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To: Barker, Gillian <Gillian.Barker@niassembly.gov.uk>; Wilson, Lucia <lucia.wilson@niassembly.gov.uk>; Patton, Suzanne <Suzanne.Patton@niassembly.gov.uk>

Subject: The Gathering submissions as evidence for Public Accounts Committee consideration of NIAO Report on Planning

Hi Gillian, Lucia and Suzanne,

Please find attached the letters, additional information submitted by members of the general public and also suggested actions (which might help not only the Planning system itself but also improve public confidence in the Planning System) which were sent to the NIAO after The Gathering met with them in Sept of 2021.

These will supplement the information you have received in the past few days from members of the general public who have had to spend huge amounts of their time challenging decisions of their local planning committees. The costs to physical and mental well being cannot not be monetized...but they go far beyond the millions of pounds that local councils in NI have spent in defending erroneous planning decisions and bad practices which will have been evidenced to you in the submissions from local people and local campaign groups.

The Gathering has also amassed much evidence of the expenditure local councils have had to incur in defending the indefensible.

I would appreciate if you include these in the written evidence to be presented to the Public Accounts Committee and I would reiterate the need to give local people an opportunity to present their evidence in the same format as allowed to DFI and council officials, in front of the committee itself.

Many thanks

Nuala Crilly

On behalf of The Gathering



Hi Colette and Roger,

I know a number of attendees at our meeting of Thursday 9th September have already written individually to express their thanks to you both for attending and also to express the constructive manner in which it was conducted. People felt heard. But I am taking this opportunity on behalf of the wider Gathering itself to again express gratitude for taking time to hear our experiences and concerns and to allow local people play a part in shaping the final NIAO report on Planning.

To reiterate, The Gathering is an open collective of individuals, communities, grass-roots based campaign groups and activists and embodies a dynamic repository of skills, knowledge, expertise and creativity gathered from our lived experiences in pursuit of environmental and ecological justice. Our goal has been to provide support, solidarity, exchange of information, have discussions about current issues relevant to community based campaigns and most importantly to give voice to local people and their campaigns.

The first Gathering was held in Nov 2017 in St Columbs Park House and we have been meeting every 3 months since then (including via zoom during the pandemic). We also began to host a series of mini Gatherings in Nov 2019 to allow greater voice and discussion to the particular campaigns people were fighting on broad themes

Many topics discussed, inspiring guest speakers, and an element of creativity to bring lightness into the serious business of campaigning for change.

There has also been the development of a range of Gathering subgroups to focus on particular issues like Clean Air for all, Health, Mobouy illegal dump, Language, Legislation, Cross border issues, Strategy, development of an Aarhus Centre in Ireland and of most relevance to this meeting **the establishment of a sub group to examine the practices and patterns within planning at local council level.**

Over the past 4 years, we have been in a unique position, through the main Gatherings, the mini Gatherings and subgroup meetings, to notice the emergence of patterns of irregularity in **ALL** of the council areas as campaigners from all over NI have shared their experiences of dealing with their local councils and in doing so found common cause with other campaign groups. This led to development of this 'Council Sub group' to examine these emerging patterns and to look at what they say about issues that go to the heart of the planning system here in the North. We never intended to be in this position, to act as overseer and in many cases act as the Independent Environmental Protection Agency but that is where we find ourselves as local people concerned with and passionate about the protection of our environment and the many ecosystems, species and biodiversity of which it is comprised.

We have defined these patterns of irregularity into 3 broad categories:

- Public Administration
- Professional Competence (or lack thereof)
- Professional Corruption¹

¹ The use of the terms *organisational pathology* and *professional corruption* are drawn from the works of Vaughan[1] and Samuel.[2] Simply put, these refer to

And just to expand on what we mean by these broad headings:

1. Public Administration – meaning the lack of access to knowledge and information. This includes the withholding of key documentation from the planning portal that hampers public participation, for example EIA Determinations and Habitats Regulations Assessments. It means not keeping records or minutes of meetings, a reliance on ‘oral government’. Not replying to correspondence. Ignoring requests for information. Fobbing people off with assurances that actions will be taken...they aren’t.

Launching public consultation documents at unsuitable times like 23rd December

2. Professional competence (or rather the lack of it), that is embedding and normalising bad planning practice. Planners not being aware of the legislation to which they must adhere being unaware of their lawful obligation requiring it to screen the project for EIA. Saying that Habitat Regulation assessments are not necessary when they are. Leaving information off the planning portal so local people can’t access it.

Planners and staff not understanding the transboundary legislation that applies to many planning applications where there could be adverse effects within the Republic of Ireland or indeed their responsibilities in relation to planning applications in the South that could impinge on council areas and citizens within the North

The issue of elected representatives overturning professional planning officers' recommendations is also worth considering. If they go against a recommendation, they are required to provide sound legal reason as to why they came to their decision. This doesn't

observable symptoms that manifest in distinct patterns of abnormal behaviour, unethical conducts, have the ability to harm the organisation’s reputation, tend to persist, generate tensions among its members and antagonism between an organisation and the public.[3] If not addressed, these corruptions and pathologies become contagious within organisations, “*deeply penetrate their culture*”, [4] and require concealment “*...from the public gaze.*” [5] Perhaps the most concerning pathology for any public authority is the unavoidable abandonment of public service values that comes with the decision to conceal neglectful practice. [6]

[1] Vaughan, D. (1999) The Dark Side of Organizations: Mistake, Misconduct and Disaster. *Annual Review of Sociology*. 25, 271-305.

[2] Samuel, Y. (2012) *ORGANIZATIONAL PATHOLOGY: Life and Death of Organizations*. New Jersey, Transaction Publishers, p97-99.

[3] Ibid: 36

[4] Ibid: 35.

[5] Ibid: 6.

[6] Ibid: 38.

happen. There was an instance in DCSDC only months ago when despite the advice of the planning officer that to approve a particular housing development would be illegal and therefore they recommended rejecting the application, one councillor still voted to support the planning application!

3. Professional corruption. This relates to dishonesty and unethical conducts that are ignored, tolerated, or even endorsed within public bodies and, thus, have become deeply embedded in the corporate culture of the planning system. Council officials try to rationalise why they are right as opposed to acknowledging they are wrong. This is inherited behaviour. These conducts also appear to include central and local government authorities, suggesting that with the transfer of planning functions and staff, institutionalised bad planning practice and behaviours transferred too. (see more indepth explanation in footnotes)

Some examples of this impacting the Faughan, RARE, Friends of Knock Iveagh, Fishquarter residents, to mention a few.

With the will, the first two should be fixable and indeed councils have been directed by NI Public Services Ombudsman to do so with respect to public administration.

The last, the professional corruption is what the system appears not to want to hear about. And to remain convincingly ignorant of the extent of the institutional neglect, the system shuts out engagement with those voices that it knows would expose it. (the latest example of this being Belfast City Council's refusal to share the expenditure on external legal advice sought since 2015) saying it would not be in the public interest

Both the Minister / Department are declining to meet with representatives of the Gathering and some of the individual groups on serious of issues – illegal waste, public inquiry and the cross-cutting nature with planning; miscarriages of justice due to use of false and misleading evidence in planning cases; the lack of oversight and scrutiny, etc. – precisely because of the uncomfortable knowledge they know will not fit with their official narrative of promoting public engagement with planning. **But in doing so, the Dept is squandering all credibility and legitimacy in the eyes of a growing movement of citizens who feel they are being marginalised because of the uncomfortable knowledge they would bring to the table from their own lived-experiences, validated by other lived experiences.**

Representatives of 4 community based campaigns (Rostrevor Action Respecting our Environment RARE, Prehen Historical and Environmental Society, Stop The Chop (Portaferry), Stop The Drill (Woodburn Forest) shared their experiences with you both and engaged in a productive discussion. These groups come from different council areas yet were able to relate similar experiences in their dealing with local councils and also DFI in the delivery of its oversight function with respect to planning We then volunteered some recommendations which if implemented, could help bring about positive change within the operation of the planning system and in doing so, increase public trust and confidence in the system.

It is really important to note at this point there are MANY MANY groups/individuals within The Gathering who could have shared their own experiences with you had we had the time in the meeting on issues such as development of Anaerobic Digestors encouraged by the overly generous Renewable Obligations Certificates; Planning applications for Housing developments that are not accompanied by the required EIAs or HRAs...nor indeed for which the full information is being shared with the public on the Planning Portal; the lengthy, ongoing campaigns by local communities in the Sperrins against goldmining applications; construction of wind turbines without the proper EIAs and HRAs and their continued operation despite enforcement notices to cease or JR outcomes in favour of local people who deem such developments illegal. There have been many rural developments which also have been challenged as contrary to planning policy.

Having discussed with those representatives of the Gathering who attended our meeting with NIAO and, subsequently, the wider Gathering sub-group set up to examine our collective experiences with councils and planning, it was felt very strongly that it would be important to address the emergence of the term “mischief makers” which was mentioned by NIAO in context of recent judicial reviews. The Gathering also invited and heard from Rural Integrity (RI) member Gordon Duff in respect of the specific issues it’s successful legal challenges and the cases dismissed on a technicality (as opposed to hearing the substantive legality of those challenges) are presenting for local authorities, central government, and the environment.

Mischief makers

The phrase “*making mischief*” was first deployed by the Department of the Environment in the High Court during a judicial review hearing in 2016 in the case of *Donnelly-v-Department of the Environment*. Those who witnessed this felt that, from the outset, it was clearly an attempt to undermine the legitimacy and credibility of the pioneering Litigant in Person (LiP), Bill Donnelly, his wife and Mackenzie Friend, Joyce Donnelly and those supporting him from the public gallery. Indeed, the reference was deployed more than once during the hearing and was clearly targeting not only Mr Donnelly, but also “...*those who sit behind him*” as mischief makers.²

It is important to note that there is nothing in the High Court ruling, or the subsequent Appeal Court judgment to suggest Mr Donnelly’s motives were anything other than a genuine concern for the environment, for the proper rule of law and alarm over the lack of proper planning control at the Cavanacaw gold mine, County Tyrone.³ Rather, the judges, including the former Lord Chief Justice (LCJ), Sir Declan Morgan, commended Mr and Mrs Donnelly on the manner they conducted themselves in Court and how they presented and argued their case in what is a very alien and intimidating situation for citizens unable to afford legal representation.

² Contemporaneous notes of the hearing, 26 September 2016.

³ Magee, K. (2012) *Cavanacaw gold mine – residents get £10,000 compensation for planning breaches*. BBCNI News, 12 September 2021. URL: <https://www.bbc.co.uk/news/uk-northern-ireland-19562775> [Accessed: 3 October 2021].

In the more recent case of *Donnelly-v-Fermanagh and Omagh District Council*,⁴ the Court was scathing in its criticism of both the central and local planning authorities for their neglectful approaches to planning enforcement at the Cavanacaw mine. While dismissing the application for leave, Humphreys, J. expressed (*in obiter*), his “grave public concern”⁵ that this case was characterised by repeated, unenforced breaches of planning control and the Court’s dissatisfaction that it should be left to the members of the public, like Mr Donnelly, to highlight such breaches to the planning authorities. The judge went on to question whether a public authority’s approach:

*“...which relies upon complaints from the public, and evidence produced by them, could properly be seen as compliant with the obligation imposed by Regulation 32 of the 2017 Regulations.”*⁶

Far from the mischief making accusation levelled at him by the Department, like many LiPs, Mr Donnelly was legitimately highlighting planning and environmental failures of grave public concern and challenging neglect within the planning system, as recognised and acknowledged by the Courts.

A Guide for Litigants in Person

Indeed, in recognition of the rise in planning and environmental cases conducted in the Courts without legal representation, in November 2019, the LCJ formally acknowledged the importance the Courts must attach to LiPs having access to environmental justice and the pressures that they face. This can be found in Sir Declan Morgan’s foreword on *A Guide for Litigants in Person*.⁷

Nonetheless, there is a growing concern among members of the Gathering that the Department’s unfair narrative of LiPs (and those who assist them) as mischief makers is painting an undeserved picture of those seeking to challenge bad planning decisions and policy through the only avenue available to them; the judicial review process. It is also concerning if this unsubstantiated narrative, first proffered by the Department, is being deployed as a means of distracting from legitimate criticisms by attacking the credibility of the critics,⁸ or is having an undue influence on politicians and external scrutiny bodies.

Unsubstantiated narrative

For example, at the Committee for the Economy on 5 May 2021, the Department for Infrastructure’s Chief Planner expressed his perception that the bar for judicial review was

⁴ The High Court of Justice in Northern Ireland (2020) *Donnelly-v-Fermanagh Omagh District Council*. Court Ref: HUM11243, 3 April 2020. No link available but a hard copy can be provided on request.

⁵ *Ibid.*, para.[31].

⁶ *Ibid.*, para.[33]. NB: The “2017 Regulations” referred to are *The Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2017*.

⁷ Deb, A., Honey, R., Fegan, C. and Anyadike-Danes, M. (2019) *Judicial Review in Planning and Environmental Cases in Northern Ireland – A Guide for Litigants in Person*. Belfast, Friends of the Earth Northern Ireland / KRW Law / The Bar of Northern Ireland.

⁸ Reade, E. (1987) *British Town and Country Planning*. Milton-Keynes, Open University, p194.

lower in Northern Ireland than in the rest of the UK.⁹No evidence was presented in support of this assumption. John O’Dowd MLA expressed that he was under the same misapprehension until advised otherwise by the Lord Chief Justice at the time.¹⁰

Moreover, the Environmental Justice Network Ireland (EJNI) had cause to raise concern with the Public Accounts Committee (PAC)¹¹ over its recommendation in the *Report on Major Capital Projects* to explore raising the fees for judicial review and to raise the bar to obtaining leave for legal challenge in order to “...reduce the risk that vexatious challenges are made.”¹²The Gathering does not consider that any of those groups or individuals which form part of our community collective have embarked on a vexatious legal challenge of a planning or environmental decision. Quite the opposite, in that challenges have reached the leave threshold on arguable points of law accepted by the Courts, often after an onerous leave hearing, or that the substantive legality of the arguments have not been heard.

Certainly in respect of the three judicial reviews of major capital projects covered in the report, two were successful; namely, the A5 strategic road proposal and the Casement Park stadium. These two challenges exposed how the Department acted unlawfully and, therefore, there can be no question that these were vexatiously made.

Murphy-v-Department for Infrastructure

The third judicial review was in respect of the A6 strategic road proposal (Toome to Castledawson stretch) which the Court accepted raised important issues of environmental law. Indeed, in its judgments, the Courts commended the LiP, Chris Murphy on the manner in which he conducted his challenge. There was no indication from the Court that there was anything vexatious about Mr Murphy’s motives for judicially reviewing the A6 project. Nor is there any evidence in the PAC *Report on Major Capital Projects* to suggest this was the case. Rather, in response to EJNI’s letter of the 2 March 2021, the Chair of the PAC sought to provide assurance that there was no suggestion that the A6 challenge was vexatiously made,¹³ thus, alleviating the concern that the PAC appeared to be wrongly conflating the successful defence of the A6 judicial review with a vexatious challenge.

In respect of the PAC report, wisely, the Minister for Justice rejected this element of the PAC’s recommendation 13, stating:

“DoJ does not accept the recommendation insofar as it relates to the NICS working with the judiciary on the test for judicial review. It is for the judiciary to apply the law as it stands and

⁹ Committee for the Economy, 5 May 2021 at 2hrs, 14mins. URL: <https://niassembly.tv/committee-for-the-economy-meeting-5th-may-2021/> [Accessed: 29 September 2021].

¹⁰ Ibid.

¹¹ Environmental Justice Network Ireland (2021) Letter from Dr. Ciara Brennan to the Public Accounts Committee dated 2 March 2021 (copy can be provided on request).

¹² Northern Ireland Assembly Public Accounts Committee (2021) *Report on Major Capital Projects*, Recommendation 13, page 13. URL: <http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/pac/reports/major-capital-works-example/final-version---report-on-major-capital-projects.pdf> [Accessed: 29 September 2021].

¹³ Northern Ireland Assembly Public Accounts Committee (2021) Letter from the Chair, William Humphreys MLA OBE dated 12 March 2021 (copy can be provided on request).

outside a court setting it would not be appropriate to engage with the judiciary on how the law is applied or if the right balance is being struck.”¹⁴

The Gathering supports the position of the Minister for Justice in this regard. For completeness and in respect of the costs element of Recommendation 13, citizens tend to mount legal challenges as LiPs because they cannot afford the prohibitively expensive costs of legal representation at judicial review in Northern Ireland. Therefore, raising the administrative costs as a deterrent, would be seen as a retrograde step to providing access to environmental justice, as enshrined in Article 9 of the Aarhus Convention. Indeed, there is an arguable case that it would result in non-compliance with the Convention.

Yet the perceptions persist, mostly within political and official circles, that the litany of recent environmental cases coming before the Northern Ireland Courts are being mounted for trivial reasons, or that those behind them are in some way mischief makers or vexatious. This is simply not borne out by the facts. Therefore, it is disappointing that the NIAO's expressed concern about potential mischief makers engaging in the judicial review process feeds into this unsubstantiated narrative emanating from official circles. Particularly so, as this can have unwarranted consequences for those brave enough to step into the court room to exercise their lawful right to challenge what they consider are decisions that will adversely impact the environment and create dangerous precedent that embeds bad planning and law within the system. Moreover, there is a danger of legitimating political and business-led hostility towards those lawfully exercising their right to a fair trial, as has been the recent experience of An Taisce.¹⁵

An Taisce-v-An Bord Pleanála

In this recent and ongoing case in the Republic of Ireland, An Taisce (and individuals within that organisation) has come under severe criticism and sustained abuse for simply exercising its right to mount a legal challenge of An Bord Pleanála's decision to approve a major cheese making plant in Kilkenny for the Glanbia / Royal A-ware consortium. This should be a lesson for those in positions of power and influence as to the effects misinformation can have on the lives and reputations of those wishing to protect the environment. More so, when those mounting legal challenges in Northern Ireland, unlike An Taisce, are more often individuals without the support of established institutions or legal representation.

¹⁴Department of Finance (2021) Memorandum on the Second Report from the Public Accounts Committee Mandate 2017-2022: Major Capital Projects. Belfast, Northern Ireland Assembly, p9. URL: <https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/mor-2nd-report-1722.pdf> [Accessed: 30 September 2021].

¹⁵ Slattery, L. (2021) *An Taisce criticised over €140m cheese plant appeal*. The Irish Times, published 9 May 2021. URL: <https://www.irishtimes.com/business/agribusiness-and-food/an-taisce-criticised-over-140m-cheese-plant-appeal-1.4559713> [Accessed: 4 October 2021]. See also, Hurson, N. (2021) *An Taisce criticised for delays to Glanbia cheese plant*. Irish Farmers Journal, published 31 March 2021. URL: <https://www.farmersjournal.ie/an-taisce-criticised-for-delays-to-glanbia-cheese-plant-612709> [Accessed: 4 October 2021].

Rather, the lived-experiences of members of the Gathering indicate that a real problem with the planning system is the “*professional corruption*”¹⁶ which often follows the exposure of neglectful practices aimed at rationalising, or concealing wrong-doing, including the corruption of the judicial review process and the proper rule of law.

Corruption of the judicial review process

In March of this year, the Gathering ran an on-line event entitled *TRUMPING TRUTH: Are false facts corrupting the judicial review process?* The conclusion was that this was the case in the judicial reviews examined. At this event, members of the Gathering presented their experiences of the judicial review process and how the reputation of the Courts was being tarnished in the eyes of the public by judges’ inability or indifference to Respondents’ use of false facts that is corrupting the judicial review process and the proper rule of law. Three cases were presented where it was evident to all that objectively verifiable evidence was set aside or ignored in favour of a respondents’ or notice party’s false and misleading evidence and assertions.

The cases presented were:

- River Faughan Anglers-v-Department of the Environment[2014] NIQB 34;
- Blackwood-v-Derry and Strabane District Council [2018] NIQB 87; and
- Sands-v-Newry Mourne and Down District Council[2018] NIQB 80.

To its discredit, all are characterised by the Courts’ reliance of evidence that had no basis in truth. The first and third cases were conducted with legal representation and there was no question raised by the Courts that either was without merit or vexatious in nature. Both these cases were unable to proceed to the Court of Appeal, against the advice of counsel,¹⁷ solely because of the inability of the applicants to afford the additional costs above those already incurred.

As you will be aware, the first and second cases have been referred to the NIAO under its publication “*Raising Concerns*” as external whistleblowing cases due to the serious matters of irregularity and impropriety that they give rise to.

As with the Donnelly challenges mentioned above, the Blackwood challenge was conducted as a LiP case. Not only did the judge commend the LiP for how the case was presented “...in articulate and measured terms, via an impressively formulated comprehensive written submission”,¹⁸ but also issued a “*stern reprimand*” to the Respondent, Derry City and Strabane District Council for blithely breaching the EIA Regulations which McCloskey, J deemed amounted to “*unacceptable conduct*”.¹⁹ Once more, there was no issue, or question of making

¹⁶***Professional Corruption***—refers to the unethical and improper conducts of professionals employed in the public sector. Samuel, Y. (2010) *ORGANIZATIONAL PATHOLOGY: Life and Death of Organisations*. New Jersey, Transaction Publishers, p.97.

¹⁷ For example: see letter from Counsel for River Faughan Anglers submitted to the United Nations as part of Aarhus communication ACCC/C/2013/90. URL: https://unece.org/DAM/env/pp/compliance/C2013-90/Correspondence_Communicant/frCommC90_23.03.2017_att_1_letter_of_counsel.pdf [Accessed: 2 October 2021].

¹⁸ [2018] NIQB 87, para.[4].

¹⁹ *Ibid.*, para.[68].

mischief or vexatiousness raised by either the Court or the Respondent during this hearing or in the judgment.

Rural integrity

Contrary to the mischief maker label often attached to LiPs, evidence indicates that RI is making an invaluable contribution to the rule of law and drawing attention to serious questions over how planning policy is being misapplied across Northern Ireland. While this has went largely unreported until recently, NIAO is asked to consider the evidence set out below.

Lisburn Castlereagh City Council

In the 2017 case of RI-v-Lisburn and Castlereagh City Council (LCCC), Keegan, J. (now Lady Chief Justice Keegan) quashed planning permission S/2008/0908/F. In her judgment she drew attention to what the Court considered a “...*highly significant and serious matter...*”²⁰ of public administration brought by RI. The judge went on to state:

*“So it follows that were it not for Mr Duff’s diligence this matter may very well not have come to light and as such a flawed administrative decision would not have been exposed.”*²¹

This successful intervention is far from mischief-making as the Court ruling confirms. Rather, it is the motives and actions of the public authority that are called into serious question in this ruling by the presiding judge.

That same year, following RI’s notification of its intention to judicially review another case, LCCC agreed to the quashing of permission LA05/2017/0814/F which was subsequently declared unlawful by the Courts on 7 November 2017.²²

More recent developments reinforce the public service RI is providing in the absence of oversight and scrutiny of the planning system. As reported in *BelfastLive* in August 2021, ²³LCCC has agreed to the quashing by consent of another judicial review brought by RI against permission LA05/2017/0633/O.²⁴ What is concerning about this case is that the local authority first sought to resist the *locus standi* of the applicant. When that failed, it convinced the Court that RI should lodge £10,000 as a surety against the Respondent’s costs. The

²⁰ Rural Integrity (Lisburn 01)-v-Lisburn Castlereagh City Council [2017] NIQB 133, para.[17]. URL: <http://www.bailii.org/nie/cases/NIHC/QB/2017/133.html> [Accessed: 2 October 2021].

²¹ Ibid.

²² High Court of Justice in Northern Ireland: Queen’s Bench Division (2017). In the matter of an application by Gordon Duff for the judicial review of the decision by Lisburn Castlereagh City Council – *Court Order 2018 No.12691/01*.

²³ Hughes, B. (2021) Quashed housing plans in watchdog probe against DUP Minister Edwin Poots’ son cost council ratepayers £62,500. **BelfastLive**, published 24 August 2021. URL: <https://www.belfastlive.co.uk/news/northern-ireland/quashed-housing-plans-watchdog-probe-21380263> [Accessed: 2 October 2021].

²⁴High Court of Justice in Northern Ireland: Queen’s Bench Division (2021). In the matter of an application by Gordon Duff for the judicial review of the decision by Lisburn Castlereagh City Council – *Court Order 2018 No.25375/01*.

Gathering is concerned that this was done in the knowledge from previous cases that the LiP did not have the financial means to meet this demand. However, when local supporters of RI lodged the surety with the Court, only then did LCCC concede the case and submitted to have the impugned permission quashed.

It should be of concern to those responsible for overseeing the proper use of public finances, if this local authority was aware that it had made an unlawful decision, but rather than exercise its duty of candour to the Courts, instead set out to ensure the case was not heard. This is because, by its actions, LCCC will have significantly added to the costs to the public purse which is reported to be £62,500.²⁵

In the context of the previous judgment against LCCC (refer to footnote 19), rather than the motives of RI being called into question in its third successful challenge, it is the motives of the council which once again require scrutiny. This is because its actions may well suggest that no lessons have been learned from the criticisms handed down by Keegan J. in 2017.

It should also be noted that as recently as 24 September 2021, the Chief Executive of LCCC has notified Mr Duff that he intends to apply to the High Court to have (a fourth) permission LA05/2021/0292/F quashed after receiving notification from Mr Duff of his intention to judicial review that approval.

Causeway Coast and Glens Borough

On 23 September 2021, solicitors acting for Causeway Coast and Glens Borough Council informed Mr Duff that the Council has agreed to the quashing of permission LA01/2020/1235/O, based on legal advice it took after receiving notification of Mr Duff's intention to judicially review the Councils' decision.

These RI successes alone should be an indicator that there is something wrong with the administration of planning and councils' adherence to the rule of law. Certainly, if Mr Duff had not challenged these unlawful decisions, these matters would not have come to light, as stated by Keegan, J. in the first case mentioned (refer to footnote 19). However, in addition to the above, the recent issue of planning advice by the Department for Infrastructure (DFI) to councils further supports the legitimacy of RI's legal challenges.

Planning Advice Note:

It is a feature of RI's challenges that these relate to environmental concerns over the cumulative impact that poor/ unlawful decisions are having on Northern Ireland's countryside and the dangerous precedent this is setting due to a lack of official intervention. They largely (but not exclusively) focus on the misapplication of policy *CTY8: Ribbon Development* as contained in *Planning Policy Statement 21: Sustainable Development in the Countryside*.

The Gathering considers that it is no coincidence that on 2 August 2021 the DFI issued *Planning Advice Note: Implementation of Strategic Planning Policy for development in the Countryside*.²⁶This sets out to re-emphasise to councils the proper interpretation of rural

²⁵Refer to footnote 23.

²⁶Department for Infrastructure (2021) *Planning Advice Note: Implementation of Strategic Planning Policy for development in the Countryside*. Belfast, DFI Regional Planning Directorate.

planning policies which, the Gathering considers, is a belated and tacit endorsement of the legitimacy of the many challenges Mr Duff has been mounting in the absence of any official oversight or scrutiny. It now appears that with the issue of this Planning Advice Note, the Department, who is charged with ensuring that the integrity and credibility of the planning system is not undermined, agrees with Mr Duff that rural planning policy is not being properly applied by councils.

Substantive legality

Unfortunately, the dismissal of a majority of RI's challenges by McCloskey, J. on a technicality – a Court rule – means that the substantive legality of those cases has never been heard before the Court. Yet, where cases unaffected by the technicality have either proceeded to court, or were likely to proceed, Mr Duff's success rate is impressive by any standards.

The above-documented successes of RI along with the recent issue of the Department's Planning Advice Note are ringing endorsements of the legal grounds of challenge being put forward by RI. Notwithstanding the technicality which prevented so many RI challenges from being heard, this suggests that the planning issues being raised by Mr Duff continue to be highly significant and serious matters of public interest, as first recognised and recorded by the now Lady Chief Justice Keegan back in 2017. There is no evidence to suggest that those challenges dismissed by the Courts on a technicality would also have been dismissed on the substantive legality of the cases.

Rather, what the above evidence-based assessment indicates, is that these cases are being brought in the public interest. There is no evidence that they are vexatiously taken, nor mounted by those simply wishing to make mischief. Rather, the evidence indicates otherwise; that in properly exercising their legitimate and lawful rights, LiPs are influencing, and even driving change for the better, where the planning authorities and the system established to oversee them are proving ineffective.

Therefore, the question over the role of LiPs must move away from one of mischief makers mounting vexatious legal challenges. Rather, it is one of why such a misconception persists when the facts of the cases indicate otherwise?

That a citizen of limited financial means feels compelled to lodge a judicial review(s) at their own expense to highlight serious misgivings about how the planning system is being administered, should not be viewed as mischief making without a robust examination of the motives behind these challenges, the issues of public concern that they raise and the unacknowledged influence such citizen scrutiny is having where official oversight has failed.

In our meeting with you, we made some recommendations as to how the current situation could be improved, how there could be more oversight and scrutiny of the planning process

<https://www.infrastructure-ni.gov.uk/sites/default/files/publications/infrastructure/Final%20Planning%20Advice%20Note%20%28PAN%29%20-%20Implementation%20of%20Strategic%20Planning%20Policy%20on%20Development%20in%20the%20Countyside%20%2802%2008%202021%29.pdf> [Accessed: 2 October 2021]. ACCC

at local level and how public confidence could thus be enhanced. I have sent those separately to Roger but think it useful to include them here too:

1 Equal Rights of planning Appeal: there is very strong support for this amongst local people

Equal Rights of Planning Appeal is a response to the imbalance that currently exists in that the ability to challenge planning decisions currently lies solely with the applicant/the developer and not with local people whose only recourse to appeal against flawed planning decisions and processes is to launch a lengthy costly Judicial Review process.

The inequity between the rights afforded to developers, but denied to citizens is found to be in breach of the Aarhus Convention, as per case ACCC/C/2013/90 (the recently reported on Faughan case).

The 'Presumption to approve' also needs to be examined as part of this process of addressing this inequity between developers and citizens.

2 Establishment of an independent oversight body such as exists in the Republic of Ireland - an Office of Planning Regulation. T

The Office of the Planning Regulator in Ireland was established after the Mahon Tribunal findings. These findings included exposure of corruption in the planning process.

This is necessary because DfI is not fulfilling its oversight and scrutiny role and this has put local citizens under enormous stress as they have had to undertake this role themselves at huge personal cost timewise and physically, mentally and emotionally not to mention the impacts on family life.

'The Department's interest in exercising its powers is not to interfere with a council's right and responsibility to take its own decisions, but for the purpose of considering the exercise of the Department strategic functions and to safeguard against systemic risks to the achievement of regional planning objectives' Angus Kerr in letter to Nuala Crilly August 17 2021

The establishment of an independent oversight body may help restore public faith in the planning system. It may well be too late for DFI to undertake scrutiny role as it will expose their own failures and bad practises which have become deeply embedded in the system when planning transferred over from central government to local government with the Review of Public Administration in 2015.

3 Enforcement of Strong ethical standards and codes of conduct to comply with:

There must be an effective mechanism through which the enforcement of strong ethical standards and codes of conduct can be undertaken.

There needs to be consideration of fines and penalties for those involved.

There is no audit office within DfI such as previously existed within Department of Environment.

From campaigners experiences, there is a history of oral meetings with no records kept.

Complaints against a council being investigated by the council itself (through its own Complaints Process) does not instill faith in the process. Complaints then have to go to NIPSO who are also under severe pressure with requests to launch investigations into unsatisfactory outcomes from local councils internal complaints processes.

Complaints submitted by local campaigners are ignored, local people are disrespected and treated badly. Apologies (Non-apologies) are only issued when instructed to by Ombudsman only after local citizens complain.

Ultimately, vast amounts of public monies being spent by local councils in seeking external legal advice after erroneous decisions have been challenged by local people, at a time when pressures on the public purse have never been greater.

So we, The Gathering, hope this letter clarifies and gives a sense of the obstacles, frustrations and challenges local people in council areas ALL over Northern Ireland have had to face when dealing with planning matters at local council level.

Best regards,

Nuala Crilly

On behalf of The Gathering



Unauthorised AD development/Failure to undertake Transboundary EIA's/Failure to follow Councils Complaints Policy/Failure to adhere to Planning Legislation

This Complaint was with CC&GS Borough Council:

LA01/2017/0221/CA Unauthorised AD plant.

Planning Approval granted without an Appropriate Assessment under Habitats Regulations of the potential adverse environmental impacts arising from the disposal of digestate on protected European Sites. A Cumulative Assessment with other Projects was not undertaken in breach of Habitats Regulations.

Location and size of AD plant built greater than what was approved.

Also, Environmental Enforcement complaints regarding traffic, odour and toxic gas emissions into nearby homes.

Council issue Planning Enforcement Notice to cease operations and remove plant and at the same time issued a CLEUD Certificate of Lawful Existing Use or Development!!!

PAC overturned Council Enforcement Notice PAC 2018/E0003

Baranait Residents group did not have the money to launch a JR and still have to endure the ingress of toxic fumes into their homes.

These following Complaints all alleged systemic breaches in and have occurred in numerous council areas:

**The Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2017 and;
The Conservation (Natural Habitats, etc) Regulations (Northern Ireland) 1995 and;
Regulation (EC) No. 1013/2006 (Waste Shipment) Regulations, The Transfrontier Shipment of Waste 2007.**

Antrim and Newtownabbey Borough Council

LA03/2019/0461/F

submitted to Office of Environmental Protection C235, Complaint accepted

Mid & East Antrim Borough Council

LA02/2019/0590/F

LA02/2017/0670/F

submitted to Office of Environmental Protection C226, Complaint accepted

Derry City and Strabane District Council

LA11/2017/0233/F

LA11/2017/0264/F

submitted to Office of Environmental Protection C239, Complaint under review

Mid Ulster District Council

LA09/2018/0595/F

LA09/2018/0418/F

LA09/2018/1237/F

LA09/2018/0982/F

LA09/2017/0677/F

LA09/2017/0581/F

Unauthorised AD development/Failure to undertake Transboundary EIA's/Failure to follow Councils Complaints Policy/Failure to adhere to Planning Legislation

LA09/2016/1783/F

LA09/2016/1691/F

LA09/2016/1349/F

Council has paused Stage 2 with no timeline given for response

Newry Mourne and Down District Council

LA07/2019/0858/F

LA07/2019/0683/F

LA07/2019/0377/F

LA07/2019/0156/F

LA07/2017/1499/F

Complaint submitted February 2021, no response

Armagh Banbridge and Craigavon Borough Council

LA08/2020/0887/F

LA08/2018/0935/F

LA08/2017/1237/F

LA08/2017/0373/F

LA08/2017/0303/F

LA08/2017/0307/F

LA08/2017/0225/F

LA08/2016/1592/F

Complaint submitted February 2021, no response

Fermanagh and Omagh District Council

LA10/2019/1469/F

LA10/2019/0408/F

LA10/2018/1076/F

LA10/2018/0232/F

LA10/2018/0233/F

LA10/2018/0108/F

LA10/2017/1162/F

Complaint submitted February 2021, no response

Causeway Coast and Glens Borough Council

LA01/2018/0155/F

LA01/2018/1548/F

Submitted February 2021, no response.

Summary

The Planning Authorities have not been undertaking Appropriate Assessments in contravention of the Habitats Directive and the UK High Court ruling EWHC (2017) 351 Wealden District Council versus Secretary of State for Communities and South Downs National Park Authority regarding the erroneous application of a 1% Screening Threshold to eliminate other Projects from an In-combination Assessment with the Project under consideration.

The Planning Authorities have failed to undertake Transboundary Environmental Impact Assessments, in breach of The Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2017, regarding Projects which propose to dispose of their waste in ROI.

The Planning Authorities have materially misled Council Members with the advice in the Officers Reports, by failing to address the Legal Challenges raised by Objectors, in such a

Unauthorised AD development/Failure to undertake Transboundary EIA's/Failure to follow Councils Complaints Policy/Failure to adhere to Planning Legislation

way as to misdirect the Members to make unlawful Planning Approvals, EWHC (2016) 2832.

It was one complaint per Council citing the list of Planning Approvals where a breach of the legislation was identified.

Cases listed were Poultry units which proposed to dispose of their waste in ROI.

The planning applications are nearly all identical and were lodged in a relatively short period of time.

The planning consultants are the same people. Previously they had been successfully in getting approval by disposing of the waste on other farms in NI. However, from 2017 onwards this became more difficult due to water bodies and protected sites in NI already exceeding their critical threshold for ecological damage.

Therefore, they identified a loophole, in that NIEA and Planning Authorities presumed that their legal obligations only extended to the jurisdiction of NI and therefore did not assess impacts outside of NI.

I wrote to each of the competent authorities in ROI and asked if they had been consulted as per the EIA Directive and what role they undertook. The ROI Councils confirmed they were not consulted and Louth Council wrote to DCSD Council to inform them it was DCSD Council's legal duty to assess impact in ROI not Louth Council.

I lodged the Complaints to Councils in February and got responses from only 3 Councils with whom I exhausted their Complaints procedures. As this happened, I got no further responses from the remainder of Councils to my Complaints which is very concerning.

I had undertaken this investigation of intensive agriculture planning applications because my attempts to obtain information on procedures and assessments for the Limavady Pig Factory Farm had been frustrated by Council, SES and NIEA who had refused to provide me with this information or even provide explanations for their determinations.

It has become clear that these Competent Authorities had been breaking the law in terms of the Habitats Regulations and Planning EIA Regulations which therefore explains their reluctance to share information or provide explanations.

The CEO of NIEA Tracey Teague admitted to me that they had failed to undertake Appropriate Assessments of AD plants. Yet they still continue in providing erroneous advice to Planning Authorities resulting in Unlawful Planning Approvals.

These could result in costly legal challenges but unfortunately communities affected are unaware of their potential grounds for challenge nor have the funds to do so.

Also, when communities do mount a legal challenge or get their Council to do so, such as with Baranait Road AD plant, the applicant, just has to win on appeal at the PAC. This is after years of costs incurred in challenging and campaigning all because a Public Body failed to adhere to the Regulations at time of approval.

There is an urgent need to reform Local Planning to make it Transparent, Accessible and Accountable to the people it serves and not the developer.

Measure that will help effect Change:

1 Equal Rights of planning Appeal: there is very strong support for this amongst local people

Equal rights of planning is a response to the imbalance that currently exists in that the ability to challenge planning decisions currently lies solely with the applicant/the developer and not with local people whose only recourse to appeal against flawed planning decisions and processes is to launch a lengthy costly Judicial Review process.

The inequity between the rights afforded to developers, but denied to citizens is found to be in breach of the Aarhus Convention, as per case ACCC/C/2013/90 (the recently reported on Faughan case).

The 'Presumption to approve' also needs to change as part of addressing this inequity between developers and citizens.

Additionally, the UK is not compliant with the provisions of The Aarhus Convention in terms of access to information for local people,

(segregation of duties across staff)

Call in Facility: not used properly in NI

2 Establishment of an independent oversight body such as exists in the Republic of Ireland - an Office of Planning Regulation. T

The Office of the Planning Regulator in Ireland was established after the Mahon Tribunal findings. These findings included exposure of corruption in the planning process.

This is necessary because DfI is not fulfilling its oversight and scrutiny role and this has put local citizens under enormous stress as they have had to undertake this role themselves at huge personal cost timewise and physically, mentally and emotionally not to mention the impacts on family life.

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Complaints against council being investigated by council does not instill faith in the process. Complaints then have to go to NIPSO who are also under severe pressure with requests to launch investigations.

Complaints ignored, local people disrespected and treated badly. Apologies (Non-apologies) issued when instructed to by Ombudsman after local citizens complain

Vast amounts of public monies being spent in seeking external legal advice after erroneous decisions have been challenged by local people

4 Whistleblowing ?(fear of challenging)

Providing protections to those who whistle blow and according members of the public who whistleblow the same level of protections as those afforded to whistle-blowers within an organisation whilst also providing the same level of concern and scrutiny to the issues highlighted by a whistle-blower who is a member of the public.