2018 No: 038492/01

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

In the matter of a decision by Derry City and Strabane District Council made on 17 January 2017 to grant planning permission A/2014/0495/F relating to lands opposite 52 Lismacarrol Road / Glenshane Road, Crossballycormick, Londonderry.

STATEMENT FILED PURSUANT TO ORDER 53, RULE 3(2)(a) OF THE RULES OF THE COURT OF JUDICATURE OF NORTHERN IRELAND 1980

(Amendments marked in red)

Introduction

1. The applicant is Dean Blackwood of 20 Campbell Park Avenue, Belfast, BT4 3FH, acting as Litigant in Person on behalf of River Faughan Anglers Ltd., a not-for-profit, cross-community and voluntary-run organisation, of which I am the Chairperson and a director ("the Applicant").

2. I challenge the grant of planning permission A/2014/0495/F on 17 January 2018 by Derry City and Strabane District Council ("the Respondent") for the *"Construction of manager's dwelling and 6 no. cottage*

style apartments in 2 no. blocks with associated landscape works to provide Tourism based "fishing end use" on the site under PPS 16", located at Lands opposite 52 Lismacarrol Road / Glenshane Road, Crossballycormick, Londonderry ("the impugned permission").

3. In granting the impugned permission, the Respondent placed determining weight on two historic planning permissions on the premise (which I dispute) that both remain *"live"* and implementable at any time. These are; A/2007/0895/RM granted on 2 March 2009 for the *"Construction of 2no. 1-2 storey buildings comprising 6no. 2 bedroom self-catering tourist chalets for fishermen and all associated siteworks"*; and A/2007/0897/RM granted on 11 March 2009 for the *"Construction of 1-2 Storey split level Managers Dwelling and all associated site works"* at Lands opposite No.52 Glenshane Road, Crossballycormick, Londonderry.

4. Without the lawful commencement of planning applications A/2007/0895/RM and A/2007/0897/RM as the determining factor, the impugned permission stands, or falls, on its own planning merits.

The relief sought

5. The relief sought is as follows:

(a) An order of *certiorari* to bring into this Honourable Court and quash the decision by the Respondent to grant the impugned permission A/2014/0495/F on 17 January 2018.

(b) A declaration that *"live"* permissions A/2007/0895/RM granted on 2 March 2009 and A/2007/0897/RM granted on 11 March 2009 have, in fact,

lapsed and could not, therefore, be afforded determining weight in the granting of the impugned permission.

(c) Alternatively, a declaration that the Respondent acted in breach of the *Conservation (Natural Habitats, etc.) Regulations (Northern Ireland)* as amended ("the Habitats Regulations"), by failing to conduct a review of the *"live"* permissions A/2007/0895/RM and A/2007/0897/RM, to which Regulation 43(1) would apply, and as lawfully obliged to do so in accordance with Regulations 45, 46, 50 and 51, before giving these decisions determining weight in the granting of the impugned permission.

(d) A declaration that the Respondent is in wide and general breach of Regulation 43(1) the Habitats Regulations by its failure to conduct a review of extant permissions likely to give rise to significant effects on the River Faughan and Tributaries Special Area of Conservation, as lawfully obliged to do so in accordance with Regulations 45, 46, 50 and 51.

(e) A declaration that the Respondent acted in breach of Habitats Regulations and European Directive 92/43/EEC ("the Habitats Directive"), by failing to properly carry out a Habitats Regulations Assessment for the development to which the impugned permission relates, contrary to Regulation 43(1) and Article 6(3), respectively.

(f) A declaration that the Respondent acted in breach of the Habitats Regulations and Directive by failing to consider the impact of the impugned permission on a protected species (bats), contrary to Regulation 34 and Article 12, respectively.

(g) A declaration that the Respondent acted in breach of the *Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2015* ("the EIA Regulations"), Regulation 4(1) and European Directive 2011/92/EU

("the EIA Directive"), Article 2(1) by failing to require the preparation of an environmental statement in connection with the impugned permission.

(h) A declaration the impugned permission is unlawful, *ultra vires*, and of no force or effect.

(i) Such further or other relief as this Honourable Court shall deem met.

(j) All necessary and consequential directions.

(k) A Costs Protection Order not exceeding £10,000, this being an application for judicial review of a decision which falls within the provisions of the Aarhus Convention and, therefore, constitutes an Aarhus Convention case within the meaning of the Cost Protection (Aarhus Convention) Regulations (Northern Ireland) 2013, as amended.

(l) Costs recoverable by the Applicant shall not exceed £35,000 subject to Regulation 4(3)(b) of the afore-mentioned Regulations.

6. The grounds on which relief is sought are as follows:

Wrongful determining weight

7. The respondent erred by granting the impugned permission on the premise that material starts had been lawfully commenced in respect of historic planning permissions A/2007/0895/RM and A/2007/0897/RM and, consequently, that this carried determining weight in the decision-making process. These historic permissions were granted on 2 March 2009 and 11 March 2009, respectively, but had not been lawfully commenced prior to the expiry of those reserved matters permissions on 2 March 2011 and 11 March 2011. Accordingly, works undertaken in February 2011 in

the attempt to secure material starts (before the expiry of the permissions), were unauthorised and thus unlawful *(Whitley & Sons-v-Secretary of State for Wales [1992] 64 P&CR 296)*.

8. In the case of A/2007/0895/RM, this is because:

(i) the foundations laid for the *"self-catering tourist chalets"* in February 2011 have not been constructed strictly in accordance with the details supporting the application *R(Ellaway)-v-Cardiff County Council* [2014] EWHC 836 (Admin). Rather, those foundations, in their entirety, have been constructed outside of the approved footprint authorised by the grant of the said planning permission and approved drawings and, therefore, cannot be considered to represent the lawful commencement of the development.

(ii) The said foundations have been constructed outside of the redline of the planning permission granted on 2 March 2009.

9. In the case of A/2007/0897/RM, this is because:

(iii) the foundations laid for the *"manager's dwelling"*, whilst located within the red line of the planning permission, have not been constructed strictly in accordance with the details supporting the application.

(iv) Notwithstanding points (i), (ii) and (iii) above, the laying of foundations to secure material starts for both permissions, took place prior to the compliance with planning conditions which prohibited *"...the commencement, operation or any works or other development..."* before safe access was completed onto a protected route, in the interest of road safety. On plain reading, these approvals were each subject to a "condition precedent", which was both a prohibitive condition and went to the heart of the permissions *(Greyford Properties Ltd-v-Secretary of State for Communities*

and Local Government, Torbay Council [2011] EWCA Civ 908). Therefore, the works undertaken in February 2011 cannot have lawfully commenced the developments authorised by these permissions as both decisions had lapsed. That being so, the Respondent erred in placing determining weight on these expired planning permissions as primary justification for the grant of the impugned permission, which could not lawfully be determined on that basis.

Failure to conduct a review of these extant permissions

10. Alternatively, in the event the Court declares the historic permissions A/2007/0895/RM and A/2007/0897/RM extant, the respondent will have erred in not fulfilling its legal obligation under the Habitats Regulations. Regulations 45, 46, 50 and 51 impose a lawful obligation on the respondent to review extant consents that have the potential to significantly impact on a European site. Extant planning permissions A/2007/0895/RM and A/2007/0897/RM are two such consents requiring review under the Habitats Regulations, having been granted permission on 2 March 2009 and 11 March 2009, respectively, and commenced (but not substantially completed) in February 2011. Having reached the conclusion that these historic permissions remained *"live"*, and having been informed by the site owner (Ms Catherine Deery) on 19 September 2017 of her intention to recommence construction works, the Respondent, as the competent authority, erred when it failed in its legal obligation to initiate reviews of these permissions under Regulations 45, 46, 50 and 51 of the Habitats Regulations.

Breach of a lawful duty, generally, to review extant permissions

11. Since Local Government Reform on 1 April 2015, the lawful duty to review extant planning permissions under Regulations 45, 46, 50 and 51 of the Habitats Regulations has become the responsibility of the Respondent, as legislated for under *The Conservation (Natural Habitats, etc.) (Amendment) Regulations (Northern Ireland) 2015*. This legal obligation is a precautionary and pre-emptive one. In making no effort to appraise itself of the extent of *"live"* consents requiring review (to which Regulation 43(1) would apply) and choosing to remain ignorant of the potential for significant effects on the River Faughan and Tributaries Special Area of Conservation (and other European sites under its jurisdiction) from extant permissions, the Respondent is in wide and general breach of the Habitats Regulations.

Failure to properly conduct a Habitats Regulations Assessment

12. The Respondent erred by failing to subject an amended application received on 19 September 2016 to a proper Habitats Regulations Assessment (HRA) before granting the impugned permission on 17 January 2018, contrary to Regulation 43(1) of the Habitats Regulations and Article 6(3) of the Habitats Directive. These Regulations and Directive impose a strictly precautionary approach to environmental assessment of development proposals likely to have a significant effect on a European site *(Case C-127/02 Landelike Vereniging tot Betoud van de Waddenzee-v-Statsecretaris van Landbouw, Natuurbehher en Visserij* [2004] ECR I-07405). Authority dictates that Appropriate Assessment must contain complete, precise and definitive findings capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned (*Sweetman, Attorney General and Minister for the Environment, Heritage and Local Government-v-An Bord Pleanála* [2013] Case C-258/11).

13. The impugned permission includes the construction of a proposed sewerage system. Yet it is now evident that scientific doubt remains over the acceptability of the means of sewage disposal from the site. The Northern Ireland Environment Agency's Water Management Unit (WMU) has confirmed on 16 April 2018 that the acceptability of the means of sewage effluent disposal granted by the impugned permission has not been assessed, nor agreed, including the appropriateness of granting a consent to discharge which could impact on the SAC. Such scientific uncertainty offends the seminal authorities cited in paragraph 12.

14. Additionally, the HRA conducted on 26 June 2017 is incomplete and displays a basic lack of coherence, contrary to the precision required by legal authority. For example, it relies on the prevention of pollution entering the *"Alexandra dry dock"* as a means of protecting the River Faughan and Tributaries SAC, County Londonderry. There are no dry docks on the Faughan. Furthermore, the outcome of Appropriate Assessment conducted on 26 June 2017; namely, *"significant adverse effects on the site integrity"*, is incompatible with the HRA and the recommendation to grant the impugned permission. This is because the recommendation to *"approve planning with conditions"*, contradicts the outcome, which concludes that *"no mitigation measures can be introduced to ensure that there will be no adverse effect on site integrity"*. This material error adds further confusion and doubt as to the rigour of assessment carried out, as required by Regulation 43(1) and Article 6(3) of the Habitats Regulations and Directive, respectively.

Breach of Directive 92/43/EEC regarding protected species (bats)

15. The Respondent erred in granting the impugned permission without having regard to the provisions of Regulation 34 of the Habitats Regulations and Article 12 of the Habitats Directive, in that it failed to consider the impact on a protected species (bats) (*Morge-v-Hampshire County Council* [2011] UKSC 2). This is despite previous nature conservation concerns being raised by Environment and Heritage Service (now NIEA) in respect of historic permissions granted on the site of the impugned permission in 2004. At that time, a bat survey was required to be conducted, which identified the presence of two species of bats (Soprano Pipistrelle and Daubenton's) foraging over the river adjacent to the site and one Leisler's bat recorded passing over the site, all in the space of one hour on the night of 23 June 2003. In these circumstances, the Respondent was required to consider whether the proposed development would cause disturbance to this protected species within the provisions of Regulation 34 and Article 12 before granting the impugned permission. In failing to so, the Respondent erred in law.

Breach of lawful obligations in respect of the relevant Planning (Environmental Impact Assessment) Regulations (Northern Ireland)

16. The Respondent erred in failing to recognise that at crucial times during the processing of the impugned planning permission, that substantive evidence of significant adverse effects in the form of a failed Appropriate Assessment completed on 25 May 2016 (conducted in accordance with Regulation 43(1) of the Habitats Regulations), was a trigger for Environmental Impact Assessment (EIA). Instead, the respondent neglected to conduct an EIA Determination under Regulation 10(3) of the EIA Regulations 2012 and, subsequently 10(3) of the EIA Regulations 2015, for a period of two years. This is despite Regulation 10(3) requiring a competent authority to screen for EIA within four (4) weeks of receipt of

the planning application, or a longer period as agreed with the planning applicant in writing.

17. That it did not conduct its initial EIA Determination until two years into the processing of the impugned permission shows the Respondent's predisposition to screen negatively for EIA. However, even then, the Respondent should have been aware that when completing the initial EIA screening on the 10 October 2016, that if it was not possible to rule out the likelihood of significant effects (as previously and subsequently confirmed by consultees), including the need for more work and information to resolve those risks, then this represented the archetypal case for environmental assessment under the EIA Regulations. (*Champion-v-North Norfolk District Council* [2013] EWCA Civ 1657).

Failure to notify or consult with a public body with recognised expertise; namely the Loughs Agency.

18. The Respondent erred by failing to consult with the Loughs Agency. This Agency performs a critical function in relation to its statutory fisheries conservation role, including the protection of inland waterways designated as SACs. Failure to properly consult and take notice of it views regarding riverine Natura 2000 sites has previously proven fatal to an impugned development project. (*Alternative A5 Alliance-v-Department for Regional Development* [2013] NIQB 30). Yet, despite its recognised expertise in fisheries conservation, Loughs Agency was not consulted by the Respondent even though the impugned permission encroached into the SAC. This deprived the decision-maker of expert input, which should have been a key material consideration when determining the impugned permission.

Failure to determine the impugned permission in accordance with the relevant development plan.

19. Sections 6(4) and 45 of the Planning Act (Northern Ireland) 2011 requires that an application must be determined in accordance with the local development plan unless material considerations indicate otherwise. This imposes a statutory duty on the Respondent to establish whether the proposal accords with the development plan *(BDW Trading Ltd-v-Secretary for State for Communities and Local Government* [2016] EWCA Civ 493) and to take account of relevant plan policies.

20. In relation to the impugned permission and the River Faughan, relevant policies of the Derry Area Plan 2011 are found in Section 4, "Natural Environment", policies ENV1, ENV2, ENV7, ENV8 and ENV9 and Section 11, "Tourism", policies TU1 and TU2. However, in assessing the impugned permission against the development plan, only policy ENV1 – "Areas of High Scenic Value (AoHSV)" has been taken account of as a *"material consideration"*. The Respondent has, therefore, failed to fulfil is statutory duty under Sections 6(4) and 45 of the Act.

The misinterpretation of planning policy.

21. It is established by legal authority that the interpretation of planning policy is a matter for the Courts and not for a planning authority *"...to determine from time to time as it pleases, within the limits of rationality."* (*Tesco Stores Ltd-v-Dundee City Council* [2012] UKSC 13: para.18).

22. The Respondent has misinterpreted policy TSM5 of *Planning Policy Statement 16: Tourism.* This policy, point (a), allows for the grant of permission for *"one or more new units all located within the grounds of an existing or approved...self catering complex..."* However, the impugned permission is not for a minor or secondary addition to an existing or approved self-catering complex. It is a stand-alone, new development proposal. According to the Respondent, it is designed *"to largely replace the approved development on site..."* It cannot, therefore, fall within the ambit of policy TSM5, criteria (a) or (b), which relates solely to proposed secondary development, that *"...is required to be subsidiary in scale and ancillary to the primary tourism use of the site."*

23. Authority dictates that, in order to lawfully depart from planning policy, the decision-maker must, first, have had regard for and understood the planning policies pertinent to the decision (*Stewart-v-Department of the Environment* [2014] NIQB 3]. Until August 2017, the Respondent resolutely and repeatedly proclaimed that the impugned permission was contrary to policy TSM5. By recently departing from its long held (and correct) interpretation of policy the Respondent has not understood, has misinterpreted or mis-constructed the interpretation of policy TSM5, which on close and proper reading does not support the granting of the impugned permission. For whatever reason, it has sought to apply policy TSM5 *"...as it pleases..."* in the face of authority which has deemed such action unlawful.

Failure to conduct adequate inquiry resulting in manifest error, procedural irregularity and procedural unfairness, including a lack of transparency and not providing adequate reasons for the decision.

24. Being under the mistaken premise that the impugned permission "*...seeks to build the holiday chalets largely over the footprint of the approved chalets therefore there will be no build-up of development at this part of the site*", the Respondent is guilty of manifest error in its professional assessment of the impugned permission. This is because on the plain facts of the case, the tourist chalets approved by the impugned permission are not sited over the footprint of those approved under A/2007/0895/RM, to which the Respondent attaches determining weight. On comparison, the footprints referred to by the Respondent are, essentially, free-standing from one another.

25. This fundamental failure of professional assessment is likely to have been compounded, if not propagated by procedural irregularity, as the same official was instrumental for all the following key tasks:

- the preparation of the negative EIA determination dated 6 December 2017.
- preparation of a fundamentally flawed and inaccurate planning committee report of 10 January 2018;
- the subsequent signing of the planning decision notice on 17 January 2018; and
- the authorisation of the closure of the enforcement file on 25 January 2018 on the premise that material starts had been lawfully made in respect of planning permissions A/2007/0895/RM and A/2007/0897/RM.

26. Basic lack of oversight will have reduced the likelihood of manifest error being uncovered, undermined established corporate safeguards and represents a subversion of good administrative practice. This is compounded by the opaque, or often missing reasoning as to why the Respondent considered that material starts had been lawfully made on the historic permissions and / or why material policy considerations have not

been articulated. Long-established corporate procedures and public interest principles aimed at ensuring accountability, public trust, and safeguarding the planning decision-making process from irregular or improper practice (*Corbo-v-Department of the Environment* [2012] NIQB 107), were ignored, or set aside, placing this challenge into the broad public law realm of procedural irregularity.

27. In turn, a lack of adequate enquiry, including into the matter of the lawful commencement of development of permissions A/2007/0895/RM and A/2007/0897/RM has given rise to procedural unfairness. This is because lawful process exists under Section 169 of the Planning Act (Northern Ireland) 2011 to submit claims that any operations which have been carried out in, on, over or under land, have been lawfully commenced. Onus is placed on the planning applicant to substantiate its claims with evidence that satisfies the planning authority. This process was not followed and serious errors were made. As a result, the onus to prove unlawfulness has been unfairly and unjustly placed upon the Applicant.

28. The withholding of the HRA conducted on 26 June 2017 (for the amended application received on 19 September 2016) from the planning portal, hard copy file and request for disclosure, also offends the public law principles of procedural fairness / transparency. This HRA was fundamental to the granting of the impugned permission and should, automatically, have been placed in the public domain. At no time was it made explicit to the planning committee, that a HRA was required, or had been carried out. It was not made available to the Applicant despite a request on 9 February 2018 under disclose for *"all documentation held on the impugned permission which has not uploaded, or has been withheld from the planning portal."* By withholding this HRA until three months after the impugned decision was granted, such a lack of transparency misled the Applicant into believing no such assessment existed; disadvantaged the Applicant in

understanding how the decision was reached; and denied it (and the planning committee) the opportunity to question the material error of fact and material omission cited at paragraph 14 above. This, along with the failures set out in paragraphs 19 – 23 above, rank as further and cumulative contaminating factors that offend established principles of public law on procedural fairness, including on a lack of transparency, and procedural irregularity.

Irrationality

29. In granting the impugned decision, the Respondent acted irrationally. The planning committee, as the decision-making body, was not only deprived of information on key material considerations, but was provided with plainly wrong and, therefore, misleading information, both in terms of erroneous policy interpretation and basic failures of professional assessment. In such circumstances, the Respondent could not reasonably and rationally have reached the decision to grant the impugned permission.

Amended and dated this 3rd day of May 2018

Signed: Dean Blackwood,

2018 No: 38492/01

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN the matter of a decision by Derry City and Strabane District Council made on 17 January 2017 to grant planning permission A/2014/0495/F relating to lands opposite 52 Lismacarrol Road / Glenshane Road, Crossballycormick, Londonderry.

DOCKET FOR EX PARTE APPLICATION

Dean Blackwood, representing River Faughan Anglers Ltd. to move on a date to be fixed, for the following relief:

1. An order of *certiorari* to bring into this Honourable Court and quash the decision by the Respondent to grant the impugned permission A/2014/0495/F on 17 January 2018.

2. A declaration that *"live"* permissions A/2007/0895/RM granted on 2 March 2009 and A/2007/0897/RM granted on 11 March 2009 have, in fact, lapsed and could not, therefore, be afforded determining weight in the granting of the impugned permission.

3. Alternatively, a declaration that the Respondent acted in breach of the *Conservation (Natural Habitats, etc.) Regulations (Northern Ireland)* as

amended ("the Habitats Regulations"), by failing to conduct a review of the *"live"* permissions A/2007/0895/RM and A/2007/0897/RM, to which Regulation 43(1) would apply, and as lawfully obliged to do so in accordance with Regulations 45, 46, 50 and 51, before giving these decisions determining weight in the granting of the impugned permission.

4. A declaration that the Respondent is in wide and general breach of Regulation 43(1) the Habitats Regulations by its failure to conduct a review of extant permissions likely to give rise to significant effects on the River Faughan and Tributaries Special Area of Conservation, as lawfully obliged to do so in accordance with Regulations 45, 46, 50 and 51.

5. A declaration that the Respondent acted in breach of Habitats Regulations and European Directive 92/43/EEC ("the Habitats Directive"), by failing to properly carry out an Appropriate Assessment for the development to which the impugned permission relates, contrary to Regulation 43(1) and Article 6(3), respectively.

6. A declaration that the Respondent acted in breach of the Habitats Regulations and Directive by failing to consider the impact of the impugned permission on a protected species (bats), contrary to Regulation 34 and Article 12, respectively.

7. A declaration that the Respondent acted in breach of the *Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2015* ("the EIA Regulations"), Regulation 4(1) and European Directive 2011/92/EU ("the EIA Directive"), Article 2(1) by failing to require the preparation of an environmental statement in connection with the impugned permission.

8. A declaration that the impugned permission is unlawful, *ultra vires*, and of no force or effect.

9. Such further or other relief as this Honourable Court shall deem meet.

10. All necessary and consequential directions.

11. A Costs Protection Order not exceeding £10,000, this being an application for judicial review of a decision which falls within the provisions of the Aarhus Convention and, therefore, constitutes an Aarhus Convention case within the meaning of the Cost Protection (Aarhus Convention) Regulations (Northern Ireland) 2013, as amended.

12. Costs recoverable by the Applicant shall not exceed £35,000 subject to Regulation 4(3)(b) of the afore-mentioned Regulations.

Readings

A) Statement pursuant to Order 53, rule 3(2) of the Rules of the Court of Judicature (Northern Ireland) 1980;

B) Affidavit of Dean Blackwood, with exhibits, sworn on the 13 April 2018.

Dated this 13 day of April 2018.

Signed: Dean Blackwood

20 Campbell Park Avenue
Belfast
BT4 3FH

2018 No:

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

In the matter of a decision by Derry City and Strabane District Council made on 17 January 2017 to grant planning permission A/2014/0495/F relating to lands opposite 52 Lismacarrol Road / Glenshane Road, Crossballycormick, Londonderry.

STATEMENT FILED PURSUANT TO ORDER 53, RULE 3(2)(a) OF THE RULES OF THE COURT OF JUDICATURE OF NORTHERN IRELAND 1980

Introduction

1. The applicant is Dean Blackwood of 20 Campbell Park Avenue, Belfast, BT4 3FH, acting as Litigant in Person on behalf of River Faughan Anglers Ltd., a not-for-profit, cross-community and voluntary-run organisation, of which I am the Chairperson and a director ("the Applicant").

2. I challenge the grant of planning permission A/2014/0495/F on 17 January 2018 by Derry City and Strabane District Council ("the Respondent") for the *"Construction of manager's dwelling and 6 no. cottage style apartments in 2 no. blocks with associated landscape works to provide Tourism based "fishing end use" on the*

site under PPS 16", located at Lands opposite 52 Lismacarrol Road / Glenshane Road, Crossballycormick, Londonderry ("the impugned permission").

3. In granting the impugned permission, the Respondent placed determining weight on two historic planning permissions on the premise (which I dispute) that both remain *"live"* and implementable at any time. These are; A/2007/0895/RM granted on 2 March 2009 for the *"Construction of 2no. 1-2 storey buildings comprising 6no. 2 bedroom self-catering tourist chalets for fishermen and all associated siteworks"*; and A/2007/0897/RM granted on 11 March 2009 for the *"Construction of 1-2 Storey split level Managers Dwelling and all associated site works"* at Lands opposite No.52 Glenshane Road, Crossballycormick, Londonderry.

4. Without the lawful commencement of planning applications A/2007/0895/RM and A/2007/0897/RM as the determining factor, the impugned permission stands, or falls, on its own planning merits.

The relief sought

5. The relief sought is as follows:

   (a) An order of *certiorari* to bring into this Honourable Court and quash the decision by the Respondent to grant the impugned permission A/2014/0495/F on 17 January 2018.

   (b) A declaration that *"live"* permissions A/2007/0895/RM granted on 2 March 2009 and A/2007/0897/RM granted on 11 March 2009 have, in fact, lapsed and could not, therefore, be afforded determining weight in the granting of the impugned permission.

(c) Alternatively, a declaration that the Respondent acted in breach of the *Conservation (Natural Habitats, etc.) Regulations (Northern Ireland)* as amended ("the Habitats Regulations"), by failing to conduct a review of the *"live"* permissions A/2007/0895/RM and A/2007/0897/RM, to which Regulation 43(1) would apply, and as lawfully obliged to do so in accordance with Regulations 45, 46, 50 and 51, before giving these decisions determining weight in the granting of the impugned permission.

(d) A declaration that the Respondent is in wide and general breach of Regulation 43(1) the Habitats Regulations by its failure to conduct a review of extant permissions likely to give rise to significant effects on the River Faughan and Tributaries Special Area of Conservation, as lawfully obliged to do so in accordance with Regulations 45, 46, 50 and 51.

(e) A declaration that the Respondent acted in breach of Habitats Regulations and European Directive 92/43/EEC ("the Habitats Directive"), by failing to properly carry out an Appropriate Assessment for the development to which the impugned permission relates, contrary to Regulation 43(1) and Article 6(3), respectively.

(f) A declaration that the Respondent acted in breach of the Habitats Regulations and Directive by failing to consider the impact of the impugned permission on a protected species (bats), contrary to Regulation 34 and Article 12, respectively.

(g) A declaration that the Respondent acted in breach of the *Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2015* ("the EIA Regulations"), Regulation 4(1) and European Directive 2011/92/EU ("the EIA Directive"), Article 2(1) by failing to require the preparation of an environmental statement in connection with the impugned permission.

(h) A declaration the impugned permission is unlawful, *ultra vires*, and of no force or effect.

(i) Such further or other relief as this Honourable Court shall deem met.

(j) All necessary and consequential directions.

(k) A Costs Protection Order not exceeding £10,000, this being an application for judicial review of a decision which falls within the provisions of the Aarhus Convention and, therefore, constitutes an Aarhus Convention case within the meaning of the Cost Protection (Aarhus Convention) Regulations (Northern Ireland) 2013, as amended.

(l) Costs recoverable by the Applicant shall not exceed £35,000 subject to Regulation 4(3)(b) of the afore-mentioned Regulations.

6. The grounds on which relief is sought are as follows:

Wrongful determining weight

7. The respondent erred by granting the impugned permission on the premise that material starts had been lawfully commenced in respect of historic planning permissions A/2007/0895/RM and A/2007/0897/RM and, consequently, that this carried determining weight in the decision-making process. These historic permissions were granted on 2 March 2009 and 11 March 2009, respectively, but had not been lawfully commenced prior to the expiry of those reserved matters permissions on 2 March 2011 and 11 March 2011. Accordingly, works undertaken in February 2011 in the attempt to secure material starts (before the expiry of the permissions), were

unauthorised and thus unlawful *(Whitley & Sons-v-Secretary of State for Wales [1992] 64 P&CR 296)*.

8. In the case of A/2007/0895/RM, this is because:

(i) the foundations laid for the *"self-catering tourist chalets"* in February 2011 have not been constructed strictly in accordance with the details supporting the application *R(Ellaway)-v-Cardiff County Council* [2014] EWHC 836 (Admin). Rather, those foundations, in their entirety, have been constructed outside of the approved footprint authorised by the grant of the said planning permission and approved drawings and, therefore, cannot be considered to represent the lawful commencement of the development.

(ii) The said foundations have been constructed outside of the redline of the planning permission granted on 2 March 2009.

9. In the case of A/2007/0897/RM, this is because:

(iii) the foundations laid for the *"manager's dwelling"*, whilst located within the red line of the planning permission, have not been constructed strictly in accordance with the details supporting the application.

(iv) Notwithstanding points (i), (ii) and (iii) above, the laying of foundations to secure material starts for both permissions, took place prior to the compliance with planning conditions which prohibited *"...the commencement, operation or any works or other development..."* before safe access was completed onto a protected route, in the interest of road safety. On plain reading, these approvals were each subject to a "condition precedent", which was both a prohibitive condition and went to the heart of the permissions *(Greyford Properties Ltd-v-Secretary of State for Communities and Local Government, Torbay Council* [2011] EWCA Civ 908). Therefore, the

works undertaken in February 2011 cannot have lawfully commenced the developments authorised by these permissions as both decisions had lapsed. That being so, the Respondent erred in placing determining weight on these expired planning permissions as primary justification for the grant of the impugned permission, which could not lawfully be determined on that basis.

Failure to conduct a review of these extant permissions

10. Alternatively, in the event the Court declares the historic permissions A/2007/0895/RM and A/2007/0897/RM extant, the respondent will have erred in not fulfilling its legal obligation under the Habitats Regulations. Regulations 45, 46, 50 and 51 impose a lawful obligation on the respondent to review extant consents that have the potential to significantly impact on a European site. Extant planning permissions A/2007/0895/RM and A/2007/0897/RM are two such consents requiring review under the Habitats Regulations, having been granted permission on 2 March 2009 and 11 March 2009, respectively, and commenced (but not substantially completed) in February 2011. Having reached the conclusion that these historic permissions remained *"live"*, and having been informed by the site owner (Ms Catherine Deery) on 19 September 2017 of her intention to recommence construction works, the Respondent, as the competent authority, erred when it failed in its legal obligation to initiate reviews of these permissions under Regulations 45, 46, 50 and 51 of the Habitats Regulations.

Breach of a lawful duty, generally, to review extant permissions

11. Since Local Government Reform on 1 April 2015, the lawful duty to review extant planning permissions under Regulations 45, 46, 50 and 51 of the Habitats Regulations has become the responsibility of the Respondent, as

legislated for under *The Conservation (Natural Habitats, etc.) (Amendment) Regulations (Northern Ireland) 2015*. This legal obligation is a precautionary and pre-emptive one. In making no effort to appraise itself of the extent of *"live"* consents requiring review (to which Regulation 43(1) would apply) and choosing to remain ignorant of the potential for significant effects on the River Faughan and Tributaries Special Area of Conservation (and other European sites under its jurisdiction) from extant permissions, the Respondent is in wide and general breach of the Habitats Regulations.

Failure to properly conduct a Habitats Regulations Assessment

12. The Respondent erred by failing to subject an amended application received on 19 September 2016 to a Habitats Regulations Assessment (HRA) before granting the impugned permission on 17 January 2018, contrary to Regulation 43(1) of the Habitats Regulations and Article 6(3) of the Habitats Directive. These Regulations and Directive impose a strictly precautionary approach to environmental assessment of development proposals likely to have a significant effect of a European site *(Case C-127/02 Landelike Vereniging tot Betoud van de Waddenzee-v-Statsecretaris van Landbouw, Natuurbehher en Visserij* [2004] ECR I-07405).

13. The Respondent was made aware of the requirement to conduct a HRA for the revised application by the Northern Ireland Environment Agency on 28 October 2016 and, again on 2 October 2017, which advised *"...this should ensure compliance with the Habitats Directive."* However, as far as the Applicant can ascertain, no such assessment has been conducted for the revised application to which the impugned permission relates.

Breach of Directive 92/43/EEC regarding protected species (bats)

14. The Respondent erred in granting the impugned permission without having regard to the provisions of Regulation 34 of the Habitats Regulations and Article 12 of the Habitats Directive, in that it failed to consider the impact on a protected species (bats) (*Morge-v-Hampshire County Council* [2011] UKSC 2). This is despite previous nature conservation concerns being raised by Environment and Heritage Service (now NIEA) in respect of historic permissions granted on the site of the impugned permission in 2004. At that time, a bat survey was required to be conducted, which identified the presence of two species of bats (Soprano Pipistrelle and Daubenton's) foraging over the river adjacent to the site and one Leisler's bat recorded passing over the site, all in the space of one hour on the night of 23 June 2003. In these circumstances, the Respondent was required to consider whether the proposed development would cause disturbance to this protected species within the provisions of Regulation 34 and Article 12 before granting the impugned permission. In failing to so, the Respondent erred in law.

Breach of lawful obligations in respect of the relevant Planning (Environmental Impact Assessment) Regulations (Northern Ireland)

15. The Respondent erred in failing to recognise that at crucial times during the processing of the impugned planning permission, that substantive evidence of significant adverse effects in the form of a failed Appropriate Assessment completed on 25 May 2016 (conducted in accordance with Regulation 43(1) of the Habitats Regulations), was a trigger for Environmental Impact Assessment (EIA). Instead, the respondent neglected to conduct an EIA Determination under Regulation 10(3) of the EIA Regulations 2012 and, subsequently 10(3) of the EIA Regulations 2015, for a period of two years. This is despite Regulation 10(3) requiring a competent authority to screen for EIA within four (4) weeks

of receipt of the planning application, or a longer period as agreed with the planning applicant in writing.

16. That it did not conduct its initial EIA Determination until two years into the processing of the impugned permission shows the Respondent's predisposition to screen negatively for EIA. However, even then, the Respondent should have been aware that when completing the initial EIA screening on the 10 October 2016, that if it was not possible to rule out the likelihood of significant effects (as previously and subsequently confirmed by consultees), including the need for more work and information to resolve those risks, then this represented the archetypal case for environmental assessment under the EIA Regulations. (*Champion-v-North Norfolk District Council* [2013] EWCA Civ 1657).

Failure to notify or consult with a public body with recognised expertise; namely the Loughs Agency.

17. The Respondent erred by failing to consult with the Loughs Agency. This Agency performs a critical function in relation to its statutory fisheries conservation role, including the protection of inland waterways designated as SACs. Failure to properly consult and take notice of it views regarding riverine Natura 2000 sites has previously proven fatal to an impugned development project. (*Alternative A5 Alliance-v-Department for Regional Development* [2013] NIQB 30). Yet, despite its recognised expertise in fisheries conservation, Loughs Agency was not consulted by the Respondent even though the impugned permission encroached into the SAC. This deprived the decision-maker of expert input, which should have been a key material consideration when determining the impugned permission.

Failure to determine the impugned permission in accordance with the relevant development plan.

18. Sections 6(4) and 45 of the Planning Act (Northern Ireland) 2011 requires that an application must be determined in accordance with the local development plan unless material considerations indicate otherwise. This imposes a statutory duty on the Respondent to establish whether the proposal accords with the development plan *(BDW Trading Ltd-v-Secretary for State for Communities and Local Government* [2016] EWCA Civ 493) and to take account of relevant plan policies.

19. In relation to the impugned permission and the River Faughan, relevant policies of the Derry Area Plan 2011 are found in Section 4, "Natural Environment", policies ENV1, ENV2, ENV7, ENV8 and ENV9 and Section 11, "Tourism", policies TU1 and TU2. However, in assessing the impugned permission against the development plan, only policy ENV1 – "Areas of High Scenic Value (AoHSV)" has been taken account of as a *"material consideration"*. The Respondent has, therefore, failed to fulfil is statutory duty under Sections 6(4) and 45 of the Act.

The misinterpretation of planning policy.

20. It is established by legal authority that the interpretation of planning policy is a matter for the Courts and not for a planning authority. *"...to determine from*

time to time as it pleases, within the limits of rationality." (*Tesco Stores Ltd-v-Dundee City Council* [2012] UKSC 13: para.18).

21. The Respondent has misinterpreted policy TSM5 of *Planning Policy Statement 16: Tourism.* This policy, point (a), allows for the grant of permission for *"one or more new units all located within the grounds of an existing or approved...self catering complex..."* However, the impugned permission is not for a minor or secondary addition to an existing or approved self-catering complex. It is a stand-alone, new development proposal. According to the Respondent, it is designed *"to largely replace the approved development on site..."* It cannot, therefore, fall within the ambit of policy TSM5, criteria (a) or (b), which relates solely to proposed secondary development, that *"...is required to be subsidiary in scale and ancillary to the primary tourism use of the site."*

22. Authority dictates that, in order to lawfully depart from planning policy, the decision-maker must, first, have had regard for and understood the planning policies pertinent to the decision (*Stewart-v-Department of the Environment* [2014] NIQB 3]. Until August 2017, the Respondent resolutely and repeatedly proclaimed that the impugned permission was contrary to policy TSM5. By recently departing from its long held (and correct) interpretation of policy the Respondent has not understood, has misinterpreted or mis-constructed the interpretation of policy TSM5, which on close and proper reading does not support the granting of the impugned permission. For whatever reason, it has sought to apply policy TSM5 *"...as it pleases..."* in the face of authority which has deemed such action unlawful.

Failure to conduct adequate inquiry resulting in manifest error, procedural irregularity and procedural unfairness

23. Being under the mistaken premise that the impugned permission "*...seeks to build the holiday chalets largely over the footprint of the approved chalets therefore there will be no build-up of development at this part of the site*", the Respondent is guilty of manifest error in its professional assessment of the impugned permission. This is because on the plain facts of the case, the tourist chalets approved by the impugned permission are not sited over the footprint of those approved under A/2007/0895/RM, to which the Respondent attaches determining weight. On comparison, the footprints referred to by the Respondent are, essentially, free-standing from one another.

24. This fundamental failure of professional assessment is likely to have been compounded, if not propagated by procedural irregularity, as the same official was instrumental for all the following key tasks:

- the preparation of the negative EIA determination dated 6 December 2017.
- preparation of a fundamentally flawed and inaccurate planning committee report of 10 January 2018;
- the subsequent signing of the planning decision notice on 17 January 2018; and
- the authorisation of the closure of the enforcement file on 25 January 2018 on the premise that material starts had been lawfully made in respect of planning permissions A/2007/0895/RM and A/2007/0897/RM.

25. Basic lack of oversight will have reduced the likelihood of manifest error being uncovered, undermined established corporate safeguards and represents a subversion of good administrative practice. Long-established corporate procedures and public interest principles aimed at ensuring accountability, public trust, and safeguarding the planning decision-making process from

irregular or improper practice (*Corbo-v-Department of the Environment* [2012] NIQB 107), were ignored, or set aside, placing this challenge into the broad public law realm of procedural irregularity.

26. In turn, a lack of adequate enquiry, including into the matter of the lawful commencement of development of permissions A/2007/0895/RM and A/2007/0897/RM has given rise to procedural unfairness. This is because lawful process exists under Section 169 of the Planning Act (Northern Ireland) 2011 to submit claims that any operations which have been carried out in, on, over or under land, have been lawfully commenced. Onus is placed on the planning applicant to substantiate its claims with evidence that satisfies the planning authority. This process was not followed and serious errors were made. As a result, the onus to prove unlawfulness has been unfairly and unjustly placed upon the Applicant.

Irrationality

27. In granting the impugned decision, the Respondent acted irrationally. The planning committee, as the decision-making body, was not only deprived of information on key material considerations, but was provided with plainly wrong and, therefore, misleading information, both in terms of erroneous policy interpretation and basic failures of professional assessment. In such circumstances, the Respondent could not reasonably and rationally have reached the decision to grant the impugned permission.

Dated this 16 day of April 2018

Signed: Dean Blackwood