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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JULIAN CREIGHTON FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE PLANNING APPEALS COMMISSION DATED 6 FEBRUARY 2025

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Mr Julian Creighton appeared as a Litigant in Person
Mr Conor Fegan (instructed by Arthur Cox Solicitors) for the Planning Appeals Commission

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McLAUGHLIN J

Introduction

[1] This is an application for leave to apply for judicial review of a decision of the Planning Appeals Commission ("the Commission") taken by Commissioner B Stevenson dated 6 February 2025. The Commission dismissed an appeal against the decision of Lisburn and Castlereagh City Council ("the Council") to refuse planning permission. The proposed development was the retention of temporary accommodation for use during the construction of a new dwelling between 2 and 4 Lairds Road which had previously been granted planning permission (S/2013/0641/F and LA05/2021/0560/F) ("the existing permission").

[2] The existing permission authorised the construction of a new dwelling house located between No.2 and No.4 Lairds Road, close to its junction with the Magheraconluce Road. The proposed dwelling house already benefits from an authorised access on to Lairds Road. The instant planning application relates to the retention of temporary accommodation consisting of three portacabins which have been erected to the rear of the proposed dwelling, with proposed temporary access via an existing gate on to the Magheraconluce Road. Planning permission for the temporary accommodation was refused by both the Council and by the Commission

on the ground that it would be prejudicial to road safety, by reason of the adequacy of the proposed visibility splays at the temporary access on to the Magheraconluce Road.

Planning history

[3] On 28 February 2023, the Council granted planning permission LA05/2021/0560/F, which authorised construction of a dwelling house on an infill site adjacent to and west of No.4 Lairds Road, Hillsborough. The planning applicant was Mr Julian Creighton and the planning agent was Pepper Architects. In order to facilitate construction of the new dwelling, the applicant required temporary accommodation. Three portacabins have been erected to the rear of the development site, with a separate access on to the Magheraconluce Road and are currently being used by the applicant's family, pending construction of the new dwelling. Neither the erection of the portacabins, nor the use of the land for temporary accommodation, nor the use of the Magheraconluce Road gate for that purpose were authorised by the existing planning permission. The applicant therefore made a further planning application to regularise this development.

[5] The planning application for retention of the temporary accommodation and temporary access was made on 30 November 2021. The application was the subject of objections from neighbouring owners. For present purposes, the full range of issues raised by the objectors is not relevant, save that they included objection to the proposed temporary access arrangements onto the Magheraconluce Road.

[6] The original proposed planning drawings filed with the application depicted a visibility splay at the new access point which was 2m in depth and extending 45m in each direction to the left and right of the access (Drawing 01). In a consultation response dated 29 March 2022, Department for Infrastructure ("DfI") Roads considered that insufficient detail was included on these plans. It requested submission of a "clear, fully dimensioned engineering drawing" which showed the proposed access and parking to include visibility splays, forward sight lines and access with dimensions to the requirements of the guidelines contained in the Department's Development Control Advice Note 15 ("DCAN 15"). It noted that in light of the traffic speeds at this section of the road the proposed visibility splays were insufficient to meet the standards prescribed by DCAN 15.

[7] In July 2023, the applicant responded to the DfI consultation advice by submitting a revised plan (Drawing 01/1) which proposed visibility splays 2m in depth and extending 65m in each direction from the access gate.

[8] In a further consultation response, DfI Roads commented that the revised proposals were still below standard and had not been correctly drawn to the right-hand side. A speed survey had not been included with the revised proposals, nor did they include a justification analysis. DfI Roads indicated that the visibility splay dimensions required would be 2.4m in depth and 79m to the left with a lesser

distance to the right. DfI Roads therefore recommended refusal on the ground that the proposal was contrary to the requirements of Planning Policy Statement 3: Access, movement and parking. No further revised proposals were submitted by the applicant.

[9] On 26 January 2023, the Council issued a Notice of Refusal which contained only one refusal reason in the following terms:

> "The proposal is contrary to the STDS and [PPS3], Policy AMP2, in that it would, if permitted, prejudice the safety and convenience of road users since visibility splays from the proposed access cannot be provided in accordance with standards contained in the Department's Development Control Advice Note 15."

[10] As set out above, in addition to the statutory consultation response from DfI Roads, road safety concerns relating to the use of the access were also raised in the representations from third party objectors.

[11] The applicant appealed the refusal to the Commission. In accordance with the Commission's procedures, he elected for appeal by way of written representations only. Accordingly, no oral appeal hearing was either requested or convened.

[12] In the course of the leave hearing, the applicant explained in submissions that he did not file a statement of case in support of the appeal. He informed the court that, unfortunately, his agent missed the Commission deadline and was refused an extension of time.

[13] The Council submitted a statement of case for the appeal on 14 August 2023 which included, inter alia, a detailed analysis of the refusal reason. It also contained an appendix prepared by DfI Roads, setting out its analysis of both the proposal and the refusal reason. It had carried out its own site inspection and speed survey for traffic approaching the junction in each direction. It calculated the required visibility splays to be 2m x 60m (right hand side "[RHS]") and 2.4m x 90m (left hand side "[LHS]"). It observed that conditions on the ground at that time provided visibility splays of only 2m x 25m [RHS] and 2m x 79m [LHS]. The applicant's most recent proposal [Drawing 01/1] proposed an improvement in those conditions which would deliver visibility splays of 2m x 65m in both directions. It also observed that the drawing had not been prepared to DCAN 15 standards insofar as it "needed to be drawn to the tangent of the road curve and the splay to the … [LHS] still fell short of the required splay." Therefore, it maintained its objection that the proposed access did not meet the standards required by DCAN 15.

[14] Statements of case were submitted on behalf of the objectors which, once again, included road safety concerns related to the access onto the Magheraconluce Road.

[15] After the statements of case had been submitted, the Council adopted its new Local Development Plan Strategy. Since its contents would be a material consideration in the forthcoming appeal, the Commission afforded all of the parties an opportunity to file any supplementary statement of case.

[16] On 25 November 2024, the applicant submitted a supplementary statement of case which containing a revised proposal for access onto the Magheraconluce Road. This depicted a proposal for visibility splays 2m in depth, 90m [LHS] and 72m [RHS]. It also contained an analysis of average vehicle speeds and numbers on this section of the Magheraconluce Road. When compared against the guidelines in DCAN 15, it was contended that the proposed visibility splay on the LHS complied with guidelines. On the RHS a distance of 90m was required for vehicles travelling at 44mph and 70m for vehicles travelling at 37mph. The speed limit on the road was 40mph. It was therefore asserted that the RHS visibility splay complied with the lower required distance but not the upper required distance. For vehicle speeds below 37mph DCAN 15 also suggested that a distance of 45m could be acceptable.

[17] The Council requested further consultation advice from DfI Roads on the new proposals as part of its supplementary statement of case. By email of 25 November 2024, the Council asked DfI Roads "*would you be able to provide comment on the possibility of a relaxation of visibility splay standards*?" By response dated 3 December 2024, DfI Roads commented:

> "I have had a look at this scheme and based on the fact that it is a temporary access and the Commissioner is likely to go with the bracketed figures from DCAN 15, I would be willing to accept the visibility splays as indicated on drawing number 215001 temp A, bearing the date stamp 04 August 2022 …"

[18] This email exchange between DfI and the Council was not provided to the Commission along with the Council's updated submission. These were obtained by the applicant at a later date, following a Freedom of Information request.

[19] On 4 December 2022, the Council submitted a supplementary statement of case advising that it no longer relied upon its refusal reason. Its communication stated:

> "… as this application is for temporary development and it is suggested that a period of two years is conditioned as appropriate to allow construction of the approved dwelling [LA05/2021/0560/F] and the temporary access

> is discontinued and the land restored to its former condition, the council is satisfied that the refusal reason which only relates to the access can now be withdrawn on the advice of DfI Roads."

[20] Following this important change in position on the part of the Council, the applicant appears to have been given advice by his agent to the effect that the appeal was over or that it would be determined in his favour. The precise content of the advice received by the applicant was not clear from the evidence, however, it is apparent from the grounds of challenge that this was his clear understanding of the legal effect of the Council's change of position.

[21] It is of note that the applicant's further revised proposals for visibility splays at the temporary access were submitted in a rebuttal statement of case. They were different to those submitted with the original planning application and had therefore not been the subject of advertisement or public consultation. The ownership of all of the land which would be necessary to construct the proposed new visibility splays had also not been the subject of an ownership declaration, which would ordinarily be required for a planning application or revised proposal which incorporated changes to the boundaries of the development site.

The Commission's decision

[22] The Commissioner carried out a site inspection which included driving the Magheraconluce Road in both directions and monitoring traffic speeds by following cars driving in ordinary conditions.

[23] The Commissioner noted that the Council no longer stood over its refusal reason, but also that the third party objections remained, which included concerns about the temporary access arrangements.

[24] The Commissioner noted that the applicant had submitted a further revised proposal within his rebuttal statement with revised visibility splays. However, since these had not been submitted on a separate scale drawing and since an updated Certificate of Ownership had not been submitted or other confirmation provided of the applicant's control over the enlarged areas of land, the Commissioner did not consider that they provided an appropriate basis upon which to assess the proposal. Nevertheless, she did ultimately do so and her planning assessment included a consideration on the merits of both the first set of revised proposals submitted to the Council in Drawing 01/1 and also the further revised proposals contained in the applicant's rebuttal statement of case.

[25] The Commissioner was not convinced that the temporary accommodation actually required a new access, as she considered that it had not been demonstrated sufficiently that access via the authorised entrance onto Lairds road was not possible. However, this does not appear to have influenced her ultimate conclusion.

In her assessment of the temporary access arrangements, she noted that there was no dispute about the average traffic speeds on the Magheraconluce Road in each direction and that these accorded with her own observations during the site inspection. Applying the standards within DCAN 15 for both the length and depth of the necessary visibility splays, she calculated the necessary dimensions to be 2m x 60m [RHS] and 2.4m x 90m [LHS]. She therefore concluded that neither the revised proposal considered by the Council in Drawing 01/1, nor the further updated proposal in the statement of case achieved DCAN 15 standards on the LHS. She did not consider that there was a proper basis for departure from recommended standards. Her conclusions were explained as follows:

> "21. In relation to the splay proposed to the southwest [LHS], the Magheraconluce Road is relatively straight in this direction. Whilst a relaxed splay of 2m x 64m is proposed in this direction … to accord with DCAN 15, a splay of 2.4m x 90m would be required in this direction. A below standard splay of 2m x 90m in this direction is also indicated on the plan in the appellant's rebuttal statement. I note that DfI Roads now accept the proposed reduced splay of 2m x 65m and this is endorsed by the council. DfI Roads state that because of the temporary nature of the access, they are willing to accept the visibility splays as indicated on the stamped refused drawing numbered 01/1 dated 4 August 2022. In light of DfI Roads change in position, the council has recommended a condition limiting the temporary development to two years.
>
> …
>
> 23. Given the speed of traffic approaching the site on this straight side of Lairds Road, I consider that any reduction in the splay in this direction would prejudice road safety. Whilst the suggested two-year period is a limited period of time, it nevertheless remains a notable period under which to use an access with a sub-standard splay. The conditions on this section of Magheraconluce Road, along with the above reasons, are such that I am not persuaded that such a relaxation in the standard of visibility for a limited period of up to two years can be justified on road safety grounds.
>
> 24. As a splay of 2.4m x 90m is required to the southwest [LHS], in order to comply with DCAN 15 standards and I cannot accept that a reduced splay in this direction would be acceptable. The appealed

> development would prejudice road safety and significantly inconvenience the flow of traffic, contrary to policy TRA 2 of the PS."

[26] The Commissioner therefore dismissed the appeal on road safety grounds. She elected not to follow the recommendation of DfI Roads which had been accepted by the Council. However, in doing so, she elected to follow, rather than to depart from, the DCAN 15 guidelines for visibility splays.

Grounds of challenge

[27] The applicant now challenges the decision to dismiss the appeal. He also seeks an extension of time to do so. The Commission's decision was dated 6 February 2025 and proceedings were issued on 15 May 2025. The proceedings were therefore commenced approximately nine days after the three-month time limit prescribed by Order 53, rule 4(1).

[28] The proposed grounds of challenge in the applicant's skeleton argument expanded somewhat upon those in the Order 53 statement. Nevertheless, the Commission answered all of the proposed grounds on the merits in the course of the hearing and did not object to the court proceeding on the basis of the reformulated grounds. There were five proposed grounds, which contained substantial overlap:

(i) Error of law – refusal of Commission to permit withdrawal of the appeal.

(ii) Failure to give appropriate weight to expert advice from DfI Roads.

(iii) Irrationality – failure to take account of the Council's approach in favour of "subjective complaints" from neighbours.

(iv) Procedural impropriety – inadequate reasons for departure from DfI applies.

(v) Breach of legitimate expectation – failure to follow policy guidance that appeals could be withdrawn by written notice.

[29] It is well established that in order to secure an extension of time, an applicant must demonstrate good reason for any delay. The onus lies upon the applicant to adduce evidence explaining each period of delay. When assessing whether the reasons provided amount to "good reason", the court will consider all relevant circumstances but will look, in particular, for the possibility of substantial hardship to or prejudice to the rights of the applicant or third parties; any potential detriment to good administration and any broader public interests which may be served or impacted by a decision to extend time (see eg *Re Laverty* [2017] NICA 75, at [21] per Weatherup LJ). When considering whether an applicant has demonstrated "good reason", the court will invariably also consider the duration of any delay, the reasons for that delay and the likely merits of the case. Since the merits of the leave

application were argued in full by both parties, I will address the proposed grounds of challenge first and then the application to extend time.

[30] The test for the grant of leave to apply for judicial review is whether any of the proposed grounds are arguable and enjoy reasonable prospects of success. I have set out below an analysis of each of the proposed grounds of challenge by reference to that test.

Grounds 1 and 5: Error of law and legitimate expectation

[31] These two proposed grounds of challenge are related and it is convenient to consider them together. Both are premised upon the assertion that the appeal had been "withdrawn" or had otherwise been concluded once the Council indicated that it no longer relied upon its proposed refusal reason. Both of these proposed grounds of challenge are without merit and are unarguable.

[32] Part 3 of the Planning (Northern Ireland) Act 2011 ("the 2011 Act"), provides for a two-tier decision making process for planning applications and appeals. Pursuant to section 45(1), a planning application is made to the council in whose district the proposed development is located or, in certain specified cases, it must be made to the Department for Infrastructure. The council/department is the statutory decision maker and is conferred with a power to determine the planning application, after having regard to the local development plan, so far as material to the application and to any other material considerations. Section 45(1) confers upon the council/department the power to grant planning permission (with or without conditions) or to refuse planning permission. Where the council/department grants permission subject to conditions requiring further approvals and/or consents, they may have a continuing role after the decision notice has been issued. However, where the council refuses permission, its decision making functions are concluded.

[33] The power of a planning applicant to appeal to the Planning Appeals Commission against a refusal of planning permission is an entirely separate statutory procedure. Section 58(1) of the 2011 Act provides in material part that, where an application is made to a council for planning permission which is refused, "… *the applicant may by notice in writing appeal to the Planning Appeals Commission*." In the event of an appeal, the decision maker is the Commission, not the council. This is made clear by section 58(4) which provides:

> "(4) Where an appeal is brought under this section from a decision of a council, the planning appeals commission … may allow or dismiss the appeal or may reverse or vary any part of the decision whether the appeal relates to that part thereof or not and may deal with the application as if it had been made to it in the first instance."

[34] This provision makes clear that, on an appeal against refusal, the Commission is the planning authority, with exclusive power to determine the planning application, including the power to grant permission with or without conditions or to refuse. The role of the council in such an appeal is as a party to the proceedings, as the planning authority or decision maker. Similarly, any person who submitted representations to the council during the original application, may also participate in the appeal, in accordance with any procedural rules prescribed by the Commission. Any person who exercises those rights, will also be a party to the appeal.

[35] The first important feature of this proposed ground of challenge is that the applicant never notified the Commission of a desire to withdraw his appeal. On the contrary, he maintained the appeal at all times. The entire premise of both of these grounds of challenge is therefore misconceived. The applicant appears to have interpreted the decision of the Council to withdraw its opposition to the appeal to be a decision on the appeal itself. This reflects a misunderstanding on the part of the applicant as to both the nature of the appeal and the identity of the decision maker. As the 2011 Act makes clear, once the applicant has appealed, the decision maker is the Commission. It acts independently of the applicant, the council and any other party to the appeal.

[36] As appears from section 58(4), the Commission has the same powers to determine the application as if it had been made to it in the first instance. It must do so having had regard to all material considerations. That is an assessment which it makes for itself, irrespective of any updated views of the council or other party. The mere fact that the council has adopted a particular stance in the appeal, is not determinative. The Commission is obliged to decide the matter independently, in light of all material considerations. As set out below, DfI and the Council adopted one position on the acceptability of the new access proposals, but the remaining parties to the appeal did not agree. The third party objectors maintained their objection. In those circumstances, the Commission was obliged to have regard to those representations, if they were considered to be material to the planning application. In this case, since the key issue was the temporary access onto the Magheraconluce Road and since that issue had been raised by the objectors, the Commission to consider and to determine the matter independently of the position adopted by the Council. It is clear that the Commissioner both understood and fulfilled this duty and was not bound by the Council's revised position.

[37] For all of these reasons, Ground 1 of the challenge is not arguable and does not enjoy reasonable prospects of success. In simple terms, the Commission is an entirely independent decision-making authority. The mere fact that the Council has changed its attitude to the application and has withdrawn its proposed refusal reasons is not determinative of the appeal. While it may ordinarily be influential and while the Commission may frequently attach significant weight to such a decision by a council, the views of the council are not determinative.

[38] Ground 5 is a legitimate expectation challenge. It derives from a provision within the Commission's procedural guidelines which entitles an appellant to give notice of intention to withdraw an appeal. It is therefore founded upon the same contention that the Council's change of position amounted to a "withdrawal" or terminating event, as a result of which the Commission was bound to find in favour of the applicant. As with Ground 1, the applicant has misconstrued the legal effect of the Commission's procedures. A change in stance by a council on an appeal against refusal does not amount to a withdrawal of an appeal by an appellant. For the same reasons as set out above, this ground is also unarguable and does not enjoy reasonable prospects of success. Leave on both of these proposed grounds is therefore refused.

Ground 2: Failure to give appropriate weight to expert evidence

[39] By this proposed ground of challenge, the applicant contends that the Commission acted unlawfully by failing to follow the advice of DfI Roads on the acceptability of the proposed temporary arrangements for visibility splays. The applicant contended that there was no objective basis for the Commission to depart from the updated DfI Roads' advice and complained that the Commissioner did not seek further comment from either the Council or DfI prior to reaching the decision.

[40] The issue at the heart of this proposed ground of challenge is whether (and in what circumstances) a planning authority is entitled to depart from the views and consultation advice of an independent expert statutory body on an issue material to a planning decision.

[41] In *R (Morge) v Hampshire CC* [2011] 1 WLR 268, the Supreme Court made clear that a planning authority was not bound by expert independent consultation advice, but that it was entitled to follow it and normally would do so. The case concerned the impact of a development upon a European protected species (ie. bats) and whether a decision to grant permission complied with obligations under article 12 of the Habitats Directive. Following updated bat surveys, the expert consultation authority (Natural England) withdrew its objection to the scheme. The Supreme Court confirmed that the planning authority was entitled to rely upon the expert advice but that it was not bound by its conclusions. Lord Brown stated:

> "[30] ….. Where, as here, Natural England express themselves satisfied that a proposed development will be compliant with article 12, the planning authority are to my mind entitled to presume that that is so."

[42] Similarly, Lady Hale stated:

> "[45] … [Natural England] … were the people with the expertise to assess the meaning of the updated Bat Survey and whether it did indeed meet the requirements of the

> Directive. The planning authority could perhaps have reached a different conclusion from Natural England but they were not required to make their own independent assessment.

[43] In *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174, Sales LJ stated the principle in similar terms, emphasising that if the authority elected not to follow expert consultation advice, it should normally have good reason for its decision:

> "85. Moreover, the authorities confirm that in a context such as this a relevant competent authority is entitled to place considerable weight on the opinion of Natural England, as the expert national agency with responsibility for oversight of nature conservation, and ought to do so (absent good reason why not) …"

[44] In the more recent case of *R (Wyatt) v Fareham Borough Council* [2022] EWCA Civ 983, Lindblom LJ conducted a detailed review of the principles governing the conduct of appropriate assessments under the Habitats Directive in which planning authorities must carry out assessments of the likely impact of developments upon European protected habitats. In doing so, they will be heavily dependant upon the opinion and advice of expert national consultation authorities. He expressed the relevant principle in the following similar terms:

> "(4) A competent authority is entitled, and can be expected, to give significant weight to the advice of an "expert national agency" with relevant expertise in the sphere of nature conservation, such as Natural England ... The authority may lawfully disagree with and depart from such advice. But if it does, it must have cogent reasons for doing so …"

[45] All of these principles accord with the statutory scheme for planning decision making under the 2011 Act. The duty to assess all material considerations and to determine the planning application is conferred exclusively upon the applicable planning authority (ie. the council, the department or the commission). As with all other material considerations, the weight to be attached to the expert independent consultation advice, is a matter for the authority. The relevant planning authority is entitled to and would normally be expected to give substantial weight to the advice of expert national consultation body but it is not bound to follow it (whether in whole or in part). The position is therefore similar to the duty upon planning authorities to take account of material planning policy. A planning authority is entitled to depart from planning policy, where there are proper planning reasons for doing so, which are supported by the materials available to the authority. Where expert independent advice is provided by a statutory authority on a matter within its

area of expertise, a planning authority will normally follow or and give it substantial weight but may elect not to do so. Where it does decide to depart from the advice, the authorities require that it should identify "cogent reasons" for its decision. It is not entirely clear from the authorities whether the adjective "cogent" connotes a higher standard of review that the normal *Wednesbury* standard. However, in practical terms, on a review of such a decision, the court will assess whether sufficient material was before the planning authority to support its decision to depart from the advice and will also assess the extent to which the authority has articulated its reasons with sufficient clarity.

[46] In this case, it is clear that there were ample materials available to the Commissioner to support her view about the non-acceptability of the revised proposals. The Commissioner carried out her own site survey which involved travelling past the proposed access onto the Magheraconluce Road in both directions and satisfying herself that the observed speed of traffic accorded with the survey undertaken by DfI Roads. She also entered and exited the site via the proposed access to observe visibility conditions. She was therefore well placed to make her own overall judgment about road and access conditions at this location. The Commissioner also had the benefit of clear and unambiguous departmental guidelines governing recommended standards for visibility slays. She satisfied herself that on the RHS of the access, the proposed visibility splay of 2m x 65m (as contained on drawing 01/1) was in accordance with DCAN 15. To the LHS, she concluded that a visibility splay of 2.4m x 90m was required in order to comply with DCAN 15. The proposal considered and refused by the Council proposed a relaxed splay of 2m x 65m. The most recent proposal in the applicant's rebuttal statement was for 2m x 90m. Based upon the traffic speeds from this approach, both of these proposals fell short of the standards within DCAN 15, which required a splay of 2.4m x 90m. The Commissioner stated clearly that, in light of the average traffic speeds at this location, she was not persuaded that a departure from standards would be acceptable. She also noted that the proposed two-year period of use was a "notable period under which to use and access with a substandard splay."

[47] Accordingly, in deciding not to follow the DfI recommendation, the Commissioner has elected to <u>apply</u> published standards rather than to depart from them. She did so, based upon her own detailed site visit and in light of continuing objections from third parties who had familiarity with the location. The decision of the Commissioner to depart from DfI advice might be unusual and may even be regarded as harsh to the applicant. However, it was a decision to apply standards, not to depart from them. In my view it cannot plausibly be argued that this was impermissible or that the Commissioner did not articulate cogent reasons for her decision. The position might have been different if she had elected to depart from standards, in the face of DfI advice that standards should be applied. However, she did the opposite in this case.

[48] Accordingly, I do not consider this ground of challenge to be arguable, nor does it enjoy reasonable prospects of success. Leave is, therefore, refused on this ground.

[49] The Commission submitted that the applicant was at liberty to submit a further planning application with more detailed proposals if he wished to do so. Pursuant to section 46(1) of the 2011 Act, a council has a discretionary power to decline to determine a planning application if the conditions set out in that section are satisfied and the council considers that there has been no significant change in relevant considerations since the earlier determination. The conditions contained in section 46(2) and (3) are that during the previous two-year period, either the department or the Planning Appeals Commission has "*refused a similar application*." I wish to make clear that nothing in this judgment should be interpreted as a pre-determination of that question in the event that a further application is submitted. I simply observe that the applicant has a statutory right to submit a further planning application for the same development. Thereafter, it will be a matter for the Council to determine whether it is entitled to or should decline to determine it on the grounds of similarity. It may be that, if the applicant was to propose alternative visibility splays such as one with dimensions of 2.4m x 90m to the LHS or alternative arrangements to facilitate access and egress from the site onto the Magheraconluce Road, a sufficient distinction may be made to merit a full determination by the Council. This will be a matter for the Council to decide if such an application is made.

Ground 3: Irrationality

[50] By this proposed ground, the applicant contends that, even if the Commissioner was entitled to depart from the DfI advice, she was irrational to do so in this case. This proposed ground overlaps considerably with Ground 2. I have already determined that the Commissioner had sufficient information and materials to justify applying the DCAN 15 guidelines, rather than accepting a recommendation for departure. I consider those to be sufficient or "cogent" reasons on the facts of this case. Accordingly, for the same reasons, I do not consider it to be arguable that the Commissioner acted irrationally. This proposed ground of challenge does not enjoy reasonable prospects of success and leave is refused.

Ground 4: Procedural impropriety

[51] By this proposed ground, the applicant contends that the Commissioner acted unfairly and failed to give adequate or intelligible reasons for not following the DfI advice and by not deciding the appeal in his favour, in light of the Council's position. This proposed ground also overlaps with the earlier grounds and for the same reasons, I do not consider it to have any merit. The Commissioner was entitled not to follow the DfI advice, she was not bound to follow the position of the Council and she has given clear and cogent reasons for her decision. Accordingly, I consider

this ground of challenge is not arguable and does not enjoy reasonable prospects of success. Leave is, therefore, refused on this ground.

Conclusion

[52] In light of the conclusions I have reached on the merits of the challenge, it is not necessary to consider the application for an extension of time.

[53] For all of the above reasons, the application for leave to apply for judicial review is dismissed. I will hear the parties on costs.