

**Neutral Citation No: [2018] NIQB 45**

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

**Ref: KEE10586**

**Delivered: 16/4/2018**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION BY DERMOT NESBITT  
FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF A DECISION OF NEWRY AND MOURNE  
AND DOWN DISTRICT COUNCIL MADE ON 2 JUNE 2017 TO GRANT  
OUTLINE PLANNING PERMISSION REFERENCE LA07/2016/0991/0**

**KEEGAN J**

[1] This is an application for judicial review dated 15 August 2017. Leave was granted by McCloskey J on 30 November 2017 on two discrete grounds set out in the Order 53 statement as follows:

- (1) The respondent failed to have regard properly or at all to the “form of the building as was proposed by the planning applicant”.
- (2) The respondent failed to have proper regard to the “pattern of development” as proposed by the planning applicant.

[2] I heard this application on 15 February 2018. The applicant Mr Nesbitt appeared as a litigant in person. Ms Comerton BL appeared on behalf of the respondent. Mr Beattie QC appeared on behalf of the notice party, Choice Housing Ireland Limited, who was the successful applicant in the planning application. I am grateful to all who participated in this hearing for their oral and written submissions.

**Background**

[3] I have received detailed evidence from the applicant which has been presented in a helpful format. I refer to this in summary in this section of my judgment.

[4] The subject matter of the application is a property situated at 19 Downpatrick Road in Crossgar. This is now a derelict site. The planning permission of 2 June 2017 relates to that property. On that date outline planning permission was granted for a single storey development of the property by way of four apartments in a single storey block. The applicant and his wife own the adjacent property at 21 Downpatrick Road.

[5] The applicant's involvement with the development of number 19 began some time ago as he explains in his affidavit. On 7 March 2007 the applicant and his wife received a letter from Murlands solicitors expressing their client's interest in purchasing his property. This was on the basis that their client had entered a binding contract to purchase 19 Downpatrick Road. The applicant avers that he was also made aware by the owner of 17 Downpatrick Road that there was an expression of interest made to purchase that property. So starts the chain of events from 2007 to 2018 over 11 years whereby the applicant has been engaged with the planning authorities in relation to the development of 19 Downpatrick Road in Crossgar.

[6] The applicant states that he bought his first and only home in 1970 which was the last of four properties on the Downpatrick Road between Nos. 15 and 21. He states that it was on green field land and that it had been in his wife's family ownership for around 200 years. He explains that his late parents' home where he spent his childhood was 250 metres further out the Downpatrick Road on land initially owned by his maternal grandparents and in which his daughter and family now live. The applicant states that when he built his home the lands to the south and west were still green field. However he confirms that his site was within the development limit of the village and new dwellings have been built on this land since around 1990. The land is designated for housing development in the Ards and Down area plan 2015 and building is on-going. The applicant raises no objection to that broad development plan however he has consistently objected to the proposed development of apartments at 19 Downpatrick Road and he states his reason thus:

"My single rationale for objection is clear - the failure to act in accordance with planning policy."

[7] The applicant states that the dwellings fronting the Downpatrick Road, including development since his house was built, are characterised by single family homes, detached in form and each within their own private grounds. He accepts that there is a variety in architectural styles and treatments, within building lines and property sizes. He refers to a housing development called Westlands to the north of 15 Downpatrick Road. So he explains that the applicant site is set within an immediate proximity of four dwellings with large garden plots. The applicant refers to the fact that located on the opposite side of the Downpatrick Road is Tobar Mhuire which is a wooded demesne. There is also a listed gate lodge on Downpatrick Road opposite both the applicant's home and the application site.

[8] In his affidavit the applicant then sets out some history of the planning applications in relation to the site. He avers that the planning permission granted on 2 June 2017 by the respondent represents the latest redevelopment of the site. The planning applicant was Choice Housing Ireland Limited and the date of application was 22 July 2016 and the application was for four two-bedroomed apartments. However this is not the first application as the applicant explains at paragraph 6 of his affidavit as follows;

“Over the period December 2007 to June 2017, there have been three applications and nine amendments on this site involving apartments. Chronologically over these years these involved:

- (1) Four townhouses and eight apartments.
- (2) Four townhouses and seven apartments.
- (3) Four townhouses and six apartments.
- (4) Four townhouses and three apartments.
- (5) Three apartments.
- (6) Seven apartments.
- (7) Four apartments.

[9] In his evidence the applicant also summarises the outcome of these applications as follows:

“Except for the last four apartment application the settled position for the other applications and amendments as well as the Planning Appeal Commission’s decision for this site has been refusal. This approval is the ground floor section of the immediately previous seven apartment application that was refused planning permission.”

[10] The applicant also places emphasis upon other complications in the progress of this process. In particular he refers to a possible conflict of interest when Trinity Housing was involved in the development. He refers to the fact that he drew this to the attention of the Northern Ireland Audit Office and the Northern Ireland Assembly’s Public Accounts Committee. At paragraph 11 of his affidavit the applicant states that a Minister recommended approval on 24 March 2011 for four townhouses and six apartments on the site but the recommendation was

subsequently overturned by another Minister on 14 November 2001. Overall, the applicant avers that the ten year application process has been punctuated by various and sometimes very challenging events. In his affidavit the applicant also relies upon the fact that the site was the subject of a similar planning application R/2014/0393/F that was refused by the then Department of the Environment on 10 February 2015. This decision was appealed but was upheld for the reasons comprised in a decision of Commissioner McGlinchey which the applicant places reliance upon.

[11] The current application was put before the Planning Committee of the relevant Council by way of case officer's report. The applicant along with others raised objections. There was a hearing at which presentations were made. The applicant addressed the Planning Committee and a note of that hearing has been made available to this court. The applicant also provided written objections to the proposal. In his affidavit the applicant sets out the basis of his challenge in detail. However, I will concentrate upon the two points upon which leave was granted namely the 'form' challenge and the 'pattern challenge.'

[12] In relation to the issue of form the applicant comprehensively makes the case from paragraph 63 to 72 of his first affidavit supplemented by Exhibit 19 to his second affidavit. I utilise the following quotation in summarising the applicant's position as follows:

"Where policy is relevant it must be taken into account, correctly interpreted and correctly applied. The case officer's report, neither considered form nor even mentioned the word form. This admission together with not including the actual written requirements of this policy contained for example in PS7 QD1 (g) resulted in a misapplication of planning policy and consequently the misdirection of the Planning Committee. A review of Exhibit 11 illustrates the importance placed upon the word form as it features consistently in policy requirements in addition to the above mentioned PS7 QD1 (g) including the latest planning policy document the SPPS. Since the case officer's report did not have any regard to form it follows that the Planning Committee was misdirected and cannot have acted legally."

[13] In relation to pattern which is the second ground of review the applicant repeats the point that where policy is relevant it must be taken into account, correctly interpreted and correctly applied. The applicant has set his case on this issue in two exhibits, Exhibit 8 and Exhibit 9 to his first affidavit and Exhibit 20 to his second replying affidavit.

[14] The applicant accepts that the word pattern is used in the case officer's report but he makes the case that since the detailed site characteristics had not been noted, analysed and compared in the case officer's report, material information was not considered and thus the outcome was that the policy test was not given proper regard. The applicant states that while the plans were available on the planning web portal they were not included in the case officer's report. He states that an examination of these plans reveals a number of matters. Firstly, that the layout plan showed two shared entrances, each one accessing two two bed apartments - the second plan, a concept plan reveals that there are shared long/grassed areas to the front and surrounds of the apartment block, one parking space, a shared six metre entrance to the site and 4.8 metre driveway - at the rear of the apartment block there are: five shared parking spaces, a shared amenity area and 6 metre wide shared hard surface area. Paragraph 77 of the first affidavit avers that it is demonstrably clear that the approved building comprising of four apartments does not reflect at all any of the characteristics of the wider area and in particular that no one would have any private (personal: relative to one family group) front/rear amenity space.

### **The evidence on behalf of the respondent**

[15] The respondent has filed three affidavits sworn by Mr Anthony McKay who is the Chief Planning Officer at Newry and Mourne District Council. An affidavit has also been filed by Mr Conor Hughes, a planning consultant. An affidavit has been filed by Ms Una McMullen who attended the planning meeting when the decision was made.

[16] The affidavits of Anthony McKay confirm the long history of planning applications in this case. In relation to the specific challenge Mr McKay's first affidavit contains the following defence at paragraph 18:

"The case officer's report sets out sufficiently and correctly the form (as defined by the applicant) of the proposed development and of the adjacent housing in the Downpatrick Road and Rocksfield residential development. The subject of the form of the proposed building was clearly and properly considered by the case officer in his report. There was no legal requirement to cite the term form in the case officer's report in relation to the outline planning application."

Paragraph 19 refers to the various references in relation to form.

[17] This affidavit confirms that form is not defined by the Planning Act (Northern Ireland) 2011 or in the relevant planning policy statement. However, the affidavit opines that the case officer's report properly and sufficiently described and considered the subject of the form of proposed development as required. The

affidavit also states that the grant of outlining planning permission was subject to approval of certain reserved matters including siting, design, external appearance of the building, the means of access thereto and landscaping of the site. This affidavit then refers to the various policies.

[18] This affidavit then refers to the pattern issue within the policy context. At paragraph 36 the affidavit states that:

“The case officer’s report sets out accurately, sufficiently and correctly the character and characteristics of the application site and relevant area, and this exposition is consistent with the appeal decision (Ref 2015/A0066).”

This deponent disputes the applicant’s averment at paragraph 74 of his first affidavit that the detailed site characteristics have not been noted, analysed and compared.

[19] At paragraph 42 to 44 Mr McKay describes the experience and knowledge of the Planning Committee. He refers to the fact that this Planning Committee was constituted in or about 1 April 2015. He states that in total 10 councillors attended the Planning Committee meeting on 24 May 2017. He states that at that time in and about 7 of the 10 councillors had been members of the Planning Committee since it was created in 2015 and the remaining 3 councillors had been members of the Planning Committee for approximately one year. He explains that the Planning Committee currently meets once every month and that for a period of approximately 6 months during 2016 the Committee met and determined planning applications every fortnight in order to deal with the large number of applications. He states that by 24 May 2017 the Committee had been considering and determining planning applications for over two years and he refers to the following information:

“The Committee members would by virtue of their Committee membership have substantial local and background knowledge including a working knowledge of the relevant planning policies and material considerations for this outline planning application.

The Planning Committee had experience in determining planning applications for social housing in established residential areas where there were local objections to the application, and the Committee members would have been familiar with the policies and issues relating to social housing, established residential areas and preserving residential quality.”

[20] The affidavit then refers to the written statements submitted to the respondent by the applicant and the notice party which were in and about 17 May 2017. Mr McKay then refers to the actual meeting on 24 May 2017 and the fact that he made a presentation to the Planning Committee. He refers to the fact that the applicant made oral representations to the Planning Committee. He refers to the fact that the notice party also made representations. He also refers to the fact that there were Committee questions and discussion. This affidavit also avers that the Committee Members had access to all relevant material including the planning file, the development plans and relevant policy documents.

[21] At paragraph 46 of his affidavit Mr McKay refers to the fact that “the applicant submitted an extensive and comprehensive statement to the council on or about 17 May 2107. This statement is exhibited at Tab 2 to the affidavit. It is 26 pages long and, as Mr McKay states, it was not placed before the court nor exhibited in the application for leave for judicial review. Mr McKay continues by stating that the Committee Members were forwarded copies of the applicant’s written statements in or about 5 days before the committee meeting on 24 May 2017 to enable them to consider the applicant’s representations. Paragraph 47 of this affidavit also refers to the fact that the statement also contained 8 photographs and at Annex 4 it included detailed representations relating to the “chronological policy development” including extracts from policy. It also included 9 grounds of objection set out in the applicant’s summary, 8 further additional grounds relating to the case officer’s report including a claim that the policy tests were not properly applied and a 12 page analysis of the case officer’s report.

[22] In relation to the actual decision making process, Mr McKay explains his direct input which I summarise as follows:

“There was a Committee discussion relating to the character of the area. I stated again that the area was largely residential with a mix of residential types – there were large detached houses on the Downpatrick Road adjacent to the site, the Rocksfield development comprised of more modern mixed housing types adjacent and to the rear of the site, other houses along the Downpatrick Road and the monastery across the road from the site. The Committee assessed the character of the area and discussed whether the proposed development was in keeping with the character of the area.”

[23] The affidavit then states that the Committee voted in relation to the planning application and the majority of members 7 to 3 agreed to grant outline planning permission.

[24] An affidavit has also been filed by a solicitor, Una McMullen. She states that she was in attendance at the Planning Committee meeting on 24 May 2017 as a legal advisor. She has provided her brief contemporaneous notes of the Committee's proceedings which have been transcribed. At paragraph 5 of her affidavit she states that:

"My note records that the applicant specifically stated in his presentation to the Committee that:

- (1) Built form doesn't appear in the report.
- (2) In relation to the planning report that form - rely on appearance."

[25] At paragraphs 6 and 8 of this affidavit Ms Mullen also refers to her records as follows:

"My note records that during the councillor's questions and discussion there was also reference to 'built form'".

"My note also records that Councillor McAteer asked Mr McKay 'what is the prominent building form'."

"My note records that the reply to the question included 'detached homes'".

[26] Ms Mullen makes reference to an exchange which took place near the conclusion of the meeting as follows which is contained in a transcript:

"Q. Question from Councillor McAteer - What is prominent building form? -

A. Detached homes.

Q. Is building consistent?

A. Same frontage as single storey building access is set in."

[27] The affidavit by Mr Conor Hughes, planning consultant, then refers to a number of matters in relation to the design of the development. At paragraph 5 of his affidavit he avers that:



“The design and layout of the new proposals was expressly directed towards form and was designed to reflect the existing pattern of development. The use of single main entrance, layout of the rooms and parking arrangements were deliberately designed to respect the arrangements of the buildings along the street frontage.”

[28] Mr Hughes also refers to the fact that he sent an e-mail on 17 May 2017 setting out the points that would be covered. He then confirms that he attended at the meeting and made his presentation and was questioned by the Committee members. He explains that the applicant also made a presentation.

### **Policy context**

[29] Three policy documents have been highlighted as relevant to this case namely:

- Planning Policy Statement 7 - “PPS7” - Quality Residential Environments
- Addendum to Planning Policy Statement 7 - Safeguarding the Character of Established Residential Areas
- Strategic Planning Policy Statement for Northern Ireland - “SPPS”.

### **Specific policy foundation for the form and pattern challenge**

[30] The operative part of PPS7 for the purposes of this challenge is QD1. This part of the policy includes the following provisions:

“Planning permission will only be granted for new residential development where it is demonstrated that the proposal will create a quality and sustainable residential environment. The design and layout of residential development should be based on an overall design concept that draws upon the positive aspects of the character and appearance of the surrounding area.

In established residential areas proposals for housing development will not be permitted where they would result in unacceptable damage to the local character, environmental quality or residential amenity of these areas.”

All proposals for residential development will be expected to conform to all of the following criteria:

- (a) The development respects the surrounding context and is appropriate to the character the topography of the site in terms of layout, scale, proportions, massing and appearance of buildings, structures and landscaped and hard surfaced areas;
- (b) Features of the archaeological and built heritage, and landscape features are identified and, where appropriate, protected and integrated in a suitable manner into the overall design and layout of the development;
- (c) Adequate provision is made for public and private open space and landscaped areas as an integral part of the development. Where appropriate, planted areas or discrete groups of trees will be required along site boundaries in order to soften the visual impact of the development and assist in its integration with the surrounding area;
- (d) Adequate provision is made for necessary local neighbourhood facilities, to be provided by the developer as an integral part of the development;
- (e) A movement pattern is provided that supports walking and cycling, meets the needs of people whose mobility is impaired, respects existing public rights of way, provides adequate and convenient access to public transport and incorporates traffic calming measures;
- (f) Adequate and appropriate provision is made for parking;
- (g) The design of the development draws upon the best local traditions of form, materials and detailing;

- (h) The design and layout will not create conflict with adjacent land uses and there is no unacceptable adverse effect on existing or proposed properties in terms of overlooking, loss of life, overshadowing, noise or other disturbance; and
- (i) The development is designed to deter crime and promote personal safety.”

[31] Paragraph 4.6 of this policy document also states:

“Proposals for new residential development must take account of the specific circumstances of each site. The Department will expect developers in preparing layouts to have greater regard to the site context, in particular the characteristics of land form in the townscape or landscape setting, and the need for these elements to be integrated into the overall design concept.”

[32] In addition, Policy LC 1 of the Addendum to PPS 7 refers to the following considerations:

“In established residential areas planning permission will only be granted for the redevelopment of existing buildings, or the infilling of vacant sites (including extended garden areas) to accommodate new housing, where all the criteria set out in Policy QD1 of PPS 7, and all the additional criteria set out below are met:

- (a) The proposed density is not significantly higher than that found in the established residential area
- (b) The pattern of development is in keeping with the overall character and environmental quality of the established residential area, and
- (c) All dwelling units and apartments are built to a size not less than those set out in Annex A.”

## General policy considerations

[33] The addendum to PPS7 at paragraph 1.3 states that “the strategic importance attached to established residential areas is reflected in robust operational planning policies.” In particular, policy QD1 of PPS7 clearly states as follows:

“In established residential areas proposals for housing development will not be permitted where they would cause unacceptable damage to the local character and environmental quality or residential amenity of these areas.”

[34] Policy LC2 of the Addendum to PPS 7 refers to the conversion or change of use of existing buildings to flats or apartments. This states that planning permission will only be granted for the conversion or change of use of existing buildings to flats or apartments (including those for multiple occupancy) where all of the criteria set out in Policy QD1 of PPS7, and all of the additional criteria set out below are met:

- (a) There is no adverse effect on the local character, environmental quality or residential amenity of the surrounding area;
- (b) The proposal maintains or enhances the form, character and architectural features, design and setting of the existing building;
- (c) The original property is greater than 150 square metres gross internal floor space;
- (d) All flats or apartments are self-contained (i.e. having separate bathroom, WC and kitchen available for use only by the occupiers);
- (e) The development does not contain any flat or apartment which is wholly in the rear of the property and without access to the public street.

[35] The SPPS refers at paragraph 6.136 and 6.137 to regional strategic policy. Paragraph 6.136 reads as follows:

“The policy approach must be to facilitate an adequate and available supply of quality housing to meet the needs of everyone; promote more sustainable housing development within existing urban areas; and the provision of mixed housing development with homes in a range of sizes and tenures. This approach to housing will support the

need to maximise the use of existing infrastructure and services, and the creation of more balanced sustainable communities.”

[36] Within this overarching document reference is also made to the following:

“In preparing Local Development Plans (LDPs) Councils shall bring forward a strategy for housing, together with appropriate policies and proposals that must reflect the policy approach of the SPPS, tailored to the specific circumstances of the plan area. Planning authorities must deliver increased housing density without town planning: higher density housing developments should be promoted in town and city centres and in other locations that benefit from high accessibility to public transport facilities. Within established residential areas it is imperative to ensure that the proposed density of new housing development, together with its form, scale, massing and layout will respect local character and environmental quality as well as safeguarding the amenity of existing residence. In existing areas of distinctive townscape character an increase in density should only be allowed in exceptional circumstances.”

### **Application of policy**

[37] In order to understand how the issues of pattern and form have been considered the applicant has referred in his papers to a number of previous appeal decisions. I will not repeat all of these but they are useful in terms of the previous articulation of the issues. In particular, the applicant relies upon a 2015 decision of Commissioner McGlinchey. In this there is a detailed exposition of the nature of the surrounding area. In particular at paragraph 12 it states as follows:

“The existing dwelling on the appeal side is one of four detached residential properties that front on to this section of Downpatrick Road. All are set within large plots (Nos. 15, 17, 19 and 21) with generously proportioned gardens front and rear and are an individual family occupation. All four properties but the Rockfield residential development which is a variety of house types including detached and semi-detached dwellings in single storey, 1½ storey and 2 storey designs set within a mix of plot sizes.

Albeit that only glimpses of the rooftops of some of the dwellings in the Rocksfield development are visible from the appeal side frontage, the access to the development lies just to the south the adjoining property of No. 21 and a number of houses within the development are clearly visible from the access road. Given the visual relationship and the sharing of a common boundary, I consider that both the dwellings along the Downpatrick Road and the dwellings in Rocksfield form the surrounding context of the site and inform the character of this part of Crossgar. Given its position closer to the village centre, the Westfields development does not contribute to the appeal side context in the same extent.”

[38] Paragraph 13 states:

“Notwithstanding the absence of apartment development in this part of Crossgar, much of the detail and the justification and amplification part of policy QD1 and other planning guidance is aimed at encouragement of variety and layout and diversity of dwelling type within new residential schemes. There is no policy that would preclude apartment development within this residential area so long as the development created quality residential environment in accordance with PPS7 and APPS7.”

[39] In this previous application the Commissioner determined that the development did not accord with policy. Her conclusion is found at paragraph 19 as follows:

“Nonetheless, I have found that the proposal does not meet criteria (a) and (h) of policy QD1 or criteria (a) or (b) of policy LC1 and would therefore not provide equality and sustainable residential development. Compliance with planning policy is in the public interest and is a matter of acknowledged importance and the failure of this proposal to meet the requirements of policy outweighs the presumption in favour of permitting sustainable development set out in paragraph 3.8 of SPPS. The objective of promoting or improving well-being set out in Section 1(2)(b) of the Planning Act is part of a two pronged objective that includes furthering sustainable development.

Notwithstanding the identified need for social housing, the well-being of prospective tenants of the appeal proposal cannot take precedence over the impact of the proposal would have on the character of the area and on the amenity of existing residence. My conclusion is that the need for social housing in Crossgar is not outweighed by the damage to local character and to the residential amenity of adjoining properties.”

[40] In relation to the policy objectives paragraph 14 of this judgment is insightful because it provides some explanation of the character of the area. This states as follows:

“Policy QD1 requires a proposal for new development respects the surrounding context and is appropriate to the character of the site. Whilst the policy does not require the proposals to emulate what already exists in an area as stated in appeal decision 2009/A0302, it does direct that proposals for residential developments should draw upon the positive aspects of the character and appearance of the surrounding area. Though this stretch of Downpatrick Road is characterised by a wide variety of dwellings with considerable diversity in the scale, proportions, massing and appearance, there is a noticeable contrast in the form and density along the road frontage compared to the more densely developed housing to the rear. Whilst the proposed buildings disposition from the road frontage and its extent across the site are similar to that of the approved dwelling and that areas of amenity space are retained to the front and rear, the proposed scheme entails extensive areas of hard standing denoting the intensification of the residential use. Whilst the building will screen a number of the parking spaces to the rear, six of the spaces with other shared surfaces would be visible from the road frontage at the widened access and to the site. When viewed from the Downpatrick Road, the layers of the appeal scheme would depart significantly from that of the approved single dwelling and other individual dwellings in the immediate area.”

[41] Paragraph 15 also states:

“The appeal site and the other three dwellings facing Downpatrick Road have an extant low density of less than five dwellings per hectare (DPH) the development of seven apartments with ancillary areas of hard standing would be a visibly more intensive form of development (approximately 33 DPH) out of character with the more loose density of development apparent along this stretch of Downpatrick Road which is markedly different to the transitional density and layout of development that is evident in development set further back from the road. I judge that the layout of the appeal scheme when viewed from Downpatrick Road would be at odds with the prevailing pattern of development in the area. The proposal would set an undesirable precedent for more intensive development and other sites along this road frontage and elsewhere in Crossgar and the plan area generally without having due regard to the prevailing character and density of the surrounding area. I consider that the appeal proposal would not satisfy criterion (a) of policy QD1 or criteria (a) and (b) of policy LC1 of APPS7. The planning authority and the objectors concerns in these regards are upheld.”

[42] In the concluding paragraph of this decision the Commissioner also refers to the fact that “compliance with planning policy is in the public interest and is a matter of acknowledged importance and the failure of this proposal to meet the requirements of policy outweighs the presumption in favour of permitting sustainable development set out in paragraph 3.8 of the SPPS.”

### **The case officer’s report**

[43] It is of note that the case officer’s report refers to the previous decisions in this case including the appeal decisions. There was no issue taken that the proper policy has been considered, however there was an issue whether the constituent parts of the policy have all been considered specifically regarding form and pattern.

[44] The case officer’s report begins by referring to the location. The section in relation to site characteristics and area characteristics sets out some detail of the area referring to the Downpatrick Road and Rockfield development. Reference is made to the planning history. Reference is made to the objections and representations and



in particular in relation to that reference is made to the nature of the objections namely that the development of apartments is out of character/would create conflict with local character and existing development of along Downpatrick Road which comprised single family dwellings in their own plots, with front and rear gardens and of their own direct access to the road and parking facility/garages for each dwelling, which would set an unwanted precedent - This proposal is completely different from the area's established character and this site is only suitable for a replacement dwelling - this application would create the density of developments significantly higher than the area - the increased density with four units replacing one dwelling on the same site represents a very significant increase in housing density - loss of amenity (noise and nuisance) from increased activity on the site created by four units - there are other sites in Crossgar that are more suitable for this development - there is limited information -/drawings available to provide comment on - the background and history of this site including previous appeal associated with R/14/0393 is referred to in detail - planning circulars 03 of 07 issued by DOE (now DFI) is also referred to, and advises this proposal comprises inappropriate development, - the proposal is contrary to SPPS, - the proposal is contrary to PPS7 (a, g and h and addendum a and b) - the proposal could detract from the listed building to the far side of the Downpatrick Road (Gate Lodge at Tobar Mhuire - the development of this site has now been on-going for 10 years.

[45] The case officer's report notes that the owner of 21 Downpatrick Road who is the applicant and another objector made more than one representation. The application was then presented to the Planning Committee for determination. Reference is made to consultations and also the relevant policies. Reference is made to the need for social housing in Crossgar. In reaching a conclusion the report states that:

"Having account of the content and provisions of the area plan and applicable policy context and in the absence of any other applications for social housing and the wider Crossgar area, it is considered there can be no objections to the principal of social housing on this site."

[46] The officer's report then goes on to look at the nature of the development area. The section on page 5 purports to deal with the character of the area. This is comprised in the following summation of it:

"As such while it is noted the application site comprises one dwelling on a sizeable plot, it is considered the character of the area extends to include both the properties along the stretch of Downpatrick Road and Rocksfield, and cannot be restricted to the four named properties along the

Downpatrick Road. These four larger plots are not considered to be typical of the character of the area, whereby the adjacent properties along both the Downpatrick Road and also those within the Rocksfield development help inform the local areas character. However having account of the separation distance and lack of visual linkage with the Westlands development including topography and layout of the road, it is considered this development of Westlands does not form part of the character of the application site.”

[47] The conclusion in relation to the character is as follows:

“As outlined above this area is residential in character, and although it is an acknowledged existing development in this area it is characterised by dwellings in single family occupation, it is considered there is no policy that precludes apartment development within the residential area as long as the development creates a quality residential environment in accordance with PPS7 and addendum to PPS7. “

[48] The above tract comprises the case officer’s position and explanation of the character of the area. The case officer then goes on to describe the characteristics of the block of apartments in terms of amenity, parking issues, noise, nuisance and site density. The conclusion reached is as follows:

“In light of the above it is considered the pattern of development as indicated on the plan submitted is in keeping with the overall character and environmental quality of this established residential area.”

[49] The ultimate conclusion is described in these terms:

“Whilst it is noted there is opposition to this proposal from local residents and elected representatives, it is considered the development as proposed complies with the requirements of the area plan and applicable policy test, and will not result in any unacceptable impact or harm the amenity of any existing residence, properties or character of the area, for the reasons outlined above and there are no grounds to sustain a refusal.”

## Legal context

[50] This is governed by Section 45 of the Planning Act (Northern Ireland) 2011. Under that section, the respondent in dealing with the planning application must have regard to the development plan, insofar as material to the application and to any other material considerations. It is accepted that policy is a material consideration. This case centres on an alleged deficit in the case officer's report which it is argued misled the Planning Committee.

[51] The case officer's report is not a statute and should not be read as such. Counsel referred to various dicta in this arena, in particular the case of *R (Zurich Assurance Limited t/as Thread Needle Property Investments) v North Lincolnshire Council* [2012] EWHC 3708 which at paragraph [15] contains the following statements of principle;

“(ii) When challenged, such reports are not to be subjected to the same exegesis that might be appropriate for the interpretation of a statute: what is required is a fair reading of the report as a whole. Consequently:

‘An application for judicial review based on criticisms of the planning officer's report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the Committee about the material matters which thereafter are left uncorrected at the meeting of the Planning Committee before the relevant decision is taken.’ (*Oxton Farms, Samuel Smith's Old Brewery (Tadcaster) v Selby District Council* 18 April 1997, 1997 W Law 1106 per Judge LJ (as he then was) [page 11 para (b)].’

(iii) In construing reports, it has to be borne in mind that they are addressed to a ‘knowledgeable readership’, including council members ‘who, by virtue of that membership, may be expected to have a substantial local and background knowledge (*R v Mendip District Council ex parte Fabre* [2000] 80 P & CR 500, per Sullivan J as he then was). That background knowledge includes a working

knowledge of the statutory test for determination of a planning application (*Oxton Farms*, per Pill LJ).”

[52] A further authority that has been referred is that of Lord Justice Lindblom in *Mansell v Tunbridge and Malling Borough Council and Others* [2017] EWCA Civ 1314 which at paragraphs [41] reminds the court that:

“A planning decision is not akin to an adjudication made by a court (see paragraph [50] of my judgment in *Barwood v East Staffordshire Borough Council*). The courts must keep in mind that the function of planning decision-making has been assigned by Parliament, not to judges, but – at local level – to elected councillors with the benefit of advice given to them by planning officers, most of whom are professional planners, and – on appeal – to the Secretary of State and his inspectors.”

[53] Paragraph 42 of the same decision also refers to the principles on which the court will act when criticism is made of a planning officer’s report to committee which are described as well settled and which are summarised as follows:

“(1) The essential principles are as stated by the Court of Appeal in R v Selby District Council, ex parte Oxton Farms [1997] E.G.C.S. 60 (see, in particular, the judgment of Judge LJ, as he then was). They have since been confirmed several times by this court, notably by Sullivan LJ in *R (On the Application of Siraj) v Kirklees Metropolitan Borough Council* [2010] EWCA Civ 1286, at paragraph [19], and applied in many cases at first instance (see, for example, the judgment of Hickinbottom J, as he then was, in *R (On the Application of Judgment Approved by the court for handing down (subject to editorial corrections) Mansell v Tonbridge and Malling BC Zurich Assurance Ltd., t/a Threadneedle Property Investments) v North Lincolnshire Council* [2012] EWHC 3708 (Admin), at paragraph 15).

(2) The principles are not complicated. Planning officers’ reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Hale of Richmond in *R (On the Application of Morge) v Hampshire County Council* [2011] UKSC 2, at

paragraph 36, and the judgment of Sullivan J, as he then was, in *R v Mendip District Council, ex parte Fabre* (2000) 80 P. & C.R. 500, at p.509). Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (see the judgment of Lewison LJ in *Palmer v Herefordshire Council* [2016] EWCA Civ 1061, at paragraph [7]). The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice that was given, the committee's decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice.

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

[54] The significance of planning judgment is also well worn territory set out in the seminal decision of *Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government and Hinckley and Bosworth Borough Council* 2014 EWHC 754. The governing legal principles in this case have also been rehearsed in the leave decision at paragraph [6] drawing on paragraph [43] of *Bow Street Mall Limited & Others v Department of the Environment* 2006 NIQB 28 case. This authority is significant in setting the limits of judicial review within the planning sphere given the discretion afforded judgment to the decision-maker. In particular at paragraph 43 (b) the following is restated:

“It is settled principle that matters of planning judgment are within the exclusive province of the local planning authority or the relevant minister (per Lord Hoffman in *Tesco Stores v Secretary of State* 1995 2All ER 636.”

[55] These cases point towards restraint however that does not mean that planning cases are immune to judicial review. Much will inevitably depend upon an examination of the facts of each case.

[56] The applicant made reference to a decision of the Supreme Court in *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13. This authority was relied upon to demonstrate that conflation of policy may lead to unlawfulness in the decision-making process. In particular paragraph [26] page 85 refers to this as follows:

“Secondly, the interpretation favoured by the appellants appears to me to conflate the first and third criteria of the policies in question ...If suitable meant ‘suitable for meeting identified deficiencies in retail provision’, as the appellants contend, then there would be no distinction between those two criteria, and no purpose in their both being included.”

[57] The importance of adherence to policy was also stressed in *Lamont's (David John Stewart and Elaine) v Department of the Environment (Planning Service)* [2014] TRE9118. The applicant stressed that after issue the Chief Planner recommended that all staff review this judgement. The applicant has relied upon salient parts of paragraph [49] of the judgment to the effect that policy must be adhered to where possible, if there is a departure from policy reasons must be given, the policy must be properly understood, and the court will quash a decision if satisfied as to a failure to have proper regard to policy unless in exceptional cases where that has not affected the outcome.

[58] I bear all of these established legal principles in mind in my determination of whether the decision is unlawful for failing to consider a material policy consideration.

### **Consideration**

[59] In this case it is important to state that the court is exercising a supervisory function and is not undertaking a merits review. The court cannot substitute its own view. The court is only empowered to review the legality of the decision making process. Issues of weight and evaluative planning judgment rest with the decision maker. The court will not interfere with the exercise of the planners' discretion on the weighing of factors subject to a rationality challenge in the *Wednesbury* sense. However, for a decision to be lawful it must take into account all material considerations. I must be satisfied that the decision maker has asked the correct questions in reaching its determination. In that regard planning policies are broad guidance documents which assist planners in reaching their decision.

[60] The case officer's report forms the basis of the recommendation to the decision maker. That must be accurate to allow the decision maker to make a proper and fully informed decision. The nub of the case is whether the case officer's report adequately discharges that obligation. I reflect that the jurisprudence in this area allows a large measure of leeway to case officers and in my view the threshold is relatively high for the applicant to succeed in a challenge of this nature.

[61] The first task for this court is to consider the policy at issue. This must be construed in context having regard to the policy objective. In that regard it seems to me that a number of matters are uncontroversial in this case. Firstly, it was accepted by all that there is no absolute policy prohibition upon apartment development in a residential area such as this. Also, it was accepted that any such development must be assessed against the potential harm which may be caused to the local area taking into account its characteristics. The issue in this review is whether the form and pattern of the proposed development have been properly considered within that context.

[62] There is no definition of form, pattern or appearance within the Planning Act (Northern Ireland) 2011 or elsewhere within the regulatory structure or policy. In the respondent's affidavit reference is made to a definition of "appearance" from section 2(1) of the Town and Country Planning (Development Management Procedure) (England) Order 2010 as follows:

"The aspects of a building or place within the development which determine the visual impression the building or place makes, including the external built form of the development, its architecture, materials, decoration, lighting colour and texture."

[63] Various definitions of form and pattern have been proffered in the papers however I am not convinced that I need to be overly formalistic in relation to definitions. Overall the parties did not differ substantially as to the meaning of the policy. It was effectively accepted that the form of something extends beyond appearance. Appearance relates purely to the visual whilst form goes beyond that and relates to the constitution of something. It was accepted that in this case form meant an apartment block.

[64] I agree with the arguments of the interested party that the policy does not refer to any of these concepts in isolation. In particular the parts of the policy that issue refer to pattern in the context of movement as follows:

“(e) a movement pattern is provided that supports walking and cycling, meets the needs of the people whose mobility is impaired, respects existing public rights of way, provides adequate and convenient access to public transport and incorporates traffic calming measures.”

Also form is referenced within the concept of design:

“(g) the design of the development draws upon the best local traditions of form, materials and detailing.”

[65] With all of that in mind I turn to an analysis of the case officer’s report. In so doing I bear in mind the essence of the applicant’s challenge. The main complaint made by him is that the development in this case is for apartment type accommodation in a residential area the character of which is defined by single family occupation. The issue of an apartment development in this type of area is not precluded as the applicant accepted. However, it is only to be accepted on the basis of the policy thrust if all planning considerations are weighed in the balance. These are particularly the planning considerations in QD 1 from (a) to (i). In this case the applicant says that pattern has been wrongly considered although it was specifically referred to and that form has not been considered at all and also that the issue of form has been conflated with the issue of appearance. The applicant also refers to the policy driver of the SPPS which refers to the imperative test that residential development of this nature must only be approved where it would not cause irreparable harm to the area, also referred to as the “demonstrable harm” consideration. The pattern of development must be in keeping with the overall character and environmental quality of the established residential area.

[66] I bear in mind that the development of this site has a long history. In my view that fact is particularly relevant in terms of a proper exposition of the policy



considerations in the case officer's report to allow an informed decision to be made. It appears to me that the case officer's report should describe the characteristics of the area, and then contain an assessment of the various features of the development against the policy objectives.

[67] In terms of the first requirement I consider that the case officer does define the characteristics of the area in keeping with policy requirements. The applicant did not seriously challenge this part of the report. As regards the form challenge, I accept that the report does not mention the word form. It would have been better to have done so however in my view that does not invalidate the entire report. The report must be viewed as a whole to see if this issue is properly addressed. I have examined the respondent's evidence in this regard and I accept the evidence provided by Mr McKay at paragraph 19 of his first affidavit. The report refers on numerous occasions to the fact that the proposed development was an apartment block. Anyone reading the report could be left in no doubt that the form of the development was an apartment block. In my view the report did deal with the form of the proposed development. It did not rely on any incorrect policy. It also dealt with the overriding imperative to ensure that the development did not cause demonstrable harm to the area. In my view the applicant has failed to evidence a failure to understand the policy or act in accordance with it.

[68] Similarly, I consider that the issue of pattern was properly put before the committee in the case officer's report along with the accompanying information and the plans which were explained.

[69] I agree that the appearance of the development was referred to but in my view this was not to the exclusion of the form of the development. I do not consider that the two concepts have been conflated in the manner suggested by the applicant.

[70] The respondent's evidence has provided further information as to the decision making process. It highlights the fact that the issues raised by the applicant cannot be viewed in isolation. In addition to the case officer's report the decision maker had a comprehensive 26 page submission of the applicant, his presentation, photographs and presentations made by the chief planning officer and Mr Hughes. The respondent's evidence is that a considerable amount of material was provided in advance to the committee. Ms McMullen has averred to the discussion at the meeting which she says included a consideration of form. It is for the decision maker to weigh up all of this in reaching an informed judgment. Overall I cannot see that the planning committee acted in a manner which went beyond evaluative planning judgment.

[71] In this case it is important to note that the applicant was directly involved in the decision making process. The document he presented (which was not before the court in the leave papers) is highly significant as it sets out the policy objections in detail. It is interesting that somewhat different points are made to those in this

challenge but nonetheless it means that the applicant faces a further difficulty in making his argument that the committee was misdirected or failed to take into account a material consideration in this case. Annex 4 of that document sets out what is described as “chronological policy development” and makes specific reference to the various policy considerations including pattern and form. In Section 7 of that document under the heading conclusion, the applicant states that:

“In order that this planning application is acceptable regarding planning policy and guidance two key requirements needed addressed; namely, density and form. A failure to meet these requirements in accordance with the established residential area’s character and the application would fail two key policy tests.

Also, to overcome form: rely on what the apartment block appears to represent, a detached dwelling.”

[72] Even if the case officer's report were found to be deficient due to lack of specific referencing of policy (which I do not accept) that report cannot be viewed in isolation. In truth, the committee was well briefed and had to hand all material evidence and policy considerations. I do not consider that the committee was misdirected. In my view the decision making process was lawful and cannot be characterised as irrational or unreasonable.

### **Conclusion**

[73] Accordingly, this application must be dismissed. I will hear from counsel as to whether anything else arises and as to the question of costs.