are considered similar to the proposal. I will address these cases below:

R/2009/0355/F

In this case there were exceptional circumstances noted by the case officer. The main farm dwelling was a listed building and clustering with the buildings had the potential to impact its setting. The site and the farm buildings could be visually read together from the Milltown Road, and the site was accessed from an existing lane. The land to the north of the farm buildings was considered too prominent, whilst the proposed site allowed for better integration. The case officer noted that in approving the application that 'this was a unique case with circumstances that are distinguishable'.

LA07/2015/0405/RM

Again, this case was exceptional in that there were no farm buildings on the farm holding. The principle of the dwelling was found acceptable and the site complied with CTY13 (a-f), CTY14, and CTY16.

With regards to the application being assessed, there are no such circumstances. The application fails to meet criteria (c) as it fails to cluster or visually link with existing farm buildings.

CTY13

The site is located at bottom of two hills which slope down to the site from the north and south. The hill to the rear would provide a suitable back drop when approaching from the north, whilst the existing hedging would provide suitable screening from view when approaching from the south. There is a large mature tree along the southern boundary which would provide screening of the site along with the 2 existing natural boundaries. There are limited long views of the site due to the undulating topography of the surrounding area and I am content that the proposed dwelling would not appear prominent and would integrate suitably into the landscape. The proposed design is considered acceptable for the area, however the proposal is contrary to criteria (g) of CTY 13 as it fails to cluster or visually link with the farm building.

CTY14

It is not considered that the proposed dwelling would be unduly prominent due to its position on lower ground. The dwelling would not result in a sub-urban style build up or add to a ribbon of development. The proposal complies with CTY14.

CTY16

NIEA Water Management Unit has been consulted and is content with the proposal with informatives.

It is recommended to refuse this application.

Recommendation:

Refusal

Refusal Reasons/ Conditions:

The proposal is contrary to the Strategic Planning Policy Statement for Northern Ireland (SPPS) and Policies CTY1 and CTY10 of Planning Policy Statement 21, Sustainable Development in the Countryside and does not merit being considered as an exceptional case in that it has not been demonstrated that the proposed new

building is visually linked or sited to cluster with an established group of buildings on the farm.

The proposal is contrary to the Strategic Planning Policy Statement for Northern Ireland (SPPS) and Policy CTY13 of Planning Policy Statement 21, Sustainable Development in the Countryside, in that the proposed dwelling is not visually linked or sited to cluster with an established group of buildings on the farm.

Re: LA07/2015/0714/F - Farm Dwelling Ballyclander Road - Item 5 on the agenda

To whom it may concern;

I note that you have acknowledged my wish to speak at next week's Planning Council Meeting (21st June 2017) in relation to the above application. The content of my speech shall include;

- Background to the case
- Visual linkage
- Integration of the new dwelling into the existing landscape
- Securing Mortgages for new build farm dwellings
- Demonstration of exceptional circumstances through our completed H&S Report, Structural Report & Farm Expansion Report.
- Relevant precedence

I will also email through a power point presentation, no later than Monday morning (19th June 2017), which I intend to present to Council while delivering my speech.

Thanks also for notification of the Councillors who attend the site visit.

Regards

Brigin