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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JAMES HUGH ALLISTER AND ROBERT EDWIN AGNEW FOR JUDICIAL REVIEW

-v-

CAUSEWAY COAST AND GLENS BOROUGH COUNCIL

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GLOSSARY

CCGBC:	Causeway Coast and Glens Borough Council
DAERA:	Department of Agriculture, Environment and Rural Affairs
DETEIA:	Pre-planning application EIA screening request
DfI:	Department for Infrastructure
DLD:	The Council's Director of Leisure and Development
DSD:	Department for Social Development
EIA:	Environmental Impact Assessment
FOI:	Freedom of information
ICO:	Information Commissioner's Office
The Motor Club:	The Coleraine & District Motor Club
NAP:	Northern Area Plan
NIEA:	Northern Ireland Environment Agency
NIAO:	Northern Ireland Audit Office
PAD:	Pre-Application Discussion
PAN:	Pre – planning application Notice
PC:	The Council's Planning Committee
PCR:	Planning Committee Report

PPS:	Planning Policy Statement
SIB:	Strategic Investment Board
SPPS:	Strategic Planning Policy Statement

The Protagonists

James Hugh Allister	First-named Applicant
Robert Edwin Agnew	Second-named Applicant
Shane Mathers	Principal Planning Officer, CCGBC
Denise Dickson	Head of Planning, CCGBC
David Jackson	Chief Executive, CCGBC
Ben Wilson	Architect for the Developer
Eimear Murphy	Planning Consultant for the Applicants
Heidi Clarke	Planning Officer, CCGBC
Peter May	Permanent Secretary DfI
Michael Wilson	Planning Officer, CCGBC
Vivienne and Colin Gilholm	Directors of C & V Developments Limited
Michael Williamson	Accountant with ASM Chartered Accountants (who were commissioned by DSD to carry out Hotel Scoping Study for Portrush)
Timothy Ferguson	Developer's Planning Consultant
Mervyn White	Representative of NW200 Organisation
Mark Donnelly	Don Hotels Limited
Padraig McShane	Former Councillor, CCGBC
Jonathan Gray	Projects Director for SIB Ltd
Richard Baker	Director of Leisure and Development, CCGBC
Philip Tweedie	Director of Philip Tweedie Limited

Peter Woodhead	Registered Valuer, Philip Tweedie Limited
Sinéad Duggan	Committee and Members Services Officer, CCGBC
Christopher J Callan	Senior Director and Head of Professional and Consultancy Services in CBRE (NI) Limited
Terry McKinney	DfI Roads
Noel Magowan	Planning Officer, CCGBC
Tim Hopkins	Chartered Surveyor for Applicant

McCLOSKEY LJ

Preamble

I. As these proceedings progressed they developed certain unforeseen and challenging features: unexpected interruptions; the involvement of additional parties; a dramatic increase of affidavits (upwards of 40 ultimately); a deluge of documentary evidence (over 10 volumes); the involvement of additional legal teams (six in total by the end of the hearings); repeatedly frustrated case management mechanisms; and slipping timetables. The sheer volume of affidavits and bundles of documentary evidence, in tandem with the imperative of delivering final judgment with expedition, has the practical consequence that much of the evidence will not be rehearsed by me, whether in summary form or at all. The various case management mechanisms devised by the court have ensured that all of the parties have had adequate opportunity to draw to the Court's attention those aspects of the evidence upon which they place particular reliance.

II. As the case progressed, three themes (among others) emerged with some prominence. First, the increasing prejudice to the developer; second, the unfairness to Council officers and officials resulting from the wave of delays in a context of trenchant attacks on their integrity and professionalism; third, the damage to the public interest caused by the continuing uncertainty and delayed finality. All of the foregoing is reality: the court passes no judgment on the whys or hows thereof.

III. The hearings were, ultimately, completed on 24 June 2019 and certain loose ends were tied up within a week thereafter. The imperative of delivering the court's judgment speedily being compelling, certain aids were welcome. I refer particularly to the guide to the voluminous bundles deployed by Mr Alan Kane QC (with Ms Fionnuala Connolly, of counsel) on behalf of the Applicants and the comprehensive written submission of Mr Stewart Beattie QC (with Mr Philip McAteer, of counsel) on behalf of the Respondent Council. Furthermore, prior to completion of the hearings all of the parties were afforded the opportunity to contribute to and comment on most of the purely factual/evidential aspects of what follows.

IV. It has also been possible to utilise three of the tools which are now standard in planning/environmental judicial reviews under the revised Judicial Review Practice Direction namely a glossary, a list of *dramatis personae* and a chronology, all agreed by the parties' legal representatives. Finally, time limits for oral argument were applied.

V. The background to the above will become clearer by highlighting certain of the procedural landmarks of this litigation:

(a) The court made three additional orders in June 2018, the third whereof, dated 27 June (one of two orders on that date) granted leave to apply for judicial review.

(b) By its order dated 08 October 2018 the court vacated the substantive hearing dates, substituting three dates in November 2018.

(c) Following several days of hearings the court, by its further orders dated 10 and 14 December 2018, granted interested party status to five non-parties and made appropriate ancillary and consequential directions.

(d) The unexpected developments which intervened in December 2018 are reflected in the court's *ex tempore* ruling of 10 December 2018 (see Appendix 1).

(e) By 20 December 2018 the case had been listed on a total of 10 dates for mixed case management and substantive hearing purposes.

(f) Four further case management listings followed between 18 January and 01 March 2019.

(g) The substantive hearing resumed between 25 - 27 March 2019 but could not be completed.

(h) Further substantive listings followed on 10-13 and 24 June 2019 (see Appendix 2).

(i) Ultimately the case had been listed before the court on a total of 22 dates. The court continued to issue case management directions to the end, reflected particularly in its joint orders of 12 and 13 June 2019.

VI. Given the sheer bulk of the evidence ultimately assembled and the difficulty in separating clearly certain grounds of challenge from others, coupled with the need for expedition, I regret that the judgment contains certain elements of repetition and overlap. I wondered, in retrospect, whether this case had in truth been a candidate for the assembly of bundles of evidence of a subject by subject basis. I have concluded, however, that given the substantial blurring of many lines, this would probably not have been feasible or, alternatively, would have generated disproportionate expense.

1. Introduction

[1] James Hugh Allister and Robert Edwin Agnew (thereinafter "*the Applicants*") are the owners of separate dwellings situated in Ballygelagh Village, an exclusively residential development situated just beyond the western/north-eastern boundary of Portstewart and accessed by a private lane from the main Portstewart to Portrush Road. The development consists of 27 houses constructed in the 1990s on the site of an historic *clachan* of dwellings. It has uncluttered views of the north coast, situated approximately one mile away and beyond. It is surrounded on all sides by green fields which are interrupted only by a roughly rectangular strip of hard standing immediately adjoining the aforementioned main road (the Ballyreagh Road, or "coast" road). This strip serves as the "pits" (or "paddock") for the North West 2000 motorcycle race, a well-known annual event of major touristic significance. I have visited the site.

[2] The location and setting are further described in Mr Allister's first affidavit in the following terms:

> "*Ballygelagh Village has a particular landscape setting – at ease with its coastal location and the setting of Portstewart. Central to the successful absorption and integration of Ballygelagh Village into this sensitive setting is its green frontage to the coast …. This …. is critical to the landscape and amenity setting for our home and that of our neighbours. Our west facing home has uninterrupted views to the sea and the Donegall headlands. This, along with its relative privacy, was and is its main attraction …*
>
> *The fields in front of our home were for years part of the green belt and now in planning terms are part of the countryside, with the development limit of Portstewart being further to the west. They provide the sense of where a clear line of distinction exists between town and country …*
>
> *These fields are the only surviving agricultural fields in close proximity to the coastal road between Portstewart and Portrush and, to that extent, present as a green wedge between the two towns.*"

These linguistic descriptions are enhanced and enlivened by the photographic images and maps assembled in the evidence before the court.

[3] The Applicants have been granted leave to challenge a decision of Causeway Coast and Glens Borough Council (the "*Council*") dated 05 March 2018 whereby it granted permission for a hotel complex development described in the planning application in these terms:

> "… *a hotel and spa complex including conference and banqueting facilities, holiday cottages, North West 200 visitor attraction (including exhibition space, tourist retail unit – C.150 square metres – and office space), demonstration restaurant, car/coach parking, access/junction alterations, landscaping and associated infrastructure works on land south of 120 Ballyreagh Road, Portstewart …*"

The site of the proposed development consists of some 13 acres. The planning applicant is described as C & V Developments Limited (hereinafter the "*developer*") who has participated fully in these proceedings, making a material evidential contribution and assisting the court in its resolution of the issues through the submissions of its counsel.

2. Additional Parties

[4] At the stage when the court was about to begin the fourth day of a scheduled six day substantive listing, an unexpected development materialised. This entailed the advent of an affidavit sworn by an independent elected member of the Council, Mr McShane, emanating from solicitors engaged by him. This was the first communication from this source and, thitherto, the only identified interested party was the developer.

[5] Councillor McShane's first affidavit, in short, levelled allegations of some gravity against the Council's Chief Executive Officer (the "*CEO*"), implicated other Council officers/employees in certain events and conversations and, further, was of obvious materiality to certain issues raised by the Applicants' challenge. The court proceeded as follows:

(a) This affidavit evidence was duly admitted.

(b) Having regard to the provisions of RsCJ Order 53, Rule 5(3) and (7) and Rule 9(1), service of the proceedings on the CEO and other Council Officers was directed.

(c) The CEO, the Council's Solicitor (David Hunter) and the Director of Leisure and Development (Richard Baker) were accorded interested party status. The Chief Planning Officer (Diane Dickson) and the Council's main deponent, a Principal Planning Officer (Shane Mathers), were each afforded the opportunity of providing further affidavits.

(d) Service of the proceedings on the firm of Phillip Tweedie & Company, authors of a contentious 'de minimis' easement valuation report, was also directed and this firm too was granted interested party status.

While a regrettable break in the hearing resulted, this was the unavoidable consequence of a quite unexpected development.

[6] During the weeks which followed the legal representation of parties grew. Ultimately, each was represented by solicitor and counsel.

[7] The ground of challenge primarily engaged by this new evidence was that which complains about the Council's failure, in contravention of both policy requirements and the common law, to make adequate enquiry about the financial viability of the proposed development. The possibility of this evidence, and further evidence yet to materialise, permeating other grounds of challenge was also recognised.

3. Chronology

[8] I gratefully insert the agreed schedule provided in response to the court's direction, with modest judicial modifications.

"1 October 2015	Meeting between David Jackson and [the developer] and NW200.
17 November 2015	Initial concept masterplan and conceptual layout circulated on behalf of [the developer].
17 November 2015	Email from Mervyn White, NW200 referencing a meeting due to take place the following day.
18 November 2015	Meeting between [the developer], NW200 and planners at Chief Executive's Office.
1 December 2015	[the developer] in contract to purchase site
16 December 2015	Meeting between planning applicants and planners at Council Offices.
17 December 2015	Letter from [the developer] to David Jackson thanking him and his colleagues for the meeting to discuss the project, and asking that request for access easement be taken through appropriate channels.
17 December 2015	Email from Richard Baker to Invest NI stating that "we are very supportive of the project".
19 December 2015	Email from Tim Ferguson to David Jackson thanking him for taking time to

	discuss the proposal and stating that 'We found it very productive'.
10 January 2016	Richard Baker email to Michael Wilson and Melanie Orr copying David Jackson and Tim Ferguson making arrangements for Pre-application Meeting.
15th January 2016	Pre-Application Discussion received LA01/2016/0071/PAD
26 January 2016	Grant of easement ratified by Council
5 February 2016	Email from David Jackson to Moira Quinn copying in Denise Dickson 'Let's turn this around really quickly. Very significant hotel development opportunity getting some momentum'.
3 March 2016	SIB Report sent by Jonathan Gray to CCGBC.
22 March 2016	Seal of easement by CCGBC.
29 April 2016	Pre-Application Notice received LA01/2016/0522/ PAN
17 June 2016	Pre-application event at Council offices
17 June 2016	Grant of Easement
18 June 2016	Pre-application community consultation public event
15 July 2016	Request for Screening Opinion by the developer. LA01/2016/0893/DETEIA
10 August 2016	Registration of Easement
13 September 2016	Environmental Assessment Determination Sheet signed. Letter to developer's Planning Consultant confirming negative screening decision. C&V letter asking that request for use of land (for carpark and hotel servicing) be taken through appropriate channels.
14 September 2016	Email from David Jackson to Moira Quinn, 'This relates to the Portstewart Hotel Development which is a strategic priority for the Borough.'
20 October 2016 (date signed) 31 October 2016 (date received) 1 November 2016 (date validated)	Planning Application lodged seeking planning permission for a 119 bed 3 storey hotel and spa complex.
7 November 2016	Applicant's FOI request to CCGBC
8 November 2016	Meeting at Paddocks, Portstewart between David Jackson, PT, developers

	and representatives from NW200.
23 February 2017	Letter from David Jackson to FNA setting out outcome of internal review regarding FOI request.
27 March 2017	FNA wrote to Peter May, Permanent Secretary at DfI requesting the Department to give consideration to calling in the planning application.
12 April 2017	Email from David Jackson to Shane Mathers requesting an update for decision.
19 April 2017	Response from Peter May to FNA's request dated 27 March 2017 on call in request.
4 May 2017	Emails from Shane Mathers to David Jackson copying Denise Dickson, email from David Jackson to Shane Mathers, email from David Jackson to Shane Mathers regarding update on curlews and potential for objection.
28 June 2017	Site Visit by Planning Committee ("PC") Members. Site visit report prepared and circulated to members before the PC meeting.
28 June 2017 at 2pm	PC Meeting held.
29 June 2017	Planning permission granted to the developer.
18 July 2017	Applicants send Pre-action Protocol letter.
29 July 2017	Report on valuation of value over easement at The Pits from Peter Woodhead to CCGBC.
31 July 2017	Valuation from Philip Tweedie.
11 August 2017	Pre Action Protocol Response.
15 August 2017	Application lodged by the Council to quash the decision of its own PC of 29 June 2017.
6 September 2017	Order of the High Court quashing the planning permission on the Council's

	own application.
11 October 2017	The Council writes to Department for Infrastructure ("DfI") asking whether the Department wishes to call in the application
8 November 2017	Implementation date for CCGBC Protocol for the Operation of the CCGBC Planning Committee
29 November 2017	DFI letter to the Council including its consideration "that the application should not be called in"
11 January 2018	Decision of Information Commissioner on FNA's FOI complaint.
24 January 2018	At 11.57am (2 hours before the PC meeting), disclosure provided to First Named Applicant further to the ruling of the Information Commissioner's Office ("ICO").
24 January 2018	Council PC, with a recommendation to approve.
2 March 2018	DfI advises again that it did not wish to call in the application
5 March 2018	Planning permission granted."

4. The Proposed Development

[9] I have adverted in [3] above to the proposed development as described in the planning application. By its impugned decision the Council approved the entire development as proposed, subject to a series of conditions. It is appropriate to highlight some of these: the proposed exhibition space and tourist retail facility were restricted to a maximum floor space of 150 square metres, in furtherance of the vitality and viability of existing town centres; the proposed office use and meeting room were restricted to a maximum floor space of 90 square metres; the seven self-catering chalets are to be devoted to holiday letting accommodation use only; a noise bund to the west of 120 Ballyreagh Road shall be installed prior to construction of the hotel building; specified maximum "*rated noise emissions*" related to *inter alia* two of the Ballygelagh dwellings will be observed; an expert noise survey will be undertaken at a specified time; and specified landscaping/planting works will be undertaken.

[10] The approved development is described in detail in the "Planning Statement", prepared by the developer's agent, which accompanied the planning application. This contains certain passages of note:

> "*Much of the new and larger hotel stock (ie 70 bedrooms plus) in Northern Ireland has been concentrated around the main cities ….*
>
> *One of the key reasons for pursuing this development …..* [at] *… this particular location is to provide a home for the ever popular North West 200 ….* [which] *is an all year round operation and employer in the local area …*
>
> *This proposal would see the development of the first four star hotel and spa complex on the north coast and with it the inclusion of a conference centre and home for the global North West 200 event …*
>
> *The conference centre and demonstration restaurant will provide a facility to allow local organisations to market themselves and hold events all year round …*
>
> *It is expected that the hotel complex will prove popular during the summer months in hosting larger scale weddings ….*
>
> *The proposed hotel complex is there to complement existing provision, provide the first four star grade level accommodation and hospitality and be of a scale that can cater for the larger events.*"

[11] With specific reference to the development site, the Planning Statement says *inter alia*:

> "*The application area extends to some 5.38 hectares with the buildings ground floor footprint approximately 5,500 square metres …*
>
> *The subject site would represent a form of extension to Portstewart's settlement boundary. It provides key sea views which is considered critical when attracting both tourism, investors and visitors alike …*
>
> *While much of the coastal line to the north of the A2 remains untouched and protected under a variety of designations, the lands to the south* [including

> Ballygelagh] *do not have such a designation and have been subject to piece meal development …*
>
> *The vast majority … relates to tourism in the form of holiday homes/caravans … the lands in question are not allocated as 'green belt' or a 'special countryside area' (as noted within SPPS) rather 'white land' ….*
>
> *The site is made up of a mix of hard standing and agricultural fields … used for sporadic low level cattle grazing. The sensitivity threshold of the site is low compared to those running alongside the coast line and to the north of the A2 ….*
>
> *The gradient of the site is undulating. It ranges from approximately 35 metres AOD towards the southern boundary where there is a form of mounding and then steadily drops to approximately 19 metres AOD to the north side."*

["AOD" denotes "Above Ordnance Datum"]

[12] The Planning Statement contains a discrete chapter which purports to identify all applicable planning policies. Two major such policies are identified. The first is Planning Policy Statement 16 – Tourism ("PPS16"). This contains a series of discrete policies. The Planning Statement purports to outline the specific requirements of Policy TSM3, Policy TSM4, Policy TSM5 and Policy TSM7. The second major policy identified is the Northern Area Plan 2016 ("NAP 2016"). This attracts the following commentary:

> "*… The subject site has no specific designation or allocation upon it. It is shown to be 'white land' or continuation of existing use … a tarmac area together with rough grazing land that falls within the general countryside close to the settlement of Portstewart ….*
>
> *A core objective of* [NAP 2016] *is to facilitate and promote sustainable and economic development … a core part of the Plan Strategy is therefore to further the tourism potential and investment in towns such as Portrush and Portstewart.*"

The NAP further states that the three towns of Coleraine, Portstewart and Portrush, with a combined total population of 40,000, are seen to "*function effectively as a single urban area*".

[13] Under the rubric "Site Selection", the proposed development is described as "*a large four star hotel complex … a large scale hotel and related uses …*", continuing:

> "*The core components proposed require land large enough to accommodate approximately 5,500 square metres of new (ground 4) floor space. Together with associated access, parking and servicing including the landscape grounds the area needed extends to some 5.38 hectares ….*
>
> *In terms of location the subject site was chosen following extensive research, not only in terms of being able to avail of a site large enough to accommodate the development, but one that is in a location that will meet four star plus visitor expectations. A site with sea views was of critical importance … the proposal will be a 'destination' in its own right with the provision of the North West 200 Exhibition Centre, spa complex and demonstration restaurant and requires to be in an easily accessible and related location.*"

In a later passage it is stated:

> *"There is a need for the scale of development proposed in order to increase the North Coast's tourism potential and fulfil an acknowledged shortfall in provision."*

The Planning Statement also uses the language of "*larger four and five star hotel accommodation with ancillary facilities*".

[14] Further insight into site, orientation and scale emerges from the following passages:

> "*The main hotel building represents the largest built form on the site and from the outset it was decided to locate this on the lower lying and forward facing part of the site to reduce visual impact. The building has been orientated to face Ballyreagh Road, the coastline and the start and finish line of the NW 200 road race. It has also been orientated towards the path of the sun creating courtyard spaces and towards the sea views of Innishown, North Donegal and the Scottish highlands of Islay and Jura …*
>
> *The main hotel building will accommodate 119 bedrooms, a large conference and banqueting facility, leisure and spa complex, restaurant, bar and the North West 200 visitor attraction and facility … as well as the administration hub for the NW 200 organisation …*

The conferencing and banqueting facility has its own dedicated accessible entrance from the main public space and also internally from the hotel. It consists of a first floor conferencing and banqueting facility capable of hosting 350 people conference style and 300 banqueting style …

The leisure element of pool, gym and associated classroom space is located on the rear south facing wing of the building …

Spa provision in the form of treatment rooms, thermal suite, group treatment room and relaxation room are provided on the second floor ..

Bedroom accommodation … 119 bedrooms of which there will be three suites, family rooms and accessible bedroom accommodation …

Hotels have to accommodate large service requirements …

Nine sensitively designed modern holiday cottages are proposed …. accessed from a single approach lane off the main access road serving the site …

Both types of cottage have been designed to orientate themselves to the north and west of the site, to follow the natural contours that exist and to minimise the visual impact and massing form presented both to Ballyreagh and to Ballygelagh Village …"

"Type A" cottages will have two bedrooms while "Type B" will have four.

[15] The Planning Statement then deals with the final aspect of the proposed development, namely the "*demonstration restaurant hotel*". This will be a free-standing building with a north (ie coastal) facing aspect designed for "*small scale functions/demonstration cooking*". Its purpose is to "*cater for foodies*" and its activities will take place during morning, afternoon and evening sessions. Its market will consist of both hotel guests and outsiders.

[16] In addressing the subject of economic benefits, the Planning Statement represents that there will be "*close to 100 full time equivalent (and sustainable) jobs, with part time employment opportunities also on offer during high demand periods*", generating almost £2 million in salaries and wages. It projects that in its third year of operation there will be almost 50,000 "*overnight guests*", on the basis of a full year market. Food and beverage purchases are expected to total almost £800,000 per annum. It is

further projected that guests will spend almost £6 million per annum in the local economy.

5. Two Contextual Features of Note

[17] The developer's proposal constitutes a "*major development*" within the compass of the Planning (Development Management) Regulations (NI) 2015 (the "*2015 Regulations*") as the area of the subject site exceeds two hectares. As a result the new statutory provisions relating to "Proposal of Application Notice", pre-application community consultation and a consultation report, enshrined in sections 27, 28 and 50 of the Planning (NI) Act 2011 (the "*2011 Act*"), were engaged. There is no issue regarding compliance with these requirements. In passing, these statutory provisions were considered in the recent judgment of this court in *Greencastle Rouskey Gortin Concerned Community Limited's Application v Department for Infrastructure* [2019] NIQB 24.

[18] Second, the impugned decision is a remade decision. On 29 June 2017 the Council granted planning permission for the proposed development. A PAP letter from the Applicants' solicitors ensued. This elicited the following response from the Council's solicitor –

> "*We have reviewed the materials and consulted with senior counsel. As a result, and upon the advice of senior counsel, the Council accepts that the basis on which the information referenced at paragraph 8.28 of the Planning Report was not disclosed to objectors cannot be sustained. The materials should have been disclosed and members of the public and others afforded the opportunity to review and comment on same.*"

In paragraph 8.28 of his June 2017 report to the Council's Planning Committee ("PC"), the case officer addressed the financial viability evidence provided, in the context of the Policy TSM3 requirements, stating that this had not been disclosed to PC members, or anyone else, on the ground of "*commercial sensitivities*". Further to the letter from the Council's solicitor its Chief Executive Officer brought an application for judicial review naming the Council as respondent, giving rise to an order of the High Court dated 06 September 2017 quashing the first grant of planning permission of 29 June 2017.

6. The Applicants' Grounds Summarised

[19] The Order 53 pleading in this case has been nothing if not organic. This has entailed judicial intervention from the outset, in both the case management phase and during the substantive hearing. It was also affected by the late development noted in [4] – [7] above. In its ultimate incarnation, following much amendment and as construed by the court, it formulates the following specific grounds of challenge:

(i) Procedural Unfairness

(ii) Breach of the Planning Committee's Protocol.

(iii) Breach of the Planning (Notification of Councils Own Application) Direction 2015.

(iv) Breach of Policy AMP3

(v) Misapplication of planning policy: TSM3 v TSM4.

(vi) Alternatively, breach of Policy TSM3.

(vii) Improper motive.

(viii) Unlawful EIA negative screening decision.

[20] Two comments are appropriate at this juncture. First, the grounds evolved in tandem with the organic nature of the proceedings. Second, while a breach of Article 1 of Protocol 1 ECHR (contrary to section 6 of the Human Rights Act 1998) was formally pleaded, this was in reality a lightweight, or makeweight, contention, far removed from the heart of the Applicants' challenge and was not actively pursued. Ultimately all parties presented their submissions to the court by reference to the grounds listed above.

7. Councillor McShane

[21] I turn to the affidavit evidence of Councillor McShane at this juncture, given its indelible nexus with that of the CEO (above). The Councillor's first affidavit - unheralded, unforeseen and of late advent - which caused the significant fissure in these proceedings, noted in the Preamble at [V] and at [4] – [5] above, includes the following material averments:

> "*…. On Wednesday 7 February 2018 …. a meeting of the Land and Property subcommittee was due to commence … and ….. we* [Mr Hunter, Council's solicitor and the deponent] *engaged in a short discussion about an item on that evening's agenda of the Land and Property subcommittee … 6.1 … North West Hotel Development, lands at Ballyreagh Road, Portstewart – request for further easement. After voicing my concerns about the initial land easement and additional easements being requested, Mr Hunter stated the following:*

> *'I cannot control the two boys. They are totally out of control. They have a special relationship with big business and it's not good .. they don't listen to me. They just do what they want.'*
>
> *I then asked him who he was referring to and he replied:*
>
> *'Jackson and Baker.'*
>
> *I believe that he was referring to Mr David Jackson, Chief Executive of Causeway Coast and Glens Council and Mr Richard Baker, Director of Leisure and Development."*

Councillor McShane then deposes that some little time later he received from the Council's Democratic Services Manager *inter alia* (a) a valuation and easement report relating to the location and (b) a "Strategic Investment Board Report… potential grant of easement – council lands at Ballyreagh" which "*… were never brought before the Council*". This assertion is confirmed by the minutes of CPRC committee on 19 January 2016, adopted by full Council on 26 January 2016 and subsequently confirmed by the sealing of the easement by full Council at its meeting held on March 22nd 2016.

[22] Continuing, Councillor McShane explains that his concern was to "*… understand why a valuation was authored over a year after the granting of an easement to the hotel developer*". During a further conversation with the Council's solicitor on 1 June 2018 the Councillor commented that this "*seemed like an attempted coverup*", to which the solicitor allegedly replied:

> "*That's exactly what it was …. David Jackson* [the CEO] *pushed this very hard and put pressure on everybody to get the deal done and to get the hotel delivered …* [and] *… had delivered a directive to that effect.*"

During a further conversation on 24 August 2018, Councillor McShane attributes to the solicitor the following statement:

> *"Senior planner frequently comes to me to say – he's been in [expletive] trying to pressurise me and all the rest of it."*

I interpose this: the transcript relating to the 01 June 2018 conversation attributes to the Councillor not the words "*attempted cover up*", but "*and to me, it seems to be covering the basis*" (presumably "*bases*"). The transcript also includes the word "directive" as follows: "*… that was the directive, get this done*", referring to the CEO.

[23] It is convenient here to interpose the following averments made by the Council's HOP:

> *"5. Due to the contentious nature of planning, the Planning Department receives continual pressure from all sides in the planning debate to reach a recommendation or determination in favour of various participants in the process, whether they be applicant/agent, in support of or in opposition to a proposed development. Nevertheless, the role of the Planning Department is to act impartially in reaching an informed and balanced recommendation/decision on any planning application in accordance with the local development plan, unless material considerations indicate otherwise.*
>
> *6. In relation to the subject application, this is a major planning application and therefore the decision is not made by Planning Officers but by the Planning Committee. At no time was pressure put on me or my staff to reach a planning recommendation on this application to either approve or refuse planning permission by the Chief Executive, Mr Jackson or anyone else in the Respondent Council. I have listened to the recordings and, whilst I cannot speak to the intention of those using the word "pressure" in that discussion, the only issue of pressure that I was ever aware of related to the desire for expeditious progressing of the application through the planning process."*

[24] Later, (per Councillor McShane's first affidavit) in his capacity of Chair of the Council's Audit Committee he arranged a meeting with the CEO and (in terms) confronted him with all of the foregoing. In response, the CEO asserted that he was "*oblivious to the valuation … unaware of the lack of a valuation prior to sale …*" and undertook to investigate the matter. He has not reverted to the Councillor subsequently. Finally, the CEO denied the accusation that he "*… gave away public lands for a nominal fee to his own preferred developer*".

[25] Next, Councillor McShane's affidavit adverts to an email from a DFI official to the CEO, dated 12 February 2018, the context whereof was the question of whether DFI should "*call in*" the planning application. The affidavit continues:

> "*On the morning of 19 February 2018 in an emailed response to* [DFI], *Mr Jackson attached the valuation document he claimed he was oblivious to, along with an SIB report and several other documents. Mr Jackson states in the email:*

> *'Council is in possession of a report from the Strategic Investment Board, which is attached, as is the valuation of the easement.'*
>
> *The SIB report was carried out inhouse. It is designed to inform Councillors and guide them in their decision making. It was never shown to Councillors. The valuation document was only done after it became clear there was going to be a judicial review on the initial approval. The document dated 10 July 2017 was done 16 months after the Council agreed the sealing of documents on the easement. The Council's solicitor, Mr Hunter, said a senior management meeting was held when it became clear there was going to be a judicial review. He stated to me he requested a valuation while Richard Baker said he would get an SIB report authored. When I asked why they wanted to attain a valuation after the easement had been granted, Mr Hunter stated it was to have something on the file."*

Councillor McShane deposes, finally:

> *"I would lastly state that in respect of my interactions with both Mr David Hunter and Mr David Jackson I made audio recordings of some of our conversations. I did this due to the fact that I had such grave concerns in respect of the actions of the Council and individuals acting on behalf of the Council. I must add, however, that in doing what I have done I have nothing to gain and by placing this affidavit before the court I have much to lose …"*

[26] Councillor McShane swore a second affidavit which focuses on one of the more contentious issues in the proceedings namely the Council's grant of an easement to the developer for nil financial consideration in the absence of any evaluation of the strip of land in question. While I shall examine this discrete issue in a separate, later section of this judgment it is appropriate to highlight certain averments of a more general nature:

> *"I wish to emphasise that I became involved in these proceedings out of a sense of public duty and in order to seek to ensure that fair and transparent consideration would be given to a number of matters which were of concern to me, and which also seemed to be relevant to the matters raised in the present application for judicial review …*

> *Although I seconded the grant of the planning permission which is impugned in this case, what I later learned about the process made me consider that I had reached this decision without having been presented with the full background and facts ...*
>
> *As chair of the Council's audit committee, I consider that there are issues of potential public importance relating to this case which require to be investigated further and closely examined..."*

Councillor McShane further avers:

> *"I entirely recognise that it is part of the Chief Executive's role to encourage and facilitate economic development in the Borough. My concerns relate to (i) whether all developers or potential developers are provided with the same level of interest and assistance or whether there may be an unfair or unequal preference given to some developers;*
>
> *And (ii) whether any legitimate function of encouraging development might spill over, or have spilt over, into improper influence in the Council's other procedures (either by way of influence on the planning process or the grant of interests in land otherwise than at best value to the Council)".*

It is appropriate to interpose here that Councillor Mr McShane, who attended all or most of the hearings, was the beneficiary of legal representation during a brief, finite period only. Ultimately his attempts to secure considerable public funding and Council funding, were (the court was informed), unsuccessful.

8. The Council's CEO

[27] Brief mention of the Council's CEO has been made in [5] above. The CEO is one of the five additional interested parties who became involved in these proceedings from December 2018. Prior thereto the only active interested party had been the developer. There is a body of evidence relating to the conduct of the CEO in connection with the impugned decision. I shall highlight certain salient elements. This dovetails neatly with the chronology of material events (*supra – "the Chronology").*

[28] On 14 September 2016 the CEO, in an email to the Council's Director of Performance on the subject of "North West Development" stated:

> "*This relates to the Portstewart Hotel development* ***which is a strategic priority for the Borough****. It should be straightforward because the area in question is on a lease to NW200 …..*
>
> *Please can be action as soon as possible.*"

The addressee forwarded the email to a Council official, requesting that the matter be given priority. The context of this email exchange was a request from the developer for a grant of easement over lands owned by the Council to facilitate the development. While at this stage no planning application had been made, the PAD, PAN and DETEIA (pre-application screening determination request) had been received (see, in passing, *Re Greencastle* [2019] NIQB 12). The Council had previously resisted disclosure of this email exchange when responding to a freedom of information ("FOI") request by Mr Allister made on 7 November 2016. This was subsequently overruled by a formal decision of the Information Commissioner's Office ("ICO") dated 11 January 2018

[29] In the context just described, the Council adopted the position that apart from the documents in respect whereof it was asserting FOI exceptions it held no further information relating to Mr Allister's request. The ICO accepted this:

> "*The Commissioner also finds that the Council does not hold any further information relevant to the request.*"

The background included a formal application by Mr Allister to the Council to formally review its initial response to his FOI request. Via the initial request and formal review application Mr Allister was pursuing documents pertaining to "*council/planners/applicant meetings in November 2015 and December 2015 ….* [records of] *telephone communications between the parties ….* [records of] *a meeting for both the applicant and* [a council official] *with a third party to discuss the idea of an hotel academy/cooker school …. full disclosure relating to contact between the council and* [DSD/DOC] *in respect of this proposed hotel development, particularly but not exclusively in relation to the contact between council official Peter Thompson and DSD official William (Cameron?) with a view to a briefing for the applicant on the 'hotel study' …… the meeting projected between applicant and Council officials for on or about 6th July 2016 and any other such meetings … information on the other 'matters' on which the applicant required 'comfort'* [by letter dated 17 December 2015 to the CEO] …." The Council's formal review decision which maintained its initial FOI response and precipitated Mr Allister's recourse to the Information Commissioner is contained in a letter dated 23 February 2017, the author whereof is the CEO.

[30] Chronologically, the next landmark in this discrete narrative was the public meeting of the Council's Planning Committee ("PC") on 24 January 2018: by some measure the key event in the saga. Those in attendance included the Council's Head of Planning ("HOP") who made the following contribution:

> "*The Head of Planning advised that information had been received from an objector prior to the Committee meeting. However Committee was advised it related to discussions in relation to the easement application; the comments were the personal view of the Council officer; planning officers were not included in the emails. The Head of Planning advised that the information was not considered to be a material planning consideration … and should be given no weight as it was in relation to the granting of the easement without consideration of relevant planning policy.*"

Mr Allister, also in attendance, was granted speaking rights. Per the minutes:

> "*J. Allister addressed Committee in objection to the application and as author of stated correspondence and sought a deferral of the application ….* [on the basis of] *… disclosure of the documents made to him on the morning of the Planning Committee meeting. J Allister advised that he had only had time to glance at the papers and hadn't time to fully consider the content. J Allister referred to one comment …. and will write to the DFI to request that they 'call-in' this application as it is unfair on* [sic] *objectors.*"

Following an "in Committee" session for the purpose of receiving legal advice, the PC then voted against a proposal to defer determination of the planning application. In the contemporaneous notes made by the Council's solicitor a representation by Mr Allister person in attendance that the PC had been "*misled*" is recorded.

[31] Mr Allister, in one of his affidavits, referring to the additional documents received by him just two hours in advance of the PC meeting on 24 January 2018, avers:

> "*Having considered the documentation …. I now believe that Mr Jackson attended meetings involving the applicant and the planning officers before the application was lodged, thereby blurring any distinction between the role of the planning officials and his role as* [CEO]. *In particular I believe he attended such meetings on 18 November 2015 and 16 December 2015 the latter, I believe, being the meeting which the applicant's agent found 'very productive'. The hands on approach of the Chief Executive, and the appearance thereof, has to be considered in the context that the Council has an interest as owner of part of the site and facilitated access to this otherwise landlocked site by granting the applicant an access easement for £1 in*

> *a process which obtained involving a retrospective valuation from an independent valuer some months after granting the said easement.*"

It is uncontested (and confirmed by minutes and notes of the meeting) that the "*Council Officer*" mentioned in the intervention of the HOPO noted in [24] above is the CEO.

[32] The additional documentary materials secured by Mr Allister pursuant to his successful FOI challenge consist of 15 pages of materials including the following in particular:

(a) An email from the developer's agent dated 17 November 2015 to the CEO and other Council officials, including Ms Dickson, attaching "*the initial concept master plan and conceptual layout for the proposed development … in advance of tomorrow's meeting …*". (The meeting "tomorrow" is documented in a file note).

(b) A Council file note of the meeting held on 18 November 2015 which *inter alia* records the availability of the "Pre-Application Discussion" ("PAD") process for the purpose of "*preliminary advice*" on any development proposal. Those in attendance are not identified.

(c) A letter dated 17 December 2015 from the developer to the CEO extolling the envisaged development as "*an exciting development and one that would bring a significant tourism and economic boost not only to the North Coast but Northern Ireland as a whole*". The letter continues:

> "*Prior to making what will be a significant investment and taking this proposal through the planning and development processes, we need to have comfort on a number of matters. One such matter relates to having the appropriate flexibility regarding the access arrangements into the site … we attach a plan which denotes the area of land we would like to reserve for such purposes …. to enable flexibility in the final positioning of the road together with associated infrastructure and drainage works … we now kindly ask if you can take this requirement through the appropriate channels.*"

(d) A Council file note of a similar meeting held one month later, on 16 December 2015 with content very similar to that of its immediate predecessor and noting also the likelihood of an imminent PAD application. Once again those in attendance are not identified.

(e) A third Council file note of a meeting held on 01 July 2016. Mr Allister, Ms Dickson and the author of all three file notes are identified as attendees.

The particulars of two other attendees have been deleted. At this stage the PAN had been submitted by the developer. Ms Dickson stated that no assurance that planning permission would be granted had been given to the developer. She stated that the relevant PPS16 policy would be Policy TSM3. The balance of the discussion, as noted, was non-committal and non-specific.

[33] The Council's HOP avers that she did not – but the CEO did – participate in the meetings attended by the developer and planning officers on 18 November and 16 December 2015. In addition, the Council's evidence ultimately disclosed a series of documents, all previously undisclosed, evidencing the following:

(a) a meeting involving David Jackson, the developer and NW 200

(b) the notes of the Council's "Strategy" meeting of 16 December 2015;

(c) the notes of the agenda for the meeting of 16 December 2015;

(d) the outcome with action points arising out of a meeting of 16 December 2015;

(e) confirmation of contact and meeting between Council officials, developer and Invest NI;

(f) an email inviting Council officers to a meeting between planners and developer and

(g) a written exhortation from the CEO to the HOP and another planner "Let's turn this around really quickly. Very significant hotel development opportunity getting some momentum".

[34] Following his joinder as one of the newly involved interested parties mid-proceedings the CEO swore an affidavit. An observation is appropriate at this juncture. As the second phase of the proceedings advanced, I repeatedly made clear that the provision of affidavit evidence by the interested parties would be a matter entirely for them. From the court's perspective there was no compulsion or, indeed, expectation. This was based *inter alia* on another comment, also made with some frequency, expressing the court's realisation that the allegations and insinuations against the CEO and other Council Officers could conceivably be the subject of investigation and action in the forum of certain competent public authorities such as Police Service of Northern Ireland, the Public Prosecution Service, the Northern Ireland Public Services Ombudsman, the Northern Ireland Local Government Ombudsman and/or the Northern Ireland Audit Office ("NIAO").

[35] The provision of affidavit evidence by the CEO and other interested parties is to be considered against the immediately preceding background. A second observation is apposite. By swearing affidavits the CEO and others exposed themselves to the possibility of having their evidence tested by an application to the

court for permission to cross-examine. In the event no such application materialised.

[36] The CEO, in his affidavit, describes the role of the NIAO vis-à-vis the Council; his responsibility *qua* CEO to endeavor to deliver the outcomes "required" of him by the Council; his limited decision making powers; his duties under the Council's Strategy 2015-2019 and his consequential relationships with a wide range of business interests; his duty to foster and enhance relationships with business interests; his role and responsibilities in respect of the Causeway Coast (etc.) Management Plan 2015-2020; a suggested oversight by the Council's lawyers which resulted in a failure to procure a valuation for the important easement granted to the developer, *circa* June 2017; the entirely independent nature of the *ex post facto* valuation obtained thereafter; the absence of any impropriety in this respect; the propriety of his interaction with Council planning official; the transparent manner in which the subject planning application was processed at all times; the status of hotel development as one of the Borough's strategic priorities; his asserted remoteness from the procurement of the Strategic Investment Board ("SIB") report; his dependence upon and deference to the Council's legal officers in various respects and matters; and the voluminous email traffic with which he is required to deal daily.

[37] The CEO further deposes that, in accordance with his job description (which was exhibited), he has the following overarching duty:

> *"…responsibility for implementing the Council's strategic objectives and ensuring the efficient, effective and equitable discharge of responsibilities of the Council as detailed in the legislation".*

I draw attention also to certain of the "Main Duties and Tasks" in the job description:

> *"To communicate the Council's vision, mission, priorities, objectives and processes effectively, both internally to staff and trades unions and externally to partners, agencies and the public…*
>
> *To lead in ensuring that the Council's strategic plans and policies are matched to a common purpose across the organization and the area;*
>
> *To take overall responsibility for ensuring that the Council's decisions and policies are implemented…*
>
> *To lead by example by promoting at all times best practice and the highest standards of the public service ethos…*

To actively foster and enhance positive relationships with all local communities, agencies and partners including the voluntary sector and local business, as well as with other statutory bodies at regional and national level".

9. The Council's Director of Leisure and Development

[38] The Council's Director of Leisure and Development ("DLD") is another of those who, having been implicated in certain events by Counsellor McShane's initial affidavit, became one of the newly added interested parties mid - proceedings. The DLD swore an affidavit to which various documents were exhibited.

[39] The DLD describes his professional role as that of delivering the key strategic priorities of the Council and contributing to the operational effectiveness of the organisation. Per job description he is a member of the Council's Senior Leadership Team and is required to support the CEO. He is further required to deliver the Council's Corporate and Community plans by providing leadership and business focus within his Directorate and fostering effective external partnerships and relationships. Economic and tourism development is one of his specific portfolios.

[40] The DLD avers that he has routine meetings with potential investors and developers. He asserts that in the event of a planning application materialising this process of communication terminates. His duties entail involvement with the Strategic Investment Board ("*SIB*"). The Council's strategy 2015 – 2019 identifies priorities including the development of the economy, job creation and the promotion of tourism. The duty of promoting the prosperity of the Borough is delegated to and shared between the CEO and the DLD. The Council has a discrete Causeway Coast and Glens Tourism and Destination Management Plan 2015 – 2020. One of the identified deficiencies which this strategy seeks to address is the lack of four and five star hotel accommodation and the related over-dependence on self-catering and caravans. The DLD deposes:

"*The critical weakness in the area is hotel provision.*"

An independent report commissioned in 2014 exhorted that any newly approved hotel in the borough should be of 4 star quality and consist of around 100 bedrooms, on-site car parking, conference and banqueting facilities and high quality restaurant and bar facilities. The capacity for a smaller, boutique type hotel was also identified. A new 4 star hotel development was projected to create an economic benefit of almost £1 million per annum.

[41] The DLD robustly denies the allegations made against him in Councillor McShane's affidavit evidence. He emphasises that he is duty bound to develop and maintain good relationships with businesses having regard to the Council's strategic aims and objectives. He asserts his awareness of the requirement of non – communication with a developer following submission of a planning application

(evidently grounded in established protocol). He avers categorically that he had no role in the procurement of the Strategic Investment Board Report (the "*SIB Report*"): generated in March 2016, as per the chronology in [8] above. The deponent notes that this report was commissioned some 15 months before the first grant of planning permission and 18 months before completion of the first judicial review (as detailed in the chronology). Finally the DLD asserts that he had a very limited role in the planning approval process, being confined to facilitating some initial meetings.

10. One of the Council's Solicitors

[42] One of the solicitors employed by the Council (there are two, as I understand) is another of the lately added interested parties. The person concerned has sworn a short affidavit. This focuses exclusively on the transcripts of the recordings introduced in evidence via Councillor McShane's initial affidavit. The deponent accepts that he is one of the conversants in these recordings. He denies any wrongdoing on his part and seeks to explain certain of the words spoken by him. He avers that the decision to procure a second, independent valuation report concerning the easement (*supra*) was his. He confirms that the impetus for this was Mr Allister's intimation of the possibility of judicial review proceedings. He suggests that following receipt of the independent report there was no requirement to refer this matter back to the Council, given that the decision had been made (some time previously) and the easement had been granted.

11. The Independent Valuers

[43] The firm of independent valuers thus instructed also acquired the status of interested party in these proceedings, following Councillor McShane's initial affidavit. The prelude to their instructions was the SIB Report generated in March 2016. This is described in the affidavit of Jonathan Grey, SIB employee and author of said report. The easement was granted to the developer some three months later (17 June 2016).

[44] As confirmed by the solicitor's affidavit and detailed in the Chronology, Mr Allister's PAP letter was the stimulus for the Council's instructions to the independent valuers. The PAP letter and the valuation report were separated by a period of some two weeks. Three affidavits have been sworn on behalf of the valuation firm instructed. My summary follows.

[45] The firm was instructed to value the easement as at the date of the inspection. The affidavits indicate that this instruction was altered verbally by the solicitor concerned to the effect that the easement was to be valued as of 31 March 2016. This alteration was unexplained. The backdating of valuations (per these affidavits) is not uncommon and the valuers had no cause for concern in this respect or otherwise. The valuers were not informed that the easement in question had already been granted by the Council to a third party.

[46] The valuers explain that the valuation method which they utilised was the so-called "*Stokes and Cambridge*" mechanism. This (they contend) is considered appropriate in cases where the development potential of an allotment of land can be realised only by the use of external land in separate ownership ie the familiar "*ransom strip*" scenario. The first and second steps taken were, respectively, to determine the value of this agricultural land and then to measure the value of the proposed development upon completion. This gave rise to figures of £130,000 and £7 million respectively. Third, the cost of construction was measured at approximately £9.5 million. Thus there was a deficit of around £2.5 million. The final step in the "*Stokes and Cambridge*" methodology was to calculate one third of this negative figure. As this gave rise to no increase in the value of the subject lands, a *de minimis* (zero) valuation was considered appropriate.

[47] The valuers aver that their chosen methodology is supported by other valuers with whom they have conferred. In the context of these proceedings, their solicitor instructed an independent valuer to provide a report which forms part of the assembled evidence. This was prompted by *inter alia* a valuation report provided on behalf of the Applicants challenging the rationale and methodology of the interested parties July 2017 report to the Council. These interested parties' valuer makes the following conclusions:

(i) The exercise carried out by Mr Grey (SIB) in March 2016 cannot be characterised a legitimate valuation exercise as Mr Grey possessed no qualifications for this purpose. He was not qualified to venture beyond considering the potential wider economic benefits and did not consider any comparable "*commercial*" development sites is without substance and unparticularised.

(ii) These interested parties cannot be criticised for failing to consider a land use other than that of the specific hotel development proposed. The independent valuer expresses these views in trenchant terms.

(iii) No directly comparable market transactions have been identified from any quarter. In particular, there have been no open market sales of development land with hotel planning consent in any provincial location throughout Northern Ireland for many years.

(iv) The approach adopted by the Applicant's valuer is condemned as "*entirely erroneous*". It overlooks the key consideration that the subject lands being situated in the green belt could only be developed for hotel use and nothing else. In summary, the professional assessment of a nil value by the interested parties comfortably satisfies the application of the test of the hypothetical reasonably competent valuer.

12. The Developer

[48] C&V Developments Limited (the "*developer")* has participated actively in these proceedings from their inception. Until approximately the mid-point the developer was the only active interested (or "*notice*") party. I refer to, but do not repeat, the references to the developer in the Preamble hereto and the court's ruling of 13 June 2019 (reproduced in Appendix 2).

[49] The developer has made a significant contribution to these proceedings through the affidavit evidence provided and the submissions of Mr Donal Sayers, of counsel. It is unnecessary to reproduce these materials *in extenso*.

[50] There are averments on behalf of the developer that, notwithstanding the significant reverse inflicted by these unwelcome proceedings, the hotel project remains alive and viable. It is asserted that 46 companies and some 86 people have made contributions to the project to date, while spending on professional fees *et al* exceeds £1.6 million. The developer emphasises that this will be the first four star hotel and spa complex on the North Coast, rectifying a deficiency in the tourism market which accords with the Council's strategic plans and objectives. The developer's affidavits highlight *inter alia* the very close proximity of the site of the proposed development with the town of Portstewart, the separation from the Portstewart settlement limit to the nearest boundary of the site being 127 metres. It is emphasised that a significant portion of the site is already developed ("*brown field*") and that the proposed development will entail elements of green field, to the rear (where the Applicants' dwellings are located).

[51] Furthermore, the developer draws attention to the commitment in writing by Coleraine and District Motor Club (the *"Motor Club")* that "*… the requirement for overspill car parking, service access and HGV turning provision within the paddock* [or "pits"] *can be provided on a permanent basis throughout the year*" (per a letter from the Motor Club). This commitment, it is contended, confounds any suggestion that the site would be landlocked but for the Council's controversial grant of easement. This latter facility, it is said, was pursued and secured by the developer given the Club's concerns that the main access to the subject site would traverse the "*pits*". (I observe: it is difficult to conceive how this could possibly be an effective means of access to and egress from the hotel and other facilities during the period of practice for the NW200 and the event itself.)

[52] Through its affidavits and counsel's submissions the developer makes the case that it behaved with the utmost propriety at every stage. Any suggestion of special or favourable treatment is robustly rejected. More specifically, the suggestion that the price which the developer paid for purchasing the lands increased approximately threefold upon the grant of the contentious easement is objectively unsustainable. It is contended that policy compliant information confirming the financial viability of the proposed development was provided to the Council by the developer. This is based particularly on the evidence relating to the work undertaken by the developer's accountants which embraced the compilation of a business plan for bank and/or grant funding and identified sources of funding

and the availability of any necessary bridging finance. Also highlighted is the fact of the objection (Mr Allister's) relating to this discrete issue and the evidence that the Council's PC plainly took this into account.

13. Governing Principles

[53] A brief exposition of the main governing principles is convenient at this juncture. It is appropriate to begin with a dominant principle, one that lies at the apex of all the others. This court exercises no appellate jurisdiction. Its function is remote from that of an appeal tribunal or a public enquiry. It does not possess the powers or jurisdiction of regulators of inquisitors such as ombudspersons and auditors. Second, those who have provided evidence in this case have done so through the conventional procedural medium of sworn affidavits. There has been no examination in chief or cross examination of any deponent. Third, the judicial review court is, fundamentally, a judicialised tribunal of supervisory superintendence.

[54] The last mentioned legal truism applies with particular force in the context of these proceedings which have the features noted above. This is readily linked to the next principle of significance, conveniently formulated in the recent decision of the Court of Appeal in *JG v The Upper Tribunal, Immigration and Asylum Chambers* [2019] NICA 27 at [34]:

> "*While judicial review proceedings differ sharply from their private law counterpart, there is nonetheless a burden of proof in play. The applicant must establish his/her case to the civil standard of the balance of probabilities: see for example* ***R v Inland Revenue Commissions, ex parte Rossminster*** *[1980] 992 at 1026H, per Lord Scarman.*"

[55] Closely related to the last mentioned principle, concerning burden of proof, is the long standing and hallowed doctrine of standard of proof. These being civil proceedings the standard engaged is that of the balance of probabilities. In *In Re H and Others* [1996] AC 563, Lord Nicholls stated at [73]:

> "*The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than*

> *accidental physical injury. A stepfather is usually less likely to have repeatedly raped and had non-consensual oral sex with his under age stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation."*

Later, in *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 Lord Hoffmann stated at [55]:

> *"The civil standard of proof always means more likely than not. The only higher degree of probability required by the law is the criminal standard. But, as Lord Nicholls of Birkenhead explained in In re H (Sexual Abuse: Standard of Proof) (Minors) [1996] AC 563, 586, some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. In this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not."*

See also *In Re CD* [2008] UKHL 33 at [22] – [28], per Lord Carswell.

A convenient digest of some of the leading principles is found in the judgment of Lindblom LJ in *Mansell v Tombridge and Malling BC* [2017] EWCA Civ 1314 at [41].

[56] Further to the foregoing there is a bespoke suite of legal principles engaged in a substantial proportion of planning and environmental judicial review challenges. These having been rehearsed with such frequency and erudition in so many decided cases, I eschew any attempt at comprehensive formulation and gratefully adopt the summary in *Re Bow Street Mall Consortium's Application* [2006] NIQB 28 at [43], per Girvan J. Many of the well settled principles have featured in the recent jurisprudence of this court: see *Re Belfast City Council's Application* [2018] NIQB 17, *Re McNamara's Application* [2018] NIQB 22, *Re Conlon's Application* [2018] NIQB 49, *Re Alexander's Application* [2018] NIQB 55, *Re Blackwood's Application* [2018] NIQB 87, *Re Sands Application* [2018] NIQB 80 and *Re Greencastle and Rouskey's Application* [2019] NIQB 24. Reference to this recent cohort of judicial decisions has one particular merit namely that of judicial consideration of the principles in the context of the new statutory planning arrangements applicable in this jurisdiction since 2015.

[57] I also take cognisance of the emphasis in the submissions of Mr Kane QC on the importance and scope of the Council's duty of candour to the court and their

invocation of decisions such as *R (Saha) v Secretary of State for the Home Department* [2017] UKUT 17 (IAC) at [47] – [48]:

> *"[47] In our judgement it is impossible to overstate the importance of the duty of candour in judicial review proceedings. The value and force of judicial review in a society governed constitutionally by the separation of powers and built on the rock of the rule of law is founded on, inter alia, a relationship between the executive and the courts akin to a partnership. The executive, for its part, guarantees that the court will be fully armed and equipped to adjudicate in every case. The court, for its part, guarantees, in accordance with the judicial oath of office, independent and impartial adjudication.*
>
> *[48] The mutual trust and confidence upon which these guarantees depend is threatened and undermined by the events which have occurred in these proceedings. Every failure of this kind on the part of the executive is inimical to the rule of law. The damage which is caused is not confined to the individual case. There can be a significant ripple effect. Furthermore, there is another impact which the Tribunal has witnessed at first hand in these proceedings. Where litigation is conducted in this way by the executive, the ability of its legal representatives to discharge their ethical and professional duties owed to other parties and the court or tribunal is compromised. This too undermines the rule of law and can have repercussions beyond the individual case. Government clients owe duties not only to the court or tribunal. They also have duties to their appointed legal representatives and all other parties to the proceedings. All of the duties in play are encompassed within an overarching obligation of good faith rooted in respect for the rule of law."*

[58] I shall consider each of the Applicants' grounds of challenge, as distilled in [19] above, *seriatim*.

14. The Procedural Unfairness Ground

[59] Many of the basic facts bearing on this ground, uncomplicated and uncontentious, can be gauged from [22] – [27] above. I shall reduce them to their essential core. Mr Allister had engaged in a protracted exercise, of some 15 months duration, asserting his statutory FOI rights against the Council. He was doing so at all times in his capacity of registered objector to the planning application. This discrete episode culminated in the public meeting of the Council's PC on 24 January 2018. Mr Allister, who was in attendance, having just received additional Council

"FOI" documents, requested an adjournment. This was refused. The gist of this ground is that this refusal rendered the decision making process procedurally unfair. This ground acquired a second element at a later stage of the proceedings, following late disclosure of material documents by the Council, namely that Mr Allister has, via the Council's evidence in these proceedings, belatedly received certain additional materials which should have been provided to him prior to the critical date of 24 January 2018.

[60] As set out in the Chronology, this discrete chapter began with Mr Allister making a FOI request on 07 November 2016. This elicited a Council response and the provision of certain documents on 17 January 2017. Mr Allister requested a review two days later. This gave rise to a further Council decision of 23 February 2017 providing two further pages of email correspondence. Mr Allister appealed to the ICO. This gave rise to a partially successful outcome via an ICO decision dated 11 January 2018 requiring the Council to disclose certain further information. On 24 January 2018, the crucial date, Mr Allister's solicitors wrote to the Council requesting the materials. On the same date, the documents which Mr Allister was legally entitled to receive were provided to him, just two hours in advance of the PC's meeting. This was the stimulus for Mr Allister's request that consideration of the planning application be deferred to a meeting on a later date, which the PC refused.

[61] Drawing from the minutes of the meeting, it is evident that Mr Allister canvassed two points of substance. First, he "*… had only time to glance at the papers and hadn't time to fully consider the content*". Second, arising directly out of the documents lately provided, he would be writing to DFI requesting a "call-in" of the planning application. According to the contemporaneous notes of the Council's solicitor, Mr Allister specifically contended that the PC had been misled. Mr Allister was also asserting that, based on a quick perusal of the lately provided documents, further investigation of the role of the CEO was required. The PC (as it can legitimately do) then retired into private session with its solicitor, for further deliberation. What emerged from this, some 40 minutes later, is worthy of note: one of the members proposed deferring further consideration of the planning application for merely one month. A majority voted against.

[62] The materials provided to Mr Allister some two hours before the PC meeting began consisted of 14 pages of emails generated on various dates between December 2015 and September 2016. All of them, with one exception, were redacted to a greater or lesser extent. There is redaction of both content and names. The authors and recipients include the Council's CEO, its Director of Performance (Ms Quinn), its DLD (*supra*) and representatives of the developer. The subject matter is the proposed development and, more specifically, "*a request for an access road through the NW pits area*". The materials disclose that the Council is the lessor of certain lands, the lessees being the Motor Club and NIE. The word "*easement*" is used in certain of the communications. The developer's representatives emphasised the need for certainty regarding the "*red line*" in their anticipated planning application. One of

the emails refers to the "*overflow car park*". Another, dated 15 February 2016, records receipt of an "*easement agreement*" from a firm of solicitors.

[63] I interpose the observation that these emails in unredacted form ultimately formed part of the evidence. This followed an early ruling by the court. Mr Allister did not, of course, have them in this form at the material time.

[64] The Council's evidential response to this ground is contained in the first affidavit of the Principal Planning Officer ("*PPO*") who was the author of the Planning Department's reports to the Council's PC. The deponent avers that Mr Allister's adjournment request was considered "*in committee*" by the PC members, legal advice was given and members received copies of the lately provided documents. The key averments are the following:

> "*Members resolved to proceed with the meeting given that no material weight was to be given to the comment of the Chief Executive as it did not relate to planning considerations …*
>
> *The information released to Mr Allister on 24 January 2018 under the Environmental Information Regulations 2004 was not pertinent to the planning merits of the subject planning application. That was the decision reached by the Planning Committee as noted above. Therefore the position of the objectors was not prejudiced by release of the information on the same day …*"

I shall revisit these averments *infra*.

[65] The second limb of this discrete ground of challenge is addressed mainly in Mr Allister's fifth affidavit. This was sworn in response to an affidavit of one of the Council's solicitors provided in the context of persisting requests for discovery by the Applicant's solicitors. In short, the affidavit of the Council's solicitor exhibited certain documents which had not previously been provided to either the Applicants or the court. In passing, I make clear the absence of any impropriety on the part of the solicitor who swore this particular affidavit, which was plainly the product of much diligent industry.

[66] Mr Allister's FOI request made on 07 November 2016, was formulated in focused and specific terms: see [29] above. He was seeking *inter alia* all communications between the Council, in whichever of its internal incarnations, and the developer or any of its representatives prior to the date of validation of the planning application (01 November 2016), excluding "*any documents appearing on the planning portal*". The latter, in simple terms, is an electronic mechanism established, maintained and updated by the Council which permits members of the public to access planning applications and related documents on a Council website.

[67] The documents newly disclosed in these proceedings reveal (in brief compass) a meeting attended by the Council's CEO and the developer on 01 October 2015, a further such meeting on 16 December 2015, the involvement of planning officials in the latter, the consideration of planning issues, the involvement of the Council's DLD, a further meeting with the developer on 27 January 2016, an exhortation from the CEO to the Head of Planning to process the planning application "*really quickly*"; internal communications involving *inter alios* the latter two officers concerning the two easement issues; and much further material exposing the full story of the critical easement. Mr Allister makes the following averment:

> "*In summary I find it very disturbing that despite my FOI requests, despite a further last minute attempt to disclose some documents to me just before the 24 January 2018 meeting and despite the duty of candour owed by the Respondent in respect of this application for judicial review, the fact is that all the documents referenced* [above] *were withheld from me until now. I believe that as an objector I was prejudiced and prevented from making representations thereon, particularly in respect of the important access issue and the high level involvement of senior council officers from the earliest stages of the planning process. This, when taken with the withholding of* [the CEOs] *'strategic priority' email just before the meeting of the decisive Planning Committee on 24 January 2018 causes me to believe I was denied a fair hearing. Had all of the above mentioned documents been available to me on 24 January I would have sought an adjournment to have time to properly consider their import in order to make representations to the Respondent on the planning issues and on self-referral to the Department while it would also have been relevant in my making a full request to the Department to call in the subject planning application …*
>
> *I further believe … that the documentation revealed …. confirms an inappropriate involvement from the outset by the Respondent's most senior officers with this evolving planning proposal, which has tainted the decision making process.*"

These averments neatly encapsulate the substance of the second limb of this ground of challenge.

[68] While the court conducts a largely objective audit in relation to issues of procedural unfairness, it will usually give consideration to any explanation provided or response made by the public authority concerned. The evidence does

not include any exposition of why the majority (8/3) voted against Mr Allister's deferral request. This is nowhere documented. Furthermore, no member of the majority has sworn an affidavit. Both the contemporaneous records and the affidavits which have been sworn (by planning officials) mention legal advice: first, advice from counsel and the Council's solicitor to the HOP and, second, advice to PC members "*in committee*" from the solicitor. Privilege not having been waived, the content of this advice is not known.

[69] The one matter which does emerge with some clarity is the contribution of the HOP to the PC's deliberations. This had two main components. These are drawn from the averments of the HOP:

> "*…. I advised members that the information received from the objector prior to the meeting …. related to discussions in relation to the easement application, that the comments were the personal view of the Council officer, that planning officers were not included in the emails, that the information was not a material planning consideration and therefore no weight should be given to it as it was in relation to the grant of the easement, without consideration of planning policy.*"

It is common case, I understand, that "*the personal views of the Council officer*" refers to the CEO's email of 14 September 2016 to the Council's HOP describing the proposed development as "*a strategic priority for the Borough*" and urging the swiftest action possible.

[70] In its consideration of the question of why Mr Allister's deferral request was refused by the Council's PC, the court has also considered the contemporaneous records and minutes of the critical meeting on 24 January 2018. This yields the following analysis:

(a) A comparison of the two Council affidavits bearing most importantly on this issue discloses certain inconsistencies *(infra*).

(b) The planning case officer, in his first averments concerning this issue, refers only to the "*personal comment*" matter, neglecting that of the easement. This is repeated in a further averment in the same affidavit.

(c) This is followed by the same deponent's averments relating to disclosure of information to Mr Allister on 24 January 2018 "*under the Environmental Information Regulations 2004*", coupled with the suggestion that this "*… was not pertinent to the planning merits of the subject planning application*" and immediately linking this to the PC's refusal of the deferral request.

These averments were made in direct response to the Applicant's procedural unfairness ground. They bear no relationship to the content of the materials belatedly disclosed to Mr Allister. They are misconceived and significantly erroneous. These considerations *per se* cast a shadow over the deferral refusal decision in the context of the procedural unfairness ground of challenge.

[71] As regards the material averments of the Council's HOP:

(a) PC members were "*advised*" by this senior Council officer about "*the information received from the objector prior to the meeting …*" (the "*objector*") being Mr Allister. This was a misleading and erroneous statement as no such information had been provided by Mr Allister, whether in this way or any other.

(b) There is no suggestion that the PC members either were provided with or studied the contents of the documents in question.

(c) There is no indication that this deponent had any role in the compilation or provision of the new materials to Mr Allister: the evidence indicates clearly that the Council Officer concerned and author of the relevant covering letter was its Information Governance Officer.

(d) Taking into account (c), there is no indication of why or in what circumstances this deponent would have sought legal advice about the emails from both senior counsel and the Council's solicitor (the reference to senior counsel being especially puzzling). Furthermore, the averment that the subject of the advice sought was that of "*regarding receipt of the emails*" is at best opaque.

[72] Certain further pertinent facts emerge with some clarity. First, the PC members were given no briefing about the relevant background viz Mr Allister's FOI requests or the sequence of events thereafter. Nor were they briefed about the legal rights and obligations in play. Furthermore, they received no briefing relating to Mr Allister's procedural fairness rights. Three further matters were excluded from the briefing and advice they received. First, no consideration was given to the denial to Mr Allister of the opportunity to make further timeous and informed representations to DfI regarding "*calling in*" the planning application. Second, nothing was said about the potential of the issue examined in the lately disclosed emails namely the easement/access over the "*pits*" area to the hotel site to be reflected in a planning condition. Contrary to the advice given to the PC, I consider that this was a material planning consideration. If this is wrong it was, as a minimum, relevant to the "call in" issue (*infra*). Third, the PC received no information relating to the Council's recent interaction with DfI on the "call in" issue: see further [73] – [74].

[73] A brief digression to the "*call in*" issue is appropriate at this juncture. One feature of the new statutory planning arrangements in Northern Ireland is the "*call in*" power conferred on DFI. Section 29 of the 2011 Act provides, in part:

> "*(1) The Department may give directions requiring applications for planning permission made to a council, or applications for the approval of a council of any matter required under a development order, to be referred to it instead of being dealt with by councils.*
>
> *(2) A direction under subsection (1) –*
>
> *(a) may be given either to a particular council or to councils generally; and*
>
> *(b) may relate either to a particular application or to applications of a class specified in the direction …*
>
> *(4) An application in respect of which a direction under this section has effect shall be referred to the Department accordingly.*"

This invests DfI with a discretionary power of notable breadth.

[74] As appears from the chronology, the issue of a possible DFI "*call in*" was raised in a letter from the Council to the Department dated 11 October 2017. This was written in the wake of the order of the High Court (dated 06 September 2017) acceding to the Council's application to quash the first grant of planning permission to the developer (on 29 June 2017). DFI replied, by letter dated 29 November 2017, intimating that "*call in*" was not appropriate. As observed, this issue, in its entirety, was overlooked in the PC advice, briefing, deliberations and decisions on 24 January 2018, when the second (impugned) grant of planning permission was made.

[75] The rounded, open-textured principle (or doctrine) of procedural fairness is rooted in the common law. Its ancestral antecedents are traceable to two Latin maxims, familiar to what is probably an ever shrinking audience, which need not be reproduced. The principles which have developed are the product of judge made law. The court is the arbiter of whether these principles have been duly observed in any decision making process to which they apply. The court conducts a detached, objective audit in which the Wednesbury principle has no purchase. This discrete aspect of the doctrine finds some emphasis in *MM (Sudan)* [2014] UKUT 105 (IAC) at [14] – [23].

[76] Mr Allister, Mr Agnew and others in like position and circumstances were no mere busybodies. Rather, they were the beneficiaries of a statutory right to be consulted and a common law right to be heard. Their interest in the planning

application was not less than compelling. They were implacably opposed to the proposed development and, in furtherance of their opposition, had sought to exercise associated legal rights in the FOI realm. The common law right to which Mr Allister in particular could lay claim at the stage of the PC meeting on 24 January 2018 is well established and uncontroversial, formulated in the following terms in one of the leading authorities:

> "*To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken.*"

See *R v North and East Devon Health Authority, ex parte Coughlan* [2011] QB 213 at [108]. As will be apparent, the right to be consulted engages a series of inter-related common law principles and requirements. I refer also to *Re PL's Application* [2019] NIQB 64 at [13] and [55] – [57].

[77] The application of common law procedural fairness to planning decision making processes was considered by this court in *Re Belfast City Council's Application* [2018] NIQB 17 at [28] – [33]. Having considered the seminal pronouncement of Lord Mustill in *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531 at 560, this court also drew on the following passage in *In Re D (Minors)* [1996] AC 593 at 603:

> "*…. It is a first principle of fairness that each party to a judicial process shall have an opportunity to answer by evidence and argument any adverse material which the tribunal may take into account when forming its opinion. This principle is lame if the party does not know the substance of what is said against him (or her), for what he does not know he cannot answer.*"

With modest and principled adjustment, I consider that this passage applies to the decision making process of the Council under challenge in these proceedings. The first adjustment is that while the Council's process was not of course a judicial one, there was no argument from any quarter that this alters the substance of the principle. I consider this approach to have been correct. The second adjustment involves the principle, also uncontroversial in my view, that where the party concerned receives relevant material, a fair and reasonable opportunity to consider this forms part of its procedural fairness rights. This may be linked to another principle, equally uncontentious, that insufficient time and/or inadequate opportunity may impair a party's right to make informed representations, thereby

violating the consultation principles and breaching the overarching principle of procedural fairness.

[78] The doctrine of common law procedural fairness gives rise to a series of due process rights which are inalienable and indefeasible. Borrowed from another field, this is illustrated by *inter alia* the proposition that waiver of a person's right to a fair trial – enshrined in the common law, Article 6 ECHR and in other instruments of EU and international law – is virtually impossible as a matter of law. Of more specific contextual relevance is the statement of Weatherup J in *Re Rowsone's Application* [2004] NI 82, at [19]:

> "*The Respondent is under a duty to deal with applications for planning permission in accordance with the requirements of procedural fairness. This duty extends to objectors and may require the Respondent to provide objectors with an opportunity to make additional representations.*"

I refer also in this context to *Re Toal's Application* [2017] NIQB 124 at {39] – [44].

[79] The submissions of Mr Beattie QC and Mr McAteer on behalf of the Council had a series of interconnected elements: the lately produced documents were not material; Mr Allister was not disabled from making appropriate representations to the PC; following the anti-deferral resolution he could have sought to make further representations; and he chose not to do so. As regards the second *tranche* of new documents disclosed to Mr Allister for the first time in the second phase of these proceedings, Mr Beattie's submission was substantially the same. He contended in particular that only a small proportion of these documents are "*planning related*" and characterised them, in terms, as routine and innocuous. Approximately two thirds of the documents related to the easement issue. Finally, counsel drew attention to their other submissions relating to the separate ground of challenge which I have listed as (v) in the court's summary of the grounds in [19]. This I consider to be a separate, self-contained issue.

[80] The riposte to the foregoing submissions is in my view the following:

(a) The test of materiality must be the simple one of whether the lately produced documents, both on 24 January 2018 and in the final phase of these proceedings, coupled with considered and informed representations concerning their content, could have yielded any of the outcomes then pursued by the Applicants namely a refusal of planning permission or a deferral of the PC decision or a DfI "*call in*" decision. . This clearly invites an affirmative answer. As the review of the authorities in *MM (Sudan)* [*ante*] and the decision in *Cotton* especially make clear, there is heavily circumscribed scope for the contrary contention.

(b) By virtue of the second of the procedural defects constituting this ground Mr Allister was deprived of the opportunity of deploying the full range of materials and arguments in support of a request to DFI that it exercise its "*call in*" statutory power. The full story unfolded belatedly only through the Council's evidence in these proceedings. While there was a further exchange of letters with DfI post – 24 January 2018 Mr Allister was, realistically, fighting a rearguard action given that the PC had made its decision. The horse had well and truly bolted. The court declines to condemn the effective pursuit of this opportunity as merely optimistic and speculative as it has no evidential or legal basis for doing so. This was no kite flying *excursus*. Notably, the Council's HOP had spontaneously raised this issue with DfI just weeks previously and the factual matrix evolved after that. Furthermore, the discretionary statutory power conferred on DfI by section 29 is one of manifest breadth.

(c) In requesting a short-lived deferral of the PC's decision, Mr Allister was simply advancing procedural fairness common law rights *qua* consultee.

(d) Objectively, Mr Allister's entitlement to a further short period of time for the purpose of digesting fully the lately produced documents and, if appropriate, pursuing further enquiries relating thereto and making "*call in*" representations to DFI is incontestable. It is the epitome of the fair and reasonable. This analysis is reinforced by the late disclosure to the Applicants which occurred in these proceedings.

(e) Objectively, there was no public interest so pressing that the PC clock could not be stopped for just a month (see De Smith's Judicial Review, 7th Ed, 8-006 ff).

(f) Mr Allister <u>in theory</u> could have sought further oral representation facilities in the wake of the PC's resolution to proceed, rather than defer: but in light of the immediately foregoing analysis, this was a purely theoretical option, of no real practical utility, divorced from the reality of the situation prevailing at the time and on the date in question.

(g) Mr Allister was disabled from advancing in particular the full story of the controversial easement, a matter clearly falling within the broad scope of section 29.

(h) Given the evidence disclosed in these proceedings, an arguable breach of protocol (formal or otherwise) in the continuing interaction between the Council's CEO and/or DLD with the developer postdating receipt of the planning application could also have been deployed by Mr Allister: see [8] of the DLD's affidavit, noted in [41] above.

[81] To the foregoing analysis I add the following. The legal test is whether an adjournment of the PC's proceedings could have given rise to one of the results pursued by Mr Allister. If deferral had been granted the PC could foreseeably have received further representations from Mr Allister relating to public law and/or planning considerations which it would have been bound to take into account: relating to in particular (but inexhaustively) improper motive, conflict of interest, breach of protocol and the various ingredients of the DFI "call-in" issue. The Council's PC, as a public authority, would have been obliged to consider all such matters. Furthermore this organ would not have been prevented from expressing a view thereon or, indeed, on any issue pertaining to section 28. The "not planning considerations" wall, a prominent theme of the Council's defence of these proceedings, would have been worthless. There was no legal impediment to the PC members to receiving representations on the "call in" issue and choosing to express a view thereon. Furthermore, while DfI did received a further "call in" application from Mr Allister post – PC meeting, this, in the real world, was at best a forlorn and impotent gesture, given that the PC had completed its task and determined that planning permission should be granted. I have certain sympathies with the narrow approach adopted by the senior planning officials involved. But one of the lessons of this litigation is that they will have to broaden their horizons in any future case involving section 29 issues.

[82] Finally, the diagnosis of procedural unfairness contaminating the Council's decision making process as a whole becomes irresistible when one grafts on to the framework of 24 January 2018 the belated disclosure of further documents and substantially augmented material information to the Applicants via these proceedings. The materiality of these documents is confirmed not only by their contents but also by the fact of their intra – litigation disclosure. Furthermore, they must be considered in the context of Mr Allister's demonstrably wide FOI request: see [2] *supra*. Mr Allister's FOI rights were not observed at the appropriate time. In summary, he was not afforded a fair and reasonable opportunity to make considered, comprehensive, informed representations to either the PC or the other statutory agency endowed with relevant legal powers namely DfI. The conclusion that the grant of planning permission by the Council, which in effect ratified the resolution adopted by the PC, is vitiated by procedural unfairness follows.

[83] I consider that the Applicants' separate ground of challenge entailing an asserted breach of Article 41 of the Charter of Fundamental Rights of the European Union which enshrines the right to good administration, is, by virtue of the court's analysis and conclusions regarding the procedural unfairness ground above, also established. This open-textured right must, in my judgment, embrace *inter alia* the right to a procedurally fair decision making process which duly respects the citizen's right to meaningful consultation where this arises, coupled with scrupulous and timeous observance of the citizen's FOI rights. Juridically the Charter is, of course, engaged, (see Article 47) because of the factor of the EIA Regulations, a measure having its genesis in EU law (considered further *infra*): see Article 51 of the Charter and *Akerberg Fransson* [C-617/10, EU:C:2013:105]. This, correctly, was not contested.

15. The Second Ground: Breach of the PC's Protocol

[84] The instrument in question is entitled "Protocol for the Operation of the Causeway Coast and Glens Borough Council Planning Committee" ("*the Protocol"*). This contains a discrete chapter entitled "*Site Visits*". Its material provisions are for present purposes the following:

> "*It is recognised that members of the Planning Committee may need to visit a site to help them make a decision on a planning application. For example, the proposal may be difficult to visualise or the application is particularly contentious …*
>
> *The Head of Planning, in discussion with the Chair of the Committee, shall decide if a site visit would be beneficial …*
>
> *Site visits will only be carried out where there are clear benefits … and will normally be arranged for the morning of the Planning Committee meeting …*
>
> *Attendance of* [sic] *is optional. The Council officer should record the date of the visit, attendees and any other relevant information …*
>
> *The Planning Officer should prepare a written report on the site visit which should be presented to the Planning Committee meeting at which the application is to be determined.*"

[85] The main focus of the Applicants' case is the provision which the Protocol makes for site visits by members of the PC. The evidence includes a two page document purporting to record a visit to the development site by certain members of the PC on 29 June 2017. The evidence suggests that a short report of this exercise was generated: there is no clear evidence of circulation or actual reading and the court must note the unmistakeable factor of acute time pressure. Analysis shows that this site visit was attended by only five of the eleven PC members involved in the impugned decision on 24 January 2018. Of these five, one did not participate in the decision, having withdrawn as a gesture of protest against the PC's rejection of the motion to defer consideration of the planning application (see [61] above).

[86] The proceedings on 24 January 2018 were not preceded by a site visit. In paragraph 5.1 of the January meeting minutes there is a note "*Report, addendum and erratum circulated*". In the planning case officer's first affidavit it is averred that the aforementioned note of the site visit was one of the documents provided at the meeting, by reference to a note in the terms "*Report, erratum, addendum* ***and site visit details*** *circulated*". The four words in bold are not contained in the copy minutes in

the evidence. Mr Allister highlights this in his second affidavit. In the next ensuing affidavit sworn by the case officer no response to this discrete point is made.

[87] I return to the two page document noted in [85] above. This is linked to averments in the planning case officer's first affidavit asserting that (a) he and two other planning officers, each identified, accompanied by ten "*Members*", visited the subject site on 29 June 2017, (b) he is the author of the document, which he describes as "*a site visitor report*", (c) this was prepared in accordance with paragraph 8.7 of the Protocol and (d) it was circulated to PC Members "*before the Planning Committee meeting commenced*". The subject planning application was, of course, on the agenda of <u>two</u> separate PC meetings, separated in time by some seven months. The averment just noted fails to identify <u>which</u> of the meetings. While the HOP also addresses this issue briefly, her averments do not shed any illumination. Moreover, the two page document suffers from three surprising infirmities; it fails to identify the Council official/s in attendance, it is unsigned and it is undated. Ultimately, there was no claim that the PC members who assembled on 24 January 2018 had been equipped with this report.

[87] This species of protocol was considered in the judgment of this court in *Re Belfast City Council's Application* [2018] NIQB 17 at [55] and [66] – [70]. I refer particularly to [68}. The language of the Protocol is to be given its ordinary, natural and undistorted meaning. The analysis of the "Site Visits" provisions of the Protocol in my view is quite straightforward:

(i) A site visit is not obligatory under the Protocol.

(ii) Where the possibility of a site visit arises for consideration a joint decision is to be made by the HOP and the PC Chair.

(iii) As a general rule at least such a decision is required in every case.

(iv) The decision thus made will entail a reasonable degree of latitude on the part of the decision makers.

(v) Where a site visit is arranged PC members are not obliged to attend (although the attendance of all would obviously be desirable).

(vi) Every site visit should generate two separate reports: (a) from the Council officer (**paragraph 8.6**) and (b) from the Planning officer (**paragraph 9.7**).

(vii) The Planning Officer's report is to be "*presented*" to the PC at the relevant ensuing meeting.

[89] The upshot of the foregoing is that three identifiable breaches of the Protocol are demonstrated. First, the record of the Council officer required by paragraph 8.6 was not made. Second, there was a failure on the part of the planning case officer to

present his record of the site visit to the Council's PC at its meeting on 24 January 2018, contrary to paragraph 8.7. Third, there was a failure to comply with paragraph 8.2 in that the HOP and the PC Chair failed to give joint consideration to the desirability of a site visit in advance of the 24 January 2018 PC meeting.

[90] I turn to consider the purpose of a site visit under the Protocol. Self-evidently, this is to inform and educate PC members in advance of performing their solemn duty of determining the planning application in question. The rationale underpinning the Protocol must include the consideration that the broad array of visual aids, illustrations and depictions available in today's high tech world and which are frequently provided to PC members before and/or in the course of the meetings at which key decisions are made are considered not necessarily an adequate substitute for visiting the site.

[91] A further aspect of the rationale must be the consideration that at its monthly meetings every Council's PC is required to consider multiple planning applications. This is, self-evidently, a heavy and challenging responsibility. Advance preparation is a matter of obvious importance. Maximum familiarity with the substance, details and nuances of every planning application on the agenda of the forthcoming meeting is obviously essential. Furthermore PC members, as elected representatives, have a broad range of duties extending beyond those involved in their membership of this particular committee. The proposition, therefore, that in certain cases an advance site visit will enhance the prospects of a properly informed and balanced decision, encompassing all appropriate matters of planning judgement, is in my view incontestable.

[92] Site visits by PC members also promote transparency and accountability, two of the values underlying the recent major reforms in Northern Ireland transferring planning decision making responsibilities to democratically elected councillors. Furthermore, there is nothing casual or informal about the site visit mechanism established by the Protocol. Quite the contrary: the Protocol prescribes a series of solemn formalities. Due observance of these has the twin merits of reminding PC members of the important duty which they are discharging and prescribing steps and procedures which will indisputably enhance the quality of the decision making process and its outcome. Simultaneously the values of transparency and accountability will be promoted.

[93] A further, free standing aspect of the Protocol is that those who elect councillors to office in local government have a right to expect that instruments of this kind will be respected and observed. It is not for this court, absent detailed argument on the issue, to determine that what the law recognises as a substantive legitimate expectation to this effect is engendered by the Protocol. However, the analysis that it operates as a species of representation, promise or assurance to the audience concerned – developers, objectors and other ratepayers alike – seems to me uncontentious. The solemnly and formally adopted protocols of every council belong to the realm of their Standing Orders and are to be treated with respect.

These are mechanisms which curb the decision making powers of elected representatives and promote the well-recognized public law values of procedural fairness, proper motive, taking everything relevant into account and disregarding the immaterial.

[94] This court's experience of planning judicial reviews, including the present case, confirms the force of much of the foregoing. A site visit provides a unique opportunity for grasping and appreciating matters of scale, distance and height together with setting, views, perspectives and likely impact on the immediate and more distant surrounds and other land uses. In this case the proposed development raised multiple questions relating to setting, scale, views, perspectives and impact. To this one adds the assessment made just seven months previously that a site visit was necessary. Furthermore, it is of significance that, from the outset, the planning application in question belonged to the "major" category. The Council's affidavit evidence does not grapple with the issue of passage of time and fading memory. Nor does it engage with the issue of change of PC personnel, noted in [85] above. Finally, I consider Mr Beattie's emphasis on discretion misplaced, for the reasons given.

[95] The Protocol is an instrument to be observed by planning officers, Council officials and PC members alike. It is not an 'opt-in/opt-out' mechanism. It is no free-wheeling palm tree. The provisions in Section 8 of the Protocol must, as an irreducible minimum, be conscientiously considered. The evidence establishes to the satisfaction of the court that this basic requirement was not observed. Thus Mr Beattie's appeal to the factor of discretion has no purchase. Given the factors highlighted, I consider that the demonstrated breaches of the Protocol cannot be dismissed as merely technical or minor. These breaches are at variance with the underlying purpose and ethos of this instrument. This ground of challenge succeeds accordingly.

16 The 2015 Directions Ground

[96] The essence of this free standing ground of challenge is that the impugned grant of planning permission is vitiated by non-compliance with Regulation 2 of the Planning (Notification of Council's Own Applications) Direction 2015 (the "*first 2015 Direction*") and the Planning (Notification of Applications) Direction 2015 (the "*second 2015 Direction*"). Each is a species of subordinate legislation made in exercise of the powers conferred on the Department by articles 17 and 18 of the Planning (General Development Procedure) Order (Northern Ireland) 2015.

[97] The relevant provisions of the first 2015 Direction are as follows:

> ***"Information to be given to the Department***
>
> **2. –**

(1) Where a district council proposes to grant planning permission for development falling within any of the descriptions of development listed in the Schedule to this Direction, it shall send to the Department the following information:

(a) a copy of the planning application, accompanying plans and any other information provided in connection with the application (e.g. transport/retail assessment), together with the full address and post-code of the site to be developed;

(b) copies of all observations submitted by consultees and all representations and petitions received, together with a list of the names and addresses of those who have submitted observations/made representations (including details of any petition organiser if known). Where 'pro-forma' representations are received, only one copy example need be submitted, but all names and addresses must be provided. Copies of petitions should be submitted, but only the organiser or first named should be included in the list of names and addresses;

(c) the district council's comments on the consultees' observations and on representations received;

(d) the district council's reasons for proposing to grant planning permission, including, where relevant, a statement setting out the reasoning;

(i) behind the district council's decision to depart from the development plan; and/or

(ii) for taking the decision it has, in light of any objections received.

(2) Where the district council holds the information set out in sub-paragraphs (a) to (d) above on its website, it may comply with some or all of the requirement to provide this information to the Department by means of an e-mail to the Department containing a link, or a series of links, to the relevant pages on the council's website.

Restriction on grant of planning permission

3. A district council must not grant planning permission for development falling within any of the descriptions of development listed in the Schedule to this Direction before

the expiry of a period of 28 days beginning with the date notified to them by the Department as the date of receipt by the Department of the information which the district council is required to give to the Department under paragraph 2.

SCHEDULE

DESCRIPTIONS OF DEVELOPMENT FOR WHICH APPLICATIONS MUST BE NOTIFIED TO THE DEPARTMENT

1. Development in which district councils have an interest

Development:

(a) for which the district council is the applicant/developer;
(b) in respect of which the district council has a financial or other (e.g. partnership) interest; or
(c) to be located on land wholly or partly in the district council's ownership or in which it has an interest;

in circumstances where the proposed development would be significantly contrary to the development plan for its district."

[Emphasis added]

[98] The relevant provisions of the second 2015 Direction are:

"***Information to be given to the Department***
3. —
(1) Where the council proposes to grant planning permission for development falling within any of the descriptions of development listed in the Schedule to this Direction, it must send the Department the following information:

(a) a copy of the application (including copies of any accompanying plans, drawings, statements, assessments, pre-application material and any other supporting information);
(b) a copy of the requisite notice;
(c) a copy of any representations made to the council in respect of the application; and

(d) a copy of any report on the application prepared by the council.

(2) Where the council holds the information set out in sub-paragraphs (a) – (d) above on its website, it may comply with some or all of the requirements to provide this information to the Department by means of an e-mail to the Department containing a link, or a series of links, to the relevant pages on the council's website. Restriction on grant of planning permission.

4. The council must not grant planning permission for development falling within any of the descriptions of the development listed in the Schedule to this Direction before the expiry of a period of 28 days, beginning with the date notified to them by the Department as the date of receipt by the Department of the information specified in paragraph 3.

5. If, before the expiry of the 28 day period referred to in paragraph 4, the Department has notified the council that they do not intend to issue a direction under section 29(1) of the 2011 Act, in respect of that application, the council may proceed to determine the application."

[99] The schedule to the second 2015 Direction is in the following terms:

*"**SCHEDULE***

DESCRIPTION OF MAJOR DEVELOPMENT FOR WHICH APPLICATIONS MUST BE NOTIFIED TO THE DEPARTMENT OF THE ENVIRONMENT

1. A major development application which would significantly prejudice the implementation of the local development plan's objectives and policies.

2. A major development application which would not be in accordance with any appropriate marine plan adopted under the Marine Act (Northern Ireland) 2013.

3. Significant objection by a Government Department or Statutory Consultee to a major development application;

(i) <u>Development Affecting a Road</u>
Development which has been the subject of consultation with the Department for Regional Development under Article 13 of the GDPO where it has raised a significant objection against the granting of planning permission or has recommended conditions which the council does not propose to attach to the planning permission.

(ii) <u>Development in vicinity of major hazards</u>
Development which has been the subject of consultation with the Health and Safety Executive for Northern Ireland under Article 13 of the GDPO where the Health and Safety Executive has raised a significant objection against the granting of planning permission or has recommended conditions which the council does not propose to attach to the planning permission.

(iii) <u>Nature Conservation, Archaeology and Built Heritage</u>

Development which has the potential to:

(a) affect a marine conservation zone designated under the Marine Act (Northern Ireland) 2013;
(b) have an adverse effect on a Northern Ireland priority habitat or priority species;
(c) have an effect on a Natura 2000 site as designated under the Conservation (Natural Habitats, etc) Regulations (Northern Ireland) 1995;

(d) have an effect on an Area of Special Scientific Interest designated under Article 28 of the Environment (Northern Ireland) Order 2002;
(e) have an effect on a World Heritage site appearing on the World Heritage List kept under the 1972 UNESCO Convention for the Protection of World Cultural and Natural Heritage;
(f) affect a site or setting of any historic monument as defined under Article 2 of the Historic Monuments and Archaeological Objects (Northern Ireland) Order 1995 or an area which contains archaeological remains or historic park, garden or demesne; or
(h) affect a listed building as defined under section 80 of the 2011 Act,

where the Department on being consulted by the council under Article 13 of the GDPO has indicated that the development may adversely affect such a site and has raised a significant objection against the granting of planning permission or has recommended conditions which the council does not propose to attach to the planning permission.

(iv) <u>Flooding</u>

Development which has been the subject of consultation with the Department of Agriculture and Rural Development (DARD) under Article 13 of the GDPO where DARD has raised a significant objection against the granting of planning permission or has recommended conditions which the council does not propose to attach to the planning permission."

[100] The first of the two 2015 Directions imposes notification and related requirements in cases where the Council concerned is the planning applicant. In the final incarnation of the organic Order 53 pleading it is contended that the Council was obliged to notify DFI of its intention to approve the proposed development on four counts: the asserted divergence of the proposal from the NAP 2016, the Council's "*interest in the land which was the subject of the planning application*" (presumably a reference to the easement), the Council's asserted "*withholding of the information relating to the Council's interest in the land from the relevant decision makers*" and, finally, the CEO's declaration that the proposed development was a Council "*strategic priority*".

[101] If and insofar as it forms part of the Applicants' case that the effect of the first 2015 Direction is to require the Council corporate to consider the notification

provisions and decide whether this step is required, I am unable to identify any supporting legal foundation in counsels' arguments .

[102] I highlight the tepid terms of the formulation in the amended skeleton argument of counsel which advances "*the **possibility** that there was a **potential** significant departure from the Area Plan*" [my emphasis]. This as framed cannot amount to a sustainable ground. Furthermore, it fails to engage with the clear element of evaluative planning judgement which an assessment under paragraph 1 of the Schedule clearly requires. This discrete issue was specifically addressed in the planning case officer's report in the form of a judgement which (a) can be challenged only on the narrow ground of *Wednesbury* irrationality and (b) is not challenged on this basis in any event. The first element of this ground is unparticularised and opaque and, in the court's estimation, quite toothless.

[103] The second element of this ground must fail for the same reason. The pre-condition for making a reference to DFI was, I accept, partly satisfied in that part of the subject lands are in the ownership of the Council which simultaneously gives rise to a financial interest therein. However, the requirement that the proposed development be "*significantly contrary to the development plan*" (the statutory language) is manifestly not satisfied. No significant contravention of the development plan – itself a matter of rational judgement, engaging the *Wednesbury* standard of review – has been demonstrated by the Applicants

[104] The third element fails to make good this ground for two reasons. First, it is not grounded in any of the provisions of the Schedule. Second, the assertion (properly so-called) which it makes, namely that the Council's interest in part of the lands was withheld from PC members is unsustainable, being confounded by the evidence. The fourth element of this ground (the CEO's "declaration") must fail on the elementary basis that it is unrelated to the provisions of the Schedule. These grounds, I would add, suffer from inadequate particularisation and definition in any event.

[105] Finally, it was not contended that there were any facts or features which in some way converted the planning application lodged by the developer into the Council's "*own application*" for planning permission. For the series of reasons given I conclude that the notification requirements under the first 2015 Direction were not triggered. This limb of this ground of challenge has no merit in consequence.

[106] As regards the second of the 2015 Directions, the pleaded ground is that a breach of paragraph 2 occurred by reason of the Council's failure "*to notify* [DFI] *of its intention to approve the planning application proposal*". Elaboration of this ground is provided in counsels' skeleton argument with the formulation of two specific contentions. First, the impugned grant of planning permission was "*significantly contrary to the vision and policy of the NAP 2016 and significantly prejudiced the implementation of the Area Plans objectives and policies*", followed by a repetition of the four specific grounds identified immediately above. The second contention asserts a

failure to alert the PC to the Council's interest in the land or the provisions of the 2015 Directions, with the consequence that the PC was "*deprived of the opportunity*" to refer the planning application to DFI.

[107] As regards the second of the 2015 Directions, the pleaded ground is that a breach of paragraph 2 occurred by reason of the Council's failure "*to notify* [DFI] *of its intention to approve the planning application proposal*". Elaboration of this ground is provided in counsels' skeleton argument with the formulation of two specific contentions. First, the impugned grant of planning permission was "*significantly contrary to the vision and policy of the NAP 2016 and significantly prejudiced the implementation of the Area Plans objectives and policies*", followed by a repetition of the four specific elements identified [99] above. The second contention asserts a failure to alert the PC to the Council's interest in the land or the provisions of the 2015 Directions, with the consequence that the PC was "*deprived of the opportunity*" to refer the planning application to DFI.

[108] These contentions are advanced in a legal limbo, without cross-reference to the legal framework concerned, namely the second 2015 Direction. They suffer from many of the flaws diagnosed above in the challenge based on the first of the 2015 Directions. Their particularisation and elaboration are at best opaque. I have, notwithstanding, attempted the exercise of relating these contentions to the provisions of the second 2015 Direction. The outcome is a clear conclusion that none of the grounds or features advanced on behalf of the Applicants impels to a finding by this court that any of the requirements of this statutory measures was infringed by the Council in its decision making process.

[109] I would add that the court's exchanges with Mr Kane QC appeared to suggest that the Applicants are no longer relying on an asserted breach of the 2015 Direction as a free standing ground of challenge. Furthermore, I make clear that any complaint based on a failure to bring either of these Directions to the attention of the PC is not to the point. Rather, the issue for the court is whether, in its objective audit of legality, any unlawful non-compliance with either Direction occurred. I consider that there was none.

[110] It follows that this discrete ground of challenge has no substance.

17. The Policy AMP3 Ground

[111] This compact ground of challenge is formulated thus in the final amended Order 53 pleading:

> "[The Council] *failed to consult with the statutory roads consultee when notified by submission dated 21 October 2017 of …… queries about the compatibility of the access arrangements with the policy prevailing in respect of 'protected routes' ….* [and] *when notified by the first*

> *named Applicant's submission dated 04 December 2017, it failed to investigate undertakings provided on behalf of NW200 organisation as to availability of lands for overspill parking and service access and alternative facilities and specifically failed to check what was intended or* [to have] *recourse to the roads consultee, nor were safety issues queried with the appropriate authorities.*"

It is necessary to reflect briefly on the true essence of the Applicant's case pursuant to this ground. As demonstrated by the submissions of Mr Beattie QC, the formulation and presentation of this ground were from time to time vague and opaque. In oral argument there was considerable emphasis on the Council's consultation with the statutory road authority, DFI. This, in my view, was something of a diversion. Properly analysed, the real thrust of this ground, ultimately, is planning policy orientated. It entails a complaint that the proposed main access from the Coast Road (a protected route) to the site is incompatible with planning policy. The further contention developed is that as the planning officials failed to recognise this, it was excluded from their reports to the PC.

[112] In this context it is appropriate to refer to Mr Allister's letter of 21 October 2017 to the Council. One of the virtues of this letter is that it identifies clearly the two quite separate easement issues relating to the proposed development site. The first easement issue relates to the proposed main vehicular access at the Portstewart/westerly extremity of the site. This is the access which was rendered viable for the developer by the Council's grant, for nil consideration, of an easement over lands in its ownership. The second easement (or, perhaps, sub-lease or assignment?) issue concerns an access connecting the proposed site with the existing NW200 "pits" area, ostensibly for the purpose of so-called "over spill" parking. I say "ostensibly" as while this could possibly operate also as a conventional, separate means of vehicular access to and egress from the site (on which issue the evidence is not clear), all those who adopted and used the "overspill" label did so erroneously: this was necessary, integral and permanent vehicular parking, nothing less. This fact was in my view not properly understood by either the planning officials or the Motor Club representatives.

[113] With that preamble I draw attention to the following passages in the letter:

> "*On the matter of the main access onto the A2 protected route we do not believe the issue has been adequately addressed. The proposed access is to a Protected Route outside the settlement limits. Surely Policy AMP3 of PPS3 (as amended) is emphatic that use is required to be made 'of an existing vehicular access'. That is not what is proposed here. Instead, it is proposed that the existing modest access should be closed and a new larger access opened several metres to the west.*

Moreover, the dominant use of the existing access is to serve a single dwelling, with very occasional onward access to the western extremity of 'the pits area'. Now, what is proposed is to replace this with an access to a huge multi-faceted complex with a reversal of balance of use whereby the domestic access becomes miniscule in terms of use. The intensification proposed is so disproportionate as to be unreasonable and unsustainable. We do not detect any or adequate engagement on the magnitude of such a change on this protected route, nor does it appear that the owner of the single dwelling hither to predominantly accessed has consented to the closing up of his existing access or to the proposed arrangements ….

Thus, we believe that there has been inappropriate consultation and approval on the critical issue of access."

As these passages demonstrate Mr Allister was advancing the two fold complaint of policy incompatibility and inadequate consultation with DFI. It is the first of these two elements which, ultimately, emerged as the central core of this discrete ground of challenge. (I have considered, but decided against, requiring that the Order 53 Statement be revised so as to reformulate this ground in the foregoing terms: see further [226] *infra*).

[114] This was followed by further electronic correspondence from Mr Allister to the Council's HOP on 04 December 2017 relating to the issue of overspill parking accommodation. The thrust of this letter differed from its immediate predecessor. It was directed squarely to the issue of road safety in the context of the operation of the contemplated second easement on the dates of the annual NW200 event which, Mr Allister asserts, entails "*frenetic use*" of the pits (or paddock) hard standing. There was no reply to either communication.

[115] PPS3, Policy AMP3 (as amended in June 2010 by PPS21, Annex 1 – Consequential amendment to Policy AMP3 of PPS 3 Access, Movement and Parking) provides the following:

"*Other Protected Routes – Outside Settlement Limits*

Planning permission will only be granted for a development proposal involving direct access, or the intensification of the use of an existing access in the following cases:

(a) A Replacement Dwelling – where a building to be replaced would meet the criteria set out in Policy CTY3 of PPS21 and there is an existing vehicular access onto the Protected Route.

> *(b) A Farm Dwelling – where a farm dwelling would meet the criteria set out in Policy CTY10 of PPS21 and access cannot reasonably be obtained from an adjacent minor road. Where this cannot be achieved proposals will be required to make use of an existing vehicular access onto the Protected Route.*
>
> *(c) A Dwelling Serving an Established Commercial or Industrial Enterprise – where a dwelling would meet the criteria for development set out in Policy CTY7 of PPS21 and access cannot reasonably be obtained from an adjacent minor road. Where this cannot be achieved proposals will be required to make use of an existing vehicular access onto the Protected Route.*
>
> *(d) Other Categories of Development – approval may be justified in particular cases for other developments which would meet the criteria for development in the countryside and access cannot reasonably be obtained from an adjacent minor road. Where this cannot be achieved proposals will be required to make use of an existing vehicular access onto the Protected Route."*

In the present context subparagraph (d) is the important passage.

[116] In the planning case officer's June 2017 report to the PC, PPS3/AMP3 (Access to Protected Route) was listed as one of the "*Relevant Policies and Guidance*". One of the report's discrete chapters is entitled "Traffic and Parking" (paragraphs 8.106 – 8.112). The relevant passage, having identified PPS3/Policy AMP3, states:

> "*The policy allows development access onto protected routes in circumstances where this cannot be achieved on to an adjacent minor road and where it is an acceptable form of development in the countryside. On the basis that the principle of development is acceptable, and there is no nearby minor road offering access to the site, the proposal is required to use an existing access. In this instance there is no viable option of access onto the site from a minor road, and the proposal utilises* ***an existing relocated access and is considered acceptable****. DFI Roads has been consulted on this matter and raises no objection in this regard. In all cases where access to a Protected Route is acceptable in principle it will also be required to be safe in accordance with Policy AMP2.*"

(My emphasis: the key word in this passage is "relocated")

This is replicated in the planning case officer's January 2018 report to the PC at para 8.125.

[117] On the topic of car parking the report advises:

> "*DFI Roads advised that the development should be served by 355 car parking spaces, but … accepted 318 subject to them being provided permanent parking spaces. Consequently a revised master plan … was received with the integrated northern 'overspill parking' area into the overall parking layout. A small hedgerow now delineates the service road and parking area …*
>
> *DFI Roads also raised a concern in relation to the northern parking area and service route as it has in the past been used by the NW200 during race week.*"

The "northern parking area" is the zone proposed for "overspill parking" (ie the "second" easement). The author makes two ensuing comments of note. First:

> "[The operators of the] *NW200 have at no stage raised concern that the NW200 would be unable to operate if this proposal was built.*"

Second:

> "*It is a matter for the hotel operator to operate during road closures which is no different to* [other business affected by the road race] *within the triangle circuit.*"

I shall revisit these two comments presently.

[118] The planning case officer's January 2018 report to the PC replicates all that is considered in the immediately two preceding paragraphs with certain modifications. First, the aforementioned two comments are not repeated. Second, there is reference to a letter from the NW200 organisers, dated 15 November 2017, purporting to confirm that "*… the need for overspill parking, service access and HGV turning can be provided on a permanent basis.*"

The report continues:

> "*However to safeguard the provision, condition 33 is imposed to ensure all hard surfaced areas have been constructed and permanently marked in accordance with the approved Drawing Number 38B and to prevent these hard surfaced areas from being used for any purpose at any*

> *time other than for the parking and movement of vehicles of customers and staff of the approved development.*"

The report summarised the Policy AMP3 objection in these terms:

> "*The A2 is a protected route and a new access onto a protected route outside settlement should not be supported. The new access would affect the efficiency and safety of the protected route.*
>
> *Policy AMP 3 - Access onto a protected route has not been properly applied. There has been inadequate engagement on the magnitude of such a big change to this protected route and the owner of the dwelling has not consented to the closing up of the access. How have his interests been taken into consideration?*
>
> *The area of parking which was previously annotated as overspill car park still reads as being separate to the main car park 1. There is not sufficient robust connection between the two areas given the planting screening.*"

This passage can be linked to Mr Allister's written representations of 4 December 2017. I interpose here that the expressed reason for condition number 33 of the impugned grant of planning permission is "*to ensure that adequate provision has been made for parking, servicing and traffic circulation within the site*". The genesis of this condition can be traced to the DfI consultation response dated 8 June 2017.

[119] DfI, *qua* roads consultee, was consulted on eight occasions by the Council between 8 November 2016 and 2 October 2017. The evidence includes a full suite of the DFI consultation responses.

The planning case officer, in his first affidavit, avers that –

> "*The representation by one of the Applicants regarding access to the Protected Route was considered. However, the position of DFI Roads had been made clear on the issue of the access to a Protected Route. There was no legal requirement for the Respondent to have recourse to a roads expert having heard from the appropriate consultee. DFI Roads officials were satisfied that the proposal was acceptable with regard to the requirements of PPS3 … policy AMP3. The Respondent is entitled to have regard to and rely upon the views of DFI Roads and was content with the response provided. Therefore further consultation with DFI Roads at this point was not required.*"

The first question which these averments raise is whether they can be linked to a DfI consultation response (the deponent not purporting to do so). The second question is whether there is any note or record corroborating these averments. The third question is the rhetorical one of why the rationalisation provided by these averments was not conveyed to Mr Allister in response to his detailed written representations noted above.

[120] DfI, in its consultation responses, repeatedly expressed concerns relating to the second easement issue. It highlighted in particular that the car parking proposed in the "*pits*" area could not properly be characterised additional or "*overspill*" as it was considered an integral requirement of the proposed development. It followed from this that the proposed separation of the development site, by a fence, from this car parking area was unacceptable. The consultation exchanges continued. On 06 June 2017 the Council drew to the attention of DFI that the development proposal included two separated pedestrian links between the two areas under consideration. In its response, made two days later, the DFI correspondence refers to discussions with an unnamed Council planning official (or officials). The response states:

> "*Subsequent to Ms Clarke's email dated 2nd June 2017 and further discussions with the Local Planning Authority, DFI Roads can recommend the following conditions and informatives ….*"

(Ms Clarke is a Council planning official.)

A series of conditions relating to visibility displays, gradient, other technical matters and compliance with specified drawings followed. Notably, the rational of safety is expressed in most of these.

[121] A perusal of the totality of the DfI consultation responses does not readily disclose a nexus with the averments of the planning case officer in [119] above. The court accepts that the Council was entitled to act upon DfI's assessment of the roads and vehicular safety considerations. This assessment, in a nutshell, was that these factors could be satisfactorily addressed by the suite of planning conditions which DfI proposed. However, there is a quite separate issue. The case officer has deposed, in terms that DfI expressed itself satisfied regarding the policy requirements of PPS3/Policy AMP 3. There is no mention of these policies anywhere in the DfI responses. More specifically, DfI at no time addressed the key issue raised by this ground of challenge, namely the policy compatibility of both relocating and enlarging the extant vehicular access to an existing dwelling fronting the Coast Road. Indeed it would be a little surprising if DfI had done so, given that this discrete issue belongs to the territory of planning policy rather than that of road safety and related matters. It follows from this analysis that the case officer's affidavit purports to rely on DfI consultation responses in a manner and for a purpose which are untenable.

[122] The legal framework is straightforward. Planning authorities consult with specified agencies for three reasons, a mixture of the factual and the legal. The factual driver is that while planning authority officials who advise decision makers are presumptively well qualified in the principles, theory and practice of town and country planning their expertise in certain land use areas – environment, ecology, habitats, air quality, noise impact, together with roads and traffic issues (inexhaustively) – is limited. Lacking the necessary in-house skills and expertise, it is necessary for planning authorities to fill this void. The second reason is a legal one. It is rooted in the planning authorities' inter-related public law duties to take all material matters into account, to disregard matters extraneous and to avoid the prohibited territory of Wednesbury irrationality. In reduced terms, there is a legal obligation to engage fully with the issues thrown up by every planning application. In cases where a planning application raises issues requiring expert input and assessment which the planning authority is unable to provide it must take appropriate steps to rectify this *lacuna* in its inbuilt skills and expertise. Finally, there is a free standing duty imposed by statute to consult in prescribed cases

[123] In the January 2018 report to the Council's PC one finds the statement:

> "*DFI Roads has been consulted as the competent authority in relation to traffic, access and parking matters and raises no objection to the proposal.*"

This is correct and unobjectionable as far as it goes. However, the report fails to address the key policy issue thrown up by the proposed site access arrangements namely the provision of the main access through relocation and enlargement of the extant access to a dwelling fronting the Coast Road. True it is that the report mentioned Policy AMP 3 in its summary of the objections registered in Mr Allister's letter of 21 October 2017. However, crucially, this summary omits altogether Mr Allister's representations relating to the "*existing vehicular access*" provisions of Policy AMP 3. The case officer's report to the PC says the following of this policy (paragraph 8.125):

> "*The policy allows development access onto protected route* [sic] *in circumstances when this cannot be achieved onto an adjacent minor road and where it is an acceptable of development in the countryside. On the basis that the principle of development is acceptable, and there is no nearby minor road offering access to the site, the proposal is required to use an existing access. In this instance there is no viable option of access onto the site from a minor road, and the proposal utilises an existing relocated access and is considered acceptable. DFI Roads has been consulted on this matter and raised no objection in this regard. In all cases, where access to a Protected Route is acceptable in*

> *principle it will also be required to be safe in accordance with Policy AMP 2.*"

Repeating (at paragraph 8.127:

> "*DFI Roads was consulted on the proposed development as the competent authority on road and traffic matters and it raises no objection to the Transport Assessment or the proposed access arrangements.*"

[124] Bearing in mind that the court's evaluation and interpretation of a report of this kind must avoid the legalism of an exercise in the construction of a statute or legal instrument, the relevant passages in the case officer's report bearing on this discrete issue invite the following analysis:

(a) The report fails to convey to the PC Mr Allister's objection based on Policy AMP 3.

(b) The policy requirements governing utilisation of an existing access by relocation are not spelt out clearly or fully.

(c) The officer addresses the issue of relocating an existing access in a single sentence which <u>also</u> addresses the issue of site access from a minor road.

(d) The phraseology "*an existing relocated access*" is ambiguous: it could denote an existing access which has been relocated or one which is to be relocated.

(e) There is no indication in the text that policy AMP 3 does not recognise the mechanism of <u>relocating</u> an existing access.

(f) The developer's proposal to both relocate <u>and</u> enlarge the existing access is not addressed.

[125] The case officer's report to the PC was, therefore, flawed. The vital importance of reports of this nature has been emphasised in one of the recent judgment of this court relating to the new statutory planning arrangements in Northern Ireland: *Re Conlon's Application* [2018] NIQB 49 at [11] and *Re Belfast City Council's Application* [2018] NIQB 17 at [56]. With reference to this discrete ground of challenge, the specific responsibility imposed on the case officer was to bring to the attention of the decision makers, the PC members, the relevant policy requirements in sufficiently detailed and accurate terms to ensure that they were properly understood by the reader, thereby facilitating the twofold exercise of relating them to the material aspects of the development proposal and forming a judgement accordingly.

[126] Based on the foregoing analysis I conclude that an error of law has occurred. The discrete Policy AMP 3 requirements were not properly rehearsed in the case officer's report or, alternatively, were misconstrued. Furthermore, Mr Allister's objection based on this policy was not conveyed to the relevant audience. The multiple inter-related public law defects which result are those of policy incompatibility, leaving out of account material considerations, unlawful consultation and procedural impropriety. These shortcomings could in principle have been rectified in the forum of the PC's decision making. However, there is no evidence that this occurred and this case, correctly, was not advanced.

[127] One concluding observation, related to my comments in [112] above, is appropriate. During the process under scrutiny the specific question of how the "*pits*" could, physically, accommodate hotel car parking adjudged necessary during the annual NW200 phase was raised more than once. There were clear ambiguities in the Motor Club's written contribution to this subject. How could the Club, on the one hand, represent its ability and willingness to provide the vehicular accommodation and, on the other, enter a *caveat* about the annual event, simultaneously asserting vaguely and blithely that the parking needs of the hotel could be met at some other unspecific and undefined location? An obvious need for further enquiry arose. However, on the evidence, this issue was, ultimately, quietly buried giving rise to a distinctly incomplete chapter.

[128] For the reasons given I conclude that this ground of challenge succeeds.

18. The Fourth Ground: Planning Policies TSM3/TSM4 Error Of Law

[129] It is clear, and not disputed, that in making the impugned decision the PC members in question accepted the advice in the planning case officer's report that PPS 16/TSM3, rather than PPS 16/TSM4, was the applicable planning policy. The Applicants contend that this was erroneous in law. The title of PPS 16 is "Tourism". The introductory paragraphs highlight *inter alia* the links between tourism and the economy, the financing of conservation and enhancement initiatives, relieving poverty and promoting social inclusion and cohesion. The introduction continues:

> "*Sustainable tourism development is brought about by balancing the needs of tourists and the tourism industry with those of the destination. This requires management and the land use planning system as a key role in managing tourism-related development through planning policies that provide a framework for identifying appropriate development opportunities and safeguarding tourism assets from harmful development … without damaging those qualities in the environment which are of acknowledged public value and on which tourism itself may depend.*"

The aim of the PPS16 is "*to manage the provision of sustainable and high quality tourism developments in appropriate locations within the built and natural environment*" (section 3.0) and, as set out at section 3.1 of the policy, the objectives of the planning policy are to:

> - "*facilitate sustainable tourism development in an environmentally sensitive manner;*
> - *contribute to the growth of the regional economy by facilitating tourism growth;*
> - *safeguard tourism assets from inappropriate development*
> - *utilise and develop the tourism potential of settlements by facilitating tourism development of an appropriate nature, location and scale;*
> - *sustain a vibrant rural community by supporting tourism development of an appropriate nature, location and scale in rural areas;*
> - *ensure a high standard of quality and design for all tourism development."*

[130] Within PPS 6 there are 8 discrete tourism policies, TSM1 – TSM8. The 7th and 8th are of general application, whereas the first 6 are concerned with specific types of tourism development. Policies TSM3 and TSM4 are of the latter *genre*. PPS 16 states at paragraph 5.01:

> "*Proposals for tourist development in the countryside will be facilitated through PPS16 (policies TSM2 to TSM7) and other planning policy documents that provide scope for tourism development in the countryside."*

New build hotels on the edge of a settlement will be facilitated through TSM 3 (paragraph 5.5).

[131] The subject matter of Policy TSM3 is "Hotels, Guesthouses and tourist hostels in the countryside". The opening passage is:

> "*<u>New/replacement buildings</u>*
>
> *Planning permission will be granted for a new hotel/guesthouse/tourist hostel in the countryside in the following circumstances and will be assessed under the specified criteria …"*

One of the "*circumstances*" is that of "*New build hotel, guesthouse or tourist hostel on the periphery of a settlement*". This is followed by the sentence:

> *"A firm proposal to develop a hotel, guesthouse or tourist hostel on land at the edge of a settlement will be permitted subject to the following specific criteria …"*

In the list of three criteria follows, the third is in these terms:

> *"The development is close to the settlement, but will not dominate it, adversely affect landscape setting or otherwise contribute to urban sprawl."*

[132] There follows a "Justification and Amplification" section which contains the following material paragraphs:

> *"New buildings for these forms of tourist accommodation should usually be located within settlements in order to take advantage of existing services and facilities, provide ready access for visitors and employees and to minimise the impact on rural amenity and character …*
>
> *However, it is important that firm proposals for such projects are not impeded due to a lack of suitable land within settlements. Where the case for a location outside a settlement in such an area can be clearly demonstrated, the selected site should be as close to the settlement as possible, subject to amenity and environmental considerations, as this is usually more sustainable than a more remote site …*
>
> *A proposal must also respect the character of the settlement and its setting in the surrounding landscape. This in turn will require careful site selection, layout, design and landscaping …"*

[Paragraphs 7.11 – 7.13 in part.]

The text of Policy TSM3 continues, at paragraph 7.14:

> *"To allow informed consideration all applications made under this policy will be expected to be accompanied with the following information:*
>
> - *Sufficient evidence to indicate how firm or realistic the particular proposal is and what sources of finance are available (including any grant aid) to sustain the project;*
>
> - *Detailed information of an exhaustive search to illustrate that there is no reasonable prospect of securing a suitable site within the limits of the particular settlement or other nearby settlement;*

- *Justification for the particular site chosen and illustrative details of the proposed design and site layout."*

In passing, the first of the three elements tabulated above forms the basis of a separate, free standing ground of challenge (*infra*).

[133] Policy TSM4 is entitled "Major Tourism Development in the Countryside – Exceptional Circumstances". It begins:

> *"A proposal for a major tourism development in the countryside will be permitted if it meets all of the following exceptional circumstances:*
>
> *(a) Demonstration of exceptional benefit to the tourism industry;*
>
> *(b) Demonstration that the proposal requires a countryside location by reason of its size or site specific or functional requirements;*
>
> *(c) Demonstration of sustainable benefit to the locality.*
>
> *All proposals brought forward under exceptional circumstances must be accompanied by a statement demonstrating how the proposal meets the three criteria."*

The section "Justification and Amplification" follows:

> *"7.16 This policy makes provision for major tourism development projects in the countryside in exceptional circumstances for proposals that offer exceptional benefit to the tourism industry in Northern Ireland. The ability of the proposed development in itself to attract tourists to Northern Ireland will be significant in assessing whether it will offer exceptional benefit to the tourism industry. A further consideration will be the extent to which the proposed development meets a regional or sub-regional market need that is identified in the Tourism Priorities for Action Plan ….*
>
> *7.17 This policy will not facilitate approval of relatively minor proposals for tourism development, for example a single guesthouse or small scale self-catering development, as such proposals are unlikely in themselves to offer exceptional benefit to the tourism industry or be of a scale that requires a countryside location. However, a* ***proposal***

> ***that offers a tourist amenity likely to attract significant numbers of visitors along with a commensurate level and quality of visitor accommodation will fall to be considered under this policy."***

[Emphasis added.]

[134] This is followed by a series of stipulations relating to what must accompany a development proposal to which this policy applies: a "*tourism benefit statement*", proof of financial viability, site selection justification and a "*sustainable benefit statement*". Next it is stated that all such proposals will require consultation with the Northern Ireland Tourist Board and the relevant local council. The final two paragraphs are in these terms:

> "*7.20 It is anticipated that the requirement for the type of tourism development that might be regarded as exceptional in the context of this policy will diminish through time as market needs are met. Accordingly, this policy will be subject to review in consultation with Northern Ireland Tourist Board and local government …*
>
> *7.21 The impact of proposals on rural character, landscape and natural/built heritage is an important consideration in their assessment, particularly within areas designated for their landscape, natural or cultural heritage qualities.*"

[135] Section 7 of the Case Officer's June 2017 report identified a series of "*relevant policies and guidance*" which the author then examined in some detail in paragraphs 8.2 – 8.119. In the January 2018 report to the PC the corresponding section comprises paragraphs 8.2 – 8.137. Pausing, the planning officer's report which the PC considered in adopting the resolution giving rise to the impugned grant of planning permission addressed the subject of planning policy in considerably more extensive terms than its predecessor.

[136] In a discrete chapter entitled "Principle of Development", the case officer states *inter alia* (paragraph 8.13):

> "*The main policy consideration to assess the principle of the development is Policy TSM3 ……*"

The immediately succeeding paragraph (8.14) is the key passage with reference to this ground of challenge:

> *"It is recognised that Policy TSM4 – Major Tourism Development in the Countryside – also relates to the*

> *principle of certain forms of tourism development in the countryside. However, given that TSM3 relates specifically to a typology which includes hotel developments, and considering that the level of other amenities are commensurate to a large scale hotel, it is felt that TSM3 is best placed to consider such a proposal. This is supported by the supporting text of TSM4 which identifies major tourist development as tourism amenities likely to attract significant numbers of visitors along with a commensurate level and quality of visitor accommodation. The proposal is a hotel with ancillary related uses that would not attract significant numbers in their own right. There are uses that need to be considered against the relevant policies that apply, such as the retail and office elements."*

[137] In one of the early sections of his report (paragraphs 5.1 and 5.2) the case officer purported to summarise the outcome of "*publicity and consultations*", in the span of some nine pages. He recorded that there had been 75 letters of objection, 85 letters of support, one petition of objection and one petition of support. Among the objections listed in the ensuing text was the following:

> "*Policy TSM3 and TSM4 of PPS16 are relevant and the applicant must demonstrate exceptional circumstances. It is unjustified major development and as such should be advertised as a departure from the local plan and may trigger a call-in.*"

Some 50 pages later, under the rubric of "Consideration of Objections", the case officer included in a three page bullet point list (paragraph 8.137) the following pithy statement:

> *"TSM4 was not applied for the reasons set out in paragraph 8.14."* [reproduced in [136] above]

[138] At this juncture it is necessary to consider the PAP correspondence. I pause to observe that the two letters in question were models of their kind. Among the multiple issues detailed in the PAP letter of the Applicant's solicitors was the Council's failure to apply TSM4 to the proposed development. This letter was written at a stage when the Applicants and their legal representatives were in possession of the case officer's report of January 2018. This discrete contention elicited the following riposte in the PAP response of the Council's solicitor:

> "***Failure to apply TSM4 …..***
>
> *The Case Officer never says that TSM4 does not apply. You seek to parse the report to deliver a legal argument relating to a material consideration. The Case Officer*

> *refers to TSM4. It is not stated that the policy is not material or is to be excluded. It is stated that TSM3 is best placed to consider the proposal. The determination reached was that the proposal was on the periphery of a settlement and that is apparent from any fair reading of the Planning Committee report …*
>
> *Proper consideration and explanation was given as to why Policy TSM3 was considered to have greater weight than Policy TSM4. That is an exercise of planning judgement that the Case Officer was entitled to consider, and it was thereafter for the proposed Respondent to agree with the weight given or not.*"

[139] In this PAP skirmishing the Applicants' letter advanced the separate, discrete assertion that the Council was applying TSM4 to a pending hotel planning application (in shorthand, the "*Dunluce Application*"), developing the contention that the non-application of TSM4 to the subject proposal was "*irrational, unreasonable and unfair*". The Council's solicitor replied in the following terms:

> "*The proposed Respondent has not prepared a report on* [the Dunluce Application] …
>
> *The approach to policy and the weight to be applied in that application has* [sic] *not been determined.*"

The PAP response was written precisely three weeks after the author of the two reports to the PC had written to the agent for the developer in the Dunluce Application in the following terms:

> "*Proposal: Proposed luxury hotel resort incorporating conference facilities and spa, guest suites, apartments and villas, associated access, car parking, landscaping and ancillary development …*
>
> *It is with great regret that I advise we consider the principle of the development unacceptable. The main planning policies to which the proposal is considered contrary (to) are: ……*
>
> *PPS16 Tourism – Policies TSM4 (criterion B), paras 7.18 and 7.21, TSM8 and PPS21 …. Policies CTY1, 13 and 14 ….*
>
> *I have discussed the matter with Denise Dickson, Head of Planning, and the application shall be progressed with a*

> *recommendation to refuse to the Planning Committee as soon as possible.*"

This communication was copied to both the HOP and two other Council planning officers. This letter is to be juxtaposed with the note of the meeting which preceded it, attended by three of the Council's planning officers and representatives of the Dunluce application developer. In passing, the court has received evidence that the Dunluce application was recently withdrawn.

[140] This was followed by an exchange of correspondence between the Dunluce developer's agent and the planning case officer. The Council's response letter is dated 02 May 2018. By reason of (*inter alia*) Mr Allister having availed of the so-called "open file" policy, whereby he was permitted to inspect the Council's planning files and make copies of requested documents, it emerges that there are two versions of the Council's letter of response, dated 02 May 2018, each included in the evidence assembled before the court. Only one of these versions contains the following short numbered paragraph:

> "*The proposal does not meet with the policy requirements of TSM3 of PPS16 'Tourism' as it does not involve either the replacement of an existing rural dwelling or a new build proposal on the periphery of a settlement.*"

Considered in its context, the author was evidently intending to convey that the Dunluce application was not assessed as falling within the embrace of Policy TSM3. Rather, as the preceding exchange of communications makes clear, the Council's planning officials had determined that the applicable policy was Policy TSM4.

[141] Brief reference to the development proposed by the Dunluce application is appropriate at this juncture. As appears from the developer's Planning Supporting statement dated November 2017 the Dunluce proposal was for a 115 bedroom hotel, incorporating inter alia a luxury spa and a conference suite including ballroom, restaurants and bars, 48 guest apartments and three detached guest villas some 2.5km to the east of the centre of Portrush and 780 metres north-east of the eastern-most extent of the town, defined by an edge of settlement caravan park. Factually, the Planning Statement makes the case for approval under PPS16 TSM4. It does not seek to make the case that the proposal can be approved under TSM3.

[142] At this juncture I summarise the main submission on behalf of the Council. Mr Beattie's point of departure is to draw attention to the principles formulated by Lindblom LJ in *Mansell v Tonbridge and Malling BC* [2017] EWCA Civ 1314 at [41]-[42]. Therein, one finds (in addition to what I have highlighted in above), the exhortation that planning policies are to be read and construed with good sense and fairness, followed by:

"(2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Hale of Richmond in R. (on the application of Morge) v Hampshire County Council [2011] UKSC 2, at paragraph 36, and the judgment of Sullivan J., as he then was, in R. v Mendip District Council, ex parte Fabre (2000) 80 P. & C.R. 500, at p.509). Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (see the judgment of Lewison L.J. in Palmer v Herefordshire Council [2016] EWCA Civ 1061, at paragraph 7). The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice.

(3) Where the line is drawn between an officer's advice that is significantly or seriously misleading – misleading in a material way – and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example R. (on the application of Loader) v Rother District Council [2016] EWCA Civ 795), or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, Watermead Parish Council v Aylesbury Vale District Council [2017] EWCA Civ 152). There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law (see, for example, R. (on the application of Williams) v Powys County Council [2017] EWCA Civ 427). But unless there is some distinct and material defect in the officer's advice, the court will not interfere."

[143] Next Mr Beattie drew attention to the discrete tourism policies in the Northern Ireland Plan ("*NAP*"). This explicitly recognises the role and importance of "*regional planning policies*" in this sphere. Such policies provide -

> "*… the framework for identifying appropriate development opportunities and safeguarding tourism assets from harmful development.*"

Within these NAP passages one finds reference to PPS16 as one of the regional policies which provides –

> "*… the framework for identifying appropriate development opportunities and safeguarding tourism assets from harmful development.*"

The substance of Mr Beattie's submission (as understood by the court) was that the NAP, in the realm of tourism, formulates certain highbrow, or overarching, policy principles but no detailed policy. This submission is accepted.

[144] Mr Beattie referred to the definition of "*hotel*" in PPS 16:

> "*A hotel shall provide overnight sleeping accommodation for visitors in separate rooms comprising not less than 15 double bedrooms, of which 100% shall have an en suite bathroom.*"

This policy definition, as is stated, mirrors that contained in the Tourism (NI) Order 1992. The court accepts the submission that the "*hotel*" references in Policy TSM3 must be considered by reference to this definition.

[145] This was followed a submission focusing sharply on the third of the Policy TSM3 criteria reproduced in [131] above. This is linked to the extract from the case officer's report to the PC reproduced in [136] above. By this route the submission was developed that these are matters of evaluative planning judgement engaging the *Wednesbury* principle, with no properly established grounds for intervention by the court.

[146] The final submissions of Mr Beattie addressing this discrete issue placed emphasis on the language of Policy TSM4:

> "*… a proposal that offers a tourist amenity likely to attract significant numbers of visitors along with a commensurate level and quality of visitor accommodation will fall to be considered under this policy.*"

Counsel further highlighted the absence of the word "*hotel*" in any part of this policy. Mr Beattie submitted, finally, that the salient aspects of the Dunluce planning application were the espousal of Policy TSM4 by the developer's agent, the unmistakably distinctive location of the proposed development – an elevated site within the Causeway Coast and Glens Area of Outstanding Natural Beauty – and the early withdrawal of the application, with the consequence that it generated no case officer's report and all that would flow there from.

[147] The case officer's reasoning that the specific planning policy engaged by the proposed development was TSM3 rather than TSM4, expressed mainly in paragraph 8.14 of his report, has the following core elements:

(a) TSM3 is specifically concerned with (*inter alia*) hotel developments.

(b) The proposed development is, on one of its boundaries, on the periphery of a settlement, the distance from the Portstewart boundary to the east being 127 metres.

(c) Policy TSM4 is directed to a major tourism development in the countryside bringing exceptional benefit to the tourism industry, being a development which would in itself attract tourists to Northern Ireland and including a commensurate level and quality of visitor accommodation.

Ultimately, the Applicant's challenge had an intense focus on the foregoing aspects of the case officer's assessment.

[148] The main question is whether the Council erred in law in applying Policy TSM3, rather than Policy TSM4, to the development proposal. This turns, firstly, on the interpretation of the two policies concerned. The interpretation of a planning policy, in common with the interpretation of any document, is a question of law for the court: *Tesco Stores – v – Dundee City Council* [2012] UKSC 13 and *re McFarland's Application* [2004] UKHL 18 at [25] per Lord Steyn. In *Tesco Stores* at [18], Lord Reed (delivering the judgment of the court) stated:

> "*The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law,* ***the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained*** *... In this area of public administration as in others …* ***policy statements should be interpreted objectively in***

> ***accordance with the language used, read as always in its proper context.***"
>
> [Emphasis added.]

At [19] Lord Reed cautioned that planning policy statements are not to be construed "*as if they were statutory or contractual provisions*". The court has been helpfully reminded via counsel's submissions that there are more recent formulation of the governing principles in certain of its decisions, in particular Re McNamara's Applications [2018] NIQB 22 at [22] and Re Alexander's Application [2018] NIQB 55 at [69], a passage perhaps worth repeating:

> "*Planning policies are not to be construed by the mechanisms applicable to a statute, contract or deed. Rather they are to be viewed as instruments of guidance which are not designed to place decision makers in a straightjacket and do not demand precise correspondence with the planning application concerned. They are devised within a realm which respects the central role of evaluative planning judgement, permitting some flexibility ….*"

[149] The application of a given planning policy is to be distinguished from its interpretation. The first step for a planning authority in a case such as the present is to determine whether a particular policy applies to the development in contemplation. This, as in the instant case, will frequently raise issues of interpretation of the text of one policy or more. Interpretation, a matter of law, is the first exercise to be completed. Evaluative judgement is alien to the exercise of interpretation. However, questions of judgement can arise at a second stage when the authority is considering whether particular provisions of a policy apply to an aspect or aspects of a development proposal and, if so, in what manner and to what extent. This distinction is made clear in [19] in *Tesco Stores*:

> "*… development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgement. Such matters fall within the jurisdiction of planning authorities and the exercise of their judgement can only be challenged on the ground that it is irrational or perverse ….*"

This distinction is exemplified in the illustration which Lord Reed proceeded to provide at [20]:

> *"[20]. The principal authority referred to in relation to this matter was the judgment of Brooke LJ in R v Derbyshire County Council, Ex p Woods [1997] JPL 958 at 967. Properly understood, however, what was said there is not inconsistent with the approach which I have described. In the passage in question, Brooke LJ stated:*
>
> > *'If there is a dispute about the meaning of the words included in a policy document which a planning authority is bound to take into account, it is of course for the court to determine as a matter of law what the words are capable of meaning. If the decision maker attaches a meaning to the words they are not properly capable of bearing, then it will have made an error of law, and it will have failed properly to understand the policy.'*
>
> *By way of illustration, Brooke LJ referred to the earlier case of Northavon DC v Secretary of State for the Environment [1993] JPL 761, which concerned a policy applicable to "institutions standing in extensive grounds". As was observed, the words spoke for themselves, but their application to particular factual situations would often be a matter of judgment for the planning authority. That exercise of judgment would only be susceptible to review in the event that it was unreasonable."*

[150] This ground of challenge generated a debate of some intensity. This is attributable at least in part to the open textured language of Policy TSM4. This is of course a "major development": see [17] *supra*. But this is statutory (not policy) language, shedding at most limited light on this exercise of policy construction. Furthermore there are no obvious bright luminous lines identifying the boundaries between the two policies. Ultimately I consider the determining factor to be the following wording of Policy TSM3:

> *"… a new hotel … in the countryside …* [a] *new build hotel … on the periphery of a settlement … on land at the edge of a settlement …."*

These words are to be given their ordinary and natural meaning. As in the *Northavon* case they speak for themselves. Applying this approach, the development proposal in this case plainly entails a new build hotel in the countryside. It falls naturally and irresistibly within this terminology, with a resulting magnetic nexus to Policy TSM3.

[151] I consider that, properly analysed, one aspect of this ground of challenge raises a matter of evaluative planning judgement. The case officer made an evaluative assessment on a matter of setting, junction and distance. Mr Kane QC submitted that the site of the proposed development is not (in the language of Policy TSM3):

> *"… on the periphery of ……*
>
> *…. at the edge of ..."*

the settlement of Portstewart. Developing the argument he pointed out that the relevant boundary of the subject site is separated from the eastern boundary of Portstewart by a Landscape Policy Area and the proposed development is not contingent with the built development of Portstewart. There was no dispute about the case officer's measurement of 127 metres. In my estimation the correct legal analysis is that the words "*periphery*" and "*edge*", undefined in the policy, required the formation of a planning judgment on the part of the case officer. This was the real exercise in play, rather than one of construction. This being so the legal threshold is that of irrationality which, plainly, is not overcome as the case officer's assessment falls comfortably within the range of assessments open to him.

[152] The court's determination of this ground is that as a combined matter of (a) construction of Policy TSM3 and Policy TSM4 and (b) planning judgement Policy TSM4 does not apply to the development proposal. The policy engaged is, rather, Policy TSM3. I would emphasise that this is a case specific conclusion. I consider that, in certain circumstances, the embrace of Policy TSM4 could extend to certain proposed developments including a substantial hotel element. I would add that where, as in the instant case and that of the Dunluce planning application, a developer's agent in a "planning statement" espouses a particular planning policy or policies this will not bind either the planning authority or the court. It is incumbent on the authority to examine all such claims scrupulously and to make its own independent, professional assessment.

[153] This ground of challenge fails for the reasons given.

19. The PPS16/Policy TSM3 Ground

[154] The essence of this ground asserts a breach of paragraph 7.14 of PPS16/Policy TSM3, paragraph 7.14. This ground is promoted without prejudice to the Applicants' contention that Policy TSM4 (rather than Policy TSM3) was the applicable planning policy.

[155] Paragraph 7.14 of Policy TSM 3 states:

> "*To allow informed consideration all applications made under this policy will be expected to be accompanied with the following information:*
>
> - *Sufficient evidence to indicate how firm or realistic the particular proposal is and what sources of finance are available (including any grant aid) to sustain the project.*"

In passing, planning applications to which Policy TSM4 applies must satisfy the additional requirement of providing a tourism benefit statement demonstrating the value of the proposal in terms of tourism revenue, increased visitor numbers to Northern Ireland and the locality and furtherance of the Tourism Priorities for Action Plan.

[156] The pleaded formulation of this ground incorporates two complaints, namely that the Council (a) failed to investigate the role of Don Hotels Limited in the planning application and (b) acted in breach of Policy TSM3 by accepting "*wholly inadequate*" financial information provided by the developer.

[157] The factual elements of this discrete ground of challenge are compact in nature. The planning application was received on 31 October 2016 and identified the developer as the applicant. Until July 2017, in the immediate wake of the subsequently aborted first grant of planning permission, there was no indication that the operator of the proposed hotel and other operations would be other than the developer. At this stage, Don Hotels made a first, unheralded appearance. By letter dated 28 July 2017 Don Hotels notified the Council that it had contracted to purchase the development site. It transpired that this contract pre-dated the planning application, being dated 30 August 2016. All of this information only emerged at the stage of the Council's response dated 03 October 2017, to the first PAP letter written by the Applicants' solicitors. The main purpose of the aforementioned letter, addressed to the Council's CEO, was to register a request that the Council execute a deed of easement with the company in specified terms.

[158] Mr Allister wrote to the Council's HOP by letter dated 05 October 2017, in the following terms:

> "*I refer to the submission on behalf of the applicant, dated 20 September 2017, which purports to comply with the requirement of 7.14 of PPS16 … hitherto hidden information on financial viability – which caused the Council to ask the High Court to quash its own decision granting planning permission – is now acknowledged to have been wholly inadequate; otherwise you would not have been asking for additional information …*
>
> *I suggest that the information now supplied also fails the test of 'sufficient evidence' to allow 'informed*

consideration'. The claim by the applicants' agent in his letter of 20 September 2017 that 'the funds … are in place to take the project forward' is not borne out by the content of what he has submitted. There is expectation, but not evidence, of funding …

Clearly, there are no arrangements in place, just hope and expectation! …

Likewise, with grant aid. A grant funding application has been submitted to Invest NI, but there is no offer of assistance ….

Nothing is quantified. And to whom would any loans or grant aid be offered? The [agent's] *letter of 15 September 2017 speaks of the funding being sought for 'the developer'. But, something significant, which is not revealed, is that the developer no longer seems to be the planning applicant, C&V Developments Limited, because – though the 'financial' support documents do not reveal it – C&V Developments Limited has contracted to sell the subject lands to Don Hotels Limited …*

Erne Terrace Company Limited was incorporated on 08 July 2016 and then changed its name to ~~Dawn~~ Don Hotels Limited with a single shareholder and director. It has no apparent history of trading or assets or involvement in hotel development. The single director and shareholder was previously director of a company now dissolved …

It is claimed that business plans have been prepared, but none have been submitted …

Thus, I respectfully suggest that the information supplied on 20 September 2017 falls far short of what is required under PPS16."

Mr Allister received neither an acknowledgement of nor a reply to this letter, an issue not addressed in the Council's affidavit evidence.

[159] Mr Allister made further written representations, dated 04 December 2017. These contained nothing relating to the "operator identity" issue. Next on 22 January 2018, two days in advance of the scheduled PC meeting, the Council's head of planning telephoned the developer's agent. The purpose of this (per her contemporaneous file note) was "*to clarify role of ~~Dawn~~ Don Hotels Limited in this planning application*". The response was that the agent would arrange for the

developer to telephone. According to the note, this occurred on the same date and the developer –

> "*…. advised that this was a joint venture between C&V Developments and Don Hotels Limited and* [the latter] *would be project managing the project managers* [sic]."

Evidentially, this signifies the end of the discrete Don Hotels "chapter". It is common case that the Council made no further enquiries and requested no further information relating to this company.

[160] The Council's affidavit evidence addresses this issue as follows. The planning case officer, in his first affidavit (para 39ff) avers:

> "*The involvement of Don Hotels Ltd is a factor that was taken into account and was further investigated. The Respondent is satisfied that the applicant C & V Developments Ltd is properly identified, and that it has satisfactorily explained the relationship. The issue was taken into account.*
>
> *A feasibility study had been undertaken, a business plan developed, the fact that the project was out to tender, and the involvement of Interstate Europe Hotels and Resorts and Don Hotels Limited were known to the Respondent and were material considerations, as was the information from ASM and that sources of finance were available to sustain the project.*
>
> *Furthermore the Planning Committee itself engaged with the issue of Don Hotels Limited and the financial issues generally. The speakers addressed this matter and Members posed questions and investigated the issue before taking the decision*".

The deponent exhibits materials exhibited which were provided by Ferguson Planning to the Department on 20th September 2017, comprising letters from ASM Chartered Accountants ("ASM" - appointed project accountant) Interstate Europe Hotels and Resorts ("Interstate", the appointed hotel operator) and WH Stephens (appointed project manager). The accountants represented *inter alia* that they had prepared business plans to support applications for bank funding.

[161] In his first affidavit the case officer refers to "*the involvement of Interstate Europe Hotels and Resorts and Don Hotels Limited*". (It is not clear that the "*involvement*" of the first of these two named actors had been disclosed by the Council to any interested party previously: Mr Allister's discrete complaint to this

effect appears well founded.) The exhibits included a letter dated 19 September 2017 from Interstate Hotels. This confirmed:

> "*… that a full feasibility study has been carried out and we are confident that there is demand in this area for the proposed hotel. We have taken our knowledge of the industry to prepare a full set of projections and we can confirm that the business is viable and sustainable. In light of this, Interstate are now appointed as the management company of the proposed hotel project*" (TB3, p113).

The case officer avers that the "*involvement*" of these two actors –

> "*… where* [sic] *known to the Respondent and where* [sic] *material considerations, as was the information from* [the developer's agent] *that sources of finance were available to sustain the project.*"

The case officer bases these averments on a feasibility study, a business plan and "*the fact that the project was out to tender*". He further suggests that both the "Don Hotels" issue and that of "*the financial issues generally*" were adequately probed by the PC at its January 2018 meeting. This, a matter of opinion and objective evaluative assessment, is strongly contested by Mr Allister who highlights in particular that the financial information provided by the developer's agent in September 2017 makes no mention of Don Hotels.

[162] The developer has sworn an affidavit which contains the rather brief averment that –

> "*… 46 companies, and a minimum of 86 people, have been involved in the project to date. Spending to date on matters such as design fees/professional fees/planning fees etc has been in excess of £1.6.*"

There is also an affidavit sworn by the accountant who provided the information received by the Council in September 2017 when the second planning application (post-quashing order) was lodged. This confirms that the accountants had made a positive assessment of the viability of the proposed development and not the land owner or developer. The deponent further avers:

> "*Throughout my involvement with the project, I have worked with a team of individuals who represent C&V Developments and Don Hotels.*"

[163] While the accountant's affidavit appears to confirm the absence of concrete funding offers from/arrangements with "*various banks and Invest NI*", this issue was

further addressed in a letter dated 15 September 2017 from ASM to the Council indicating that ASM were strongly of the view that there was a need for a hotel of the nature proposed and opining that the project would be commercially viable, adding:

> *"The sources of funding available to the project include private equity, bank finance, mezzanine finance and grant aid. Each source of funding will carry related conditions which will be assessed by the developer and its advisors when drawing final conclusions as to the most appropriate funding structure for the scheme. As it currently stands, we can confirm that discussions have been held with a number of local banks and which have indicated a willingness to offer debt to support the project. However, one of the conditions of those offers will be the securing of full planning consent for the project.*
>
> *Invest NI and Tourism NI were consulted at the earliest opportunity when the scheme concept was being developed. Subsequently, a grant funding application was submitted to Invest NI. This was supported by a detailed business plan.*
>
> *There has been an on-going dialogue between this firm and Invest NI as it undertakes its own assessment of the proposed project. We fully expect the project to secure an offer of assistance from Invest NI and it is usual practice that any offer of capital grant assistance will include the condition that the project has, or must secure, full planning consent. Otherwise, the grant offer is non-binding.*
>
> *In terms of the balance of funding to be introduced to the scheme, the developer has the necessary monies available to it to bridge the gap between the bank finance and grant assistance that it expects to secure, to the enable the scheme to progress."*

[164] The feasibility study identified by the case officer is the ASM *Hotel Demand and Need Assessment* document, which was submitted with the planning application as noted at para 1.4 of the Planning Statement, where it is identified as **Economic Assessment** . It is acknowledged that the Council did not receive, and thus did not consider, the tender documents or business plans identified in the aforementioned correspondence.

[165] The PC's consideration of these issues is addressed in the affidavit of the developer's agent (Mr Ferguson of Ferguson Planning, at paras 39-41) and in the minutes of the PC meeting on 24 January 2018, which record:

> *"The Chair invited T Ferguson, Agent and N Northam to address the Committee in support of the application and responded to points of clarification. T Ferguson advised that the supporting financial information included C&V Developments Ltd, Don Hotels Ltd and Interstate and that the financial information of the developers referred to in ASM Chartered Accountants letter related to both C&V Developments Ltd and Don Hotels Ltd. N Northam provided a background to Interstate Europe Hotels & Resort's involvement in the hotel industry and their confidence in this project.*
>
> *T Ferguson responded to questions from Members regarding access and funding, referring to C&V Developments Ltd, Don Hotels Ltd and Interstate Europe Hotels & Resorts."*

The agent's averments are supported by the minutes and other records of the PC meeting.

[166] Brief mention of the 2017 judicial review application is appropriate at this juncture. The story of this first judicial review is a simple one. On 29 June 2017 the Council determined to grant planning permission for the proposed development. On 14 August 2017 the Council commenced judicial review proceedings, brought in the name of its CEO. The court was asked to quash the grant of planning permission on the ground that the financial viability information provided pursuant to paragraph 7.14 of Policy TSM3 had been treated as commercially sensitive, one of the consequences whereof was that the objectors had been denied the opportunity to consider the information and make any appropriate representations. The stimulus for the judicial review application was a PAP letter dated 18 July 2017 written by the Applicants' solicitors. Under the rubric of "*Information And Documentation Sought*" the solicitors requested *inter alia* "*…. all communications with any agency or party touching upon the funding of the proposal*". By order dated 06 September 2017 the High Court quashed the grant of planning permission.

[167] Just two days later the Council's Senior Planning Officer ("SPO", Mr Wilson) wrote to the developer's agent stating *inter alia*:

> "*This application will now have to be considered* [sic] *and a fresh decision taken. To allow informed consideration, and in accordance with paragraph 7.14 of PPS16, Council require the following information: sufficient evidence to*

> *indicate how firm or realistic this proposal is and what sources of finance are available (including any grant aid) to sustain the project.*"

This elicited a letter of response dated 20 September 2017 enclosing letters from ASM, Interstate and WH Stephens, accompanied by the comment:

> "*As you will see from the letters it is clear that the funds and operations are in place to take the project forward. The significance of the proposal in terms of job creation and inward economic investment to the North Coast is vast and something the applicant seeks to bring forward in the very near future.*"

The correspondent invited the SPO to request any additional information considered appropriate.

[168] ASM represented that they had been engaged by the developer in 2016 to undertake research in connection with the development proposal. This gave rise to the preparation of business plans to support applications for bank funding and grant aid. It was noted that any grant aid would be contingent upon planning permission being granted. The accountants stated specifically:

> "*… we are strongly of the view that there is a need for a hotel of the scale, quality and facilities proposed by the developer. We believe that the project will be commercially viable. The sources of finance available to the project include private equity, bank finance, mezzanine finance and grant aid. Each source of funding will carry related conditions which will be assessed by the developer and its advisors when drawing final conclusions as to the most appropriate funding structure for the scheme. As it currently stands we can confirm that discussions have been held with a number of local banks which have indicated a willingness to offer debt to support the project …*
>
> *Invest NI and Tourism NI were consulted at the earliest opportunity when the scheme concept was being developed. Subsequently, a grant funding application was submitted to Invest NI. This was supported by a detailed business plan. There has been ongoing dialogue between this firm and Invest NI as it undertakes its own assessment of the proposed project. We fully expect the project to secure an offer of assistance from Invest NI ….*"

The Interstate letter expressed the firm belief that the development proposal was "*viable and sustainable*" and that it had been appointed as the "*management company*

of the proposed hotel project". The letter from WH Stephens ("*Project Managers and Cost Consultants*") confirmed their appointment in early 2017, the issue of the tender for the project in July 2017 and the subsequent receipt of tenders from putative contractors.

[169] The concluding submission of Mr Kane QC on this issue suggested that it was essential that the PC decision makers be informed of the components of the "*joint venture*" (the terminology of the developer). The belated, and perhaps fortuitous, disclosure of further information on this topic on the date of the PC meeting (24 January 2017) was criticised. The central plank of Mr Beattie's submission had a strong focus on the policy wording of TSM3. He contended that the policy language is "*replete with planning judgement*", thereby engaging the *Wednesbury* standard of review.

[170] The authors of Policy TSM3 could have formulated the requirement under scrutiny in a prescriptive manner. They could have opted for a policy model requiring the provision by the developer of specific types of information satisfying certain standards. This, however, is not the model which was devised. Rather, the actual policy standard requires of the planning officials and PC members concerned a series of subjective views and opinions. It is for them to judge, without reference to a list of prescribed standards and requirements, whether sufficient evidence to indicate how firm or realistic the development proposal is. The second element of the policy requirement invites a further evaluative judgement about the available sources of finance. The policy requirement as a whole requires the decision makers to make an assessment of financial viability. The policy permits them to do so without attempting any kind of financial audit or accountancy exercise. I accept Mr Beattie's submission that the *Wednesbury* standard of review is applicable. The task of the court is to consider the relevant evidence which was before the PC members and to ask whether they could be rationally satisfied about the foregoing.

[171] The Applicants' challenge has subjected all the evidence bearing on this ground of challenge to penetrating scrutiny. The court is the beneficiary of this exercise. The *Wednesbury* principle poses an elevated threshold for judicial intervention under this ground. I have been unable to identify any indicators of irrationality. On the contrary, the issue of financial viability was the subject of appropriate evidence and sufficient consideration. Furthermore, there was no policy requirement to make any further investigation of the role of Don Hotels. While such enquiry might conceivably arise under paragraph 7.14 of PPS16 in a given case, in the present case the role proposed for this entity was disclosed sufficiently in a context in which it was but one facet of the elaborate structure devised for delivering the proposed development.

[172] There are two final considerations. First, the Applicants have adduced no evidence confounding the Council's assessment that the project that the project was financially viable. Second, the discrete issue of further enquiry is itself subject to the *Wednesbury* principle: see *Re Hegarty* [2018] NIQB 20 at [31] – [36]. The Applicants'

case falls well short of establishing an irrational failure by the Council to pursue further enquiries about any aspect of financial viability, including Don Hotels. It follows that I dismiss this discrete ground of challenge.

21. The Improper Motive Ground

[173] This discrete ground of challenge was somewhat elusive and nebulous, perhaps on account of its essence. Its clearest focus was on the statements and conduct of the Council's CEO, addressed in [21](ff) above. Mr Kane's submissions also ranged in considerable detail over the evidence relating to the Council's grant of an essential vehicular access easement over its lands for nil consideration. The tentacles of the easement issue were far ranging, implicating in various degrees a substantial number of the protagonists in these proceedings. In essence, the case made was that the actions of the Council's planning officials and PC members were tainted by improper external influences.

[174] The outline above is confirmed by the formulation of this ground in the final incarnation of the Order 53 pleading. This contains nine particulars in total, which draw attention to specific certain other of the particulars appear to rather stray into other territory and are couched in the terms of "*failed to take into account*" bare assertions which fall foul of the "*SOS principle*": see *Re SOS (NI) Limited's Application* [2003] NIJB 252 at [18] – [19].

[175] Salient features of the evidence relating to the easement issue include the following. There is a letter, with enclosures, dated 11 October 2017 from the Council's HOP to DfI. The covering email addressed the following request to DfI:

> "*Please advise whether the Department wishes to call-in this application based on the information attached.*"

The letter identifies the relevant statutory power namely section 29 of the Planning Act (see paragraph [73] *ante*). It was accompanied by substantial attachments and refers *inter alia* to the High Court quashing order of 06 September 2017 whereby "*… the decision be remitted to the proposed respondent to hold a fresh adjudication before an independent panel*". The quashing Order was the evident impetus for the communication.

[176] The text continues:

> "*Objectors to this application are alleging that the Planning Committee would not fulfil this role as an independent panel and have requested Council write to you requesting that the Department call-in the application for determination …*

Furthermore, one of the issues of concern to objectors is the matter of Council granting an easement for £1 to the developers over Council land. Subsequent to the granting of the easement, Council received a further request from the developers to acquire some of Council's land at the site for overflow car parking. The area of land requested was included in the developer's planning application. Council has not taken any decision yet in respect of this subsequent request. At the time of the granting of the easement Council did not obtain a valuation but granted the easement for a nominal sum based on a report from the office seconded to Council from the Strategic Investment Board. Recently Council did obtain a valuation on the easement which has borne out the stance taken at the time. Copies of the easement and both valuations are enclosed and the report from the SIB officer enclosed."

One of the attachments to the letter was a deed made on 17 June 2016 between the Council and the developer pursuant where to the Council, in consideration of the payment of £1, granted to the developer an easement over certain Council land, the effect whereof was to provide a crucial means of access from the Ballyreagh Road to the development site.

[177] Another attachment to Ms Dickson's aforementioned letter is a three - page document entitled "*Potential Grant of Easement – Council Lands at Ballyreagh*". This document has no title and is not on any official notepaper. Furthermore, it is neither signed nor dated. Nor is the agency under whose auspices it was created disclosed. Given these defects is a quite unsatisfactory document.

[178] Ultimately, the genesis of this document was explained in the affidavit of Jonathan Grey dated 6 February 2019. Mr Gray is the Projects Director for Strategic Investment Board Ltd ("*SIB")* providing services to this Council and Derry City and Strabane District Council. He refers to a meeting of 3rd March 2016 discussing the potential easement. At paragraph 9 he avers that:

"9. The legal, practical and financial aspects of the issue were discussed at the meeting together with the overall public interest and risks. At the end of the meeting, Mrs Quinn asked that I provide her with a note and to copy in Mr Hunter. I returned to my desk and worked on writing up the note for the rest of that afternoon and at 7:05pm I sent the note to Mrs Quinn and Mr Hunter by email. I also copied the note to Mr Thompson for information because he has responsibility within the Council for the operation management of the North West 200 Pits area, and it was sent to Mr Baker as he is the Director with responsibility for Mr Thompson's service area. I did not retain any other

notes of the meeting."

I shall describe Mr Gray's composition as the "*SIB report*".

[179] The following passages in the SIB report are noteworthy:

> "*Proper consideration of what constitutes obtaining best value in the context of the governing legislation requires consideration of the overall costs and benefits to the public purse …*
>
> *The value of an easement on the land under consideration, in the absence of the proposed development, is low. This is because the land is under lease to the NW200 for another 10 years and is therefore undevelopable for the foreseeable future.*"

The statutory duty to which the Council was subject in this discrete context was that of securing the best price which could reasonably be obtained, per section 96(5) of the Local Government Act (NI) 1972.

[180] The SIB report then considers, and rejects, the option of compulsory acquisition, continuing:

> "*It could be argued that a higher value could be obtained for the easement on the land on the basis that it is key land for the proposed development. However, this has to be weighed against the broader benefits to Council that would accrue from the development proceeding.*"

Certain "monetary benefits" and "non-monetary benefits" are then identified. The document concludes:

> "*Based on the overall analysis of the benefits to the Council of the development proceeding, the de minimis value of the land involved and that Council has statutory competence in relation to tourism and economic development, it is considered that granting an access easement over the land to facilitate and enable the development to proceed clearly achieves best value for Council.*"

There is a link between this document and certain E-mails and notes, which I have considered.

[181] Another attachment to the HOP's aforementioned letter was a report prepared by Philip Tweedie and Company, a firm of professional valuers, dated 29 July 2017 (see in this context [43] – [47] above). This is entitled "Valuation and

Report on Easement at The Pits, Portstewart, BT55 7PT". From the "Executive Summary" and an accompanying letter, it is clear that this report was commissioned by Mr Hunter, Council solicitor. The report concludes:

> "*The value of the easement is de minimis as a result of the estimated costs of developing the adjacent land …. The development of the adjacent land will enhance the economy of the borough and will be to the benefit of the Council.*"

In the body of this short report the author reasons "*… there is no significant increase in the market value of the adjacent land which could be attributed to the grant of this easement* [because] *the cost of developing the site for the proposed hotel complex is so significant that it outweighs any increase in market value between its existing use (agricultural) and its proposed future use (hotel)*". The "*adjacent land*" is the development site.

[182] The two successive planning case officer's reports to the Council's PC in June 2017 and January 2018 respectively are silent on the issue of the easement other than the references at Paragraph 5.2 which provides commentary on objections, including that:

> *"The Council has a self-interest in the application as landowner of part of the site and it would financially gain as a result of rates. The Council granted an easement over key land for £1 without which the site would be landlocked. The easement was granted to C & V Development 17.06.17"*

and at paragraph 8.43 where it is stated that:

> *"In addition to the above the applicant has applied and was granted (17.06.2017) an easement of over a piece of lane required to access the site by Causeway Coast and Glens Borough Council. This further demonstrates a firm intent to deliver the development."*

There is also a tangential reference to the possible acquisition of additional Council land:

> "*There was also a revision to the overall layout to include an area identified as overspill car parking and service road as this is integral to the overall scheme and operation of the hotel. A hedge is proposed to enclose this.*"

There is also reference to the need for additional land for the northern parking area and service route at para. 8.129 of the January 2018 Planning Committee Report.

> *"…The Coleraine and District Motor Club who operate and run the NW200 have supported the application in letter dated 15.11.2017 and are satisfied that the need for overspill parking, service access and HGV turning can be provided on a permanent basis. The detail of such arrangements is a separate matter for the landowner, developer and Coleraine and District Motor Club to agree upon."*

(see in this context the observation at [127] above). This is the terminology of both reports.

[183] Other parts of the evidence bearing on the easement issue have been addressed in earlier sections of this judgment: see in particular the resumes at [32] – [37] and [42] – [47]. The easement itself was granted by an indenture made on 17 June 2016. The parties to this deed are the Council and the developer. This records the grant of the fee simple in the strip of land in question for a consideration of £1. The attached map illustrates clearly the strip of land. It is positioned on the westerly extremity of the "pits" area at its intersection with the Landscape Policy Area and provides a direct connection between the Coast Road and the site of the proposed development.

[184] In his submissions Mr Kane QC emphasised the critical importance of the easement to the developer. Without the easement the subject site would be landlocked and the development not feasible in consequence. As regards the CEO it was submitted that the requirement of scrupulous adherence to the demarcation which should exist between the Council corporate and its PC was not observed. Furthermore there was a lack of transparency as the documents indicating the involvement of the CEO during the period in question were not uploaded to the Council's Planning Portal or included within the planning file for inspection or disclosed timeously to the Applicants even in these proceedings. The PC, he argued, required a fuller briefing on the conduct of the CEO.

[185] The affidavits of the planning officials concerned strongly reject any suggestion of improper influence from the CEO. The contemporaneous records of the PC meeting indicate clear and robust advice from the HOP that the views expressed by the CEO were nothing more than his personal opinion and "*… should not be given any weight in the planning consideration*". The HOP asserts that the involvement of the CEO did not extend beyond his exhortations that the planning application be determined expeditiously. There was no "*directive*" or anything comparable from the CEO.

[186] Allegations of improper motive do not feature with frequency in judicial review proceedings. This is a reflection of *inter alia* the real world in which public officials presumptively act in good faith and conscientiously in the discharge of their duties and there are almost invariably evidential difficulties in attempting to prove

the contrary. Improper motive is a near relative of bias in the sphere of public law. Both are insidious and elusive in nature. Direct evidence of these contaminants will rarely be available. Rather, as in the present case, the court is invited to string together various pieces of evidence and make a finding. This invitation is extended in the context of the governing legal principles rehearsed at [53] – [57] above and in the absence of examination in chief or cross examination of deponents.

[187] The Applicants' challenge has exposed certain irregularities on the part of the Council of unmistakable significance: a failure to properly discharge the FOI duties owed to Mr Allister; a failure to timeously and spontaneously provide various pieces of relevant documentary evidence in these proceedings, in breach of the duty of candour owed to the court; clear breaches of the PC's Protocol; an irregular internal valuation of the easement over Council lands; the furtive procurement of a second valuation report; the effective suppression of the latter report, with no alert to the corporate Council; the treatment of Mr Allister on the occasion of the PC's meeting on 24 January 2018; the failure to identify any sustainable reason for refusing (by a majority) Mr Allister's modest and manifestly reasonable deferral request, with resulting inappropriate haste; and the overdue disclosure of certain Council documents at a late stage of these proceedings and in a context of strong compulsion. I weigh all of these considerations in conjunction with those aspects of the evidence upon which the Applicants place particular reliance.

[188] I consider it necessary to bear in mind three particular layers of roles, duties and functions within the Council. The conduct of the CEO and the DLD belonged to one layer. The activities of the planning officials unfolded within a second layer. The third layer involved the conduct of the decision makers, namely the PC members. These layers were not, of course, separated by bright, luminous lines or confined to hermetically sealed compartments. Mr Allister's main complaint relates to the intersection between the first and second of the three layers. This has some *prima facie* attraction. However, I consider the most important interface to be that of the planning officials and the PC. I have subjected the evidence bearing on this to particular scrutiny.

[189] Having done so, while certain imperfections, questions and queries have been exposed and fully ventilated I am left with no misgivings about the purity of the conduct and motives of the planning officials and the PC members. The Applicants have failed to establish to the requisite degree that the briefing of the PC and /or its majority decision were tainted in the manner asserted. I am satisfied that the planning officials and PC members discharged their duties conscientiously and in good faith and without any conscious or subconscious alien motive or predisposition in favour of the developer. This ground of challenge fails accordingly.

21. Unlawful EIA Screening Decision

[190] This ground of challenge is based on certain of the requirements of the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2015 (the "EIA Regulations"). The Council's discrete decision that the proposed development is unlikely to have significant environmental effects is challenged by the Applicants. The sheet anchor of this ground is the fact, clearly demonstrated, that the Council acted upon the misstatement that the boundary of the proposed development site is some 100 metres from the "buffer zone" of a "Marine Protected Area" (located to the north). This is demonstrably erroneous: the northern boundary of the site in fact encroaches on the buffer zone. It does so necessarily for the purpose of required road adaptation and reconfiguration works. This can be linked to condition 30 of the impugned planning consent.

[191] The error is clearly stated in the Council's "EA Determination Sheet", a formal record which documents its EIA screening decision. This identifies the provider of this information as the Northern Ireland Environment Agency ("NIEA"), Marine Team.

[192] The Applicants further contend that the impugned grant of planning permission is non-compliant with the EIA Regulations in certain respects. It is contended in particular:

(i) The EIA screening decision contravened paragraph 2 of Schedule 2 to the EIA Regulations by failing to consider the absorption capacity with the natural environment of "*coastal zones*" in its evaluation of the environmental sensitivity of the geographical area.

(ii) There was a misdirection regarding the "*coastal zone*" issue arising out of the abovementioned factual error.

(iii) The potential impact of the proposed development on the marine environment was not adequately assessed.

(iv) There was a failure to consult with the Marine Division of the Department of Agricultural and Rural Development in Northern Ireland ("*DEARA*"), the relevant expert agency.

I have confined the above summary to those aspects of this ground which are coherently and non-repetitiously formulated. I take note of the asserted breaches of regulations 4(2) and 7(6) in addition to paragraph 2 of Schedule 2. There is evident overlap in the constituent elements of this ground, far from uncommon in judicial review.

[193] By regulation 2 "EIA development" –

> "*… means development which is either* –

> *(a) Schedule 1 development; or*
>
> *(b) Schedule 1 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location.*"

The central pillar of this regime is regulation 4, which prohibits the grant of planning permission for "EIA development" by the relevant authority without first having taken into account "*environmental information*". The latter is defined by regulation 2(2) as:

> "*… the environmental statement, including any further information and any other information, any representations made by any party required by these Regulations to be consulted and any representations duly made by any other person about the likely environmental effects of the proposed development.*"

This is followed by the definition of "*environmental statement*":

> "*… a statement that includes such of the information referred to in Part 1 of Schedule 4 as is reasonably required to assess the environmental effects of the development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile, but which includes at least the information referred to in Part 2 of Schedule 4.*"

[194] There is no suggestion that the development authorised by the impugned grant of planning permission is "Schedule 1 development". Rather the Applicants' challenge focusses on Schedule 2 .The Applicants contend that the approved development is "Schedule 2 development", relying on paragraph 12(c) of the Table in paragraph 2 of Schedule 2. This relates to "*holiday villages and hotel complexes outside urban areas and associated developments* [where] *the area of the development exceeds 0.5 hectares*". Where a project constitutes "*Schedule 2 development*" it is necessary to apply the "*selection criteria*" contained in Schedule 3. These are grouped under three headings: characteristics of development, location of development and characteristics of the potential impact: in paragraphs 1, 2 and 3 respectively. The Applicants' case relies on paragraph 2 ("Location of development"). This provides, in material part:

> "*The environmental sensitivity of geographical areas likely to be affected by development must be considered, having regard in particular to - …*
>
> *(c) The absorption capacity of the natural environment, paying particular attention to the following areas - ….*

(ii) Coastal zones."

The Applicants contend that the "coastal zones" element of the Schedule 3 selection criteria was not lawfully applied.

[195] The Planning (General Development Procedure) Order (NI) 2015 ("the 2015 Order") contains regulations for councils relating to consultation procedures. Article 13 provides:

> *"Consultations as to applications for planning permission*
>
> *13.—(1) Before determining an application for planning permission the council, or as the case may be, the Department shall consult in accordance with this Article and Schedule 3, except where—*
>
> *(a) the consultee has advised the council or, as the case may be, the Department in writing that they do not wish to be consulted;*
>
> *(b) the development is subject to any standing advice provided by the consultee to the council or, as the case may be, the Department in relation to the category of development; or*
>
> *(c) the development is not EIA development and is the subject of an application to which Article 14 applies.*
>
> *(2) The exception in paragraph 1(a) shall not apply where, in the opinion of the council or, as the case may be, the Department, development falls within paragraph 2(b)(ii) of Part 1 or paragraph 2(b)(ii) of Part 2 in Schedule 3.*
>
> *(3) The exception in paragraph 1(b) shall not apply where—*
>
> *(a) the development is EIA development; or*
>
> *(b) the standing advice was issued more than 2 years before the date on which notification of the application was issued to the consultee and the guidance has not been amended or confirmed as being extant by the consultee in that period.*

(4) Where, the council or as the case may be, the Department is required by this Article to consult one or more consultee(s) before determining the application –

(a) it shall give notice of the application together with information specified under Article 15(4) to the consultee; and

(b) notwithstanding Article 8(1)(d) subject to paragraph

(5) the council or, as the case may be, the Department shall not determine the application –

(i) before 21 days after the date on which notice is given under sub-paragraph (a) and development is not EIA development,

(ii) before 28 days where the development is EIA development, or

(iii) any other date agreed in writing between the consultee and the council or, as the case may be, the Department in accordance with Article 15(2)(b),

whichever is the latest.

(5) Sub-paragraph (4)(b) does not apply if, before the end of the period referred to in that sub-paragraph the council or, as the case may be, the Department has received a substantive response required by virtue of paragraph (1) concerning the application from each consultee from whom a response was sought.

(6) The council or, as the case may be, the Department shall, in determining the application, take into account any response from a consultee required by virtue of paragraph (1)."

[196] Schedule 3 to the 2015 Order provides for "Consultation Arrangements". Part 1 provides for "*consultation where an application for planning permission is to be determined by a council*." This states:

"Subject to Article 13, the council must before determining an application for planning permission for development consult a person, authority or body mentioned in a

> *paragraph below in the circumstances specified in that paragraph.*
>
> *The Department of the Environment where a development proposal –*
>
> *(n) involves the use of land likely to have an effect on the marine environment."*

I observe that the statutory language is "effect", unqualified by the adjective "significant", in contrast with the EIA Regulations *(ante).* This is a stricter test, albeit still involving evaluative judgement.

[197] The governing principles were considered in the recent judgment of this court in *Re Sands' Application* [2018] NIQB 80 at [17] – [26] and [29] – [35]. One of the principles which emerges with clarity from the relevant jurisprudence is that every screening decision must be the product of careful and conscientious consideration and, further, "*… must be based on information which is both sufficient and accurate*": *R(Bateman) v South Cambridgeshire DC* [2011] EWCA Civ 157 at [11]. There is a related duty on the planning authority to provide:

> "*… sufficient information to enable anyone interested in the decision to see that proper consideration has been given to the possible environmental effects of the development and to understand the reasons for the decision. Such information may be contained in the screening opinion itself or in separate reasons if necessary.*"

See also *R (Loader) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 869 at [16], [31], [36] and [43] especially. In *Sands* at [19] this court emphasised that every EIA screening decision is rooted in solemn legal duty and is a measure having legal effects and consequences.

[198] I refer to paragraph 31 of the case officer's second affidavit:

> "*…. Mr Allister refers to the red line boundary. While it is acknowledged that a small part of the application site, namely some of that for visibility splays, fell within the marine consultation buffer, it was resolved that consultation with NIEA marine division was unnecessary given that this was of little planning consequence given that it is designated as a visibility splay, which must be retained and kept clear."*

Accordingly, the relevant error of fact is conceded. The task for the court is to evaluate its legal consequences.

[199] The main elements of the evidential framework bearing on this ground are the following:

(i) The Council's EIA determination sheet, dated 13 September 2016, records that the subject site is "*… positioned approximately 100 metres outside the marine consultation buffer*". The formal determination was that an Environmental Statement ("ES") was not required for a series of expressed reasons, one whereof was the following:

> "***The absorption capacity of the natural environment, paying particular attention to the following areas - ….***
>
> ***Coastal zone:*** *the site is not within the marine coastal zone.*"

In the "Conclusion" it was stated *inter alia*:

> "*It is considered the environmental effects from the development would be limited to the site and immediately surrounding area. The proposal is not located directly within or abutting any environmentally sensitive locations.*"

(ii) A chain of emails discloses a series of evidently rushed eleventh hour communications between the Council and DAERA. These demonstrate that the EIA screening assessment was made on the basis that: ***".. the red line boundary of the proposed development is approximately 100 metres outside the marine consultation buffer …"*****(**my emphasis). This was repeated subsequently in the Council's PAP response.

(iii) The evidence includes a short report prepared by Mr McKeown, consulting civil engineer, on behalf of the Applicants, with accompanying map. This states:

> "*The minimum distance between the northern end of the site and the HWMMT line is 82 metres. That is, the 100 metre buffer zone extends to the seawards side of the HWMMT line by up to 18 metres.*"

(iv) The EIA test formulated by DAERA (in a published policy type document) in this particular context is:

> "*Does the development fall partially or wholly within the marine buffer zone, ie 100 metres landward of the Mean High Water Spring Tide Mark out to 12 nautical miles (including estuaries, sea loughs and rivers that are under tidal influence)?*"

(v) The case officer's first report to the PC, in June 2017, stated, *inter alia*:

> "*The consultation did not identify any significant environmental effects from the proposal and the determination was set out in a letter dated 13/09/2016 that the proposal was not an EIA development and as such did not need to be accompanied by an Environmental Statement.*"

The officer's second (January 2018) report to the PC is couched in identical terms.

[200] Ms Murphy, an independent planning consultant who has sworn an affidavit on behalf of the Applicants, refers to the aforementioned DAERA publication and avers:

> "*This advice, albeit quite constrained, in the context of identifying proposed development which may have an effect on the marine environment, placed an obligation on the Council to determine if any of the red line of the proposed development fell within that buffer zone and if it did then consultation advice was required and an assessment reached on any potential impact on the marine environment and coastal zone.*"

The first affidavit of Mr Allister exhibits the DAERA consultation response noted above and its accompanying screen shot. The deponent suggests the genesis of the error in the following averment:

> "*… the accompanying screen shot attached shows the wrong area was examined, in that the area shown relates to an area to the west in the vicinity of Millbank Avenue, Portstewart.*"

This is not disputed.

[201] The formal DAERA consultation response to the Council is dated 07 September 2016. This agency has a number of internal divisions, including the Water Management Unit and the Natural Environmental Division ("NED"). It also has a separate Marine Division which is the relevant expert agency. This latter unit was not consulted by the Council or, internally, by DAERA. It is evident that NED consulted with the Northern Ireland Environment Agency ("NIEA" – and see further [191] above). The NIEA consultation response states *inter alia:*

> "*We would also refer to the BS10175:2011 Code of Practice for Planning and Biodiversity …*
>
> *This information would assist the planning authority to determine whether the potential impacts meet the selection criteria in Schedule 3 of the EIA Regulations or if NIEA's further advice is required. Should the planning authority determine that a development proposal is EIA development, NIEA should be consulted as appropriate to advise further on the scope of the environmental information required to support this application.*"

[202] Mr Allister, in his first affidavit, drew attention to this discrete evidence. The case officer's replying affidavit which contains 15 paragraphs grouped under the heading "Alleged Unlawful EIA Screening Assessment and Ensuing Decision" makes no reply to this. Nor does it with the averments of Ms Murphy reproduced above. The planning officials, having identified a series of issues in the EIA determination sheet, determined that there were no significant environmental effects identified.

[202] The case officer, in his second affidavit, rejoined:

(i) The full image of the DAERA "screen shot" map purports to (a) depict the coastal buffer zone, by a cloudy (light blue) shaded area and (b) does not depict the boundaries of the subject site by a red line, which was drawn by a DAERA official. There is no overlap. This red line "*… does not encompass the entirety of the application site and this red line was not relied upon by the Planning Department to inform whether any part of the application site fell within the marine consultation buffer*".

(ii) Considered in conjunction with the corresponding averments in his first affidavit, the case officer is seemingly suggesting that the DAERA line did not mislead him or his colleagues. His affidavits exhibited a map that showed the planning application site encroaching beyond the DAERA red line.

(iii) As only a small corner of the buffer overlapped the red line and the area was designed merely to facilitate visibility splays "*… it was resolved that this was of little planning consequence … a planning judgment was reached that no further consultation with NIEA Marine Division was necessary*".

[203] Mr Kane QC, in his concluding submissions, contended that the negative EIA screening decision was legally flawed as it was based on inaccurate information concerning the marine buffer zone. This, it was argued, gives rise to breaches of those provisions of the EIA Regulations identified above. It was further

submitted that "*effective public participation*" philosophy, one of the principles underpinning this measure of EU law, was frustrated as a result.

[204] The submissions of Mr Beattie QC confirmed that the factual error of the NIEA consultee which forms the cornerstone of this ground is (correctly) not contested. An affidavit sworn by the Council's Senior Planning Officer purports to explain how the error came about. This contains the following key passage:

> "*Following receipt of* [the NIEA] *response the Planning Officer … and I reviewed the position. I was aware of the full extent of the application site boundary and of the extent of the marine buffer, notwithstanding the DAERA map which I had seen which did not include the full planning application red line boundary. I was aware that only a tiny part of the planning application red line of the proposed application site crossed into the buffer and that that area involved no development, but rather was only included for the purpose of visibility splays. Taking all of this into account I decided that no further consultation was required ….*
>
> *The overall assessment was made that the proposal was unlikely to have any significant environmental effect on the marine environment and further consultation was not required.*"

This affidavit was sworn at a relatively late stage of the proceedings. While Mr Beattie also advanced certain submissions relating to the Councils' duty to consult, I consider that these lay outwith the real contours of this ground of challenge and, further, neglected the principle that every consultation exercise, whatever its parentage, must comply with certain irreducible legal requirements.

[205] Certain salient features of the evidence invite the following analysis:

(a) There is no note or record or any other evidence of the Council's planning officers' discovery of the NIEA/DAERA error.

(b) There was no further relevant communication between the Council and any agency.

(c) There is no note or record or other evidence of the consideration which the Council's planning officers claim to have given to this issue upon their discovery of the aforementioned overlap.

(d) The averment that no "*further*" consultation with NIEA Marine Division Is untenable, as there had been no <u>previous</u> consultation with this agency.

(e) The September 2016 email flurry contains no reference to or hint of, even oblique, Mr Mathers' claims regarding error discovery and ensuing evaluative planning judgement.

[206] The coastal zone/marine environment issue has been a feature of the Applicant's case from the outset, as a perusal of the original Order 53 Statement confirms. The Senior Planning Officer's affidavit was sworn at a stage (March 2019) when, but for the unexpected events of December 2018 (see [4]ff above) the hearings would have been completed. The deponent avers that he makes his affidavit in response to the fifth affidavit of Mr Allister. Just over half of his averments accord with this description. However, unprompted and not responding to Mr Allister's fifth affidavit, the deponent then embarks upon a series of averments relating to the marine buffer issue. This occurred in the midst of the turbulent waters in which the Council found itself following Councillor McShane's unexpected intervention mid – proceedings. The timing and context of his evidential contribution to this subject are striking.

[207] Having regard to [203] – [206] the court must entertain significant misgivings about the averments of the planning case officer and the Senior Planning Officer on this issue. I find this evidence quite unsatisfactory. It savours of impermissible *ex post facto* rationalisation.

[208] Ultimately, the legal analysis is quite straightforward. The "*coastal zones*" assessment required by paragraph 2 of Schedule 3 to the EIA Regulations was not carried out. Thus there was a breach of the Regulations. By virtue of this breach specified "*environmental information*" was not taken into account in either the case officers' reports or the deliberations and decision making of the PC decision makers. Regulation 4 prohibits the grant of planning permission for "*EIA development*" without first having taken into account "*environmental information*". A breach of regulation 4 has thus been established.

[209] Furthermore, an uncontested material error of fact has intruded: see the survey of the applicable principles in *MM (Sudan) (ante)* and the decision in *E & R v SSHD* [2004] EWCA Civ 49 in particular. I consider the materiality of this error to be beyond plausible dispute. This is particularly clear from the terms of the screening decision itself, as recorded in the EA Determination Sheet. The error was one of egregious dimensions, considered in its full factual, policy and statutory context. To this public law audit may be added the misdemeanours of legally defective consultation, the intrusion of an alien (or immaterial) factor and the disregard of the true facts.

[210] Mr Beattie QC highlighted that the planning officials' consultations with DAERA Marine Division identified hydrology and water impacts as a material consideration, giving rise to proposed planning conditions which, ultimately, were imposed. This court is not prepared to conclude that this in some way operated as a substitute, adequate or otherwise, for the exercise specifically required by

paragraph 2 of Schedule 3 to the EIA Regulations. The contrary conclusion cannot be made with confidence. The court simply does not possess the expertise required to make this conclusion. One of the major purposes of the consultation exercises required by the relevant legal rules is to ensure that those agencies equipped with the requisite expertise make a meaningful and accurate contribution to the planning officials' advices to the PC and the deliberations and decision making of the latter. This did not occur in the present case.

[211] Finally, the question of whether the public law misdemeanours diagnosed suffices *per se* to vitiate the impugned grant of planning permission does not arise, given the court's anterior conclusions that three of the Applicant's other grounds of challenge are made good. If this stark question had to be confronted, I would supply an affirmative answer, having to the elevated importance accorded to environmental protection in our legal system in recent years. Furthermore, if and insofar as there is any merit in Mr Beattie's submission that in the matrix under scrutiny there was no legal duty on the Council to consult, the swift riposte is the public law principle that consultation, once undertaken, must comply with all relevant legal requirements and principles. For the reasons given this ground of challenge succeeds also.

22. The Interested Parties

[212] I refer to the court's ruling and decision at Appendix 2 and associated Order. In response, the Applicants' representatives provided the following:

> ***"RULINGS ON INTERESTED PARTIES***
>
> *Pursuant to the Case Management Direction issued on 13th June 2019 in which the Court directed the Applicants to provide Schedules of the findings, if any, which they sought in respect of five interested parties, the Applicants have now drafted the appropriate Schedules.*
>
> *At the outset it should be emphasised that any criticism of Messrs Hunter, Jackson and Baker flow from their involvement as Council Officers in this matter and not as individuals whilst in relation to Messrs Tweedie and Woodhead, it is in their capacity as persons instructed by the Council and not as individuals.*
>
> ***SCHEDULE ONE – PHILIP TWEEDIE***
>
> *As regards Mr Tweedie a finding that no allegation of personal impropriety or professional negligence is made against him but that the professional opinion of his firm's employee is challenged by Mr Hopkins on behalf of the Applicants.*

SCHEDULE TWO – PETER WOODHEAD

As regards Mr Woodhead the Applicant contends that the Court should make the following findings: -

1) He received verbal instructions from the Council Solicitor, David Hunter, to carry out a valuation of the easement already granted to the Developer;
2) He was informed by Mr Hunter that the land had already been disposed of and the price obtained;
3) He proceeded to carry out the valuation without receiving written instructions from the Council and his letter accepting the parameters of instruction related to verbal instructions;
4) He stated that the basis of the valuation was for asset management purposes rather than for an easement. The Executive Summary section of the report was inaccurate;
5) That a clear difference of professional opinion exists between himself and Mr Hopkins.

Whilst the Applicants have raised several criticisms of Mr Woodhead's report, some of which are noted in the reports of Messrs Hopkins and Callan, they wish to make clear that they seek no finding of personal impropriety or professional negligence against him. He has provided a professional valuation report that was open to a contradictory professional opinion being taken, for the reasons set out above and in the report of Mr Hopkins. The findings sought by the Applicants relate to the statements of Mr Hunter in his Affidavit and tape recordings.

SCHEDULE THREE – DAVID HUNTER

As regards David Hunter the Applicants contend that the Court should make the following findings:

1) He obtained a valuation report on the easement from Philip Tweedie and Co as a result of an intimated challenge by the First named Applicant to the decision of the Council and following receipt of a Northern Ireland Audit Office enquiry to the Council on 30th June 2017.
2) He obtained the valuation in July 2017 in order to cover the bases and not prior to the granting of the easement.

3) He agreed with Councillor Mc Shane in the recording of the 1st June 2018 that the valuation was garbage, and that the approach taken by the Council was in the Councillor's words, ridiculous.

4) He concealed that the Chief Executive pushed the project very hard and put pressure on everybody to just get the project done, and that was the directive.

5) He carried out tasks, as the council solicitor, at the direction of the Chief Executive, with which he was uncomfortable.

6) He failed to ensure that the Planning Committee was properly informed as to the arrangements with the valuation of the easement;

7) He accepted the truth of Councillor Mc Shane's comment in the tape-recorded conversation on the 1st June 2018 that the Council Committee did not know about the proposed arrangement in respect of the granting of the easement.

8) He was aware that the Chief Executive was interfering in the planning process, that the Head of Planning was complaining of being pressurised by the Chief executive on a frequent basis but failed to take any steps to report such behaviour.

9) He failed to ensure the Council carried out its legal and asset disposal considerations in respect of the easement as ordered by elected members on 19th January 2016.

10) He failed to properly answer Councillor Mc Shane, when asked in the meeting of 28th September 2018 as to whether the Council had fulfilled its legal duties on the grounds of self-discrimination (sic)(incrimination).

11) He was aware that Richard Baker asked Jonathan Grey to obtain a valuation and proceeded on that basis. He did accept that valuation even though he himself admits that he knew Mr Grey was not qualified to give the valuation. He failed to follow due legal process in this regard and furthermore failed to follow properly the Council Committee direction of the 19th January 2106.

12) He failed to stop this flawed process and, in his words, let it go. He did not, as a solicitor to the Council, stop this process and tell the others in the Council to follow due process.

13) He advised Peter Woodhead that the land had already been disposed of and the price obtained.

14) He obtained a valuation over 11 months after it had already been granted and simply to have it on file. He did not act in the best interests of ratepayers.

15) He participated in a process whereby an open-ended and irrevocable easement was granted in perpetuity

to a developer who had yet to secure planning permission and without any proper valuation being carried out, prior to its grant.

Mr Hunter has not denied any of the admissions and comments he made to Councillor Mc Shane in the tape-recorded conversations. In his very brief affidavit he does not dispute that it is his voice on the recordings. He seeks to place his own interpretation on some of his comments about the Chief Executive but does not dispute that he failed to follow due process nor does he dispute the chronology of the granting of the easement and valuation while accepting that the Council Committee was not fully informed by himself.

Accordingly, on the basis of his own words alone, the Court should make the requested findings against Mr Hunter.

SCHEDULE FOUR – RICHARD BAKER

In respect of Mr Baker, the Applicants ask the Court to find

1) He contacted Invest NI on behalf of the Developer and declared council support for the project
2) He engaged with the Planning Process at an early stage, meeting with planning officials and Jonathan Gray, the author of the SIB report
3) He applied considerable pressure to David Hunter in respect of the valuation of the easement.

SCHEDULE FIVE - DAVID JACKSON

As regards the Chief Executive, David Jackson, the Applicants contend that the Court should make the following findings:

1) He promoted this specific planning project declaring it to be a "strategic priority".
2) He actively participated in the facilitation of the site assembly for the developer via the Council granting the essential access easement.
3) He attended meetings involving the Developer and Planning Officials.
4) He made written comments to Council Officials, including planning officers, which were explicitly and implicitly supportive of an impetus towards approval.

5) He actively facilitated the granting of the easement with request to council officials to turn it around quickly.
6) He failed to disclose a number of Freedom of Information documents sought by the Applicant, Mr Allister, until directed to do so by the Information Commissioner's Office.
7) He failed to disclose to the Applicants and the public a number of documents to which they were entitled under FOI (see Bundle to be supplied to the Court by the Applicants on 18 June 2019).
8) He pushed the development project very hard and put pressure on everyone to get this done and that was a directive issued by him.
9) He tried to pressurise the Head of Planning on a frequent basis.
10) He instructed the Council Solicitor to carry out tasks with which the Solicitor was professionally uncomfortable.
11) He failed to advise the DFI in correspondence sent by him in February 2018 that the Council Committee which approved the grant of easement had been informed that a valuation would be obtained prior to disposal whereas it was not obtained until a year after disposal.
12) He failed to answer accurately questions posed to him by an elected Councillor, probing whether the Council had complied with its duties to ratepayers. He expressed concerns to Councillor Mc Shane in his tape-recorded conversation of 2nd October 2018 about the lack of a valuation for an easement and implied he was oblivious to that lack of valuation and reasons for it but that suggestion is not credible. In his own affidavit he admits that he was involved in the decision to obtain a valuation in July 2017 and had investigated why it had not been obtained.

13) He failed to ensure the equitable discharge of the responsibilities of the Council

Therefore, on the basis of the comments made by Mr Hunter and the documentary evidence the Court should make the appropriate findings against Mr Jackson."

[213] On behalf of the CEO and the DLD Mr Gerald Simpson QC (with Mr Ronan Daly, of counsel) submitted that given the character of these proceedings the court should be slow to embark upon any determination of disputed factual issues, particularly the more controversial ones; there has been no forensic testing of serious allegations; cogent evidence is required in any event to make good the more serious allegations; unwarranted reputational damage could be inflicted by inappropriate

judicial findings; many of the issues introduced in the second phase of the proceedings are at best peripheral to those belonging to the territory of the judicial review challenge; the conduct of both officials was compatible with their public duties and, in particular, the pursuit of the Council's strategic priorities and objectives; there was no impropriety in exhorting expedition in the determination of the planning application; the CEO's actions in leading the first judicial review application are antithetical to any suggestion of improper motive or conduct; and there are robust rejections of the more serious allegations in each of the officials' affidavits. I refer also to the court's resume of the affidavit evidence of these two officials at [32] – [41] above.

[214] On behalf of the Council's solicitor, Mr Henry Toner QC (with Mr Ivor McAteer, of counsel) invited the court to examine carefully the actual wording of the transcribed conversations involving Councillor McShane, in preference to any subjective interpretation or gloss thereof. Counsel further highlighted the expressly "*off the record*" context within which the conversations unfolded. Most of what the solicitor says in the recordings withstands any charge of impropriety in any event, it was argued. The invitation to the court to infer impropriety must founder on a combination of insufficiency of evidence and burden and standard of proof. I refer also to [42] above.

[215] On behalf of the firm of independent valuers, Mr Brett Lockhart QC described the case against his client as a charge that the valuation of the contentious easement had been carried out in a cursory and unprofessional manner, tantamount to an allegation of professional negligence. It was submitted that both the pursuit of this allegation and the terms in which it had been framed were unwarranted for a series of reasons, in particular the independent valuation report prepared on his client's behalf. Given the risk of serious reputational damage, the stakes were high for his client. Mr Lockhart highlighted also the presumptive damage to his client's reputation already incurred, the lack of any available redress, the significant financial expense to which the client has been put in defending himself and the impropriety of the allegations against him being maintained.

[216] As noted in [26] above, Councillor McShane was not legally represented at most of the hearings, in the wake of unsuccessful attempts to secure public funding and Council funded legal representation. He was represented by solicitor and counsel during a finite period only. Arising out of this the court has the benefit of a written submission of Mr David Scoffield QC and Mr Alistair Fletcher of counsel. If and insofar as any of these services were provided *pro bono* the court commends the lawyers concerned.

[217] The submissions of counsel emphasised *inter alia* the unimpeachable motives of Councillor McShane, who has at all times acted in the public interest, together with the following. The issue of overarching concern to the Councillor is the grant of the contentious easement by the Council to the developer for nominal consideration in the absence of a proper valuation report. Councillor McShane

highlights conduct which he considers to have been furtive, improper and shorn of transparency. Counsels' submissions draw attention to various features of the conduct of the three Council officers, suggesting that there are significant questions to be answered. In particular, there is evidence indicating that certain Council officers were predisposed to ensuring that the development proposal was approved, conducting themselves and exerting pressure to this end. The key submission advanced in relation to the easement is the following:

> "*The democratically accountable Councillors were not fully informed of the issues surrounding the easement and were not therefore able to adequately scrutinise the basis for granting same to the developer or the terms on which it was granted.*"

Finally, it is stated in Counsels' written submission:

> "*The matters raised by Councillor McShane's intervention, however, have an impact beyond the confines of the case before the court. It is clear that further investigation and scrutiny by appropriate bodies are required. This is something which Councillor McShane intends to actively pursue.*"

[218] I do not overlook that the developer comes under the umbrella of "*interested parties*". In this context I refer to the court's resume of its evidence at [48] – [52] above. However the issue being addressed in this chapter of the judgment relates to interested parties other than the developer. As [210] makes clear, the Applicants do not request the court to make any particular findings against this agency.

[219] In the concluding submission of Mr Kane QC one finds elements of disclaimer and clarification worthy of note:

> "*The Applicants have never used the language nor made the case of a conspiracy with its attendant ingredients and innuendo having been entered into by the Respondent … the development and diversion of the case towards scrutiny of individuals beyond what was triggered by the 'strategic priority' comment of the Chief Executive was as a direct result of the unforeseen intervention of Councillor McShane …* [who] *… was not providing an account of those encounters which would have been open to the challenges of memory, accuracy and recall difficulties but was rather acting as a conduit for furnishing statements made directly by the two officials themselves whose words and intonation can be heard.*"

Rather than advancing a conspiracy case –

> "*… the Applicants contend that this is a case of planners taking their eye off the ball in haste to secure a new luxury hotel and that, further, they were subjected to pressure from the involvement of senior officers and in particular the Chief Executive who clearly had a bias towards providing directions and facilitating efforts aimed at the approval of the planning application and the provision of the easement critical to its successful approval.*"

[220] The "***Governing Principles***" section of this judgment is at [53] – [57]. The principles which have particular purchase in this discrete context are rehearsed at [54] – [55]. Giving effect to these principles, the court's response to the Applicant's invitation in [210] above is essentially twofold:

(i) The Applicants will easily identify those aspects of the conduct of the interested parties concerned which are admitted or uncontested or objectively incontestable. The court has addressed their conduct only to the limited extent necessary for adjudicating on the Applicants' grounds of challenge. Any further exercise would be inappropriate.

(ii) The Judicial Review Court is plainly not the forum for embarking upon the exercise urged on behalf of the Applicants. There are other arenas in which certain public authorities can deploy mechanisms and powers not available to this court for that purpose. This court declines to engage in inappropriate encroachment.

[221] As regards the independent valuers, the court's construction of what is contained in "*Schedule 2*" in [210] above is that of an unequivocal acknowledgement on the part of the Applicants that differing professional opinions have been expressed and "*… no finding of personal impropriety or professional negligence against him*" is, ultimately, sought. Properly analysed, and as confirmed by the final sentence, what the Applicants are really seeking via Schedule 2 are findings relating to words allegedly spoken by the Council's solicitor.

[222] The court has no hesitation in concluding that the reputation of Philip Tweedie & Co emerges unblemished from these proceedings. There is not the slightest indication of any impropriety on the part of either Mr Tweedie or any member of his firm.

[223] Mention must also be made of the Council's litigation solicitor, Ms Keenan. The perch of presiding judge facilitates certain unique insights into the conduct of proceeding by legal practitioners, the more so in the electronic age. From the mid-proceedings point Ms Keenan found herself in an unenviable situation of unparalleled turbulence, a veritable vortex with multiple attendant challenges, conundrums and stresses. In this maelstrom the court made many demands. Ms

Keenan's professionalism and ready engagement with the court were exemplary throughout.

23. Summary of Conclusions

[224] The conclusions made by this judgment are summarised thus:

(i) The Applicants' challenge succeeds on the grounds of procedural unfairness, breach of the Planning Committee's Protocol, error of law in respect of Policy CMP3 and unlawful EIA screening decision.

(ii) The other grounds of challenge are dismissed.

Remedy

[225] Having considered the parties' post – judgment submissions at a specially convened hearing I consider the appropriate exercise of the court's discretion to entail the making of an order of certiorari quashing the impugned grant of planning decision. Having regard to the particular features, statutory and otherwise, of planning decision making, coupled with those aspects of the impugned grant of planning permission which the court has found to be unlawful, a mere declaration would plainly be insufficient. I would add that remedy of a declaration in this type of context will, in principle, rarely be appropriate.

[226] I decline the suggestion that the quashing order should specify the grounds upon which it is made, as I consider these clear from the terms of this judgment. In addition, the possible creation of a hierarchy of legal flaws, as diagnosed by the court, would be inappropriate. Furthermore, my exchanges with counsel conveyed to me the real risk of disharmony between the judgment of the court and its final order if this course were to be pursued. There is, however, merit in Mr Beattie's submission that the court's earlier expressed view that the Order 53 pleading in respect of the Policy AMP3 ground should be formally amended could create unnecessary uncertainty and debate. Thus I decline to require this step.

[227] The determination of the underlying planning application remains to be lawfully undertaken and completed. This is an exercise to be performed by the Council in accordance the applicable legal rules and requirements and the guidance and education to be derived from this judgment.

[228] The Respondent will pay the Applicants' costs, in accordance with the costs protection Order made at an early stage of these proceeding. All of the interested parties will bear their respective costs.

APPENDIX 1: Ruling & Order 10 December 2018

McCLOSKEY J

[1] The substantive hearing of this judicial review challenge has reached approximately mid-point and ought to be continuing as scheduled. There has however been an unexpected event and that takes the form of an affidavit sworn by one of the Respondent's councillors, Mr McShane. This affidavit was sent by a solicitor representing Mr McShane to the Office of the Attorney General on Friday 7 December 2018. It would appear from the email which has been brought to the attention of the court that it was simultaneously copied to the Northern Ireland Ombudsman's Office. The court has seen the affidavit and considered its contents. It was properly brought to the attention of the court and it was properly distributed among all parties to these proceedings.

[2] The immediate impact of this development is a prosaic one. The court has a series of duties under various provisions of the Rules of the Court of Judicature: Order 53 Rule 3(5), Order 53 Rule 3(7) and Order 53 Rule 9(1), all of which must be construed and applied in accordance with the overriding objective. The court must also be alert to its inherent jurisdiction. The combined effect of these provisions requires the court to ensure that formal notice of these proceedings is given to certain non-parties.

[3] Three such parties in particular are identifiable at this stage. The possibility of identifying others remains open. The parties concerned are the Chief Executive Officer of Causeway Coast and Glens Borough Council, Mr David Jackson, the Council's solicitor, Mr David Hunter and Mr Richard Baker, Director of Leisure and Development. These three persons are implicated in certain events and conversations that are described in the affidavit of Mr McShane. They plainly have a sufficient interest in these proceedings to be given notice.

[4] What is the immediate impact of this unheralded development? Having regard to the issues which have been canvassed in argument to this point and the issues remaining to be addressed I consider it not appropriate to continue with the presentation of the Applicants' case at this juncture. Time is needed for absorption and reaction on all sides and, further, the court must now proactively take certain steps.

[5] The court has wrestled with the issue of expedition from day one in these proceedings. That is traceable to the first order which I made (in June 2018) and has been a recurring theme of the management of this case. It will therefore be apparent to all concerned that it is a matter of great regret and concern to the court that a halt has been reached, unavoidably so, at this uncompleted stage of the proceedings.

[6] A case management court order is required at this stage. It will have the following components:

(i) The judicial review papers and Mr McShane's affidavit will be served on Mr Jackson, the Council Chief Executive Officer, by Wednesday 12 December 2018.

(ii) The affidavit of Mr McShane will be served on the Council's solicitor, Mr Hunter by the same date.

(iii) *Ditto* Mr Baker.

(iv) Any application by Mr Jackson, Mr Hunter or Mr Baker to this court will be made by 20 December 2018.

(v) Irrespective of whether any such application is made Mr Jackson, Mr Hunter and Mr Baker will have an opportunity to provide affidavit evidence to this court, the time limit for which will be 11 January 2019.

(vi) The same opportunity is afforded to the un-named person who is described as the "senior planner" in Mr McShane's affidavit.

(vii) The "Council corporate" will have the same opportunity to provide further affidavit evidence, by 18 January 2019.

(viii) Any rejoinder affidavit on behalf of the developer will be provided by 25 January 2019. Any rejoinder affidavit on behalf of the Applicants, Mr Allister and Mr Agnew, will be provided by 8 February 2019.

(ix) Any further Amended Order 53 pleading will be provided by 08 February 2019.

(x) The court will conduct two further reviews of this case before the end of term. One will be on Friday 14 December and the next will be on 20 or 21 December, to be confirmed.

This order of the court takes effect at once.

[7] There are certain ancillary observations which the court makes at this stage. They are inevitably incomplete and of an embryonic nature. The affidavit sworn by Councillor McShane raises a series of questions and it is to be expected that the parties to these proceedings will formally direct certain questions and requests to Councillor McShane. The court makes no order of any kind at this stage, but it is foreseeable that the court may be formally requested to make an order in respect of certain aspects of the contents of Councillor McShane's affidavit and references

which the affidavit contains, in particular references to recorded conversations and to the unidentified person who is ascribed as the "senior planner".

[8] It is to be expected that the issue of cross-examination may possibly arise and the court will deal with that if and when it arises. It is equally to be expected that the issue of disclosure of documents will arise and if that is not addressed in a consensual manner the court will also be in a position to deal with that.

[9] There are several imponderables arising out of this highly unexpected development. They include the conduct of agencies who have their own statutory functions and responsibilities. In the first place there is the Public Services Ombudsman and the Local Government Standards Ombudsman who has been given direct notice of the contents of Councillor McShane's affidavit. The possibility that other public authorities with their own statutory functions and responsibilities may become involved also clearly exists.

[10] What does all of this mean for the future conduct of the judicial review proceedings? The answer is the court is unable to make any confident prediction at this stage. However, flexibility and imagination may well be required with a view to providing the maximum certainty to those who have a direct interest in the judicial review challenge, namely the Applicants, Mr Allister and Mr Agnew, the Respondent, The Causeway Coast and Glens Borough Council and the interested party, CV Developments. The court will consider mechanisms for providing the maximum and swiftest certainty to the four judicial review protagonists at the earliest possible date. Proposals can be made to the court to that effect by the parties either individually or jointly. One possibility, and it is only one I stress, is that the court could adjudicate and provide a judgment on the issues which have been addressed to date and possibly certain further issues still to be addressed having heard argument of course from all of the parties.

[11] Absent a crystal ball it is not feasible to say anything further at this stage. I confine myself to highlighting what appears to be more of a probability than a possibility, namely the court being unable to adjudicate finally on one of the grounds in particular until certain further events have been finalised. All of this is framed in deliberately tentative and provisional terms. If any of the parties to these proceedings wishes to formulate any litigation management proposal to the court in advance of the review on 14 December please do so and I will quite happily receive that late on the evening of 13 December. Alternatively, you may wish to await certain further developments and instructions from your respective clients and defer that until the review to be conducted on the last or penultimate day of term and I will quite happily accept that suggestion also. Any other developments which occur between now and the listing of each of those reviews will of course, as is considered appropriate, be brought to the attention of the court.

APPENDIX 2: Ruling & Order 13 June 2019

McCLOSKEY J

[1] It is trite to observe at what is required of the court at this stage is a balancing exercise. The court is obliged to take into account a series of factors which are enshrined in Order 1, Rule 1A of the Rules of the Court of Judicature 1980 ("the Rules"). This provision begins with the rather vague and opaque statement that: *"The overriding objective is to enable the court to deal with cases justly."*

[2] However, the rule goes on: *" Dealing with a case justly includes"* - so it is inclusive, it is not exhaustive - "… so far as is practicable", and all of the list that follows resonates in these proceedings, "… *ensuring the parties are on an equal footing, saving expense; dealing with the case in a way that is proportionate; having regard to, inter alia, the importance of the case and the complexity of the issues; ensuring that the case is dealt with expeditiously and fairly; allotting to the case an appropriate share of the court's resources, by taking into account the need to allot resources to other cases."*

[3] I am enjoined by what follows, namely paragraph 3 of the rule, to seek to give effect to what is called the overriding objective, with all of those ingredients and such further ingredients as the court may identify in any given litigation context. I have drawn attention to this at a previous stage of these proceedings and it is timely and appropriate to do so once again at the stage which the proceedings have now reached.

[4] I have, for the purposes of today's listing, reminded myself of what the court has pro-actively and expeditiously done in the history of these proceedings. First of all, within two working days of the application for leave to apply for a judicial review being filed, I drew up a comprehensive initial order, dated 11 June 2018. I am reminding myself as much as everyone else of what I said then, in that order about the timetabling:

> *"The substantive hearing will be conducted during the early stages of the - I leave aside the legalese - the forthcoming term. To this end the parties' representatives are hereby advised that for an inevitably limited period, they have, at this stage, for a two day hearing, a choice of 24 and 25 September and 3 and 4 October."*

The Order further cautioned that I would not be able to hold those dates provisionally available beyond 15 June and certain ancillary directions were duly made.

[5] By the court's second order, issued on 27 June, I granted leave to apply for judicial review and I affirmed the following: *"The matter shall be listed for hearing on two days, namely 8 and 9 October 2018."* Those two dates were finalised after I had

considered representations from the parties. In addition, from the earliest stage of these proceedings, as this brief review has reminded me, the issue of the formulation of the Applicants' case has been a live one and that has been one of the recurring themes ever since. The listing on 27 June 2018 was the first of what ultimately became 22 listings in this court, spanning a period of one year.

[6] The next order which was drawn up was that of 8 October 2018, when I was required, in specified circumstances, to promulgate that the hearing dates which were to be 8 and 9 October were vacated for the reasons which materialised unexpectedly at that stage. I drew up a further timetable in the same order. Allied to the terms of that order was a further direction which made provision for the hearing dates, which at that stage had to be deferred to November 2018. Five days of substantive hearing then ensued. Those who have access to the ruling which I made on 10 December 2018 will be aware of the various unexpected events which then materialised. I described that in this detailed *ex tempore* ruling as an unexpected event which took the form of an affidavit sworn by one of the Respondent's Councillors, Mr Padraig McShane, which was sent by a solicitor then representing him to the office of the Attorney General on 7 December 2018 - the fifth substantive day of hearing, from recollection.

[7] We reconvened on 10 December 2018 for the purpose of continuing and completing the hearing and, for the reasons set out in my ruling, that was not possible. At that stage, I drew attention to the duties which were imposed upon the court by the various provisions of the Rules, quite separate from and independent of the overriding objective and my inherent jurisdiction, stating:

> " *The combined effect of these provisions requires the court to ensure that formal notice of these proceedings is given to certain non-parties ... [* inexhaustively *] ... Mr David Jackson, Mr Hunter, Mr Baker" [* and pointing out that there could be others and observing *] These persons plainly having sufficient interest in these proceedings to be given notice."*

[8] I stated with reluctance that it would not be appropriate to continue with the presentation of the Applicants' case at this juncture, that time was needed for absorption and reaction on all sides and further, the court must now pro-actively take certain steps. The most important of those steps were the directions which the court then made to ensure that the newly identified interested parties were given all of the due process rights which devolved on them.

[9] I observed further:

> *"There are several imponderables arising out of this highly unexpected development ... including, inter alia, the involvement of other agencies who have their own statutory functions and responsibilities, Public Services*

> *Ombudsman, the Local Government Standards Ombudsman and so forth, [* inexhaustively *]."*

I posed the following rhetorical question:

> *"What does all of this mean for the future conduct of the judicial review proceedings? The answer is, the court is unable to make any confident prediction at this stage. However, flexibility and imagination may well be required, with a view to providing the maximum certainty to those who have a direct interest in the judicial review challenge and I then listed the applicants, respondent counsel and the interested party, CV Developments. The court was to consider mechanisms for providing the maximum and swiftest certainty to these four judicial review protagonists at the earliest possible date and I invited the parties' proposals to do that. Absent a crystal ball, it is not feasible to say anything further at this stage."*

[10] I have reflected also on the succession of case management direction orders which followed - on 10 December, 14 December, 20 December and multiple other dates. Pausing, any external observer might be forgiven for thinking that this court was involving itself in no other case but this at that stage: and that is not very far from the truth. This case was dominating this court's agenda and, I wish to add to that, it then had another phase of equal dominance, about three months later, when my strenuous efforts to resume the hearing and complete the hearing were thwarted by a series of events outwith the court's control. These surrounded, in particular but not exclusively, Councillor McShane as the order of the court, dated 15 February 2019, that is order No. 9, made clear and further orders have followed.

[11] The court said more than once that the resumed hearing dates of this case, for this week, were set in stone. While this message had a greater impact in some quarters than others, it has been achieved, following much judicial travail and struggle with one qualification [** below]. I have energetically endeavoured to bring the case to finality by today, the fourth of these allocated further hearing dates and once again, this case has absolutely dominated this court's agenda, which involves more than 200 other cases in the system at present.

[12] **The foregoing rather lengthy preamble, brings me to the here and now. The submissions of Mr Lockhart QC on behalf of Mr Tweedie's firm, as I will call that interested party now, very quickly, for me, threw into sharp relief the position into which this new cohort of interested parties finds themselves thrust in these proceedings. It is fair to say that the proceedings lacked shape and direction during the phase which was initiated by the unexpected developments in the middle of December 2018. The reason for that is an entirely prosaic one: as the orders of the court stated repeatedly, there was simply no way of predicting what that entirely unexpected development would generate. The only clear and coherent course

which the court could pursue was to take appropriate steps to ensure that the due process rights of the newly involved interested parties were fully observed and, secondly, to allow everyone to assemble substantial quantities of further evidence.

[13] All of that was undertaken without any adjudication by the court of the relevance of the evidence or how it fitted into the grounds of challenge. The court has drawn attention to the grounds of challenge umpteen times, as these proceedings have progressed. We are left with a case which has experienced growth which may variously be described as organic, totally unexpected, unpredicted and exponential. One might understandably lose sight of the fact that there are but three litigation protagonists, the two Applicants and the Respondent Council.

[14] Having considered the written submission and the oral submission concerning Mr Tweedie, it became crystal clear to the court that a formulation of the essential particulars of the case which the Applicants are making against the interested parties was an absolute necessity. That gave rise to the oral order which I pronounced yesterday and which stimulated a letter in response from the Applicants' solicitors. That, in turn, gave rise to an immediate written response on the part of the court. Once again, I wish to emphasise to everyone in the courtroom the priority accorded to and the endless efforts which the court has invested in these proceedings at every stage. Counsel will no doubt have alerted their clients to receiving directions and emails from the court at ungodly hours, at various stages of these proceedings: 11 pm, midnight, 1 am – a frequent occurrence.

[15] In this context it is appropriate to reiterate what I wrote, therefore, in formal terms at 8 o'clock yesterday evening:

> *"I have noted today's letter from the applicants' solicitors. There is an evident misconception. I wish to be absolutely clear: supporting evidence, cross-references, analysis, submissions and page references and so forth are not required, emphatically so. I have simply requested what I called "the bottom line", to be formulated in basic but sufficient terms".*

And I then provided what I considered might be a helpful illustration.

[16] Thus compliance with the order that I made yesterday, which I reiterate this morning could, for example, take the form of the following and I quote from what was written*:*

> *"As regards AB (for example, Mr Tweedie) the Applicants contend that the court should make the following findings: (i) he did X; (ii) he did Y; (iii) he, together with XY… engaged in specified and particularised behaviour"... (iv) Mr Tweedie failed or omitted to .....*

> *I cannot emphasise sufficiently how simple and basic, but clear and coherent, the written formulation which the court is requiring of the Applicants' legal representatives is to be. It will not take the form of a submission, an analysis, references to evidence, cross-references, references to submissions, oral or written - none of that will be contained. It will take the basic form which I have indicated. It will be something akin to a straightforward indictment, something of that nature. Nothing further - absolute basic but clear and coherent particulars of the findings which the Applicants invite the court to make, in respect of each member of this cohort of interested parties. In the case of Mr Tweedie's firm, there are two individuals and as regards the remainder, there are three individuals."*

[18] I observed further in the written communication that it would have been essential, in counsels' closing, to address this topic from this concrete perspective in any event. There can scarcely be any surprise. Although I could have approached this matter in a number of ways, it seemed to me that the clearest and fairest mechanism was that of what findings are the Applicants inviting the court to make, in respect of each of the five persons concerned. I wish to reiterate, as I did in the draft order of yesterday evening, what are the drivers of this exercise namely (i) the overriding objective, the court's powers, the inherent jurisdiction; and (ii) elementary fairness to the persons concerned.

[19] I said the following and I repeat:

> *"Their positions, plight, exposure and due process rights and so forth have been thrown into sharp relief only at this stage. None of them is on notice in any considered, coherent or orthodox way of the case against each."*

The combined experience of the lawyers and the judge in this courtroom is probably 400 years plus. If we extract from that one simple, but vital, principle which we have all learned it is the right to know the case against oneself and the corresponding right to respond to it. Neither of those rights has been fully vindicated on behalf of each of these interested parties at this stage. No-one belonging to this cohort is on notice in any considered, coherent or orthodox way of the case against each. I then identified the third driver in these terms:

> *"The acute difference between assembling a mass of evidence on the one hand and making a focused, resulting case against the persons concerned on the other ... [including] ... the sharp distinction between the litigation axis… involving the Applicants and the Respondent on the one hand … and the litigation axis involving the*

Applicants and these interested parties on the other. They are very different indeed."

[20] Finally, I draw attention to the judicial review ethos and procedure. First, this is a court of supervisory superintendence. Second, it has long been recognised that the judicial review court is normally ill-suited to the exercise of fact finding. Third, linked to this, in the vast majority of judicial review cases the facts are not in dispute. Fourth, there has been no cross-examination of any of the multiple deponents who have sworn a near record number of affidavits in this case. Fifth, as highlighted in the judgment given in the Court of Appeal last week, in the case of *JG v UTIAC [*2019] NICA 27, the distinctive character of judicial review proceedings does not exclude the basic rules of evidence. Thus there is an onus on every judicial review litigant to make good its case, according to the civil standard of the balance of probabilities. This, sixthly, engages a further principle, namely that the more serious or improbable the allegation, the more cogent and compelling will the necessary supporting evidence have to be. I drew attention very briefly yesterday to some leading authorities on that principle. While I could probably have added further judicial review governing principles to this list it seems to me that these are the most important ones in the present context.

[21] Balancing everything, I come to the very reluctant conclusion that the course which the court should adopt this morning, is to order that the Applicants' legal representatives complete all of the steps which they have been required to take by close of business on Tuesday of next week, that is 18 June. I don't think I need to repeat them. Two, in particular, have emerged during yesterday's and today's proceedings. The first is the exercise which I directed orally yesterday and then expanded in written terms overnight and which I have endeavoured to further explain and illuminate in the course of this *ex tempore* ruling this morning. I hope I can say with confidence that it should be abundantly clear what is required on that front.

[22] The second is the rather important matter as regards the Applicants, what I shall call the "FOI exercise". I explained in court yesterday what the rationale of this new necessary free standing exercise is. It will be necessary in complying with this direction to reflect on the following: first, what Mr Allister was seeking in his FOI requests addressed to the council; second, what those requests yielded; third, what, in retrospect, as of midday on 24 of January 2018 those requests should have yielded. In complying with this direction, it will be necessary to bear in mind, that Freedom of Information Act rights have to be exercised/invoked: there is no automatic process of granting free access to information, rather the prescribed procedure has to be followed. That is the reason why I draw attention to the terms in which the requests under that legislation were formulated by Mr Allister.

[23] Next to be borne in mind, it in the abstract, seems quite unlikely that the totality of the new documentary materials which Mr Allister has received through the vehicle of these proceedings and, in particular, during what I've called phase

two belongs to the realm of what he should have received by midday on 24 January 2018. However, beyond that observation I decline to venture because I do not have the tools at this moment in time, or the resources, to undertake the analysis that is required. But in completing this important exercise on the applicants' side, the legal team will have to be alert to a potentially important distinction between (a) what Mr Allister should, enjoying the statutory rights conferred on and invoked by him, have received by midday on 24 January 2018; and (b) everything else: the latter will not form part of the booklet I have requested. The booklet will comprise only those materials which Mr Allister's legal representatives contend he ought to have received by the time and date which I have emphasised. It will, in the first place, be a contention. That will also have to be provided also by close of business next Tuesday.

[24] That, in turn, will trigger a free standing interaction between the Applicants and the Respondent on this discrete issue. This will require the Respondent to evaluate whether it agrees with the Applicants' contention. If this notional box is ticked 'yes', hallelujah. In the rather more likely event that it isn't, then the Respondent will make its reply and we will have an issue which may require determination by the court. I will have to allow the Respondent two working days for that purpose and, therefore, that will trigger a time limit of close of business on 20 June.

[25] That brings me then to the further steps required to bring the proceedings to completion. The court will have to reconvene one last time. The purpose of the relisting will be for counsel representing all members of this cohort of interested parties to present their clients' case to the court in summary form. That will be undertaken in the context of what I stated in the draft order which I circulated to everyone last night:

> *"Long months of personal and professional anxiety cannot be permitted to continue in this forum."*

I underlined those three words *"in this forum"*, because I have absolutely no control over what might happen in some other forum or some other for a which, as I observed in my ruling of mid-December 2018, could conceivably be engaged as a result of the unexpected developments.

[26] I have determined that the court, in bringing these proceedings to finality, will endeavour, within the acute time and calendar constraints and pressures prevailing, to sever the issue of the case made against the cohort of interested parties and provide them with a judicial determination in writing, with the absolute minimum of delay. Whether this course proves feasible and expeditious remains to be seen.

[27] That brings me then to the party which was, for a very long time in these proceedings, the only properly interested party (as the rules label them) namely the

developer, CV Developments. The court has referred to the interests and the position of CV Developments at every turn of these proceedings, beginning with its very first order, issued 12 months ago. The developer has become a victim in its own right, caught up in the litigation crossfire between the Applicants and the Respondent Council. This, regrettably, is a feature of planning and environmental challenges in judicial review proceedings. It is one of the reasons why such cases are routinely given priority in this court. It is another of the reasons why, when I overhauled extensively the Judicial Review Practice Direction in recent months, I devoted a bespoke, free standing new chapter to environmental and planning judicial reviews.

[28] I hope that this court has done all that it can in the unprecedented circumstances of these proceedings to recognise the intense interest which the developer, CV Developments, has in this litigation. The further case management order which I have pronounced this morning is drawn up with much reluctance and with that interest acutely to the forefront of the court's mind.

[29] If any of the representatives considers that the order which I have pronounced orally should contain some further provision, other than the critical one of the next and final listing date, or any revision of the provisions which I have endeavoured to articulate extensively, then I will deal with that. The order will also be completed in the usual way with the provisions of reserving costs and liberty to apply.

[Final Re-listing date of 24/06/19 confirmed subsequently]