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

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY PAUL McNAMARA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

-v-

LISBURN AND CASTLEREAGH CITY COUNCIL

_____

MCCLOSKEY J

Introduction

[1] Paul Thomas McNamara (hereinafter the "Applicant"), who resides at 16 Burnpipe Lane, Dromore Road, Ballynahinch, has been granted leave to apply for judicial review for the purpose of challenging a decision of the Respondent, Lisburn and Castlereagh City Council (the "Council"), dated 05 July 2017 whereby outline planning permission authorising a development entailing an "*infill dwelling and garage*" at 17 Burnpipe Lane (hereinafter "the site") was granted. Burnpipe Lane is a narrow, privately owned country thoroughfare. The site is located across the road from the Applicant's residence, roughly opposite. The Applicant resides at number 16 with his wife and children, the construction of their new home there having been completed in the spring of 2009.

The Challenge

[2] This is, at heart, an error of law challenge. The core of the Applicant's case is that in making the impugned decision the Council erred in law in its construction and application of a relevant planning policy, namely Planning Policy Statement Number 21 "Sustainable Development in the Countryside" ("PPS 21") and, specifically, the discrete policy "CTY8" enshrined therein.

[3] The preface to PPS21, published in June 2010, explains that it contains planning policies for development in land lying outside the settlement limits identified in development plans. The policy applies to all areas of the Northern Ireland countryside. It refers at the outset to the Regional Development Strategy (RDS) for Northern Ireland which, as regards "Rural Northern Ireland" has the following aim, namely to –

> "*…. develop an attractive and prosperous rural area, based on a balanced and integrated approach to the development of town, village and countryside in order to sustain a strong and vibrant rural community, contributing to the overall wellbeing of the region as a whole.*"

The Introduction continues:

> "*An approach which strikes a balance between the need to protect the environment while simultaneously sustaining a strong and vibrant rural community* (is sustainable)."

[4] The subject matter of Policy CTY8, a component of PPS21, is "Ribbon Development". This short policy begins:

> "*Planning permission will be refused for a building which creates or adds to a ribbon of development. An exception will be permitted for the development of a small gap site sufficient only to accommodate up to a maximum of two houses within an otherwise substantial and continuously built up frontage and provided this respects the existing development pattern along the frontage in terms of size, scale, siting and plot size and meets other planning and environmental requirements. For the purpose of this policy the definition of a substantial and built up frontage includes a line of three or more buildings along a road frontage without accompanying development to the rear.*"

Next the possibility of an "*appropriate economic development*" is recognised. This has no application to the present context.

[5] Under the rubric of "Justification and Amplification" it is stated, *inter alia*:

> "*Ribbon development is detrimental to the character, appearance and amenity of the countryside. It creates and reinforces a built up appearance to roads, footpaths and private laneways and can sterilise back-land, often hampering the planned expansion of settlements. It can also make access to farm land difficult and cause road*

> *safety problems. Ribbon development has consistently been opposed and will continue to be unacceptable.*

The policy continues:

> "*For the purposes of this policy a road frontage includes a footpath or private lane. A 'ribbon' does not necessarily have to be served by individual accesses nor have a continuous or uniform building line. Buildings sited back, staggered or at angles and with gaps between them can still represent ribbon developments, if they have a common frontage or they are visually linked.*"

The policy states, finally:

> "*Many frontages in the countryside have gaps between houses or other buildings that provide relief and visual breaks in the development appearance of the locality and that help maintain rural character.* ***The infilling of these gaps will therefore not be permitted except where it comprises the development of a small gap within an otherwise substantial and continuously built up frontage.*** *In considering in what circumstances two dwellings might be approved in such cases it will not be sufficient to simply show how two houses could be accommodated. Applicants must take full account of the existing pattern of development and can produce a design solution to integrate the new buildings.*"
>
> [Emphasis added.]

[6] It is common case that Policy CTY8 of PPS21 is the central planning policy applicable to the development authorised by the impugned decision of the Council.

[7] The report of the Planning Case Officer to the Council is, in every case, a matter of critical importance. In this respect I refer to this Court's recent observations in Belfast City Council v Planning Appeals Commission [2017] NIQB ….. at [51]–[58] generally and [56] especially. In the present case the report of the case officer concluded as follows:

> "*The proposal is for an infill dwelling and garage in the countryside. All material considerations have been considered including the comments made by way of representation. On balance, the proposal is considered to be acceptable and to comply with the development plan and relevant planning policies. It is recommended that planning permission is approved.*

The case officer's report describes the physical characteristics and surroundings of the site in the following terms:

> *"3. The site is located on the south western side of the Dromara Road, and accessed via a long laneway known as Burnpipe Lane. There is an existing build up of development along this laneway. There are a number of dwellings in close proximity to the site. No. 17 Burnpipe Lane is sited to the south west of the site, No. 15 is to the north west of the site. Across the laneway is no. 16 Burnpipe Lane and the laneway also serves numerous other properties.*
>
> *4. The application site benefits from mature natural boundaries, which provides some degree of enclosure from surrounding development. The land rises up to the northern corner of the site, to the south and west and towards the eastern corner. There is a hollow in the middle of the site. The land is overgrown and would appear to be marshy in the centre. Views of the site are restricted to the laneway across the site frontage due to the existing mature boundaries."*

The case officer's report was supplemented by a series of slides explained and illuminated by accompanying text which takes the form of the officer's speaking notes for the presentation made to the Council's planning committee ("PC") at its public meeting held on 28 June 2017.

[8] In the body of the report the case officer addressed, *inter alia*, Policy CTY8. This section of the report begins with an accurate portrayal of the first of the passages quoted in [3] above. It continues:

> *"23 It is contended that as you travel along Burnpipe Lane, moving from property number 11a to property number 17, there is a substantial and continuously built up frontage. Properties number 11a, 13, 15 and 17 all present a frontage onto Burnpipe Lane. Within this context, the proposed site is considered to be a gap within that frontage.*
>
> 24. *The plot layout of property number 17 is slightly different to the others however, in line with recent*

PAC decisions the garden extends to the laneway and presents a frontage, in combination with the dwellings to the north. It is considered that the gap could accommodate no more than two dwellings and is therefore considered to fit with the exception under Policy CTY 8.

25. *The premise of Policy CTY 8 is to prevent the creation or addition of ribbon development. Policy CTY 8 states that planning permission will be refused for a building which creates or adds to a ribbon of development. It states that a ribbon does not necessarily have to be served by individual accesses nor have a uniform or continuous building line. Buildings sited back, staggered or at angles with gaps between them can still represent ribbon development. This is indeed the case along this stretch of laneway."*

[9] The officer then addresses Policy CTY8:

"25. Policy CTY 8 states that an exception will be permitted for the development of a small gap site sufficient to accommodate up to a maximum of 2 houses within an otherwise continuously built up frontage.

26. *In this case the dwellings along the frontage are located at varying distances from the laneway. They do all however have a common frontage onto the laneway. The proposed site layout dated 13 March 2017 depicts the footprint of the proposed dwelling in relation to the surrounding context.*

27. *The site clearly has a frontage to the laneway and is considered to be a gap within a substantial and continuously built up frontage. The proposal therefore meet the exceptionality test contained within policy CTY 8 and as such meets policy CTY 1.*

28. *There is a varied plot size to the properties along Burnpipe Lane and the proposed site is considered to respect this. It is contented that the proposal complies with Policy CTY 8. Although the proposed dwelling will be closer to the laneway than other dwellings, it is still considered to be a*

gap site. A dwelling situated slightly closer to the road will not cause demonstrable harm."

[10] The report next addresses the objections received:

> *"30. The objectors have raised concerns in that it is believed that the ribbon of development is to the west of the site. The garden of property number 17 extends down to Burnpipe Lane and therefore presents a frontage to Burnpipe Lane, and is included in the substantial and continuously built up frontage. Therefore the site presents a gap within the built up frontage that run from property number 11a to 17."*

This section of the case officer's report terminates with the following:

> *"31. An objector has expressed the view that the proposal would increase the visual linkage between existing buildings in the area and has the potential to create to exacerbate ribbon development. The proposal complies with the exception tests within policy CTY 8 Ribbon Development and is considered to be an acceptable development with all existing boundaries being retained as part of the application.*

[11] I return to the aforementioned speaking notes and slides. These materials include the following significant passages:

> *"… The planning unit is of the view that …… there is indeed a substantial and continuously built up frontage either side of the proposed site along Burnpipe Lane …….*
>
> *There is an existing build up of development along this lane way. There are a number of dwellings in close proximity to the site. Number 17 Burnpipe Lane is sited to the south west of the site, number 15 is to the north west of the site. Across the lane way is number 16 Burnpipe Lane and the lane way also serves numerous other properties ….*
>
> *The built up frontage of development is evident. Numbers 11A, 13, 15 and 17 are located at varying distances to the edge of the laneway ranging from 42 to 120 metres. The curtilages of these dwellings extend down to the lane way*

and all the dwellings are visible when standing at the site proposed for development."

I interpose at this point the description of the site/location as being 100 metres north of number 17 Burnpipe Lane. Finally the officer's oral presentation to the PC reiterated the view expressed in her report that numbers 11A, 13, 15 and 17 constitute "*a substantial and continuously built up frontage*" onto Burnpipe Lane giving rise to the assessment that the site located 100 metres north of number 17, was considered to be "*a gap within an otherwise substantial and continuously built up frontage*".

[12] The planning case officer, in an affidavit, explains that the photographs (which became the slides before the PC) were taken by her during a visit to the relevant location. She further avers that her report was provided in advance to each member of the PC and that the members "*…. had access to the documentation relating to the planning application on the planning file and the electronic documentation on the planning portal including the letters of objection and all plans …..* [and] *….. electronic copies of the planning policy statements, strategic planning policy and all relevant planning guidance and advice documents.*" I pause to observe that <u>without particularisation</u> the latter part of these averments is opaque and should be avoided in every case. Furthermore this affidavit contains another averment to which this Court will attribute little weight:

> "*The Committee members have a substantial local and background knowledge including a working knowledge of the relevant planning policies and material considerations for this outline planning application.*"

See in this context <u>Belfast City Council v Planning Appeals Commission</u> (*supra*) at [57] – [58].

[13] In this context I draw attention to another issue of good litigation practice. The Council's solicitor has exhibited to her affidavit the manuscript notes made by her at the public meeting of the PC on 28 June 2017. This is a commendable illustration of every judicial review respondent's duty of candour to the court. The "Attendance Note" of the solicitor, who attended the relevant meeting is in printed form and, hence, readily comprehensible. As the solicitor who swore this affidavit recognises, this court "*… has been requesting copies of such materials in similar cases …*". To this I add that the production of such materials will almost invariably be required by the duty of candour.

[14] Against the background of the admittedly elaborate preamble above, I turn to the thrust of the submission of Mr Potter (of Counsel) on behalf of the Applicant. The centre piece of Mr Potter's submission focuses on "slide 9" of the case officer's presentation to the PC, which had the following accompanying text:

> "*The policy does not insist that there has to be a uniform building line with buildings along the frontage being the exact same distance from the road or laneway in order for a proposal to be deemed an exception within the context of policy CTY8.*"

Mr Potter characterises the Applicant's principal objection to the proposed development as "*… the siting of the proposal relative to existing development does not respect the existing development pattern*" and, from this foundation, contends that the impugned decision is legally incompatible with Policy CTY8. His submission is conveniently and lucidly formulated in the following passage in his skeleton argument:

> "*It appears the case officer has failed to distinguish between the materiality of alignment in respect of what constitutes ribbon development and the materiality of alignment in respect of the 'existing pattern of development' when considering a proposed small gap exception …*
>
> *The case officer has wrongly conflated the definition of an impermissible ribbon development with the scope of a small gap site exception ….*
>
> *Paragraph 5.33* [of Policy CTY8] *relates to whether there is a ribbon development, not the matter of a permissible exception.*"

While I take cognisance of the fact that, in support of his case, the Applicant relies on certain decisions of the PAC relating to proposed developments in the general vicinity, this reliance has not translated to the formulation of a discrete ground of challenge and I derive no assistance from these case sensitive appeal decisions.

[15] Pausing, Mr Potter's central submission, as I understand it – and following exchanges with the bench – is that the existing development in the vicinity of the site namely the residential properties at numbers 11A, 13, 15 and 17 do not, within the meaning of Policy CTY8, constitute "*a ribbon of development*". As the PAP correspondence indicates, the case initially being made on behalf of the Applicant was that the proposed development would create ribbon development. In its ultimate refinement and incarnation, the Applicant's case (within the boundaries of the permitted grounds of challenge) is that the extant development in the vicinity of the site does not constitute "*ribbon development*" within the meaning and ambit of Policy CTY8, giving rise to error of law on the part of the Council.

[16] The submissions developed by Mr Beattie QC on behalf of the Council, equally focused and succinct, have three main strands. First, as a matter of fact, the PC in its insistence that the proposed development would be permissible only if

carried out to the rear of the site was demonstrably alert to the policy requirements enshrined in Policy CTY8 and in particular the exhortation that the proposed development harmonised with the "*existing development pattern*", providing acceptable integration (my summary). This is reflected in condition 06 of the impugned grant of outline planning permission. Second, the correct characterisation of the Applicant's challenge is an attack on the exercise of evaluative planning judgement, thereby engaging the elevated threshold of irrationality. Third, linked to the latter assessment, the Applicant is in truth inviting the Court to substitute its opinion for that of the Council.

Consideration and Conclusions

[17] In the context of this challenge the governing legal principles can be stated succinctly. The interpretation of any planning policy is a question of law for the Court; exercises of interpretation should not treat planning policies as a statute or contract or any comparable instrument; a similar approach to the reports of planning case officers is to be adopted; and decisions involving predominantly matters of evaluative judgement are vulnerable to challenge on the intrinsically limited ground of Wednesbury irrationality only.

[18] I consider that Policy CTY8 is correctly viewed as having two main elements. The first of these is the more straightforward of the two. It consists of a policy statement enshrining a general, not inflexible, rule that a development proposal entailing the construction of a building "*which creates or adds to a ribbon of development*" will normally be refused. In the ideal world, the phrase "*a ribbon of development*" would be accorded some kind of definition, even one of the inclusive variety. While no explicit definition is provided, the meaning of this phrase can be reasonably deduced from certain other phrases within the policy. The first is "*an other wise substantial and continuously built up frontage*". The word "*frontage*" in this context clearly denotes "*road frontage*". The word "*road*" denotes the physical means whereby access to the buildings at the location is secured. The policy envisages that this will normally ("*include*") consist of a footpath or private lane.

[19] The second statement in the policy illuminating the meaning of "*a ribbon of development*" is:

> "*A 'ribbon' does not necessarily have to be served by individual accesses nor have a continuous or uniform building line. Buildings sited back, staggered or at angles and with gaps between them can still represent ribbon development, if they have a common frontage or they are visually linked.*"

"*Ribbon*" is an ordinary, unsophisticated member of the English language. It invites no special meaning in the Policy CTY8 context. Both Counsel concurred with the

Court's formulation that, in this context, it denotes a strip of developed houses or other buildings.

[20] The other important aspect of the first main element of Policy CTY8 is its rationale. This is stated unequivocally: the creation or enlargement of a ribbon of development in a rural area is antithetical to its character. It is, in the words of the policy –

> "…. *detrimental to the character, appearance and amenity of the countryside* [and] *creates and reinforces a built-up appearance to roads, footpaths and private laneways and can sterilise back-land, often hampering the planned expansion of settlements* [and] *can also make access to farm land difficult and cause road safety problems*".

This part of the policy is, by some measure, the most clearly formulated.

[21] The reason why there is no outright prohibition against the creation or enlargement of ribbon development in the countryside is not difficult to find. It is readily deductible from those passages of the RDS quoted at the beginning of PPS21 and reproduced in [3] above. These passages give expression to a familiar theme in planning law, namely the balancing of competing aims and interests. Read in conjunction with Policy CT8, I consider that there are two identifiable competing interests. On the one hand the character, appearance and amenity of the Northern Ireland countryside must be respected and protected. On the other hand, some development must be permitted in furtherance of the goal of sustaining a strong and vibrant rural community. This is encapsulated in paragraph 1.5 of PPS21, which states that:

> "*An approach which strikes a balance between the need to protect the environment whilst simultaneously sustaining a strong and vibrant rural community.*"

Policy CTY8 must be construed and applied against this background. This discrete policy is, in a nut shell, a juggling act.

[22] I come to the second main element of Policy CTY8, namely the exception to the general rule. An exception is permissible where a development proposal partakes of the following ingredients:

(a) It relates to a site sufficient only to accommodate two houses at most.

(b) The site is located within an otherwise substantial and continuously built up road frontage.

(c) The latter includes a line of three or more buildings along a road frontage without accompanying development to the rear.

(d) The proposed development must respect the existing development pattern along the frontage as regards size, scale, siting and plot size and satisfy other planning and environmental requirements.

[23] The meaning of the word "*line*" is not difficult to ascertain. It takes its colour from the passage reproduced in [19] above. The policy states unequivocally that the building line need not be "*continuous or uniform*". Rather it can take the form of buildings "*sited back, staggered or at angles and with gaps between them …*". Finally the gap where the development is proposed must be located between an "*otherwise substantial and continuously built up frontage*".

[24] As the foregoing paragraphs demonstrate, Policy CTY8 is of deceptively modest physical size. Its contents invite careful reflection and analysis. Read as a whole and in the context of the broader, more strategic parent policy, namely the RDS it yields the analysis which I have undertaken above, an exercise which gives rise to an intelligible, sensible and workable planning policy model. This exercise also demonstrates two further features of the policy. First, its architects have eschewed the use of rigid linguistic formulae. Second, the application of the policy in any given case will entail a significant element of evaluative planning judgment.

[25] Mr Potter, in a commendably focused submission, contended that there are two key questions to be addressed:

(a) Is there a substantial and continuously built up frontage at the location under scrutiny?

(b) Is there a small gap between extant buildings sufficient to accommodate a maximum of two houses?

Focusing on the second of these questions, Mr Potter submitted that neither the vacant site nor that part of it proposed for physical building is "*between*" existing buildings and, therefore, there is no gap site with the result that the general prohibition applies. In response to probing from the court, Mr Potter clarified that the main feature of this argument is alignment: the site proposed for development is too far forward from, and out of alignment with, the existing buildings on both sides. Mr Potter agreed with the court's suggestion that he was in substance advocating the requirement of a pretty straight building line. He criticised the planning officer's report on the ground that it failed to engage with this issue of alignment.

[26] I consider this submission to be irreconcilable with the court's analysis and construction of Policy CTY8 set forth above, in particular its unambiguous statement that a "*continuous or uniform building line*" is not required, augmented by the equally unequivocal recognition that ribbon development can be constituted by buildings "*sited back, staggered or at angles and with gaps between them*". The final

element of paragraph 5.33 of Policy CTY8, namely that the existing buildings "*have a common frontage or they are visually linked*" is not contested.

[27] Mr Potter's first submission is defeated further on the simple ground that the planning officer did indeed address the issue of alignment of the existing buildings – see paragraphs 25 and 27 of the extracts reproduced in [9] above – and did so in a context where it is common case that neither her report nor her later presentation to the PC, based on speaking notes, contains any misstatement or misrepresentation of the policy.

[28] The second of Mr Potter's central submissions is that the decision of the Council's PC is vitiated in law because the planning officer erroneously conflated ribbon development with the exception to the general prohibition, thereby construing the exception too widely. I consider that in paragraphs 23, 24 and 25 of her report – see above – the planning officer was unmistakably addressing only the issue of ribbon development. Her consideration of the exception to the general prohibition begins in the next paragraph, number 26. A perusal of the planning officer's speaking notes invites the same analysis. The notes accompanying, or pertaining to, "slide 8" in the main reflect and reproduce paragraphs 22 – 25 of her report. Next, by reference to "slide 9", the planning officer turned to address the Applicant's objection based on a decision of the Planning Appeals Commission ("PAC") in the appeal by Johnston (reference 2014/A0148). The officer explained eloquently her reasons for distinguishing the Johnston decision. She continued:

> "*In relation to the application before you now for consideration, there is a clear build up of developments along this lane way. This application site is clearly a gap within this frontage. There is a clear line of buildings along the lane way, particularly at either side of the application site.*"

I consider it clear that in this passage the planning officer was addressing the terms of the exception to the general prohibition. Her presentation continued:

> "*The policy does not insist that there has to be a uniform building line with buildings along the frontage being the exact same distance from the road or lane way in order for a proposal to be deemed an exception within the context of policy CTY8.*"

She then reproduced paragraph 5.3 of the policy, unerringly.

[29] I am quite unable to identify any impermissible conflation in the discrete passage quoted above, which forms the centre piece of Mr Potter's second submission. In this passage the planning officer correctly portrays the terms of the policy. The question of whether there is existing ribbon development at the location is a central feature of the issue of whether an exception to the general

prohibition should be permitted. The assessment of whether there is ribbon development is part and parcel of the exception. The two cannot be sensibly separated. The operation of the exception is dependent upon the existence of ribbon development at the location. For these reasons I must reject Mr Potter's second submission.

[30] Mr Potter did not attack the planning officer's report and subsequent presentation to the Council's PC on the ground of irrationality. He was correct not to do so. There is an abundance of visual evidence, mainly in the form of photographs and supplemented by plans, before the court which confirms beyond peradventure that the planning officer's report and presentation are not open to challenge on this intrinsically limited ground. This assessment is readily reinforced by the clear evidence that the work of the planning officer in this case was of the highest quality. Her assiduous efforts served to ensure that the Council's PC, when it came to make its decision, avoided the pitfalls which could have left it open to legal challenge.

[31] If and insofar as this is, properly exposed, a Wednesbury irrationality challenge to matters of evaluative planning judgement, I accept the submission of Mr Beattie QC: see [30]. Mr Beattie is also correct to point out that the PAC decision in the Johnston case is infected by, *inter alia*, the appointed Commissioner's misstatement of Policy CTY 8 and a consequential erroneous approach to "align" and "alignment".

Disposal

[32] For the reasons given the application for judicial review is dismissed. Having regard to the protective costs order made at an earlier stage, the consequential order for costs in favour of the Council, which must follow ineluctably, shall be capped at £5,000 plus VAT.