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*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

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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 STUART KNOX  
FOR JUDICIAL REVIEW**

**-v-**

**CAUSEWAY COAST  
AND GLENS BOROUGH COUNCIL**

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**McCLOSKEY J**

**Introduction**

[1] Stuart Knox (hereinafter "*the Applicant*"), a resident of Portballintrae, challenges the decision of Causeway Coast and Glens Borough Council ("*the Council*") dated 14 March 2018 whereby full planning permission was granted for a development described as the "*conversion and alteration of historic vernacular building to provide new detached dwelling unit ...*" on a site adjacent to a public car park and some 10 metres to the east of the Applicant's home ("*the site*"). I shall describe this as "*the impugned decision*".

[2] The successful planning applicant (hereinafter "*the developer*"), who participated fully in these proceedings throughout, is one Seymour Sweeny with an address at Portballintrae. As an aside, the owner of the site is a person other than the developer.

## The Challenge

[3] The three grounds of challenge promoted at the outset of the proceedings were:

- (a) Error of law consisting of *incompatibility with/breach of* Policy C0U4 of the Local Development Plan (the “LDP”), thereby contravening the requirement enshrined in section 6(4) of the Planning Act (NI) 2011.
- (b) A failure to have regard to paragraph 4.9 of the Strategic Planning Policy Statement for Northern Ireland (“SPPS”) which requires that the need for “adequate private, semi-private and public amenity space” be treated as “a prime consideration in all residential development”.
- (c) A failure to provide adequate reasons for the impugned decision.

In the event, the Applicant did not pursue the first two grounds and leave to apply for judicial review, correctly unopposed, was granted on the reasons ground only.

## Planning Policy Framework

[4] The statutory Local Development Plan (“LDP”) is the Northern Area Plan 2016. This encompasses the geographical areas of four pre-existing Councils (Ballymoney, Coleraine, Limavady and Moyle) which, with effect from 01 April 2015, merged to form the Respondent council. It was formally adopted by the former central government planning authority, the Department of the Environment (the “Department”). Such adoption was the culmination of a series of statutory steps and processes which, in their latter phase, included a public enquiry and a report of the Planning Appeals Commission. The effect of the new legislative arrangements is that this will remain the Council’s LDP unless and until the Council formally adopts a successor measure.

[5] The LDP has the following self-proclaimed aim:

*“The aim of the Plan is to provide a framework for development throughout the Northern Plan Area in general conformity with the principles and policies of the Regional Development Strategy, facilitating sustainable growth, meeting the needs of communities and protecting environmental attributes.”*

This is followed by a series of “Objectives”. In passing, none of these featured in the arguments of the three parties. The “Plan Strategy” has an assortment of components. One of these, notably, is:

*“The Giants Causeway and Causeway Coast World Heritage Site and its distinctive setting will be protected from inappropriate development.”*

[6] Volume 1 of the LDP (“Strategic Plan Framework”) contains *inter alia* three separate policies relating to “The Giants Causeway and Causeway Coast World Heritage Site” (the “WHS”). The third of these, Policy COU4, is germane in the context of this litigation:

*“No development within the Distinctive Landscape setting outside of settlement development limits will be approved except:*

- (i) Exceptionally modest scale facilities, without landscape detriment, which are necessary to meet the direct needs of visitors to the World Heritage Site.*
- (ii) Extensions to buildings that are appropriate in scale and design and represent not more than 20% of the cubic content of existing buildings.*
- (iii) Replacements of existing occupied dwellings with not more than a 20% increase in the cubic content.*

*These allowances will be permitted once only."*

(I shall describe the "*distinctive landscape setting*" as the "*DLS*".)

[7] The ensuing narrative in Policy COU4 includes the following:

*"Development proposals within the [DLS] of the [WHS] will be subject to particular scrutiny ...*

*The [DLS] is located within the Causeway Coast AONB, where sensitive development is required ...*

*The relationship of this landscape to the [WHS] requires an even stricter approach to development proposals than elsewhere in the AONB, to ensure the balance between landscape and built form is not adversely affected with buildings appearing over-dominant and out of historic context. The Department, therefore, imposes restrictions on the scale of extensions and replacement dwellings to avoid this arising. The Department will seek improvements to the landscape setting where these are appropriate and are related to the development proposed."*

("AONB" denotes "Area of Outstanding Natural Beauty".)

[8] The second main planning policy which falls to be considered is Policy CTY4, one of the discrete policies within Planning Policy Statement 21 ("PPS21"), "Sustainable Development in the Countryside" (June 2010). Policy CTY4 is entitled "The Conversion and Reuse of Existing Buildings" and states:

*"Planning permission will be granted to proposals for the sympathetic conversion, with adaptation if necessary, of a suitable building for a variety of alternative uses, including use as a single dwelling, where this would secure its upkeep and retention. Such proposals will be required to be of a*

*high design quality and to meet all of the following criteria:*

- (a) the building is of permanent construction;*
- (b) the reuse or conversion would maintain or enhance the form, character and architectural features, design and setting of the existing building and not have an adverse effect on the character or appearance of the locality;*
- (c) any new extensions are sympathetic to the scale, massing and architectural style and finishes of the existing building;*
- (d) the reuse or conversion would not unduly affect the amenities of nearby residents or adversely affect the continued agricultural use of adjoining land or buildings;*
- (e) the nature and scale of any proposed non-residential use is appropriate to a countryside location;*
- (f) all necessary services are available or can be provided without significant adverse impact on the environment or character of the locality; and*
- (g) access to the public road will not prejudice road safety or significantly inconvenience the flow of traffic.*

*Buildings of a temporary construction such as those designed and used for agricultural purposes, including sheds or stores will not however be eligible for conversion or re-use under this policy.*

*Exceptionally, consideration may be given to the sympathetic conversion of a traditional non-*

*residential building to provide more than one dwelling where the building is of sufficient size; the scheme of conversion involves minimal intervention; and the overall scale of the proposal and intensity of use is considered appropriate to the locality.*

### **Listed Buildings**

*All proposals for the conversion or refurbishment of a building listed as being of special architectural or historic interest for residential purposes will be assessed against the policy provisions of PPS 6."*

Under the rubric "Justification and Amplification", it is stated:

*"5.20 Due to changing patterns of rural life there are a range of older buildings in the countryside, including some that have been listed, that are no longer needed for their original purpose. These can include former school houses, churches and older traditional barns and outbuildings. The reuse and sympathetic conversion of these types of buildings can represent a sustainable approach to development in the countryside and for certain buildings may be the key to their preservation.*

*5.21 There is the potential for the reuse of an existing non-residential building as a dwelling and exceptionally, planning permission may be granted to conversion of a traditional building to more than one dwelling. There is also scope for the reuse and adaptation of existing buildings in the countryside for a variety of non-residential uses, including appropriate economic, tourism and recreational uses or as local community facilities. Retailing, unless small scale and ancillary to the main use, will not however be considered acceptable.*

5.22 *The Department would stress the importance of good design in all such cases and in particular care needs to be taken for proposals involving the conversion of traditional buildings to ensure that their character is not lost to the overall scheme of redevelopment.*

5.23 *In addition it should be noted that his policy relates only to schemes of sympathetic conversion. The Department would therefore stress that a grant of planning permission for conversion of a non-residential building to residential use will not in itself be considered sufficient grounds to subsequently permit the replacement of the building with a new dwelling, unless the proposal meets the requirements of Policy CTY 3."*

[9] The third component of the relevant planning policy equation is the Strategic Planning Policy Statement for Northern Ireland (the "SPPS"), published by the Department in September 2015. This contains a suite of specific so-called "Subject Policies", one whereof is "Development in the Countryside", wherein is found the following noteworthy passages:

*"[4.10] The natural and heritage assets of the countryside and coast need to be recognised for the contribution they make to enhancing human health and wellbeing. Conserving and, where possible, enhancing these environments as well as promoting their appropriate use, accessibility and connectivity is key to ensuring their sustainable upkeep ..."*

Under the banner "Regional Strategic Policy" one finds, in the context of references to LDPs, the following:

*"All development in the countryside must integrate into its setting, respect rural character and be appropriately designed ...."*

.....

*New dwellings in existing clusters: provision should be made for a dwelling at an existing cluster of development which lies outside a farm provided it appears as a visual entity in the landscape; and is associated with a focal point; and the development can be absorbed into the existing cluster through rounding off and consolidation and will not significantly alter its existing character, or visually intrude into the open countryside."*

(At paragraphs 6.70 and 6.73.)

### **Relevant Statutory Framework**

[10] Land use and development in Northern Ireland are commonly described as "*plan led*" in the wake of the significant reforms effected by the Planning Act (Northern Ireland) 2011 (the "*Planning Act*"). This is the effect of Part 2 of the statute the subject matter whereof is "Local Development Plans". It contains the following key provision:

### **Section 6**

#### **Local development plan**

*"6 – (1) Any reference –*

- (a) to a local development plan in this Act and in any other statutory provision relating to planning; and*
- (b) to a development plan in any statutory provision relating to planning,*

*is to be construed as a reference to the development plan documents (taken together) which have been adopted by the council or approved by the Department in accordance with section 16(6).*

*(2) In this Part the development plan documents are –*



- (a) *the plan strategy;*
- (b) *the local policies plan.*
- (3) *If to any extent a policy contained in a local development plan conflicts with another policy in that plan the conflict must be resolved in favour of the policy which is contained in the last development plan document to be adopted or, as the case may be, approved.*
- (4) *Where, in making any determination under this Act, regard is to be had to the local development plan, the determination must be made in accordance with the plan unless material considerations indicate otherwise."*

### **The Planning Officers' Advice**

[11] In accordance with the formal Scheme of Delegation of the Council the subject planning application was transferred to the remit of its Planning Committee ("PC"), as a "*delegated application*". The PC, in the usual way, received reports from the Council's planning officers. It suffices to focus on the main report only, ie that dated 21 February 2018.

[12] The applicable planning policies are rehearsed in the main report to the PC. The planning officer also engages with the case in favour of development made by the developer's agent in a written statement. The following are the salient passages in the officer's assessment of Policy COU4:

*"COU4 is very clear in prohibiting **all development** bar the three defined exceptions. Change of use is development. Conversions or change of use applications are not included within the three exceptions and as such are not acceptable ...*

*While the visual impact of the conversion is limited, it is the intent of the policy to protect the landscape setting from the ancillary works which would result as part of the change of use ....*

*The grant of planning permission would establish permitted development rights. Even if restricted it would be unreasonable to refuse permission for security lighting, car parking, garages, sheds, stores, bins etc. Although the footprint of the site is very restricted it is not unreasonable to consider an extension to the site over time ...*

*As such it is misguided to consider that the change of use will have no impact upon the immediate or wider landscape. Nor is it [a] question of the material harm that would result. By establishing a presumption against all development bar the defined exceptions, it is the intent of the policy to protect the landscape from the cumulative impact of development and ancillary development, which individually may not result in material harm."*

(at paragraphs 8.6 and 8.9 – 8.11.)

[13] Next the officer addressed the SPPS in these terms:

*"In relation to the conversion and re-use of existing buildings for residential use the SPPS states [that] provision should be made for the sympathetic conversion and re-use, with adaptation if necessary, of a locally important building (such as former school houses, churches and older traditional barns and outbuildings) as a single dwelling where this would secure its upkeep and retention."*

(at paragraph 8.12.)

In passing, the nomenclature "*locally important building*" does not entail any formal designation process.

[14] The officer then addressed policy CTY4 (PPS21):

*“ ... Policy CTY4 of PPS21 ..... states [that] planning permission will be granted to proposals for the sympathetic conversion, with adaptation if necessary, of a suitable building for a variety of alternative uses subject to criteria ...*

*In this respect, there is no objection to the principle of the conversion. However, the lack of curtilage and basic amenity space results in a building that is wholly unsuitable for conversion to residential use and would result in demonstrable harm to the character of the rural area.”*

(at paragraphs 8.13 – 8.14.)

[15] The officer next dwelt on the topic of “amenity space”:

*“paragraph 4.9 of the SPPS states [that] the need for adequate private, semi-private and public amenity space is a prime consideration in all residential development and contributes to mental and physical well being and the strengthening of social cohesion ....*

*Given the location of the site it is highly likely that the purchaser will require reasonable space. Having regard to this location it is less than size of private amenity space but rather its practical value. It should offer a degree of private amenity to ensure that the property is fit for purpose and provides a positive design which promotes well being ...*

*The Agent has argued that paragraph 4.9 of the SPPS is not operational policy and cannot be applied. However, its inclusion as a core principle outlines its significance as a fundamental requirement of sustainable development.”*

(at paragraph 8.16 – 8.18.)

[16] Turning to the subject of “*Integration and Character*”, the planning officer continued:

*“Paragraph 6.70 of the SPPS states that all development in the countryside must integrate into its setting, respect rural character and be appropriately designed ...*

*In this case, while it is accepted that the building is an established feature, the ancillary development of domestic paraphernalia which would likely and to some extent necessarily follow would fail to integrate. If planning permission was granted for the change of use, it would be unreasonable to refuse planning permission for such ancillary development as it would likely be argued essential to support/enable residential use ...*

*The application site lacks any natural boundaries and is unable to provide any sense of enclosure to help ancillary development to integrate into the landscape. The building is somewhat divorced from the cluster of dwellings which exacerbates the integration issue, with the building standing in isolation within the corner of a car park ...*

*Critical views of the site are from the adjacent public car park, pathways and golf course with longer views from the surrounding area. The failure to provide even a buffer of land around the building means that the site cannot introduce new planting to offer some degree of integration for ancillary development. It is evident from neighbouring dwellings how the provision of a low level wall and moderate soft landscaping can help to soften the overall impact of a building and its ancillary development ...*

*The inability of the site to integrate into the surroundings results in the building and its ancillary development being prominent. As such the proposed development would be contrary to paragraph 6.70 of the SPPS.”*

(at paragraph 8.19 – 8.23.)

[17] The officer’s report concludes in these terms:

*“The proposal is considered unacceptable in this location having regard to the Northern Area Plan and other material considerations. When considered in the context of the policies outlined above officials consider that the proposed development fails to meet with the permitted exceptions allowed in the Distinctive Landscape Setting of the Giants Causeway. The proposal fails to provide adequate private amenity space. In addition, ancillary development associated with the use of the building as a dwelling would fail to integrate. Refusal is recommended.”*

This is followed by three proposed refusal reasons:

*“10.1 The proposal is contrary to paragraph 6.73 of the [SPPS and Policy COU4 ....] in that the site lies within the Distinctive Landscape Setting of the Giants Causeway and Causeway Coast World Heritage Site. The proposal does not qualify as an exception and therefore does not justify a relaxation of the strict planning controls in this area.*

*10.2 The proposal is contrary to paragraph 4.9 of the [SPPS] in that the development as proposed fails to provide a quality residential environment by reason of*

*inadequate private amenity space for a permanent residential unit.*

10.3 *The proposal is contrary to paragraph 6.70 of the [SPPS] in that the proposed building is a prominent feature in the landscape, lacks long established natural boundaries and is unable to provide a suitable degree of enclosure and therefore would not visually integrate into the surrounding landscape."*

### **The Planning Committee Proceedings**

[18] The PC, in the customary way, convened in public on 12 March 2019, at its monthly meeting. There were ten planning applications on its agenda. The PC consisted of a chairperson, four Aldermen and seven Councillors. The Council officers present included the author of the main report to the PC (*supra*), the Head of Planning and the two Council solicitors. There is no audio recording of the meeting. The evidence does, however, include the minutes compiled by a Council employee together with the notes made by the Head of Planning.

[19] The aforementioned minutes invite the following brief analysis:

- (a) The Principal Planning Officer ("PPO") concerned made a presentation which was, in effect, a summary of the above mentioned report, ending with a recommendation that the PC refuse the planning application for the reasons proposed.
- (b) The PPO then responded to questions from PC members "*in relation to land ownership*".
- (c) The developer's "Agent" made a presentation commending the planning application. He then responded to questions from PC members "*... in relation to the impact a refusal would have on the area; history of the building; amenity provision and land outlined in blue (viz the subject site)*".
- (d) The PC then proceeded "*in Committee*" [ie in camera] for some five minutes during which members discussed the

*“legal consideration of”* the subject site, ownership and an unspecified right of way issue.

- (e) Upon reconvening in public mode, the developer’s Agent responded to further questions from PC members *“in relation to amenity space; ownership, the car park and curtilage”*.
- (f) The PPO then responded to further queries from Members *“in relation to designated landscape setting boundary; amenity and red line of application site”*.
- (g) The Head of Planning (“HOP”) reminded the PC of *“the requirement to be consistent in the implementation of planning policy in decision making”*.

[20] At this juncture the critical stage of the PC proceedings was reached. One of its members proposed:

*“... that the Committee has taken into consideration and disagrees with the reasons for the recommendation set out in section 9 and guidance in section 7 and 8 and resolves to APPROVE planning permission for the following reasons ....*

- *Consider that the conversation [sic] of the barn is acceptable in principle.*
- *No policy requirement for private amenity space.*
- *Proposed development would be an improvement to what currently on site [sic]”*.

The highlighted words belong to the forefront of these proceedings, by some measure. Two footnotes are apt. First, the underlining has not been added by the court. Second, the references to “sections” 7, 8 and 9 clearly correspond to the numbered chapters and paragraphs of the PPO’s main report to the PC.

## Other Evidence

[21] I have considered other aspects of the assembled evidence, particularly those which featured in the submissions of the parties. These include, inexhaustively, various maps and photographs, the materials compiled by the developer's Agent, certain letters of objection and consultation responses and the site visit report. I do not consider it necessary to dwell on any of these.

[22] There was a particular focus on the Council's PAP response letter. It is appropriate to interpose at this juncture that this has two incarnations. The first is the original letter. The second is the letter as enlarged in response to the court's initial case management direction that via the mechanism of expanding the letter the Council respond to the Applicant's judicial review leave application. This contains a section entitled "Asserted Failure to Provide Reasons", within which there are certain passages of note. First:

*"The Planning Committee was informed regarding the provisions of Policy COU4 ...*

*However, the Planning Committee resolved to give greater weight to other material considerations, central to which was the proposal not being considered detrimental to the character of the area, relative to the relevant policy provisions. While the foregoing is not stated expressly in the minutes ... the minutes do not form a full transcript of deliberations by the Committee."*

[Emphasis added.]

Second:

*"... the specified material considerations indicated that the provisions of the [LDP] should not be followed. Therefore while the Planning Committee were aware of the relevant provisions of the plan and that the proposal did not accord*



*with them, it identified that the specified material considerations were of such weight to displace the statutory authority given to the plan."*

Next:

*"While the Planning Committee did have regard to the presumption in favour of the plan as required by section 6(4) ..., as material considerations indicated otherwise, it was resolved to approve the application."*

Followed by:

*"Weight to be attached to material considerations is a matter for the decision maker alone to determine. In this case the Committee considered that the other material considerations, including that the proposal would not be detrimental to the character of the area, outweighed the provisions of Policy COU4. Therefore the conclusion was reached that the principle of the development was acceptable."*

And finally:

*"... the Planning Committee acknowledged the policy provisions of the plan [ie the LDP] but resolved that other material considerations be given greater weight."*

[23] The passages reproduced immediately above are, of course, to be considered in their full context and I have done so. Some of them have in common the feature that they are not contained in either the minutes of the relevant PC meeting or in any other evidential source.

[24] Brief reference to the Council's affidavit evidence is appropriate at this juncture. This consists of a single affidavit sworn by the Council's HOP, to whom some reference has been made above. As already noted Ms Dickson was in attendance throughout the totality of the PC's

deliberations on the occasion of its monthly meeting on 12 March 2018, both private and public. Certain interventions are attributed to the HOP.

[25] The HOP deposes *inter alia*:

*“The planning policy in COU4 was before the Planning Committee ...*

*It was not challenged by the [planning applicant’s] representative that the proposal was contrary to COU4 ...*

*However the regional policy was also presented to the Planning Committee ... [which] ... reached a different decision than the officers on the weight to be given to the respective policies and considered that compliance with the regional policy (CTY4), which meant that conversion of the bar was acceptable in principle, outweighed non-compliance with the area plan (policy COU4) in this case ...*

*The Committee reached a different decision than the officers on the weight to be given to the respective policies and considered compliance with the regional policy (CTY4) which meant that conversion of the barn was acceptable in principle, the location of the site on the outer edge of the Distinctive Landscape setting, the public viewpoints of the building and the risk of the building falling into a state of dilapidation outweighed non-compliance with the area plan (COU4) in this case ...*

*There is no specific policy requiring a set amenity area or space ... and the Planning Committee regarded the proposal as satisfactory in that regard ...*

*The Planning Committee also regarded the proposal as an improvement to what is on the site."*

These averments can be linked to both the minutes of the PC meeting and the PAC response.

[26] The Applicant's planning consultant (Mr Rolston) avers in his affidavit *inter alia*:

*"... I am respectfully of the view that the [PC] manifestly failed to adequately articulate their reasons for departing from the clear and strong recommendation of their officers ...*

*The three reasons expressed by the [PC] in the resolution to approve the planning application are in my respectful view, not clear and logical reasons and do not represent proper planning reasons."*

The deponent elaborates on these views in a little detail.

[27] In the affidavit sworn by the person described throughout the evidence as the developer's "Agent" (Mr Donaldson) one finds, unsurprisingly, a differing perspective:

*"In my opinion the stated reasons for granting approval fairly summarise the substantial discussion which took place and the basis which I had advanced to the [PC] as to why they were not required to slavishly adhere to the Area Plan, but, as a matter of planning judgement, they could and should grant permission. In my view, the reasons are clear (albeit shortly stated)."*

Appropriate elaboration follows. As noted above, I have also considered the other materials prepared by Mr Donaldson at separate stages of the planning application process.

[28] I consider it unnecessary to elaborate on the other evidence touching directly or indirectly on the reasons issue. It has all been considered.

### **Consideration and Conclusions**

[29] While I consider that the first question to be determined by the court is whether the Council was subject to a legal obligation to provide reasons for the impugned decision, any suggestion in argument on behalf of the Council and the developer that there was no such obligation flickered rather than flourished.

[30] I consider that the Council did indeed have a duty of this kind, on two grounds. The first is found in its “Protocol for the Operation of the Causeway Coast and Glens Borough Council Planning Committee” (“*the Protocol*”), operative from 08 November 2017. This species of instrument was considered by this court, inexhaustively so, in Re Belfast City Council’s Application [2018] NIQB 17 at [66] – [70]. This topic also featured in Re Conlon’s Application [2018] NIQB 49 at [43] – [51].

[31] The Protocol is the kind of instrument which is not to be equated with statute, whether primary or subordinate. Notwithstanding, it has statutory parentage. Thus it is invested with a certain measure of solemnity and gravity. As its title indicates, it is concerned largely with matters of process and procedure. Some planning decisions are finely balanced and it is the prerogative of the Planning Committee to come to its conclusions and decision provided they are SUPPORTED by:

“7.1 .... *sound, clear and logical planning reasons following an informed debate. The Committee Members can accept or give different weight to the various arguments and material considerations ....*

7.2 *The Planning Officers/Head of Planning/Legal advisor will have the opportunity to explain the implications of the Planning Committee’s decision prior to the vote. Consideration will need to be given to whether such decisions will be*

*capable of being defended on appeal to the Planning Appeals Commission with the potential for award of costs against the Council. ...*

7.3 *The reasons for any decision which are made contrary to the Planning Officer's recommendation must be formally recorded in the minutes and a copy placed on file."*

Giving effect to the analysis in the immediately preceding paragraph and taking into account the absence of any suggestion in the evidence or in argument that the PC was entitled to do otherwise, the conclusion that the foregoing provisions of the Protocol subjected the PC to a legal obligation to provide reasons for the impugned decision seems to me irresistible.

[32] There is a second and separate route to the same conclusion. In R (CPRE Kent) v Dover District Council [2018] 1 WLR 108, a planning case in which the duty to provide reasons was embedded in statute, namely regulation 24(1)(c) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011, the Supreme Court upheld the decision of the Court of Appeal that the impugned grant of planning permission was vitiated by a failure to provide legally adequate reasons. Lord Carnwath JSC, giving the unanimous opinion of the court, conducted an extensive and illuminating review of the subject of reasons in the planning sphere. The following passage belongs to the specific context of his Lordship's consideration of the common law and, in particular, the absence of any general duty to give reasons emanating from that source, at [59]:

*"59. As to the charge of uncertainty, it would be wrong to be over-prescriptive, in a judgment on a single case and a single set of policies. However it should not be difficult for councils and their officers to identify cases which call for a formulated statement of reasons, beyond the statutory requirements. Typically they will be cases where, as in Oakley and the present case, permission has been granted in the face of substantial public*

*opposition and against the advice of officers, for projects which involve major departures from the development plan, or from other policies of recognised importance (such as the "specific policies" identified in the NPPF - para 22 above). Such decisions call for public explanation, not just because of their immediate impact; but also because, as Lord Bridge pointed out (para 45 above), they are likely to have lasting relevance for the application of policy in future cases."*

[33] The whole of Lord Carnwath's erudite opinion repays careful and, indeed, repeated reading. Of particular note is his examination of the interaction of statute and the common law. Equally instructive is his identification of the nexus between a duty to give reasons (where same arises) and the common law principle of fairness, linked in turn to the constitutional principle of the right of access to a court. With particular reference to [59], reproduced above, the word "*typically*" stands out. It is at once to be contrasted with "*exhaustively*", or kindred terms; and the shadow of *obiter dictum* might possibly apply. This last mentioned factor will be best resolved in a case where it has been the subject of considered argument (there was none in the present one). *Obiter* or not, Lord Carnwath's observations, as a minimum, attract the highest respect.

[34] Mr William Orbinson QC (with Mr Simon Turbitt, of counsel), on behalf of the Applicant, placed appropriate emphasis on two matters. The first, which has mixed elements of law and fact, is that the Giant's Causeway has the status of WHS. The second is that it is Northern Ireland's only WHS. By its impugned decision (it was argued) the Council's PC declined to give effect to one of three specific policies in its own LDP protecting this national jewel, preferring (apparently) to give precedence to another planning policy contained in a different code. This decision was, in the language of Lord Carnwath "*against the advice of officers*" and approved a project involving a "*major departure from*" the Council's LDP in the sense that it was in direct conflict with the discrete policy in question and did not fall within any of the (extremely limited) exceptions to the prohibition on development of this kind. In the judgement of this court, the conclusion that there was a duty at common law to provide reasons for the impugned decision follows inexorably.

[35] The second – and crucial – issue to be determined by the court is whether the Council (in effect its PC), in making the impugned decision, provided supporting reasons which accord with the applicable legal standard.

[36] On this issue there is no want of high authority. The Supreme Court and its predecessor have pronounced upon it thrice during the past two decades. I pay particular attention to what was said in City of Edinburgh Council – v – Secretary of State for Scotland [1997] 3 PLR 71 and [1998] 1 All ER 174 since the statutory provision in play in that case, section 18A of the Town and Country Planning (Scotland) Act 1972, is a virtual mirror image of section 6(4) of the Planning Act. Section 18(a) provides:

*“Status of development plans*

*Where, in making any determination under the Planning Acts, regard is to be had to the development plan, the determination shall be made in accordance with the plan unless material considerations indicate otherwise.”*

This is replicated in the corresponding English statute, section 54A of the Town and Country Planning Act 1990.

[38] Lord Clyde, with whom all members of the House agreed, said the following, at 186):

*“In the practical application of section 18A it will obviously be necessary for the decision maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in*

*the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse."*

The immediately succeeding passage is also material:

*"Counsel for the Secretary of State suggested in the course of his submissions that in the practical application of the section, two distinct stages should be identified. In the first the decision maker should decide whether the development plan should or should not be accorded its statutory priority; and in the second, if he decides that it should not be given that priority it should be put aside and attention concentrated upon the material factors which remain for consideration. But, in my view, it is undesirable to devise any universal prescription for the method to be adopted by the decision maker, provided always of course that he does not act outwith his powers. Different cases*



*will invite different methods in the detail of the approach to be taken and it should be left to the good sense of the decision maker, acting within his powers, to decide how to go about the task before him in the particular circumstances of each case. In the particular circumstances of the present case, the ground on which the reporter decided to make an exception to the development plan was the existence of more recent policy statements which he considered had overtaken the policy in the plan. In such a case as that it may well be appropriate to adopt the two-stage approach suggested by counsel. But even there that should not be taken to be the only proper course. In many cases it would be perfectly proper for the decision maker to assemble all the relevant material including the provisions of the development plan and proceed at once to the process of assessment, paying of course all due regard to the priority of the latter, but reaching his decision after a general study of all the material before him. The precise procedure followed by any decision maker is so much a matter of personal preference or inclination in light of the nature and detail of the particular case that neither universal prescription nor even general guidance are useful or appropriate."*

[39] The theme readily identifiable in the latter passage resurfaces in a later one where Lord Clyde was addressing what was, in substance, an irrationality argument, at 190

*"It is no part of the function of a reviewing court to re-examine the factual conclusions which [the decision maker] drew from the evidence in the absence of any suggestion that he acted improperly or irrationally. Nor is it the duty of a reviewing court to engage in a detailed analytic study of the precise words and phrases which have been used. That kind of exercise is quite inappropriate to an understanding of a planning decision."*

Lord Clyde then turned to the argument that the decision maker had not provided adequate reasons, acknowledging the overlap with the irrationality challenge, stating at 191:

*“... the pursuit of a full and detailed exposition of the [decision maker’s] whole process of reasoning is wholly inappropriate. It involves a misconception of the standards to be expected of a decision letter in a planning appeal of this kind.”*

As Lord President Emslie observed in Wordie Property – v – Secretary of State for Scotland [1984] SLT 345 at 348 –

*“The decision must, in short, leave the informed reader and the court in no real and substantial doubt as to what the reasons for it were and what were the material considerations which were taken into account in reaching it.”*

Lord Clyde noted the following statement of Lord Lloyd in Bolton MDC v Secretary of State for the Environment [1995] P and CR 309, at 313:

*“There is nothing in the statutory language which requires [the Secretary of State], in stating his reasons, to deal specifically with every material consideration ...*

*His duty is to have **regard** to every material consideration; but he need not mention them all.”*

[40] Lord Clyde also drew on the oft quoted formulation of Megaw J in Re Poyser and Mills Arbitration [1964] 2 QB 467 at 478:

*“Parliament provided that reasons shall be given and in my view that must be read as meaning that proper, adequate reasons must be given. The reasons that are set out must be reasons which will not only be intelligible, but which deal with the substantial points that have been raised.”*

Lord Clyde concluded at 191]:

*“It is necessary that an account should be given of the reasoning on the main issues which were in dispute sufficient to enable the parties and the court to understand the reasoning. If that degree of explanation was not achieved the parties might well be prejudiced. But elaboration is not to be looked for and a detailed consideration of every point which was raised is not to be expected.”*

[41] The content of a statutory duty to give reasons featured again in another decision of the House of Lords, South Bucks DC v Porter [2004] UKHL 33, where there was a single speech, that of Lord Brown, with whom all members of the House concurred. He stated at [36]:

*“[36] The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the “principal important controversial issues”, disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such*

*applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."*

I am alert to the cautionary words in the immediately preceding paragraph [35]: Lord Brown's self-appointed task was "to attempt some broad summary of the authorities governing the proper approach to a reasons challenge in the planning context", something which was not to be "regarded as definitive or exhaustive".

[42] In R (CPRE Kent) v Dover District Council [2017] UKSC 79, the Supreme Court gave consideration to yet another statutory provision requiring the provision of reasons by the deciding authority, in this case belonging to the realm of EIA development. The statutory duty in play required a statement containing *inter alia* "The main reasons and considerations on which the decision is based ...". Lord Carnwath JSC, with whom all members of the court agreed, examined the topic of the "standard of reasons", at [35]. Having noted Lord Brown's "broad summary" (*supra*), he drew attention to the statement of Sir Thomas Bingham MR in Clarke Homes v Secretary of State for the Environment [1993] 66 P and CR 263, at [36], that the Secretary of State's decision letters required "a straightforward down to earth reading ... without excessive legalism or exegetical sophistication".

[43] Lord Carnwath, continuing, at [41], having drawn attention to the need for "a reasoned conclusion" relating to "a wide range of differing views and interests", concluded:

*"Where there is a legal requirement to give reasons, what is needed is an adequate explanation of the ultimate decision."*

The immediately following passage resonates in the present litigation context, at [42]:

*“... the decision letter of the Secretary of State or a planning inspector is designed as a stand-alone document setting out all the relevant background material and policies, before reaching a reasoned conclusion. **In the case of a decision of the local planning authority that function will normally be performed by the planning officer’s report.** If their recommendation is accepted by the members, no further reasons may be needed. Even if it is not accepted, it may normally be enough for the committee’s statement of reasons to be limited to the points of difference. However the essence of the duty remains the same, as does the issue for the court: that is, in the words of Bingham MR ... whether the information so provided by the authority leaves room for ‘genuine doubt .... as to what [it] has decided and why.’.”*

[my emphasis]

[44] Further citation of authority on the content and scope of the duty to provide reasons, where this arises, in the world of planning decision making is unnecessary. I so observe having taken account of the several other sources over which the parties’ arguments ranged. It suffices to draw attention to one discrete, well settled line of authority, of general application, exemplified by the decision in R v Westminster Council, ex parte Ermakov [1996] 2 All ER 302 at 315:

*“The court can and, in appropriate cases, should admit evidence to elucidate or, exceptionally, correct or add to the reasons; but should ... be very cautious about doing so. I have in mind cases where, for example, an error has been made in transcription or expression, or a word or words inadvertently omitted, or where the language used may be in some way lacking in clarity. These examples are not intended to be exhaustive, but rather to reflect my view that the function of such evidence should generally be elucidation, not*

*fundamental alteration, confirmation, nor contradiction.”*

Hutchison LJ added that neither reception, nor reliance upon, evidence which “*indicates that the real reasons were wholly different from the stated reasons*” would be appropriate.

[45] Mr Orbinson, appropriately, reminded the court of certain general contextual features of planning decision making in Northern Ireland at this point in time. These were identified in the decision of this court in Re Belfast City Council’s Application [2018] NIQB 17, first at [56]:

*“[56] One feature of the decision making framework outlined above is that the planning decisions of Councils may sometimes be relatively inscrutable. One of the consequences of this is that the documents surrounding and pertaining to a planning decision assume considerable importance. In the event of a legal challenge one of the documents which will inevitably be scrutinised with some care is the case officer’s report to the PC. This engages certain familiar principles. In particular, reports of this nature are not to be equated with the judgment of a Court or other judicial decision. Nor are they to be construed as a statute, contract or other legal instrument. Rather they must be read and interpreted with a degree of latitude appropriate to the legal and factual context in which they are generated. I consider that none of these principles precludes a penetrating examination of the text which is reasonable, balanced and properly informed.”*

Next, having considered the statement of Sullivan J in R v Mendip DC, ex parte Fabre [2000] 80 P and CR 500 at page 509, the court observed:

*“Any temptation to apply this statement with a broad sweep should, in my judgement, be resisted, not least because the new planning decision*

*making system in Northern Ireland is still in its infancy.”*

Adding at [58]:

*“While the statement of Sullivan J undoubtedly merits respect, it invites the following analysis. First, it was made in a first instance decision of the jurisdiction of England and Wales which, ipso facto, does not have precedent effect. Second, it was made in a legal context which differs from that prevailing in this jurisdiction. Third, I consider that it does not fall to be construed as a statement of immutable legal principle. Fourth, it may be considered an expression of judicial impression or opinion not readily related to an underlying evidential substratum. Fifth, it must inevitably be calibrated by reference to the Northern Ireland context highlighted in [51] – [54] above. In short, Councils in Northern Ireland became planning decision makers on 01 April 2015, reflecting a reform which was radical in nature. There is no evidential basis available to the court which warrants the generous degree of latitude and deference, based on presumed experience and expertise, espoused by Sullivan J in Fabre. This may of course change with the passage of time.”*

In cases where a legal duty to provide reasons arises, this court described the standard required as that of *“coherent and intelligible reasons”* in the discharge of a legal obligation *“of supreme importance”*: see [110] (vi).

[46] The issue of the content of reasons for planning decision, where required, was examined in greater detail in Re Sands Application [2018] NIQB 80, at [109] – [121]. The theme which probably emerges most strongly from these passages is that of considering all of the material evidence as a whole in the evaluation of a reasons challenge. At [112] this court stated:

*“All of the foregoing draws attention to the essentially prosaic reality that in a context where the decision maker is not a judicialised body subject to a common law duty to provide a properly reasoned, written judgment two considerations, in particular and inexhaustively, apply. The first is that the quest to ascertain a council’s reasons on key issues in a planning case will almost invariably require consideration of an amalgam of documentary sources, sometimes supplemented by affidavit evidence. The proposition that all such evidence must be considered in its entirety and not in isolated fragments is uncontroversial. The second main consideration is that the documents on which the glare of the spotlight is likely to be most intense – in particular Case Officers’ reports, notes of site visits and minutes of PC meetings – are not to be read and construed through the prism applicable to the decisions of a judicialised body. Rather a broader and more elastic approach is appropriate. This is nothing more and nothing less than the “fairly and in bonam partem” exhortation of Lord Wilberforce: see [50] supra. To summarise, the applicable legal framework is one in which excessive legalism and rigid prescription are intruders.”*

[47] As the submissions of Mr David Scoffield QC (with Mr Wayne Atchison of counsel) reminded the court, the context also includes one particular legal principle which was expressed pithily in Re Stewart’s Application [2003] NI 149 at [9]:

*“Such planning policy statements are not, however, a straight jacket and do not have to be slavishly followed in all circumstances .... the determining body must have regard to the policy but need not necessarily follow it.”*

Carswell LCJ added, tellingly:



*“If it departs from it, it must give clear reasons so that persons affected may know why an exception is being made to the policy and the grounds for the decision. We would only add that those reasons must be material planning reasons.”*

[48] There is a further aspect of the duty to give reasons (where this arises) which has not been the subject of detailed attention in the main decided cases. The provision of reasons is a facet of procedural fairness. It is readily linked to public law “buzz words” such as transparency, accountability and accessibility. This gives rise to an important consideration, jurisdictional in nature. In judicial review challenges based on a complaint of procedural unfairness, whether it be inadequate reasons or something else, the court is the arbiter. It forms its own view, unshackled by the constraints of, for example, the Wednesbury principle. The court does not ask itself whether the act or omission under scrutiny lay outwith the range of courses or responses rationally available to the public authority decision maker. Rather the question for the court is whether there was unfairness of the procedural, or due process, variety. In a reasons challenge the court determines this question by reference to the settled principles outlined above.

[49] One particular consequence of the foregoing, in my estimation, is that, typically, the court may not derive much assistance from the subjective protestations of planning experts, via affidavits, that the reasons proffered by the deciding authority for the impugned decision were – or, as the case may be, were not – adequate, intelligible or coherent. I am not suggesting that evidence of this kind is inadmissible and I intend no criticism whatever of the decisions of legal representatives to introduce it. But its utility may, in certain cases, be at best minimal and at worst non-existent.

[50] In the present case I consider that there are distinctly adversarial traits in the opinions which the two planning experts have, in their affidavits, expressed on the reasons recorded in the minutes of the key meeting of the Council’s PC. In my judgement, they strayed into the prohibited realm of advocacy, to be contrasted with balanced, detached and objective evaluation and assessment. I have derived no assistance from either of these evidential sources. The net result is a no scoring draw (to be contrasted with a scoring one).

[51] There is one further specific issue worthy of mention. The submissions of Mr Stewart Beattie QC (with Mr Philip McAteer of counsel) on behalf of the Council, in tandem with those advanced on behalf of the developer, were critical of the Applicant regarding the terms in which he had formulated his written objection to the planning application and his limited participation in the decision making process, including non-attendance at the PC's public meeting, thereafter.

[52] Forensically, these submissions were well made. However, it is appropriate to draw attention to the following. First, the Applicant's sufficiency of interest (or standing) to bring these proceedings is, correctly, not contested. Second, the legal duties of the Council had to be performed irrespective of the contributions made, or not made, by the Applicant. Third, the Applicant's entitlement to the grant of leave to apply for judicial review - again correctly - was not disputed.

[53] Mr Beattie's submissions do, however, highlight that the anterior conduct and participation of a judicial review litigant may be of some materiality. In this respect Mr Knox is to be contrasted with the hypothetical energetic, relentless and actively participating objector. This hypothetical person is likely to possess an insight and comprehension not shared by those such as Mr Knox. This, in the judicial review litigation scenario, may become a contextual factor which the court must weigh. Rephrased somewhat, there is no hierarchy of membership of the audience to which a planning authority's decisions are directed. The planning authority must have regard to the totality of the audience. This will include those who have the benefit of skilled legal advice and representation during the decision making process and all others. The legal standard which the authority's reasons must satisfy is immutable. It bears no relationship to the varying individual members of the audience of legitimately interested persons and groups. Doctrinally, save for those few cases where the specific and personal knowledge and/or conduct of the challenging litigant is legally relevant, all members of the notional "audience" are to be treated equally.

[54] The foregoing moderately lengthy preamble leads to the main question to be determined by the court: do the reasons documented in the minutes of the public meeting of the Council's PC on 12 March 2018 comply with the applicable legal standards viz the requirements

contained in paragraphs 7.1 - 7.3 of the Council's Protocol and the common law principles identified above ?

[55] As a starting point the Applicant does not contend that the 29 words under scrutiny are not deserving of the appellation of "reasons". This acknowledgement is properly made. Elaborating, considering all of the material evidence in its totality I am satisfied that the PC members were alert to all relevant planning policies and understood the import of section 6(4) of the Planning Act. In the statutory language, the fundamental question for them was whether there were "*material considerations*" which sufficed to "*indicate*" that their decision could lawfully be made other than "*in accordance with*" the LDP.

[56] Second, again bearing in mind the principles to be applied, I consider that to construe the three bullet points constituting the 29 words in question as the formulation of the three factors which the PC considered sufficient to displace the LDP involves no distortion of the language used or other impropriety. Third, each of the factors identified has the status of a material consideration in planning law. The contrary, correctly, was not argued. Furthermore, I consider that the language used is coherent and intelligible.

[57] What is there on the other side of the scales? Mr Orbinson highlighted, correctly, that there is no express formulation of the "*material considerations*" identified; there is no express balancing of the three factors in question vis-à-vis the LDP; there is no express indication of the quantum of weight being attributed to the three factors in question, either individually or cumulatively; and the bullet points were bare conclusions without accompanying elaboration. While Mr Orbinson's critique was more extensive than this, I have identified what I consider to be its core elements.

[58] The foregoing criticisms are well made. The only documentary evidence of the reasons for the impugned decision does indeed have each of the features highlighted. The question for the court is whether this renders the impugned decision unsustainable in law on account of legally inadequate supporting reasons. I have not found this question easy to answer. This is so principally because the Council's PC, with a little effort and at no additional cost, could have done so much better. This analysis follows inexorably from the terms of the minutes. It is

reinforced by the Council's need to provide a considerably more expansive exposition of its reasoning in both the PAP response letter and Ms Dickson's affidavit.

[59] However, having regard to the full evidential context, I conclude, by an admittedly narrow margin, that the recorded reasons pass muster in law. I thus conclude because considered in their full evidential and juridical contexts they are imbued with sufficient clarity, coherence and intelligibility. I am bound to add, however, that the Council should not have found itself in the position of defending the legal sustainability of the reasons for its impugned decision before this court. These proceedings were pre-eminently avoidable. The recorded reasons have been found to satisfy the legal *minima*. However, the court trusts that every Council in Northern Ireland will not satisfy itself with the bare minimum. Judicial review is designed *inter alia* to encourage and promote the highest standards of decision making in the realm of public law. The net effect of the authorities by which this court is bound is to erect a relatively high threshold for judicial intervention in a judicial review reasons challenge. The Applicant has failed, narrowly, to overcome this threshold.

[60] Furthermore, the Council and its legal representatives should not have found themselves in the position of having to select its HOP as the appropriate deponent. Ms Dickson was neither the decision maker nor a member of the body - the Council's PC - which made the impugned decision. Expressly eschewing any hard or fast rule, it is eminently foreseeable that in future cases the court will reflect carefully on why the author of the Council's affidavit evidence is not the chairperson of the PC. This discrete factor in the judicial and public accountability mechanism, in my view, can only serve to improve the quality of contemporaneously documented reasons for Council planning decisions.

[61] As stated and re-emphasised in decisions of high authority, the public law duty to provide reasons, where same exists, has the supreme virtue of serving to focus the decision maker's mind and, in so doing, reduces the risk of contamination via the intrusion of something alien or the disregard of something material or, in the worst case scenario, the simply irrational. Councils in Northern Ireland should, therefore, both welcome and embrace the legal duty to provide adequate, coherent and

intelligible reasons for their decisions on planning applications and should, if necessary, revisit practices, procedures and cultures which are not conducive to the discharge of this solemn legal obligation.

[62] Finally, I have decided the central issue in this case without reliance on either the Council's PAP response (as enlarged) or the corresponding parts of its affidavit evidence. Thus the Ex Parte Ermakov principles do not arise for consideration.

### **Omnibus conclusion**

[63] For the reasons given, and not without some hesitation, the court dismisses the application for judicial review.

### **Costs**

[64] Having expressed a provisional view and considered the parties' submissions on costs, following an adjournment for this purpose, I approve the consensual proposal that each party bear its own costs.