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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF APPLICATION BY GORDON DUFF FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF CAUSEWAY COAST AND GLENS BOROUGH COUNCIL

The applicant, Mr Duff, appeared in person
Kevin Morgan (instructed by Causeway Coast and Glens Borough Council Legal Services) for the respondent
The notice party, Mr McDonald, also appeared in person

SCOFFIELD J

Introduction

[1] The primary issue in this case is the relief which should be granted to the applicant in circumstances where the respondent, Causeway Coast and Glens Borough Council ("the Council"), accepts that it has acted unlawfully in the grant of planning permission to the notice party, Mr McDonald; but the notice party opposes the grant of an order quashing the impugned permission.

[2] The case has a somewhat unusual procedural history. When Mr Duff first complained about the grant of planning permission to Mr McDonald, by way of pre-action correspondence sent after that permission had been granted, the Council indicated that it would not oppose the grant of relief in proceedings to be brought by him, including the quashing of the planning permission. However, when those proceedings were lodged, Mr McDonald, the beneficiary of the planning permission, opposed the grant of leave to apply for judicial review and the grant of any relief. At that time, Mr McDonald was represented by solicitor and counsel. I was persuaded by the submissions made on Mr McDonald's behalf that Mr Duff lacked standing to bring the application for judicial review in light of the facts that the proposed

development could not conceivably directly impact the applicant and that Mr Duff had played no role at all in the planning process prior to the grant of the permission: see [2022] NIQB 11.

[3] Mr Duff appealed that ruling to the Court of Appeal, which allowed his appeal and granted leave to apply for judicial review: see [2023] NICA 22. In doing so, the Lady Chief Justice emphasised the specific circumstances of the case, which were described as "exceptional", because the Council had expressly invited Mr Duff to make an application for judicial review and had not opposed his standing to do so at first instance, conceding that it was appropriate for him to apply to the court "to correct a public law wrong." In light of these factors, the Court of Appeal considered that leave to apply for judicial review ought not to have been refused on standing grounds. The case was then remitted back to the High Court for hearing.

[4] When the case was listed for further directions it became clear, firstly, that the Council maintained its original stance of conceding that it had acted unlawfully and not opposing the grant of relief; and, secondly, that Mr McDonald wished to oppose the grant of relief both on the merits and as a matter of the court's discretion as to remedy. I summarise his position further below. By this time, Mr McDonald was acting as a litigant in person since, as a result of the costs of the earlier proceedings below and on appeal, he no longer considered that he could afford to instruct a legal team. I permitted him to be assisted by his architect, Mr Boyle, who acted as a McKenzie friend.

[5] I am grateful to both litigants in person and to Mr Morgan who appeared for the Council for their submissions.

Factual background

[6] I set out again the basic summary of the facts which appears in the initial leave ruling in the case. The proceedings concern the grant of planning permission in the countryside for an 'infill' dwelling, that is to say, a dwelling which is considered permissible under Policy CTY8 of Planning Policy Statement (PPS) 21 as filling a small gap in an otherwise substantial and continuously built up frontage in the countryside. In this case the Council granted such planning permission (reference LA01/2020/1235/O) in relation to a site between 51 and 53 East Road, Drumsurn, near Limavady.

[7] Policy CTY8 provides (in relevant part) as follows:

> "Planning permission will be refused for a building which creates or adds to a ribbon of development.
>
> An exception will be permitted for the development of a small gap site sufficient only to accommodate up to a maximum of two houses within an otherwise substantial

> and continuously built up frontage and provided this respects the existing development pattern along the frontage in terms of size, scale, siting and plot size and meets other planning and environmental requirements. For the purpose of this policy the definition of a substantial and built up frontage includes a line of 3 or more buildings along a road frontage without accompanying development to the rear."

[8] I analysed a number of features of this policy in another case brought by Mr Duff, which was treated as a lead case to determine a variety of issues he had raised in relation to the policy in several applications for judicial review, namely *Re Duff's Application (Glassdrumman Road, Ballynahinch)* [2022] NIQB 37 ("the *Glassdrumman Road* case").

[9] Mr McDonald has been granted permission for a dwelling on a site at the location identified above. The site is a small roadside field, located in a rural area, of predominantly agricultural character, outside of any settlement as defined in the Northern Area Plan 2016. Mr McDonald continues to maintain that the Council was right to consider that his application complied with planning policy and, in particular, that it was entitled to consider that the proposal was for a small gap site within an otherwise substantial and continuously built up frontage comprising Nos 51, 53 and 55 East Road.

[10] A previous application (reference B/2012/0155/O), which had been made before planning functions were transferred to district councils, was refused by the Department of the Environment on the basis that the proposal would result in ribbon development along East Road and fail to integrate in the landscape, resulting in a suburban style build-up when read with other existing development in the immediate vicinity. Mr McDonald did not appeal this decision to the Planning Appeals Commission (PAC), although he has averred that he was advised by his planning consultant that an appeal would have had good prospects of success. (He has provided a copy of a letter from a planning consultancy offering to act for him in the appeal, which provides no such indication, although it is possible that this advice was given orally.) He also contends that, in further discussion with Planning Service, his planning consultant was advised that his application had been "in the spirit of the policy and as such should have been approved."

[11] Mr McDonald made a further application for outline permission at the site (reference LA01/2020/0962/O) which was recommended for refusal, and which was withdrawn prior to a decision being taken by the Council. He has provided reasons why his agent did not have an opportunity to ask for this to be deferred for further consideration. Then, on 18 November 2020, he submitted a further application through his agent AQB Architectural Workshop Limited (AQB). This application was considered by the planning committee of the Council at its meeting on 25 August 2021. In advance of that, as is usual, the Council's professional planning

officers prepared a report for the committee, highlighting a number of salient issues, assessing the proposal against applicable planning policy, and making a recommendation. The planning officer's report noted that there were no objections to the proposal.

[12] Significantly, however, the planning officer's report included the following advice in the Executive Summary:

> "The principle of development is considered unacceptable in regard to the SPPS and PPS21 as there is no substantial and continuously built up frontage within the countryside at this location. The proposal would also have an adverse impact on rural character through the creation of ribbon development and would fail to satisfactorily integrate into the landscape. No overriding reasons have been forthcoming as to why the development is essential and cannot be facilitated within the development limit."

[13] This was clear advice that the relevant policies were not complied with. The officer's report therefore again recommended refusal on the basis that the proposal was contrary to the Strategic Planning Policy Statement for Northern Ireland (SPPS) and Policies CTY1, CTY8, CTY13 and CTY14 of PPS21. The discussion and conclusion within the report indicated that there was no substantial and continuously built up frontage within the rural area at the location (and consequently no gap to infill) as there was not the required number of buildings to form a built up frontage.

[14] In particular, it was noted that the dwelling at No 51 East Road sat to the rear of the application site and its curtilage did not extend to East Road, terminating approximately 25 metres back from the road edge where it accessed onto the laneway. Since the curtilage of No 51 did not have a common frontage onto East Road, it could not be considered to form part of a substantial and continuously built up frontage with Nos 53 and 55. Additionally, since there was (in the officer's view) no gap site at the location, the proposal would further add to the linear pattern of development along the roadside adding to ribbon development, which was detrimental to rural character and contrary to policy. Put simply, the development would result in the planning harm Policy CTY8 was seeking to avoid; and did not fall within the narrow exception which that policy viewed as permissible. There was also no overriding reason why the development was essential at this location under Policy CTY1. The proposal would also fail to integrate into the landscape and would erode the rural character of the area, which was also contrary to policy. Accordingly, refusal was recommended on a variety of bases.

[15] A site visit occurred on 23 August 2021, at which seven councillors and two council officers were present. The site visit report suggests that officers gave advice to those members of the planning committee who were present in the same vein as

was contained in the officer's report – pointing out why (in the officers' view) the relevant planning policies were not complied with.

[16] Notwithstanding this, at the committee meeting two days later, and despite the recommendation to refuse from Senior Planning Officer McMath (who gave a presentation in relation to the application), the committee decided by majority vote to grant the application. This was after a presentation by the applicant's architect, Mr Boyle of AQB, in which he contended that the site complied with Policy CTY8 and that the three relevant dwellings (Nos 51, 53 and 55) all shared a roadside frontage. He also – seemingly as an alternative – submitted that the spirit of the policy was met. The Chair put the motion to a vote and six members voted to approve the application; five members voted to refuse the application; and there was one abstention.

[17] The Head of Planning sought reasons for voting for an approval. These are generally required where a decision is taken which is contrary to officers' recommendations. The minuted reasons are as follows:

> "That the Committee approved for the following reasons:
>
> - The houses to the side are road frontage; as the frontage of no.51 goes to the road do not see a difference; if you take that as frontage, therefore infill applies and complies with policy;
>
> - A dwelling on the site will integrate with the buildings already there;
>
> - Is not ribboning, the laneway ensures ribboning does not take place."

[18] It seems that these reasons were only articulated *after* the vote was taken. As appears below, the vote against accepting the officer's recommendation was treated as a vote to approve the planning application. Accordingly, the reasons why the majority of the committee were voting to approve do not appear to have been discussed in advance of the vote (contrary to model practice in this area, as endorsed by the UK Supreme Court in para [60] of its decision in *Dover District Council v CPRE Kent* [2017] UKSC 79).

[19] The minute also notes that Councillor Hunter (who seconded the motion to accept the officer's recommendation to refuse the application) stated her dissatisfaction with the lack of justification for the committee's decision; and that the Head of Planning "advised that she can only record what the Members have put forward for their reasoning."

The parties' submissions on the merits

[20] Mr Duff has three broad grounds of challenge: first, that immaterial considerations have been taken into account; second, that material considerations have been left out of account; and, third, that there has been a breach of planning policy without the appropriate justification. The particulars provided in the grounds represent a number of consistent themes in Mr Duff's challenges in relation to infill development in the countryside, most of which are dealt with in the judgment in the *Glassdrumman Road* case.

[21] In particular, the applicant contends that there is no substantial and continuously built up frontage at this location – largely because No 51 East Road should not be considered to form part of such a frontage (since it does not actually front onto East Road). He contends that No 51 is "up a lane with no frontage to East Road"; and he has provided photographic evidence which supports that contention. This is in support of the central thrust of his case, which is that there was no relevant substantial and continuously built up frontage within the terms of Policy CTY8 to enable legitimate infill development to occur. Accordingly, the Council's planning committee erred in considering that the proposal complied with relevant planning policy. He also contends that the proposed dwelling will not integrate; that it will allow suburban build-up; and that it will create or add to ribbon development in a manner which is precluded, rather than permitted, the relevant policy. In substance, his case is that the Council's professional planning officer got the assessment right and that the elected councillors who voted in favour of the proposal got it wrong in a manner which is legally indefensible.

[22] In large measure, the Council agrees with this analysis. In para [16] of my decision at the leave stage, I described the Council's position as follows:

> "First, the Council accepts that it is arguable that, as already outlined in the summary of the officer's report above, there is no relevant frontage to East Road at the dwelling at No 51 and that the committee's minuted reasoning that "the frontage of no.51 goes to the road" could not be stood over. Relatedly, it was accepted to be arguable that the three dwellings said to form the continuous frontage were not visually linked given the extent to which No 51 was set back. Second, the Council also accepts that the further committee reasoning that "the laneway ensures ribboning does not take place" arguably cannot withstand scrutiny. Indeed, it is difficult to see that the mere presence of a laneway between two properties would have any significant impact on the issue of visual linkage which is relevant as part of the assessment of whether ribbon development has been created or added to. The Council accordingly did not

> oppose the grant of leave and, indeed, consented to the grant of relief even at this early stage."

[23] In a position paper lodged after Mr McDonald's position became clear, the respondent accepted that the proposed development constituted ribbon development precluded by Policy CTY8; that it did not come within the 'infill' exception, as it is not within a continuous and substantially built up frontage (with No 51 'not counting'); that it was likely to result in suburban style build-up with a detrimental change to the rural character of the countryside at the location; that it did not visually integrate; and that there were no overriding reasons why the development was essential and could not be within a settlement. Whilst the Council did not accept *all* of Mr Duff's pleaded grounds, it accepted the thrust of them in relation to Policy CTY8, which it conceded had been misapplied, particularly in respect of its consideration of No 51 East Road.

[24] I was informed that the Council's planning committee had resolved at a meeting on 22 September 2021 that the proceedings would not be defended by the Council; and made a further resolution to similar effect at a meeting on 26 January 2022, after having considered the notice party's written submissions and further planning report which were submitted in the course of the initial leave application. In his oral submissions, Mr Morgan accepted on behalf of the Council that the planning committee had "misdirected itself in relation to a fundamental and grounding factual point" because No 51 did not have frontage onto East Road.

[25] For his part, Mr McDonald continued to contend that the grant of planning permission was defensible on the merits. He submits that he is the innocent party in the whole affair and simply wishes to protect his "legally granted" planning permission. He maintained the position that the planning committee, having undertaken a site visit in order to inform itself, was entitled to exercise its own planning and factual judgement in relation to the issues raised by Policy CTY8. In particular, they were entitled to take their own view on the question of fact as to whether or not the curtilage of No 51 extended down to the road. As noted in the leave decision, this case was supported by a report from a newly instructed planning consultant, Gemma Jobling BSc Dip TP MRTPI of JPE Planning, which maintained the view that the relevant policies were complied with (including by virtue of the fact that the driveway access to No 51 East Road formed a frontage to the road). Mr McDonald also notes that a case will only be called in from officers to the planning committee where the councillor requesting this has provided sound planning reasons for the committee considering the matter, which must have been accepted by the Council's Head of Planning at that point. The notice party has also suggested, as a fall-back position, that the site is "within the spirit" of the planning policy.

[26] Mr McDonald has also averred that the Council's position in failing to oppose Mr Duff's application, from the time of the pre-action correspondence onwards, has been solely on the basis of its potential costs' exposure in these proceedings. He has

averred (although without providing detailed particulars of this exchange) that the Council has "previously stated that there was no legal flaw in their decision making." In his skeleton argument he suggests that this was an exchange between his architect, Mr Boyle, and the Council's solicitor, Mr Linnegan. The respondent disputes this suggestion and says that, for the reasons given above, it is conceding the application because it recognises that the committee decision was unlawful and cannot withstand the legal challenge which has been mounted against it. Although I understand that Mr Linnegan no longer works for the Council, Mr Morgan indicated on instruction that he had denied making representations in the terms alleged by the notice party.

Conclusion on the merits

[27] As I observed at para [18] of the leave ruling in this case, even in relation to planning policies which involve judgment-laden concepts, the invocation of the exercise of planning judgment is not a magic shield which invariably wards off any prospect of successful challenge by way of judicial review:

> "Although the application of Policy CTY8 calls for the exercise of planning judgment in places, there are limits to how far that may go for three reasons. First, as authority establishes, planning authorities do not live in the world of Humpty Dumpty where the words used in a policy can be applied so flexibly as to render them devoid of sensible meaning (see Lord Reed in *Tesco* [2012] UKSC 13, at paragraph [19]). Second, albeit judgment may require to be exercised in matters of evaluation, there are other matters (such as the ascertainment of physical features on the ground) which may require assessment as a matter of fact, rather than the exercise of judgment, where judicial review will lie more readily in the case of a clearly established error. And, third, even where judgment is concerned, although the court's role is then extremely limited, it retains a residual discretion to review for irrationality or *Wednesbury* unreasonableness."

[28] In short, a planning authority is not entitled to stretch the language of a planning policy beyond breaking point; nor to maintain that black is white.

[29] In this case, at least two of the reasons given for departing from the officer's recommendation are legally unsustainable:

(a) First, it was contended that each of the relevant houses to either side of the site "are road frontage" because "the frontage of no.51 goes to the road." The officers were convinced that this was simply wrong as a matter of fact; and the Council collectively maintains this position. The fact that No 51 is

accessed by a laneway which opens out onto the road does not mean that the dwelling, which sits *to the rear* of the application site, has or forms part of a frontage along the road. The curtilage of the property ends some 25m *back* from the road edge (where it accesses onto the laneway). It is only the laneway which meets the road; and the access to No 51, beyond gates on the lane, is well back from the road on which the application site and other houses do have frontage. The officer was simply right, as a matter of fact and/or a matter of the application of the policy, to say that as the curtilage of No 51 does not have a common frontage onto East Road it cannot be taken to form part of a substantial and continuously built-up frontage along East Road. That is also consistent with the Planning Appeals Commission's decision in Appeal 2019/A0250, at para 6, which appears to have addressed a materially identical issue. Whether viewed as an error of material fact, a misinterpretation of the policy, or simply an irrational approach, this represents a legal flaw which renders the resulting decision liable to be set aside. (I also note in passing that the notice party's reliance on the committee members having conducted a site visit appears to me to have been misplaced when the vast majority of those voting to approve the application had *not* been present at the site visit.)

(b) Second, the committee noted that the proposal was "not ribboning" on the basis that "the laneway ensures ribboning does not take place." Having regard to the nature of ribbon development which Policy CTY8 is generally designed to avoid, it is impossible to see how the mere existence of a laneway adjacent to the application site could, of itself, ensure that there was no unacceptable ribbon development. I find this reason irrational. It simply does not stack up as a matter of logic. As a matter of planning analysis, it is little more than gibberish. (It is also the case that a proposed development must create or add to a ribbon of development in order for the infill exception, upon which the planning applicant relied, to potentially arise.)

(c) In light of my conclusions in relation to the above two issues, I need not consider in detail whether it was permissible for the majority of the planning committee, as an exercise of reasonable planning judgment, to conclude that the proposed dwelling "will integrate." That is a matter upon which, if the committee properly directed itself, it would be difficult to upset their decision unless clearly irrational. I do note, however, that the reason recorded in the minutes said that the dwelling would "integrate with the buildings already there" rather than, as policy requires, addressing the more exacting tests within Policies CTY13 and CTY14. I simply observe that the officer's report addressed the questions of integration and impact on the rural landscape in some detail in a manner which is not matched by the brief reason for departure on this issue which is recorded in the minutes.

[30] I should also say something about the case advanced on Mr McDonald's behalf by his architect before the planning committee. He relied on the fact that para

5.33 of the amplification text related to Policy CTY8 in PPS21 allows for an infill opportunity whenever buildings are set back or staggered. However, that is to misunderstand the distinction between ribbon development on the one hand (which is generally prohibited) which *can* take into account buildings which are set back from the road where they are visually linked to other buildings, and a continually built up frontage on the other (which is a necessary element for the exception with Policy CTY8 to apply) in respect of which no such concession applies. This was explained in the judgment in *Glassdrumman Road* case (see, for instance, paras [49], [52] and [91](iv) of that judgment). It follows from the text used but also the purpose of the policy: a wide interpretation is to be given to ribbon development, which is to be avoided in the countryside; and a narrow interpretation is to be given to the exception to this policy so that harm to rural character is avoided.

[31] In the report provided by the notice party from Ms Jobling, described as a preliminary planning opinion, she does not repeat this point. She accepts that No 51 is set back from the public road with a sweeping driveway and says that it is served by a driveway access which presents onto East Road forming a frontage to the west. It is her "view" that "this driveway access forms part of the planning unit comprising No. 51 and this extends to create a frontage along East Road." However – even assuming that Ms Jobling is right about the laneway forming part of the planning unit – in light of the evidence presented in these proceedings, including the photographic evidence of the site, and the Council's settled view on this issue (which is now in line with its officers' consistent approach to the issue), I cannot accept that this establishes a substantial and continuously built-up frontage either side of the application site, even arguably so.

[32] As noted above, the notice party also contended that his proposal was within "the spirit" of Policy CTY8. This echoes a representation made by Mr Boyle to the planning committee, which is set out in the minutes, that "the spirit of policy CTY8 is met." This usually means that the conditions in the relevant policy are *not* met but in a way which the applicant contends is minor. Such a submission to planning committee members can be an extremely dangerous one because it is apt to confuse the position between a situation where policy conditions are met (and the proposal is policy compliant) and a situation where policy conditions are *not* met in some material way (and the proposal is policy non-compliant). In order to properly direct themselves, planning decision-makers must correctly understand whether a planning policy authorising development is complied with; or whether they are proposing to grant planning permission notwithstanding that the relevant policy is not complied with. In the latter instance, the decision-maker must recognise that they are granting planning permission which is *contrary* to planning policy and have valid planning reasons for doing so. (A similar issue arose for consideration in *Re Portinode's Application* [2022] NIQB 36, at paras [18]-[25].)

[33] For the reasons set out at para [29] above, I consider that the applicant succeeds in his case (conceded by the Council) that the respondent acted unlawfully when granting the impugned planning permission in this case. The question, then,

is what relief should be granted on foot of this finding. In particular, should the planning permission be quashed, which is the usual order where such a permission has been granted in a way found to be unlawful by the Judicial Review Court?

Mr Duff's fresh argument about the vote

[34] Before addressing that issue, I note that Mr Duff introduced a further argument before the hearing which was grounded on the precise voting mechanism deployed at the key planning committee meeting of 25 August 2021. He argued that there was no decision to approve the planning application in this case at all. The officer's report recommended refusal of the application. A decision was taken to reject that recommendation; but the reasons for this were only given and recorded after the vote. In particular, however, Mr Duff argues that there was no valid vote to grant planning permission because there was no motion to approve the application. The vote taken against refusal did not amount to a vote to approve the application, he submits, since such a vote could equally lead to a range of other outcomes (such as deferral of a substantive visit pending a site visit, further representations, etc.).

[35] The Council's position, expressed in response to correspondence from Mr Duff on this issue, is that the vote to reject the planning officer's recommendation amounted to a vote to approve the application. The respondent was and is satisfied that a valid vote to approve the planning permission was taken. This is supported by the minutes of the meeting since, after the vote to reject the officer's recommendation was made, the minutes record that the Head of Planning "sought reasons for voting *for an approval*" [my emphasis] from the members who had so voted. A planning permission document (previously referred to as the 'green form') was formally issued on 26 August 2021 purporting to represent the grant of the relevant permission.

[36] Strictly speaking, I do not need to determine this issue, since it formed no part of the applicant's pleaded grounds; and there is no claim for a declaration that no valid planning permission was actually granted. Insofar as necessary, however, I would reject the argument on Mr Duff's behalf. Although it would plainly have been better and more transparent to hold two separate votes (one on accepting the officer's recommendation and, if that was rejected, a further vote on how to then proceed), the important thing is how the purpose and effect of the vote was understood at the time. I am satisfied from the evidence, and particularly the formal committee minutes, that those present at the meeting understood that the vote taken was intended to result in the grant of planning permission (contrary to the officer's recommendation) and that this was the will of the majority voting. After the Head of Planning had sought reasons, it was minuted that "the Committee *approved* for the reasons" which I have already described. The Chair then declared the application approved; and it was further agreed that the issues of conditions and informatives to be included within the permission were delegated to officers. Whether, as a matter of internal procedure, the voting was regular or not, I am satisfied that the committee intended to and did approve the grant of planning permission which was

subsequently given effect by the officers issuing the formal document to that effect. That permission enjoys the presumption of legality unless and until set aside.

Mr Duff's request for a quashing order

[37] Mr Duff indeed invites the court to set aside the notice party's planning permission so granted. He has relied, inter alia, upon my decision in *Re Burns' and Duff's Applications* [2022] NIQB 10, at para [30](a) in which I indicated that it would be unusual for a court to stand in the way of a public authority having its own decision quashed, on its own application, when it comes before the court and admits a public law flaw in its decision-making process which is substantiated by evidence provided on its behalf. Although this is not a case of the Council itself applying to set aside its own decision (as that case was), Mr Duff is right to identify that the *usual* course where a public authority admits such a flaw in its decision-making is that the court will grant an order of certiorari to quash the resultant decision.

[38] Mr Duff also made a number of interesting submissions based upon work carried out by the Northern Ireland Audit Office (NIAO) and the Public Accounts Committee (PAC) of the Northern Ireland Assembly. The NIAO published a report by the Comptroller and Auditor General and the Local Government Auditor in February 2022 entitled, 'Planning in Northern Ireland.' Part Three of the report dealt with variance in decision-making processes. It expressed a number of concerns which resonate with the present case. These included a finding that the type of applications being considered by planning committees within councils, rather than simply being dealt with on a delegated basis by councils' professional planning officers, were not always appropriate. Elected members were calling in for consideration applications which were not always the most significant and complex; and, indeed, some council planning committees appeared to be "excessively involved in decisions around the development of new single homes in the countryside." The NIAO considered that the evidence highlighted a disproportionate use of committee time and focus on such applications.

[39] The NIAO report also considered the extent to which planning committees within local councils overturned the recommendations of their professional planning officers. Everyone accepts that this is an entirely proper and permissible outcome in certain cases, with the proviso that decisions to depart from officers' recommendations should be supported by clear planning reasons. Some planning committees have a higher rate of overturning their officers' recommendations than others, however, with the Council in this case being towards the top of the league table (see Figure 7 in Part Three of the NIAO report). The vast majority of cases (90%) where the officers' recommendations were overturned was where a planning committee granted planning permission against the officers' advice. Of even more direct relevance in the present case is that almost 40% of decisions made against officer advice related to single houses in the countryside. In all of these instances the recommendation to refuse planning permission was overturned and approved by the committee. It does not appear that a committee has disagreed with a

recommendation to approve in such a case, thereby taking a stricter view of the planning issues than the professional officers. The NIAO expressed the following concerns as a result of this analysis:

> "In cases where the planning committee grants an application contrary to official advice, there is no third party right of appeal. The variance in overturn rate across councils, the scale of the overturn rate and the fact that 90 per cent of these overturns were approvals which are unlikely to be challenged, raises considerable risks for the system. These include regional planning policy not being adhered to, a risk of irregularity and possible fraudulent activity. We have concerns that this is an area which has limited transparency."

[40] In the usual way, the NIAO report was considered by the PAC in the exercise of its scrutiny functions. It too issued a report, on 24 March 2022, entitled 'Planning in Northern Ireland' (NIA 202/17-22). The PAC expressed concern about how the planning system was operating for rural housing. In particular, based on the evidence presented to it, the Committee said that it was concerned that "there appears to be an increasingly fine line between planning committees interpreting planning policy and simply setting it aside." The PAC was also concerned about inconsistent application and interpretation of the relevant planning policies across Northern Ireland. It concluded that the operation of the planning system for rural housing "is at best inconsistent and at worst fundamentally broken", recommending that the Department ensure that policy was agreed and implemented equally and consistently.

[41] For what it is worth, these findings and conclusions chime with the view I expressed in para [89] of the *Glassdrumman Road* decision, arising from my experience of dealing with a significant number of challenges brought by Mr Duff relating to councils' application of Policy CTY8 of PPS21. Although I consider there is more scope within the policy for the exercise of planning judgment than Mr Duff's submissions in that case would have allowed for, I nonetheless expressed the view that:

> "… in this and a range of other cases… I consider that one can discern a somewhat relaxed and generous approach to the grant of planning permissions under the infill exception in Policy CTY8 which may be thought to have lost sight of the fundamental nature of that policy as a restrictive policy with a limited exception. In the words of the Department's Planning Advice Note of April 2021, there is a case that decisions have been taken which "are not in keeping with the original intention of the policy' which will then 'undermine the wider policy aims and

> objectives in respect of sustainable development in the countryside.'"

[42] Mr Duff made it clear that he was not making any suggestion of fraud in this case, and I wish to emphasise that, since the mere mention of this issue in the present context was something to which Mr McDonald and Mr Boyle understandably took exception. Mr Duff did, however, have a concern that some councils were being lax about the requirements of Policy CTY8 and were granting planning permission, purporting to do so in the exercise of planning judgment, where it was plainly inappropriate to do so. He counted this case as one of those. As a result, he urged the court to put down a marker that, where a council unlawfully granted planning permission in this way, that permission would be quashed on a successful application for judicial review.

The notice party's grounds of opposition to the grant of a quashing order

[43] Mr McDonald opposes the grant of a quashing order essentially on four grounds. First, he contends that, since relief in judicial review is discretionary, the primary relief Mr Duff seeks should be refused to him because he is an undeserving applicant. This is a variation on a 'clean hands' argument, namely that an applicant seeking public law relief should not themselves have shown disregard for the law (in this case, planning law). Second, he contends that a quashing order should be refused in the exercise of the court's discretion because of the prejudice this will now cause to him. Third, and relatedly, he contends that it would be unfair for his planning permission to be quashed in light of the Council's role in all of this. Fourth, he maintains that, notwithstanding the Court of Appeal's ruling on standing, Mr Duff should nonetheless be viewed as a "busybody" and should not be considered to enjoy standing. I address each of these issues in turn below.

The 'clean hands' argument

[44] Mr McDonald has averred that he has researched the applicant's history with a number of councils in Northern Ireland where a number of planning applications which he submitted were rejected. He mentions, in particular, an application for self-catering apartments on a farm he owns in Donaghadee; and an application in the Belfast area which would include the cutting down of a number of trees protected under a tree protection order (TPO). He also alleges that Mr Duff has a car mechanic garage at his land in Donaghadee "which does not include basic environmental safeguards such as oil/petrol interceptors or welfare facilities." A short document was provided summarising in very brief terms (what was said to be) Mr Duff's planning history listing a range of planning applications in different council areas, some of which had been refused, including some for dwellings in the countryside. A number were said to represent applications made in response to enforcement action or for retrospective approval. On the basis of this history, Mr McDonald suggested that Mr Duff did not have a genuine desire to protect the

environment and/or that he was simply an aggrieved planning applicant with a "vendetta" against councils.

[45] I do not doubt that the Judicial Review Court can withhold a remedy in the exercise of its discretion in circumstances where the applicant's own conduct, outside their conduct of the proceedings themselves, is such as to render this appropriate (see, for example, Auburn, Moffett & Sharland, *Judicial Review: Principles and Procedure* (OUP, 2013) at paras 32.39 and 32.40). I have not been persuaded, however, that the present case falls within that category. I was provided very limited detail indeed in relation to the variety of planning applications which were said to provide a possible motivation for Mr Duff's litigation and/or to mark him out as an undeserving applicant. Mr Duff submitted that some of the applications relied upon by Mr McDonald had not been made by him but had, in fact, been made by his father before he died. There was insufficient information provided to satisfy me that Mr Duff was guilty of some wrongdoing or inconsistency in approach which, of itself, ought to lead to the refusal of a remedy in these proceedings. Both the Court of Appeal and I have previously accepted that Mr Duff has a genuine concern for the environment. The litany of judicial reviews he has pursued in this area could scarcely be explained otherwise. Where, as here, an applicant is seeking to enforce a planning policy designed for the protection of the environment, there would require to be strong material before the court would refuse relief purely on the grounds of the applicant's own behaviour. The notice party has not raised any matter which appears to me to warrant this unusual course.

Fairness, prejudice and standing revisited

[46] Mr McDonald also says that he has experienced hardship, financial burden and stress throughout the process of seeking to retain his planning permission. He says this has also affected his immediate family, his mother and his brothers. Mr McDonald owns the application site and the adjacent dwelling at No 53 East Road (which was the original family home). His evidence is that he wished to sell the application site with the benefit of planning permission in order to raise funds to develop a 'granny annex' at his own property for his mother, who is in failing health and requires new accommodation. Plans were prepared for this in 2020; but these have had to be put on hold. He was also seeking to improve the existing dwelling at 53 East Road. He further explained that, with the benefit of the impugned planning permission, there was another potential option open to him which, at the time of the hearing, was in fact the more likely of the two to be pursued. Instead of selling the application site with the benefit of permission, he could alternatively sell his existing house in Limavady, build the newly approved dwelling for his family and fully renovate No 53 for his mother, allowing her to live beside him and his family in the two houses. For the moment, neither option is possible because of the legal uncertainty hanging over the impugned permission.

[47] Mr McDonald relied upon the personal circumstances of his mother, who currently lives in rented accommodation in Limavady. She had to move there to be

closer to family, due to mobility issues, after his father died; but this accommodation is said to be unsuitable for her current needs. The delay and uncertainty in proceeding with the plans described above have also caused her significant stress. Mr McDonald also submits that he had been "financially crippled" trying to retain the planning permission granted.

[48] Mr McDonald further contends that, had the Council mounted an objection to Mr Duff's locus standi from the outset, and had it not therefore invited Mr Duff to apply for judicial review (which it would then concede in order to avoid costs), Mr Duff would not have been granted leave to apply for judicial review at all. He maintains that he was told that the Council were conceding the intended proceedings on the grounds of cost alone and not because it considered that it had done anything wrong. Viewed in this way, he feels significantly let down by the Council, which he considers wrongly caved in to an unmeritorious threat of proceedings from Mr Duff on purely financial grounds.

[49] Mr McDonald has averred that he has spent in excess of £15,000 fighting a battle which should not have arisen if the Council had responded appropriately. (By this, however, he obviously means the Council contesting Mr Duff's application for judicial review, including on the issue of standing, rather than by it not having granted his planning permission in the first place). For its part, the Council maintains that it has acted appropriately and on legal advice at all times.

[50] Against all this, Mr Duff has relied upon the fact that a previous application from Mr McDonald at the proposal site was refused in 2012 for similar reasons (it would result in ribbon development; it failed to integrate with the landscape; and it would result in suburban style build-up); and that a further application was withdrawn after it had been recommended for refusal, on essentially the same grounds upon which the officers had recommended refusal of *this* application. The application giving rise to the permission impugned in these proceedings was, Mr Duff submits, virtually identical to and on the exact same site as the withdrawn application; and was submitted only 16 days after the previous application was withdrawn. In his view, Mr McDonald and his advisers ought to have known at all relevant times that the application was not compliant with the relevant policy. In addition, he points to the fact that PPS21 does, exceptionally, allow for development in the countryside where there are compelling personal circumstances (see Policy CTY6); but that the circumstances of this case are unlikely to fall within that category, given its strict conditions and since Mr McDonald originally wished to use the grant of permission as a financial scheme simply to raise additional capital to help to rehome his mother. Whilst professing sympathy for Mrs McDonald's plight, Mr Duff also pointed out that she still owns her original home in Claudy, which is being rented out, which could provide another source of income.

[51] It is difficult to ascertain the most just outcome in all of these competing circumstances. For Mr Duff, Mr McDonald secured a planning permission to which

he was never entitled. For Mr McDonald, Mr Duff has challenged a planning permission after the event which is no concern of his.

[52] For the reasons I have given above, I consider that the Council was wrong to grant the planning permission in this case in the way in which it did. Particularly in light of the previous refusal decisions or recommendations, the grant of the permission represented something of a windfall to Mr McDonald. At the same time, as I highlighted in my decision on leave, Mr McDonald secured the permission in the absence of any third party objections. It was also granted before the court had provided the guidance on Policy CTY8 which is set out in the *Glassdrumman Road* case, which has been treated as a lead case on this issue. At that time, there was perhaps a more relaxed approach to the grant of permission under that policy which appears to have been influential in the thinking of Mr McDonald and his advisers. Mr McDonald was then taken by surprise by the intervention of Mr Duff, completely after the event, seeking to challenge the permission. If Mr Duff had objected during the planning process, the course of events may have been very different. In those circumstances the permission may not ever have been granted. At least, however, the issue with Mr Duff's standing would not have arisen; and Mr McDonald would have been aware from an early stage of the potential issues with his planning application.

[53] In my view, the Council was right to concede the substance of Mr Duff's challenge; but could have taken a firmer line on the standing issue from the outset. Had it done so, even on the Court of Appeal's analysis, Mr Duff would have lacked standing to bring the proceedings. On the other hand, the Council could also have made more clear, from a very early stage, why it was proposing to concede the grant of relief. Much of Mr McDonald's frustration (and then his expenditure in these proceedings) was because of his belief that the Council was conceding the case only on financial grounds without accepting that it had committed any legal error. I cannot resolve the question of what Mr McDonald was or was not told in this regard, nor do I need to; but it is certainly unhelpful that his understanding of the Council's position and that which has been advanced to the court on the Council's behalf are at such odds with each other. I accept that, rightly or wrongly, Mr McDonald genuinely believed that the Council was conceding only on the issue of cost. This situation arose, at least in part, because the Council only spelt out its position with any degree of clarity when pressed to do so in the course of the initial leave hearing.

[54] This brings me lack to the issue of standing. The suggestion that a different or separate analysis of an applicant's interest is appropriate for the purposes of the *grant of relief*, even if the applicant had sufficient interest to litigate the issues in these proceedings in the first place, was raised in the *Glassdrumman Road* case (see para [88]). It did not have to be determined in that case, since I did not consider the respondent's decision in that case to have been unlawfully taken. The issue does, however, need to be grappled with in this case.

[55] It is clear from authority not only that standing can be revisited at the remedy stage but also that an interest which is sufficient for the grant of leave may not be sufficient for the grant of relief or some particular form of relief. In *Walton v Scottish Ministers* [2012] UKSC 44 Lord Reed, at para [95], said that "… the interest of the particular applicant is not merely a threshold issue, which ceases to be material once the requirement of standing has been satisfied: it may also bear upon the court's exercise of its discretion as to the remedy, if any, which it should grant in the event that the challenge is well-founded." In that regard, he was agreeing with Lord Carnwath who, at para [103], considered that the issue of discretion "in practice may be closely linked with that of standing" and that the court's discretion may be important to some extent in acting as a necessary counterbalance to the widening of the rules of standing. In environmental cases, for instance, an individual may have sufficient interest to bring a case even though they themselves are not directly affected; but, where the court proceeds on that basis, it is important that those interests are not seen in isolation and that other interests – both public and private – are taken into account.

[56] Many years before that, in *R v Department of Transport, ex parte Presvac Engineering Ltd* (1992) 4 Admin LR 121, at 145-146, it had been said that, at the substantive stage, the court must review the question of sufficiency of interest and exercise its discretion accordingly. Whether this was properly to be viewed as an investigation of standing or simply the exercise of discretion in relation to remedy was "probably a semantic distinction without a difference." Before that still, in *R v Inland Revenue Commissioners, ex parte National Federataion of Self-Employed and Small Businesses Ltd* [1982] AC 617, at 656, it had been emphasised that the exercise of the court's discretion as to remedy in judicial review proceedings "and the determination of the sufficiency or otherwise of the applicants' interest" for this purpose would depend upon the due appraisal of many different factors revealed by the evidence in the course of the proceedings.

[57] Taking all of the above into account, I have concluded that a quashing order should be refused in this case on the basis of standing, taking into consideration the prejudice which would be caused to Mr McDonald if a quashing order was granted and Mr Duff's lack of direct interest in the proposal for which permission has been granted and non-participation in the planning process. Mr Duff had standing to bring the proceedings (as the Court of Appeal held) on the "highly fact specific" basis that the Council had invited him to do so. He has succeeded in establishing illegality on the respondent's part, which will be reflected in a declaration. However, as the Court of Appeal explained, his standing to bring this case – notwithstanding his non-participation in the original planning process and the fact that he has no direct interest in the proposal – was exceptional. In my view, it is not sufficient to entitle him to the primary relief which he seeks in all of the circumstances of this case.

Costs

[58] In reaching the conclusion set out above, I have also taken into account the appropriate disposal in relation to the costs of the proceedings. I propose to deal with costs in the manner set out below which, taken together with the approach to relief described above, represents a package which in my view meets the overall justice of the case:

(a) Mr Duff should bear his own costs. Although he has been successful on the merits, he has not achieved the primary relief which he sought. He also embarked upon the proceedings on the basis that he would not seek costs against the Council (although he did secure the costs of his successful appeal against the Council).

(b) Mr McDonald should also bear his own costs. Although he has successfully opposed the grant of a quashing order, he unsuccessfully contended that there was no legal flaw in the planning permission which had been granted, even in the teeth of the Council's concessions in this regard. His costs of these proceedings are, to some degree, a counter-balance to the windfall planning permission which he received.

(c) The Council should also bear its own costs. Although it could, and should, have been more transparent from the outset as to the basis upon which it was conceding the proceedings, the Court of Appeal has already condemned it in the costs of the applicant's leave appeal. Its position in the substantive hearing before me was appropriate and it should not be penalised in costs any further.

A cautionary word

[59] These proceedings provide an example, in my view, of the dangers of elected councillors rejecting the advice of professional planning officers without valid planning grounds for doing so. The analysis of the NIAO discussed above suggests that there may be more willingness on the part of council members to do so in relation to single houses in the countryside than in relation to some other types of development. Whilst it is entirely permissible for elected councillors (to whom planning powers have been given by statute) to exercise planning judgment in a different way to officers in many instances, or to give material considerations different weight than their officers might, they should be wary of stretching planning policy beyond its proper meaning or making decisions on grounds which are not legally defensible. Where they wish to depart from an officer's recommendation, it will often be better to discuss this in advance, including (at least in some cases) with the benefit of the officers' advice or legal advice as to whether there is legitimate scope for a different view to be taken. Where, as here, an unjustifiably generous approach is taken and a legal challenge ensues, this can result in delay and heartache for the planning applicant whom the councillors may have hoped to benefit; and in significant legal costs to the council concerned.

Conclusion and costs

[60] For the reasons set out above, I will declare (a) that the respondent erred as to a material fact, misinterpreted planning policy and/or reached a view which was irrational in concluding that there was a substantial and continuously built-up frontage in which the application site formed a gap site; and (b) that the respondent reached an irrational conclusion in determining that the presence of the laneway at the location ensured that "ribboning does not take place."

[61] I grant no other relief in these proceedings and, in particular, decline to quash the planning permission granted by the Council. Since the permission was for outline planning permission only, a reserved matters application will still be required before development can be lawfully commenced.

[62] There will be no order as to costs between the parties.