Neutral Citation No: [2018] NIQB 17 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **McC10549** **JR 2017/36823/01** *Delivered:* **23 February 2018**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY BELFAST CITY COUNCIL FOR JUDICIAL REVIEW

-v-

THE PLANNING APPEALS COMMISSION

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Appendix of Statutory Provisions

GLOSSARY

The Council: Belfast City Council

PAC: Planning Appeals Commission

IP: The Interested Party, Car Park Services Ltd & Slaney Ltd

PAD: 'Pre-application Discussion' process involving the Council & the IP between 20th February 2015 and 30th June 2015, prior to the IP submitting an application for planning permission

PAD Meeting: Meeting which took place on 17th January 2015 between the Council & the IP to discuss the proposed application

PC: The Council's Planning Committee

NOA: Notice of Appeal

OP: The Council's "Operating Protocol" for planning decisions

SOs: The Council's Standing Orders

SOC: Statement of case

SOD: The Council's statutory Scheme of Delegation in planning decision making.

DRAMATIS PERSONAE

Kelly Mills: The Council's Principal Planning Officer
Conor Campfield: The Council's Senior Planning Officer
Gemma Jobling: IP's planning consultant
Andrew Nesbitt: IP's project architect
Carrick Hill Residents' Association: Objector at PAC
Community Places: Not for profit organization offering planning advice to objector

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McCLOSKEY J

Introduction

[1] This case raises certain interesting and novel questions of law in the context of the new planning legislative framework introduced in Northern Ireland with effect from 01 April 2015. Belfast City Council (the "*Council*"), having secured the requisite permission of the court, challenges a decision of the PAC dated 27 February 2017 whereby, allowing the developer's appeal, full planning permission was granted for a development entailing purpose built managed student accommodation comprising 79 apartments containing 365 en suite bedrooms with shared living rooms and kitchens, 8 studio apartments containing 28 self-contained studios and ancillary facilities, but internal and external, on a site bounded by Library Street, Stephen Street and Kent Street, Belfast (the "*site*"). The grounds of challenge, succinctly, are *ultra vires*, irrationality, misdirection in law and procedural unfairness.

The Interested Party

[2] As noted above, the developer has the status of interested party in these proceedings. This is a purely procedural issue. It is unnecessary to reproduce the relevant rules of court, which are RSC Order 53, Rule 9(1). In the abstract it is difficult to conceive of any planning judicial review in which the developer concerned will not be "*a proper person to be heard*" within the meaning and ambit of rule 9, with the obvious exception of a case in which the developer is the judicial review applicant. I am prepared to leave open the possibility that there may be other cases, giving effect to the entrenched "*never say never*" principle of public law. The submission of Mr Beattie QC, representing the developer, that his client is "*a proper person to be heard*" in this case was well made. Indeed the present case

illustrates the overlap between the "*directly affected*" and "*fit and proper person*" criteria in the two procedural rules.

[3] Various forms of taxonomy have evolved:

- Interested party.
- Notice party.
- Third party.
- Non-party.
- Intervening party (or intervener).

Indeed this may not be a complete lexicon in this discrete sphere of practice and procedure. The critical feature in every case is that a non-party who participates in the proceedings has a sufficient interest in their subject matter and/or is sufficiently affected by them. This I consider to be the governing principle. Any attempted formulation of the principle in more prescriptive terms would be undesirable. Flexibility and adaptability are two of its chief characteristics.

[4] The second stand out consideration relating to non-parties is that their participation in the proceedings requires the permission of the Court. In the jurisdiction of Northern Ireland, one does not have detailed procedural rules or practice directions governing this discrete issue. While this may foreseeably change with the passage of time, in furtherance of the overriding objective, it has not been exposed as a serious *lacuna* in practice. Sensible informal practices, adherence to professional standards and an alertness to the overriding objective have, in this jurisdiction, combined to ensure that this is so.

[5] The third main feature of the participation of a non-party in judicial review proceedings is that the Court is the arbiter of the <u>mode</u> of participation. There are no hard and fast rules in this respect. Thus, and inexhaustively:

(a) In some cases it may be appropriate to permit the developer to make a contribution by written argument, oral argument, affidavit evidence or "pure" documentary evidence at the leave stage.

(b) In other cases, particularly where the Court is satisfied that leave to apply for judicial review should be granted on the papers, none of these steps will be required.

(c) In many cases the Court's initial order/s will afford the developer the facility (if so advised) of making one or more of the contributions identified in (a) above.

(d) Where leave to apply for judicial review has been granted, the Court's final decision on the mode of participation of the developer is likely to be postponed to the stage when all evidence and arguments to be considered have been assembled.

[6] At each of the stages identified above, the Court will be making a quintessentially case management decision. Every such decision will entail the formation of an evaluative judgement. Mechanistic rules and practices will have no role in this exercise. The Court will be exercising a discretion. It seems to me that in every case and at every stage the exercise of this discretion will be influenced and informed mainly though not exclusively by the threefold factors of fairness, the overriding objective with its multiple and multi-layered ingredients and the self-evidently important objective that the Court's substantive decision is as fully informed as possible and, to this end, has the benefit of high quality adversarial argument on the most important issues of fact and of law. The latter factor is a paradigm example of an intuitive judgment to be made by the assigned Judge.

[7] There are certain ancillary principles worthy of brief mention:

(i) A properly managed and orchestrated participation by a non-party should not result in the generation of additional costs, incurred for example by an unnecessarily prolonged hearing.

(ii) Active co-operation between the principal parties and a non-party will always be required.

(iii) The circumstances in which a non-party will recover costs against a principal party are comparatively rare.

(iv) Where a restricted participation approach might stimulate a burning sense of injustice or grievance, the court may wish to take this into account.

(v) "Participation orders" will be subject to review and reconsideration by the Court, both of its own motion and otherwise.

(vi) In a common law legal system operating in the 21st century being "*heard*" does not invariably entail an oral hearing or a right to make oral representations.

(vii) The "watching brief" facility will be liberally granted by the Court, taking into account particularly that the cost thereof is borne by the non-party concerned and it involves no increased resource on the part of the Court.

Agreed Material facts

[8] At the Court's request, the parties provided a schedule of agreed material facts. This reflects the three phases of the "story" of this case. I gratefully reproduce it at this juncture.

Pre-application

(i) IP requests a pre-application meeting with the Council on 20th February 2015.

(ii) IP submits a Pre-Application Discussion (PAD) request to the Council on 29th April 2015.

(iii) PAD meeting between IP and the Council took place on 17th June 2015.

(iv) Following the meeting both parties retained file notes. Neither was exchanged, agreed or referenced at any time prior to these proceedings.

(v) Under the published guidance it is usual for the Council to provide written advice to a developer following a PAD. The Council is not bound by any such advice. The Council did not provide written advice in this case.

[9] **Application stage**

(vi) IP submits a planning application to the Council on 30th June 2015, proposing development for 444 bed purpose-built managed student accommodation, with a 1.4m set back on 2nd floor.

(vii) The Council advertise planning application on 18th December 2015.

(viii) Development Management Officer's Report is provided to the IP on 14th January 2016, containing a recommendation that the Council Planning Committee refuse the application for unacceptable impact to the residential amenity of dwellings on Stephen Street through dominance, overshadowing, loss of light as a result of the proposed height, scale and massing of the building, and unacceptable damage to the character of the area by introducing unsympathetic built form in close proximity to the established 2 ½ storey residential properties on Stephen Street.

(ix) IP submits draft schematic drawing showing additional set back on 15th January 2016.

(x) On 15 January 2016 the IP submits a request for a deferral of consideration of the decision for one month to allow further more detailed drawings to be submitted.

(xi) IP submits updated daylight assessment to the Council on 18th January 2016

(xii) The Council's PC considers the application for planning permission at its public meeting on 19th January 2016.

(xiii) Committee is provided with a late items record, recording, *inter alia*, the drawing and daylight assessment referred to at 6 & 8 above

(xiv) Ms Kelly Mills of the Council made an oral presentation which was accompanied by a power point presentation.

(xv) IP is represented at the Committee meeting by Gemma Jobling, planning consultant, who made oral representations on its behalf

(xvi) Gemma Jobling makes request on behalf of NP that the Committee defer its decision to allow the IP to submit an amended proposal. Local Councillor supports the IP's request for a deferral. That request is denied by members

(xvii) Members vote to refuse the application for planning permission

(xviii) Decision notice is not issued to the IP until 22nd February 2016. It is dated 20th January 2016

(xix) IP submits amended plans to the Council on 22nd January 2016, being:

a. 339CL(90)107B-revised Library Street Elevation;
b. 399CL(90)104C-revised Kent Street Elevation;
c. 399CL(90)125- proposed indicative roof plan;
d. 399CL(90)106B- contextual elevation, Kent Street, Revised.

(xx) The Council returns plans at 10 above to IP on 25th January 2016, advising that a decision was made on 19th January 2016 and the Council could not consider the amendments.

[10] **Appeal**

(xxi) IP appeals to PAC on 16th May 2016 and advises that it seeks to make its appeal on the basis of an amended scheme and provides PAC with amended drawings and requests a preliminary hearing to determine whether the amended drawings are admissible under S.59 of the Planning Act (NI) 2011.

(xxii) PAC advertises the appeal on 3rd June 2016, describing the proposed development as the original 444 bed scheme considered by the Council.

(xxiii) IP submitted a statement of case which sets out an analysis of and appended copies of the relevant legal authorities in respect of the admission of revised drawings and other matters relevant to S.59 of the Planning Act (NI) 2011

(xxiv) PAC decided that the method of determining the appeal should be by 'informal hearing'. This was conducted on 2nd November 2016. The IP was legally represented at the hearing. The Council was represented by an experienced planning officer Mr Conor Campfield. Carrick Hill Residents' Association was represented by Colm Bradley, Community Places, Grace Campbell, Community Places, Frank Dempsey, Carrick Hill Residents and Gerard Dempsey, Carrick Hill Residents. The Commissioner hearing the appeal was Mandy Jones.

(xxv) Mr Campfield did not at any time in the course of the hearing request an adjournment to seek legal advice.

(xxvi) Mr Campfield did not at any time during the informal hearing refer to the Pre-Application Discussions. The Council Statement of Case submitted in advance of the hearing did not refer to the Pre-Application Discussions. The IP Statement of Case does reference the PAD issue.

(xxvii) At the appeal hearing the local residents and their representatives confirmed that they had sight of the amended plans and did not assert any prejudice.

(xxviii) Prior to closing the informal hearing the Commissioner asked all of the parties whether they thought that they had a fair hearing and whether they had anything further they wished to say. The Respondent and IP aver that all parties confirmed that they had a fair hearing.

(xxix) PAC currently does not require that parties inform it or each other if they intend to be legally represented at hearing.

(xxx) PAC issues written decision on appeal on 27th February 2017. It considered the question of whether it would admit the amended plans as a preliminary issue, and decided that they were admissible under S59(1)(a) and were "material considerations" for the purposes of S59(2) of the Planning Act (NI) 2011.

The Council's Decision

[11] The underlying decision in this matter is that of the Council's PC. A file record dated 18 June 2015 documents a meeting attended by 2 Council planning officers, the IP's agent and others. There was a "*general discussion*" relating to scale, massing and design. Scale and massing were identified as "*key issues*". Adverse impact on the row of terraced dwellings on Stephens Street was highlighted. Issues of foot fall and adjoining footpaths were also raised together with the need for a travel management plan and transport assessment. This was followed by submission of the planning application on 30 June 2015. The DMO, in his report to the Council's PC, having noted that the designation of the site was white (ie unzoned) land situated within a mixed use area advised:

> "*The principle of purpose built managed student accommodation (PBMSA) is acceptable at this location providing other relevant planning policies are considered and assessed.*"

The DMO recommended refusal, in the following terms:

> "*The proposed height, scale and massing of the development is considered unacceptable as it fails to take account of its immediate context that includes the impact on 2 ½ storey residential dwellings in Stephen Street. …*
>
> *In terms of amenity it is considered that the proposed development will result in an unacceptable damage to the residential amenity of residents in Stephen Street through dominance, loss of light and overshadowing …*
>
> *Having regard to BMAP, to the policy context and other material considerations, the proposal is considered unacceptable and refusal is therefore recommended.*"

The outworkings of this recommendation are contained in the accompanying CO's report. On 19 January 2016 the PC adopted the recommendation to refuse.

[12] Following notification of the IP's appeal to the PAC, the Council formally amended its refusal reasons. It did so by notice to the PAC dated 03 October 2016 which incorporated the following additional reason:

> "*The proposal is contrary to the Strategic Planning Policy Statement for Northern Ireland* ["SPPSNI"], *BMAP and police QD1 of Planning Policy Statement 7* ["PPS7"] *quality residential environments in that the proposal would, if permitted, result in unacceptable damage to the residential amenity of existing dwellings in Stephen Street*

> *and create conflict through dominance, over shadowing and loss of light as the result of a proposed height, scale and mass of the building. The introduction of the proposed unsympathetic built form to the location would not result in a quality development through the overdevelopment of the site to the detriment of its neighbours and the character and appearance of the area.*"

I observe in passing that this discrete event has not generated any issue of substance among the parties. As a result there was no argument about the Council's legal entitlement to amend its decision or the related issue of law of how the proclamation of an amended decision interacts with the question of the legally effective date, considered in [74] – [82] *infra*.

[13] I interpose at this juncture a footnote of a little significance. At its public meeting on 19 January 2016, the Council's PC received oral presentations from one of its planning officers (Ms Mills) and the IP's planning consultant ("GJ"). The representations of GJ included a request that the PC defer its decision to enable the IP to submit an amended proposal. This request was defeated by a majority vote.

PAC Appeals: Statutory Framework

[14] The full suite of statutory provisions having a bearing in one way or another on the range of issues which this challenge raises is contained in the Appendix to this judgment. The discrete statutory regime governing appeals to the PAC is contained in sections 58 – 60 of the Planning Act (NI) 2011 (the "*2011 Act*"). The right of appeal to the PAC against a Council refusal decision is conferred by section 58(1). Section 58(5) provides:

> "*Before determining an appeal under this section, the Planning Appeals Commission must, if either the applicant or the council so desires, afford to each of them an opportunity of appearing before and being heard by the Commission.*"

Section 59, under the rubric of "Matters which may be raised in an appeal under section 58", provides:

> "*(1) In an appeal under section 58, a party to the proceedings is not to raise any matter which was not before the Council or, as the case may be, the Department at the time the decision appealed against was made unless that party can demonstrate to the satisfaction of the Planning Appeals Commission –*

> ***(a)*** ***That the matter could not have been raised before that time,*** *or*
>
> *(b)* *That its not being raised before that time was a consequence of exceptional circumstances.*
>
> *(2)* *Nothing in subsection (1) affects any requirement or entitlement to have regard to –*
>
> *(a)* *The provisions of the local development plan, or*
>
> *(b)* *Any other material consideration.*"

Section 59 is of central importance in these proceedings.

The PAC Decision

[15] The PAC allowed the appeal and granted full planning permission, subject to specified conditions. At the outset of the PAC process, when the appeal was initiated by the IP (on 16 May 2016), it was intimated that the appeal was proceeding on the basis of an amended scheme. This is apparent from the Notice of Appeal ("NOA"), signed by GJ, which stated *inter alia*:

> "*We enclose …….*
>
> *(iv)* *Amended drawings submitted and received by Belfast City Council during the course of application but not stamped refused (these supersede Council's drawing references numbers 15 and 16).*
>
> *(v)* ***Amended drawings that we wish to form the basis of the appeal submission*** *…….*
>
> *in respect of item (v) listed above, please be advised that the appellant seeks to contest this appeal on the basis of a reduced scheme, detailed by the suite of amended drawings enclosed herewith. In light of this* ***we hereby request a preliminary hearing*** *to determine whether these will be accepted as admissible by the PAC.*"

[The emphasis is original]

The NOA continues:

> "*In accordance with section 59(1)(a) and (b) of the* [2011 Act] *it is the appellant's case that the matter of reducing the scheme could not have been raised before the time owing to the late introduction of the refusal reason and the Council's unwillingness to accept amendments prior to issuing the refusal Decision Notice. Therefore the amended drawings should be admitted in this appeal consistent with …… section 59(1)(a).*"

This is followed by a section entitled "Particulars". These state *inter alia*:

> "*(i) The appellant first learned of the Council's dissatisfaction of the proposal on the afternoon of Thursday 14 January 2016 by email from the case officer.*
>
> *(ii) The issue of scale and massing only became apparent at the 11th hour, three days prior to the Planning Committee Meeting at which the application was refused.*
>
> *(iii) The appellant was given no prior notice that this was a pivotal issue that would result in refusal. There is no reason why this issue could not have been raised earlier when the planners were involved in discussion of detail and there is no reason why the issues relating to the refusal could not have been raised during the pre-application discussions.*
>
> *(iv) The site benefits from a planning history of tall buildings with a comparable frontage location having been approved in 2001 and 2012. The appellant relied on this as an indication of what was deemed compliant with prevailing planning policy by the planning authority. The planning history was referred to during the pre-application discussions and was detailed within the Concept Statement.*
>
> *(v) At no point up until 14 January 2016 (some 11 months after the first meeting with the planners) did the Council indicate that these two planning approvals would not be considered as material to this application. Rather at the 11th hour the Council indicated that these were both 'bad' decisions and would not be giving them any material weight. This could and should have been*

raised much sooner in the processing of this application ….

(vi) The Council's handling of the application has been wasteful of time and its wholly unreasonable, particularly as the appellant sought to engage prior to the submission of the application. Had this pivotal issue been raised at an earlier stage, the appellant could have presented a reduced scheme."

[16] Repeating the Appellant's request for a "*preliminary hearing*" and adverting to the Council's inconsistent preparedness to accept amended scheme drawings in respect of <u>another</u> purpose built managed student accommodation development considered at the same PC meeting, the NOA ends with a flourish:

> "*The Council's handling of the application has been wasteful of time and is wholly unreasonable, particularly as the Appellant sought to engage prior to the submission of the application. Had this pivotal issue been raised at an earlier stage, the Appellant could have presented a reduced scheme.*"

By letter dated 20 May 2016 the parties to the appeal were informed that it would be determined by a single Commissioner. On 03 June 2016 the PAC advertised the appeal, describing the proposed development in the terms of the <u>original</u> proposal refused by the Council. The parties were notified by letter of the Commission's decision to apply the so-called "*informal hearing*" process. There was no specific response to the IP's request that the "section 59 issue" be addressed and determined by the mechanism of a preliminary hearing.

[17] The IP's Statement of Case ("SOC") was received by the Council on 07 October 2016. The Council's SOC was exchanged more or less simultaneously. The PAC then conducted its "informal hearing" on 02 November 2016. This was not preceded by any preliminary hearing or ruling relating to the section 59 issue.

[18] Both the NOA and the IP's SOC described the development proposal in terms identical to those contained in the original planning application to the Council. The PAC's public advertisement of the appeal followed suit. The SOC, having repeated this description on its opening page, stated in the "Executive Summary":

> "*The scheme has been modified to address the sole reason for refusal by reducing the alleged impact on the residential properties along Stephen Street. The proposal description is amended ….*"

I summarise the amendments as follows:

(i) 75 apartments instead of 78;

(ii) 365 en suite bedrooms in place of 408;

(iii) 8 studio apartments instead of 10;

(iv) 28 self-contained studios instead of 36;

(v) the studio apartments and self-contained studios to occupy the 9th and 10th floors instead of the ground floor and 10th floor;

(vi) 21 car parking spaces instead of 22;

(vii) 111 cycling spaces in lieu of 104; and

(viii) 7 motor cycle spaces.

The text of the SOC offers the following summary:

> "*The nature of the proposal remains unchanged; the application is for managed student accommodation across a 10 storey building and includes ancillary parking and communal facilities. The total quantum of apartments has been reduced from 114 to 79 and the beds reduced from 444 to 393.*"

I interpose here the footnote that all parties combined to provide the court with a joint assurance that the figures and arithmetic above are without flaw.

[19] The hearing before the PAC ensued. The agreed facts pertaining thereto are rehearsed in [8] (xxiv) – (xxix) above. The hearing occupied most of a day. The decision of the appointed Commissioner was promulgated some four months later, on 27 February 2016.

[20] Under the rubric of "Preliminary Matter", the appointed Commissioner begins her decision by addressing the "section 59 issue". She describes the updated drawings as incorporating amendments which "*… reduce the alleged impact on the residential properties along Stephen Street*". She then rehearses the essential particulars of the proposed amendments and juxtaposes the original description of the development proposal with the amended description thereof. She notes the following contention of the IP:

> "*There were ongoing discussions during an 11 month period where the issue of scale, massing and height was not raised.*"

The decision continues:

> "*Although the amended scheme was before the Council it was submitted a few days after the Planning Committee meeting and two days after the date on the Refusal Notice. However, the appellant argues that reducing the scheme could not have been raised before this time owing to the late introduction of the refusal reason (they were not aware of these issues despite lengthy pre-application discussions) and the unwillingness of the Council to accept any amendments prior to issuing the refusal notice.* ***In this respect, I consider that the amendments are in accordance with section 59(1)(a).***"
>
> [Emphasis added]

[21] The appointed Commissioner then turns to examine the issue of material considerations:

> "*Section 59(2) of the Act however states that section 59(1) does not affect any requirement or entitlement to have regard to the provisions of the local development plan or any material consideration.* ***The proposed amendments are material considerations as they relate directly to the reason for refusal.***"
>
> [My emphasis.]

Continuing, the Commissioner states:

> "*The nature of the proposal remains unchanged for managed student accommodation across an 11 storey building with central atrium and courtyard including ancillary parking and communal facilities. The amended scheme is a reduction in the overall numbers of bedrooms and the set back of the façade to Stephen Street by 7 – 8 metres from floors 3 to 10 ….*
>
> *To my mind, this does not significantly alter the nature of the proposal. The Council addressed the merits of the reduced scheme in their statement of case. The objectors also had an opportunity to comment on the reduced scheme ….*
>
> *I have examined the new suite of drawings and consider the design amendments to be relatively minor overall and to constitute a reduction of the scheme. I am satisfied that*

> *there would be no prejudice to any other party. Accordingly, I will base my considerations of the new suite of drawings submitted to the Commission within the Appellant's statement of case.*"

This section of the PAC's decision is readily severable from all that follows and it is appropriate to analyse it briefly at this juncture.

[22] First, subject to a discrete argument of Mr Beattie QC which I shall address *infra*, all parties are agreed that, in light of the formulation of the IP's NOA and SOC the appointed Commissioner committed no legal error in addressing her mind to the provisions of section 59. To this I add that it was plainly appropriate to undertake this exercise at the outset. It is common case that this was the first issue canvassed by the Commissioner at the hearing and, appropriately, it is also the first issue addressed in her decision. Second, as submitted by Ms Kiley (of counsel) on behalf of the Council, the Commissioner proffered two reasons for deciding the appeal on the basis of the new drawings and amended development proposal: first, because she considered the requirements of section 59(1)(a) satisfied; and second, because she considered the amended drawings to be a material consideration. In thus ruling it is clear that the Commissioner acceded to the contentions of the IP in all material respects.

[23] In this, the preliminary, section of her decision, the Commissioner also addresses a third consideration (at paragraphs 7 – 9). I consider that there are two discernible factors in these discrete passages. First, the Commissioner gave active consideration to the question of fairness, specifically whether the Council and/or the objectors would be unfairly disadvantaged if the appeal were to be determined on the basis of the revised drawings. I am satisfied that the Commissioner had in mind unfairness of the procedural variety. Her assessment was that there would be no unfairness of this species. This assessment was not challenged in these proceedings and I consider it unimpeachable in any event. In my view the Commissioner also had in mind, perhaps subconsciously, the "advertisement issue" which I shall address separately *infra*.

[24] The greater part of the appointed Commissioner's decision is concerned with the range of issues bearing on whether the appeal should be allowed. While this aspect of the decision lies outwith the limits of this judicial review challenge, it is necessary to highlight certain features of it.

[25] The Commissioner identifies the two central issues as (a) the principle of development and proposed use at the location in question and (b) the impact of the proposed development on the character of the area and the residential amenity of the adjacent residents. Having identified and considered a range of applicable planning policies, the Commissioner turns to consider the topic of planning history (at paragraph 24):

> "*Planning permission was approved for 93 apartments over 8 storeys …. on 19 June 2012. The Council state that this was a poor decision made by* [DOE] …… *This approval does not lapse until 2017 ….*
>
> *I consider that this extant approval for an 8 storey building is a material consideration and accepts the principle of a tall building on the appeal site …*
>
> *Directly abutting the appeal site is a 9 storey development which has been constructed, approved 10/11/2004.*"

The Commissioner continues:

> "*In terms of the urban design, the Council seems to refer to the dwellings on Stephen Street in isolation and disregard the surrounding context and approvals.*"

Having elaborated on this the Commissioner states (at paragraph 30):

> "*The row of 8 2 ½ storey dwellings on Stephen Street are an anomaly within the high rise and dense urban grain to the north, east of the appeal site and south. These residential buildings are in sharp contrast to the surrounding scale of buildings and extant approvals. To my mind, the appeal site presents an opportunity for an architectural solution to embrace this transition in scale and massing. Although the row of dwellings are* [sic] *indeed part of the character of the area, they do not constitute the prevailing character and should not solely dictate the massing and scale of a design proposal on the appeal site.*"

[26] The Commissioner then expresses herself satisfied as regards the issues of scale and massing, highlighting several features of the amended development proposal, in particular the proposed "step back" of 7 metres from the 4th to the 11th floor. She expresses the view that this is demonstrably preferable to the solid 9 storey approved façade, with no "set back". She then expresses herself satisfied that the amended proposal is compatible with the operative planning policies. Her omnibus conclusion is expressed in the following terms (paragraph 43):

> "*In conclusion, I consider that the appeal proposal accords with BMAP and the HMO subject plan. I consider that it is an appropriate design to respond to its inner city location and addresses the scale of tall buildings in the area whilst being cognisant of the dwellings on Stephen Street. Given the design, previous land use and planning*

history, I consider that the appeal proposal complies with PPS 7 policy QD1. Accordingly, the Council's reason for refusal and the objector's concerned have not been sustained."

The appeal was allowed and the development proposal approved subject to a series of conditions.

The judicial review challenge

[27] The Council's challenge raises, within the ambit of the court's succinct formulation of the permitted grounds of challenge in [1] above, a series of legal issues of some novelty and importance. I shall address each in turn.

Planning decision making and procedural fairness: generally

[28] "Transparency", once a buzz word in great demand, has lost much of its novelty. It has become embedded in the conduct and decision making of public authorities of all kinds. Legally, it did not import anything new as it had been recognised, albeit in different language, in the principles of procedural fairness (formerly natural justice) which, in our legal system, are of some antiquity. "Transparency" simply added a new word to the legal lexicon. But it did not import anything new of substance.

[29] The practice entailing informal communications and discussions between developers and their agents (on the one hand) and planning officials (on the other) is a long established one. I consider it appropriate to view this from the perspective of the public interest. The orderly development of land in any community or society belongs to the realm of the public interest. Proposals for the development of land not infrequently engage a multiplicity of planning policies, belonging to different hierarchical levels and sometimes not obviously reconcilable or harmonious with each other. One grafts onto this factors which recur with some frequency in the world of planning decision making: unacceptable intrusion, loss of view and light, detrimental impact on the amenity of others, uncomfortable situational "fit" and previous site use, whether actual or approved. There are, of course, many others.

[30] Against this framework there is, in many cases, a substantial element of evaluative judgment on the part of decision makers. All of this is reflected in the legal truism that if a judicial review challenge materialises, the Court will be obliged to give effect to the entrenched principle that judicial intervention in matters of planning judgment, typically the weight accorded by the decision maker to specified material considerations, is appropriate only on the intrinsically limited ground of irrationality: the "Tesco Stores" principle. (Tesco Stores v Secretary of State for the Environment [1995] 1 WLR 759).

[31] The matrix sketched in [29] – [30] serves to demonstrate that legal certainty and predictability do not exactly abound in the world of planning decision making.

No planning application can lay claim to a guaranteed successful outcome. Every planning application entails varying degrees of unpredictability and uncertainty. This applies to a context in which the putative developer must invariably make a predominantly economic decision having substantial financial consequences. The fee for a planning application is measured by reference to a set formula. In the present case it cost the IP £33,512.00 to lodge his planning application. Furthermore, with effect from 01 April 2017 the fee payable in return for the Council's willingness to engage in the "PAD" exercise would have been £1,500 plus VAT Basic fairness surely dictates that in the process of assessment, examination, consideration and, ultimately, determination which followed he was entitled to be treated with basic procedural fairness.

[32] The ingredients of procedural fairness are intrinsically fact specific and context sensitive, varying from one case to another. In the particular context of planning decision making, it seems to me harmonious with well-established principle that the developer should be treated on a "cards face up" basis throughout the process. This entails, fundamentally, knowing the case which he has to meet. Being taken by surprise in any material respect is antithetical to this principle. This is so not merely because it is procedurally unfair vis-à-vis the developer. It also offends against the overarching requirement of transparency to which all planning decision making has aspired for many years. It suffices to recall the code of procedural fairness principles memorably formulated by Lord Mustill in R v Secretary of State for the Home Department, ex party Doody [1994] 1 AC 531, at … :

> *"(1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."*

While one is mindful of the context in which this code was formulated, its terms are demonstrably wide reaching and its contents have been applied to a broad range of public authority decision making.

[33] Ms Kiley helpfully reminded the Court of another seminal statement of the same Law Lord soon afterwards:

> "….. *it is a first principle of fairness that each party to a judicial process shall have an opportunity to answer by evidence and argument any adverse material which the tribunal may take into account when forming its opinion. This principle is lame if the party does not know the substance of what is said against him (or her), for what he does not know he cannot answer.*"
>
> (Re D (Minors) [1996] AC 593 at 603.)

I shall explain presently why this discrete principle of procedural fairness resonates with some force in the instant context.

Procedural fairness: this case

[34] At this juncture, I turn to examine the legal contours of the interaction between the Council's officials and the IP's agents. While this belongs to two neatly divisible phases, namely pre-planning application (the "PAD" phase) and post-planning application, the legal contours do not, in my view, differentiate between the two. They are, fundamentally, rooted in the long established principles applicable to a procedurally fair decision making process.

[35] The pre-application discussions ("PAD") issue is inextricably linked with the operation of section 59 of the 2011 Act in the factual matrix under scrutiny. The protagonists in this issue are the Council and the IP. While they are not fully agreed upon certain of the factual issues, the extent of their disagreement belongs to a mini-context raising the question of how two documents should be construed. The construction of any document is always an issue of law for the Court: see In Re McFarland [2004] UKHL 17 at [24], per Lord Steyn (generally) and Tesco Stores v Dundee City Council [2012] UKSC 13 (in the specific context of planning policies and guidance). The exercise to be performed is not an especially difficult one, having regard to the contents of the two documents in question and the abundance of surrounding evidence.

[36] A "PAD" meeting was attended by representatives of the Council and the IP's agents on 17 June 2015. The application for planning permission followed some two weeks later. There are two records of this meeting. The first is that compiled by Mr Nesbitt, the IP's project architect. This is in the form of manuscript notes, evidently made contemporaneously. The court received the benefit of a printed version

thereof. It is clear from this document that a broad range of issues pertaining to the envisaged planning application was discussed. The record consists of a combination of relatively cryptic notes, abbreviations and acronyms and, in consequence, requires a little interpretation. It is clear that the issues discussed included the impact of the contemplated development on its immediate surroundings, Stephen Street in particular, the height and "set back" of the envisaged new building and the planning history of the subject site.

[37] Mr McErlean, a Council Planning Officer, one of those in attendance at the meeting, also made a record. This is a typescript document ("Note for File") which he compiled the following day. It contains the following entry:

> "*General discussion with regard to scale, massing and design ….*
> *The scale and massing should reflect this context, especially the row of dwellings around Stephen Street.*"

Pausing at this point, all of this is <u>in substance</u> consistent with Mr Nesbitt's notes. The only significant issue of contention between the parties is the immediately following sentence:

> "*The scale and massing are* ***key issues****.*"
>
> [My emphasis.]

The note, continuing, attributes the following response to Mr Nesbitt:

> "*We have addressed the relationship with these dwellings with a set-back on upper floors.*"

To Mr McErlean is attributed the following rejoinder:

> "*The set-back is very minimal given the context and would do little to address potential impact on the row of terrace dwellings on Stephen Street.*"

[38] I consider the difference between the two records to be one of emphasis rather than substance. It is clear from Mr Nesbitt's note that the issue of impact on the residents of Stephen Street featured prominently during the meeting. This purely objective assessment is reinforced by Mr McErlean's record. It is evident from the latter that Mr McErlean was, in all probability, making notes as the meeting progressed. This follows from the form and structure of his typescript note, which consists of a series of statements attributed to their various authors. These statements are formulated in intelligible language and coherent sentences. In their printed form, they have the appearance of words actually spoken. This analysis

inclines to the conclusion that the planning officer concerned probably did state that "*scale and massing are key issues*".

[39] This, however, is not a critical finding for the following reasons, all of them interlocking. First, the "distance" between the two records of the meeting is far from substantial. Second, the Council officials concerned failed to provide the IP's agents with the "Note for File" at any time. Third, this was the only meeting of its kind. Fourth, the Council's officials did not on any subsequent date raise this issue with the IP's agents notwithstanding that, as the months advanced, communications were exchanged on a range of issues bearing on the planning application. Fifth, the Council's officials did not canvas this issue again with IP's agents until fully seven months later when they advised by email that they would, three working days later, be presenting the planning application to the PC "*with an opinion to refuse*". Sixth, at this stage, given the timing, the opportunity for the IP's agents to deal with this critical issue effectively and timeously was quite inadequate.

[40] It is clear from the communications between the Council's officials and the IP's agents on 14/15 January 2016 (all documented in emails) that the agents were alerted at that stage to unacceptable scale and massing being the central reason for the recommended refusal of planning approval. In their detailed communication of 15 January 2016 the agents (per Mr Nesbitt) claimed that this "…. *was never cited as a potential reason for refusal*". Based on all the evidence, this is technically correct, although the agents could not plausibly suggest that this issue had not been raised previously: see [31] – [32] above. The more important passage in this communication is what follows immediately thereafter:

> "*During the last 7 months we have been in detailed discussions with the planners on very technical issues and at no point during this communication has the matter of scale or overshadowing been raised as a possible reason to refuse this application. Had this issue been highlighted during this lengthy consideration period we would have acted to amend the scheme to address this issue as this can easily be addressed through a reduction in scale …. We understood that this was not a critical issue owing to the substantial planning history on this site ….*
>
> *This voluminous history and the existence of a live permission cannot merely be set aside.*"

Thus the agents, with impressive immediacy and in articulate detail, were protesting that they had in effect been ambushed.

[41] As I have held above the issue of scale and massing was plainly raised at the "PAD" stage. This represents the earliest stage at which it could have featured. I consider that on any reasonable objective assessment the IP's agents must in any event have been alert to this issue since, having regard to the nature of the proposed

development and the surrounding location in all of its aspects it was, from the moment of conception, an unmistakable material consideration. This is another reason why the differences in the parties' records of the PAD meeting, which I have found to be minor, do not really matter.

[42] The evidence establishes that the only meeting attended by representatives of the two protagonists was the "PAD" event on 17 June 2015. This is the first feature of the critical period between lodgement of the planning decision and the ultimate determination of the PC which stands out. There are others:

(i) The Council's officials at no time provided the IP's agents with their written record of the PAD meeting.

(ii) This failure was in breach of the Council's published guidance and is nowhere addressed in the Council's affidavit evidence.

(iii) The issue of scale and massing was not raised by the Council's officials at any stage during the aforementioned critical period.

(iv) This discrete failure takes colour from the fact that during such period the parties were in discussion and communication relating to a range of issues bearing on the planning application. Indeed on the date when the Council advised the IP's agent that at the PC meeting scheduled to take place three working days later, the recommendation would be to refuse the application a meeting with representatives of Building Control and Waste Management had been scheduled for the following day.

(v) The agents' assertion that throughout the critical period there had been "*detailed discussions*" with the Council's officials on "*very technical issues*" during which the issue of scale and massing had at no time been ventilated is unchallenged.

(vi) Nor is there any challenge to the agents' claim that if alerted to this factor it could have been "*… easily addressed through a reduction in scale*" via an amended development proposal. (Indeed events proved this to be unassailably correct).

[43] I have no hesitation in concluding that the failure of the Council's officials to alert the IP's agents to their obviously profound concerns about the scale and massing of the proposed development, considered in its full context, was procedurally unfair. Its effect was that the IP and its agents were unfairly taken by surprise. The "ambush" element was that they had insufficient time and opportunity to respond and rectify. This should never have occurred. The lament in the IP's NOA that the Council's handling of the planning application had been "*wasteful of time*" and "*wholly unreasonable*" is fully justified.

[44] While Mr Turbitt (of counsel) on behalf of the PAC developed the argument that the Council's internal note of the PAD meeting had the status of new evidence, not considered by the PAC, which this court should admit only in accordance with the principles in E v Secretary of State for the Home Department [2004] EWCA Civ 49, this argument was not supported by the interested party and, in my estimation, overlooks the fundamental consideration that this is an application for judicial review in which there is no *lis inter-partes* and the applicant's duty of candour is engaged. In contrast, the decision in E was a statutory appeal which raised the issue of the entitlement of the Court of Appeal to admit new evidence designed to demonstrate that the decision of the first instance judicial agency was vitiated by ignorance of or mistake as to the material facts. I consider that the principles enshrined in this decision have no application to the present context, factually or juridically.

The Council's PAD Guidance

[45] This is a public document, having no statutory pedigree or basis, promulgated by the Council in April 2017. It is a classic non-statutory measure of guidance. By virtue of its date of creation, it postdates the events under scrutiny in these proceedings. The court was informed that, at the material time, the governing instrument was a DOE publication "Guidance on Pre-Application Discussions", being Information Note No 14 published in March 2014. This did not feature in either evidence or argument. In her affidavit Ms Mills, the Council Principal Planning Officer, avers (*inter alia*) that PAD meetings were conventionally followed by a Council letter "*clarifying points raised and issues discussed*" and that such letters "*…. do not bind the Council in determining any future application ….*". (The Council did not, of course, adhere to this normal practice in this case) .

[46] Ms Mills is correct to draw attention to the "not binding" factor. I would, however, highlight the following public law dimension. The planning officers involved in the examination and processing of every development proposal are not the ultimate decision makers. Accordingly they have considerably greater latitude than the decision makers to express provisional views and opinions. And while they will ultimately adopt a quasi - adversarial role in the formulation of a recommendation to the PC and the presentation of "their" case in support, they are legally obliged to maintain an open mind until this final stage is reached. They act as the Council's agents at all material times and the duty of ensuring a procedurally fair decision making process falls primarily upon them.

[47] In the interests of providing the Council, developers and other interested parties with maximum guidance, I say the following about the Council's recently published PAD Guide. First, Council officials must be mindful at all times that, with effect from April 2017, developers have been obliged to pay handsomely for the facility of "PAD". Second, the Council commits itself unambiguously to providing "*a full response from a Planning Officer*": this can only mean, sensibly, a written

response. Third, the Council commits itself to providing "*advice based on the information you give us*" which is "*impartial*" and "*will not affect any subsequent decision the Council takes …*" It then goes further, undertaking to "*make every effort to give comprehensive professional advice*", albeit with a suitable qualification. This is followed by certain sensible provisions alerting developers to what should be provided for a PAD exercise.

[48] The Guide contains the following eye catching passage:

> "*If, following PAD, the application you submit does not follow the pre-application advice given, we reserve the right not to engage in any more negotiations or discussions and to refuse the application.*"

The Court would advocate great care and caution in giving effect to this statement. To begin with, its terms are unfortunate, given the elements of threat and punishment which it implicitly embodies. Secondly, this statement is manifestly incompatible with the principles of procedural fairness rehearsed above. Third, this statement does not promote any identifiable public interest.

[49] Furthermore, as I have observed already, the overarching public interest in play is that of the orderly development of land. This dominant public interest has certain subsidiary elements. In particular, it cannot be in the public interest to deny a developer a fair and reasonable opportunity to address the central concerns of the ultimate decision maker's agents, as these evolved and/or the views of interested parties, including objectors and consultees, both obligatory and optional. No public interest is served by a decision making process which avoidably results in expensive appeals or judicial review challenges (or both, as in this instance) with ensuing delay and uncertainty for all concerned, including objectors and the perpetuation of an ugly, undeveloped vacant site. As this brief analysis demonstrates, the other clearly identifiable public interest in this matrix is the economic well-being of the country.

[50] To summarise, there are six major legal principles engaged by the Council's PAD Guide:

(i) If and to the extent that any provision of the Guide does not harmonise with the principles of common law fairness, the latter will prevail.

(ii) The Guide cannot, as a matter of law, dilute the duty of every planning decision making agency to take into account all material considerations in every decision making context.

(iii) Similarly, the Guide is not capable in law of modifying or emasculating any statutory provision, primary or subordinate, and will yield to any such provision in the case of conflict or inconsistency.

(iv) The Guide must not be applied in practice as if it were a straightjacket: non-statutory measures of this kind, while they must always aspire to being as comprehensive as possible, do not exclude the incorporation of additional provisions ancillary and reasonably related to the published text.

(v) A further principle of public law is engaged. The import of this is that the Council is obliged to give effect to the various procedures and assurances contained in the Guide, subject to anything to the contrary in the Court's analysis above or other compelling legal reason (see, for example, McFarland, *supra,* at [24] and R (Lumba) v Secretary of State for the Home Department [2012] 1 AC 245 and [2011] UKSC 12 at [20] per Lord Dyson).

(vi) Any issue of interpretation of the Guide is, in common with the interpretation of any document, a question of law: McFarland *ibid* at [24].

Council planning decisions generally

[51] The major reform of local government in Northern Ireland took effect on 01 April 2015. This was effected by the Local Government Act (NI) 2014 (the "2014 Act") which brought about a major overhaul of the system which had been in existence during some four decades. The new regime reduced the number of local (or district) Councils from 24 to 11. This was driven by a government policy designed to make Councils more efficient, innovative, more cost effective and empowered to discharge a broader range of public functions. Planning, formerly the preserve of central government under the aegis of the Department of the Environment ("DOE") was in large part devolved to the 11 reconfigured councils. This major reform also took effect on 01 April 2015. It had a lengthy gestation period, one feature whereof was the introduction of the 2011 Act.

[52] Prior to 01 April 2015 the status and role of Councils in the Northern Ireland planning system had been that of consultee. With effect from 01 April 2015 a radical change was introduced. Councils became responsible for devising their own local development plans, determining individual planning applications and making decisions on enforcement action. This major development was marked by, *inter alia*, the publication of the DOE "Application of the Councillor's Code of Conduct with regard to planning matters" (February 2015). This publication, notably, acknowledges (at paragraph 5), that these new functions "*may seem daunting at first* …". It also contains an interesting passage (at paragraph 19) relating to the "PAD" process, which includes the recognition that:

> "*Such pre-application discussions can be of considerable benefit to both parties and are generally encouraged.*"

The remaining provisions of this instrument are unremarkable in the context of these proceedings.

[53] Venturing beyond the foregoing preamble, some reflection on the decision making processes of Councils in this new era is appropriate. I begin with some general observations. The planning committees of councils do not compose essays documenting matters such as their understanding, insight, assessment of material considerations, evaluation of relevant planning policies and the reasons for their decisions. Rather, in brief compass, their decision making involves the receipt of a planning case officer's report, the consideration of the case papers (usually, one assumes), the possibility of oral presentations at their public meetings, debate and discussion in the same forum – albeit constrained by the requirements and limitations of Standing Orders ("SO's") - the receipt of legal and other advice if considered appropriate and a site visit if so advised.

[54] Ultimately their decisions are taken by vote, the manifestation being a show of hands. This is followed by a relatively formulaic letter informing the developer of the outcome, usually taking the form of one of the following: outline planning permission, unconditional permission, conditional permission or refusal. There is obvious potential for variations in practice between one case and another. For example, in certain instances, the reasons for the Council's decision will be clear to the developer as a result of "PAD" meetings and communications. Equally, in other cases the developer and objectors will entertain little doubt about the basis of the decision as a result of the public proceedings of the PC – in particular the presentations made and the questions and interventions of councillors. On the other hand, some cases may not partake of either of these features either meaningfully or at all. These reflections serve to emphasise the importance of the Council providing coherent and intelligible reasons for its planning decisions in accordance with the principles in South Bucks District Council v Porter (No 2) [2004] UKHL 33.

[55] Much of the foregoing synopsis is distilled from the Operating Protocol ("OP") which every Council's PC must have. The OP of this Council, considered in conjunction with its Statutory Orders ("SOs"), reveals that the membership of its PC consists of twelve Councillors, the quorum is six, decision making is by vote and decisions are made by simple majority. I shall examine this topic in a little further detail *infra*. It suffices to observe here that the question of adherence to the OP has the potential to arise with some frequency. I consider that one of the main purposes of the OP is to secure that the planning decisions of councils accord with the governing legal rules and principles.

[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.

[57] In formulating the approach outlined above, I take into account that in R The Mendip DC, ex parte Fabre [2000] 80 PCR 500 Sullivan J stated, at p 509:

> *"Whilst planning officers reports should not be equated with inspectors decision letters, it is well established that, in construing the latter, it has to be remembered that they are addressed to the parties who will be well aware of the issues that have been raised in the appeal. They are thus addressed to a knowledgeable readership and the adequacy of their reasoning must be considered against that background. That approach applies with particular force to a planning officer's report to a committee. Its purpose is not to decide the issue, but to inform the members of the relevant considerations relating to the application. It is not addressed to the world at large but to council members who, by virtue of that membership, may be expected to have substantial local and background knowledge. There would be no point in a planning officer's report setting out in great detail background material, for example, in respect of local topography, development planning policies or matters of planning history if the members were only too familiar with that material. Part of a planning officer's expert function in reporting to the committee must be to make an assessment of how much information needs to be included in his or her report in order to avoid burdening a busy committee with excessive and unnecessary detail."*

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.

[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.

The Council's Decision Making Analysed

[59] The planning officer's report to the PC recommended refusal of the development proposal on the sole ground of excessive scale and massing with resulting unacceptable loss of residential amenity for the occupants of the small cluster of dwelling houses on Stephen Street. The evidence establishes clearly that the PC acceded to this recommendation. This analysis, uncontested by any of the parties, is reinforced by the transcript of the proceedings before the PC on 19 January 2016. This has certain noteworthy features:

(a) The case made eloquently on behalf of the IP in the ensuing NOA to the PAC was foreshadowed, consistently and clearly, in the presentation of its agents (Ms Jobling).

(b) The central thrust of Ms Jobling's presentation was a request for deferral (which the Council's OP permits) based on having been taken by surprise.

(c) Ms Jobling's presentation placed some emphasis on the planning history of the subject site.

(d) The Council's planning officer made a significant misrepresentation to the PC, in asserting that a previous planning permission had expired.

(e) The Council did not even attempt to engage with the deferral request.

[60] As already observed, the proceedings of the Council's PC in this case do not reflect well on either the PC or the planning officials concerned. I would add that factor (e) by itself would suffice to vitiate the Council's refusal decision.

[61] As a prelude to considering the discrete question of the legally effective date of the Council's refusal decision, I would highlight certain further uncontentious facts:

(a) On 15 January 2016 the IP's agent provided the Council with a schematic drawing. This was, in effect, the precursor of the more detailed amended drawings which followed 7 days later.

(b) At the conclusion of its deliberations at its public meeting on 19 January 2016, one of the PC members proposed that the DMO's recommendation of refusing the planning application be adopted.

(c) This proposal was seconded by another PC member and there were no dissenters, with the result that the proposal was adopted.

(d) On 22 January 2016 the IP's agents transmitted four amended plans to the Council.

(e) On 25 January 2016 the Council returned these plans to the agent, intimating that they could not be considered as the planning application had been determined on 19 January 2016.

(f) On 22 February 2016 the Council transmitted the formal decision notice, bearing the date of 20 January 2016, to the IP's agent.

[62] It is convenient at this point to dwell briefly on the schematic drawing noted in [61](a) above. This drawing was the subject of a dedicated entry in the PC's "Late Items" list for 19 January 2016, the date of the relevant public meeting. This entry was compiled by one of the planning officers involved in the IP's application. It yields the following analysis:

(i) It asserts that the amended drawing exhibits a "*reduced height*" of the proposed development: it is common case that this is incorrect.

(ii) It further asserts that at a meeting with the planning applicant on 18 June 2015 (incorrect date), "*consultation responses and potential impact on adjacent 2 ½ storey residential properties were discussed*." In the planning officer's "note for file" - see [37] *supra* – only <u>one</u> consultation response is identified (Transport NI).

(iii) The assertion that at the June 2015 meeting the IP's agent was informed that the proposed "set back" at second floor level "*was not considered acceptable*" does not accurately represent the contents of the "Note for File". Alternatively, insofar as this is an assertion that this was conveyed to the IP on some later date, it is manifestly incorrect.

(iv) The entry further contains the misrepresentation that an earlier grant of permission for an 8 storey apartment development on the site, in 2012, had "*now expired*".

(v)

As noted above, the transcript of the PC's proceedings on 19 January 2016 confirms that this misrepresentation was repeated. Pausing at this juncture, I observe that given the incontestable materiality of the planning history of the site, this error *per se* – in common with that identified at [58](e) above - was sufficient to vitiate the Council's refusal decision, being a paradigm illustration of taking into account an immaterial consideration and, simultaneously, disregarding something material.

[63] A further brief observation is conveniently made at this point. It is abundantly clear from the aforementioned transcript, considered in conjunction with other items of related and surrounding evidence, that the PC made no attempt to grapple with

the IP's request for deferral. Under the PC's OP deferral is one of the optional courses. It is an elementary proposition of law that in cases where this is raised it must be considered. A further flaw in both the written and oral presentations of the Council's planning officers is readily identifiable. No attempt was made to engage with the deferral request. The correct analysis clearly is that the PC, having failed to address itself to the deferral request, made no decision upon it. This is yet another ground upon which its refusal decision is vitiated.

Council Planning Decisions and Delegation

[64] At this juncture I shall examine one discrete issue relating to the Council's Standing Orders and its Scheme of Delegation ("SOD"), which is contained in the Belfast City Council Constitution (April 2015). Section 31 of the 2011 Act (reproduced in the Appendix) obliges every Council to prepare a "scheme of delegation" in respect of the determination of planning permission and related decisions. Section 31 contemplates that under a scheme of this kind the decision will be made "*by a person appointed by the Council for the purposes of this section instead of by it ….*". The Council's SOs, which are one of the appendices to its Constitution, provide, *inter alia*, that the PC shall be one of the Council's five standing committees. The SOs contain the following material statements:

> "*The Planning Committee shall be responsible for all the Council's planning functions, except those matters which are expressly delegated to officers or reserved to full Council. Specific responsibilities include ….*
>
> *Deciding applications for planning permission and whether to impose any condition, limitation or other restriction on an approval, consent, licence or permission ……*"

The "exception" specified in the above extract is illuminated by Section 3 of the Council's SOD which states, at the outset:

> "*The exercise of the following functions,* ***in line with relevant Council policies, is delegated to the Director of Planning and Place***".

There follows a lengthy list of delegated functions, one of which is "*determining applications for developments of up to four dwellings*". That, plainly, is not this case.

[65] It appearing to the Court that the materials provided by the parties did not include any dedicated SOD under section 31 of the 2011 Act, a direction seeking clarification was issued post-hearing. This elicited the following further information:

(i) On 19 February 2015, the Council's draft SOD in respect of planning functions and decisions was agreed by its Shadow PC.

(ii) On 02 March 2015 the draft SOD was sent to DOE for approval.

(iii) On 20 March 2015 the Council's Shadow Strategic Policy and Resources Committee (the "SPRC") agreed the Council's revised Constitution, revised SOs and the draft SOD.

(iv) On 24 March 2015 all of the aforementioned documents were adopted by the Council.

(v) On 01 April 2015 DOE approved the Council's draft SOD.

(vi) On 01 April 2015 the draft minutes of the Council were adopted at the first formal meeting of the new BDC.

[66] It is necessary at this juncture to consider further the Council's "Operating Protocol: Belfast City Council Planning Committee" (the "OP"). This is an appendix to the Council's SOs. The "key aims" of the OP are expressed thus:

> "[That] *those who apply for, or object to, applications before the Committee are able to make informed representations* ***and know the case which they have to meet****; and*
>
> *(b)* [that] *the Committee makes decisions in a sound, lawful and transparent way and in a timely and efficient manner.*"

[The highlighted words resonate with reference to the principles of procedural fairness considered in [30] – [36] of this judgment.]

Under the rubric "Remit of the Committee", it is stated:

> "*The primary roles of the Committee will include:*
> …….
>
> *(c) Consideration of applications for planning permission and development management in accordance with the Council's scheme of delegation.*"

[67] Paragraphs [6] – [10] of the OP, under the rubric of "Scheme of Delegation", invite careful attention. Paragraph [6] begins:

> "*As per the requirements of section 31 of the Planning Act (NI) 2011 the Council will operate a scheme of delegation for planning outlining delegation both to the Committee and Officers. The overall objective is to ensure*

> *that arrangements for decision making on applications for local developments are efficient while ensuring that proposals that raise strong local views or sensitive issues for the local environment can be dealt with by elected members.*"

In paragraph [7] the rationale for the delegation of the function of determining "*local, generally non-contentious applications*" to "*appointed officers*" emerges clearly, while paragraph [9] notes that applications of the aforementioned kind can "*…… be referred to the Committee for determination*".

Next, paragraph [10] states:

> "*Major applications, applications made by the Council or an elected member of the Council and applications relating to land which the Council has an interest in cannot be delegated.*"

[68] While the OP is obviously an important instrument, the correct approach to its construction must, in my view, differ from that applicable to a statute, contract or deed. It was drawn up by the Council for use by the Council, its ratepayers and others. It falls to be construed with some latitude and, of course, as a whole. It must also be considered in conjunction with other related documents, in particular the SOs, the Guide to Council SOs and the SOD. One of the keys to understanding the interplay between the SO and the SOD and how they interact with the other aforementioned instruments is that the SOD does not purport to delegate <u>any</u> Council function to its PC. This is clear from its title – "Scheme of Delegation to Chief Officers" – and its contents. Furthermore, the effect of the SOD is to establish a dichotomy: decisions belonging to the delegated category are made by the Director of Planning and Place, while non-delegated decisions are made by the Council. But what does "the Council" denote in this context?

[69] In order to make sense of the <u>non-delegated</u> Council planning functions, it is necessary to return to Section 2 of the SOs. Here one finds the unambiguous statement - reproduced in [63] above – that the PC carries out <u>all</u> of the Council's planning functions, save those "*delegated to officers or reserved to full Council*". The planning functions "*delegated to officers*" are spelled out in Section 3 of the SOD. Is there any SO or comparable instrument which has the effect that specified planning functions are "*reserved to full Council*"? The court has been unambiguously assured that the answer is "none "and, having conducted a vigorous post-hearing exercise via a series of directions and a relisting, I am satisfied about this matter. It follows from this analysis that, under present arrangements, the "full" Council does not exercise any of its planning functions. Rather these, in their totality, are exercised by either the PC or the Director of Planning and Place.

[70] It also follows from the above analysis that the term "*major applications*" – in paragraph [10] of the OP – denotes planning applications which have not been delegated to the Director of Planning and Place under Section 3 of the SOD. The foregoing analysis also illuminates the reference in the evidence wherein the planning application under scrutiny in these proceedings is described as a "*major application*". As Mr Beattie highlighted, this is the terminology found in the planning application itself and the DMO's report to the PC.

[71] The foregoing analysis also illuminates the following. On 01 February 2016 the Council (corporate) at its monthly meeting formally ratified the minutes of the PC meeting held on 19 January 2016. The terms of the formal resolution are noteworthy:

> "*That the minutes of the proceedings of the Planning Committee of 19 January* ***omitting matters in respect of which the Council has delegated its powers to the Committee****, be approved and adopted.*"
>
> [My emphasis.]

There is no error in the highlighted words. I suspect that they are a time honoured formula in the world of Council decision making. What they mean, in this context, is that the Council (corporate) had no function of approving and adopting the minutes of the PC proceedings of 19 January 2016 because everything decided at that meeting had been delegated to the PC. Stated succinctly, the PC operates as the (corporate) Council's *alter ego* as regards all planning – and related – decisions made by it pursuant to the SOD.

[72] It follows from the above analysis that the possibility of (and procedure for) amending the minutes and proceedings of any of the Council's Standing Committees, which is provided for and regulated by the SOs, has no application to the PC. Thus the (corporate) Council has no power to amend, vary or revoke the decisions of its PC. The effect, both practical and legal, of this in the present case is that the Council did not have the function, duty or discretion of considering the new plans submitted by the interested party within days of the pronouncement of the PC's refusal decision at its public proceedings.

[73] In the foregoing analysis and conclusions I do not overlook section 31(5) of the 2011 Act (see Appendix). This is a fall back provision which empowers the (corporate) Council –

> "*… if it thinks fit* [to] *decide to determine an application itself which would otherwise fall to be determined by a person so appointed.*"

The "*person so appointed*" within the meaning of this provision is the Council's Director of Planning and Place: see [70] above. If the Council were to exercise its "call in" power under section 31(5), the effect of this, by virtue of the existing SO and SOD arrangements, would be to confer on the PC the function of determining the application in question.

[74] Finally, I take cognisance of section 25 of the 2011 Act (see Appendix). This establishes a dichotomy of "*major developments*" and "*local developments*". Neither of these terms is defined in the interpretation section, namely section 250. The key provision is section 25(2):

> "*The Department must by regulations describe classes of development and assign each class to one of the* (aforementioned) *categories……*"

The outworkings of section 55(2) are found in the Planning (Development Management) Regulations (NI) 2015, which came into operation on the same date as the new statute, namely 01 April 2015. In short, every development described in the Schedule to the Regulations is a "*major development*", per regulation 2(1), while per regulation 2(2):

> "*All other development belongs to the category of local development.*"

The nexus between section 25 of the 2011 Act and the 2015 Regulations (on the one hand) and the SOD (on the other) becomes clear when one addresses these provisions in their totality, particularly when one considers the specific requirements of a SOD prescribed by Regulations 8 – 10. These various provisions of primary and subordinate legislation, considered as a whole, explain and illuminate the functions delegated to the Director under Section 3 of the Council's SOD and, simultaneously, the functions reserved to the Council's alter ego namely its PC.

Planning decisions: the legally effective date

[75] The comprehensive new legislative regime which came into operation in 2015 is surprisingly unclear with regard to this elementary and self-evidently important issue. While there are two statutory provisions, namely section 59 of the 2011 Act and Article 22 of the Planning (General Development Procedure) Order (NI) 2015 (the "General Development Order") which, in the final analysis, point most clearly to the correct answer, I shall begin with the decision in R (Burkett) v Hammersmith and Fulham LBC [2002] 1 WLR 1593, which featured in the submissions of all parties.

[76] In Burkett, the House of Lords endorsed the joint approach of the parties that the resolution of a local planning authority to grant outline planning permission subject to *inter alia*, completion of a statutory agreement did not create legal rights. Per Lord Steyn at [32]:

> "*It is common ground that the resolution by itself created no legal rights. Only upon the fulfilment of both conditions precedent, and the grant of planning permission, did rights and obligations as between the local authority, the developer and affected individuals come into existence. Until all these things have happened, the resolution was revocable …..*"

The analogy with the present case is not exact, for at least two reasons. First, Burkett concerned a grant of outline planning permission which included a condition requiring the execution of a statutory agreement. Second, the statutory framework differs from that applicable in the present case. Third, the council's resolution - contrasting markedly with the decision of the PC in the instant case – gave authority to a designated council official to grant planning permission subject to fulfilment of the two specified conditions. Correctly analysed, therefore, I consider that Burkett does not have the status of a precedent decision binding on this court. Its utility in the present context is to draw attention to the importance of the exercise entailing detailed scrutiny of the various applicable legal and procedural sources carried out above.

[77] I turn to the first of the two statutory provisions to which I have already drawn attention. Section 58(3) of the 2011 Act specifies a time limit for appeals by the planning applicant to the PAC against refusal decisions and conditional approval decisions. Notice of appeal must be served "*within four months from the date of notification of the decision to which it relates ….*". This provision points strongly to the conclusion that the date of notification of the Council's decision is the date upon which it takes effect in law.

[78] The second statutory provision which illuminates this discrete issue is Article 22 of the General Development Order. This provides:

> "*The council or, as the case may be the Department, shall give notice of a decision or determination in writing and on an application for planning permission or for approval of reserved matters, where a permission or approval is granted subject to conditions or the application is refused, the notice shall state the reasons for the refusal or for any condition imposed.*"

In my judgment, Article 22 combines with section 58(3) in impelling to the conclusion that the legally effective date of any decision or determination of the Council within the ambit of the planning legislative framework is that upon which it is notified to the planning applicant.

[79] This view is reinforced by the decision of the House of Lords in R (Anufrijeva) v Secretary of State for the Home Department [2004] 1 AC which, albeit in a quite

different statutory context, promulgated a common law principle which I consider to be of broad application, extending to the present context which, in common with that in Anufrijeva, has a *lacuna* in the statutory regime. Lord Steyn stated, at [26]:

> "*The arguments for the Home Secretary ignore fundamental principles of our law. Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the Courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice. That is a fundamental and constitutional principle of our legal system.*"

Lord Steyn continued at [28]:

> "*This view is reinforced by the constitutional principle requiring the rule of law to be observed. That principle too requires that a constitutional state must accord to individuals the right to know of a decision before their rights can be adversely affected ….*
>
> *I accept, of course, that there must be exceptions to this approach, notably in the criminal field, eg arrests and search warrants, where notification is not possible. But it is difficult to visualise a rational argument which could even arguably justify putting the present case in the exceptional category.*"

[80] The Anufrijeva principle, superimposed upon the court's assessment of the two statutory provisions highlighted above, lends powerful weight to the view that the operative date in law of every planning decision of a Council is the date of notification to the planning applicant. Thus the statutory prescription in section 58(3) of the 2011 Act harmonises comfortably with a legal principle of constitutional stature. The effect of this analysis is that the operative date in law of the Council's planning decision in the present case was 22 February 2016.

[81] The legal analysis above has, potentially, a further significant consequence. The IP's amended drawings were arguably "*before*" the Council within the meaning of Section 59(1) since they were provided before the legally effective Council determination of 22 February 2016. If correct, it would follow that they could properly be considered by the PAC without any special ruling under the new statutory provisions. This analysis would lead ineluctably to the conclusion that the preliminary decision which the PAC purported to make under section 59(1) was unnecessary.

[82] I have purposely framed the immediately preceding paragraph in the conditional tense mainly for the reason that, in my view, this discrete issue, which is one of some importance, will benefit from more extensive argument in a suitable future case. On the one hand, as Mr Beattie has submitted, the legal basis – whether in SOs or elsewhere – of the individual Council officer's act of simply returning the amended plans to the interest party's agent is not immediately clear, particularly when one considers the court's view that the legally effective date of the PC's refusal decision, which of course became the Council's decision, had not been reached at that stage. Furthermore, it might be said that there is nothing in the series of Council instruments considered above – the SOs, the SOD and the OP – which expressly disables the PC from revisiting a decision which it has promulgated in its public proceedings prior to the legally effective date. On the other hand, there is nothing in any of the aforementioned instruments or, perhaps more important, in the primary or secondary legislation empowering the PC, during the twilight period between its publicly broadcasted decision and the legally effective date thereof, to effectively stay or rescind such decision and reconsider same. Furthermore, to hold that there is an implied power to this effect would run contrary to the principle of legal certainty and would be further undermined by the consideration that the disappointed planning applicant can exercise a statutory right of appeal to the PAC, while other interested parties can have recourse to judicial review. These latter considerations seem to me to favour the conclusion that in the circumstances of this case the PC had no legal power to re-open its decision promulgated in public. I decline to venture any further to cater for the possibility that there might be other circumstances where the court would be prepared to hold that there is an implied power, or duty, to this effect.

The Section 59 Issue

[83] I shall, therefore, address the section 59 question on the basis that the discrete "*before*" issue is resolved against the interested party. In any case in which the application of Section 59(1) arises, the first question to be posed is whether the "*matter*" in question was "*before the Council*". As the analysis which I have espoused above – subject to the qualification of fuller argument in a suitable future case – makes clear, the word "*before*" in this discrete statutory context is not to be equated with something that is laid physically before the Council prior to the legally effective date of its decision. A "*matter*" within the meaning of section 59(1) may, of course, take many forms: these include, inexhaustively, a new or revised drawing, a new issue, a new or revised expert's report, a new or revised statement of evidence, a new argument and a new or revised legal submission. In my view, with the proviso noted, a "*matter*" cannot be considered to have been "*before the Council*" if, for whatever reason, the Council was not legally empowered to give consideration to it.

[84] The approach which I have espoused above means that the court must confront squarely the question of whether the PAC erred in its application of section 59(1)(a) to the interested party's appeal.

[85] There is nothing in the statutory consultation materials or later Hansard debates which sheds any light on the rationale and central aims of section 59(1)(a). It has no statutory antecedents in Northern Ireland and there is no comparable provision in the legislation prevailing in England and Wales. Generally, one of the clearly identifiable aims of the new statutory model in Northern Ireland is that of increased speed and expedition in reaching finality in planning decision making generally. This is uncontroversial. It seems to me that in adopting this discrete statutory provision the Northern Ireland legislature must have had in contemplation that some relaxation of the previous practice whereby new evidence and materials would not be considered by the PAC would be harmonious with enhanced expedition and speedier finality.

[86] The present case illustrates vividly why courts and tribunals at all tiers of the legal system have consistently been reticent about deciding abstract or theoretical questions of law. If this court had been conducting a moot it would have found some attraction in Ms Kiley's submission that the words "*could not have been raised*" in section 58(1)(a) should be construed as "*was not capable of being raised*". But a concrete factual context is required for every exercise of statutory construction. And the context of the present case points to the adoption of a less literal and austere approach.

[87] I turn to consider the factual context. The 'new matter' in the present case took the form of the amended drawings which had been forwarded to the Council by the IP's agent on 22 January 2016 and returned three days later. The same amended drawings formed a major part of the ensuing appeal to the PAC. Strictly, theoretically and technically, these additional drawings were capable of having been generated at an earlier stage of the planning process so as to form part of the materials considered by the PC at its public meeting on 19 January 2016. The interpretation of section 59(1)(a) advocated by Ms Kiley would give rise to the conclusion that the amended drawings were not a new matter and should, therefore, have been excluded by the PAC. Having regard to my assessment of the Council's decision making process in [11] – [13] and [34] – [44] above, this would produce an austere outcome, tangibly unfair to the IP. It would also have the effect of nullifying this court's analysis and conclusions in respect of the procedural fairness issue.

[88] I believe that the Northern Ireland legislature must also have had in contemplation considerations of fairness, reasonableness and the frailties of real life in the commercial world. While these are not spelled out explicitly in the statutory language they are in my view readily implied, particularly when one fleshes out the application of the public law doctrine of procedural fairness. Differently phrased, the importation of considerations of fairness and reasonableness into the section 59(1)(a) equation engages one of the established principles of statutory interpretation namely that the legislature is presumed to have intended that the statutory model would be harmonious with public law principles. In this context, the public law principles most clearly engaged are those which require a procedurally fair decision making process: see [28] – [33] above. Alternatively formulated, the legislature

cannot, in my judgement have contemplated that the primary planning decision maker would benefit from a procedurally unfair decision making process to the disadvantage of the planning applicant. I consider, therefore, that it is open to the PAC to exercise its discretion under section 59(1)(a) of the 2011 Act in circumstances where it is satisfied that the 'new matter' could not fairly or reasonably have been raised by the party concerned at the first instance decision making stage. This is not persuasively contraindicated by anything in the statutory language or its surrounding provisions.

[89] Resuming my analysis of the correct construction of section 59 of the 2011 Act, I consider that the words "*can demonstrate*" convey clearly that the onus is on the party concerned. Third, the words "*to the satisfaction of the* [PAC]" are a clear indicator that it is for the PAC to form an evaluative judgment. In doing so it must take into account all material considerations, disregard everything immaterial, avoid improper motive and material error of fact and adhere to the basic principles of procedural fairness. Stated succinctly, the full panoply of public law standards and principles will be applied to every decision of the PAC under section 59(1)(a) and (b).

[90] To summarise, giving effect to the analysis above, I consider that there was no error of law in the manner in which the appointed Commissioner applied section 59(1)(a) of the 2011 Act to the appeal underlying these proceedings.

[91] I am less confident about the appointed Commissioner's approach to section 59(2)(b). The essential thrust of section 59(2) is to operate as a reminder that at all stages of its decision making the PAC have regard to the provisions of the local development plan (where relevant, I would add) and "*any other material consideration*". The approach of the appointed Commissioner was to treat the amended drawings as a material consideration. The reasoning was:

> "*The proposed amendments are material considerations as they relate directly to the reason for refusal.*"

[92] In my view this was a little confused. The amended drawings constituted the 'new matter' which the IP was desirous of forming part – a critical part – of its appeal to the PAC. The question for the Commissioner was whether the amended drawings should be admitted. Having decided that they should, the statutory condition in section 59(1)(a) being satisfied, the Commissioner, in effect, then proceeded to pose the following question: should the amended drawings be admitted having regard to the amended drawings? This tautologous formulation makes no sense. The amended drawings were the proposed 'new matter'. They had no other legal identity. They did not have the status of a material planning or land use consideration: such conbsiderations came into play only at the later stage when the appointed decision maker (here the PAC) was deciding whether to grant planning permission, with or without conditions, or to refuse the application. See, for example, R (Kides) v South Cambridgeshire DC [2002] EWCA Civ 1370 at [121].

Nor did the amended drawings have the status of a material consideration in broader public law terms. Rather, the amended drawings were **it**.

[93] I consider, therefore, that the appointed Commissioner erred in law in treating the amended drawings as material considerations. However this is a paradigm illustration of a legal error of no consequence, which does not operate to vitiate the Commissioner's impeccably correct consideration and application of section 59(1)(a) of the 2011 Act (subject of course to my primary conclusion on this issue).

The Advertising Issue

[94] The material facts bearing on this discrete issue of law can be extracted from [8] – [10] above. In short, the development proposal considered, and rejected, by the Council was the "original" one described in [9](vi) above. This proposal was amended some days following the PC public meeting on 19 January 2016 and, when the appeal was submitted to the PAC some four months later, the IP made clear that it was being pursued on the basis of the amended proposal. The PAC advertisement of the appeal, some three weeks later, described the proposal in its original terms.

[95] The discrete statutory framework within which this specific issue falls to be considered is composed of sections 41 and 58(vii) of the 2011 Act and Article 8(1) of the GDP Order 2015, all reproduced in the Appendix. While the operative provisions of primary legislation just noted make clear that the advertising requirements governing planning applications to Councils are to be replicated in the advertisement of ensuing appeals to the PAC, they do not speak to the content of the requisite advertisement. Nor does the most prescriptive provision of subordinate legislation, namely Article 8 of the GDPO.

[96] The leading authority on this topic in this jurisdiction is a first instance decision of some vintage, Morelli v DOE [1976] NI 159. There, construing the antecedent statutory provisions, Murray J formulated the test that the advertisement of a planning application is designed to bring home to the mind of the reasonably intelligent and careful reader the nature of the development proposed. In Wheatcroft v Secretary of State for the Environment [1981] 1EJLR 139, another first instance decision, the test devised by Forbes J was whether there is "*a substantial difference*" between the advertised development proposal and the proposed for which development permission is granted. The Judge stated, at 142:

> "*The main ……. criterion …….. is whether the development is so changed that to grant it would be to deprive those who should have been consulted on the changed development of the opportunity of such consultation.*"

One grafts onto this test the underlying factual reality of the facilities available to objectors and other interested parties to study the detail of development proposal applications, whether at first instance or on appeal. It is also necessary to inject the reality that an advertisement cannot – and is not expected to – reproduce the full detail of the development proposal.

[97] On behalf of the Council Ms Kiley did not take issue with the principles to be applied and helpfully drew to the Court's attention the approach enshrined in DOE Guidance in Development Management Practice Note 14 (April 2015) which enshrines the tests of "*material amendments*" and "*significant changes*". There is nothing objectionable in these tests, provided that they are always considered in the context of the legal principles which I have expounded. Notably Forbes J espoused the view that the standard for review on a challenge of this discrete species is (in terms) that of Wednesbury irrationality. Notably this approach was endorsed in another first instance decision, Breckland DC v Secretary of State for the Environment [1992] 3 PLR 89. I consider this approach in law correct, given that the issue is one of evaluative planning judgement for the first instance decision maker and the PAC on appeal. This is reinforced by the absence of any detailed prescription of the content of planning application advertisements in either the primary or the subordinate legislation.

[98] The foregoing analysis and conclusion do not detract in any way from the burden on developers and their agents of ensuring maximum accuracy and particularisation in every development proposal application. In this sphere one is dealing with well qualified experts of whom the highest standards are to be expected. The only qualification, juridical in nature, is that the law recognises a degree of latitude in these matters. In so doing it does not purport to espouse a charter for the slipshod or inefficient.

PAC Informal Appeal Hearings

[99] Section 204(b) of the 2011 Act (see Appendix) is strikingly light in prescription. It contemplates that, broadly, that every appeal to the PAC will be decided either "*solely by reference to written representations*" – section 204(1)(b) – or (by clear implication) an oral hearing of some kind. The PAC's powers are, by section 204(4), to confirm, reverse or vary the decision under appeal. Its decisions take effect as if they had been made by the first instance decision making agency. Section 204(5) is a notable provision in this context. It empowers the Department to make rules "*… for regulating the procedure for proceedings before the [PAC] ….*" Any procedural rules thus adopted must be preceded by obligatory consultation with the PAC. The procedure of the PAC "*… shall be such as* [it] *made determine*" – but "*…. subject to the provisions of this Act and any such rules*".

[100] The Department has not exercised its rule making power. The net result of this is to confer considerable latitude on the PAC in all matters of procedure. There are two main constraints. The first is that the PAC is at all times "*subject to the*

provisions of" the 2011 Act. The second is that in all matters of procedure the PAC must act in accordance with the standards and principles of public law and, most apposite in this context, the principles of procedural fairness. In this respect, the "template" which the Court has applied to the decision making processes of Councils does not, in principle differ from that which applies to the PAC: see [28] – [33] above.

[101] The evidence includes a joint publication of the Planning Appeals Commission and the Water Appeals Commission entitled "Appeal Procedures", which was promulgated in October 2016. The misrepresentation in [1] of the Introduction to the effect that the authority for this measure is provided by section 204(5) of the 2011 Act is venial in nature. It can be easily corrected in future publications of this kind and does not alter its legal status in any way. The legal status of this measure does not differ in principle from that of the Council's PAD guidance publication, with the result that the analysis in [45] – [51] above applies equally to the "Appeal Procedures" instrument.

[102] It is instructive to reproduce [2] of the publication in its entirety:

> "*The PAC is a statutory tribunal, independent of any government department or agency. It has a wide range of appeal functions which include matters relating to planning, listed buildings, conservation areas, advertisements, trees, roads and the environment. The WAC is a separate statutory tribunal, also independent of government. Its remit includes matters relating to water quality, fisheries, marine licensing and reservoirs.*"

Under the rubric of "The Choice of Appeal Procedure", it is stated in [22]:

> "*Appeals can be considered in either of the following ways:-*
> • *by a hearing, whether formal or informal; or*
> • *by exchange of written representations, with or without an accompanied site visit.*"

In [25] there is a discrete section entitled "Informal Hearing":

> "*Stage 1 - The Commission invites all parties to submit statements of case within four weeks.*
> *Stage 2 - Statements of case are exchanged and two weeks are allowed for the submission of rebuttal evidence. Rebuttal evidence is copied to participating parties for information only.*
> *Stage 3 - The appeal is allocated to a Commissioner who considers all the evidence, carries out an unaccompanied site visit and either issues a decision on the appeal or submits a report to the Commission.*

> *Stage 4 - Where a collective decision is to be made, a panel of Commission members meets to consider the Commissioner's report and a decision is issued."*

Under the rubric of "Formal Hearing" one finds the following:

> *"Stage 1 - The Commission normally gives parties 12 weeks' notice of the hearing date and invites them to submit statements of case.*
> *Stage 2 - Statements of case are exchanged and two weeks are allowed for the submission of rebuttal evidence. Rebuttal evidence is copied to participating parties at least three weeks prior to the hearing.*
> *Stage 3 - The appeal is allocated to a Commissioner who conducts the hearing.*
> *Stage 4 - The Commissioner considers all the evidence, visits the site with or without the attendance of the parties and either issues a decision on the appeal or submits a report to the Commission.*
> *Stage 5 - Where a collective decision is to be made, a panel of Commission members meets to consider the Commissioner's report and a decision is issued."*

[103] The publication continues, at [27]:

> *"If a hearing is requested, the Commission will decide whether it is to be formal or informal, taking into account the preferences of the appellant and the authority, the nature and scale of the subject matter of the appeal, the likely complexity of the legal and technical issues and the number of third parties. The Commissions' experience has been that in the vast majority of appeals, an informal hearing represents an effective and efficient method of gathering information in a non-confrontational atmosphere. Formal hearings are necessary only for particularly complex cases where issues need to be tested by formal questioning between opposing parties."*

This may be linked to [41]:

> *"An informal hearing takes the form of a round-table discussion led by the Commissioner, who will invite comments on what appear to be the main issues and matters requiring further clarification. All parties will have an opportunity to put forward views and may be assisted by an agent or adviser. However, an informal hearing is not a forum for repeating written evidence already available*

> *to the parties. Statements of case will be taken as read. Written rebuttal evidence may not be introduced but there will be an opportunity to raise relevant rebuttal points during the discussion. When the Commissioner considers that an issue has been sufficiently clarified, he or she will move on to the next issue. Cross-examination and formal legal submissions are not necessary at informal hearings, but in complex appeals the Commissioner may allow some questioning between parties on issues not already covered in the round-table discussion."*

This contrasts with the procedure adopted at a formal hearing, per [42]:

> *"At a formal hearing evidence is probed through questioning by opposing parties and by the Commissioner. Parties, in turn, may briefly explain their position and address points made by other parties. The usual sequence is that the authority presents its evidence first and is questioned; followed by objectors (or their spokesperson); then the appellant; and finally supporters (or their spokesperson). Parties may be professionally represented (but do not have to be) and may put forward witnesses to answer questions and discuss points arising from their written evidence, which will be taken as read. The Commissioner will take an active role in investigating evidence and may ask questions at any stage of the proceedings. Closing statements will not be required."*

[104] It is, in my view, entirely appropriate that this publication is framed in open-textured terms. It does not enshrine inflexible rules or regulations and, I would add, it must be applied with the contextual flexibility which differing appeals may require. This is a reflection of the public law principle that procedural fairness is an intensely contextual concept.

[105] In the present case, the PAC's response to the NOA was to inform the IP's agent that it had been decided to convene a "*single informal hearing*". The evidence also contains a letter, written approximately one month later, reiterating this discrete decision and advising (in terms) that the publication discussed above was available on the PAC website. Not knowing what formal communications there were between the PAC and range of other interested parties identified in the "**Dramatis Personae**" in the pre-amble to this judgment, I would make the modest observation that the PAC should be alert to the desirability of enclosing the "Appeal Procedures" publication with letters of this kind in appropriate cases. This would be both sensible and reasonable in certain instances and <u>may</u>, depending on the context, be required by the principles of procedural fairness.

[106] The PAC, the Council, developers and the public already have the benefit of the consideration given to the PAC's informal hearing mechanism in Re Stewart's Application [2003] NICA 4. Carswell LCJ, delivering the unanimous judgment of the Court, stated at [20]:

> *"In our opinion the issues in planning decisions lie at the judgment and discretion end of the spectrum. We do not consider that the use of the informal hearing procedure is in itself unfair or a breach of the Article 6 rights of an objector. There may be cases where there is such a need to establish the correct facts in a conflict of evidence or test the validity of certain types of evidence that an informal hearing would not suffice to satisfy Article 6, but this was not in our opinion such a case. In the absence of such factors, we do not regard the resort to informal hearings as being per se in breach of the parties' Article 6 rights."*

The Lord Chief Justice added, at [21]:

> *"It is necessary, however, to sound a note of caution. Where a person or body has the function of conducting an inquisitorial type of proceeding of the type of the informal hearing of planning appeals, it is of particular importance that care is taken to ensure that all reasonable expressions of opinion are received and that sufficient opportunity is given to the participants in the proceeding to present their case in an effective fashion. We would draw attention to the remarks of Pill LJ in Dyason v Secretary of State for the Environment [1998] JPL 778, in the course of which he said:*
>
> > *'The hearing must not become so relaxed that the rigorous examination essential to the determination of difficult questions may be diluted. The absence of an accusatorial procedure places an inquisitorial burden on an inspector'."*

The court adopted the cautionary words of Pill LJ in Dyason v Secretary of State for the Environment [1998] JPL 778:

> *"The hearing must not become so relaxed that the rigorous examination essential to the determination of difficult questions may be diluted. The absence of an accusatorial procedure places an inquisitorial burden upon an inspector."*

This authoritative judicial guidance in Re Stewart continues, at [22]:

> *"We need hardly say that Commissioners holding informal hearings should not do so in a manner which unrepresented parties might find brusque or intimidating"*

I trust that within the above passages, coupled with [] – [] of this judgment, ample guidance on the legal requirements relating to PAC informal hearings has been provided.

The informal hearing: this case

[107] Via the admittedly lengthy preamble of [99] – [106] above, I come to the nub of the informal hearing complaint in the Council's grounds of challenge. This is expressed succinctly in Ms Kiley's skeleton argument thus:

> "*It is the Applicant's case that the failure of the PAC to require parties to give prior notification that they will be legally represented at an appeal hearing is in breach of the common law duty of fairness.*"

Formulated in these broad and sweeping terms I consider this contention unsustainable. It invites the short, perhaps blunt, riposte that the context and factual matrix of every case will be unavoidably sensitive. Thus it is possible, in the abstract, that inequality of arms giving rise to common law unfairness could conceivably arise in any given case where one party is legally represented and the other has no legal representation. Beyond this somewhat bland observation, it is neither possible nor appropriate to venture.

[108] This brings me to the context of the present case. The submission formulated by Ms Kiley was that the Council's planning officer (Mr Campfield) –

> "*… was at a substantial disadvantage in that he was unable to respond effectively to legal issues and submissions made by the appellant's legal representatives …..* [so that] ……. *the Council was thereby denied the opportunity to respond to the Appellant's case effectively. Effective preparation and representation required argument on the law, particularly the requirements of section 59 ……*"

The first part of this submission is unparticularised and, having considered carefully the averments of Mr Campfield in his affidavit, I consider that it has no adequate evidential foundation. Quite the contrary: Mr Campfield's averments convey clearly that he articulated significant representations to the Commissioner in the course of the hearing. The key passage in his affidavit which, in substance, complains about procedural unfairness is couched in vague and diffuse terms and fails to

acknowledge the more informal and less regimented nature of the hearing which was being conducted. It must also be observed that Mr Campfield's averments on this issue are unsupported by any affidavit sworn on behalf of others in attendance.

[109] The nub of this ground of challenge is that the PAC's procedures should be such as to alert all participating parties in advance to the fact of legal representation on the part of any of the parties concerned. The PAC's existing procedures do not do this. I find nothing unlawful in this at the general level. However, to cater for the possibility, identified above, that inequality of arms giving rise to material procedural unfairness could result from the extant practice, I invite the PAC to consider the economic and practical feasibility of revising its pre-hearing procedures so as to ensure that (a) every party who intends to be legally represented is required to signify this fact and (b) any alteration occasioned by subsequent developments is also notified to the PAC in the first place and, thereafter, by the PAC to the other participating parties.

Summary of Conclusions

[110] My omnibus conclusion is that on the grounds and for the reasons elaborated above, the Council's judicial review challenge must be dismissed. I summarise my discrete findings and conclusions thus:

(i) Every planning decision must be the product of a procedurally fair decision making process in which the developer is treated on a "cards face up" basis throughout. Developers must not be taken by surprise or ambushed.

(ii) Procedural fairness is enhanced and promoted by recourse to the "PAD" process.

(iii) The overarching public interest in play is that of the orderly development of land, linked to the economic well being of the country.

(iv) "PAD" guidance does not dilute the duty to take into account all material considerations.

(v) There is a distinction between planning officers and the corporate council decision making agency.

(vi) Every council's duty to provide coherent and intelligible reasons for its planning decisions is of supreme importance.

(vii) Planning officers' reports and presentatrions to council planning committees are of obvious importance and will be scrutinised with care.

(viii) The Council's Planning Committee operates as the Council's *alter ego*, making final and binding decisions within the scope of its delegated powers.

(ix) The only other authorised decision making agency is the Council's Director of Planning and Place, acting within the scope of his delegated powers under the SOD, subject to "call in" by the Council in any given case under section 31(5) of the 2011 Act.

(x) All "major" planning applications (as defined) are reserved to the Council's Planning Committee.

(xi) The operative date viz the date upon and from which legal effects and consequences materialise is the date of notification of the Council's planning decision.

(xii) It is doubtful whether the Council's Planning Committee is empowered to reconsider or amend its planning decisions between the date when they are promulgated in public and the later date of notification.

(xiii) A "matter" cannot be considered to have been "before" the Council, within the meaning of section 59(1) of the 2011 Act, if the Council was not legally empowered to give consideration to it.

(xiv) The PAC is empowered to exercise its discretion under section 59(1)(a) of the 2011 Act in circumstances where it is satisfied that the "new matter" could not fairly or reasonably have been raised by the party concerned at the first instance decision making stage.

(xv) Section 59 imposes an onus on the party concerned.

(xvi) Every decision under section 59 engages the full panoply of public law standards and principles.

(xvii) The PAC "Appeal Procedures" guidance is appropriately framed in open-textured terms, does not enshrine inflexible rules or regulations and is to be applied with the contextual flexibility which differing appeals may require. It belongs predominantly to the public law realm of procedural fairness.

(xviii) This guidance is not rendered unlawful in whole or in part by its failure to alert all participating parties in advance to the fact of legal representation on the part of any of the parties concerned.

Costs

[111] Both the PAC and the IP apply for costs against the Council. In the English context, which is comparable to though not a mirror image of the Northern Ireland framework, authoritative guidance is provided by the decision of the House of Lords

in Bolton MDC v SSHD and Others [1995] WLR 1176. This decision, reflecting the judicial discretion in all costs matters, enunciates certain general principles, namely:

(i) Where the planning authority successfully defends its decision it will normally be entitled to recover the whole of its costs.

(ii) The developer will not normally be entitled to recover costs -

> "*… unless he can show that there was likely to be a separate issue on which he was entitled to be heard, that is to say an issue not covered by counsel for the Secretary of State, or unless he has an interest which requires separate representation. The mere fact that he is the developer will not of itself justify a second set of costs in every case.*"
>
> (Per Lord Lloyd of Berwick at 117F/H.)

[112] As a perusal of this judgment demonstrates, the case presented by the developer to this Court was complimentary to that of the judicial review respondent, the PAC. There was no duplication of any kind. Furthermore the general principles rehearsed in [7](i) – (ii) above were faithfully observed. Both the evidence adduced on behalf of the IP and the submissions of its counsel, Mr Beattie QC, successfully exposed legally unsustainable aspects of the underlying decision of the Council. These are reflected in [59] – [63] above. The presentation of the case on behalf of the PAC, understandably, had a narrower focus, with a particular emphasis on the section 59, advertising and informal hearings issues. This dichotomy was highlighted in the post-hearing developments and submissions in which the leading role of *legitimus contradictor* was assumed by the IP. Moreover it is impossible to overlook the indelible fact that the IP was obliged to incur the legal costs and associated loss of business profits, coupled with uncertainty and delay, in pursuing an appeal to the PAC which, on the findings of this court, should not have been necessary.

[113] While I acknowledge the submission on behalf of the Council that, as stated in [1] of this judgment, this case raises certain interesting and novel questions of law in the context of the new Northern Ireland planning legislative framework, this in my judgement does not operate to dilute or diminish the foregoing analysis.

[114] Ultimately I must give effect to considerations of fairness and proportionality, bearing in mind that an unsuccessful judicial review challenge of this kind will rarely result in the applicant paying the full legal costs of both the respondent and any interested party. I balance all of these factors by ordering that the Council pay 75% of the PAC's reasonable legal costs and outlays and 75% of the IP's reasonable costs and outlays, to be taxed in default of agreement.

Order

[115] The application for judicial review is dismissed, with costs as aforesaid.

APPENDIX: STATUTORY PROVISIONS

Planning Act (NI) 2011

Section 25

"Hierarchy of developments

25.—(1) For the purposes of this Act, a development belongs to one of the following categories—

(a) the first, to be known as "major developments"; and

(b) the second, to be known as "local developments".

(2) The [Department for Infrastructure] must by regulations describe classes of development and assign each class to one of the categories mentioned in paragraphs (a) and (b) of subsection (1).

(3) But the [Department for Infrastructure] may, as respects a particular local development, direct that the development is to be dealt with as if (instead of being a local development) it were a major development."

Section 31

"Local developments: schemes of delegation

31.—(1) A council must—

(a) as soon as practicable after the coming into operation of this section, and thereafter—

(i) whenever required to do so by the [Department for Infrastructure]; or

(ii) subject to sub-paragraph (i), at such intervals as may be provided for in regulations made under this section,

prepare a scheme (to be known as a "scheme of delegation") by which any application for planning permission for a development within the category of local developments or any application for consent, agreement or approval required by a condition imposed on a grant of planning permission for a development within that category is to be determined by a person appointed by the council for the purposes of this section instead of by it, and

(b) keep under review the scheme so prepared.

(2) The determination of any person so appointed is to be treated as that of the council.

(3) Without prejudice to subsection (1)(a)(ii), regulations under this section may make provision as to—

(a) the form and content of,

(b) the procedures for preparing and adopting, and

(c) the requirement to publish,

a scheme of delegation.

(4) Where an application for planning permission falls to be determined by a person so appointed, sections 41(3), 42, 45, 46, 48, 52(1) and (2), 54, 58 and 60 apply, with any necessary modifications, as they apply to an application which falls to be determined by the council.
(5) The council may, if it thinks fit, decide to determine an application itself which would otherwise fall to be determined by a person so appointed.
(6) Any such decision must include a statement of the reasons for which it has been taken; and a copy of the decision is to be served on the applicant."

Section 40

"*Form and content of applications*
40.—(1) Any application for planning permission—
(a) must be made in such form and in such manner as may be specified by a development order;
(b) must include such particulars, and be verified by such evidence, as may be required by a development order or by any directions given by a council or the [Department for Infrastructure] under such an order.
(2) A direction under subsection (1)(b) must not be inconsistent with the development order.
(3) A development order must require an application for planning permission of such description as is specified in the order to be accompanied by such of the following as is so specified—
(a) a statement about the design principles and concepts that have been applied to the development;
(b) a statement about how issues relating to access to the development have been dealt with.
(4) The form and content of a statement mentioned in subsection (3) is such as is required by the development order.
(5) Subsection (1) shall apply to applications to a council or the [Department for Infrastructure] for any consent, agreement or approval of the council or, as the case may be, the [Department for Infrastructure] required by a condition imposed on a grant of planning permission as that subsection applies to applications for planning permission."

Section 41

"*Notice, etc., of applications for planning permission*
41.—(1) A development order may make provision requiring notice to be given of any application for planning permission and provide for publicising such applications and for the form, content and service of such notices.
(2) A development order may require an applicant for planning permission to provide evidence that any requirements of the order have been satisfied.
(3) An application for planning permission must not be entertained by a council or the [Department for Infrastructure] unless any requirements imposed by virtue of this section have been satisfied."

Section 45

Determination of planning applications

45.—(1) Subject to this Part and section 91(2), where an application is made for planning permission, the council or, as the case may be, the [Department for Infrastructure], in dealing with the application, must have regard to the local development plan, so far as material to the application, and to any other material considerations, and—

(a) subject to sections 61 and 62, may grant planning permission, either unconditionally or subject to such conditions as it thinks fit; or

(b) may refuse planning permission.

(2) A development order may provide that a council or the [Department for Infrastructure] must not determine an application for planning permission before the end of such period as may be specified by the development order.

(3) In determining any application for planning permission the council or the [Department for Infrastructure] must take into account any representations relating to that application which are received by it within such period as may be specified by a development order.

(4) Where an application for planning permission is accompanied by such a certificate as is mentioned in section 42(1)(c) or (d), the council or, as the case may be, the [Department for Infrastructure]—

(a) in determining the application, must take into account any representations relating to the application which are made to it by any person who satisfies it that, in relation to any of the designated land, that person is such a person as is described in section 42(1)(c); and

(b) must give notice of its decision on the application to every person who made representations which it was required to take into account under paragraph (a).

Section 58

Appeals

58.—(1) Where an application is made to a council—

(a) for planning permission to develop land; or

(b) for any consent, agreement or approval of the council required by a condition imposed on a grant of planning permission; or

(c) for any approval of the council required under a development order;

then if that permission, consent, agreement or approval is refused or is granted subject to conditions, the applicant may by notice in writing appeal to the planning appeals commission.

(2) Subsection (1) shall not apply to any application referred to the Department under section 29.

(3) Any notice under this section must be served on the planning appeals commission within 4 months from the date of notification of the decision to which it relates or such other period as may be specified by development order.

(4) Where an appeal is brought under this section from a decision of a council, the planning appeals commission, subject to subsections (5) to (7), may allow or dismiss the appeal or may reverse or vary any part of the decision whether the appeal relates to that part thereof or not and may deal with the application as if it had been made to it in the first instance.
(5) Before determining an appeal under this section, the planning appeals commission must, if either the applicant or the council so desires, afford to each of them an opportunity of appearing before and being heard by the commission.
(6) If at any time before or during the determination of an appeal under this section it appears to the planning appeals commission that the appellant is responsible for undue delay in the progress of the appeal, it may—

(a) give the appellant notice that the appeal will be dismissed unless the appellant takes, within the period specified in the notice, such steps as are specified in the notice for the expedition of the appeal; and
(b) if the appellant fails to take those steps within that period, dismiss the appeal accordingly.

(7) Subject to subsection (5), sections 41, 42, 45, 52, 53, 54 and 55 shall apply, with any necessary modifications, in relation to an appeal to the planning appeals commission under this section as they apply to an application for planning permission.

Section 59

Matters which may be raised in an appeal under section 58
59.—(1) In an appeal under section 58, a party to the proceedings is not to raise any matter which was not before the council or, as the case may be, the [Department for Infrastructure] at the time the decision appealed against was made unless that party can demonstrate to the satisfaction of the planning appeals commission—

(a) that the matter could not have been raised before that time, or
(b) that its not being raised before that time was a consequence of exceptional circumstances.

(2) Nothing in subsection (1) affects any requirement or entitlement to have regard to—

(a) the provisions of the local development plan, or
(b) any other material consideration.

Section 204

Procedure of appeals commission
204.—(1) Where, under this Act or any other statutory provision, the appeals commission may determine an appeal—

(a) the appeal shall be heard by such member or members of the appeals commission as the chief commissioner may appoint in that behalf; …

(2) Where, under this Act or any other statutory provision, the appeals commission may hold an inquiry, independent examination or hearing—

(a) the inquiry, independent examination or hearing shall be held by such member or members of the appeals commission as the chief commissioner may appoint in that behalf; …

(4) Where, under this Act or any other statutory provision, the appeals commission may determine an appeal in relation to a decision of a council or any other body, the commission may confirm, reverse or vary the decision and any determination of the commission on the appeal shall have the like effect as a decision of the council or, as the case may be, the body, for the purpose of this Act or any such statutory provision, except a provision relating to appeals.

(5) The Department, after consultation with the appeals commission, may make rules for regulating the procedure for proceedings before the appeals commission and, subject to the provisions of this Act and any such rules, that procedure shall be such as the appeals commission may determine.

(6) Rules under subsection (5) which provide for the taking of any decision may, in particular, provide for that decision to be taken—

(a) by a panel of not fewer than 4 commissioners; or

(b) by a single commissioner.

(7) Rules under subsection (5) which provide for the making of any report may, in particular, provide for that report to be made—

(a) by a panel of commissioners;

(b) by a single commissioner.

(8) Rules made under subsection (5) shall be subject to negative resolution.

(9) Where, under this Act or any other statutory provision, a person has been afforded an opportunity of appearing before and being heard by the appeals commission or the appeals commission holds an inquiry or independent examination the appeals commission must make a report on the hearing, inquiry or independent examination to the relevant department and that department must consider that report.

Section 250

Interpretation

250.—(1) In this Act—

….

"development" has the meaning given in section 23;

"development order" has the meaning given in section 32;

"planning decision" means a decision made on an application in accordance with Part 3;

"planning permission" means permission under Part 3;

Planning (General Development Procedure) Order (NI) 2015

Article 8

Notice etc. of applications for planning permission and appeals

8.—(1) Subject to Article 3, where an application for planning permission is made to the council or, as the case may be, the Department, the council or, as the case may be, the Department shall—

(a)publish notice of the application in at least one newspaper circulating in the locality in which the land to which the application relates is situated;

(b)serve notice of the application to any identified occupier on neighbouring land in accordance with paragraph (2);

(c)where it maintains a website for the purpose of advertisement of applications, publish the notice on that website; and

(d)not determine the application before the expiration of 14 days from the date—

(i)on which the notice is first published in a newspaper in pursuance of sub-paragraph (a),

(ii)stipulated on the notice to any identified occupier issued under sub-paragraph (b), or

(iii)on which the application is first published on the website in pursuance of sub-paragraph (c),

whichever date is the later or latest.

(2) The notice to be given in accordance with paragraph (1)(b) must—

(a)state the date on which the notice is sent;

(b)include the reference number given to the application by the council, or as the case may be, the Department;

(c)include a description of the development to which the application relates;

(d)include the postal address of the land to which the development relates, or if the land in question has no postal address, a description of the location of the land;

(e)state how the application, plans or drawings relating to it and other documents submitted in connection with it may be inspected;

(f)state that representations may be made to the council or, as the case may be, the Department and include information as to how any representations may be made and by what date they must be made (being a date not earlier than 14 days after the date on which the notice is sent);

(g)include a statement as to how information explaining the manner in which applications for planning permission are handled and the procedures which are followed in relation to such applications can be obtained; and

(h)where the development to which the application relates is a class of development prescribed for the purposes of section 27 (pre-application community consultation) of the 2011 Act, include a statement that notwithstanding that comments may have been made to the applicant prior to the application being made, persons wishing to make representations in respect of the application should do so to the council or, as the case may be, the Department in the manner indicated in the notice.

(3) Where an appeal is made to the planning appeals commission under sections 58 or 60 paragraph (1) shall apply as if—

(a)for the words "Subject to Article 3, where an application for planning permission is made to the council or, as the case may be, the Department, the council or, as the case may be, the Department" there were substituted "Where an appeal is made to the planning appeals commission under sections 58 or 60 it"; and,

(b)for the word "application" where it occurs in paragraph (1)(a),(c) and (d)(i) and (iii) there were substituted "appeal"; and,

(c)sub-paragraphs (b) and (d)(ii) were omitted.

(4) When an appeal is made to the planning appeals commission under sections 143 and 159—

(a)paragraph (1) shall apply as if—

(i)for the words "Subject to Article 3, where an application for planning permission is made to the council or, as the case may be, the Department, the council or, as the case may be, the Department" there were substituted "Where an appeal is made to the planning appeals commission under section 143 or 159 it",

(ii)for the word "application" where it occurs in paragraph (1)(a), (b) (c) and (d)(i), (ii) and (iii) there were substituted "appeal"; and

(b)paragraph (2)(a) to (f) shall apply as if—

(i)for the words "council or as the case may be, the Department" where they occur in each sub-paragraph there were substituted "the planning appeals commission"; and

(ii)sub-paragraphs (g) and (h) were omitted.

(5) For the purposes of enabling the planning appeals commission to comply with paragraph (1)(b) and (d)(ii) the council, or as the case may be, the Department, shall provide the planning appeals commission with a list of identified occupiers on any neighbouring land.

Article 22

Written notice of decision or determination relating to a planning application

22. The council or, as the case may be, the Department shall give notice of a decision or determination in writing, and on an application for planning permission or for approval of reserved matters, where a permission or approval is granted subject to conditions or the application is refused, the notice shall state the reasons for the refusal or for any condition imposed.

The Planning (Development Management) Regulations (NI) 2015

Article 1(3)

"the GDPO" means the Planning (General Development Procedure) Order (Northern Ireland) 2015(**1**);

"appointed officer" means a person appointed by the council for the purposes of section 31(1)(a);

"appropriate council" means the council for the district in which the land to which the application relates is situated;

"council" means a district council;

"EIA development" has the same meaning as in regulation 2 of the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2015"

Article 2

"For the purposes of section 25(1)(hierarchy of developments) the classes of development belonging to the category of major development are—

(a)development described in Column 1 of the table in the Schedule, where any applicable threshold or criterion in the corresponding entry in Column 2 of that table is met or exceeded; and

(b)any change to or extension of development of a class described in paragraphs 1 to 9 of Column 1 of the table in the Schedule where that change or extension itself meets or exceeds the threshold or criterion in the corresponding entry in Column 2 of that table.

(2) All other development belongs to the category of local development."

Article 8

"8.—(1) A scheme of delegation must—

(a)describe the classes of local development to which the scheme applies; and

(b)state with respect to every such class which of the applications mentioned in paragraph (2) are to be determined by an appointed officer and, if such application is only to be so determined in particular circumstances, specify those circumstances.

(2) The applications are—

(a)an application for planning permission; or

(b)an application for consent, agreement or approval required by a condition imposed on a grant of planning permission.

(3) A scheme of delegation must include provision that prohibits an appointed officer from determining an application for planning permission in the circumstances mentioned in paragraph (4).

(4) The circumstances are that—

(a)the application is made by the council or an elected member of the council; or

(b)the application relates to land in which the council has an estate."

Regulation 9

"The council must send a copy of the scheme of delegation to the Department and must not adopt the scheme until the scheme has been approved by the Department."

Regulation 10

"10. On adoption of the scheme the council must—

(a)make a copy of the scheme of delegation available for inspection at an office of the council; and

(b)publish the scheme of delegation on the website of the council."

Regulation 11

"The council must prepare a scheme of delegation at intervals of no greater than three years."