

Investigation Report

Investigation of a complaint against Ards & North Down Borough Council

NIPSO Reference: 17334

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The Role of the Ombudsman

The Northern Ireland Public Services Ombudsman (NIPSO) provides a free, independent and impartial service for investigating complaints about public service providers in Northern Ireland.

The role of the Ombudsman is set out in the Public Services Ombudsman Act (Northern Ireland) 2016 (the 2016 Act). The Ombudsman can normally only accept a complaint after the complaints process of the public service provider has been exhausted.

The Ombudsman may investigate complaints about maladministration on the part of listed authorities, and on the merits of a decision taken by health and social care bodies, general health care providers and independent providers of health and social care. The purpose of an investigation is to ascertain if the matters alleged in the complaint properly warrant investigation and are in substance true.

Maladministration is not defined in the legislation, but is generally taken to include decisions made following improper consideration, action or inaction; delay; failure to follow procedures or the law; misleading or inaccurate statements; bias; or inadequate record keeping.

The Ombudsman must also consider whether maladministration has resulted in an injustice. Injustice is also not defined in legislation but can include upset, inconvenience, or frustration. A remedy may be recommended where injustice is found as a consequence of the failings identified in a report.

Reporting in the Public Interest

This report is published pursuant to section 44 of the 2016 Act which allows the Ombudsman to publish an investigation report when it is in the public interest to do so.

The Ombudsman has taken into account the interests of the person aggrieved and other persons prior to publishing this report.

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SUMMARY

I received a complaint about the actions of Ards and North Down Borough Council (the Council). The Complainant raised concerns about how the Council had dealt with a breach of planning control by a golf club within the Borough in relation to work it had undertaken in October 2014 to relocate the first tee at the course. His complaint also related to how the Council had handled residents' concerns about health and safety risks associated with stray balls from the golf course entering their properties, situated on a main road, adjacent to the course's boundary.

I obtained all relevant documentation, together with the Council's comments on matters the Complainant had raised. The investigation considered evidence relating to the Council's actions with regard to the planning enforcement case, a 2015 planning application, a 2016 planning application, and the health and safety investigation relating to residents' complaints about stray golf balls leaving the golf course.

My investigation found evidence of maladministration on the part of the Council in relation to how its Planning Department and its Environmental Health Protection and Development Department had dealt with a planning consultation in respect of the first retrospective planning application that the Golf Club submitted to the Council in June 2015. I concluded that these failings resulted in delay and in a lack of openness and transparency in the handling of that planning application.

I was satisfied that the maladministration I identified caused the Complainant to sustain the injustice of frustration and uncertainty.

I recommended that the Council's Chief Executive provide a written apology to the Complainant for the injustice that resulted from this maladministration. I also recommended that the learning points set out in my investigation report were communicated to the appropriate Council staff.

THE COMPLAINT

1. I received a complaint about the actions of Ards and North Down Borough Council (the Council). The complaint related to groundworks that a golf club within the Borough commenced in 2014 at the first tee of the golf course, without the benefit of planning permission. The Complainant's property is situated on a main road (Road X) that is adjacent to the boundary of the golf course, close to the site of the groundworks. The Complainant stated¹, *'The development involved an 80 by 20 metre excavation parallel to and 1.3 metres from neighbouring property. There was no consultation with nor notification to residents before this work started. In the absence of making any progress with [the Golf Club] Planning Enforcement was contacted by residents. The development had the potential to cause serious nuisance, noise, disturbance and overlooking as well as health and safety risks.'*
2. The Complainant referred to the role that (the former) Ards Borough Council's Environmental Services Department² (ES) had played in addressing health and safety concerns that Road X residents had raised in 2010 in relation to stray golf balls from first tee entering their properties, adjacent to the course's boundary. He stated,³ *'In 2010 [ES] directed [the Golf Club] to undertake a review of the 1st tee and subsequently approved the outcome of that first review. That laid the foundations for the development which commenced in October 2014.'* The Complainant contended⁴ that the role played by Ards Borough Council's ES in 2010 and the later involvement of the (subsequently formed Ards and North Down Borough) Council's Environmental Health Protection and Development Department (EHPD) in the Golf Club's redevelopment of the first tee, led to *'the planning process [being] compromised.'* He also complained that EHPD did not act in a fair and

¹ Complainant's letter dated 8 September 2017 to NIPSO's Assessment, Support, Service and Initial Screening Team (ASSIST)

² Ards Borough Council's Environmental Services predated the reorganisation of local government in Northern Ireland, which took effect from 1 April 2015. From that date, the newly formed Ards and North Down Borough Council (the Council) created its Environmental Health, Protection and Development Department. From the same date, the planning control function, which had sat within the Department of the Environment (DOE) transferred to the Council, with officers from DOE Planning Service joining the Council and forming the Planning Department.

³ Complainant's letter dated 8 September 2017 to ASSIST

⁴ Complainant's complaint form received 30 May 2017

transparent manner.

3. The Complainant described how the Council's actions had affected him. He stated⁵, *'The whole process has been going on for over two and a half years. Enjoyment of my property has been greatly diminished, I am stressed and exhausted by the process, and what was the start of a belated but pleasant retirement ...has been completely ruined.'* In terms of the outcome he wished to achieve by bringing his complaint to my Office, the Complainant stated, *'I would like the truth to come out. Actions and decisions that might well have been innocently made or otherwise ill-judged or inept have been covered up to protect organisational/presentational concerns ... The organisation should be properly held to account in whatever way is deemed appropriate.'*

Background to the complaint

4. The following account of events in 2010, which was compiled on the basis of information contained within contemporaneous records and documentation that were obtained during the course of the investigation, has been included in this report by way of explaining the background to the complaint. The Complainant did not specifically complain about the 2010 events and actions described below but they are relevant to the issues he raised in his complaint and the matters that my Office accepted for investigation. It was necessary, therefore, to include an account of these events and actions in this report.
5. In January 2010, (the then) Ards Borough Council received a complaint about stray golf balls from the first tee at the Golf Club striking neighbouring residential properties along Road X, adjacent to the golf course's boundary. ES within Ards Borough Council undertook an inspection at the Golf Club, under the provisions of the Health and Safety at Work (Northern Ireland) Order 1978 and recommended that the Golf Club's health and safety consultant (the Club's H&S Consultant) consider the matter. Subsequently, on 2 February 2010, ES wrote to the Golf Club, advising that it should consider a number of mitigating measures. These were that a gap in high level fencing, which was allowing golf balls to enter the rear gardens of adjacent properties, should be closed; use of

⁵ Complainant's complaint form received 30 May 2017

'the summer tee' should be prohibited, if that was increasing the risk of stray balls being directed into the adjacent properties; and the first tee should be lowered, as that would have the effect of increasing the height of the adjacent protective fencing. ES also indicated to the Golf Club that alternative measures recommended by golf course architects or the Club's H&S Consultant would be considered.

6. A risk assessment carried out by the Club's H&S Consultant on 28 January 2010 considered the risks associated with play from both the main tee (also known as 'the summer tee') and 'the winter tee' located closer to the Golf Club's boundary with the adjacent residential properties on Road X. The Club's H&S Consultant's assessment concluded, '*... there is a significant risk of stray golf balls causing injury (possibly serious) to members of the public in these houses and gardens*'. The assessment also found, '*...the current protective fences are not adequate*'.
7. In his report, the Club's H&S Consultant proposed three options '*to effect a substantial reduction in the risk of injury to members of the public in the area concerned*.' These were: '*the erection of sufficient netting barriers to prevent stray gold balls entering the houses and gardens*'; '*re-siting the main tee further back to a position between the clubhouse and the 18th green*'; and '*re-siting the main tee approximately where the present winter mat is located and sculpting the new tee to a position about 2m lower than the present level*'. The Golf Club forwarded a copy of the Club's H&S Consultant's report to ES.
8. On 23 March 2010, ES wrote to the Golf Club, advising that it was in agreement with the Club's H&S Consultant's '*suggested remedy of lowering the existing tee in addition to the gap in the fencing being closed*'. ES requested that these works receive the Golf Club's '*urgent attention*'. ES also informed the Golf Club that should these works not rectify the situation, '*consideration may have to be given to more extensive works which may require an element of redesigning the course*'.
9. ES wrote to the Golf Club again, on 15 April 2010, referring to a number of measures that had been discussed with senior Club officials during a '*recent*

visit⁶ by the Director of ES. ES' letter listed the measures that had been agreed with the Club officials, as follows:

'1. The existing gap in the high level fencing situated beyond the 1st hole, is to be extended and closed.

2. The 1st fairway nearest the rear of the properties to [Road X] is to be moved 30 yards to the left and the out of bounds are also moved accordingly ...

3. Players when using "the competition tee (white tee)", which is only used in the vast majority of cases on a Saturday, as suggested by ... Club Officials, shall distinctly mark their golf balls to facilitate the monitoring the use, and the extent of the problem, if any, that play from this tee causes to the complainants and their properties.

4. General play shall be form [sic] the existing "green tee box", used also for winter play and not from the forward end of the competition tee.'

10. On 22 April 2010, ES received a further complaint, from the same resident who had complained previously, about four golf balls having entered her property during the previous three-week period. ES visited the resident and explained the remedial action that had been agreed between the Director of ES and the Golf Club. ES also spoke to the Golf Club's Course Manager and obtained an update in relation to the agreed remedial works. On the same date, the Golf Club wrote to ES, in response to ES' letter of 15 April 2010, advising that it would monitor the changes that had been implemented, and would keep ES informed of any new developments.
11. On the basis of the available documentary evidence, there does not appear to have been any further inspections or interventions by ES at the Golf Club, in relation to stray golf balls entering Road X properties, until March 2015. The Council's actions at that time, and subsequently, do fall within the scope of the complaint. As such, they will be addressed later in this report.
12. However, in the intervening years, reports of stray golf balls entering adjacent Road X properties continued to be an issue for the Golf Club, with letters from residents being discussed at a number of Club Council meetings. At one such

⁶ There is no contemporaneous record of the Director of ES' site visit to the Golf Club; the date on which the visit took place is therefore not known.

meeting on 22 May 2014, a decision was taken that the first hole should be reshaped. This work was to involve relocating the first tee to a new position behind the Pro Shop and ‘banking up’ the area to the right of the tee.

13. Excavation work, in relation to the development of the new first tee, commenced at the Golf Club in late October 2014. On 23 and 27 October 2014, the Complainant, who had received no prior notification of the work, wrote to the Golf Club to voice his concerns. On 28 October 2014, he contacted the Planning Service of the Department of the Environment (DOE)⁷ to complain about the work. The events that followed have been examined as part of the investigation of his complaint.

Issues of complaint

14. When the Complainant’s complaint was accepted for investigation, he and the Council were informed that the following four heads of complaint were to be investigated:
 - i. Did the EHPD conflate its planning consultee role in relation to the 2015 and 2016 planning applications with its health and safety regulatory authority role in relation to the Golf Club?
 - ii. Did the Council’s Planning Department (PD) process the 2015 and 2016 planning applications, and the planning enforcement case, in accordance with relevant legislation and policy guidelines?
 - iii. Was appropriate action taken by EHPD in relation to safety concerns of residents of Road X?
 - iv. Further to (i) above, did EHPD act outside its role as a planning consultee in relation to the planning applications, causing delay?
15. Having investigated the complaint, and to aid understanding of the matters involved, I have decided to report on these four heads of complaint under the following three headings:

⁷ Prior to 1 April 2015, the effective date of the reorganisation of local government in Northern Ireland, the planning control function sat within the Department of the Environment (DOE). On 1 April 2015, this function transferred to the newly formed Ards and North Down Borough Council (the Council), with officers from DOE Planning Service joining the Council and forming the Planning Department.

- i. Whether EHPD acted in accordance with relevant legislation, policy and guidance in relation to:
 - a) its role as a health and safety regulatory authority with regard to the health and safety concerns raised by Road X residents; and
 - b) its role as a planning consultee with regard to the planning applications.
- ii. Whether PD acted in accordance with relevant legislation, policy and guidance in relation to its handling of the planning enforcement case.
- iii. Whether PD acted in accordance with relevant legislation, policy and guidance in relation to its handling of the planning applications.

INVESTIGATION METHODOLOGY

16. In order to investigate the complaint, Investigating Officers obtained from the Council all relevant documentation, together with the Council's comments on the issues being investigated. The investigation considered evidence relating to the Council's actions with regard to the Planning Enforcement Case, the planning applications of 2015 and 2016, EHPD's health and safety investigation in relation to Road X residents' complaints about stray golf balls leaving the golf course (the Health and Safety Case); and the Council's response to the formal complaint that the Complainant submitted to it about its actions in response to the unauthorised works undertaken by the Golf Club at the first hole of the course (the Complainant's service standards complaint).
17. Given that the complaint concerns decisions the Council made in relation to the Planning Enforcement Case, the 2015 and 2016 Planning Applications, and the Health and Safety Case, it is important that I emphasise that the 2016 Act, which governs my role, empowers me to investigate the administrative actions of the public authorities in Northern Ireland. The 2016 Act does not authorise or require me to question the merits of a discretionary decision taken by a public authority, unless an investigation discloses evidence that there was maladministration in the process by which that decision was reached.
18. I have not included in this report all of the information that was obtained in the

course of the investigation but I am satisfied that everything I consider to be relevant and important has been taken into account in reaching my findings.

19. A draft this report was shared with the Complainant and the Council for comment on its factual accuracy and the reasonableness of the proposed findings and recommendations. Both the Complainant and the Council submitted comments in response. I gave careful consideration to their comments before finalising this report.

Relevant Standards

20. In order to investigate complaints, I must establish a clear understanding of the standards, both of general application and those which are specific to the circumstances of the case.
21. The general standards are the Ombudsman's Principles⁸:
- The Principles of Good Administration
 - The Principles of Good Complaints Handling
 - The Principles for Remedy
22. The specific standards are those which applied at the time the events complained of occurred, and which governed the exercise of the administrative functions of the authority whose actions are the subject of the complaint.
23. The specific standards relevant to this complaint are:
- The Health and Safety at Work (Northern Ireland) Order 1978
 - The Planning Act (Northern Ireland) 2011
 - The Planning (General Development Procedure) Order (Northern Ireland) 2015
 - The Local Government (Performance Indicators and Standards) Order (Northern Ireland) 2015
 - The Planning (Development Management) Regulations (Northern Ireland) 2015
 - Strategic Planning Policy Statement for Northern Ireland, September 2015

⁸ These principles were established through the collective experience of the public services ombudsmen affiliated to the Ombudsman Association.

- Planning Policy Statement 8 – Open Space, Sport and Outdoor Recreation (published by Department of the Environment, February 2004)
- Development Management Practice Note 18 – The Consultation Process and Duty to Respond, Version 1, published by the Department of the Environment, April 2015
- Development Management Practice Note 18 – The Consultation Process and Duty to Respond, Version 2, published by the Department for Infrastructure, May 2016
- Enforcement Practice Note 4 - Enforcement Procedures, published by the Department for Infrastructure, October 2016
- Ards and North Down Borough Council Planning Enforcement Strategy⁹
- Ards and North Down Borough Council Regulatory Services Enforcement Policy
- Chief Environmental Health Officers Group (CEHOG) Planning Guidance for Environmental Health Officers, December 2006
- The Role of the Planning Authority and Consultees in the Online Planning Application Consultation System V2.0, published by the Department of the Environment, April 2013

INVESTIGATION

Issue 1:

Whether EHPD acted in accordance with relevant legislation, policy and guidance in relation to: (a) its role as a health and safety regulatory authority with regard to the health and safety concerns raised by Road X residents; and (b) its role as a planning consultee with regard to the planning applications.

24. As noted above, in October 2014, the Golf Club undertook excavation work to relocate the first tee closer to the course's boundary with adjacent residential properties on Road X, including that of the Complainant. The Golf Club had not obtained planning permission for the work. On 28 October 2014, prior to the transfer of the planning control function from DOE to the Council¹⁰, the

⁹ This strategy is based on DOE's PPS 9 document, which was superseded by 5 paragraphs of SPPS in September 2015 (as per Head on Planning, within 24.8.18 and on 14.11.18)

¹⁰ Prior to 1 April 2015, the planning control function sat within the Department of the Environment (DOE). On 1 April 2015, the planning control function transferred to the newly formed Ards and North Down Borough

Complainant telephoned the enforcement section of DOE's Planning Service to complain about the works, and a planning enforcement case was opened.

25. On 30 March 2015, the Complainant contacted ES, within (the then) Ards Borough Council. He spoke to ES about the relocation of the first tee and the associated health and safety risk to his and a number of other Road X residential properties adjacent to the golf course boundary. He also advised that he had been informed by the Golf Club that the work it had undertaken had been approved by ES. The Environmental Health Officer, to whom the complainant spoke, recorded the contact as a complaint¹¹ about the relocation of the first tee and the associated safety risk to properties along Road X. Subsequently, EHPD in the (by then newly formed Ards and North Down Borough) Council commenced an investigation into the issue of stray golf balls leaving the first tee and entering neighbouring Road X properties.
26. In June 2015, the Golf Club submitted a retrospective planning application (the 2015 Planning Application) to the (by then established) PD within the new (Ards and North Down Borough) Council, in relation to the works it had undertaken in 2014 to relocate the first tee. PD consulted with EHPD in August 2015 about the safety of development proposed in the 2015 Planning Application. EHPD did not provide its consultation response until October 2016.
27. The Golf Club withdrew the 2015 Planning Application that same month (October 2016) and submitted a new application (the 2016 Planning Application) in relation to an amended development proposal for the first hole at the course. PD consulted EHPD with regard to the safety of the amended proposal. EHPD provided four separate planning consultation responses to PD during the period December 2016 to February 2018. In August 2018, the Council granted planning permission for the development proposed in the 2016 Planning Application.

Council, with officers from DOE Planning Service joining the Council and forming the Planning Department.

¹¹ In commenting on the draft of this report, the Complainant maintained that his contact with ES on 30 March 2015 was an enquiry, and not a complaint.

Evidence Considered

(i) Relevant Legislation, Policy and Guidance

The Health and Safety at Work Order (Northern Ireland) 1978

28. Article 23 of the Health and Safety at Work Order (Northern Ireland) 1978 (the Health and Safety at Work Order) provides for appointed health and safety inspectors to issue 'Improvement Notices'. It states that if a health and safety inspector *'is of the opinion that a person (a) is contravening one or more of the statutory provisions; or (b) has contravened one or more of those provisions in circumstances that make it likely that the contravention will continue or be repeated, he may serve on [that person] a notice (i) stating that he is of that opinion; (ii) specifying the provision or provisions as to why he is of that opinion; (iii) giving particulars of the reasons why he is of that opinion; and (iv) requiring that person to remedy the contravention or ... the matters occasioning it within such period ... as many be specified in the notice.'*
29. Article 24 of the Health and Safety at Work Order sets out provisions for the serving of 'Prohibition Notices'. It provides that a health and safety inspector who *'is of the opinion that, as carried on or likely to be carried on by or under the control of the person in question, the activities involve or ... will involve a risk of serious personal injury, the inspector may serve on that person a notice (a) stating that the inspector is of the said opinion; (b) specifying the matters which in his opinion give or ... will give rise to the said risk ... and (d) directing that the activities to which the notice relates shall not be carried on by or under the control of the person on whom the notice is served unless the matters specified in notice ... have been remedied.'*

Ards and North Down Borough Council's Regulatory Services Enforcement Policy

30. The Council's Regulatory Services Enforcement Policy (the Regulatory Services Enforcement Policy) is *'designed to allow the appropriate enforcement option to be chosen on principles that promote consistency and fairness ... The policy is required to determine the most appropriate action from a stated range of options in relation to breaches of legislation.'*

31. The Regulatory Services Enforcement Policy sets out the criteria by which the choice of enforcement action is to be made. These criteria include, *‘the seriousness of the alleged offence ... the threat posed ... the willingness of the party to prevent a recurrence of the problem ... [and] the appropriateness of alternative actions.’* The Regulatory Services Enforcement Policy lists a range of informal and formal options for enforcement actions, including, *‘oral advice’* and *‘advisory or warning letter’*.
32. Appendix 2 of the Regulatory Services Enforcement Policy provides information relating specifically to the enforcement of the Health and Safety at Work Order, including the circumstances in which it is considered appropriate to issue improvement notices and prohibition notices. It states, *‘... an **improvement notice** may be served in any or all of the following cases: where there is a serious contravention which can be improved; where an enforcement letter or other previous advice has not been complied with [and/or] where the previous record of the company of the attitude of the employer would indicate that informal methods are not likely to be effective ... a **prohibition notice** may be served where there is a risk of serious personal injury ...’*,

Development Management Practice Note 18 - ‘The Consultation Process and the Duty to Respond

33. Development Management Practice Note 18 - ‘The Consultation Process and the Duty to Respond’, which was published by the Department of the Environment in April 2015¹² (DM Practice Note 18) explains that *‘Planning officers frequently need to obtain specialist advice to enable them to consider the potential impacts of a development proposal before determining a planning application. Thus they approach persons or bodies who have recognised expertise concerning, for example, roads, water and sewerage infrastructure or environmental issues for advice that is beyond the scope of a planning officer’s own professional knowledge.’*
34. Section 2 of DM Practice Note 18 summarises the statutory requirements for planning consultation. It explains that that Section 229(2) of the Planning Act (Northern Ireland) 2011 (the 2011 Planning Act) *‘commits a council ... to*

¹² An updated version of DM Practice Note 18 was published by the Department for Infrastructure in May 2016. The 2016 version did not materially change any of the content of the 2015 version that is referenced above.

consult before the granting of any planning permission or consent.’ It also explains that Section 229(3) of the Planning Act requires a consultee ‘to give a substantive response within a prescribed time period or ... such period as is agreed in writing between the consultee and the council ...

35. Section 3 of DM Practice Note 18 sets out the role of consultees. It states, *‘It will be necessary to consult with statutory and non-statutory bodies to obtain comments on a development proposal in relation to the consultee’s area of expertise. Consultees are required to: provide a substantive response within set timescales; comment only on matters related to material planning considerations; and not burden the development management process with matters related to the requirements of other legislation beyond the control of planning.’*
36. Section 5 of DM Practice Note 18 explains that details of *‘the consultees that should be consulted where a planning application is to be determined by a council’* (that is, ‘statutory consultees’) are set out in Schedule 3 Part 1 of the Planning (General Development Procedure) Order (Northern Ireland) 2015 (the GDPO).
37. Section 6 of DM Practice Note 18 states, *‘Article 15(2) [of the GDPO] outlines the timeframe within which statutory consultees must respond to ... the council ... As a default position Article 15(2)(a) gives a statutory consultee 21 [calendar] days to respond to a council ... from when the council ... is satisfied the information it believes necessary to enable the consultee to make a substantive response.’* It is explained in Section 7 of DM Practice Note 18 that *‘Provision is made [in Article 15(2)(b) of the GDPO] ... for an extension period beyond the 21 days as may be agreed in writing between the consultee and council ...’.*
38. Section 9 of DM Practice Note 18 explains, *‘Not all of the information required to process an application will be from statutory consultees. There will still [be] instances where non statutory consultees may also need to be consulted on a case by case basis. This, for example in a council, will include other council departments with responsibility for matters relating to environmental health or*

leisure facilities ... Non statutory consultees are not bound by the 21 calendar days for a response, however, in order to allow decisions to be made in a timely manner they should be asked to provide response in a similar timeframe and fashion.'

Northern Ireland Planning Portal - The Role of the Planning Authority and Consultees in the Online Planning Application Consultation System

39. The Northern Ireland Planning Portal - The Role of the Planning Authority and Consultees in the Online Planning Application Consultation System Version 2.0, published by the Department of the Environment in April 2013 (the Online Planning Application Consultation Guidance) explains the role of consultees in the development management process. In doing so, the Online Planning Application Consultation Guidance explains that in providing the planning authority with advice on development proposals, consultees are required to *'Identify as early as possible if there is an insurmountable difficulty ...'* and to *'Identify if further information is necessary and detail why this information is essential to inform a planning decision'*. The Online Planning Application Consultation Guidance also emphasises that it is not the role of the consultee *'to recommend or advise that permission should be granted or refused, or provide suggested reasons for refusal since consultees are commenting with regard to one of a number of material considerations which will be assessed by the relevant planning officer and development management group in reaching a corporate decision on the application. The planning authority will take into account the consultee's advice. However, it is for the planning authority to make the decision and decide if an application should be approved ... or refused.'*

Planning Guidance for Environmental Health Officers

40. The stated purpose of the document 'Planning Guidance for Environmental Health Officers', which was published by the Chief Environmental Health Officers' Group (CEHOG) in December 2006 (the CEHOG Planning Guidance), is *'to give guidance to [Environmental Health Officers (EHOs)] on the assessment of planning applications'*.
41. Chapter 3 of the CEHOG Planning Guidance states, *'The role of the EHO is to*

consider the environmental impact of the proposed development ... in considering any application, the EHO should ask the question, can the proposed development take place at all without significant adverse (environmental health) impact on residential amenity. If so, does the detail/design of the proposal need to be modified to mitigate or prevent negative environmental impact. The EHO has the role of scrutinising applications together with supporting information ... to determine if the submissions are plausible and the mitigation measures proposed adequate to safeguard residential amenity.

42. In relation to an EHO's assessment of planning applications, Chapter 3 of the CEHOG guidance states, *'The onus is on the applicant to demonstrate through the provision of supporting information, plans and assessments ... that a development can be made acceptable ... If the information submitted is insufficient, additional precise information should be requested ... sufficient information needs to be provided to enable the EHO to make an informed decision about the proposal ... applicants will sometimes forward such information directly to the Environmental Health Department, whilst this can save time it is important to ensure that such information/report/assessment is also submitted through [the planning department] as part of the formal application process.*
43. Chapter 3 of the CEHOG Planning Guidance also explains, in addressing an EHO's role in responding to planning officers, that planning departments *'rely on [environmental health departments] for a professional assessment of the acceptability or otherwise of an application in respect of environmental health issues.*

(ii) Examination of Documentation

44. A review was completed of the documentation the Complainant had provided in support of his complaint and of that provided by the Council in response to investigation enquiries. A composite chronology of events and actions relating to the Planning Enforcement Case; the 2015 Planning Application; the 2016 Planning Application; the Health and Safety Case; and the Council's response

to the Complainant's service standards complaint was compiled on the basis of the documentation review. The chronology, along with relevant extracts of the documentation examined, is included at Appendix 2 to this report.

(iii) The Council's Response to Investigation Enquiries

45. Following this Office's assessment of the complaint and the determination that it warranted further examination, the Council was invited to comment on each of the four heads of complaint that had been accepted for investigation (as set out in paragraph 14 of this report).
46. In commenting on whether EHPD had conflated its planning consultee role, in relation to the 2015 Planning Application and the 2016 Planning Application, with its health and safety regulatory authority role, in relation to health and safety risks associated with stray balls from the first tee, the Council stated¹³, *'The short answer to that is yes'. The Council continued, 'The first responsibility of [EHPD] is in relation to the Health and Safety aspect of the operation of the golf club. The complaint regarding stray balls leaving the course was made by [the Complainant] on the 31 March 2015.¹⁴ On receipt of [the Complainant's] complaint an investigation was started immediately. During the investigation it became clear that the alterations that had been carried out at the course were subject to a planning investigation. In order to ameliorate the issues with balls leaving the course (the solution for which required the input of a golf course architect) it was likely that further alterations to the golf course would be required and therefore, the health and safety requirement and the submission of a planning application to have the required alterations carried out are inextricably linked.'*
47. In commenting on whether EHPD had acted outside its role as planning consultee in relation to the 2015 Planning Application and the 2016 Planning Application, thereby causing delay, the Council refuted¹⁵ that this had been the case. The Council stated, *'The club has submitted a planning application*

¹³ Letter dated 19 January 2018 from the Head of EHPD (the Council's nominated point of contact during the investigation) to the Investigating Officer

¹⁴ The contemporaneous records provided by the Council note the date of this contact from the Complainant as **30** March 2015

¹⁵ Letter dated 19 January 2018 from the Head of EHPD to the Investigating Officer

based on the [the golf course architect appointed by the Golf Club in February 2016 (the Club's Architect's)] report which meets the health and safety improvements required. EHPD was consulted on [the 2016 Planning Application] in October 2016 and made comments in December 2016 following several representations from [the Complainant] and [a group formed by residents of Road X (the Residents' Group)] particularly in relation to an alternative proposal they had commissioned via another golf course architect. After these comments were submitted two other consultations were sent to EHPD by [PD], in order to respond to further representations from [the Complainant] and [the Residents' Group] regarding [the 2016 Planning Application]. Therefore, in this case most of the delay has been in responding to representations from the objectors.'

48. In commenting on whether EHPD had taken appropriate action in relation to health safety concerns of residents of Road X, the Council stated,¹⁶ *'When the complaint was initially made the club was asked to carry out a risk assessment in relation to the use of the new/alterd first tee and the problem of balls leaving the course as a result of driving from the new tee. It became apparent that the health and safety consultants used to advise on general health and safety issues at the club, were not experts in the safety of the design of golf courses. In October 2015, a meeting of [the Residents' Group], two councillors, [EHPD] and [PD] took place. At the meeting various options for mitigating the risk from stray balls were put forward by members of [the Residents' Group] however they were informed that it was the club's responsibility to provide a solution and this would be discussed at imminent meeting of club officials and officers from EHPD ... As a result of this meeting the golf club agreed to employ golf course architects to review the hole and cease the use of the new tee to mitigate the number of stray balls ... [the Club's Architect] was subsequently employed by the golf club. [The Club's Architect's] report was received in March 2016, it indicated that there were indeed problems with the hole when played from the new tee and that significant works would be required to rectify this. As a result, officers from [EHPD] requested the cessation of the use of the new tee, this was agreed to by the club and remains the case pending the outcome of the*

¹⁶ Letter dated 19 January 2018 from the Head of EHPD to the Investigating Officer

planning application.'

49. The Council was asked whether it had served any statutory notices under the Health and Safety at Work Order to mitigate the risks associated with play from the first tee. In response, the Council advised,¹⁷ *'The voluntary closure of the new tee meant that any formal action was considered unnecessary as the club was fully engaged with EHPD in resolving the situation. As a result ... the issues with the use of the new tee from a health and safety perspective were resolved albeit temporarily pending the outworking of [the Club's Architect's] analysis and the club's planning applications. The Council continued in its response, 'Formal action such as the service of an improvement or prohibition notice was not considered as a suitable course of action as the club had closed the tee initially being complained of and were fully engaged with the investigating officers. Not only would formal action have been disproportionate ... but it would also have been potentially counterproductive in terms of retaining the co-operation of the undertaking. A letter was however sent to club officials dated 12th November 2015 following [the Environmental Health Officer's and the Environmental Health Manager's] visit on 2nd November 2015. The letter contained a precis of what had been discussed and agreed as a suitable course of action to commence the resolution of the complaint/ situation...'*
50. The Council also advised¹⁸, *Given the above, no record exists of a decision being made in relation to the service of formal notices as we were so far from considering this as being required or being appropriate for the following reasons:- To serve a prohibition notice ... the issuing inspector must have a reasonable belief that a risk of serious personal injury resulting from the undertaking's activities exists. The club closed the "new" first tee voluntarily following [EHPD's] visit in November 2015 thus removing the element of risk for that particular tee rendering the service of a notice for that tee unnecessary and unwarranted ... To serve an improvement notice ... the issuing inspector must specify the works required to remedy the breach of a relevant statutory*

¹⁷ Comments provided by the Environmental Health Officer, as included in email dated 24.8.18 from the Environmental Health Manager to the Investigating Officer

¹⁸ Comments provided by the Environmental Health Officer, as included in email dated 24.8.18 from the Environmental Health Manager to the Investigating Officer

provision. [The Environmental Health Officer] would only have been able to require the club to employ the services of a golf course architect to carry out a suitable and sufficient risk assessment of the hole. An improvement notice was unnecessary as the club had already agreed to do this. To have gone any further than this ... would not have been possible, the design and layout of golf courses is a subjective/creative discipline. [The Environmental Health Officer] would not be professionally competent to direct a golf club as to how their course should be laid out and were [he] to attempt to do so, Council and possibly [the Environmental Health Officer] as an individual, would become liable for any claims arising from defects in any requirements that [he] may have stipulated.

51. Also in relation to the action EHPD had taken in response to the reported health and safety concerns of Road X residents, the Council stated,¹⁹ *'The informal action of the Council in stopping the use of [the new first] tee by agreement means that the circumstances originally complained of no longer existed. Therefore, the issues with the use of that tee from the health and safety perspective were resolved as of November 2015.* The Council provided a copy of an email the complainant had sent to Environmental Health Officer on 6 November 2015, in which he (the Complainant) had written, *'In respect of the outcome of your visit [to the Golf Club on 2 November 2015] I would like to put on record out appreciation that the Club has now moved to a winter tee ... This move is a very significant step forward and has brought immediate relief to the amenity aspects of this development'.* The Council referred to the Complainant's email as an *'indication that the [Road X] residents appeared to be satisfied with this course of action'.*
52. Enquiries were made of the Council in relation to the timeliness of EHPD's planning consultation response to the 2015 Planning Application, as it had been noted by the Investigating Officer that although PD had issued the consultation request to EHPD on 12 August 2015, requesting a response *'within 21 days, or other period agreed in writing, from the date of this letter',*

¹⁹ Email dated 8 August 2018 from the Head of EHPD to the Investigating Officer

EHPD had not responded to PD until 3 October 2016. The Council advised²⁰ *'The duty to respond within 21 days only applies to statutory consultees as set out in the legislation, however internal/in-house consultees including [EHPD] is [sic] not a statutory consultee ... When [responsibility for the planning control function] first transferred to the Council in April 2015 there was no dedicated officer within [EHPD] to respond solely on planning applications and we experienced a lengthy backlog in addition to significant problems experienced with [the Northern Ireland Planning Portal (the Planning Portal)] when it transferred from the unitary planning system to that of twelve authorities (including [Department of the Environment/ Department for Infrastructure]) resulting in a number of applications not appearing correctly for any consultees; however, during the past three years [since 2015] that has been resolved.*

53. In relation to the same matter, the Council also advised,²¹ *'No alternative consultation time period was formally agreed [between EHPD and PD] however ... both departments were regularly in contact in relation to the complaint ... As such both were aware of the circumstances of each other's investigations/status i.e. planning enforcement stayed their investigation as an application had been received, EHPD were awaiting the [Club's Architect's] report, planning approvals were awaiting the same as a fully worked application and EHPD's comments on the same once it had been submitted.*

54. The Council also stated²², *'With hindsight, following [EHPD's] visit to the Golf Club on 2 November 2015 and the request for the involvement of a golf course architect to resolve the issues being complained of] the submission of a holding statement for publication on [the Planning Portal] whilst we waited the submission of [the Club's Architect's] report might have been preferable. It is [the Council's] contention that residents did not suffer any detriment as a result of the lack of such a submission on [the Planning Portal] ... In addition, [the Complainant] was routinely being kept informed of our course of action.'*

55. It was highlighted to the Council that copy documentation it had provided

²⁰ Email dated 6 August 2018 from the Head of Planning to the Investigating Officer

²¹ Comments provided by the Environmental Health Officer, included in email dated 24.8.18 from the Environmental Health Manager to the Investigating Officer

²² Comments provided by the Environmental Health Officer, included in email dated 24.8.18 from the Environmental Health Manager to the Investigating Officer

indicated that the Council was of the view that the 2015 Planning Application could not progress until such time as the health and safety issues arising from the Golf Club's use of the new first tee had been resolved. The Council was asked why it had held that view. In response, the Council explained²³, '*[EHPD] was consulted by [PD] with regard to the safety of the proposals contained within [the 2015 Planning Application] to approve amendments made to the location of the 1st tee at [the Golf Club]. EHPD officers are not experts in terms of golf course design and would have been unable to give a qualified opinion as to the relative safety of the proposals for the hole in any response to [PD] that might have been made circa August 2015. In a response to a normal planning consultation (not retrospective and/or no concurrent [environmental health] investigations in progress) where EPHD officers feel they do not hold the competence to make a direct comment on proposed developments, in their response they would ask [PD] to require the applicant to engage the services of a qualified independent expert to give their opinion on the relative correctness of the proposals. In the case of a golf course the requirement would be for a report on the overall safety of the scheme and any mitigation measures that might be required to make it safe. EPHD officers would then generally request that such measures be conditioned as part of approving the permission ...*'

56. The Council continued²⁴ '*... however [the 2015 Planning Application] was not considered to be a normal planning consultation/response situation ... the application was retrospective ... and in addition to this EPHD was already in receipt of a health and safety complaint about the scheme. A health and safety enforcement investigation was therefore being carried out concurrently with the planning application. During a planning enforcement case, if a [planning] application is received relating to the matter under investigation then the [planning] enforcement case is held in abeyance until the application has been processed and a determination made. There is no provision in health and safety law to set [a health and safety] enforcement investigation aside as a result of a planning application being received. The open and transparent nature of the planning application consultation process in which officer*

²³ Letter dated 2 December 2019 from the Head of EHPD to the Investigating Officer

²⁴ Letter dated 2 December 2019 from the Head of EHPD to the Investigating Officer

consideration is published online for all to see is incompatible with the necessarily closed nature of a criminal investigation when they are running concurrently ... As Council officers could not do what would be considered normal practice in this situation i.e. make a fully informed consultation response or make a request for further information, it was felt that the overall process must be seen to be fair. An applicant in normal circumstances would be afforded the opportunity to fix a defective proposal ... it was both fair and appropriate to afford such an opportunity to the applicant in this case especially as they were willingly assisting in the EPHD health and safety investigation which ultimately sought to resolve the problem.

57. It was further explained by the Council,²⁵ *'PD officers determined that the amenity issues arising from the mounding and excavations were not sufficient grounds for refusing the application therefore the decision as to refuse or approve the scheme rested on its relative safety ... Please note that safety ... is not an absolute. The duty of the club is to carry out a risk assessment and ensure the safety of non-employees etc. who are affected by their undertaking "in so far as is reasonably practicable". Ultimately, as the approval or refusal of permission hinged on the safety of the proposal it was not possible to process [the 2015 Planning Application] in the absence of a consultation response from EHPD officers which indicated their consideration of the scheme. Until the expert's professional opinion setting out the relative safety of the proposal was received, EHPD officers were unable to determine if the reasonably practicable "test" ... was being met.'*
58. The Council was informed that it had been noted, from the documentation it had provided, that on 7 June 2016, the Environmental Health Officer had informed the Golf Club that EPHD's planning consultation response to the 2015 Planning Application had not yet been provided to PD because EPHD *'would object to [the 2015 Planning Application] as it [was] currently submitted ... on the grounds of safety'*; that such a consultation response *'would likely result in the application being refused'*; and that *'Given [EPHD's] current level of consultation [the Environmental Health Officer] believe[d] this would not be a*

²⁵ Letter dated 2 December 2019 from the Head of EHPD to the Investigating Officer

sensible course of action, however without [EHPD's] response the planners are unable to proceed.' The Council was asked to explain the comment, *'Given our current level of consultation I believe this would not be a sensible course of action'*.

59. The Council responded²⁶, *'Once the health and safety investigation commenced, EPHD officers engaged with the club officials and found them to be willing and interested participants ... the club [was] required to reassess the [first] hole and in doing so engage the services of an expert such as a golf course architect. ... [Following the Club's Architect's initial report of 3 March 2016] a process of queries from EHPD officers and responses from the club and [the Club's Architect] ensued (i.e. consultation) to try to ensure that all arising issues had been considered and that [the Club's Architect's] ultimate recommendations presented a scheme which was considered to be safe in so far as is reasonably practicable. Having required that the club assess the safety of the scheme and provide solutions to any defects that were found to be present, I consider that it would have been unfair, inconsistent and an act of bad faith (referred to as "not a sensible course of action" in [the Environmental Health Officer's] correspondence) to recommend to PD that the application be refused based on the findings in [the Club's Architect's] initial report without providing an opportunity to remedy any defects.*
60. The Council continued in its response,²⁷ *'Had permission been refused based on EHPD recommendations there would have undoubtedly been an appeal to [the PAC]. This would have triggered review of the entire planning proposal and have effectively brought the situation at the 1st hole back to square one and caused further delay. EHPD officers expected that amendments to the [2015 Planning Application] scheme would be submitted and that with the investigation having concluded, a "no objections" response could be made at that point in time. This is a difficult area of "information" law in terms of compatibility ... EHPD did eventually comment on the safety of the original scheme however, this was only once it became clear that [the 2015 Planning Application] needed to be withdrawn ... due to [an issue with the extent of the*

²⁶ Letter dated 2 December 2019 from the Head of EHPD to the Investigating Officer

²⁷ Letter dated 2 December 2019 from the Head of EHPD to the Investigating Officer

“red line”] and that the safety issues of the old scheme would be put into the public domain in the next application via the submission of [the Club’s Architect’s] report.’

61. The Council also commented on the circumstances that had led to the withdrawal of the 2015 Planning Application and the submission of the 2016 Planning Application. It stated,²⁸*‘The final EHPD consultation response relating to [the 2015 Planning Application], in which [the Environmental Health Officer] effectively held that the layout of the hole as applied for was unsafe, was not as a result of his own determination but was a reiteration of the findings in the expert report provided by the applicant. [The Club’s Architect] had concluded that [the 2015 Planning Application] scheme was not safe, and that mitigation works were required further down the fairway to make it so. The “red line” for [the 2015 Planning Application] did not extend far enough to encompass the newly proposed mitigation works, as a result in order to apply for permission for the new “enhanced” scheme, the applicant was required to withdraw their original application and resubmit with an extended red line. [The Environmental Health Officer’s] final response to [the 2015 Planning Application] was at the behest of PD officers to “tie off loose ends” in an administrative sense by providing an official rationale for its withdrawal.’*
62. Enquiries were made of the Council about EHPD’s consideration of the recommendations the Club’s Architect had made in his safety audit report dated 3 March 2016 in relation to the first hole at the golf course. The Council was asked what discussion there had been of the Architect’s proposals for the first hole at a meeting that had taken place on 5 May 2016 between EHPD officers, Golf Club officials and the Club’s Architect, in particular, what discussion there had been of the potential alternative option of the Club retaining the use of the original first tee. The Council responded, *‘A number of possibilities were discussed at this meeting, however ... [the Club’s Architect] stated that their proposal was the safest solution. It is for the club to put forward a solution, make sure that they have complied with duties to ensure it is safe and have required permissions in place. EHPD officers must be satisfied that any*

²⁸ Letter dated 2 December 2019 from the Head of EHPD to the Investigating Officer

proposals are safe in so far as is reasonably practicable, such satisfaction clearly rests on the competence of the officers involved and their understanding of their own limitations. On the basis of the expert reports and opinions received from both applicant and objectors, EPHD had no objections to the progress of the new submitted [2016 Planning Application] scheme as per [the Club's Architect's] proposals.'

Analysis and Findings

63. This first issue of complaint concerns the roles played by the Council's EHPD in relation to the Health and Safety Case, and with regard to the 2015 and 2016 Planning Applications. My findings on these matters take account of relevant legislation, policy and guidance; the detailed chronology of events and actions included at Appendix 2; and the Council's responses to investigation enquiries
64. Before setting out my findings on this issue of complaint, I should record that I am mindful that the Complainant is of the firm belief that the work carried out by the Golf Club in October 2014 to relocate the first tee was approved by ES within the (then) Ards Borough Council. He also believes that EHPD's actions in 2015, and subsequently, were improperly influenced by the role that ES had played in 2010 in relation to residents' health and safety concerns about stray golf balls from the course entering their properties. It is important, therefore, that I also record the findings of the investigation that relate to these particular matters.
65. In response to investigation enquiries, the Council provided a copy of its case file relating to health and safety matters at the Golf Club. The file included contemporaneous documentation and records relating to the action that ES took in response to the complaint it received in January 2010 from a Road X resident about stray golf balls leaving the site of the first tee at the Golf Club and striking neighbouring residential properties. A chronology of ES' actions in 2010, which was compiled on the basis of that contemporaneous documentation, was set out earlier in this report.
66. The chronology indicated that following receipt of the resident's complaint, ES undertook an inspection at the Golf Club and recommended that the Club's

H&S Consultant consider the matter. I noted that ES also wrote to the Golf Club, advising that it should consider a number of mitigating measures.

67. I noted that a risk assessment subsequently carried out by the Club's H&S Consultant concluded, '*... there is a significant risk of stray golf balls causing injury (possibly serious) to members of the public in these houses and gardens*'. The Club's H&S Consultant proposed three options to reduce the risk of injury to members of the public. These were: '*the erection of sufficient netting barriers to prevent stray gold balls entering the houses and gardens*'; '*re-siting the main tee further back to a position between the clubhouse and the 18th green*'; and '*re-siting the main tee approximately where the present winter mat is located and sculpting the new tee to a position about 2m lower than the present level*'. ES wrote to the Golf Club on 23 March 2010, advising that it was in agreement with the Club's H&S Consultant's '*suggested remedy of lowering the existing tee in addition to the gap in the fencing being closed*'.
68. I noted too that ES wrote to the Golf Club again, on 15 April 2010, referring to a number of measures that had been discussed with senior Club officials during the Director of ES' recent visit to the Club. The measures documented in ES' letter were:
- '1. The existing gap in the high level fencing situated beyond the 1st hole, is to be extended and closed.*
 - 2. The 1st fairway nearest the rear of the properties to [Road X] is to be moved 30 yards to the left and the out of bounds are also moved accordingly ...*
 - 3. Players when using "the competition tee (white tee)", which is only used in the vast majority of cases on a Saturday, as suggested by ... Club Officials, shall distinctly mark their golf balls to facilitate the monitoring the use, and the extent of the problem, if any, that play form this tee causes to the complainants and their properties.*
 - 4. General play shall be form [sic] the existing "green tee box", used also for winter play and not from the forward end of the competition tee.'*
69. I was satisfied that the scope and nature of the remedial works that were agreed between ES and the Golf Club in 2010 was apparent from the contemporaneous documentation. In terms of the redesign of the first tee, I

noted that in writing to the Golf Club on 23 March 2010, ES endorsed the Club's H&S Consultant's '*suggested remedy of lowering the existing tee* [my emphasis] *in addition to the gap in the fencing being closed*'; it was evident that ES gave no approval or endorsement of the relocation of the first tee closer to the boundary in that correspondence or in its subsequent letter to the Golf Club on 15 April 2010.

70. The investigation found no evidence of any further inspections or interventions by ES at the Golf Club, in relation to stray golf balls entering Road X properties, until March 2015, when the Complainant reported his concerns about the works the Golf Club had undertaken in October 2014 to relocate the first tee. I noted that the Council, in responding to this Office's investigation enquiries, stated that when the Complainant contacted ES in March 2015, he spoke to the officer who had dealt with the Golf Club in 2010, and that she had no knowledge of the work the Club had completed in October 2014, other than what the Complainant had reported to her at that time. The investigation found no evidence that would indicate otherwise.
71. I noted that the Council stated that it has informed the Complainant '*repeatedly*' and '*at length*' that there was no contact between ES and the Golf Club, in relation to the first hole, in the period between ES' intervention in 2010 and his contact with ES at the end of March 2015, but that he does not accept this. I am conscious that the Complainant's enduring belief that ES sanctioned the Club's relocation of the first tee in 2014 may, in part at least, be due to the content of a report the Golf Club circulated in February 2016, which I note suggests that ES' role was more than is indicated in the contemporaneous documentation examined in this investigation. It is not appropriate for me to comment on the content of the Golf Club's report. However, I can assure the Complainant that this Office's independent examination of ES' involvement with the Golf Club in relation to the first tee, in 2010 and subsequently, found no evidence that ES endorsed or approved the work the Club carried out in October 2014 to relocate the first tee closer to the course's boundary with Road X properties. Furthermore, there was no evidence that EHPD's actions during the period examined by the investigation were improperly influenced by events

in 2010.

72. That said, I consider that the Council missed a number of early opportunities to assure the Complainant that this was the case. I noted that the Complainant highlighted his concerns about ES' previous involvement with the Golf Club, in correspondence he sent to the Council 9 February 2016, 14 March 2016, 10 June 2016 and 2 September 2016. However, it was not until 11 April 2017, when the Chief Executive responded to the Complainant's letter of 2 September 2016, that the Council provided any specific detail of the role ES had played in 2010 in relation to the first hole at the course. At that time, the Council advised, *'While the lowering of the tee position was agreed which effectively raised the height of the protective fence, no comment was made by [ES] in relation to the moving of the tee to the right.'* In my view, a more timely comprehensive response from the Council to the Complainant's enquiries about the previous involvement of ES would have assisted in his (the Complainant's) understanding of the nature and extent of the role played by ES, and subsequently EHPD, in the action the Golf Club took in 2014 to relocate the first tee.
73. I turn now to my consideration of the substance of this issue of complaint, that is, EHPD's roles in relation to (a) the Health and Safety Case, and (b) the 2015 and 2016 Planning Applications, which has taken account of relevant legislation, policy and guidance, and the Council's responses to investigation enquiries. My consideration of this issue has also drawn on the chronology of events and actions, and extracts of relevant contemporaneous documentation included at Appendix 2.
74. My investigation established that on 30 March 2015 the Complainant contacted ES within (the then) Ards Borough Council about the work the Golf Club had undertaken the previous October to relocate the first tee. He indicated to ES that the work impacted on five Road X properties, including his own. The Complainant also advised that he had been informed by the Golf Club that the work it had carried out had been approved by ES. I noted that ES recorded the Complainant's contact as a complaint about the relocation of the first tee and the resulting risk to Road X properties, although the Complainant maintains that

the purpose of his contact with the (then Ards Borough) Council on that occasion was to make an enquiry, not to raise a complaint.

75. I noted that the ES Environmental Health Officer, to whom the Complainant spoke at the time, later discussed the matter with the Director of ES, who indicated that he was aware '*on an informal basis*' of the work the Golf Club had carried out, and that he did not consider it to be '*a planning issue*'. The same Environmental Health Officer and the Director of ES held an 'advisory meeting' with the Golf Club on 15 April 2015, in relation to the work that had been carried out at the first tee, and another unrelated health and safety matter. The Council officers inspected the new first tee, noting that it was '*reasonably close to housing immediate to clubhouse*' but that '*to strike a house it would need to be a deliberate act*'. I noted that a number of measures were discussed with the Golf Club at the time, including the possible extending of existing fencing and the issue of advisory letters to residents, as well as '*a review of risk assessment to reflect works carried out at first tee*'.
76. I established that the Club's H&S Consultant completed a risk assessment on 22 April 2015 to evaluate the effects of the work undertaken at the first tee. I noted that the H&S Consultant's report of 1 May 2015 concluded that the work the Golf Club had carried out to address the risk of injury to members of the public due to stray golf balls had resulted in '*a much safer ... golf hole*'. The Club's H&S Consultant recorded his opinion that '*...the changes in force ... reduce the risk to a moderate risk and a very low position in the moderate band*', and he recommended some further mitigating measures, including the planting of trees to fill a gap in existing fencing.
77. I noted that on 18 May 2015, the Council's PD wrote to the Golf Club, informing it that the work it had carried out at the first tee in October 2014 (which had been brought to the attention of DOE Planning Service by the Complainant on 28 October 2014) constituted a breach of planning control. In its letter, PD required the Golf Club to either remove the unauthorised development or to submit a retrospective planning application.
78. A retrospective planning application (the 2015 Planning Application) was

received by the Council on 22 June 2015. PD held an Enforcement Group Meeting that same day. PD noted that consultation with EHPD, in relation to the health and safety concerns associated with play from the new first tee, could take place through the 2015 Planning Application.

79. On 12 August 2015, PD issued a planning consultation request to EHPD, in relation to the 2015 Planning Application. I noted that a meeting between PD and EHPD followed on 1 September 2015, at which PD indicated to EHPD that it (PD) *'would possibly be in touch with regard to the [2015 Planning Application] in terms of consultation with [EHPD] before [PD] move forward.'* Subsequently, on 26 October 2015, the Head of Planning wrote to the Head of EHPD, indicating that it was considered that *'the main issue with regard to the [2015 Planning Application] is ... health and safety.'* I consider these interactions between PD and EHPD are indicative of PD's view that the 2015 Planning Application could not progress without consultation with EHPD in terms of the acceptability of the (retrospectively) proposed development, from a health and safety perspective.
80. I also noted that in her email of 26 October 2015, the Head of Planning asked the Head of EHPD to *'organise the appointment of a body to carry out a safety audit of the first hole'*. In making that request, the Head of Planning highlighted that *'Given that the main issue with regard to the planning application is the issue of health and safety, it is important that we get such a report commissioned as soon as possible as the issue has been ongoing for nearly a year.'* In the draft of this report, I recorded that I had concluded that the content of the Head of Planning's email to the Head of EHPD was evidence that PD had asked EHPD to obtain additional information (that is, an opinion from a suitably qualified golf course design expert or architect) that was needed to inform the consideration of the 2015 Planning Application. I also recorded my view that such action was not in keeping with the usual, and appropriate, procedure whereby PD, and not EHPD, would request any necessary additional information from the planning applicant (in this case, the Golf Club), thereby ensuring that such additional information was obtained within the open and transparent planning process.

81. In commenting on the draft of this report, the Council stated, '*... in hindsight [the Head of Planning's] email perhaps could have been worded differently, the wording she used was not a true reflection of her intent, she certainly did not wish to control the safety investigation or bypass the planning process.*' The Council continued, '*It is not unusual that one senior manager would politely advise another senior manager "to get on with it" when their own departmental performance was being affected and especially when complaints of an impact on personal safety were being received.*' The Council contended that the expert opinion EHPD had been asked to arrange, and had gone on to obtain (as I will refer to below), had been for the specific purpose of the Health and Safety Case, rather than the 2015 Planning Application.
82. In considering the Council's comments on this aspect of my draft report, I reflected again on the evidence gathered during the investigation, which was relevant to this matter. In particular, I noted that when EHPD wrote to the Golf Club on 12 November 2015, advising that the Golf Club should '*engage the services of a suitably qualified golf course architect ... [who] should assess the situation and prepare a proposal to address the health and safety issue ...*', its letter was headed, '*Re: The Health and Safety and Work (NI) Order 1978*'. The letter also referred to EHPD's '*duty to investigate and ensure that the club takes all reasonable steps to reduce the risk of injury to persons likely to be affected.*' I decided, in weighing up the relevant evidence, to accept the Council's position that EHPD had obtained the expert opinion for the purpose of the Health and Safety Case, rather than for the purpose of informing the consideration of the 2015 Planning Application.
83. I noted that members of EHPD attended a meeting at the Golf Club on 2 November 2015. The Golf Club was advised that residents' reports of stray golf balls, and evidence of damage caused by them, indicated that the use of the new first tee had increased the risk of injury. EHPD informed the Golf Club that it was to stop using the new tee and transfer play to the original ('winter') tee, and to seek advice from a suitably qualified consultant or golf course architect in relation to possible options for controlling the health and safety risk to an acceptable level. I noted that the Golf Club confirmed to EHPD on 5

November 2015 that it had, by then, moved play to the original ('winter') tee.

84. As already referred to above, on 12 November 2015, EHPD wrote to the Golf Club. EHPD confirmed the action that had been discussed at the meeting on 2 November 2015, that is, that use of the new first tee was to cease and that a report from a suitably qualified golf course architect was to be obtained and provided to EHPD by the end of February 2016. The Golf Club was also informed that the 2015 Planning Application '*could not proceed without a resolution to this health and safety issue.*'
85. I noted that the golf course architect that was subsequently appointed by the Golf Club (the Club's Architect) prepared a safety audit report in relation to the first hole at the course, and that the Golf Club forwarded that report, dated 3 March 2016, to EHPD on 13 March 2016. The report referred to the measures the Golf Club had already implemented to address the issue of stray golf balls leaving the course but concluded that while there had been some improvement, the problem had not yet been fully addressed and there was therefore a need for further mitigating measures to be put in place to adequately address the health and safety risk. In forwarding the report to EHPD, the Golf Club indicated that it intended to recommence using the new first tee from 19 March 2016.
86. The investigation established that EHPD wrote to the Golf Club on 15 March 2016 advising that it had a number of queries about the content of the Club's Architect's safety audit report. I noted that EHPD indicated to the Golf Club that it was unlikely that these queries would be addressed before the intended reopening of the new tee on 19 March 2016, and it asked the Club to delay reverting play to it. EHPD again wrote to the Golf Club on 18 March 2016, setting out the matters on which further information was needed from the Club's Architect. One of those matters was why the Club Architect had not assessed '*the original 1st hole teeing ground to the front of the pro shop.*'
87. The Club's Architect's response to EHPD's queries was provided in a further report, dated 21 March 2016, which the Golf Club forwarded to EHPD on 24 March 2016. A meeting between EHPD, Golf Club officials and the Club's

Architect followed on 5 May 2016. I noted there was discussion at the meeting of whether mitigation measures, similar to those the Club's Architect had proposed in his report of 21 March 2016, could be implemented for the original first tee, in order to address safety concerns, but that the Architect advised that this was not a viable option because the fence that would be necessary would have to extend 30 to 40 metres along the course and even then, would still not prevent golf ball egress. I noted too that the Architect's opinion was that the new first tee, with the proposed mitigation measures in place, was the safer option.

88. I further noted that in follow up to the 5 May 2016 meeting, the Club's Architect prepared another report, dated, 13 May 2016, which confirmed his view, and the rationale for it (based, in part, on golfmetric ball dispersion data), that the new first tee was safer than the original tee. The Golf Club forwarded that report to EHPD on 27 May 2016.
89. My investigation established that subsequently, on 7 June 2016, EHPD pointed out to the Golf Club that the mitigating measures proposed by the Club's Architect to address the health and safety risk associated with play from the new first tee would require the 2015 Planning Application to be amended. I noted that, ultimately, the extent of the proposed mitigating measures was such that it was necessary for the 2015 Planning Application to be withdrawn and a new application (the 2016 Planning Application) to be submitted.
90. It is evident from the chronology of events I have set out above that by early November 2015, the 'informal' action taken by EHPD in response to the health and safety concerns of Road X residents, that is, verbal and written communication with the Golf Club, had resulted in the cessation of use of the new first tee, effectively addressing the health and safety risks associated with play from it (albeit, as the Council stated in response to investigation enquiries, *'temporarily, pending the outworking of [the Club's Architect's] analysis and the club's planning applications'*). I noted the new first tee did not come back into use at any time during the period examined in this investigation (and, due to circumstances that are outside the scope of my investigation, this has remained the case ever since).

91. The Council, in response to investigation enquiries, provided a detailed rationale of why it did not find it necessary to contemplate the taking of formal action against the Golf Club under the provisions of the Health and Safety at Work Order, such as the serving of a prohibition notice or an improvement notice. In doing so, the Council highlighted that the Golf Club's voluntary closure of the new first tee from November 2015 not only meant that *'the issues with the use of that tee from the health and safety perspective were resolved as of [that time]* but also that formal action was not considered appropriate as the Golf Club *'was fully engaged with EHPD in resolving the situation'*.
92. I noted that the Council's statutory powers, under the Health and Safety at Work Order, to take formal action such as the serving of a prohibition notice or an improvement notice are discretionary. As explained at outset of this report, the 2016 Act empowers me to investigate the administrative actions of public authorities in Northern Ireland; the legislation does authorise or require me to question the merits of a discretionary decision that has been taken without maladministration. Having examined the actions of EHPD, I found no evidence of maladministration in the taking of the decision to instigate informal, rather than formal, action to seek to resolve the health and safety risks associated with play from the new first tee.
93. I noted too that the Council's Regulatory Services Enforcement Policy sets out a range of options for health and safety enforcement action, which include *'oral advice'* and an *'advisory or warning letter'*. The same policy lists the criteria to be applied in determining appropriate enforcement action. These criteria include *'... the willingness of the party to prevent a recurrence of the problem'*. It is evident that this was a relevant consideration in the case of the Golf Club. I am satisfied that EHPD's actions were in keeping with the Regulatory Services Enforcement Policy.
94. It is also evident that following the securing of the Golf Club's agreement to suspend play from the new first tee, EHPD continued in its role as health and safety regulatory authority by engaging with the Golf Club and the Club's Architect in relation to the consideration of possible options for mitigating the risks associated with play from the first hole at the course. In this regard, I

noted the Council's comment that following the receipt of the Club's Architect's initial report, *'A process of queries from EHPD officers and responses from the club and [the Club's Architect] ensued (i.e. consultation) to try to ensure that all arising issues had been considered and that [the Club's Architect's] ultimate recommendations presented a scheme which was considered to be safe in so far as is reasonably practicable.* I noted this engagement on the part of EHPD included a requirement that the Club's Architect explain the rationale for his view that the new first tee, with mitigating measures in place, was safer than the original first tee, with the same or similar measures implemented, which, I noted, was the preferred option put to the Council by the Complainant.

95. The evidence considered showed that having concluded its engagement with the Club's Architect, EHPD was content that the mitigating measures the Architect had proposed would adequately address the health and safety issues associated with play from the new first tee.
96. Having examined EHPD's role as a health and safety regulatory authority with regard to the health and safety concerns that were raised by Road X residents, I am satisfied that there is no evidence that EHPD had failed to act in accordance with relevant legislation, policy and guidance.
97. Turning then to EHPD's role as a planning consultee in the 2015 and 2016 Planning Applications, my investigation established that following the validation of the 2015 Planning Application on 4 August 2015, PD issued a consultation request to EHPD on 12 August 2015, requesting a response within 21 days, or *'other period agreed in writing'*. PD did not receive EHPD's planning consultation response, dated 3 October 2016, until 7 October 2016, almost 14 months after it had been requested.
98. The Council stated in response to enquiries, *'Ultimately, as the approval or refusal of [planning] permission hinged on the safety of the proposal it was not possible to process [the 2015 Planning Application] in the absence of a consultation response from EHPD officers which indicated their consideration of the scheme.'* It is evident then that EHPD's planning consultation response

was fundamental to the consideration of the 2015 Planning Application, and the timeframe in which that consideration could be concluded.

99. In considering this matter, I was mindful that EHPD is a not a statutory planning consultee, which as explained in Section 5 of DM Practice Note 18, are those listed in Schedule 3 Part 1 of the GDPO. Consequently, as the Council pointed out in its response to investigation enquiries, the statutory 21-day timescale for providing a consultation response did not apply to EHPD. That said, I noted that Section 9 of DM Practice Note 18 highlights that *'in order to allow decisions to be made in a timely manner [non-statutory consultees] should be asked to provide response in a similar timeframe and fashion.'*
100. The Council stated that staff resourcing issues, following the transfer of the planning control function from DOE to the Council at the beginning of April 2015, resulted in *'a lengthy backlog'* and that technical problems with the Planning Portal around the same time meant that some planning applications *'did not appear correctly'* for consultee. I accepted that these issues may have caused some initial delay in EHPD's consultation response in the case of the 2015 Planning Application. However, in my view, the fact that EHPD had met with PD on 1 September 2015 in relation to the Planning Enforcement Case, and was by then aware of the 2015 Planning Application and the need for PD to consult with EHPD in relation to it, demonstrates that these technical and resourcing problems did not impact significantly on EPHD's ability to provide a timely consultation response on that particular planning application.
101. The Council also pointed out that since EHPD officers are not golf course design experts, it would not have been possible for EHPD to have given *'a qualified opinion'* on the safety of the development proposal in any consultation response that might have been provided to PD at an early stage. The Council explained that where, in responding to *'a normal planning consultation (not retrospective and/or no concurrent [environmental health] investigations in progress)'*, EPHD officers consider they do not have the competence to comment on the development proposal, they would, in their consultation response, ask PD to require the applicant to engage the services of a qualified independent expert *'to give their opinion on the relative correctness of the*

proposal'. In the case of a golf course, the Council explained, this would be a requirement *'for a report on the overall safety of the scheme and any mitigation measures that might be required to make it safe'*, with EHPD officers *'then generally request[ing] that such measures be conditioned as part of approving the permission.'*

102. The Council stated that the 2015 Planning Application was not, however, considered to be *'... a normal planning consultation/response situation [because] ... the application was retrospective ... and in addition to this EPHD was already in receipt of a health and safety complaint about the scheme. A health and safety enforcement investigation was therefore being carried out concurrently with the planning application.'* The Council commented that *'the open and transparent nature of the planning application consultation process in which officer consideration is published online for all to see is incompatible with the necessarily closed nature of a criminal investigation when they are running concurrently.'* The Council stated that this situation meant that in the case of the 2015 Planning Application, EHPD officers *'could not do what would be considered normal practice in this situation i.e. make a fully informed consultation response or make a request for further information'*.

103. In the draft of this report, I recorded that I considered it appropriate, and necessary, for EHPD to rely on the opinion of a suitably qualified golf course design expert or architect in order that it could provide PD with an informed planning consultation response in relation to the 2015 Planning Application. I also stated that, in this regard, I had noted that Chapter 3 of the CEHOG Guidance highlighted the need for sufficient information to be provided *'to enable the EHO to make an informed decision about the proposal.'* However, I went on to record in the draft report that I did not accept the Council's position that the circumstances of the 2015 Planning Application were such that EHPD could not take the action that was *'considered normal practice'*.

104. In commenting on the draft report, the Council contended, *'... criminal investigations of the kind that [EHPD] was and still is running ²⁹ are not and cannot be open ... [EHPD] was statutorily barred by Article 30 of [the Health*

²⁹ Position as at 17 August 2020, the date the Council provided this comment on the draft investigation report

and Safety at Work Order] from being as open as you suggest was appropriate during the planning consultation process.’ The Council pointed out that in certain circumstances, Article 30 of the Health and Safety at Work Order provided for the disclosure or release of information gathered using the powers provided by the statute but stated that the planning consultation process was not such a circumstance. The Council also highlighted that Article 30 permitted the disclosure of information in circumstances where appropriate consent for the disclosure had been given. It maintained, however, that although the Golf Club had consented in May 2016 for information EHPD had gathered in the course of the Health and Safety Case (including the Club’s Architect’s report) to be released to the Complainant, *‘that permission ... made no mention of releasing information to the planning consultation process ...’*. The Council further maintained, *‘... the issue of disclosure was front and centre in the minds of officers involved at the time.’*

105. In reflecting on the Council’s comments, I noted that there were no contemporaneous records within the extensive documentation the Council had provided to indicate that Article 30 restrictions on disclosure had been a conscious consideration in EHPD’s determination that it was not able to provide a more timely consultation response to the 2015 Planning Application. I was also mindful that evidence gathered during the investigation did not support this position. This evidence included that:

- On 14 March 2016, having considered the Club’s Architect’s report received on 13 March 2016, EHPD sent an email to PD, stating, *‘It appears reference material contained within the report is not for general circulation – can it be redacted from the portal??’* (This enquiry from EHPD to PD related to a comment within the Club’s Architect’s report that reference material reproduced within it was not to be made publicly available.) There was no suggestion in EHPD’s email to PD that Article 30 restrictions on disclosure would prevent the publication of the Architect’s report in any case;
- On 6 June 2016, the Golf Club sent an email to EHPD. The Club advised it *‘believe[d] that the [2015] planning application should proceed’*. On 7

June 2016, EHPD replied to the Golf Club, advising that EHPD had not yet provided its planning consultation response to the 2015 Planning Application because EPHD *'would object to [the 2015 Planning Application] as it [was] currently submitted ... on the grounds of safety';* which *'would likely result in the application being refused';* and that *[EHPD] believe[d] this would not be a sensible course of action ...'*. There was no reference in EHPD's response to EHPD's ability to provide its consultation response being impacted by the Article 30 statutory bar;

- When EHPD ultimately provided its consultation response to the 2015 Planning Application (in October 2016) it referred to the opinion of the Club's Architect, stating, *'Officers from the Council have been working with officials from the club and their consultants, who have acknowledged the risk this application presents in its current form'*, even though, as the Council has since advised, the Architect's opinion had been obtained under the provisions of the Health and Safety at Work Order, and was therefore subject to the Article 30 statutory bar on disclosure; and
- The Council, at an early stage in my investigation,³⁰ attributed the delay in EHPD providing its consultation response to *'a lengthy backlog'* resulting from staff resourcing issues, following the transfer of the planning control function from DOE to the Council at the beginning of April 2015 and to technical problems with the Planning Portal around the same time. The Council made no mention of the impact of the Article 30 statutory bar.

106. The Council subsequently confirmed that *'Upon review of the files there is no specific instance where EHPD advised PD that they could not comment on [the 2015 Planning application] due to the statute bar'*. The Council also advised the long term absence of a staff member had meant that it had not been possible *'to access any personal notes that they may have taken at the time'*. It is my expectation that all contemporaneous records pertinent to EHPD's consultation response on the 2015 Planning Application, particularly any records relating to a matter as fundamental as the consideration of the impact of a statutory provision on the ability to provide that response, would be

³⁰ Email dated 6 August 2018 from the Head of Planning to the Investigating Officer

contained within the relevant files. I have concluded therefore that it is highly unlikely that any such records exist.

107. Having taken account of all the available evidence, I am not persuaded that the Article 30 statutory bar on the disclosure of information that had been obtained under the provisions of the Health and Safety at Work Order was, as the Council now contends, *'front and centre in the minds of the officers involved at the time.'*
108. I am not persuaded either that any of the provisions of Article 30 of the Health and Safety at Work Order prevented EHPD from asking the Golf Club to give its consent for the Club's Architect's expert opinion to be disclosed for the purpose of informing EHPD's planning consultation response. In this regard, I noted that Article 30(6)(c) expressly provides for information obtained to be disclosed where *'the relevant consent'*³¹ has been given.
109. That said, even if Article 30 of the Health and Safety at Work Order had prevented EHPD from disclosing information it had obtained under the provisions of the Health and Safety at Work Order, including the Club's Architect's expert opinion, I consider there was no valid reason why EHPD could not have asked PD to request from the Golf Club whatever additional information it (EHPD) needed to inform its planning consultation response, even if that additional information was the same information the Golf Club had already provided to EHPD for the purpose of the Health and Safety Case.. Such action by EHPD would not have led to any breach of the provisions of Article 30 and, importantly, would have ensured that the additional information EHPD needed to make an informed planning consultation response to PD was obtained and considered within the open and transparent planning process.
110. As it was, EHPD did not advise PD at an early stage that it needed more information to make an informed planning consultation response, and ask PD to obtain that further information from the Golf Club. Instead, EHPD held back from providing a consultation response that would indicate its opinion that the

³¹ Article 30(7) of the Health and Safety at work Order defines 'relevant consent' as *'... the consent of the person who furnished it [or] the consent of a person having responsibilities in relation to the premises where the information was obtained'*.

development (retrospectively) proposed in the 2015 Planning Application was unsafe, because it knew that this was likely to result in the application being refused.

111. In this regard, I noted that the Council stated, in response to investigation enquiries, that EHPD considered it would have been *'unfair, inconsistent and an act of bad faith ... to recommend to PD that the application be refused based on the findings in [the Club's Architect's] initial report without providing an opportunity to remedy any defects'*. The Council also highlighted the potential for a refusal of the 2015 Planning Application to have resulted in an appeal to the PAC, which it said *'would have triggered review of the entire planning proposal and have effectively brought the situation at the 1st hole back to square one and caused further delay.'*

112. Later, in commenting on the draft of this report, the Council set out further reasons why EHPD had not formally objected to the 2015 Planning Application in an early consultation response to PD. These reasons, all of which related to the Council's apparent concerns, by mid-2016, that the interim measure EHPD had agreed with the Golf Club in November 2015 (that the Club would cease play from the new first tee and move back to the original tee) *'was not as safe as it was originally considered to be'*, were that:

- *'If EHPD had formally objected to the original application and if planning permission had been refused ... then the club would have needed to extend the time in which they remained using the original teeing location';*
- *'The potential for the refusal of planning permission was not just a matter between the Planning Department and the club. Any appeal to the Planning Appeals Commission to overturn the decision would have extended the time the club spent on the original tee';* and
- *In the unlikely situation of the club accepting that planning permission had been refused, then regardless of any planning enforcement action, they may have been barred from making a similar application for a period of two years during which time they would have had to play from the original ... tee box and thus incurring the safety risk that EHPD were becoming*

increasingly concerned about.

113. I am not convinced, on the basis of the available evidence, of the validity of the Council's contention that concerns about the safety of the arrangement that had been agreed with the Golf Club in November 2015 was an influencing factor in EHPD's decision not to provide an early consultation response to the 2015 Planning Application. Notably, in response to enquiries during my investigation, the Council had said,³² *'The informal action of the Council in stopping the use of [the new first] tee by agreement means that the circumstances originally complained of no longer existed. Therefore, the issues with the use of that tee from the health and safety perspective were resolved as of November 2015.'* The Council had also cited the (albeit temporary) November 2015 resolution of the safety concerns arising from use of the new first tee as the reason EHPD had decided not to take formal action, such as the serving of a prohibition notice or improvement notice. It had said³³, *'The voluntary closure of the new tee meant that any formal action was considered unnecessary as the club was fully engaged with EHPD in resolving the situation. As a result ... the issues with the use of the new tee from a health and safety perspective were resolved albeit temporarily pending the outworking of [the Club's Architect's] analysis and the club's planning applications.'*

114. In my view, the content of the Environmental Health Officer's email of 7 June 2016 to the Golf Club provides a more plausible explanation of why EHPD held back from providing its consultation response to PD. That email explained that EPHD's planning consultation response to the 2015 Planning Application had not yet been provided to PD because EPHD *'would object to [the 2015 Planning Application] as it [was] currently submitted ... on the grounds of safety'*; that such a consultation response *'would likely result in the application being refused'*; and that *'Given [EPHD's] current level of consultation [the Environmental Health Officer] believe[d] this would not be a sensible course of action ...'*,

115. I accept that the potential implications of EHPD providing an early consultation

³² Email dated 8 August 2018 from the Head of EHPD to the Investigating Officer

³³ Comments provided by the Environmental Health Officer, as included in email dated 24.8.18 from the Environmental Health Manager to the Investigating Officer

response, which indicated it considered the development (retrospectively) proposed in the 2015 Planning Application was unacceptable, were material to the Council's consideration of that planning application. However, those potential implications were considerations for PD, in determining how to proceed with the 2015 Planning Application, once EHPD had provided its consultation response; they were not acceptable justification for EHPD to delay in providing that response.

116. The Principles of Good Administration, to which I referred earlier in this report, are the appropriate standards against which the administrative actions of a public body are to be judged. Good administration by public authorities means: getting it right; being customer focused; being open and accountable; acting fairly and proportionately; putting things right; and seeking continuous improvement. Being open and accountable means that a public body should be open and transparent when accounting for their decisions and actions.
117. In my view, the Council did not meet this particular standard when EHPD failed to indicate to PD at an early stage that it needed further information to enable it to provide an informed planning consultation response regarding the development proposed in the 2015 Planning Application and, instead, continued to engage with the Golf Club (within the closed criminal health and safety enforcement investigation it was conducting) while it (the Golf Club) sought to remedy the defects in that development proposal. This failing meant that PD was not in a position to address (within the open and transparent planning process) the unacceptability of the proposed development, such as by refusing the 2015 Planning Application on the basis of EPHD's consultation response and/or other material planning considerations, or by allowing the Golf Club to amend the development proposal to make it acceptable. EHPD's actions therefore compromised the openness and transparency of the planning process. I consider this constitutes maladministration on the part of the Council, which caused the Complainant to sustain the injustice of uncertainty.
118. EPHD could have, and ought to have, provided its informed, substantive consultation response to the 2015 Planning Application at a much earlier stage than was the case. I consider the significant delay in EHPD providing its

consultation response to PD was further maladministration on the part of the Council. I am satisfied that this maladministration caused the Complainant to again sustain the injustice of uncertainty and also the injustice of frustration.

119. I am not, however, in a position to quantify the precise extent to which EHPD's failure to provide a more timely consultation response ultimately delayed the Council's determination of the Golf Club's retrospective request for planning permission for the work it had carried out at the first tee in October 2014; it is evident that the nature of the mitigating measures recommended by the Club's Architect were such that it proved necessary for the 2015 Planning Application to be withdrawn, and a new application (the 2016 Planning Application) to be submitted and, as I will record later in this report, the handling of that new application proved to be complex and protracted.
120. It is not possible either to speculate on whether the 2015 Planning Application would have been refused if EHPD had provided its consultation response at an earlier stage; it is evident that PD was aware that the Club's Architect had proposed mitigation measures that would address the health and safety issues at the first hole of the gold course, and possible therefore that PD would have been prepared to afford the Golf Club the opportunity to make amendments to the development originally proposed in 2015 Planning Application rather than rejecting that application.
121. I will comment later in this report on the role PD played in relation to the consultation with EHPD with regard to the 2015 Planning Application.
122. I also examined EHPD's role as a planning consultee in the 2016 Planning Application, which was submitted to the Council on 4 October 2016. The investigation established that PD consulted with EHPD on 17 October 2016. Again, EHPD was asked to provide its consultation response within 21 days, or '*other period agreed in writing*'. EHPD provided its consultation response to PD on 14 December 2016, and this was published on the Planning Portal on 16 December 2016.
123. Although EPHD's consultation response was not provided within the requested 21-day timeframe (and there is no evidence of a longer period having been

agreed, in writing, between EHPD and PD) I did not consider this caused any material delay to PD's determination of the 2016 Planning Application because, in the event, all the additional information, maps and drawings that were required by PD to assess the application were not submitted until more than a year later.

124. I noted that on 16 December 2016, the Complainant wrote to PD, raising a number of issues about the content of EHPD's planning consultation response of 14 December 2016. That made it necessary for EHPD to provide a second planning consultation response, addressing the matters the Complainant had raised. This second consultation response was provided to PD on 12 January 2017, and was published on the Planning Portal on 24 January 2017.
125. I established that the Complainant wrote to PD again, on 7 February 2017, raising concerns about EHPD's second planning consultation response of 12 January 2017. Those concerns, and other matters the Complainant had set out in further correspondence dated 30 July 2017 to PD, were addressed in a third planning consultation response that EHPD provided to PD on 14 August 2017. EHPD's third consultation response was published on the Planning Portal that day.
126. It was later necessary for EHPD to provide a fourth planning consultation response in relation to the 2016 Planning Application, to address what was referred to in the response as *'the correction of boundary lines, mapping of the tee box and elevation cross sections for the scheme'*. I noted that it was not until 9 January 2018 that PD had received all necessary revised/corrected plans, and other related information, which it had first sought from the Golf Club on 6 June 2017, following the receipt of representations from the Residents' Solicitor about the 2016 Planning Application. EHPD's fourth consultation response was provided to PD on 19 February 2018 and, again, was published on the Planning Portal the same day.
127. It is evident then that in the case of the 2016 Planning Application, EHPD's consultee role, which included the need for EHPD to address representations about environmental health issues relating to the development proposal,

extended over a protracted period of time. I am satisfied that this was justified in the circumstances of 2016 Planning Application. I am also satisfied that the consultee role EHPD fulfilled in relation to the 2016 Planning Application was in keeping with that described in DM practice Note 18, the Online Planning Application Consultation Guidance and the CEHOG Planning Guidance.

128. In conclusion, having examined the circumstances of EHPD's planning consultee role in relation to the 2016 Planning Application, and having considered the content of the related consultation responses it made to PD, I am satisfied that EHPD acted in accordance with relevant legislation, policy and guidance, in relation to that particular planning application.

Issue 2:

Whether the Council's Planning Department (PD) acted in accordance with relevant legislation, policy and guidance in relation to its handling of the planning enforcement case.

129. As already noted in this report, in October 2014, the Golf Club undertook work to relocate the first tee closer to the course's boundary with adjacent Road X properties, including that of the Complainant. The Golf Club had not obtained planning permission for the work. The Complainant made (the then) Planning Service in DOE aware of the work on 28 October 2014 and a planning enforcement case (the Planning Enforcement Case) was opened.

Evidence Considered

(i) Relevant Legislation, Policy and Guidance

The Planning Act (Northern Ireland) 2011

130. The 2011 Planning Act provides, in Section 55, for retrospective planning applications to be made in relation to development already carried out. It states, '*On an application made to a council ... the planning permission which may be granted includes planning permission for development carried out before the date of the application.*'

131. Section 135 of the 2011 Planning Act provides a council with the discretionary power to issue a temporary stop notice, if it considers '*(a) that there has been a*

breach of planning control in relation any land in its district; and (b) that it is expedient that the activity (or any part of the activity) which amounts to the breach is stopped immediately.'

132. Section 138(1) of the 2011 Planning Act provides a council with a discretionary power to issue an enforcement notice. This section provides that *'The council may issue [an enforcement notice] where it appears to the council – (a) that there has been a breach of planning control in relation to any land in its district; and (b) that it is expedient to issue the notice, having regard to the provisions of the local development plan and to any other material considerations.'*

133. Provisions for appeals against enforcement notices are set out in Section 143 of the 2011 Planning Act. Section 143(1) states, *'A person having an estate in the land to which an enforcement notice relates ... may ... appeal to the planning appeals commission against the notice ...'* Section 143(3) provides that *'An appeal may be brought on any of the following grounds – (a) that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted...'*

Strategic Planning Policy Statement for Northern Ireland

134. The Strategic Planning Policy Statement for Northern Ireland, published by DOE (SPPS) *'sets out the strategic subject planning policy for a wide range of planning matters'*. The SPPS was published in September 2015, following the transfer of the planning control function from (the former) DOE Planning Service to local councils. At that time, paragraphs 5.54 to 5.58 of the SPPS succeeded Planning Policy Statement 9 – The Enforcement of Planning Control (PPS 9), which, when extant, had set out the enforcement approach that had been followed by DOE Planning Service.

135. Paragraph 5.55 of the SPPS states, *'Under the provisions of the 2011 [Planning] Act, councils have the general discretion to take enforcement action when they regard it as expedient to do so, having regard to the provisions of [the Local Development Plan] and other material considerations. In exercising this discretion, councils should be aware of their statutory duty to enforce planning legislation and to ensure that development is managed in a consistent,*

proactive and proportionate manner.'

136. Paragraph 5.58 of the SPPS states, *'In determining the most appropriate course of action in response to alleged breaches of planning control, councils will need to take into account the extent of the breach and its potential impact.'*

Enforcement Practice Note 4 - 'Enforcement Procedures'

137. Enforcement Practice Note 4, 'Enforcement Procedures', published by the Department for Infrastructure in October 2016 (Enforcement Practice Note 4) details the procedures for planning enforcement in Northern Ireland. It explains, in paragraph 1.1, that *'The Councils are the planning authorities with the primary responsibility for enforcement of all breaches of planning control.'* Paragraph 1.2 advises, *'There is an expectation that each council should develop their own enforcement strategy which sets out their council's enforcement approach and procedures for their given administrative area.'*

Ards and North Down Borough Council's Planning Enforcement Strategy

138. The Council's Planning Enforcement Strategy (the Planning Enforcement Strategy) came into effect on 1 April 2015. Paragraph 2.1 of the Planning Enforcement Strategy states, *'Under the provisions of [the 2011 Planning Act] the council has a general discretion to take enforcement action when it regards it expedient to do so, having regard to the provisions of the local development plan and any other considerations.'*
139. Paragraph 4.1 of the Planning Enforcement Strategy states, *'A breach of planning control occurs when building works or a material change of in [sic] use of land or a building takes places without planning consent. In most cases, it is not an offence to undertake development without consent. The Council has powers to require these breaches to be put right. We can do this by requiring changes to be made to the development, by requiring removal of the development, or by giving the development approval if we think it is acceptable.'*
140. Paragraph 7.1 of the Planning Enforcement Strategy sets out the action the Council may take in cases where it determines that there has been a breach of planning control. The Council can, *'ask for things to be put back the way they*

should be; or without prejudice, invite an application for the unauthorised development if it is considered possible that planning permission might be granted, normally allowing 28 days for its submission; or try to resolve the situation through negotiation without allowing the matter to become protracted. This may mean agreeing a compromise or partial change we are happy with. It is at our discretion to decide if this would be sufficient.’ Paragraph 7.2 continues, *‘When we ask for a retrospective planning application, we will normally wait a reasonable period for this to be submitted and for its determination before taking further enforcement action. Where it appears ... there is no prospect of planning permission being granted, we can take immediate enforcement action.’*

(ii) Examination of Documentation

141. A review was completed of the documentation the Complainant provided in support of his complaint and of that provided by the Council in response to investigation enquiries. A composite chronology of events and actions relating to the Planning Enforcement Case; the 2015 Planning Application; the 2016 Planning Application; the Health and Safety Case; and the Council’s response to the Complainant’s service standards complaint was compiled on the basis of the documentation review. The chronology, along with relevant extracts of the documentation examined, is included at Appendix 2.

(iii) The Council’s Response to Investigation Enquiries

142. The Council was asked why it had not instigated formal planning enforcement action in relation to the work the Golf Club had undertaken at the first tee, and instead, the Club had been permitted to apply for retrospective planning permission for the work. The Council was also asked to provide any documentation it held in relation to the taking of that decision.

143. In its response³⁴, the Council highlighted that *‘in most cases it is not an offence to undertake development without consent’*. The Council advised³⁵ that its

³⁴ Comments provided by the Head of Planning, as included in email dated 8 August 2018 from the Head of EHPD to the Investigating Officer

³⁵ Comments provided by the Head of Planning, as included in email dated 8 August 2018 from the Head of EHPD to the Investigating Officer

Planning Enforcement Strategy sets out that the enforcement of breaches of planning control is a discretionary function of the Council, and that the instigation of enforcement action under the 2011 Planning Act *'requires the consideration of all the enforcement options open to [it], and for the Council to make a judgement, in its professional opinion, as to the appropriate course to take'*. The Council pointed out that it could require changes to the development to be made, require the removal of the development, or give the development approval, if it considered it to be acceptable. The Council also highlighted that it had the discretion to seek to resolve planning control breaches through negotiation, which may involve agreeing a compromise or partial change, with which it was content. The Council went on to explain that any request for a retrospective planning application to regularise development was made *'on an entirely without prejudice basis'*, and was *'subject to the normal statutory advertising, neighbour notification and assessment of prevailing planning policy and guidance, and other material planning considerations, including representations'*.

144. In addition, the Council highlighted³⁶ that *'Any person is entitled to submit a retrospective planning application as provided for under Section 55 of the [2011 Planning Act] and the Council must determine such an application accordingly. It is a matter for the Council to determine each case as submitted on its own facts, subject to the development plan, the prevailing planning policy context and any other material considerations'*. The Council also advised that it always sought to *'negotiate to resolve/remedy a breach'*, and that only in very few cases would it *'ever go straight to formal enforcement action, as often that can end up in the Planning Appeals Commission (PAC) judging the Council to have "over-enforced" and result in award of costs for causing an appeal which could be deemed unnecessary whereby an application could have been submitted to remedy the breach.'* The Council further explained, *'Once an application has been submitted enforcement action is held in abeyance until a decision is made on the proposal...'*

³⁶ Comments provided by the Head of Planning, as included in email dated 8 August 2018 from the Head of EHPD to the Investigating Officer

145. The Council also highlighted³⁷ that where an enforcement notice is served, *‘any appellant can lodge an appeal against [the enforcement notice] under a number of grounds as detailed within section 143(2) of [the 2011 Planning Act], particularly ground (a) – that planning permission ought to be granted.’* In addition, the Council pointed out³⁸ that under Section 143(7) of the 2011 Planning Act, if it were to issue an enforcement notice against alleged unauthorised development, the initiation of an appeal to the PAC would mean that the enforcement notice would not take effect, pending the outcome of the appeal.
146. With regard to the action taken in relation to the Golf Club specifically, the Council stated³⁹ that it had issued a warning letter and that *‘as a result of communication with the Council’,* the Club *‘had submitted a “without prejudice” planning application within one month’.* The Council highlighted⁴⁰ that Section 138(1)(b) of the 2011 Planning Act sets out *‘the “expediency” discretion afforded to the Council’,* stating, *‘... the Council considers it prudent to await the outcome of the retrospective planning application prior to considering whether to instigate formal enforcement action’.*
147. The Council advised,⁴¹ that there was *‘no specific paper work’* relating to its decision not to initiate formal planning enforcement action in the case of the work the Golf Club had undertaken at the first tee, and instead, permit the Club to apply for retrospective planning permission for the work. The Council did however, at a later stage in the investigation, point out⁴² that the reasoning behind the decision not to serve an enforcement notice on the Golf Club was set out in PD’s Enforcement Further Assessment Report dated 18 October 2016, a copy of which was included within the Planning Enforcement Case documentation it had provided. (Relevant extracts of the Enforcement Further Assessment Report of 18 October 2016 are included at Appendix 2.) The

³⁷ Email 14 November 2018 from the Head of Planning to the Investigating Officer

³⁸ Comments provided by the Head of Planning, as included in email dated 8 August 2018 from the Head of EHPD to the Investigating Officer

³⁹ Comments provided by the Head of Planning, as included in email dated 8 August 2018 from the Head of EHPD to the Investigating Officer

⁴⁰ Comments provided by the Head of Planning, as included in email dated 8 August 2018 from the Head of EHPD to the Investigating Officer

⁴¹ Comments provided by the Head of Planning, as included in email dated 8 August 2018 from the Head of EHPD to the Investigating Officer

⁴² Letter dated 2 December 2019 from the Head of EHPD to the Investigating Officer

Council also highlighted⁴³ that its approach to enforcement had been set out in the Director of Regeneration, Development and Planning's response of 4 November 2016 to the Complainant's service standards complaint of 13 June 2016.

148. During the course of the investigation, subsequent to the granting of planning permission for the 2016 Planning Application in August 2018, the Council was asked to provide an update in relation to the Planning Enforcement Case. The Council advised,⁴⁴ *'It is normally the case that pursuant to planning permission being granted which effectively remedies the breach of planning control being investigated, an enforcement case is closed. However, in this case, given that the residents, as objectors, may apply for leave to judicially challenge the permission, it was held open for review until after 8 November 2018 (the time for submission of a judicial review being 3 months from the date of decision). A further complaint was received from [the Complainant] on 22 February 2019 stating that works were being undertaken which "were very clearly a major operation" at the Golf Club. The Council immediately site visited and witnessed one digger excavating small areas for the erection of the approved fence posts. Following this visit the Council emailed the Golf Club and advised that it was to ensure all work being undertaken was in accordance with the approved plans. The Council visited the site again on 25 March 2019 to carry out survey work to ensure that the fence posts erected had been done so in line with the planning approval. Surveying spot levels were taken to ascertain that they were being constructed in the correct location. Once this had been done and determined that all was in accordance with the approved plans, the file was written up as a closure, and letters issued to the complainants on 16 April 2019 to advise them of the conclusion of the [enforcement] investigation. This of course does not prejudice the Council's ability to take future enforcement action ... if deemed appropriate.'*

Analysis and Findings

149. The Complainant contacted (the then) Planning Service in DOE on 28 October 2014 to report an alleged breach of planning control in relation to works the

⁴³ Email 14 November 2018 from the Head of Planning to the Investigating Officer

⁴⁴ Letter dated 2 December 2019 from the Head of EHPD to the Investigating Officer

Golf Club had carried out to redevelop the first tee, close to the course's boundary with his property on Road X.

150. The 2011 Planning Act provides local councils in Northern Ireland with a range of statutory powers in relation to planning enforcement. Guidance for all councils on the procedures for planning enforcement is provided in Enforcement Practice Note 4, while the Council's specific approach to planning enforcement is set out in its own Planning Enforcement Strategy. My investigation examined the Council's actions, in relation to its response to the Complainant's report of an alleged breach of planning control by the Golf Club, against these legislative, policy and guidance requirements. In doing so, the investigation established the following chronology of events relating to the Planning Enforcement Case.
151. On 11 November 2014, the day after the Complainant had provided it with photographs of the site of the works and further details of residents' concerns, in follow up to his initial contact on 28 October 2014, DOE Planning Service undertook a site inspection at the Golf Club. The following day, DOE Planning Service asked the Golf Club to provide written details of the work and the reason why it had been carried out.
152. On 14 November 2014, the Golf Club provided some information to DOE Planning Service about the works it had undertaken, including that *'Following advice and recommendations given by Local Councillors and Ards Borough Council'*, the Golf Club had identified a need to address the problem of stray golf balls from the first tee-off area entering neighbouring properties.
153. A DOE Planning Service Enforcement Group Meeting took place on 18 November 2014. It was decided that further information should be sought from the Golf Club in order that the alleged breach of planning control could be assessed. DOE Planning Service wrote to the Golf Club, on 9 December 2014, requesting that it submit *'detailed plans'* of the works at the first tee *'so that the enforcement investigation can be progressed.'*
154. On 23 February 2015, a planning agent acting on behalf of the Golf Club (the Club's Planning Agent) provided DOE Planning Service with a site map and

photographs of the work that had been carried out. However, DOE Planning Service considered these were not sufficient to demonstrate the detail of the work completed so, on 13 March 2015, it requested the Club's Planning Agent to submit further information that would indicate how the completed and/or proposed development differed from what had existed at the site previously. DOE Planning Service contacted the Club's Planning Agent again on 25 March 2015, in an attempt to expedite the required information.

155. Representatives of the (by then established) PD in the (newly formed Ards and North Down Borough) Council inspected the site of the new first tee on 8 April 2015. They also met with a number of Road X residents, who outlined their concerns about '*overlooking and loss of private amenity space*'.
156. PD contacted the Club's Planning Agent on 9 April 2015 about the information that had been requested from the Golf Club on 13 March 2015, advising that it appeared a planning application would be required and that it was considered that since the Council had been '*more than reasonable*' in awaiting the required information, it would '*be pressing on with enforcement action*'. The Club's Planning Agent forwarded information relating to the first tee to PD later that day and on 13 April 2015.
157. An 'Enforcement Further Assessment Report' was prepared by a Planning Officer in PD's Enforcement Team on 28 April 2015. It recorded that the Planning Officer was of the opinion that a breach of planning control had occurred. PD then held an Enforcement Group Meeting on 13 May 2015, at which it was agreed that a warning letter should be sent to the Golf Club. That letter issued on 15 May 2015. It informed the Golf Club that the works it had undertaken to relocate the first tee constituted a breach of planning control, and that it was required by 17 June 2015, to '*Immediately cease use and either remove unauthorised development and return land to original form or submit a retrospective planning application.*'
158. PD completed another 'Enforcement Further Assessment Report' on 19 June 2015, referring to a recently received report from a Road X resident that '*significantly more gold balls are entering properties along [Road X], than*

previously did prior to the full operation of the new first tee coming into effect'; that residents' main concern was 'their amenities'; and that 'sooner rather than later physical harm will be done to a resident as a result of a stray golf ball.' The report recommended that there should be discussion of whether it was *'expedient to serve a Temporary Stop Notice on this occasion'.*

159. That discussion took place at an Enforcement Group Meeting on 22 June 2015, at which time it was noted that the Golf Club had (that day) submitted a retrospective planning application (that is, the 2015 Planning Application). PD decided that as consultation about the safety issues associated with play from the new first tee could take place with EHPD through the 2015 Planning Application, there was no need to serve a Temporary Stop Notice.
160. For the reasons already recorded in this report, the Golf Club withdrew the 2015 Planning Application on 13 October 2016 and submitted a new application (that is, the 2016 Planning Application). PD prepared a, 'Enforcement Further Assessment Report' on 18 October 2016. The report noted that PD, in progressing the Planning Enforcement Case, had liaised with EHPD *'as the major issues of concern were those of Health and Safety relating to ball strikes'*, and that it was considered that *'this issue would be best investigated under [environmental health] legislation'*. The report also noted the withdrawal of the 2015 Planning Application and the submission of the 2016 Planning Application, and recorded that the way forward was to, *'Await outcome of [EHPD] investigations and processing of [2016 Planning Application].'*
161. The 2016 Planning Application was considered at the meeting of the Council's Planning Committee on 7 August 2018. A decision notice granting planning permission was issued the following day. A 'Further Enforcement Report' was prepared by PD on 28 August 2018. It recorded that *'As a result of [the decision to grant planning permission] the development has been regularised and the breach [of planning control] remedied.'* The report also recommended that the Planning Enforcement Case remained open until after the expiry of the three-month period during which an objector could exercise their right to challenge the granting of planning permission.

162. The Complainant wrote to PD on 21 February 2019, querying whether works the Golf Club was undertaking at that time was in compliance with the proposed development in the 2016 Planning Application. Having inspected the site on 22 February 2019, PD wrote to the Complainant, confirming that *'the current works are to facilitate the erection of the proposed netting as approved under [the 2016 Planning Application]'*.
163. Following a further site inspection by PD on 25 March 2019, at which time it was established that the fence posts had been *'erected in the correct position in accordance with the approved plans'*, PD wrote to the Complainant on 16 April 2019, advising that the Council's investigation in relation to the Planning Enforcement Case had been completed and that *'the unauthorised works [had] been regularised through submission and approval of [the 2016 Planning Application] which [had been] granted on 8th August 2018. Accordingly, the Council does not intend to pursue this matter any further.'*
164. The above chronology of the actions the Council took in relation to the Planning Enforcement Case indicate that the alleged breach of planning control at the Golf Club was reported to (the then) Planning Service in DOE⁴⁵ on 28 October 2014. DOE Planning Service took steps during the following five-month period to obtain further information about the works the Golf Club had undertaken at the first tee, in order to determine whether a breach of planning control had occurred. There was a site inspection on 11 November 2014, following which it was decided, on 18 November, that it was necessary to seek further information from the Golf Club in order that the alleged breach of planning control could be assessed. There was then verbal and written communication with the Golf Club (on 9 December 2014) and with its Planning Agent (on 13 March, 25 March and 9 April 2015) in order to obtain the required information. I accept it was only after the Golf Club's Planning Agent provided the necessary information about the works carried out at the first tee to (the by then established) PD within the Council, on 9 and 13 April 2015, that PD was in a position to establish whether a breach of planning control had taken place.

⁴⁵ Responsibility for planning enforcement did not transfer to the Council's Planning Department (PD) until 1 April 2015, following the reform of local government in Northern Ireland.

165. I noted that PD agreed at its Enforcement Group Meeting on 13 May 2015 that a warning letter should be sent to the Golf Club, and that PD issued that letter to the Golf Club on 15 May 2015, requiring the Club, by 17 June 2015, to *'Immediately cease use and either remove unauthorised development and return land to original form or submit a retrospective planning application.'*
166. It is evident, therefore, that there was a period of almost seven months between the Complainant reporting the alleged breach of planning control (in October 2014) and the Golf Club being required by PD to take action to seek to remedy that breach (in May 2015). I am satisfied, however, that there is no evidence of unacceptable or unavoidable delay on the part of PD in requiring that action of the Golf Club; it is clear that during the intervening period, PD (and previously, DOE Planning Service) had been taking action to gather the information required to enable it to establish whether a breach of planning control had occurred, and what action in response to that was appropriate.
167. The Council's powers to take enforcement action to seek to remedy a breach of planning control are discretionary. As already explained, the 2016 Act does not authorise, or require, me to question the merits of a discretionary decision by a public body that has been taken without maladministration. Having examined the Council's actions in relation to the Planning Enforcement Case, I am satisfied, for the reasons set out below, that there was no evidence of maladministration in the taking of PD's discretionary decision of 13 May 2015 to require the Golf Club to either remove the unauthorised development or submit a retrospective planning application for the work carried out, rather than serve an enforcement notice.
168. Firstly, there is specific provision in the 2011 Planning Act⁴⁶ for a retrospective planning application to be made in relation to development already undertaken. It is not, therefore, necessarily the case that the taking of planning enforcement action must involve requiring the unauthorised development to be removed.
169. Secondly, the decision to allow the Golf Club to submit a retrospective planning application was in accordance with the Council's Planning Enforcement

⁴⁶ 2011 Planning Act, Section 55

Strategy, which highlights, in paragraph 7.1, that in responding to alleged breaches of planning control, the Council has the discretion to, *'ask for things to be put back the way they should be; or without prejudice, invite an application for the unauthorised development if it is considered possible that planning permission might be granted, normally allowing 28 days for its submission; or try to resolve the situation through negotiation without allowing the matter to become protracted.'*

170. Thirdly, as highlighted by the Council in its response to investigation enquiries, Section 138(1) of the 2011 Planning Act gives the Council the discretionary power to issue an enforcement notice where it considers it expedient to do so. It was evident to me, that in May 2015, PD did not consider it expedient to serve an enforcement notice in the case of the Golf Club. In this regard, the Council also highlighted in responding to investigation enquiries the potential for cases where formal enforcement action was initiated at the outset, to *'end up in the [PAC] judging the Council to have "over-enforced" and result in award of costs for causing an appeal which could be deemed unnecessary whereby an application could have been submitted to remedy the breach.'* In the same context, the Council also pointed out that the initiation of an appeal to the PAC against an enforcement notice would mean that the notice would not take effect, pending the outcome of the appeal. Clearly, this would render the enforcement notice ineffective for the period in which the appeal was active.
171. Fourthly, although the Council advised that it had *'no specific paper work'* relating to the decision in May 2015 not to initiate formal planning enforcement action, that is, to serve an enforcement notice, I was satisfied that there was a contemporaneous record of the decision taken at that time to invite the Golf Club to submit a retrospective planning application, in order to seek to remedy the breach of planning control. That record was contained within the 'Enforcement Further Assessment Report' of 28 April 2015 and the note of the related Enforcement Group Meeting 13 May 2015.
172. I noted that on 18 June 2015, just prior to the Golf Club's submission of the (retrospective) 2015 Planning Application, a Road X resident reported to PD that the incidence of stray balls entering neighbouring properties had increased

during the period the new first tee had been in use, and had expressed concern that *'sooner rather than later physical harm will be done to a resident as a result of a stray golf ball.'* I noted too that PD prepared another 'Enforcement Further Assessment Report' on 19 June 2015, recommending that in light of the issues the resident had raised, there should be consideration of whether it was *'expedient to serve a Temporary Stop Notice on this occasion'*.

173. I established that in discussing this matter at an Enforcement Group Meeting on 22 June 2015, PD noted that the Golf Club had submitted the 2015 Planning Application that day, and it was decided that since PD would be consulting with EHPD about the safety issues associated with play from the new first tee, within the context of its handling of the application, the serving of a Temporary Stop Notice was not appropriate. Having considered the available evidence, I am satisfied that there was no indication that this further discretionary decision by PD in the Planning Enforcement Case was attended by maladministration.

174. My investigation established that, in the event, the 2015 Planning Application was not submitted by 17 June 2015, the date PD had stipulated in its warning letter of 15 May 2015 to the Golf Club. However, I do not consider that the extent of this delay (three working days) is significant enough to cause me to question PD's acceptance of the retrospective application, rather than proceed to initiate formal enforcement action at that stage.

175. I noted the Council advised, in response to investigation enquiries, that once a retrospective planning application had been submitted, enforcement action was held in abeyance until a decision on the development proposal has been taken. I noted too that this practice was in keeping with paragraph 7.2 of the Council's Planning Enforcement Strategy, which states, *'When we ask for a retrospective planning application, we will normally wait a reasonable period ... for its determination before taking further enforcement action. Where it appears ... there is no prospect of planning permission being granted, we can take immediate enforcement action.'*

176. The 2015 Planning Application was submitted to the Council in June 2015 and subsequently withdrawn in October 2016, and that the 2016 Planning

Application was submitted in October 2016 but was not determined until August 2018. I suggest that this timescale for the processing of the Golf Club's retrospective planning applications was significantly longer than the '*reasonable period*' for determination that is envisaged in the Planning Enforcement Strategy. However, I found no evidence that PD was, at any stage, of the view that there was no prospect of planning permission being granted. Rather, as I will record later in this report, much of the delay in determining the Golf Club's retrospective planning application is to be attributed to the complexity of the 2016 Planning Application, particularly in terms of the volume and scope of the additional information and clarification that was required of the Golf Club, and the number and nature of the representations received, both from Road X residents and the solicitor who was acting on their behalf. For this reason, I am satisfied that there was no maladministration in PD's discretionary decision to await the outcome of the Golf Club's retrospective planning application before considering whether any further enforcement action might be appropriate.

177. Ultimately, there was no requirement for PD to take further enforcement action as the Golf Club's breach of planning control in relation to the unauthorised work at the first tee was remedied by the granting of planning permission in August 2018. I noted that on 16 April 2019, PD informed the Complainant of the outcome of the Planning Enforcement Case, that is, that the unauthorised works had been regularised through the submission and approval of the 2016 Planning Application, and that the Council did not intend to pursue the matter any further.

178. In conclusion, having considered the available evidence, I am satisfied PD acted in accordance with relevant legislation, policy and guidance in relation to its handling of the Planning Enforcement Case.

Issue 3:

Whether the Council's Planning Department (PD) acted in accordance with relevant legislation, policy and guidance in relation to its handling of the planning applications.

179. As already recorded in this report, when the Complainant made the Council aware, on 28 October 2014, of the work the Golf Club had undertaken to

relocate the first tee, PD established that a breach of planning control had taken place, and required the Golf Club to either remove the unauthorised development or submit a retrospective planning application. The Golf Club submitted a retrospective planning application in June 2015. Subsequently, in October 2016, the Golf Club withdrew the 2015 Application and submitted a new retrospective application, the 2016 Planning Application).

Evidence Considered

(i) Relevant Legislation, Policy and Guidance

The Planning (General Development Procedure) Order (Northern Ireland) 2015

180. Article 20 of The Planning (General Development Procedure) Order (NI) 2015 (the GDPO) sets out the timescales for the determination of planning applications. Article 20(1) of the GDPO provides that where an application for planning permission is made to a council, *'the council shall within the period specified in paragraph (2) give the applicant notice of its decision or determination'* The period specified in paragraph (2) is *'(a) in the case of an application for planning permission for development within the category of major development, a period of 16 weeks beginning with the date when the application was received by the council; (b) in any other case, 8 weeks beginning with the date when the application was received by the council ...; or (c) except where the applicant has already given notice of appeal to the planning appeals commission ... such extended period as may be agreed in writing between the applicant and the council.'*

The Planning (Development Management) Regulations (Northern Ireland) 2015

181. The Schedule to Regulations 2 and 3 of The Planning (Development Management) Regulations (NI) 2015 (the Development Management Regulations) prescribes *'the classes of development belonging to the category of major development'*. Part 9 of the Schedule provides that *'Any development not falling wholly within any single class of development described in Parts 1 to 8 [of the Schedule]'* and in which *'the area of the site is or exceeds 1 hectare'* is to be classed as a 'major development'.

The Local Government (Performance Indicators and Standards) Order (Northern Ireland) 2015

182. Schedules 3 and 4 of The Local Government (Performance Indicators and Standards) Order (NI) 2015 (the Performance Indicators and Standards Order) specifies performance indicators for councils, and the standards to be met by them, in relation to planning. One of the planning performance indicators provided for in Schedule 3 is *'The average processing time of local planning applications'*. The standard for this performance indicator, as set out in Schedule 4, is the percentage of *'Local planning applications processed from the date valid to decision or withdrawal within an average of 15 weeks.'* Schedule 3 specifies a separate performance indicator in relation to the *'average processing time of major planning applications'*. Schedule 4 provides that the relevant standard for this performance indicator is the percentage of *'Major applications processed from date valid to decision or withdrawal within an average of 30 weeks.'*

Planning Policy Statement 8 – Open Space, Sport and Outdoor Recreation

183. Planning Policy Statement 8 – Open Space, Sport and Outdoor Recreation, which was published by DOE in February 2004 (PPS 8) sets out *'planning policies for the protection of open space, the provision of new areas of open space in association with residential development and the use of land for sport and outdoor recreation...'* The preamble to PPS 8 states that its contents are *'material to decisions on individual planning applications and appeals'*.
184. PPS 8 Policy OS 3 – Outdoor Recreation in the Countryside (PPS 8 Policy OS 3); PPS 8 Policy OS 4 – Intensive Sports Facilities (PPS 8 Policy OS 4) and PPS 8 Policy OS 5 – Noise Generating Sports and Outdoor Recreational Activities (PPS 8 OS 5) are relevant to the consideration of the matters about which the Complainant is aggrieved.
185. Policy OS 3 states that the development of proposals for outdoor recreational use will be permitted where all of eight specified criteria are met. These criteria include: *'... (iii) there is no adverse impact on visual amenity or the character of the local landscape ...; (iv) there is no unacceptable impact on the amenities of people living nearby; [and] (v) public safety is not prejudiced ...'*;

186. In relation specifically to the development of golf courses, Policy OS 3 states, '*... [the relevant planning authority] will carefully consider the impact of proposals for the development of golf courses on the landscape and wider environmental qualities of the countryside. Each proposal should contain full details of the site and its immediate environs ... These details should include information on landscaping and land levels, both existing and proposed ... Where appropriate [the relevant planning authority] will use its powers contained in [the GDPO] to request applicants to supply such additional information on the proposed development as is considered necessary to allow proper determination.*
187. Policy OS 4 sets out the five criteria that must be met if development of intensive sports facilities is to be permitted. These criteria include that: '*there is no unacceptable impact of the amenities of people living nearby by the reason of the siting, scale, extent, frequency or timing of the sporting activities proposed, including any noise or light pollution likely to be generated*'.
188. It is explained in Policy OS 4 that '*Intensive sports facilities, for the purpose of [PPS 8], includes stadia, leisure centres, sports halls, swimming pools and other indoor and outdoor facilities that provide a wide range of activities*'.
189. Policy OS 5 states that the development of sport or outdoor recreational activities that generate high levels of noise will only be permitted where three specified criteria are met. These include that '*there is no unacceptable level of disturbance of people living nearby ...*'.
190. Policy OS 5 explains, '*The impact of noise is an important issue in assessing proposals for activities such as motorsports, shooting, water-skiing and paintball adventure games*'.

(ii) Examination of Documentation

191. A review was completed of the documentation the Complainant provided in support of his complaint and of that provided by the Council in response to investigation enquiries. A composite chronology of events and actions relating to the Planning Enforcement Case; the 2015 Planning Application; the 2016

Planning Application; the Health and Safety Case; and the Council's response to the Complainant's service standards complaint was compiled on the basis of the documentation review. The chronology, along with relevant extracts of the documentation examined, is included at Appendix 2.

(iii) The Council's Response to Investigation Enquiries

192. In relation to its handling of the 2015 Planning Application and the 2016 Planning Application the Council stated,⁴⁷ *'[PD] is satisfied that it has managed [the 2015 Planning Application, the 2016 Planning Application (and the Planning Enforcement Case)] in line with the relevant legislative and policy guidelines. Whilst there are performance indicators set out for categories of development, the Council strives to work with applicants to negotiate a positive outcome to proposals submitted to it, where possible and appropriate within the prevailing policy context. Often there are inevitable delays whilst a proposal is assessed, and amended plans resubmitted or submission of further relevant studies requested.'*
193. The Council also commented on the achievement of the statutory timescales and targets for the processing of planning applications that were specified in Article 20 of the GDPO and Schedules 3 and 4 of the Performance Indicators and Standards Order. The Council stated,⁴⁸ *'In the course of processing an application there may be matters arising that require amendments to be made to an application to satisfy policy or consultees, which then results in a requirement for a new round of advertising, neighbour notification and consultations. Also, within the Council's scheme of delegation ... a major application before the [Planning] Committee may be subject to a deferral for further information, legal advice or a site visit, before going before the Planning Committee again, often months later.'* The Council also stated,⁴⁹ that while it was possible to meet the 16 week statutory timescale for the processing of a planning application that fell within the category of major development, this *'was not the norm, as by virtue of that category of development, such applications tend to be more complex, invoke more objection, and require extensive*

⁴⁷ Letter dated 19 January 2018 from the Head of EHPD to the Investigating Officer

⁴⁸ Email dated 1 February 2018 from the Head of Planning to the Investigating Officer

⁴⁹ Email dated 2 February 2018 from the Head of Planning to the Investigating Officer

consultation and assessment.'

194. In addition, the Council also explained why the 2015 Planning Application had been deemed to be a 'major development'. It advised⁵⁰ that despite the Application's form P1 having stated that the area of the development site was 0.3 hectares, PD had determined that the area was in fact 2.2 hectares. The 2015 Planning Application had therefore met the threshold for 'major development', as set out in Part 9 of the Schedule to regulations 2 and 3 of the Development Management Regulations.

⁵⁰ Letter dated 19 January 2018 from the Head of EHPD to the Investigating Officer

Analysis and Findings

195. The Complainant contacted (the then) Planning Service in DOE on 28 October 2014 to report an alleged breach of planning control in relation to works the Golf Club had commenced to redevelop the first tee. Once it had been established that the works constituted a breach of planning control, the Council's PD sent a warning letter to the Golf Club on 15 May 2015, requiring it to either remove the unauthorised development or to submit a retrospective planning application. The Golf Club went on to submit a retrospective planning application (the 2015 Planning Application) in June 2015. That application was withdrawn in October 2016 and a new application (the 2016 Planning Application) was submitted. Planning permission in respect of the 2016 Planning Application was granted on 8 August 2018.
196. I noted that when the Complainant submitted his service standards complaint to the Council, he highlighted⁵¹ his concern about delay in the Council's handling of the retrospective planning applications. I also noted that in objecting to development proposal, he expressed concern about PD's assessment of the proposal against the requirements of PPS 8. My examination of PD's actions in relation to its handling of the Golf Club's two retrospective planning applications has considered these particular matters.
197. The investigation established that the Golf Club's Planning Agent first submitted the 2015 Planning Application to PD on 22 June 2015. PD considered the application was incomplete and requested further information. The required information, including an amended form P1, was provided to PD on 28 July 2015. The development proposal was described in the form P1 as, *'Proposed retention of works carried out to improve golf club including adjustment to 1st tee and regrading of ground.'*
198. Following the validation of the 2015 Planning Application on 3 August 2015, PD wrote to EHPD on 12 August 2015, seeking its comments on the development

⁵¹ Complainant's letter of 2 September 2016 to the Council's Chief Executive

proposal. EHPD was asked to provide its consultation response within ‘21 days or other period agreed in writing, from the date of [the] letter.’

199. The investigation established that EHPD ‘s planning consultation response of 3 October 2016 was received by PD on 7 October 2016. The consultation response stated, ‘*[EHPD] is of the view that the proposed arrangement is not acceptable and therefore should not be approved.*’ It also stated, ‘*Officers from the Council have been working with officials from the club and their consultants, who have acknowledged the risk this application presents in its current form. As such, the club’s consultants have produced a new proposal for the 1st hole at [the Golf Club]. The new scheme will involve works outside the scope of the current application and, in the understanding that a new application is to be submitted, [EHPD] shall provide comments in relation to the new application.*’
200. As already recorded, the 2015 Planning Application was withdrawn, by the Club’s Planning Agent, on 13 October 2016, sixteen months after it had been received by PD, and prior to the Council reaching any decision on it.
201. I noted that the timescales for a council’s determination of planning applications are set out in Article 20 of the GDPO. For the category of ‘major development’, which as the Council has explained, was the case in the 2015 Planning Application, Article 20(1) requires a council to inform the applicant of its decision or determination within ‘*a period of 16 weeks beginning with the date when the application was received by the council [or] such extended period as may be agreed in writing between the applicant and the council [unless the applicant has already given notice of appeal to the PAC]*’. I noted also that one of the planning performance indicators set out in the Performance Indicators and Standards Order is the percentage of ‘*Major applications processed from date valid to decision or withdrawal within an average of 30 weeks.*’
202. It is evident that, in processing the 2015 Planning Application, PD did not meet the 16-week timeframe stipulated in the GDPO, nor did it meet the target 30-week processing time set out in the Performance Indicators and Standards Order. The Council stated, in responding to investigation enquiries, that in processing a planning application, *there may be matters arising that require*

amendments to be made to an application to satisfy policy or consultees, which then results in a requirement for a new round of advertising, neighbour notification and consultations. Also, within the Council's scheme of delegation ... a major application before the [Planning] Committee may be subject to a deferral for further information, legal advice or a site visit, before going before the Planning Committee again, often months later.'

203. I acknowledge that in any given planning application, there may be particular circumstances that will mean it is not feasible for a determination to be made within the statutory timeframes and targets. However, I did not find, on the basis of the evidence presented to me, that any of the delay-causing factors highlighted by the Council were in play in the case of the 2015 Planning Application, once it had been validated on 4 August 2015. Rather, in my view, the primary reason for the delay in the determination of the 2015 Planning Application was that PD considered it necessary to await EHPD's planning consultation response before progressing the application further, and that consultation response was not received until 7 October 2016, almost 14 months after it had been requested from EHPD. PD's comments to the Golf Club on 21 September 2015, that *'The Application cannot move forward until [EHPD's] response is received'*; to an elected member of the Council on 2 October 2015, that *'There is no update on [the 2015 Planning Application] as [PD] are still awaiting the consultation response from [EHPD]'*; and to a Road X resident on 14 October 2015, that *'[PD] was still waiting on the [EHPD] response'*, are compelling evidence that this was the case.

204. I accept that it was appropriate and necessary for PD to consult with EHPD in relation to the 2015 Planning Application and for it to await EHPD's consultation response on the acceptability of the development proposal before reaching any decision on how the application should progress. However, PD had a duty to manage the 2015 Planning Application in a way that would ensure that it progressed as promptly as possible. As such, PD ought to have taken steps to seek to expedite EHPD's consultation response. The investigation found no evidence of PD having taken such action.

205. The Council disputed my view on this matter when it commented on my draft

investigation report. It said, *'PD and EHPD were in regular contact to advise each other of action taken and matters arising.'* The Council also provided copies of emails sent between EHPD and PD during the period November 2015 to January 2017, which, it stated, *'demonstrate[d] the level and degree of updating, notification and consultation that was taking place between EHPD and PD so that each department knew where the other stood.'*

206. I considered the documentation the Council provided at that stage of the investigation, the majority of which had already been provided previously. I accepted that the documentation demonstrated that there had been communication between EHPD and PD in relation to a number of matters relevant to the 2015 Planning Application, including the sharing of the Club's Architect's report of 3 March 2016, which had advised that the development (retrospectively) proposed in the 2015 Planning Application was not safe; the sharing of the minutes of a meeting between EHPD and PD on 7 April 2016 to discuss the Architect's report; the sharing of minutes of EHPD's meeting with the Architect on 5 May 2016; and consultation between EHPD and PD regarding the wording to be included in EHPD's ultimate consultation response in relation to the 2015 Application. However, it remains my conclusion that there is no evidence of PD ever having pressed EHPD to provide the consultation response it (PD) needed to progress the determination of the 2015 Planning Application.
207. Rather, there is clear evidence that PD was fully aware not only that EHPD was consciously holding back from providing a consultation response that would inevitably indicate the development proposed in the 2015 Planning Application was unacceptable but also that EHPD was continuing to engage with the Golf Club and the Club's Architect while they sought to resolve the safety risks associated with the development.
208. I accept that it was appropriate for EHPD to continue to work with the Golf Club and its Architect, within the context of the Health and Safety Case, to resolve the safety concerns associated with play from the new first tee, which had been first brought to the attention of ES in Ards Borough Council at the end of March 2015. However, PD had a clear obligation to progress the 2015 Planning

Application in a timely manner, with a view concluding the Planning Enforcement Case as expediently as possible. In my view, in facilitating EHPD to hold back from providing the consultation response that was fundamental to the determination of the 2015 Planning Application, PD's actions, or inactions, meant that that application was allowed to stall, which, ultimately, contributed to the length of time it took for the Planning Enforcement Case to be concluded.

209. I consider PD's actions, in facilitating EHPD to delay in providing its consultation response to the 2015 Planning Application, was maladministration on the part of the Council. I am satisfied that this maladministration caused the Complainant to sustain the injustice of frustration and uncertainty
210. With regard to the 2016 Planning Application, the investigation established that on 13 October 2016, a form P1 and associated plans and drawings were published on the Planning Portal. I noted that the Club's Planning Agent had initially submitted documents relating to the 2016 Planning Application to the Council on 4 October 2016, and that shortly after their receipt, PD had queried the size of development site. I noted too that on 5 October 2016, the Club's Planning Agent submitted an amended P1 form, which indicated the area of the development site was 0.995 hectares.
211. This meant that the 2016 Planning Application did not fall within the 'major' category of planning application, as specified in the Schedule to Regulations 2 and 3 of the Development Management Regulations. As such, the relevant statutory timescale for the determination of the 2016 Planning Application, as set out in Article 20 of the GDPO, was *'8 weeks beginning with the date when the application was received by the council'*, while the relevant planning performance indicator stipulated in Schedule 4 of the Performance Indicators and Standards Order was the percentage of *'Local planning applications processed from the date valid to decision or withdrawal within an average of 15 weeks.'*
212. The Council did not make a determination in relation to the 2016 Planning Application until 8 August 2018. It was evident therefore that the statutory timeframes and targets were not achieved. I therefore considered the factors

that had led to that significant delay.

213. I noted that EHPD was consulted about the 2016 Planning Application on 17 October 2016. Again, EHPD was asked to provide its consultation response within 21 days, or another period agreed in writing with PD. EHPD provided its consultation response to PD on 14 December 2016. As I recorded earlier, in my findings on Issue 1, EHPD provided further consultation responses to PD, in relation to the 2016 Planning Application, on 12 January 2017, 14 August 2017 and 19 February 2018.
214. In addition to the need for EHPD to provide four separate consultation responses, I noted that the assessment of the 2016 Planning Application required the Planning Case Officer to engage with the Golf Club, the Club's Planning Agent and the Club's Architect over a lengthy period to ensure that all the necessary detail and information, and accurate maps and drawings relating to the development proposal were submitted. This engagement included Planning Case Officer requesting additional information and/or clarification on 21 December 2016, 20 March 2017, 2 May 2017, 6 June 2017, 12 September 2017, 1 December 2017 and 9 January 2018.
215. I also noted that a significant number of representations about the 2016 Planning Application were received from Road X residents during the period 27 October 2016 to 26 July 2018, all of which required PD's consideration. In addition, a solicitor acting on behalf of the Residents' Group wrote to PD on several occasions⁵², raising multiple issues and concerns about the 2016 Planning Application, responses to which required significant input on the part of PD.
216. I noted too that it was necessary to issue neighbour notifications on more than one occasion⁵³ in relation to the 2016 Planning Application due to factors such as the submission of amended plans and the correction of mapping issues.
217. Having examined the chronology of PD's handling of the 2016 Planning Application, it is evident that this was a complex case, which inevitably took

⁵² 21 March 2017, 30 May 2017, 21 December 2017, 23 February 2018 and 2 July 2018

⁵³ 17 October 2016, 3 May 2017 and 19 January 2018

much longer to process than the relevant statutory timeframe and performance target. The investigation found no evidence of unavoidable delay or an unacceptable period of inaction on the part of PD. I do not, therefore, consider the length of time it took the Council to determine the 2016 Planning Application constituted maladministration.

218. This investigation also considered the Council's assessment of the development proposal against the requirements of PPS 8, which, as already highlighted, was a

further issue of concern for the Complainant.

219. I noted that when the Council's Chief Executive wrote to the Complainant on 11 April 2017, in response to the Complainant's correspondence of 2 September 2016, he (the Chief Executive) referred specifically to the relevance of PPS 8 Policy OS 4, 'Intensive Sports Facilities' and PPS 8 Policy OS 5, Noise Generating Sports and Outdoor Recreational Activities'. The Chief Executive explained *'In the context of Policy OS4 a golf course is not considered to be an intensive sports facility, and Policy OS5 refers to new proposals which generate high levels of noise, 'namely motor sports, shooting, water skiing and paintball adventure games.'*

220. Having considered PPS 8, I agree that OS Policy 4 and OS Policy 5 were not germane to the consideration of the development proposals set out in the Golf Club's retrospective planning applications. It is evident that for the purpose of Policy OS 4, PPS 8 defines 'intensive sports facilities' as those including *'stadia, leisure centres, sports halls, swimming pools and other indoor and outdoor sports facilities that provide for a wide range of activities'*. I had no reason to challenge the Council's opinion that a golf course does not fall within this definition. In relation to Policy OS 5, PPS 8 specifies activities such as *'motorsports, water-skiing and paintball adventure games'*. Again, there was no reason for me to question the Council's position that golf is not one of the high level noise-generating activities included within the scope of Policy OS 5.

221. I also noted that the 'Development Management Case Officer Report' for the 2016 Planning Application, which was presented to the Council's Planning Committee on 7 August 2018, with a recommendation to approve, recorded the Planning Case Officer's consideration of each of the eight criteria that are stipulated in PPS 8 Policy OS 3, 'Outdoor Recreation in the Countryside', which, unlike PPS 8 Policy OS 4 and PPS 8 Policy OS 5, was relevant to PD's assessment of the 2016 Planning Application.
222. In my view, the Development Management Case Officer Report provided a clear and appropriate record of the Case Officer's professional assessment of the development proposal against the requirements of PPS 8 Policy OS 3. This included, within the context of criterion (iv) of that policy, that *'there is no unacceptable impact on the amenities of people living'*, the Case Officer's consideration of concerns residents had raised about noise, overshadowing and overlooking.
223. As I have already explained in this report, it is not within my authority to challenge the merits of a discretionary decision taken by a public authority (which includes a council's decision on a planning application) unless there is evidence that the decision was attended by maladministration. The examination of PD's assessment of the development proposal against relevant planning policy did not find any evidence of maladministration in relation to that matter.
224. In summary, having considered the available evidence, I am satisfied PD acted in accordance with relevant legislation, policy and guidance in relation to its handling of the 2016 Planning Application.

CONCLUSION

225. The Complainant submitted a complaint to my Office about the actions of the Council in dealing with a breach of planning control by the Golf Club relating to work it undertook in October 2014 to relocate the first tee at the course, and with residents' concerns about health and safety risks associated with stray balls from the course entering their properties.

226. I have investigated the complaint and have found the following instances of maladministration on the part of the Council:

- i. EHPD failed to adhere to the usual and appropriate procedure, whereby it would indicate to PD that it required more information to provide a consultation response, allowing that additional information to be obtained and considered within the open and transparent planning process;
- ii. EHPD failed to provide a timely planning consultation response to PD in relation to the 2015 Planning Application; and
- iii. PD facilitated EHPD to delay in providing its consultation response in relation to the 2015 Planning Application.

227. I am satisfied that these instances of maladministration caused the Complainant to experience the injustice of frustration and uncertainty.

228. I have found no evidence of maladministration in relation to:

- i. EHPD's handling of the health and safety investigation it carried out in relation to Road X residents' concerns about stray balls from the golf course entering their properties (the Health and Safety Case);
- ii. EHPD's role as a planning consultee in the 2016 Planning Application;
- iii. PD's handling of the enforcement case relating to the unauthorised work the Golf Club carried out in 2014 at the first tee (the Planning Enforcement Case);
- iv. PD's handling of the 2016 Planning Application.

Recommendations

229. I recommend that within one month of the date of this report, the Council's Chief Executive provide a written apology to the Complainant for the injustice that has resulted from the maladministration identified in this report. The apology should be made in accordance with NIPSO's Guidance on Issuing an Apology.
230. In addition, in order to improve the Council's service delivery, I recommend that the learning points outlined in this report are communicated to the appropriate Council staff. The Council should, within two months of the date of this report, provide me with evidence that this recommendation has been implemented.
231. I am mindful that the Complainant may be disappointed that I have not upheld all aspects of his complaint. However, I note that in submitting his complaint to this Office, the Complainant stated that he wished *'the truth to come out'*. I hope that my investigation's independent examination of extensive contemporaneous documentation relating to the Planning Enforcement Case, the 2015 and 2016 Planning Applications, and the Health and Safety Case, along with the requirement for the Council to respond to detailed enquiries about its actions, has provided that outcome for the Complainant.



MARGARET KELLY
Ombudsman

9 February 2021

PRINCIPLES OF GOOD ADMINISTRATION

Good administration by public service providers means:

1. Getting it right

- Acting in accordance with the law and with regard for the rights of those concerned.
- Acting in accordance with the public body's policy and guidance (published or internal).
- Taking proper account of established good practice.
- Providing effective services, using appropriately trained and competent staff.
- Taking reasonable decisions, based on all relevant considerations.

2. Being customer focused

- Ensuring people can access services easily.
- Informing customers what they can expect and what the public body expects of them.
- Keeping to its commitments, including any published service standards.
- Dealing with people helpfully, promptly and sensitively, bearing in mind their individual circumstances
- Responding to customers' needs flexibly, including, where appropriate, co-ordinating a response with other service providers.

3. Being open and accountable

- Being open and clear about policies and procedures and ensuring that information, and any advice provided, is clear, accurate and complete.
- Stating its criteria for decision making and giving reasons for decisions
- Handling information properly and appropriately.
- Keeping proper and appropriate records.
- Taking responsibility for its actions.

4. Acting fairly and proportionately

- Treating people impartially, with respect and courtesy.
- Treating people without unlawful discrimination or prejudice, and ensuring no conflict of interests.
- Dealing with people and issues objectively and consistently.
- Ensuring that decisions and actions are proportionate, appropriate and fair.

5. Putting things right

- Acknowledging mistakes and apologising where appropriate.
- Putting mistakes right quickly and effectively.
- Providing clear and timely information on how and when to appeal or complain.
- Operating an effective complaints procedure, which includes offering a fair and appropriate remedy when a complaint is upheld.

6. Seeking continuous improvement

- Reviewing policies and procedures regularly to ensure they are effective.
- Asking for feedback and using it to improve services and performance.
- Ensuring that the public body learns lessons from complaints and uses these to improve services and performance.