

## Report to the Scottish Ministers



### COMMUNITY EMPOWERMENT (SCOTLAND) ACT 2015

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Report by Mike Croft, a reporter appointed by the Scottish Ministers

- Case reference: CAT-170-1.
- Site address: Portpatrick Village Hall, Welsh Place, Portpatrick, Stranraer, DG9 8TZ.
- Appeal by Portpatrick Harbour Community Benefit Society against the review decision by Dumfries & Galloway Council to refuse an asset transfer request relating to Portpatrick Village Hall.
- Request for asset transfer dated 4 June 2019, refused on 29 October 2019, and refused on review 16 June 2020.

Date of this report and recommendation: 23 February 2021

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## CONTENTS

## Page

Summary report	2
Preamble	13
<b>Chapters</b>	
1. Background	14
2. The appellant's eligibility to make its community asset transfer request	26
3. The appellant's case on merits	43
4. The council's case on merits	53
5. The cases for third parties on merits	58
6. Reporter's assessment on merits	62
7. Reporter's overall conclusions and recommendations	81
<b>Abbreviations</b>	
CAT	Community Asset Transfer
DGC	Dumfries & Galloway Council
PCC	the Portpatrick Community Council
PCDT	the Portpatrick Community Development Trust
PHCBS	the Portpatrick Harbour Community Benefit Society
RNLI	the Royal National Lifeboat Institution
SCIO	Scottish Charitable Incorporated Organisation
2003 Act	Land Reform (Scotland) Act 2003
2015 Act	Community Empowerment (Scotland) Act 2015

## Summary of report into refusal of community asset transfer request



### **Proposed community asset transfer of Portpatrick Village Hall, Welsh Place, Portpatrick, Stranraer, DG9 8TZ**

• Case reference	CAT-170-1
• Case type	Community asset transfer review appeal
• Reporter	Mike Croft
• Local authority	Dumfries & Galloway Council
• Other parties	Supporting and opposing local residents and organisations
• Date of application	4 June 2019
• Date case received by DPEA	13 August 2020
• Methods of consideration and dates	Written submissions and further written submissions
• Date of report	23 February 2021
• Reporter's recommendation	Dismiss the appeal and refuse the community asset transfer request

### **The statutory context**

The Community Empowerment (Scotland) Act 2015 provides a right for a community transfer body to make a request to a relevant authority for the transfer of ownership, lease or other rights in land, including buildings. Section 82(3) includes a list of matters to be taken into account in making a decision on a request. A request must be agreed unless there are reasonable grounds for refusal. The 2015 Act includes the right of appeal to Scottish Ministers if a request is refused. Other legislation, including the Land Reform Act (Scotland) 2003, as amended by the 2015 Act, and the Local Government in Scotland Act 2003 may also come into play.

### **Scottish Government guidance**

Guidance was published in 2017 for both relevant authorities and community transfer bodies.

### **The asset**

The asset that is the subject of the request in this case is Portpatrick Village Hall and land adjacent to it. The hall was built in 1929 (with later extensions), and has served as a community facility since then. It is owned by DGC. A survey in 2014 showed the hall to be in generally fair condition commensurate with its age. In recent years DGC has taken a minimal approach to the maintenance of the hall, without considering potential future maintenance associated with buildings of this age. The hall's condition remains fair in

DGC's view. There are real burdens relating to the property. In 2019 DGC estimated the open market sale value of the property as about £120,000. DGC has been looking for the local community to take over the hall (like many other community facilities in its area) since 2013. Income and expenditure data around this time show the hall to have been running at a net loss each year.

The hall is very close to Portpatrick Harbour. The harbour is owned by PHCBS, which launched a successful community share offer in 2015 that enabled it complete the purchase of the harbour.

Public meetings were held in 2015 and 2016 when consideration was given to the community taking over the hall. PHCBS's view in 2016 was that taking on the hall was not a viable option for it at that time, as its priorities lay with the development of the harbour. The impetus for local consideration of the hall's future then lay with a group established by PCC. In 2017 a two-year agreement was signed between DGC and PCC, with PCC committing to work to develop an entity capable of undertaking a CAT of the hall and taking responsibility in the meantime for day-to-day management, and with DGC continuing to take the income and pay costs.

Significant division within the local community was reflected in the submission to DGC in 2019 of two expressions of interest in a CAT of the hall by two separate organisations, PCDT (which had developed out of the PCC's hall group) and PHCBS. Both of these expressions of interest were followed by formal CAT requests under the 2015 Act.

PCC retained day-to-day operational control of the hall after its agreement with DGC expired in 2019, and that continued until the hall was closed in March 2020 because of the Covid-19 pandemic.

## **The appellant**

PHCBS is a SCIO and a community benefit society. It regards itself as a community transfer body for the purposes of the 2015 Act. Its rule 4 states its objects as *"On behalf of the Community of Portpatrick, the restoration, preservation, conservation, maintenance and improvement of Portpatrick Harbour for the benefit of that community and the public at large; and to engage in other appropriate charitable activities as the Society deems necessary for the benefit of the Portpatrick community."* Other rules include provisions about membership and the board of directors. PHCBS has 554 members, of whom 210 live in Portpatrick village. The membership is virtually unchanged since 2016.

During the last few years PHCBS has improved mooring facilities at the harbour, increased harbour income, taken over the local public toilets and adjacent land from DGC through two CATs and, with grant aid, has resurfaced the quayside and created a community hub there. It has a substantial financial reserve.

## **The CAT request and the council's consideration of it**

PHCBS's CAT request, one of the two referred to above, was made on 4 June 2019 and validated on 7 June. It sought ownership of the hall, for a sum of £1.00, and a short-term management agreement during the period of any legal transactions for that ownership. In response to its request, in June and again in July, DGC officers sought discussion with, and further details from, PHCBS. PHCBS declined to discuss or provide further information.

A DGC officer panel gave PHCBS's request a total score of 71 out of 150 on various factors under the headings of engagement, vision and impact, and sustainability. DGC's Wigtown Area Committee's recommendation on 4 September 2019 to the Finance, Procurement and Transformation Committee was that the asset should not be transferred. This was because of a low panel score and because of the division in the local community. It was also agreed that officers should explore the potential for both PHCBS and PCDT to seek mediation. The Finance, Procurement and Transformation Committee accepted the area committee's recommendations and reasons on 29 October 2019, and the decision notice was issued on 5 December. PHCBS and PCDT were subsequently invited to participate in mediation. PHCBS advised that it did not wish to do so.

PHCBS submitted a request for a review of DGC's decision on 19 December 2019. The review was made by DGC's Ad Hoc Covid-19 Sub Committee on 16 June 2020. The outcome of the review was to confirm the original decision not to transfer, and for the same reasons. Notice of this decision was issued on 18 June 2020. PHCBS appealed that decision to Scottish Ministers on 14 July 2020.

### **The alternative proposal**

This was PCDT's CAT request for the village hall. I cannot, and do not, make any recommendation on it.

The DGC officer panel scores for the PCDT CAT request, on the same factors as the PHCBS request, totalled 104 out of 150. The request was refused by DGC on 29 October 2019 because of the exceptionally high number of representations opposed to it, evidencing division in the local community. There is no indication before me that PCDT asked for a review of that decision, nor has PCDT appealed against it to Scottish Ministers. PCDT was willing to participate in mediation.

### **The appellant's eligibility to make its CAT request**

It should not be expected that any substantial question will arise at this stage over an applicant's eligibility, in law, to make a CAT request, particularly when, as here, DGC has completed two previous CATs to PHCBS. But representations from PCDT pose that question. As a basis for Ministers' consideration of the point, I have investigated it in some detail.

Part of the legal framework relates to the rules of the body making the CAT request. If the body falls within the scope of a Ministerial designation order made under the 2015 Act, its rules need to conform with section 34 of the 2003 Act. If the body does not fall within the scope of such an order, the rules need to conform with section 19 of the 2015 Act. The section 34 requirements and those in section 19 overlap, but are different. Further requirements are in section 80 of the 2015 Act.

No designation order was placed before me as part of the initial appeal papers, and neither party submitted one in response to my enquiries. DGC did not know whether PHCBS was within the scope of an order. That signals to me that DGC could not know whether PHCBS's rules should be assessed against section 34 or against section 19. It could not therefore establish whether PHCBS could properly make a CAT request, including the previous requests and the one that is the subject of this case.

In the absence of a Ministerial order, I pursued questions with the parties on the basis that section 19 is relevant. But my own research within DPEA then yielded a copy of an order (SI 2016 No 361). When I put this order to them, neither PHCBS nor DGC suggested that it was not the order that included PHCBS within its scope, and I then pursued questions with both PHCBS and DGC about the compliance of PHCBS's rules with section 34. At the end of my enquiries, however, PHCBS changed its stance and stated that the order does not apply. If that were the case, section 19 would be relevant.

My view is that the order does apply, meaning that the tests for PHCBS's rules are those in section 34 of the 2003 Act. However, given PHCBS's changing stance, I consider its rules against both section 19 of the 2015 Act and section 34 of the 2003 Act, as well as with section 80 of the 2015 Act. That analysis of its rules and of the parties' comments on them leads me to the view that the rules comply with the section 80 requirement; with some, and only some, of the requirements in section 19; and with some, and only some, of the requirements in section 34. On that basis, whether one looks at section 19 or at section 34, PHCBS was not eligible to make the CAT request that it did.

In principle, I take the view that it would be possible for an error of this kind to be made good before a CAT transfer actually takes place, and this could be ensured by imposing a condition on a CAT request decision requiring the necessary rule amendments. But such a condition would need to be reasonable in any particular case. In this case, my view is that some of the changes that would be necessary to bring PHCBS's rules into line with the legislative requirements would mean fundamental changes to the way in which it operates. It would have to become a very different body from what it is now. In essence, the problem in this case is two-fold. First, PHCBS's rules do not meet the essential tests of providing for those of its members who are members of the geographic community of Portpatrick to make up over 50% (section 19) or at least 75% (section 34) of PHCBS's membership and for that local part of its membership to control PHCBS's affairs. Secondly, it would be unreasonable to require PHCBS to change its approach and methods of working in those respects by imposing what I regard as a too-onerous condition.

My overall assessment on eligibility for Ministers to consider is therefore this: not only was PHCBS not eligible to make the CAT request that is the subject of this appeal, it would be unreasonable to impose a condition that would otherwise overcome its non-eligibility. One of my recommendations to Ministers stems from that.

In case Ministers wish to take a different view from mine on eligibility, or as they may wish to consider the merits for other reasons, I then put the eligibility question on one side and go on to deal with the various cases on merits.

### **The appellant's case on merits**

A 2017 report "*Portpatrick Village Hall Development Plan*" by consultancy Here for Growth contains important background. This report was intended to assist with planning for the village hall's future. It envisaged a structured, community-wide engagement process. It identified some community needs. It included an analysis of strengths, weaknesses, opportunities and threats. It listed the types of activities that could take place within the hall. It doubted the likelihood that the hall could become sustainable within the first two years after transfer. It saw the need for market research and marketing.

A consultation meeting on the Here for Growth report was held in January 2019, and extensive consultation and engagement within the community was carried out on community ownership of the village hall. At a meeting in May 2019 there was unanimous support for PHCBS's intention to submit an expression of interest in a CAT. PHCBS's expression of interest and its formal CAT request followed from this.

PHCBS would promote the hall, with a wide range of uses, to all user groups both within and outwith the area. It would focus on delivering an accessible venue to all user groups at affordable prices. The hall would have a role distinct from that of the smaller harbour hub.

PHCBS would assume all the real burdens if the CAT proceeds, although there is a pledge to release the burdens in those circumstances.

Very substantial benefits would arise from PHCBS's ability to work within the real burdens and the multiplicity of uses that could be accommodated. PHCBS has already built a very successful business reputation. With a wealth of knowledge and skills, it would ensure the future viability and sustainability of the facility. The hall would be promoted without any fear of needing to increase current tariffs. PHCBS's umbrella position and management structure could attract several streams of grant funding. There would be no negative consequences.

As a registered charity, PHCBS benefits from financial dispensations and reliefs providing savings of thousands of pounds each year. It has achieved a great deal since 2015. It has taken the harbour into community ownership, turning it round from a debt of £125,000. It has raised over £400,000. PHCBS has successfully completed two CATs for council land and the harbour toilets. Its harbour improvements have produced a much pleasanter and more modern environment whilst still retaining its charm. Its community hub could work in tandem with the hall, with a staffed office on the harbour providing the management base for PHCBS's combined assets, thus minimising overheads. PHCBS has largely satisfied its primary charitable objectives, and can now further support and secure the future of the wider village infrastructure. It has a strong level of governance.

PHCBS has carried out extensive and open consultation and engagement with the community through several avenues. Several public meetings have indicated strong support. Extensive consultation started in 2015-16. There was overwhelming support from PCC and from all attendees when PHCBS declared its intention to pursue a full CAT for the hall at PCC's May 2019 meeting. Its Newsletter No 6 evidences community and stakeholder engagement. The newsletter invited views on a village hall CAT: there was a total of about 40 responses, all positive. PHCBS works alongside many other community groups in Portpatrick, and it rejects DGC's allegation about its CAT request being responsible for community division. There are many letters of support for the CAT request from local stakeholders and community groups.

The hall business plan forecasts costs and income for the first three years after transfer of ownership. Costs (excluding administration and staffing costs, which would be shared with PHCBS's other assets) in each of these years are estimated to be £6,721. Income is forecast to increase, not usage. Letting income in year 1 after transfer is taken as the annual average of 2012-15 income plus 30%, ie £6,806. Years 2 and 3 are forecast to have income increases of 30% to £8,849 and 10% to £9,734 respectively. So there would be a small surplus in year 1 and larger surpluses in years 2 and 3.

PHCBS has shown its ability to deliver on commitment and it has an attractive profile and stable fiscal footing. The path is clear to make the hall a viable and sustainable asset for the community when brought under the umbrella of PHCBS's management and working along with several other community assets.

DGC secretly drove the formation of PCDT and has favoured it over PHCBS.

DGC officers clearly delayed the process of verifying PHCBS's CAT request, and deliberately prevented PHCBS from having any meaningful meetings with them.

DGC failed to comply with the 2015 Act. PHCBS's CAT request was frustrated and misrepresented to both the public and DGC members. The scores and statements applied to PHCBS's CAT request by DGC's officer panel were seriously flawed, misrepresenting the request and local community cohesion. PHCBS did not approve or were not consulted on specified DGC officer reports. DGC has not dealt properly with representations on PHCBS's CAT request. Specified documents were not taken into account by DGC.

PHCBS does not recognise the need for mediation because it has acted openly and transparently. It has a duty to protect its public reputation as a charity, and therefore exposing it to public collaboration with PCDT would be unacceptable.

### **The council's case on merits**

DGC rejected PHCBS's CAT request because of a low panel score and because of division in the local Portpatrick community.

Soon after validating the request, DGC officers took the view that PHCBS is a recognised community transfer body. But they sought discussion with PHCBS with a view to strengthening its CAT request, particularly with reference to the business plan, and more detail on potential working with the Health and Social Care Partnership, on some of the other proposed uses of the hall, and on the consultation undertaken. But PHCBS did not engage in response.

The officers panel considered engagement by PHCBS to have been moderate to weak. Although there had been a moderate degree of information sharing, the level of two-way consultation and idea sharing between PHCBS and the general public was unclear. The only evidence of engagement with a local body was with PCC. The circulation of Newsletter No 6 to PHCBS members was noted, but also noted was the fact that not all members are local to Portpatrick.

The panel considered vision and impact to have been weak to moderate. The submitted business plan focused on the harbour. In the main, the evidence demonstrating positive impact to the local community was poor or weak. There was no mention of addressing either inequality of outcomes or local challenges identified by the community.

The panel considered sustainability to be also weak to moderate. Information relating to financial planning appeared weak, as did the potential for collaborative working and the use of volunteers. PHCBS had demonstrated strong leadership in taking forward the harbour plan and appeared to have strong governance structures in place, but there was no clarity on future risks and their mitigation. It was unclear if the harbour and the hall could operate



in conjunction. It was difficult to accept the proposal for the hall to generate 70% more income by year 3 after transfer.

Overall, the panel advised that the business plan would benefit from engagement across the entire community and that PHCBS should work in partnership with organisations with similar objectives in Portpatrick to produce a more holistic plan to the benefit of all local residents.

Disposal of the hall for a nominal sum would mean no capital receipt for DGC's capital investment strategy, and the property would no longer be available to DGC for alternative uses. If the CAT proceeds, and the benefits proposed are not delivered or the asset is sold on, a condition is sought to protect against capital loss.

A 70% increase in usage of, and income from, the hall in the first three years may be optimistic, particularly in the light of the Covi-19 pandemic.

If the appeal on ownership succeeds, it would be reasonable for DGC to enter into discussions with PHCBS about early entry to enable the hall to continue to operate.

If the appeal fails, DGC would work with the local community to find a suitable partner to take over management or ownership of the hall.

DGC's approach on working with the community to ensure the sustainability of local buildings has been no different in Portpatrick from elsewhere.

There was no obstruction or misrepresentation of PHCBS's CAT request. It was progressed without delay, and in an open and transparent manner, with relevant information posted on DGC's dedicated CAT webpage. Officer support was provided to PHCBS in line with DGC's standard arrangements.

DGC does not agree with PHCBS's claims about withholding, omitting and misrepresenting documentation. DGC has no record of the submission of the Here for Growth report at an early stage. All representations were properly dealt with. The review stage was also properly dealt with.

PHCBS's and PCDT's CAT requests were both treated fairly and equitably. Both were refused. There was no favouritism.

### **The cases for third parties on merits**

#### **PCC**

PHCBS's CAT request is wholeheartedly supported. PHCBS has shown its commitment to Portpatrick in relation to the harbour and through working with the community and community groups. So it has earned the trust of the community of Portpatrick, the majority of whom support its CAT request.

PCC provides a timeline of events which focuses on the formation of PCDT. PCC does not believe that PCDT represents the Portpatrick community.

#### **Others supporting**

Dumfries & Galloway Arts Festival says it would be thrilled to build a relationship with the village hall for performing arts. Portpatrick residents refer to PHCBS's excellent track record and its open and transparent approach. They state their full confidence in its ability to run the hall successfully for the good of the village community, that being the only way to protect the hall's future.

## PCDT

PCDT states that it is a company limited by guarantee, having been incorporated in October 2018. The impetus for its creation was an understanding in 2017 between PCC and DGC that the group running the hall would work towards creating a vehicle to bring the hall into community ownership. In July 2020 PCDT had 74 members of whom 49 were full voting members, locally resident in Portpatrick.

PCDT's own CAT request for the hall scored highly against all the criteria considered by DGC's officer panel. It was rejected by DGC solely because of the potential for division in the village. PCDT believes that its CAT request still stands. It has agreed to mediation with PHCBS as a way forward, and reiterates that agreement now.

PCDT opposes PHCBS's CAT request. Given PHCBS's discriminatory and divisive behaviour, there are serious reservations about its governance and its capacity to deliver social inclusion and community benefit to the whole of the Portpatrick community. It appears to be run in an autocratic manner. Its decision-making lacks transparency.

It is not clear if there is a mechanism for new members to join PHCBS. If PHCBS's CAT proceeds, its rules require the interests of its shareholders in the harbour to be prioritised, resulting in a conflict of interest.

PHCBS CAT request provides little insight into proposals for delivering benefit to the community based on the hall.

PCC meetings have had the focus of discrediting PCDT and spreading misinformation. Petitions have been put together improperly.

## Others opposing

PHCBS does not operate in a democratic manner. Those who control it have actively worked to suppress any opposition. It communicates very little with its shareholders. Further concentration of power in the hands of those who control PHCBS would not be in the best interests of the community.

## Reporter's assessment on merits

### *Complaints about DGC's handling of the case*

There is no evidence that DGC or its officers improperly favoured PCDT at the expense of PHCBS. Nor is there any evidence that DGC officers delayed verification of PHCBS's CAT request; indeed, it is clear that they sought at a very early stage to help PHCBS improve the content of its request, and that offer was rejected.

I accept, without ascribing responsibility as it is unclear to me when PHCBS submitted the documents in question, that some of PHCBS's documents appear not to have been taken into account in DGC's early consideration of PHCBS's CAT request. That position was rectified at the review stage, and I too am able to make my own independent assessment of that documentation. So no prejudice to PHCBS has arisen in this respect.

PHCBS complains about DGC officer reports to committees not having PHCBS's prior approval or not being the subject of prior consultation with PHCBS. But there was no need in my view for such approval or consultation.

In response to PHCBS's complaints about the way in which DGC dealt with third party representations, I prepared a table listing such representations that I proposed to take into account. PHCBS and DGC were given opportunity to comment on the completeness and accuracy of this table, but neither drew my attention to any specific third party representation not already included.

I agree with DGC's view that PHCBS should enter into mediation with PCDT. This could open the way towards the difficult resolution of deep-seated issues, and would be very much in the public interest.

#### *The area for potential ownership transfer*

I clarify the area for potential transfer.

#### *Substantive merits: introduction*

My view about PHCBS's eligibility, in law, to make the CAT request that it did and to carry out a CAT arising from that request is stated above. But I put that aside and deal with the substantive merits.

#### *Delivery against section 82 matters*

A successful CAT should remove the risk of closure for some considerable time.

PHCBS has had considerable successes and achievements in recent years.

The production of the Here for Growth report was important in the process that led to PHCBS's CAT request. But the consultation on the report was not *the "structured, community-wide engagement process"* that the report itself envisaged. In addition, many of the questions that were raised by the report were not tackled in the process that then led to the CAT request and its supporting information. Consultation on the CAT request itself had similar deficiencies. The various public meetings did not constitute structured engagement.

The list of proposed uses of the hall included in the CAT request show little to indicate that thinking had progressed very far beyond the corresponding statements in the Here for Growth report. The business plan for the hall looks forward only three years, contrary to Scottish Government guidance. It excludes staff costs, and makes no proper allowance for a backlog of maintenance and repairs. There is little justification for PHCBS's forecast income increases in the first three years after transfer of 30%, 30% and 10%. It does not examine the implications in this context for the fee levels to be met by users. There is no reason to think that the availability of grants in the past for harbour regeneration would

necessarily translate, if needed, into grants for village hall use, and this is not explored. The possible cross-subsidisation of village hall costs from surplus harbour funds is hinted at, but again is not explored.

PHCBS's intention to use a staffed office at the harbour to manage both the harbour and the village hall represents good use of resources, and the real burdens appear to present no problem.

The fact that PHCBS is very substantially closed to new members does not demonstrate good leadership or governance and limits responsiveness, participation and the potential development of consensus. The evident limitations in consultation processes and the failure to develop the pointers in the Here for Growth report also do not demonstrate good leadership or governance.

The provision of a wide range of community activities in one location can have significant advantages, and PHCBS's proposal has potential to achieve those advantages. But its list of proposed uses for the village hall is not supported by any market research or in-depth contact with such user groups as may exist. Its proposal includes no targets which show how improved performance would be measured. The proposal's promotion of economic development would be somewhat limited, and the promotion of environmental wellbeing is far from certain. The proposal includes no detail about reducing inequalities of outcome which result in socio-economic disadvantage.

DGC has refused PCDT's alternative proposal, but that proposal could be resurrected. I make only a limited assessment of it. PCDT's proposal scored better than PHCBS's on all three main headings – engagement, vision and impact, and sustainability – in DGC's officer panel scrutiny. But there was substantial opposition to it from within Portpatrick, and so could not be reasonably sustained.

On section 82 matters overall, the deficiencies in PHCBS's proposal outweigh the success it has had in regenerating the harbour.

### *Demonstration of best value*

The sum being offered for the village hall in PHCBS's CAT request is a nominal sum, so any decision to transfer the hall must represent good use of public resources. I therefore examine the request in relation to seven Best Value themes.

PHCBS has a commendable broad vision, but its leadership appears over-confident, and in my view there is doubt about whether its vision is sufficiently attuned to the tasks ahead in the event of the CAT taking place. It is not at all clear that its CAT proposal demonstrates a sufficiently collaborative approach to the challenges that taking over the village hall would bring. There is some evidence to suggest that the way it has approached its transfer request has not met the best modern standards of community engagement. Matters of that kind demonstrate a failure of governance and accountability. The static character of PHCBS's membership is a very important structural limitation. PHCBS's intention to provide a joint harbour-hall office represents good use of resources but, overall, its resource investigations lack depth. It gives no indication of any consideration having been given to performance management. Its proposals do not give much assurance of long-term sustainability. The effect of its proposals on equality are not made clear. In sum, I find that the proposed CAT would not represent Best Value.

### *Alignment with Scottish Government national outcomes*

I find that the CAT request would make a weak or poor contribution to meeting Scottish Government national outcomes. Although that has to be set against DGC's clear wish to relinquish financial responsibility for the village hall, the building's disposal does not appear critical to any short- or long-term financial strategy. That points strongly to the CAT request being rejected.

### *Checklist of matters in Scottish Government guidance*

I cover most of these matters under other headings.

### *Conditions*

I support DGC's request that, if the CAT were to proceed, a condition should require PHCBS in certain circumstances to pay back any increase in the value of the asset.

If the appeal relating to ownership transfer is allowed, I see no reason why DGC and PHCBS should not enter into discussions about early entry to the hall, pending a conclusion to the necessary legal transactions about ownership, to enable the hall to continue to operate. That should be the subject of a condition.

### **Reporter's conclusions and recommendations**

If Ministers agree with my assessment on eligibility, I recommend that the appeal be dismissed and the CAT request be refused for that reason.

In my view there are also reasonable grounds for refusal of PHCBS's CAT request as referred to in section 82(5) of the 2015 Act. Therefore, if Ministers disagree with my assessment on eligibility, I also recommend that the appeal be dismissed and the CAT request be refused.

If Ministers are minded to uphold the appeal and approve the CAT request for ownership contrary to my recommendations above, I recommend that their decision be made subject to conditions and that they issue an appropriate direction to DGC.

Scottish Government  
Planning and Environmental Appeals Division  
Hadrian House  
Callendar Business Park  
Callendar Road  
Falkirk  
FK1 1XR

DPEA case reference: CAT-170-1

The Scottish Ministers  
Edinburgh

## Ministers

In accordance with my minute of appointment, I present my report in connection with a review appeal against the refusal by Dumfries & Galloway Council of a community asset transfer request by the Portpatrick Harbour Community Benefit Society for Portpatrick Village Hall, Welsh Place, Portpatrick, Stranraer, DG9 8TZ.

My report takes account of the appellant's asset transfer request dated 4 June 2019, the council's decision to refuse the request on 29 October 2019, the appellant's request for a review on 19 December 2019, the council's decision on 16 June 2020 to confirm its original decision, the appellant's appeal submission dated 14 July 2020, and the council's response to the appeal dated 31 July 2020. I have also taken account of the documents associated with these various stages, together with the parties' written submissions in response to my questions and requests for further information. I came to the view that neither a hearing session nor a site inspection was necessary.

My report is laid out in seven chapters. Chapter 1 outlines background information. Chapter 2 deals with the appellant's eligibility, in law, to make the transfer request that it did, and includes my assessment of that. Chapters 3, 4 and 5 summarise the cases on merits, ie on matters other than those covered in chapter 2, for the appellant, for the council, and for third parties respectively. Chapter 6 gives my assessment on merits. Chapter 7 provides my conclusions and recommendations arising from chapters 2 and 6.

## CHAPTER 1. BACKGROUND

### THE STATUTORY CONTEXT

1.1 Part 5 (sections 77 to 97) of the Community Empowerment (Scotland) Act 2015 came into force in January 2017. It provides for a right for a community transfer body to make a request to a relevant authority (a local authority or one of a range of other public bodies) for the transfer of ownership, lease or other rights in land, including buildings. Other parts of the 2015 Act, and indeed other legislation, also have a bearing on such requests.

1.2 Section 77 defines a community transfer body as either a community-controlled body, or a body designated as a community transfer body by an order made by the Scottish Ministers, or a body that falls within a class of bodies designated as community transfer bodies by such an order. A body which is a community transfer body by virtue of an order and makes a CAT request has to have a constitution or the equivalent which contains certain provisions as specified in section 34 of the Land Reform (Scotland) Act 2003 as amended by section 37 of the 2015 Act. A body which makes a CAT request and which is a community transfer body but not by virtue of a Ministerial order is subject to sections 77, 97 and 19 (in turn) of the 2015 Act: section 19 specifies certain provisions that the body's constitution must have. The two alternative sets of constitutional requirements (section 34 of the 2003 Act or section 19 of the 2015 Act) overlap, but are different. Section 80 of the 2015 Act states an additional requirement for the rules of a community transfer body making a CAT request for the ownership of land.

1.3 Section 79 of the 2015 Act requires the community transfer body to specify the land to which its request relates, the reasons for its request, the benefits which it considers will arise if the request is agreed and, if it is requesting ownership, how much it is prepared to pay for the asset.

1.4 The relevant authority must decide whether to agree to or refuse the request in line with section 82. It must assess the request against specified criteria, and it must agree to the request unless there are reasonable grounds for refusal. Its decision must be made in a manner which encourages equal opportunities. Section 82(3) of the Act says that in reaching its decision it must take into consideration the following matters:

- (a) the reasons for the request;
- (b) any other information provided in support of the request;
- (c) whether agreeing to the request would be likely to promote or improve economic development, regeneration, public health, social wellbeing, or environmental wellbeing;
- (d) whether agreeing to the request would be likely to reduce inequalities of outcome which result in socio-economic disadvantage;
- (e) any other benefits which might arise if the request were agreed to;
- (f) any benefits that might arise if the authority were to agree to or otherwise adopt an alternative proposal, which could include another CAT request, for the same land;
- (g) how such alternative benefits would compare to any benefits in (c) and (e) above;
- (h) how such alternative benefits relate to other matters the authority considers relevant;

(i) any obligations imposed on the authority that may prevent, restrict or otherwise affect its ability to agree to the request; and

(j) such other matters as the authority considers relevant.

1.5 The authority must issue a notice giving its decision.

1.6 Section 84 says that whilst it is considering a CAT request, it must not dispose of the land to which the request relates to anyone other than the community transfer body.

1.7 If an authority refuses a CAT request, section 85 enables the community transfer body to appeal to the Scottish Ministers. As an alternative, if the authority is a local authority, section 86 enables the community transfer body to apply to the authority to carry out a review of the case, and the authority must then do that. A decision notice arising from a review replaces an earlier decision notice. If an authority refuses a request on review, the community transfer body may appeal under section 88 to the Scottish Ministers.

1.8 Section 93 allows a relevant authority to decline to consider a CAT request if the request is for the same rights to the same land as in a CAT request made in the previous two years.

1.9 Also relevant is the Local Government in Scotland Act 2003. Section 1 places a duty on a local authority to make arrangements which secure best value, that is continuous improvement in the performance of the authority's functions. Section 11 allows a local authority to dispose of land for less than the best consideration. The Disposal of Land by Local Authorities (Scotland) Regulations 2010 set out the procedure and criteria to be met by councils proposing to dispose of land for a consideration which is at least 25% below the best that can reasonably be obtained. The local authority must appraise and compare the costs and other disbenefits and the benefits of the proposal; it must be satisfied that the disposal for the reduced consideration is reasonable; and the disposal must be likely to contribute to the promotion or improvement of economic development or regeneration, health, social well-being, or environmental well-being.

## SCOTTISH GOVERNMENT GUIDANCE

1.10 In 2017 the Scottish Government published guidance for [relevant authorities](#) and [community transfer bodies](#) to support those involved in the process. This guidance is very relevant to my report, and I refer to its details where appropriate below. The guidance in the two documents is similar, but they have different paragraph numbers. Unless stated otherwise, any reference I make to paragraph numbers in the guidance is to the guidance to authorities.

## THE ASSET

### *Portpatrick Village Hall and the associated land*

1.11 The asset that is the subject of the CAT request in this case consists of a building called Portpatrick Village Hall<sup>1</sup> and land adjacent to it. During the initial course of this appeal the clearest indication of the area that was the subject of the CAT request is that shown by the black boundary on a [plan](#) provided by DGC (and as considered by DGC).

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<sup>1</sup> I refer below to the building as "the village hall" or "the hall". In the heading to this report I correct the postcode written on the CAT request form.



DGC's title to the small area bounded in red on that plan was not clear at that stage. However, DGC subsequently confirms that at the time of the request it did have title to the area bounded in red. DGC has applied to the Registers of Scotland for voluntary registration and this is reflected in the relevant [title sheet](#). The area that PHCBS wishes to have transferred consists of the combined areas edged black and red on the plan. DGC's legal view is that, if the appeal is successful, the combined area would be transferred. PHCBS does not dissent from this.

1.12 DGC confirms that there appears to be no impediment to it selling or leasing the hall and the associated land as described above.

1.13 The asset area is shown in a rather wider context on a further [plan](#). It is an irregularly shaped area covering about 1,400 square metres (my measurement).

1.14 The village hall site was previously part of the Dunskey Estate, and was given by the Orr Ewing family in the 1920s to the then Trustees of Portpatrick Public Hall. The hall was built in 1929, and has served as a community facility since then. It was extended in 1969 and 1973. It is not listed. Ownership passed in turn to Wigtownshire District Council and then to DGC, the present owner.

1.15 A condition survey was carried out in 2014 by DGC's Principal Building Surveyor. The [report](#) of the survey indicates that the hall's external walls are predominately brick cavity walls, faced externally with wet dash cement render. The roofs consist of timber-framed, pitched and flat roofs, mainly surfaced with bitumen felt (which in 2014 was considered to be serving well). The survey report (at page 4) includes a plan showing the internal sub-divisions of the building. It is a single-storey building (covering about 500 metres – my measurement), with over half of its floor space consisting of the main hall with timber strip flooring (with a capacity of 505 people standing) and a stage. There are also two smaller rooms, a relatively modern kitchen, and three relatively modern toilets (ladies, gents and disabled). The land outside includes a car park. Services consist of a relatively modern electrical installation which also provides heating for the building; mains water supply; and connection to the public sewer.

1.16 The surveyor regarded the building in 2014 as being in generally fair condition commensurate with its age. Page 12 of the survey report lists proposed works costing a total of £25,800 over 10 years: the sequence of these is shown in column (a) of the table below. The most expensive items noted were works to some of the roofs (£6,000), decoration to the external walls (£5,000), sanding and re-sealing the hall floor (£5,000), and eradication of Japanese knotweed (£3,000).

	(a)	(b)	(c)
	Works proposed in 2014 report	Works undertaken by 2020	Works remaining in 2020 (= (a) minus (b))
Year 1	£10,600	£6,500	£4,100
Year 2	£1,300	£300	£1,000
Years 3-5	£7,700	£1,200	£6,500
Years 6-10	£6,200	£1,200	£5,000
TOTAL	£25,800	£9,200	£16,600

1.17 DGC provides a [repairs schedule](#) which indicates those works recommended in section 4 of the survey report that have been undertaken to date: the way in which they relate to the 2014 survey is shown in column (b) in the table above. Column (c) is my calculation of the remaining works. For years 1-5, column (c) shows that works costing

£11,600 in 2014 were still outstanding in 2020. Works costing a further £5,000 in 2014 are also due in years 6-10.

1.18 DGC's 2014 report on the building says that it excludes any investigation into the presence of asbestos-containing materials, and DGC says nothing about asbestos now. However, the [minutes](#) of a PHCBS meeting in May 2019 refer to asbestos being in the building, mainly in the roof.

1.19 As explained subsequently<sup>2</sup>, DGC describes its approach to the maintenance of the hall over recent years as *"a minimal approach to keeping the premises wind and watertight"* without considering *"potential future maintenance associated with buildings of this age."*

1.20 As in 2014, DGC now describes the current condition of the hall as *"fair"*. The interior is sound and dry with little sign of existing damp. Attention may be required to external decoration. The rooftop mineralised felt is still extant. Japanese knotweed may still be evident, as cut stalks can clearly be seen protruding from the ground between the hall and the adjacent bowling club.

1.21 There are three real burdens relating to the property which are detailed in an [internal DGC communication](#) of 2007. In summary they are:

- DGC is to maintain and insure the buildings and to restore the property after fire; no new buildings are to be erected; buildings are to be used only for public meetings, social and recreative purposes, or for other usual public hall purposes;
- various uses are prohibited, particularly noxious uses; and
- the council is to maintain and repair drains and sewers.

1.22 The estimated value of the property in September 2019, were it to be placed on the open market for sale, would be in the order of £120,000. That estimate was made by DGC's Service Leader Estates Management, who is a Royal Institution of Chartered Surveyors Registered Valuer. PHCBS does not comment on this valuation, nor does it produce its own valuation. Scottish Government guidance (paragraph 12.2) encourages the relevant authority and community transfer body to obtain a joint valuation, but this has not been done so far in this case.

### *The hall's surroundings*

1.23 Immediately to the east of the asset area are houses fronting the road. South-west of the hall is a bowling green, then tennis courts. The land rises steeply behind the hall and these other features. Opposite the hall and the nearby houses is an area of open space largely used, apparently, as a putting green. South-east of the bowling green and tennis courts, and less than 50 metres from the village hall at its nearest point, is Portpatrick Harbour. There are a number of buildings on the harbour's south-western side. Elsewhere in the village are hotels, public houses, restaurants, cafés and shops. Stranraer is about 10 kilometres distant by road.

1.24 PHCBS says the population of Portpatrick currently stands at about 600 residents. The 2011 Census indicates a population of 534.

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<sup>2</sup> Report to Wigtown Area Committee, 4 September 2019.

### *Management history of the hall and proposals for it, 2013-19*

1.25 Information on DGC's approach to the hall in recent years is provided particularly in two officer reports to its Communities Committee – in [June 2019](#) and [September 2019](#), and in a report to its Wigton Area Committee in [September 2019](#).

1.26 In June 2013, a body called the Portpatrick Trust<sup>3</sup> requested the transfer of Portpatrick Village Hall and other council assets for a nominal sum. This was one factor in the inclusion of the hall as one of 68 council-owned facilities in DGC's general community facilities review commencing in 2013, seeking to achieve savings of £533,800 by disposal to community management/ownership. For various reasons the asset transfers proposed in 2013 did not come to fruition.

1.27 In the meantime, in a transaction dating from 2012, with the use of community funds arising from a windfarm development, the Portpatrick Trust was purchasing the harbour from a private owner. In June 2015, having paid only part of the purchase price and seemingly in financial difficulty, the Portpatrick Trust was dissolved and its assets, including the part-purchased harbour, transferred to the newly re-formed PHCBS<sup>4</sup>. The circumstances surrounding this are described in a [note](#) prepared by PHCBS in response to my questions and in the [minutes](#) of the Extraordinary General Meeting of the Portpatrick Trust when it was replaced by PHCBS in June 2015.

1.28 PHCBS launched a community share offer in September 2015. That raised £100,000. It was therefore able to pay the remaining required amount for the harbour.

1.29 In October 2015 DGC [agreed](#) that the village hall was one of the facilities for which local management committees should take management responsibility by 31 January 2016 under its standardised agreement or through a lease. It also agreed that, if management committees were unwilling or did not have the capacity to take on full responsibility, DGC officers would work with key stakeholders to seek suitable alternative accommodation for current user groups and close the facility by February 2016; but a further report would be presented to members if suitable alternative accommodation for current user groups could not be identified.

1.30 In November 2015 DGC hosted a [public meeting](#) at the village hall about its future, with about 70 members of the public present, including user groups, community councillors and members of PHCBS. The DGC representatives presented the council's position to the meeting, and noted that the turnout proved how much the village hall means to the local community. It was recognised on behalf of DGC that there was no alternative provision available for all hall users within Portpatrick, so the hall could not close. It was confirmed for DGC that DGC required the community to take over the management of the facility either by a new management committee or by an "*established committee*". DGC did not see PCC taking on this role as its remit is to benefit the whole of the community on a range of issues, not just the hall. However, DGC did see PCC playing a key role, particularly around consultation with the local community. The meeting note records that, in the light of community anxiety about timescales, it was suggested on behalf of DGC that the community should be allowed until 31 May 2016 to take on board all the information that had been provided and to investigate all costs in detail.

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<sup>3</sup> This is sometimes referred to as the Portpatrick Harbour Trust.

<sup>4</sup> PHCBS was called the Portpatrick Community Benefit Society at this stage.

1.31 DGC's note of the November 2015 meeting included a table showing income and expenditure for the hall for 2012-13, 2013-14 and 2014-15<sup>5</sup>. The table is not easy to read, and I summarise the position with rounded figures as follows:

	2012-13	2013-14	2014-15
Staff costs	£5,841	£3,012	£9,709
Other costs	£25,327 <sup>6</sup>	£4,901	£7,579
Total costs	£31,168	£7,913	£17,288
Income	£6,702	£4,812	£7,084
Net loss <sup>7</sup>	£24,467	£3,101	£10,206

1.32 A [public meeting](#) in the village in January 2016 also referred to a May 2016 deadline, with a DGC representative there referring to a "*feasibility study*" (on the feasibility of the community taking over the management and/or maintenance of the hall) needing to be completed by then.

1.33 In August 2016, in a joint [letter of intent](#), PHCBS and PCC sought DGC's support for the principle that PHCBS and PCC should develop a community development plan and that no alternative proposals should be considered for the hall until a viable community development plan had been formulated. A viable community development plan would include the identification of the resources, strengths, weaknesses and priorities of the community. This would support a CAT for the village hall. A central part of the plan would be to look at the potential for the village hall and to seek to develop a well-defined business plan for it. The letter referred to the harbour being on track to generate a healthy charitable surplus "*that may be utilized to help support other community infrastructure in the future.*"

1.34 The letter of intent also referred to a group having been established "*with remit to investigate the viability and sustainability of hall and provide the community with advice on the way forward*". The letter states that this group had "*identified several financial, legal and historic issues associated with the hall which the community of Portpatrick will require to deal with in order to provide the community with assurance that the hall transfer (either as an asset transfer or simply as a management committee) could progress.*"

1.35 According to a [report](#) by consultancy Here for Growth (see paragraphs 3.4-5 below), PHCBS had come to the view in 2016 that taking on the hall was not a viable option for it at that time, as its priorities lay with the development of the harbour. Therefore, PCC co-opted new members to develop a steering group<sup>8</sup> in relation to a potential CAT.

1.36 DGC's position in response (Communities Committee, October 2016, confirmed by full council in December 2016) was to seek expressions of interest from "*other groups*"<sup>9</sup> within the community, as well as relocating existing user groups once alternative

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<sup>5</sup> In answer to questions that I put to DGC about this table, DGC says that the negative "payments to other bodies" reflect invoices to the RNLI and Portpatrick Folk Festival for use of the performance rights licences being coded to this code rather than an income code. The income that had been coded to "rent harbours" was for booking fees received in 2012-13 and were coded to rents harbours by mistake, when they should have been coded to the room let code.

<sup>6</sup> Emergency repairs and water charges were significant components of the higher costs incurred in 2012-13 compared with the other years.

<sup>7</sup> Apparent errors due to rounding.

<sup>8</sup> This appears to have been the same group as the one referred to in the letter of intent.

<sup>9</sup> The groups mentioned in the immediately preceding minute of the meeting were "Portpatrick Harbour Trust and Portpatrick Community Council".

accommodation had been identified, noting that Portpatrick Primary School could be used as alternative accommodation for some user groups and that there might also be alternative private sector provision that could be suitable, subject to further exploration.

1.37 On 1 July 2017 a two-year service level agreement was signed between DGC and PCC. The agreement stated that PCC shall commit to work to develop an entity capable of undertaking a CAT of the hall during the two-year period. Under the agreement PCC was responsible for taking bookings, opening, closing and cleaning the hall, while DGC continued to take the income and pay all costs associated with the building.

1.38 At a PCC meeting in [May 2018](#) reference was made to the need for a business plan for the hall to increase commercial activity, in order to see if a break-even stage could be reached.

1.39 A PHCBS meeting in [May 2019](#)<sup>10</sup> referred to very positive feedback on the prospect of PHCBS taking over the village hall, but the minutes do not include anything that can be taken as a resolution to proceed in a particular manner.

1.40 By mid-2019, of the 68 properties referred to in paragraph 1.26 above, DGC had accepted that six would be excluded from the community facilities review. Progress had been made with 60 of the remaining 62, but two were not being managed by local communities. One of these was Portpatrick Village Hall, as no suitable vehicle for transfer had been developed. According to DGC, there was significant division within the community.

1.41 That division had been reflected in the submission to DGC in April and May 2019 of two stage 1 expressions of interest<sup>11</sup> in a CAT for the hall by two separate organisations, PCDT and PHCBS respectively.

1.42 On 27 May 2019 PCC asked DGC to extend the 2017-19 agreement “*until such times as the future of the hall is decided with regard to the Community Asset Transfer Applications received by DGC.*” DGC officers asked PCC to consider possible amendments to the agreement so that it would require the PCC Hall Working Group only to run the hall operationally, rather than work to develop an entity capable of undertaking a CAT within the life of the service level agreement; and, to reduce budget pressure on DGC, for PCC to assume the annual costs of running the hall (stated to be £3,100).

1.43 DGC’s Communities Committee agreed the officers’ preferred option put to it on 11 June 2019. This was that the current agreement with PCC should be reviewed for a defined period to enable consideration of the CAT requests that had been received, on the basis that PCC would meet the current revenue costs. An alternative option – to transfer responsibility for the management of the hall to PCDT under a standardised management agreement for two years as requested within its stage 1 expression of interest – was included in the officer report, but was neither recommended by officers nor agreed by members.

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<sup>10</sup> This document is headed “*Minutes of Meeting of Portpatrick Harbour Community Benefit Society ...*” but the meeting appears to me to be a meeting of the Board of Directors.

<sup>11</sup> Scottish Government guidance (paragraph 8.2) says it may be helpful for the relevant authority to invite outline proposals as a pre-application stage. Community bodies would then know whether they had support from the relevant authority before undertaking the substantial work to produce a full CAT request, or applying for funding. A statutory request would then follow. These two stages are referred to below, following DGC’s practice, as stage 1 expression of interest and stage 2 CAT request.



1.44 PCC [responded](#) that it was not in a position to accept DGC's 11 June 2019 decision. However, it confirmed that it would continue to deal with operational tasks at the hall such as opening/closing, cleaning and taking the bookings: it did not want the responsibility of taking income and incurring expenditure associated with the building (including utility bills, insurance and repairs and maintenance). PCC continued to operate the hall in that way.

1.45 At its meeting on 17 September 2019 DGC's Communities Committee agreed that DGC should implement a new agreement with PCC, with PCC having operational but not financial responsibility for the facility, necessitating an increase in fees and charges from October 2019 or (dependent on the type of booking) January 2020. This would reduce budget pressure and prioritise expenditure. It was recognised that a full CAT was not being achieved at that stage, but DGC saw benefits in retaining the hall as a community asset, continuing current and future bookings, and consistency with all other community facilities in removing budget pressure.

1.46 PCC then continued to have day-to-day operational control of the hall (opening, closing, cleaning and taking bookings), and DGC dealt with all repairs, maintenance and health and safety matters. PCC has not agreed to a new agreement as put forward by DGC's 17 September 2019 Communities Committee, as it is worried that this would contravene the terms of the 2015 Act. On 29 October 2019, when it also rejected two CAT requests for the hall (see paragraphs 1.65-66 below), DGC's Finance, Procurement and Transformation Committee decided that the village hall should remain open and in DGC's ownership until an alternative arrangement could be agreed. However, the hall has been closed since March 2020 because of the Covid-19 pandemic.

## THE APPELLANT

1.47 PHCBS is a SCIO (charity number SC035754). It has been registered as a charity (originally as a company limited by guarantee) since 2004, and its present constitutional form as a community benefit society dates from August 2015. It became the first community benefit society in Scotland with charitable status. It was converted from its previous form to enable the issue of community shares: it believed the new form would be optimal for its development and would provide for an active and engaged membership.

1.48 PHCBS regards itself as a community transfer body for the purposes of the 2015 Act. I deal with this matter further, particularly in relation to making CAT requests, in chapter 2 below.

1.49 PHCBS's [rules](#), which have been unchanged since 2015, include its objects. Rule 4 states its objects as: *"On behalf of the Community of Portpatrick, the restoration, preservation, conservation, maintenance and improvement of Portpatrick Harbour for the benefit of that community and the public at large; and to engage in other appropriate charitable activities as the Society deems necessary for the benefit of the Portpatrick community."* PHCBS's powers are stated in rule 5, *"The Society may do all such lawful things as may further the Society's objects and, in particular, may borrow or raise funds for any purpose that is beneficial to the Society"*, and rule 6, *"The Society may carry on any trade, industry or business for the benefit of the community which is in furtherance of its Charitable Purposes."*

1.50 Rule 13 provides for admission to membership at the board's discretion of anyone who supports PHCBS's objects and pays the appropriate subscription. Rule 14 limits membership to those aged 16 and over, requires any application for membership to include

an application for at least one share in the Society, and stipulates that the directors must approve each application for membership. Rule 16 says that all members agree to participate in general meetings and take an active interest in the operation and development of the society and its business. Rule 31 provides for general meetings to be convened at the request of the board of directors, and rule 34 includes a requirement for an annual general meeting. Rule 66 provides for the management of the society's business by the board of directors who, under rule 71, may delegate those functions.

1.51 Although PHCBS's annual accounts in recent years make reference to its memorandum and articles of association, that is an error and it has no memorandum and articles.

1.52 The [2015-16 annual report and accounts](#) refer to a successful community share issue during that year, with 554 shareholders holding a total of 101,100 £1 shares at the year-end. Those shareholders were PHCBS's sole members, and the share offer was then closed. The membership has remained mainly static since then: there have been only nine membership changes since 2016, arising from deaths or share transfers. The number of members remains at 554.

1.53 At my request, PHCBS has provided information on where its members live, as follows:

- (a) Portpatrick village residents 210,
- (b) Stranraer town residents 73,
- (c) Other DG9 residents (see [map](#)) 54
- (d) elsewhere 217.

1.54 PHCBS points out that a substantial number of those identified in category (d) are local people who currently reside elsewhere but still have family ties and an active interest in the village. They return regularly to the village. A substantial number of those in category (d) also own second properties in the village and regularly reside in them.

1.55 I have asked PHCBS whether it is currently open to new members and what qualifications are currently required of new members (eg area of residence; purchase of shares). In response, PHCBS refers me to its rules 13 and 14 (see paragraph 1.50 above). PHCBS comments that its rules do not preclude the further sale of community shares or the transfer of shares under those rules.

1.56 PHCBS's initial focus was the harbour. This is not much more than 30 kilometres from the Irish coast in a key strategic position as a stopover point for many boats navigating the North Channel. PHCBS's [harbour business plan](#) included this: *"The Portpatrick Harbour community benefit society has been formed to secure the acquisition of Portpatrick harbour into the ownership and for the benefit of the community of Portpatrick and the public at large.... A new community benefit society with charitable status has been formed to facilitate raising a community share offer which will allow us to achieve the funding required to complete the purchase of the harbour... Securing this iconic asset will serve to bring our Community closer together through continued consultation and personal involvement in this socially rewarding project which will in time generate funds for the benefit of further social projects within the community helping to stimulate local employment and preserve the local economy."*

1.57 PHCBS aimed at creating sufficient financial fluidity within five years to repay every share holder should they wish to withdraw at that time. PHCBS achieved its financial goal of creating a financial reserve of £100,000 after 3½ years.

1.58 Annual reports and accounts are also provided for [2016-17](#), [2017-18](#), [2018-19](#) and [2019-20](#). For 2016-17, a 10% increase in harbour income was reported as a result of *“investment in improving mooring facilities and general increase in business.”* 2017-18 was noted as *“a very productive time for the Society”* with the introduction of more new moorings. During the same year PHCBS completed two CATs, taking over the local public toilets and adjacent land from DGC, increasing the asset value of the harbour from £75,000 to £125,000. The annual report for 2018-19 refers to the quayside surface having benefitted from complete resurfacing through two grants from national funders. The 2019-20 report refers to a newly built community hub at the harbour, funded by a grant of £134,564 from Marine Scotland.

## THE TRANSFER REQUEST AND THE COUNCIL’S CONSIDERATION OF IT

1.59 PHCBS’s stage 1 expression of interest in May 2019 was followed by its statutory stage 2 CAT [request](#) on 4 June 2019. DGC validated the request on 7 June.

1.60 The request sought ownership of the hall, under section 79(2)(a) of the 2015 Act, for a proposed price of £1.00.

1.61 The request form before me also says that other rights were sought under section 79(2)(b)(ii) of the Act, but the space (section 3C) on the form to indicate *“What are the rights you are requesting?”* is blank. In response to my enquiry on the point, PHCBS says that this part of the form *“should state that the Society offered to manage the facility in any interim period which existed while the CAT process was being undertaken and while Dumfries and Galloway Council attempted to clear the disputed Title for the property. This appears to have been erased from the document?”* Given the reference to erasure, I asked DGC for confirmation that the [application form](#) that appears on the DPEA website without the explanation in italics above is a true copy of the application form as submitted. DGC replied that it appeared to be so. Nevertheless, a DGC officer [report](#) to the Communities Committee on 11 June 2019, four days after validation of PHCBS’s CAT request, says that the request *“includes a request for a Short Term Standardised Management Agreement during the period of any legal transactions ...”*. From that it appears that the application form before me is incomplete. Whatever the true position about erasure of part of the submitted form, it is clear that DGC officers accepted that other rights were being sought under section 79(2)(b)(ii) and had a reasonably clear understanding of what those rights were. I therefore deal with the appeal on the basis of the request including the section 79(2)(b)(ii) element that PHCBS says it includes.

1.62 DGC responded to PHCBS’s request on [14 June](#). It felt that the request could be strengthened by discussion with its officers to provide more detail; there was time to develop PHCBS’s business plan for the hall as the earliest committee at which any CAT application could be considered would be in September; DGC specified *“in the spirit of critical friend”* some of the areas where it was thought that the plan could be improved. That offer of assistance was repeated in a DGC email on [12 July](#). However, there is nothing to indicate that any significant DGC-PHCBS discussions took place in response to these communications. It appears that PHCBS provided no further information in response.

1.63 By 1 August PCDT had also made a CAT request for the villager hall. Scottish Government guidance says (paragraph 9.29) that multiple requests may be made for the



same property; that they may be processed in parallel; and that, ideally, all community transfer bodies interested in a particular property would work together to submit a single request, but this is not always practical. DGC's approach to there being two requests for ownership of the same asset is described in a [report](#) to its Wigtown Area Committee on 4 September. The two applications were dealt with at the one meeting, but there were separate agenda items and separate reports. An officer panel had been established to evaluate each application. The choices for the Area Committee were to recommend both applications, or one of them, or neither of them as suitable for a CAT. The Finance, Procurement and Transformation Committee would then determine DGC's final position.

1.64 The officer panel had therefore considered the two CAT requests prior to the area committee meeting. The panel consisted of DGC's Community Empowerment Manager, Ward Officer and Community Asset Manager. The three panel officers reviewed and scored the available information independently. Their individual scores were then collectively scrutinised and reviewed before each officer finalised his or her individual scores. The individual scores were then amalgamated to provide an [overall score and narrative summary](#) for members. Scores for PHCBS's CAT request under the main headings were: engagement 13 out of 30; vision and impact 29 out of 60; sustainability 29 out of 60; total score 71 out of 150. I refer to the scores further in chapter 4 below.

1.65 The area committee's 4 September [recommendation](#) on the PHCBS request was that the asset should not be transferred. This was because of a low panel score and because of the division in the local Portpatrick community. The area committee's recommendation on the PCDT request was also that the asset should not be transferred, in that case on the basis of the exceptionally high number of representations opposed to the request, evidencing division in the local community. It was also agreed that officers should explore the potential for both PHCBS and PCDT to seek mediation through national organisations to reduce division within the local community.

1.66 The recommendations and reasons were [reported](#) to DGC's Finance, Procurement and Transformation Committee on 29 October. The committee accepted them. [Notice](#) of the decision on the PHCBS request was issued on 5 December 2019.

1.67 DGC reports that PHCBS and PCDT were subsequently invited to participate in mediation. PHCBS advised that it did not wish to do so. PCDT were willing to participate.

1.68 PHCBS submitted a request to DGC, under section 86 of the 2015 Act, for a review of its decision on 19 December 2019. The review was [carried out](#) by DGC's Ad Hoc Covid-19 Sub Committee on 16 June 2020. The review considered all of the information provided with the original request along with the reasons and information PHCBS put forward with its request for review. It also considered representations received during the review process and PHCBS's response. The [outcome](#) of the Review was to confirm the original decision not to transfer, and for the same reasons. [Notice](#) of this decision was issued on 18 June 2020.

1.69 It is against that decision that PHCBS made its [appeal](#), under section 88 of the 2015 Act, to Scottish Ministers on 14 July 2020. The appeal was acknowledged in two emails on 16 July ([here](#) and [here](#)).

## THE ALTERNATIVE PROPOSAL

1.70 The proposal I refer to here was considered by DGC in 2019. It is not a proposal on which I can make any recommendation. However, information about it (both here and elsewhere in this report) is relevant to a full understanding of the cases for and against the proposal for which I am required to make a recommendation.

1.71 The alternative proposal was put forward by PCDT. DGC points to the origins of PCDT being in the group set up by PCC (see paragraphs 1.34-35 above). DGC notes that the five founding directors of PCDT were among the nine members of that working group. That group commissioned the report by Here for Growth (see paragraphs 3.4-5 below). Information provided by DGC indicates that PCC disbanded the group in February 2019, but by that time PCDT had been incorporated (in September 2018) as a company limited by guarantee. PCDT was fully functioning by March 2019.

1.72 DGC regards PCDT as a community transfer body for the purposes of the 2015 Act. I do not comment on that one way or the other.

1.73 I have already referred (paragraphs 1.41 and 1.63) to PCDT's submission of a stage 1 expression of interest in the village hall in April 2019 and its stage 2 CAT request having been validated by DGC on 1 August 2019.

1.74 Like PHCBS, PCDT requested ownership of the village hall and indicated that it would pay £1.00 for it.

1.75 The DGC officer panel scores for the PCDT CAT request were included in the officer's [report](#) on the request to the Wigton Area Committee on 4 September 2019. The scores were: engagement 19 out of 30; vision and Impact 43 out of 60; sustainability 42 out of 60; total score 104 out of 150. As reported above, that committee [agreed](#) not to recommend the transfer to PCDT for reasons of the exceptionally high number of representations opposed to the CAT request, evidencing division in the local community. As with the PHCBS request (see paragraph 1.65 above) it further agreed that officers should explore the potential for both PCDT and PHCBS to seek mediation through national organisations to reduce division within the local community.

1.76 The recommendation was accepted by DGC's Finance, Procurement and Transformation Committee, 29 October 2019, and that acceptance constituted DGC's decision.

1.77 There is no indication before me that PCDT asked DGC for a review of that decision, nor has PCDT appealed against it to Scottish Ministers.

## CHAPTER 2. THE APPELLANT'S ELIGIBILITY TO MAKE ITS COMMUNITY ASSET TRANSFER REQUEST

### INTRODUCTION

2.1 The expectation must be that no substantial question will arise at the appeal stage over an applicant's eligibility, in law, to make a CAT request. Indeed, Scottish Government guidance (paragraphs 5.8-5.9) advises authorities to check, at the application stage, that the applicant meets the requirements of the Act and to be very clear with the applicant if there is any uncertainty over its eligibility. Therefore the normal expectation at this appeal stage is that any questions of eligibility will have already been resolved. The expectation is reinforced in this case by the fact that, as noted at paragraph 1.58 above, DGC has previously accepted two CAT requests from PHCBS, and has completed the requested CATs to PHCBS.

2.2 Nevertheless, there are representations in this case, from PCDT, that PHCBS's legal structure does not meet the requirements for a CAT for the village hall. PCDT says that DGC has not adequately addressed questions about PHCBS's legal eligibility. It says this is because PHCBS's rules do not meet all of the requirements of section 34(1B) of the 2003 Act as amended by the 2015 Act. The restrictions that are asserted that PHCBS's rules do not meet relate to the requirement for the rules to include the following: a definition of the community to which the society relates; a provision enabling the society to exercise the right to buy land under the 2015 Act; a provision that at least three quarters of the members of the society are members of the community; and a provision under which the members of the society who consist of members of the community have control of the society.

2.3 PCDT says further that PHCBS has been set up as a community of interest, that is a community of those with an interest in the harbour, rather than a community geographically based in Portpatrick. It has a wide geographic spread of members, and it is those members, not the community of Portpatrick, who technically control PHCBS. Although there is some overlap between the two communities, the interest community and the geographic community are very different.

2.4 I therefore investigate the question of whether PHCBS was eligible, in law, to make the CAT request that it did, and I do so in some detail. In this chapter I explain how I have approached the matter, and for each relevant point I interweave PHCBS's and DGC's cases with my assessment. The main thrust of PCDT's case is at paragraphs 2.2-3 above. The main parties' cases have been made primarily in response to my questions and requests for information set out in DPEA's letters on [8 December 2020](#) and [12 January 2021](#). PHCBS's responses arising from the first of these letters are [here](#) and [here](#), and DGC's responses are [here](#) and [here](#). PHCBS's responses arising from the second of these letters are [here](#) and [here](#), and DGC's answers are [here](#).

2.5 This is a matter for Ministers to decide, but I regard it as very important, and I reach a conclusion at the end of this chapter for Ministers to consider. I appreciate that it is a matter on which Ministers may well wish to seek their own legal advice.

## THE LEGAL FRAMEWORK FOR THE RULES OF THE BODY MAKING THE TRANSFER REQUEST

2.6 I summarise the legal framework on the point at paragraphs 1.1-2 above. I explain it further here.

- Section 77 of the 2015 Act defines a “*community transfer body*”, which section 79 then says can make a CAT request. The “*community transfer body*” can be either (and I call this limb 1) a “*community-controlled body*”, or it can be (limb 2) a body designated as a community transfer body by Ministerial order or a body that falls within a class of bodies designated as community transfer bodies by Ministerial order.
- If the body is within limb 1, ie it is making the CAT request as a “*community-controlled body*”, it needs to fall within the interpretation of that term given in section 97 of the Act. Section 97 says that “*community-controlled body*” has the meaning given by section 19, and section 19 says that a “*community-controlled body*” means a body having a written constitution that includes several provisions that it specifies. Scottish Government guidance (paragraph 5.11) provides a commentary on the requirements for the specified provisions.
- If the body is within limb 2, ie it is making the CAT request by virtue of designation by Ministerial order, it needs to meet the requirements set out in section 34(1), (1A) or (1B) of the 2003 Act (community right to buy), as amended by section 37 of the 2015 Act. Those requirements are that the body has a written constitution, articles of association or registered rules that include several provisions as specified in those sections. This is referred to in Scottish Government guidance (paragraph 5.21). The guidance says “*The Scottish Ministers have made an order designating organisations that meet the requirements for the community right to buy ... under the Land Reform (Scotland) Act 2003 as community transfer bodies which can make asset transfer requests, including for transfer of ownership.*” The guidance then sets out the connection to the section 34 requirement.
- It follows that the specified provisions that a body must have in its written constitution, articles of association or registered rules differ according to whether it is in limb 1 (where the specification is in section 19 of the 2015 Act) or limb 2 (where the specification is in section 34 of the 2003 Act). The two specifications overlap, but are different, and the fact that they are different is important.
- Section 80 of the 2015 Act states an additional requirement for the rules of a community transfer body which (as in this case) makes a CAT request for the ownership of land.

## REPORTER’S APPROACHES TO THE MAIN PARTIES

2.7 PHCBS’s CAT request to the council indicates that it is an organisation falling within a class of bodies which have been designated as community transfer bodies by the Scottish Ministers (ie limb 2 above). However, no designation order was provided to me as part of the initial appeal documents, nor was reference made to a specific order. I therefore asked both main parties (through the DPEA letter of 8 December 2020) to confirm whether or not PHCBS is indeed a community transfer body by virtue of a Ministerial designation order. PHCBS responded clearly that “*it qualifies as a “community transfer body” by virtue of being included in the designated class of bodies defined under Ministerial designation order ...*”.

DGC responded that it has “*no knowledge*” of PHCBS “*being or not being designated*” a community transfer body by Ministerial order.

2.8 That response from DGC is important in the context of the expectation that I mention at paragraph 2.1 above, and I comment on it here. The point is that, as DGC did not know whether a Ministerial designation order was relevant, it could not know whether it should assess PHCBS’s rules against section 19 of the 2015 Act (limb 1 above) or against section 34 of the 2003 Act (limb 2). As it did not know what the requirements were, it is my view that it could not properly and fully establish whether or not PHCBS was entitled to make the CAT request that is the subject of this case. The fact that DGC has made two CATs to PHCBS in the past does not affect that view. Since DGC did not know what the requirements were in 2020, the clear implication to me is that it had not known when the earlier CATs took place.

2.9 Neither party provided a copy of any Ministerial designation order as I had requested through the letter of 8 December. At that stage PHCBS and DGC also answered a number of questions about PHCBS’s rules that I had raised in the letter of 8 December in relation to the requirements imposed by section 19 of the 2015 Act (limb 1). As no copy of a Ministerial designation order had been provided to me, I had raised these questions in the belief, incorrect as I now consider it to be, that no such order is relevant to this case,

2.10 However, through my own researches within DPEA I was then able to obtain a [copy](#) of what appeared to be the relevant order: this is The Asset Transfer Request (Designation of Community Transfer Bodies) (Scotland) Order 2016 (SI 2016 No 361). In the DPEA letter of 12 January 2021 I asked the main parties to confirm that this order is applicable to this case. That letter also indicated that, notwithstanding my previous questions about whether PHCBS’s rules comply with the requirements of section 19 of the 2015 Act, I was minded to take the view, because of the existence of the Ministerial order, that PHCBS’s rules need to comply not with section 19 of the 2015 Act but with section 34 of the 2003 Act.

2.11 [PHCBS’s response](#) to the DPEA letter of 12 January 2021 can be summarised as below.

- (1) Clarification of eligibility was provided in answer to the DPEA letter of 8 December 2020.
- (2) PHCBS’s earlier point (see paragraph 2.7 above), that it qualifies as a community transfer body by virtue of the Ministerial order, is repeated<sup>12</sup>.
- (3) PHCBS’s CAT request was for asset transfer and “*NOT under Land reform or community rights to buy*”.
- (4) PHCBS has already indicated its eligibility under section 80(1)(c) of the 2015 Act.
- (5) It is for the relevant authority to consider whether a body’s governing documents include the required provisions. DGC has already satisfied itself of this in relation to PHCBS’s two previous CAT requests, and the request that is the subject of this appeal was validated by DGC in line with the 2015 Act.

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<sup>12</sup> PHCBS did not explicitly confirm that the order that I put before it is the relevant one, but I am not aware of any other order under the 2015 Act.

- (6) An extract from Scottish Government guidance (paragraphs 5.1-5 of the community transfer bodies' guidance) is presented.
- (7) An extract from section 80 of the 2015 Act is presented.

2.12 My comments on each of these points are below.

- (1) The DPEA letter of 12 January 2021 made clear that the relevant criteria for eligibility differed from those that had been explored in the letter of 8 December 2020. This was because I had brought to light the Ministerial order. Those relevant criteria needed to be addressed, and PHCBS failed to do that in its response to the letter of 12 January.
- (2) The fact that PHCBS may qualify as a community transfer body by virtue of the Ministerial order does not mean, of itself, that any CAT request it makes will be automatically valid. There are additional requirements, as the legislation makes clear that a body's rules need to include various provisions, as explained in Scottish Government guidance (paragraph 5.21).
- (3) I agree that PHCBS's CAT request was for asset transfer and "*NOT under Land reform or community rights to buy*". One of the purposes of the Ministerial order is to give a right to bodies which already have a right to buy under the 2003 Act to make CAT requests under the 2015 Act. PHCBS is such a body. But PHCBS is not absolved of the need to meet other relevant requirements in connection with its CAT request, and those requirements are referred to in the [policy note](#) accompanying the order.
- (4) Section 80(1)(c) of the 2015 Act indicates a requirement for a body making a CAT request for ownership. It is a requirement over and above those imposed on a body making any kind of CAT request. I deal with PHCBS's eligibility under section 80 at paragraphs 2.88-92 below, and I find no problem with its rules in that respect.
- (5) I accept that PHCBS' eligibility should have been checked on the occasions it mentions. I do not know what checks were carried out then, but I draw attention to my remarks at paragraph 2.8 above, which suggest there must have serious limits to such checking. Apart from that, I am entitled to examine the matter, and draw conclusions for Ministers to consider, and it would be wrong for me not to do so as a representation before me explicitly questions PHCBS's eligibility.

(6) and (7) The extracts presented do not bear on the points at issue here.

2.13 Having reviewed the order I put before it, DGC agrees that community groups meeting the order's tests/provisions "*would be bodies eligible to transfer the ownership of assets to.*" The other points made by DGC are included at relevant places in the remainder of this chapter.

2.14 PHCBS's later [comments](#) on DGC's response to the DPEA letter of 12 January 2021 are important to note. They have four main thrusts, as indicated below.

- (1) PHCBS strongly asserts the credentials of its rules. It refers to their construction having involved the engagement of various bodies, including one of the country's



most esteemed law firms in this field with experience in establishing SCIOs, and the Scottish Charity Regulator (OSCR), and with guidance being sought up to the level of the Scottish Ministers. This was to ensure that all existing and future requirements would be properly met. PHCBS was subsequently invited to attend a Parliamentary Committee meeting on 3 February 2016 to provide evidence to Scottish Ministers.

- (2) PHCBS says DGC's [response](#) to DPEA's letter of 12 January 2021 contradicts its acceptance of PHCBS's two previous CAT requests.
- (3) PHCBS provides its most detailed exposition of the meaning of "*community*" that it has provided during the course of this appeal.
- (4) PHCBS states: "... *this application is made under Sect 5 (Asset Transfer) of the Community Empowerment Act Scotland 2015. PHCBS have not and do not claim ... transfer under any other mechanism such as the Land Reform (Scotland) Act 2003 or Order 2016 SSI 2016/361, therefore neither apply to this case.*"

2.15 I take those points in order. On point (1), I refer to my remarks at paragraph 2.12(5) above. The eminence of those involved with the construction of PHCBS's rules does not provide a good reason for me not to examine the rules in the context of this case.

2.16 On point (2) it is true that the reservations that DGC now expresses about PHCBS's rules, in response to my questions, raise doubts about its own acceptance of PHCBS's previous CAT requests. But that does not mean that I should not examine the rules with regard to the current request.

2.17 On point (3), I refer to PHCBS's exposition of "*community*", and comment on it, at paragraphs 2.23-32 below.

2.18 On point (4), PHCBS's assertion that the order SI 2016 No 361 does not apply represents a complete change from its consistently expressed position at all earlier stages of this case from the time of its CAT request onwards. That previously expressed position is referred to in paragraphs 2.7 and 2.11(2) above. It is not clear whether its later position supersedes its earlier position, or whether it is seeking to adopt both positions in tandem. In my view, the two positions are mutually exclusive: PHCBS cannot be both a body that is **not** a body that falls within a class of bodies designated as community transfer bodies by Ministerial order (its latest position) and a body that **is** a body that falls within such a class (its previous consistently expressed position). Those different positions reflect limb 1 and limb 2 respectively as I describe them in paragraph 2.6 above. As also explained in paragraph 2.6, those two limbs lead to the different but overlapping requirements, for a body's rules, of section 19 of the 2015 Act (limb1) and section 34 of the 2003 Act (limb 2).

2.19 My view is that PHCBS **is** a body that falls within a class of bodies designated as community transfer bodies by Ministerial order (its previous consistently expressed position). That order is SI 2016 No 361, and it seems to me that the position is clear on the order's face: the order says that the classes of bodies that are designated as community transfer bodies for the purposes of Part 5 (asset transfer requests) include "... *bodies falling within subsection (1), (1A) or (1B) of section 34 (community bodies) of the 2003 Act ...*". Those three subsections in the 2003 Act relate respectively to companies limited by guarantee, SCIOs and community benefit societies. PHCBS is both a SCIO and a community benefit society. It therefore falls within the scope of order SI 2016 no 316. The further requirements of section 34(1A) and/or section 34(1B) of the 2003 Act therefore apply

in my view. This is limb 2 from paragraph 2.6 above. In its latest position (paragraph 2.14(4) above), PHCBS seeks to separate this case entirely from the 2003 Act, but in my view it cannot properly do so.

2.20 However, I do not ignore the implications of PHCBS's latest position. This necessitates giving detailed consideration to whether its rules comply with the further requirements of section 19 of the 2015 Act. I do that at paragraphs 2.21-55 below. After that, at paragraphs 2.56-87 below, I give similar consideration to whether PHCBS's rules comply with the different, but overlapping, requirements of section 34 of the 2003 Act. My view is that it is the section 34 requirements that are relevant to this case. What seems certain is that either the section 19 requirements or the section 34 requirements need to be met.

## COMPLIANCE WITH THE REQUIREMENTS OF SECTION 19 OF THE 2015 ACT

2.21 As I explain at paragraph 2.6 above, one of the types of body that can make a CAT request is a "*community-controlled body*" (sections 77 and 79 of the 2015 Act). PHCBS's recent claim that the Ministerial order is not applicable is tantamount to a claim that it is a "*community-controlled body*". A body is not a "*community-controlled body*" unless its rules meet the requirements of section 19.

2.22 I consider here, therefore, whether PHCBS's rules meet the necessary requirements for its recent claim to be accepted. A copy of its rules is [here](#). Section 19 states that a "*community-controlled body*" means a body having a written constitution that includes the following:

- (a) a definition of the community to which the body relates,
- (b) provision that the majority of the members of the body is to consist of members of that community,
- (c) provision that the members of the body who consist of members of that community have control of the body,
- (d) provision that membership of the body is open to any member of that community,
- (e) a statement of the body's aims and purposes, including the promotion of a benefit for that community, and
- (f) provision that any surplus funds or assets of the body are to be applied for the benefit of that community.

*Section 19(a) requirement: do PHCBS's rules include a definition of the community to which the body relates?*

2.23 PHCBS says the relevant rules are rules 4, 14 and 16. Rule 4, in indicating PHCBS's objects, states variously that the activities that it carries out are for, or are on behalf of, or are for the benefit of "*the Community of Portpatrick*", "*that community and the public at large*" and "*the Portpatrick community*". Rule 14 includes provisions about becoming a member of PHCBS. Rule 16 says that members agree to participate in general meetings and take an active interest in PHCBS's operation, development and business.

2.24 PHCBS says that membership is open to all who support its objects. It asserts that it is a community of people who share a common interest. It points out that its rules do not require members to exclusively reside in any defined geographical place, only that they



agree to support its objects. It says that it (PHCBS) is made up of a diverse mixture of people who derive from a number of different communities which are intertwined with and within the village. As well as residents, it points to various communities, including camping and caravanning, hiking, sailing, fishing, sporting, historical and agricultural communities all intertwined with the fabric of Portpatrick and thus wishing to support that fabric. Including also those who stay in Portpatrick as holiday makers, PHCBS regards the community of Portpatrick as a very diverse and fluid mixture of people. It says that the "*Portpatrick community*", as referred to in rule 4, is in fact made up of this diverse mixture of people who all share the same common interest to safeguard the fabric, infrastructure and historic elements which make being part of the "*Portpatrick community*" such a rewarding experience.

2.25 DGC also draws attention to rule 4. But DGC is unclear if PHCBS represents a community of place or of interest as some of its members are not local to the village/vicinity of Portpatrick.

2.26 Scottish Government guidance (paragraph 5.11) is that "*The definition should be clear enough to show whether a person is a member of the community or not.*"

2.27 I now give my views. It is worth emphasising that requirement (a) is a requirement for the rules of PHCBS, and for nothing else, to include a definition of the community to which PHCBS relates. My starting point, therefore, is the fact that only two of PHCBS's rules, and no more, refer to "*community*". These are rules 4 and 6. As already indicated, rule 4 states variously that the activities that PHCBS carries out are for, or are on behalf of, or are for the benefit of "*the Community of Portpatrick*", "*that community and the public at large*" and "*the Portpatrick community*". Rule 6 contains a cross-reference to "*the community*". The two potential communities from this are "*the community of Portpatrick*" and "*the public at large*". I do not regard "*the public at large*" as falling within the definition of community for the purposes of requirement (a). The inclusion of those words is perhaps a reflection of an intention on PHCBS's part that benefits which are intended for the local community may well produce incidental benefits to people beyond the local community and that the local benefits are not to be created if they would be at the expense of a wider public.

2.28 As noted in paragraph 2.24 above, PHCBS seeks to portray the "*Portpatrick community*" of its rules as the people who all share a common interest in safeguarding the fabric of Portpatrick. It seems to be saying that its members, who have that common interest – including those who live in distant places (see paragraph 1.53 above), perhaps as far away as Canada and Bermuda (see paragraph 2.34 below) – **are** that community, and the community **is** the body of PHCBS's members. I do not accept that view. The common-sense interpretation of the references in the rules to the "*Portpatrick community*" is that they are references to the community in the geographical location named Portpatrick; and there is nothing in the rules that suggests any different interpretation of the term. My view is that PHCBS members may well have an interest in Portpatrick, and its community, and as members they will no doubt support PHCBS's objects of benefitting that community, but that does not make them members of that community.

2.29 PHCBS's conflation of members of the community with members of the organisation seems to be wrong also in principle, unless its rules specifically provide for the two groups to be identical, which they do not. This is because the wording of section 19 itself postulates the possibility, at least, of members of the community and members of the

organisation being different. To my mind, it is almost inevitable that they will be different: even if some members of the community share the same interests as members of an organisation, others, with those same interests, almost inevitably will not wish to join the organisation. They may wish to pursue their similar interests independently. Similarly, the organisation may exercise control over who joins it as a member of the organisation, but it does not have control over who becomes a member of the community.

2.30 The fundamental point about community definition, for the purposes of section 19, is not what PHCBS now says the community is, but what the community is according to the rules. Nor is it what the rules say about membership of the organisation. I do not accept that the community that is defined in PHCBS's rules is a community of interest. It is in my clear view a community based on the geographical entity called Portpatrick. On that basis, for the purposes of requirement (a), PHCBS's rules do define the community to which the body relates, but it is not the community that PHCBS now seeks to portray. Other requirements for the rules (see below) refer to the community, and I take those to be requirements that relate to the geographic community as I find it here.

2.31 That still leaves the question of whether the definition is sufficiently clear to show whether a person is a member of the community or not. The extent of the continuous built-up area of Portpatrick village is reasonably clear, but there is a scatter of individual dwellings and hamlets within several kilometres of the village and there is nothing in the rules that indicates where the boundary of the Portpatrick community lies within that wide area. People living in the built-up area of the village will clearly be members of the community; some living beyond it may be members; there is doubt.

2.32 Partly to enable me to take my analysis forward, I take a generous view of PHCBS's rules to reflect their substantial compliance (setting aside my remarks in paragraph 2.31 above) with requirement (a).

*Section 19(b) requirement: do PHCBS's rules include provision that the majority of the members of the body is to consist of members of that community?*

2.33 PHCBS quotes its rule 13 in connection with this requirement. Rule 13 refers to qualifications for membership.

2.34 DGC refers to press reports saying that some of PHCBS's members live as far afield as Canada and Bermuda. However, it has not seen PHCBS's register of members and does not know the number of members residing locally or if they are in the majority.

2.35 It is clear to me that rule 13 does not assist PHCBS with regard to requirement (b). None of rule 13's qualifications for membership are geographic in character. I can find no geographic qualification for membership anywhere in PHCBS's rules. It follows that requirement (b) is not met.

*Section 19(c) requirement: do PHCBS's rules include provision that the members of the body who consist of members of that community have control of the body?*

2.36 PHCBS's comment on this requirement is simply "49-56 Voting."

2.37 DGC responds that rule 37 lays out that members can propose resolutions for general meetings and that rules 41 and 49 lay out that members have the right to speak

and vote at meetings. DGC therefore assumes that members have influence over and control PHCBS.

2.38 Taking PHCBS's response to be a reference to its rules 49-56 inclusive, I note that they refer to voting and resolutions. But none of them gives control to members of the geographic Portpatrick community. Nor does any of the rules referred to by DGC do that. I can find no other rules that give control of PHCBS to members of the geographic Portpatrick community. Requirement (c) is clearly not met.

*Section 19(d) requirement: do PHCBS's rules include provision that membership of the body is open to any member of that community?*

2.39 PHCBS quotes rule 4 and part of rule 14.

2.40 DGC says that membership of PHCBS is through a share option scheme which was developed to raise capital to purchase the harbour. It points out that it is not clear if this share option and ability to become a member remains open, as the share option appears to have raised the amount required. In addition, DGC notes that rule 14 restricts membership to those over the age of 16 years, and that may be seen as a restriction on membership which is therefore not open to all.

2.41 In my view the only rule to be considered here is rule 14. It contains three stipulations about those wishing to become members of PHCBS: young people under the age of 16 are to be excluded; those not also applying for at least one share are to be excluded; and those making applications not approved by the directors are to be excluded. It seems to me that requirement (d) is not unreasonably breached by the restriction on under-16s. This is because in my view there would be general acceptance that a person needs to have reached the age of 16 or thereabouts to be properly capable of applying for membership and acting as a member of an organisation of this sort. On the other hand, the requirement for membership applicants also to apply for at least one share – when the evidence (see paragraph 1.52 above) points to PHCBS's share offer having been closed in 2016 and no shares being openly available since – is a severe restriction very much at odds with section 19. Membership is prevented whenever shares are not available: that is a clear restriction in rule 14 contrary to requirement (d). The general need for director approval also appears to give the directors a wide power to restrict membership: they may not exercise rule 14 in that way, but the rule allows them to do so. That, too, contributes to my overall view that requirement (d) is not met.

*Section 19(e) requirement: do PHCBS's rules include a statement of the body's aims and purposes, including the promotion of a benefit for that community?*

2.42 PHCBS refers to rule 4. DGC refers to its response on requirement (a) (see paragraph 2.25 above).

2.43 My view is that a statement of PHCBS's aims and purposes clearly exists within its rule 4, and that includes the promotion of a benefit for the community. Requirement (e) is therefore met.

*Section 19(f) requirement: do PHCBS's rules include provision that any surplus funds or assets of the body are to be applied for the benefit of that community?*

2.44 PHCBS quotes rule 100 which says that any profits it generates shall be applied solely in the furtherance of its charitable purposes. DGC refers to rules 100 and 104 (dissolution).

2.45 I accept that the rules referred to by the parties mean that requirement (f) is met.

*Towards an overall position on section 19 compliance*

2.46 If I were to accept that PHCBS does not fall within the scope of order SI 2016 no 316 – that is PHCBS's latest position, but it is not my view (see paragraph 2.19 above) – my assessment above indicates that its rules comply with the following section 19 requirements as the rules include:

- (a) a definition of the community to which the body relates,
- (e) an appropriate statement of the body's aims and purposes, and
- (f) provision for surplus funds or assets.

2.47 However, my assessment also shows that PHCBS's rules do not comply with the following section 19 requirements because they do not include:

- (b) provision for the majority of the members of the body to be members of that community,
- (c) provision for the members of the body who consist of members of the community have control of the body, and
- (d) provision that membership of the body is open to any member of that community.

2.48 If PHCBS does not fall within the scope of order SI 2016 no 316, the position therefore in my view is that PHCBS was not eligible to make the CAT request that it did.

2.49 Continuing on the same basis, and from PHCBS's latest position that it does not fall within the scope of order SI 2016 no 316, it remains for me to consider whether the non-eligibility should, of itself, prevent the CAT from proceeding. It seems to me that the purpose of the relevant parts of the legislation is to prevent CATs from proceeding in actual reality in any case where the body receiving the transfer has rules that do not meet the specified requirements in law. The legislation sets a marker for the position to be checked, well before the CAT takes place, at the CAT request stage. Irrespective of what checking was or was not done at the application stage in this particular case, the position is that decisions on CAT requests can be subject to conditions. Scottish Government guidance (paragraph 15.12) says that a decision notice may be conditional on a range of factors, and gives confirmation of charitable status as a possible factor. Making a decision in favour of a CAT request being granted subject to a condition requiring the body's rules to be amended to bring them into compliance with the legislation appears to me to be analogous to this.

2.50 On that basis, and solely from the point of view of eligibility, an appeal decision in this case favourable to PHCBS could be made if Ministers were so minded and if it were made subject to a condition requiring PHCBS's rules being amended so that they comply with sections 19(b), (c) and (d) of the 2015 Act.

2.51 However, it is an important principle in making decisions on matters of administrative law like this that conditions are reasonable. One factor that determines reasonableness in

my assessment in cases of this sort is the extent to which the body subject to them would have to make fundamental changes to the way it operates. It would be unreasonable in my view to impose a condition that would require fundamental operational changes<sup>13</sup>.

2.52 Considering how that general point relates to this particular case, as I note at paragraph 1.53 above, PHCBS has provided information on where its members live<sup>14</sup>. I repeat the answer here: (a) Portpatrick village residents 210 (38%), (b) Stranraer town residents 73 (13%), (c) other DG9 residents (see [map](#)) 54 (10%), (d) elsewhere 217 (39%), total 554 (100%). PHCBS points out that a substantial number of those identified under category (d) are local people who currently reside elsewhere but still have family ties and an active interest in the village; they return regularly to the village. PHCBS says a substantial number of those in category (d) also own second properties in the village and regularly reside in them. However, from these figures, my calculation shows that as many as 68 people in categories (b), (c) and (d) above would need to be counted as part of the geographic community of Portpatrick to achieve the 50% threshold, and there is no evidence about the circumstances of particular individuals in those categories to suggest that a condition on the point could be easily complied with.

2.53 In principle the point might be resolved by PHCBS opening itself to a swathe of new members from within the geographic community of Portpatrick. That would be in line with a condition designed to meet the requirement in section 19(d). However, that would require PHCBS to reverse the approach it has taken to new membership over the last five years or so. As indicated in paragraph 1.52 above, PHCBS's membership has been very substantially static, with only nine membership changes since 2016, and the number of members remains at 554 several years later. New membership of PHCBS would in effect have to relate to the geographic community of Portpatrick, and the additional restrictions of share applications and directorial control (see paragraph 2.41 above) could not apply. My view is that it would be unreasonable to seek to require this fundamental change by condition on a decision in this CAT case.

2.54 Therefore, although I see nothing wrong in principle with the non-eligibility of a community body making a CAT request being resolved by a condition on a decision to grant the request, the position in this case is that to impose such a condition to overcome all the elements of non-eligibility would be unreasonable.

2.55 On that basis, taking PHCBS's latest position that it does not fall within the scope of order SI 2016 no 316 as a starting point, I conclude that PHCBS was not eligible to make the CAT request that is the subject of this appeal and that it would be unreasonable to impose a condition that would otherwise overcome its non-eligibility.

## COMPLIANCE WITH THE REQUIREMENTS OF SECTION 34 OF THE 2003 ACT

2.56 I now turn to the position that arises on the basis that PHCBS does fall within the scope of order SI 2016 no 316, ie its position as claimed throughout almost all of the

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<sup>13</sup> I draw an analogy here with planning cases: it is well established that it would be inappropriate and unreasonable to impose a condition on a planning permission requiring a proposed development to be modified in a way that would make the development substantially different from that set out in the application. The analogy is between such a development in a planning case and an organisation making a CAT request.

<sup>14</sup> Notwithstanding its statements that it does not know where PHCBS's members live, DGC has been provided with this information.

application and appeal processes. That is the position that I accept. The requirements that its rules need to meet on that basis, as a community body, are in section 34 of the 2003 Act (and reading sub-sections 34(1A) and (1B) together), as amended by section 37 of the 2015 Act. The requirements are that its rules include the following:

- (a) a definition of the community to which the body relates (section 34(5) of the 2003 Act further provides that a community shall be defined by reference to a postcode unit or units “*or a prescribed type of area*” (or both such unit and type of area); it says that the community shall comprise the persons resident in the postcode unit(s) “*or in that prescribed type of area*” and with specified voting rights there),
- (b) provision enabling the body to exercise the right to buy land under this Part,
- (c) provision that the body must have not fewer than 10 members,
- (d) provision that at least three quarters of the members of the body are members of the community,
- (e) provision under which the members of the body who consist of members of the community have control of the body,
- (f) provision ensuring proper arrangements for the financial management of the body,
- (g) provision that, on the request of any person for a copy of the minutes of a meeting of the body, the body must, if the request is reasonable, give the person within 28 days of the request a copy of those minutes,
- (h) provision that, where a request of the type mentioned in paragraph (g) is made, the body (i) may withhold information contained in the minutes, and (ii) if it does so, must inform the person requesting a copy of the minutes of its reasons for doing so, and
- (i) provision that any surplus funds or assets of the body are to be applied for the benefit of the community.

2.57 In addition section 34(4) states that a body is not a community body unless Ministers have given it written confirmation that they are satisfied that the main purpose of the body is consistent with furthering the achievement of sustainable development.

*Section 34(1A)(a)/(1B)(a) requirement: do PHCBS’s rules include a definition of the community to which the body relates (and reflecting the section 34(5) requirement)?*

2.58 The section 34(1A)/(1B) requirement here is the same as the section 19 requirement. My remarks at paragraphs 2.23-30 apply here, and my references to section 19 there can be taken as references to section 34 here. On that basis I come to the view that PHCBS’s rules do define the community to which the body relates, and that the community so defined is the geographic community of Portpatrick.

2.59 The question arises again as to whether that definition is sufficiently clear. In this case there is the additional requirement in section 34(5) for reference to be made to a postcode unit or units “*or a prescribed type of area*”. PHCBS’s rules do not define the community in terms of a postcode unit or units or “*a prescribed type of area*”. The word “*prescribed*” means by regulation, ie by statutory instrument, and I am not aware of any regulation that defines a “*type of area*” for this case. Therefore my remarks in paragraph 2.31 above apply with additional force in the context of section 34 because of the section 34(5) requirement for additional clarity.

2.60 Given that additional section 34(5) requirement, I cannot conclude that the definition of the community in PHCBS's rules is sufficiently clear. Consequently requirement (a) is not met in my view. Nevertheless, the community appears in the requirements for other rules, and for the purposes of the analysis that now follows, and in order to reach an overall, rounded view of the requirements for PHCBS's rules, I take the community to be simply the geographic community of Portpatrick.

*Section 34(1A)(b)/(1B)(b) requirement: do PHCBS's rules include provision enabling the body to exercise the right to buy land under this Part?*

2.61 PHCBS does not respond to my enquiry on whether its rules contain such a provision. DGC says such a provision is not explicit in the rules. I can find no such provision in the rules. Requirement (b) is therefore not met.

*Section 34(1A)(c)/(1B)(c) requirement: do PHCBS's rules include provision that the body must have not fewer than 10 members?*

2.62 PHCBS does not respond to my enquiry on whether its rules contain such a provision. DGC says that there is no explicit provision in the rules prescribing this minimum membership level. For my part I refer to paragraphs 2.89-90 below where I note that PHCBS now has a regulation saying that it must have not fewer than 20 members at any time. If it cannot have fewer than 20 members, it clearly cannot have fewer than 10. On that basis, and provided the new regulation is registered, requirement (c) is met.

*Section 34(1A)(d)/(1B)(d) requirement: do PHCBS's rules include provision that at least three quarters of the members of the body are members of the community?*

2.63 This requirement is a more demanding one than the corresponding requirement in section 19 which refers to a majority of the members of the body rather than at least 75% of them being members of the community. I report on the less demanding requirement at paragraphs 2.33-35 above.

2.64 The only point I need add here about the parties' cases is that DGC comments that there appears to be no provision within PHCBS's rules for three quarters of the membership to be members of the community.

2.65 I can confirm that last point. As I mention at paragraph 2.35 above, none of rule 13's qualifications for membership are geographic in character. I can find no geographic qualification for membership anywhere in PHCBS's rules. It follows that requirement (d) is not met.

*Section 34(1A)(e)/(1B)(e) requirement: do PHCBS's rules include provision under which the members of the body who consist of members of the community have control of the body?*

2.66 The section 34(1A)/(1B) requirement here is the same as the section 19 requirement. My remarks at paragraphs 2.36-38 apply here. Requirement (e) is clearly not met.

*Section 34(1A)(f)/(1B)(f) requirement: do PHCBS's rules include provision ensuring proper arrangements for the financial management of the body?*

2.67 PHCBS does not comment on its rules in relation to this requirement.

2.68 DGC states that PHCBS's rules lay out its provisions in relation to finances and financial management. It refers to rules 7-10 (borrowing), 22-28 (share capital), 68 (credit and debtors), 87 (expenses), 93-99 (interest on share capital), 100 (profits), 103 (dissolution) and 114-121 (annual return and audit).

2.69 My view is that the rules referred to by DGC amount to provision that ensures proper arrangements for PHCBS's financial management. I have reservations about its rules on share capital as, in practice, they have served and continue to serve to limit changes in membership. I regard that as a flaw, but I deal with it as a matter of merits rather than of law at paragraphs 6.50-51 below. On that basis, requirement (f) is met.

*Section 34(1A)(g)/(1B)(g) requirement: do PHCBS's rules include provision as specified on a request by any person for a copy of the minutes of a meeting of the body?*

2.70 PHCBS does not comment on its rules in relation to this requirement.

2.71 DGC comments that rule 113 details that minutes of all meetings must be kept, but that there appears no specific provision for members to request and receive minutes of meetings.

2.72 I point out that requirement (g) relates to "any person", not simply a member of the body, requesting minutes. More central to my analysis, I can find no rule that relates to requirement (g), which is therefore not met.

*Section 34(1A)(h)/(1B)(h) requirement: do PHCBS's rules include provision as specified on withholding information contained in the minutes?*

2.73 PHCBS does not comment on its rules in relation to this requirement.

2.74 DGC points out that the only reference to confidentiality in PHCBS's rules is in rule 16 which says members have a duty to respect the confidential nature of its business decisions. It says there is no mention of members being able to request information contained within minutes or informing members if information is withheld.

2.75 As with requirement (g), requirement (h) provides safeguards for any person, not simply members. It is clear to me that none of PHCBS's rules deal in any way with withholding information contained in the minutes. Requirement (h) is clearly not met.

*Section 34(1A)(i)/(1B)(i) requirement: do PHCBS's rules include provision that any surplus funds or assets of the body are to be applied for the benefit of the community?*

2.76 The position is fundamentally as I describe it in paragraphs 2.44-45 above with regard to the identical requirement in section 19. Requirement (i) is met on that basis.

*Section 34(4) requirement: does PHCBS have written confirmation from Ministers that they are satisfied that the main purpose of the body is consistent with furthering the achievement of sustainable development?*

2.77 The [policy note](#) accompanying the designation order refers to this requirement, but says the order does not require a body to have this confirmation letter to be eligible for a CAT. Therefore I have not raised the matter with the parties. I simply state that, bearing in mind section 34(4), the maintenance and potential improvement of facilities in Portpatrick in



line with PHCBS's objects is consistent with furthering the achievement of sustainable development.

*Towards an overall position on section 34 compliance*

2.78 My assessment above indicates that PHCBS's rules comply with the following section 34 (1A)/(1B) requirements:

- (c) provision for not fewer than 10 members;
- (f) provision for proper arrangements for financial management; and
- (i) provision for surplus funds or assets;

and that the following section 34(4) requirement is met:

sustainable development.

2.79 However, my assessment also shows that PHCBS's rules do not comply with the following section 34 (1A)/(1B) requirements:

- (a) community definition (substantially complies, but without the required precision of postcode units);
- (b) provision enabling exercise of the right to buy land;
- (d) provision for at least three quarters of the members of the body to be members of the community;
- (e) provision for members of the body who consist of members of the community to have control of the body;
- (g) provision for supplying copies of meeting minutes; and
- (h) provision for withholding information contained in the minutes.

2.80 If PHCBS falls within the scope of order SI 2016 No 316, as I consider it does, my view therefore is that it was not eligible to make the CAT request that it did. DGC did not properly check the position. PCDT's representation on the point is very substantially correct.

2.81 The points I make at paragraph 2.49 above therefore come into play here. Following from that, but taking the starting point of PHCBS falling within the scope of order SI 2016 No 316, and solely from the point of view of eligibility, an appeal decision in this case favourable to PHCBS could be made if Ministers were so minded and if it were made subject to a condition requiring PHCBS's rules being amended so that they comply with sections 34(1A)/(1B) (a), (b), (d), (e), (g) and (h) of the 2003 Act.

2.82 As explained in paragraph 2.51 above, such a condition would have to be reasonable. Looking at that point, I consider that the matters of non-compliance I list in paragraph 2.79 above can be divided into two. First, I take matters (b), (g) and (h). A condition requiring amendments to PHCBS's rules on these matters would simply provide for exercising the right to buy land and for matters relating to the availability of minutes of meetings. The first of these reflects a step that PHCBS clearly wishes to pursue, and the second reflects the need for openness but protecting confidentiality where necessary. A condition requiring such amendments to the rules would be entirely reasonable in my view.

2.83 That leaves non-compliance on matters (a), (d) and (e). Here the position is much as I describe it in paragraphs 2.52-53 above with regard to the deficiencies of the rules in

relation to the section 19 requirements, but with some exceptions. One exception is that the section 34 requirement for at least 75% of the members of the body to be members of the community would be significantly more difficult to achieve than the 50% requirement in section 19. The other exception is the addition of the postcode unit requirement in section 34. On its own, a condition on matter (a) would require no more than the insertion in PHCBS's rules of a postcode unit or a group of postcode units to define the boundary of the geographic community of Portpatrick. But that definition would then feed into matters (d) and (e) which define the role of those who would be members of that geographic community. I therefore consider matters (a), (d) and (e) together.

2.84 If PHCBS's rules were amended to achieve compliance on matters (a), (d) and (e), there would be, from matter (a) a precisely defined community of Portpatrick, from matter (d) at least 75% of PHCBS's members would need to be members of that community, and from matter (e) those community members would need to have control of PHCBS.

2.85 The problem is that, as described in paragraph 2.52 above, PHCBS's current membership (substantially static for several years) does not conform to that pattern. Assuming that PHCBS members who live outside Portpatrick were to remain as members in response to such a rule change, the adult population of Portpatrick is too small to provide the necessary number to meet the requirement on matter (d). Conversely, the amended rules could be met if most of PHCBS's current members living outside Portpatrick were to resign as members. Both of these alternatives pose a range of practical difficulties. There is a range of possibilities between the two extremes, but the extremes serve to illustrate that, in my view, requiring PHCBS to adopt new rules of this sort would turn it into an organisation with a membership very different from the present position. Most likely, it would be a very different kind of organisation. To my mind, to impose a condition requiring PHCBS to follow this fundamentally new approach would be unreasonable and onerous, and go beyond the scope of a proper decision in this case. Accepting a swathe of new members to overcome the problem would involve the difficulties outlined in paragraph 2.53 above, but more so because of the 75% requirement.

2.86 Therefore, as with the section 19 requirements, although I see nothing wrong in principle with the non-eligibility of a community body making a CAT request being resolved by a condition on a decision to grant the request, the position in this case is that to impose such a condition to overcome all the elements of non-eligibility would be unreasonable.

2.87 On that basis, taking as a starting point PHCBS's position throughout most of the course of its CAT request and appeal that it falls within the scope of order SI 2016 no 316, I conclude that PHCBS was not eligible to make the CAT request that is the subject of this appeal and that it would be unreasonable to impose a condition that would otherwise overcome its non-eligibility.

## COMPLIANCE WITH THE REQUIREMENTS OF SECTION 80 OF THE 2015 ACT

2.88 Because PHCBS's CAT request includes a request for a land ownership transfer, because it is a SCIO and a community benefit society, and because it is within a class of bodies designated in a relevant order, section 80 of the 2015 Act applies. There are two requirements:

- Section 80(1)(b)/(c) requires the body's constitution or registered rules to include provision that it must have not fewer than 20 members.

- Section 80(1)(e) requires the order to include provision that bodies falling within the class referred to may make a CAT request for land ownership.

*Section 80(1)(b)/(c) requirement: do PHCBS's registered rules include provision that it must have not fewer than 20 members?*

2.89 Through DPEA's letter of 12 December 2020 I asked the main parties which of PHCBS's rules it regards as meeting this requirement. In response, PHCBS stated that it now has a regulation saying that it must have not fewer than 20 members at any time. It provides a [copy](#) of the regulation, saying that it was made on 12 December 2020 by the board of directors in accordance with rule 91 which allows the board to make such regulations. DGC states that it has no comment on this.

2.90 On PHCBS's response, I see nothing wrong with this being a regulation rather than a rule or that it was made by the board of directors, provided that the regulation is registered. I note that the regulation was made during the course of the appeal proceedings and clearly in response to the point I was raising. It appears to be an admission of ineligibility before the regulation was added (including when the CAT request was made to DGC). For a requirement such as this, it seems to me that the important point in practice is that a failure to meet the terms of section 80 at the time a CAT request is made can be reasonably remedied if the remedy is applied and in force by the time the CAT takes place. On that basis, and provided the new regulation is registered, I regard the section 80(1)(b)/(c) requirement as being met.

*Section 80(1)(e) requirement: does the order include provision that bodies falling within the class referred to may make a CAT request for land ownership?*

2.91 The order does include provision that the bodies it covers may make a request to transfer land ownership. I have not pursued this point with the parties, as the section 80(1)(e) requirement is clearly satisfied.

## OVERALL ASSESSMENT ON ELIGIBILITY

2.92 Section 80 of the 2015 Act does not pose a problem with regard to PHCBS's eligibility in this case. However, whichever of PHCBS's different positions on the relevance of order SI 2016 no 316 one takes – and those positions lead to the different but overlapping requirements of section 19 of the 2015 Act and section 34 of the 2003 Act – I come to the view that PHCBS was not eligible to make the CAT request that is the subject of this appeal and that it would be unreasonable to impose a condition that would otherwise overcome its non-eligibility. In essence, the problem is two-fold. First, PHCBS's rules do not meet the essential tests of providing for those of its members who are members of the geographic community of Portpatrick to make up over 50% (section 19) or at least 75% (section 34) of PHCBS's membership and for that local part of its membership to control PHCBS's affairs. Secondly, it would be unreasonable to require PHCBS to change its approach and methods of working by imposing a too-onerous condition on an otherwise favourable CAT decision requiring the relevant changes to the rules.

2.93 Chapter 7 below includes my recommendation stemming from that.

2.94 I add that I have not consulted the parties on whether a condition should be imposed to overcome any problem of PHCBS's non-eligibility. If Ministers were minded to allow this appeal subject to such a condition, I consider that PHCBS and DGC should be consulted on the point before a decision is issued.

## CHAPTER 3. THE APPELLANT'S CASE ON MERITS

### INTRODUCTION

3.1 In chapter 2 I have dealt with PHCBS's eligibility to make the CAT request that it did, and I reach a conclusion there that is unfavourable to PHCBS. In case Ministers take a different view from mine, or as they may wish to consider the merits for other reasons, this chapter sets out PHCBS's case on merits, chapter 4 does the same for DGC's case, and chapter 5 for third parties, while chapter 6 gives my assessment of merits.

3.2 The various strands of PHCBS's case, on matters other than its eligibility, appear within its submissions and documentation at one, some or all of the three main stages of the 2015 Act process (request, review and appeal). These include its further written submissions and documentation in response to my questions and requests for information set out in letters on [20 October 2020](#), [10 November 2020](#), [24 November 2020](#), and [26 November 2020](#).

### REASONS FOR MAKING THE REQUEST AND HOW THE BUILDING WOULD BE USED

3.3 In 2015, DGC intimated its wish for local communities in its area to take control of their village halls. Indeed, DGC threatened possible closure of Portpatrick Village Hall should the community not agree to take over its management by February 2016. This led to the submission in August 2016, with PCC, of the letter of intent referred to at paragraphs 1.33-34 above.

3.4 A professional consultancy, Here for Growth, was subsequently commissioned to create a document on which the entire community could be consulted. Its report was produced in 2017 and was entitled ["Portpatrick Village Hall Development Plan"](#). It was written on the understanding that if the hall was not transferred to community ownership it would close by July 2019.

3.5 The main points from the report include these.

- The purpose of the development plan was stated to be to:  
*"Aid the Steering Group in their planning for the future of the village hall  
Enable plans to be shared with all interested parties  
Provide a platform for wider community engagement on the details of the plan  
Provide transparency on the workings of the village hall Steering Group  
Form the basis for future funding applications."*
- The report stated that *"The plan will be shared with the community as widely as possible through:  
A structured, community-wide engagement process  
Making it accessible on the village website  
Copies of the plan will be provided to all current users of the hall."*
- It acknowledged that *"Further support would be required to develop comprehensive business plans to support any future funding applications."*

- The report deals with community need. It noted that, although Portpatrick is well served by buses during the day, there is none late at night or on Sundays. That is particularly problematic for hospitality workers. Portpatrick has a primary school, but GPs and dentists are in Stranraer. Young people move out of the area, as education and employment opportunities are limited. The primary forms of employment are hospitality and care work, both low paid. In addition, Portpatrick has a high tourist population, so any solutions would have to take into account both the resident and tourist population's differing needs.

- The report's SWOT analysis on the hall included the following:

*"Strengths –*

*...*

*Busy with regular users (without any active marketing)*

*Potential.*

*Weaknesses –*

*Fear within the community of having to take on too much as volunteers*

*Fear of liability*

*The fabric of the building*

*Energy efficiency of the building.*

*Opportunities –*

*Social enterprise opportunities (particularly in relation to commercial events such as weddings and dances)*

*...*

*Health and Social Care*

*Sport and Leisure*

*Tourism / Heritage*

*...*

*Funding (grants combined with commercial income)*

*Marketing*

*Threats –*

*Impending closure by the Council*

*...*

*Capacity of volunteers*

*Declining resident community numbers*

*Title deed restrictions*

*The ability of community groups to pay the fees*

*Maintenance of the building ..."*

- The report listed the types of activities that could take place within the hall as including private functions (weddings, parties, etc), community events, community / voluntary group meetings, public meetings, arts events. sports / games, community council meetings, kids' groups, fitness classes, MP / local councillor surgery, education and training, commercial activities, local business group meetings, support groups, clubs for disabled / older people, day care services, primary health care services, and post office services.
- The report said this on the option of making the hall sustainable: *"Following analysis of the finances, it was clear that it is unlikely that the hall could become sustainable within the first two years and as such would require revenue grant funding each year to run. Unfortunately, although by no means impossible, the likelihood of securing revenue grant funding for a project that is predicted to be unsustainable at the end of*

*the funding period is very low. If [this option] were to be taken forward the following would be priorities:*

*Secure revenue funding*

*Conduct market research to develop an appropriate pricing structure*

*Ascertain need in respect of staffing*

*Marketing to increase and diversify usage*

*Enhance trading income.”*

3.6 A consultation meeting on the Here for Growth report was held in January 2019, and extensive consultation and engagement within the community has been carried out on community ownership of the village hall. At a meeting in May 2019, 60 community members unanimously supported PHCBS's intention to submit a stage 1 expression of interest. PHCBS's stage 1 expression of interest (May 2019) and its stage 2 CAT request (June 2019) followed from this.

3.7 PHCBS would promote the venue to all user groups both within and outwith the area. It would focus on delivering an accessible venue to all user groups at affordable prices. The facility would stimulate a beneficial social use in line with the spirit in which the hall was bestowed to the community. It would provide a venue for improving health and wellbeing, through providing access to healthcare facilities and supporting opportunities around the Dumfries and Galloway Health and Social Care Partnership. Greater use of the hall for sports and dance clubs would be actively encouraged, with PHCBS pursuing funding for equipment on behalf of user groups. Marketing the hall as a large wedding venue would add footfall to the entire village and stimulate the surrounding economic environment.

3.8 This would all be within the context of a sound fiscal position and the submitted business plan (see paragraphs 3.34-42 below).

3.9 The hall would have a role distinct from that of the harbour hub. The hub is a substantially smaller venue than the hall, seating around 60 people and therefore lending itself to smaller functions in a more intimate setting. Ideal for smaller events such as meetings, training venues etc, the hub is also equipped and licensed to hold film events. It is a place where community members meet for coffee mornings, holding craft courses, and using the hub's fully equipped community workshop to plan and conduct community events etc.

3.10 The hall is some 4-5 times the size of the hub, being primarily one large open floorspace suited to entirely different types of events, such as sports like badminton, indoor football etc. It has also been used for community functions like the annual lifeboat week. With a large stage, the hall can host large dance, music and sport events. Its size makes it perfect to cover any overspill from outdoor events (such as the harbourside market) in the event of poor weather.

3.11 The hall has also hosted several wedding receptions over the years. Weddings in the future could see the hub and the hall complementing each other by using common management and staff under the security of combined community ownership.

3.12 Further details of PHCBS's increasing capacity and its extensive consultation and support – which are included within its reasons for the proposed transfer of ownership – are given at paragraphs 1.57-58 above and 3.20-42 below.

## RESTRICTIONS ON THE USE OF THE LAND

3.13 It is accepted that several real burdens affecting the village hall remain in place (see paragraph 1.21 above), limiting its use. PHCBS would assume all these burdens if the CAT proceeds.

3.14 However, the Laird of Dunskey Estate has pledged that he is willing to release the burdens if PHCBS takes ownership of the hall. The Laird understands that this would allow greater scope and flexibility for future funding bids if they are necessary, and allow greater flexibility in the use of the hall for the community. This enhances the community's options for the future.

## BENEFITS THAT WOULD ARISE

3.15 There would be very substantial benefits. These would arise from the multiplicity of uses that could be accommodated (see paragraphs 3.5 and 3.7 above) and the ability to work within the real burdens (see paragraphs 3.13-14 above)

3.16 PHCBS has already built a very successful business reputation. With a wealth of knowledge and skills, it would ensure the future viability and sustainability of the facility, allowing the hall to flourish with lower overheads than those of any comparable non-registered body and in line with PHCBS's charitable objects. The hall would join a strong alliance of community assets under PHCBS's umbrella. Support from two paid members of staff would reduce volunteers' workload.

3.17 With a focus on providing for community events like fetes, markets, cinema nights, sports clubs and much more, the hall would be promoted without any fear of needing to increase current tariffs. PHCBS's umbrella position and management structure could attract several streams of grant funding.

3.18 Plans for future events such as concerts, galas and festivals would together stimulate the entire community, increasing use of all facets of the village and providing economic spin-off.

## NEGATIVE CONSEQUENCES

3.19 There would be no negative consequences.

## CAPACITY TO DELIVER

3.20 As a registered charity – the first of a completely new charity model (see paragraph 1.47 above) – PHCBS benefits from financial dispensations and reliefs providing savings of thousands of pounds each year.

3.21 PHCBS has achieved a great deal since 2015. Its accounts demonstrate its continued steady financial growth. It has taken the harbour into community ownership,

turning it round from a debt of £125,000. It has raised over £400,000, including £100,000 in community shares, £200,000 in grant funding, and over £100,000 in business revenue from running the harbour. It has over £100,000 in the bank and an annual income of over £30,000.

3.22 PHCBS has successfully completed two CATs for council land and the harbour toilets. With new moorings, increased facilities and a fresh smooth surface, the harbour improvements have produced a much pleasanter and more modern environment whilst still retaining its charm. The renovation of the harbour buildings (thanks to grant funding) has delivered a community hub – a fantastic facility – that is used as everything from a training facility, emergency support and refuge centre through to a fund-raising base. This building has the capacity to work in tandem with the hall, with a staffed office on the harbour providing the management base for PHCBS’s combined assets, thus minimising overheads.

3.23 These developments mean that the charity has largely satisfied its primary charitable objectives, almost 18 months earlier than forecast in the harbour business plan. Having established a sustainable income and healthy surplus from the successful operation of the harbour, PHCBS can now further support and secure the future of the wider village infrastructure.

3.24 The appellant’s 10 trustees include a chartered accountant, an architect, two engineers, an events manager, a journalist and a public relations consultant. It has a fully operational management team and system, incorporating health and safety systems, public liability insurances, a strict financial and accountancy policy, and a team experienced in handling staff. It also uses professional advisers on a regular basis. Its accounts demonstrate a strong level of governance.

## LEVEL AND NATURE OF SUPPORT

3.25 PHCBS has carried out extensive and open consultation and engagement with the community through several avenues. There is strong engagement with its membership through continued newsletters and updates requesting feedback and ideas.

3.26 Extensive consultation started in 2015-16, when at a public meeting PHCBS engaged with PCC to conduct due diligence in relation to the hall. There was then a consultation public meeting in March 2019 on the Here for Growth report and further engagement through the PCC meeting in May 2019. Attendances at these meetings were 70, 100 and 60 respectively. There was overwhelming support from PCC and from all attendees when PHCBS declared its intention to pursue a full CAT for the hall at PCC’s May 2019 meeting.

3.27 The publication of PHCBS’s [Newsletter No 6](#) was an important stage. It included this:

*“... the Society Committee has now taken the step of entering an Expression of Interest to Dumfries and Galloway Council in respect of Portpatrick Village Hall ...*

*The Committee having already considered this matter they are confident that the Society is now in a position to bring the Hall into secure community ownership through an asset transfer to the charity. This would be supported by a full and comprehensive business*



*plan which would see the Hall join and compliment the village's accrued assets to the greater benefit and security of them all.*

*The Society therefore invites your views and welcomes the ideas of members and wider community with regard to this proposal. A full and open community consultation will follow in line with the Community Empowerment Act Scotland 2015, prior to any further action being taken."*

3.28 The newsletter was circulated to 554 PHCBS members, nearly all online but with 10 paper copies to those without online access. Copies were also placed on the PHCBS and PCC notice boards and in local shops/pubs. A copy was placed on the PHCBS website. A further copy was sent to Third Sector Dumfries and Galloway. About 30 PHCBS members and about 10 others replied in writing, all being positive towards the transfer plans. There is support from several strategic groups, including Portpatrick Lifeboat Station RNLI, HM Coastguard, Dumfries and Galloway Arts Festival, and several local businesses. The absence of any negative response provides confidence to proceed.

3.29 Copies of three petitions are provided. [One](#), containing about 170 signatures, is critical of DGC, particularly with regard to PCDT. [Another](#), with about 130 signatures, expresses support for PHCBS's CAT request, saying that DGC aims to dispose of the village hall. A [third](#), with about 180 signatures, is against DGC's decision to refuse PHCBS's CAT request, saying that DGC has no plans to update or improve the village hall.

3.30 In response to the allegation by DGC about PHCBS's CAT request being responsible for community division, the submitted minutes of public meetings along with newsletters show how PHCBS is fully engaged with and entirely active in community engagement. The 2016 letter of intent clearly identifies PHCBS's involvement with PCC at that time in finding a way forward for the future of the village hall through community engagement and due diligence. The several letters of support from other bodies, community groups and local businesses clearly evidence this, and mean that any such unfounded allegation can be rejected. PHCBS currently works alongside and enjoys the support of many other community groups in Portpatrick, including Portpatrick School and Parent Teacher Association, Portpatrick Lifeboat station and crew, Portpatrick Golf Club, Portpatrick Parish Church, Portpatrick CoastGuard station and crews, local businesses, PCC and Portpatrick Community Resilience Team

3.31 Although DGC takes the view that there is little or no evidence of engagement with local partners, stakeholder and community planning partners, the two DGC officers attending the PCC meeting in May 2019 witnessed the overwhelming level of support for PHCBS's CAT request: almost 100 residents there unanimously applauded the announcement of the request. One of DGC's officers is on record as having commented on such positive support being a key requirement in the CAT process. In addition, PHCBS's Newsletter no 6 clearly evidences the level of community engagement and support for its CAT request as well as highlighting the extent of its volunteer base and positive impact which the charity has on the community.

3.32 On DGC's view that the CAT request did not demonstrate ability to work with volunteers and other groups, the following supporting documents were submitted with the CAT request to clearly evidence PHCBS's intentions and its ability to carry these out with the support of the community with whom it is already fully engaged:

- A detailed breakdown of how PHCBS would develop the hall as part of the community's infrastructure along with several other community assets it already holds.
- A copy of the Here for Growth report, highlighting negative and positive elements of the community's situation in relation to the hall.
- Minutes of public meetings evidencing community and stakeholder engagement, consultation and support for PHCBS's CAT request.
- Several years' charity accounts evidencing financial stability, growth and an undeniable ability to deliver on previous business plans with full community support.
- A large number of letters of support for the CAT request from stakeholders and community groups within the village.
- A recent newsletter further evidencing community and stakeholder engagement, consultation and progress with the new community hub.
- PHCBS's original business plan for the harbour which, when compared with the charity accounts supplied, clearly evidences PHCBS's outstanding performance and the positive impact which it has imparted on the local community.
- A financial appendix to the original business plan which outlines the future financial plans for the hall.

3.33 I asked PHCBS (through matter 17 in DPEA's [letter](#) of 20 October 2020) whether its proposed CAT been discussed at any of its annual general meetings, or any of its other general meetings. In reply I was referred to the minutes of PHCBS's AGM in [November 2019](#). This was some months after the CAT request had been submitted. I therefore asked (through matter 31 in DPEA's [letter](#) of 10 November 2020) if there had been any discussion at any PHCBS general meeting of the proposed CAT request before it was submitted. In response PHCBS drew my attention to its rules, including the authority given to its board of directors, and stated that all of its actions were conducted strictly in line with the rules. It also provided a timeline referring to various meetings. This part of the response said that in May 2019, because of the geographic locations of PHCBS's membership, Newsletter No 6 conveyed to all members that an expression of interest had been submitted by the board for the possible CAT of the village hall. Society members were asked in that newsletter to voice their views on this as part of the ongoing consultation process prior to submission of a stage 2 CAT request. The notice of the expression of interest was also posted, along with the newsletter, on both the PHCBS website and the community noticeboard. The PHCBS board meeting on 24 May 2019 discussed feedback from the membership, which was 100% positive in support of the hall being transferred to PHCBS.

## BUSINESS PLAN

3.34 PHCBS says in its appeal statement that *"the CAT 2 application form and financial appendixes together make up the business case/plan. This is based on the "Here for Growth " consultation document ..."*. In the following paragraph I focus on the distinct document which I regard as the [hall business plan](#).

3.35 The hall business plan forecasts costs and income for the first three years after transfer of ownership.

3.36 Costs for administration and staffing would be shared with PHCBS's other assets, and such costs are excluded from PHCBS's calculations. Costs excluding staff costs for the three years 2012-15 are taken from DGC's November 2015 table to have been £25,390, £7,209 and £7,468<sup>15</sup>. Costs for year 1 after transfer are estimated as follows from a starting point of the 2014-15 costs:

(a) Costs starting point = £7,468.

(b) Projected additional costs = building insurance £200 + contents insurance £200 + public liability insurance £200 + performing rights licence £350 + hygiene disposal £112 + internal repairs £1,000 = £2,062.

(c) Total costs = (a) + (b) = £9,530.

(d) Charity dispensations (including relief on water and sewerage rates, business rates and refuse charges) = £2,809.

Net costs = (c) – (d) = £6,721.

3.37 Costs for years 2 and 3 were assumed to be the same as for year 1.

3.38 The starting point for estimating letting income was the average of the income from DGC's table in the three years 2012-15 of £3,913, £4,812 and £6,980, ie an average of £5,235<sup>16</sup>. For post-transfer year 1, income is taken as that average plus 30%, ie £6,806. That 30% income increase in year 1 is based on conjoined activities with the harbour's "*vibrant activity*" and would reflect "*planned fetes and festivals*" to be held at both the harbour and the hall. Years 2 and 3 are forecast to have income increases of 30% to £8,849 and 10% to £9,734 respectively. Such increases are clearly possible by holding community events such as the Christmas fete which raises in the region of £3,000 per annum over a weekend of events focused at the Hall.

3.39 Consequently there would be a small surplus (£85) in year 1, and larger surpluses in years 2 and 3 (£1,128 and £3,013 respectively).

3.40 In response to DGC's comments, PHCBS emphasises that it is income rather than usage that is predicted to increase by 70%. PHCBS already works hand in hand with PCC, Portpatrick Primary School, Portpatrick Lifeboat and Portpatrick Coastguard to effect the best outcomes. This mutual support will continue, as would support for the village hall. Notwithstanding the Covid-19 pandemic, PHCBS's income (which remains stable), its joint management and staffing approach to running the harbour toilets, the community hub and the village hall would provide a level of protection from the financially negative effects of the pandemic better than the approach of DGC which neither wants the village hall nor, by its own admission, could it afford to keep or run it in the long term. PHCBS's combined income from the harbour and the hall and its charity reliefs would help to absorb any shortcomings arising from the pandemic.

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<sup>15</sup> The figures are different from those given in the table in paragraph 1.31 above, most significantly for 2013-14. PHCBS appears to have incorrectly inflated the 2013-14 figure because of its failure to recognise that the emergency repairs cost for that year is a negative figure (presumably an accounting adjustment).

<sup>16</sup> The figures for 2012-13 and 2014-15 are different from those given in the table in paragraph 1.31 above. PHCBS appears to have under-estimated income because of its failure to respond to DGC's explanation of its figures reported at footnote 5 above.

3.41 Notwithstanding the obstacles and negative elements which require to be carefully navigated, PHCBS has shown its ability to deliver on commitment and it has an attractive profile and stable fiscal footing. Its buoyant fiscal position comes from sound financial planning and good governance, and is evidenced through delivering on existing business plans. That provides greater scope through cash flow to deliver on grant applications for future projects. This is a plan that would make the hall work through collaborative events with other community assets in contrast to the previous period of a poor financial position under DGC's control. That was the period when the Here for Growth report highlighted that the hall could neither be viable nor sustainable as a stand-alone asset and would therefore require additional support.

3.42 The path is clear to make the hall a viable and sustainable asset for the community when brought under the umbrella of PHCBS's management and working alongside several other community assets. PHCBS's financial planning and vision for the hall is entirely realistic and totally relevant to the current local financial and social environment. There would be financial advantages in a "*collaboration of assets*" (the harbour and the hall) under the charity.

## COMPLAINTS ABOUT THE COUNCIL'S HANDLING OF THE CASE

3.43 These points are made in a number of submissions, including those dated [25 August 2019](#) and [3 September 2019](#) and [a timeline document](#). Some of the points have specific links included below.

3.44 As far back as August 2018 DGC officers were [dealing](#) with PCDT. In secret, they drove its formation. The documentation clearly shows that there was favouritism towards PCDT. DGC officers made an agreement to transfer the hall to PCDT without the community knowing or being consulted. This was being done even before PCDT was formally constituted. A PHCBS [email](#) of 5 June 2019 to the Cabinet Secretary for Communities and Local Government refers further to an agreement in September 2018 between the founding directors of PCDT and DGC officers to form the PCDT and for the latter to have exclusive "*full management*" of the village hall by 1 January 2019. A DGC officer report in June 2019 proposed to transfer the hall to PCDT.

3.45 Correspondence with DGC after the submission of PHCBS's stage 2 CAT request shows DGC officers clearly delaying the process of verifying the request and entering it into the CAT system. If PHCBS had accepted this delay, the CAT request would have clearly been undermined by the DGC officers' proposal to transfer the hall to PCDT.

3.46 DGC officers deliberately prevented PHCBS from having any meaningful meetings with them.

3.47 PHCBS submits a [letter](#) of 3 September 2019 from DGC to PHCBS which refers to two complaints from the latter<sup>17</sup>. Summarising DGC's words in the letter, these were (1) that DGC had ignored written requests and the 2015 Act in relation to PHCBS's CAT request for the village hall, and (2) that, by failing to comply with the 2015 Act on both PHCBS's and PCDT's applications, DGC was acting unprofessionally and unlawfully.

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<sup>17</sup> PHCBS has not made clear which of its specific letters was the one which stated the complaints to DGC.

3.48 PHCBS's CAT request was frustrated and misrepresented to both the public and DGC members. It was systematically obstructed and misrepresented by DGC officers. This amounts to systematic abuse of the 2015 Act.

3.49 The scores and statements applied to PHCBS's CAT request by DGC's officer panel were seriously flawed, misrepresenting the application and the local community cohesion.

3.50 The officer reports prepared for DGC's Wigtown Area Committee on 4 September 2019 and the Finance, Procurement and Transformation Committee on 29 October 2019 did not have PHCBS's approval. Similarly, PHCBS was not consulted on the June 2020 officer report for the review of the CAT request.

3.51 The DGC officer's review report stated that eight supplementary representations had been received of which two were in favour of, and six were against, PHCBS's request. No such supplementary representations were sent to PHCBS for comment in accordance with the guidance on the 2015 Act.

3.52 A small cluster of representations, defamatory to PHCBs, were posted on the DGC website despite its objections. PHCBS includes a copy of these representations as part of its submissions.

3.53 A substantial number of people claim never to have received any opportunity to make a supplementary representation, as no notice was sent to them by DGC as required by the 2015 Act.

3.54 DGC has failed to publish on its CAT website documents which indicate overwhelming support for PHCBS's position. Representations and documentation that support PHCBS's position, including the Here for Growth report, PHCBS's Newsletter No 6, its accounts, and the minutes of PCC's meeting on [7 May 2019](#), were withheld from, and misrepresented to, DGC members and were not posted online. An independent body should be appointed to ensure that all those who submitted original representations are identified and directly contacted and given a fair opportunity to make further representations.

3.55 On mediation, PHCBS has stated clearly to councillors on a number of occasions that it does not wish to engage in any process outwith the 2015 Act and that it does not recognise the need for mediation. This is because it has acted openly and transparently, conducting its business through the open format of community meetings attended by hundreds of people, held and chaired by PCC explicitly to consider the future of the hall. PHCBS has a duty to protect its public reputation as a charity, and therefore exposing it to public collaboration with PCDT would be unacceptable.

## CHAPTER 4. THE COUNCIL'S CASE ON MERITS

### INTRODUCTION

4.1 The various strands of DGC's case on merits appear within its submissions and documentation at one, some or all of the three main stages of the 2015 Act process (request, review and appeal). These include its further written submissions and documentation in response to my questions and requests for information set out in letters on [20 October 2020](#), [10 November 2020](#), [24 November 2020](#), and [26 November 2020](#). Its initial response to the points of appeal is [here](#).

4.2 As indicated above, DGC rejected PHCBS's CAT request because of a low panel score and because of the division in the local Portpatrick community.

### OFFICERS' INITIAL VIEW OF THE TRANSFER REQUEST

4.3 DGC officers' email to PHCBS on [14 June 2019](#) indicated that it was felt that the CAT request could be strengthened by discussion. It was thought, *"in the spirit of a critical friend"*, that these were some of the main areas where the proposal could be improved: \*

- The inclusion of a specific business plan covering the hall.
- More detail on the potential working with the Health and Social Care Partnership that was mentioned.
- More detail on the mention of markets, fetes, concerts and benefits to the business community.
- More detail on the engagement and consultation activities, ie what was presented to people and what questions they were asked to respond to.

4.4 PHCBS did not enter into discussions or provide further information in response to this request.

### THE OFFICERS PANEL ASSESSMENT

4.5 The [officers panel](#) (see paragraph 1.75 above) considered the CAT request under three headings: engagement, vision and impact, and sustainability, each sub-divided into distinct characteristics. Each characteristic was assessed on a 5-point scale: poor (1 point), weak (2 points), moderate (3 points), strong (4 points) and very strong (5 points).

#### *Engagement*

4.6 The panel's starting point on engagement was this definition of community engagement substantially derived from the National Standards for Community Engagement: *"a purposeful process which develops a working relationship between communities, community organisations and public bodies to help them to identify and act on community needs and ambitions. It involves a respectful dialogue between everyone involved, aimed at improving understanding between them and taking joint action to achieve positive change."*



4.7 The panel's engagement scoring was sub-divided into "*quality*" and "*quantity*". For "*quality*", the panel considered whether the process of engagement undertaken by PHCBS had been purposeful, had allowed all residents / stakeholders to ask questions, and had created opportunities to discuss ideas, and whether it had identified community need and ambition. The scores were weak to poor with a combined score of 5 points out of 15.

4.8 For "*quantity*", the panel considered whether PHCBS had involved all members and sectors of the community (local user groups, local non-user groups, local residents, community planning partners) in the engagement and consultation, and what proportion of the local population had been engaged. Here the scores were moderate to weak with a combined score of 8 points out of 15.

4.9 This gave a total score of 13 out of 30 (moderate to weak) for engagement. The panel noted that PHCBS had undertaken a moderate degree of information sharing and awareness raising with some members of the local community. The panel was unclear as to the level of two-way consultation and idea sharing between PHCBS and the general public. There was little or no evidence of engagement with local partners, stakeholder and community planning partners such as Police Scotland, Scottish Fire and Rescue Service and the National Health Service. The only evidence of engagement with a local body was with PCC. The circulation of Newsletter No 6 to PHCBS members was noted, but also noted was the fact that not all society members are local to Portpatrick.

#### *Vision and impact*

4.10 Vision and impact was sub-divided into four characteristics: "*plan, outcomes, equality and use of resources.*"

4.11 For "*plan*", the panel considered how well PHCBS's vision for the village hall aligns with what the local community says it needs and wants, how the hall transfer would lead to positive change in the local community, and how widespread the positive change would reach. The scores were weak: 6 points out of 15.

4.12 For "*outcomes*", the panel considered whether PHCBS had a clear vision and plan in place for its contribution to the delivery of improved outcomes for the community. The scores were again weak: 6 points out of 15.

4.13 For "*equality*", the question was whether PHCBS had demonstrated that equality issues were embedded in its vision and throughout its work. In this case the scores were weak to poor: 5 points out of 15.

4.14 For "*use of resources*", the panel considered whether PHCBS had shown how its effective management of resources would contribute to the delivery of specific outcomes highlighted in the business plan. Here the scores were strong: 12 points out of 15.

4.15 This gave a total score for vision and impact of 29 points out of 60 (weak to moderate). The officers noted that the submitted business plan referred to and focused on the original harbour ownership and regeneration, with no mention of the hall. Other than mentioning the provision of a social and recreational space, the evidence demonstrating positive impact to the local community was poor or weak. There was no mention of addressing inequality of outcomes or addressing local challenges identified by the

community. The officers considered that, although the strategic objectives of the harbour might be transferable to the hall, the hall itself was not in focus from the information presented.

### *Sustainability*

4.16 Sustainability was divided into four characteristics: *“finance, volunteers, governance and effective partnerships.”*

4.17 For *“finance”*, the question was whether PHCBS’s vision was financially sustainable and whether financial planning had been applied, including the potential for future funding. The scores were weak: 6 points out of 15.

4.18 For *“volunteers”*, the panel considered the sufficiency of volunteer support to deliver the intended outcomes, and the existence of a plan to recruit, train and develop more volunteers. The scores were again weak: 6 points out of 15.

4.19 For *“governance”*, the panel considered whether PHCBS demonstrated structures, policies and leadership behaviours that would support the application of good standards of governance and accountability. In this case the scores were strong: 12 points out of 15.

4.20 For *“effective partnerships”*, the panel considered whether PHCBS had demonstrated how it would work with partners to collaboratively approach the challenges that its community faces. The scores were weak to poor: 5 points out of 15.

4.21 The resultant total score for sustainability was 29 points out of 60 (weak to moderate). The panel considered that information relating to financial planning appeared weak, as did the potential for collaborative working and the use of volunteers. PHCBS had demonstrated strong leadership in taking forward the harbour plan, and appeared to have strong governance structures in place. PHCBS claimed to have a better understanding of the risks of the proposed CAT, but there was no mention of what those risks were and how they would be mitigated. It was noted that PHCBS had a significant level of income and reserves generated from the harbour, but it was unclear if the harbour and the hall can operate in conjunction, as PHCBS’s sole aim is focused on the harbour. It was difficult to accept the proposal for the hall to generate 70% more income by year 3 after transfer.

### *Conclusion*

4.22 The total score was 71 points out of 150.

4.23 The panel advised that the business plan would benefit from engagement across the entire community and that PHCBS should work in partnership with organisations with similar objectives in Portpatrick to produce a more holistic plan to the benefit of all local residents.

## CONDITIONS

4.24 In the event of the appeal succeeding, and should the benefits proposed not be delivered or the asset is sold on in the future, DGC would seek a condition requiring PHCBS to pay back any increase in the value of the asset.



## OTHER DISBENEFITS OF THE PROPOSED TRANSFER

4.25 In reporting to the Wigton Area Committee in September 2019 it was noted that disposal of the hall for a nominal sum of a £1 would mean no capital receipt for DGC's capital investment strategy, that the property would no longer be available to DGC for alternative uses, and that it would no longer be available to another community transfer body for similar or alternative uses.

4.26 If restrictions on indoor gatherings arising from the Covid-19 pandemic were to continue, it might not be possible for PHCBS to achieve its very ambitious target of a 70% increase in usage of, and income from, the hall over its first three years of operation. Therefore the likelihood of the hall becoming a liability to PHCBS would increase.

## PHCBS MANAGEMENT OF THE HALL DURING LEGAL TRANSACTIONS

4.27 In the event of the appeal relating to the proposed ownership transfer being allowed, it would be reasonable for DGC to enter into discussions with PHCBS about early entry to enable the hall to continue to operate. This could be achieved through a standardised management agreement or license to occupy.

## COUNCIL APPROACH IF THE APPEAL FAILS

4.28 If PHCBS's appeal fails, DGC remains committed to reducing the costs of its community facilities by transferring responsibility for management of these to local management committees under standardised management agreements or through ownership transfers. Should the appeal fail, DGC would seek to deliver on this commitment by working with the local community to find a suitable partner to achieve this.

## COMPLAINTS ABOUT DGC'S HANDLING OF THE CASE

4.29 DGC has a well-established set of [procedures](#) for dealing with CAT requests, together with an [update](#). Its responses to PHCBS's points include those in emails of [31 July 2019](#), [3 September 2019](#), [9 September 2019](#) and a set of [further responses](#).

4.30 On alleged pressure on the community to take over the village hall in 2015, and then encouragement of and support for PCDT by DGC officers, the hall was one of many properties in DGC's community facilities review 2013-2020. During this review DGC officers worked closely with communities to establish options to ensure the sustainability of local buildings, and the approach in Portpatrick was the same as in other areas. However, the PCC working group developed into a separate body, which submitted a CAT request as well as PHCBS.

4.31 Seven written representations were received at the application stage: one in favour of the proposed CAT and six against. PHCBS did not provide any comments in relation to the representations received.

4.32 DGC denies obstruction and misrepresentation of PHCBS's CAT request. All of the information provided by PHCBS has been handled in line with Scottish Government guidance. The request was progressed without delay, and in an open and transparent manner, and all timescales in Scottish Government guidance have been met. Where necessary DGC has posted relevant information on its dedicated CAT webpage. Officer support was provided to PHCBS in line with DGC's standard arrangements.

4.33 On withholding, omitting and misrepresenting documentation, DGC does not agree with PHCBS. PHCBS claims that the Here for Growth report was omitted from the documentation put to members at the request stage, but DGC has no record of its submission at that time. PHCBS claimed that newsletters and PCC minutes presented as part of the original request were not made available to members. This is DGC's standard practice, but the officer panel had those documents and so they were taken into account.

4.34 At the review stage, DGC contacted all previously interested parties to call for supplementary representations: this generated eight supplementary representations; four of them were posted on DGC's CAT webpage along with the responses provided by the PHCBS; the authors of the other four representations did not give their permission for publication within the time required.

4.35 On the omission of initial and supplementary representations from public view and from reports supplied to members, all representations on the original request were published with all personal and potentially defamatory information redacted. The only representations received by DGC at request or review stages that have not been published are those for which express permission to publish was not received. However, they were referred to in the covering report to the review committee. At the review stage correspondence was received from Portpatrick residents who were not previously interested parties, so they could not be presented as part of the review.

4.36 On defamatory representations against the PHCBS CAT request being posted on the DGC website despite PHCBS objections, DGC considers that the representations in question contain no defamatory remarks but are a mix of fact and opinion contributing to the public debate. PHCBS had the opportunity to respond to them in order to provide a balanced view.

4.37 On subsequent obstruction by DGC officers to the community's wishes, DGC progressed both CATs for the hall, concluding that it should refuse both requests. Both applications were treated fairly and equitably, and DGC did not have a favoured request.

4.38 DGC's review considered all of the information provided with the original request along with the reasons and information PHCBS put forward with the request for review. DGC's review also considered the representations received during the review process and the PCBHS response.

## CHAPTER 5. THE CASES FOR THIRD PARTIES ON MERITS

### INTRODUCTION

5.1 Third party representations are included primarily within several files called [Defamatory Representations](#), [Missing representations](#), [Representations submitted to Authority](#), [Representations](#), [Supplementary Representations](#), and [Document 1a – CAT PHCBS Supplementary Representations](#).

### PORTPATRICK COMMUNITY COUNCIL

5.2 PCC wholeheartedly supports PHCBS's CAT request. PHCBS has shown its commitment to Portpatrick over recent years by securing the harbour and building a community hub and workshop. It has worked with the community and community groups in open and transparent, minuted public meetings, and has supported community events and fund raising. This has earned it the trust of the community of Portpatrick, the majority of whom support its CAT request.

5.3 PCC provides a timeline of events which focuses on the formation of PCDT. Its formation was proposed in September 2018 by the then PCC village hall working group. PCC and community members requested they defer the formation, but PCDT was registered at Companies House in October 2018, without the knowledge of PCC and the community. In December it was discovered (through a Freedom of Information request) that DGC had been working with PCDT towards taking on the hall without PCC's knowledge. In February 2019 the hall working group was disbanded. PCDT were recruiting additional members at that time, but the community had no say in its objectives. In April 2019 PCDT submitted an expression of interest in the village hall without holding any community consultation and without PCC's knowledge. On 25 April PCC held a [public meeting](#) to discuss the community's concerns about this expression of interest; both PCDT and DGC were invited to attend but sent no representatives. Most of the 100 plus members of the community present at the meeting agreed that a petition should be raised to let DGC know of the community's concerns. At the PCC meeting in the following month (attended by DGC representatives), PHCBS's indication that it would be submitting an expression of interest in the village hall was met by a round of applause. There was a unanimous show of hands in favour of the hall being managed by PCC until a CAT had been decided. A DGC representative stated at the meeting that community engagement was required for a CAT and commented on the passion at the meeting.

5.4 PCC does not believe that PCDT represents the Portpatrick community: PCDT will not attend public, open and transparent minuted meetings where the community can have their questions answered.

5.5 I have asked PCC specifically about consultation on the Here for Growth report. In doing so I pointed out that PHCBS had indicated that consultation on that report was carried out at a public meeting on [25 April 2019](#)<sup>18</sup>, and I asked about any other form of consultation on the report. PCC [replied](#) that the Here for Growth report was discussed at a PCC meeting on 16 January 2018 and stated *"We are not aware of other discussions about the report apart from at the public meeting you mention."*

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<sup>18</sup> Initially said to be 25 January 2019 but corrected to 25 April 2019.

## OTHER SUPPORTING REPRESENTATIONS

5.6 Dumfries & Galloway Arts Festival says it would be thrilled to build a relationship with the village hall for performing arts.

5.7 A number of residents make these supporting points between them:

- PHCBS has transformed the harbour and its buildings. It has shown that it can achieve its goals. Its track record is widely acknowledged in Portpatrick and further afield. It makes logical sense to have all the assets under its capable control.
- There is full confidence in PHCBS's ability to run the hall successfully for the good of the village community. It is essential that the hall comes under its stewardship, as it offers complete transparency, a proven track record, inspires total confidence and has widespread support.
- PHCBS is well run, it has been completely open and transparent, and it has engaged with its members and the residents of Portpatrick.
- Offers of assistance in running the hall are made, and references are made to others willing to assist.
- The PHCBS plan to run the hall is the only way forward to protect its future.

## PORTPATRICK COMMUNITY DEVELOPMENT TRUST

5.8 PCDT's submissions appear at pages 26-58 of [one](#) of the collections of representations.

5.9 PCDT's legal form is a company limited by guarantee (SC 611849). It was incorporated in October 2018, and its inaugural meeting of members was in March 2019. PCDT members at that meeting decided to submit a stage 1 expression of interest to DGC. At July 2020 it had 74 members of whom 49 were full voting members, locally resident in Portpatrick. It says: *"Many of our members are happy to quietly support us but have absolutely no wish to do so publicly for fear of intimidation."*

5.10 PCDT's origins lie in the hall working group formed by PCC in 2017. That group's remit was to carry out day-to-day janitorial duties, take bookings and engage professional assistance *"in order to obtain a Hall report as part of due diligence"*. The latter led to the Here for Growth report. During 2018 the PCC's hall working group was starting to set up the framework for an organisation capable of taking over the hall, and both PCC and DGC were being kept informed of this. Following publication of a draft constitution at the September 2018 PCC meeting, the chair of PHCBS organised a petition and called an EGM with no prior attempt at discussion or debate. The hall group considered the hall to be then at risk, as no group had expressed any willingness to take it over during the previous two years. DGC had resolved to close the hall, as no budget had been allocated to support it in

2019. Following the joint letter of intent in August 2016, PHCBS did not express any interest in taking over the hall until September 2018.

5.11 PCDT was not “*driven*” by DGC officers, but was formed by a group of volunteers who had lobbied DGC not to close the hall in 2016 and had taken on the hall duties as a way forward. PHCBS omits to state that the letter of intent of August 2016 was rejected by DGC as lacking in substance. The subsequent service level agreement between PCC and DGC for the running of the hall was made on the express understanding that the hall group would work towards creating a vehicle to bring the hall into community ownership. This was the impetus for creating PCDT and working to develop a viable plan.

5.12 PCDT’s own CAT request for the hall scored highly against all DGC’s officer panel criteria, but was rejected by DGC solely because of the potential for division in the village. PCDT believes that its CAT request still stands. DGC recommended professional mediation as a way forward, a proposal that PCDT has agreed to, and that agreement is re-iterated now. Many people in the village ask why both groups cannot work together.

5.13 PCDT opposes PHCBS’s CAT request. It has serious reservations about PHCBS’s governance and its capacity to deliver social inclusion and community benefit to the whole of the Portpatrick community, given its discriminatory and divisive behaviour.

5.14 issues of community control of PHCBS, together with a number of close family connections between PHCBS and PCC, and the autocratic manner in which PHCBS appears to be run have resulted in discriminatory behaviour by the PHCBS leadership towards some members of the Portpatrick community, including some of those seeking to use the harbour.

5.15 There is a lack of transparency about PHCBS’s decision-making, with important decisions often seeming to be made at closed meetings not even involving all board members.

5.16 As the PHCBS share issue is now complete, it is not clear if there is a mechanism for new members to join PHCBS, particularly any member of the community with an interest only in the village hall rather than the harbour. At least one case is known where a share membership application by a member of the local community has been refused.

5.17 If PHCBS’s CAT proceeds, the hall would be controlled by the trustees of PHCBS rather than the community that the hall serves. The PHCBS trustees are bound by PHCBS’s rules to prioritise the interests of the community of shareholders in the harbour. That conflict of interest has the potential to be detrimental to the development of a sustainable plan for community ownership of the hall.

5.18 The PHCBS CAT request and its subsequent submissions largely focus on its achievements in operating the harbour, but provide little insight into proposals for delivering benefit to the community based on the hall CAT.

5.19 It is accepted that PHCBS has mobilised groups around the harbour, including RNLI and HM Coastguard, together with a large number of volunteers, to distribute meals during the Covid-19 pandemic. But this is being leveraged in social media publicity as evidence of widespread support for other purposes. In the meantime, PCDT proceeds quietly with targeted support, with the Stranraer Development Trust, the Rhins Churches Basic Food

Bank and Apex Stranraer, for the most vulnerable in the community. This includes distributing food to the economically vulnerable and isolated, providing pharmacy pick-ups, home repairs, an advocacy service, and a listening-ear service.

5.20 The minutes of PCC meetings that PHCBS have submitted are not primarily evidence of community consultation about the hall; rather the primary focus was to seek to discredit PCDT, to spread misinformation about alleged collusion between PCDT and DGC, and to generate support through inciting a feeling of injustice.

5.21 The meeting called by PCC on 25 April 2019 cannot be construed in any way as a consultation on PHCBS's proposal for a stage 2 CAT request. The [petition](#) that was put together at this meeting was initiated with signatures on blank paper, with the petition heading inserted subsequently.

5.22 Included in PCDT's submissions is a copy of a flyer under heading "*Portpatrick Community Resilience Team*" with 5 logos (the largest being the PHCBS logo) referring to the preparation of "*today's soup*" and to an accompanying form asking for support for PHCBS in its appeal. This form became [one](#) of the petitions in support of PHCBS's CAT request.

## OTHER OPPOSING REPRESENTATIONS

5.23 Those identifying themselves as shareholders in PHCBS make these points:

- PHCBS does not operate in a democratic manner. It is very difficult to address issues openly. It communicates very little with its shareholders. It submitted its stage 2 CAT request without consultation with shareholders.
- PHCBS's CAT request implies that the harbour funds are accessible assets to cross-subsidise the village hall, with no plan as to how shareholder interests will be protected.
- Those who control PHCBS have actively worked to suppress any opposition both within the shareholder membership and in the wider community. The "*consultation meeting*" run by PCC was a meeting to try and suppress any opposition.
- Further concentration of power in the hands of those who control PHCBS would not be in the best interests of the community.

5.24 The main points made by other third parties opposing PHCBS's CAT are these:

- Although PHCBS refers to cinema performances at the village hall, the organiser of Portpatrick Local Cinema states that PHCBS has not consulted on that.
- The process of forming a petition with no heading (referred to at paragraph 5.21 above) also occurred at a PCC meeting on 7 May 2019.

## CHAPTER 6. REPORTER'S ASSESSMENT ON MERITS

### INTRODUCTION

6.1 I deal first with two procedural matters. These relate to PHCBS's complaints and the area for potential ownership transfer. I then go on to deal with the substantive merits.

### COMPLAINTS ABOUT DGC'S HANDLING OF THE CASE

6.2 PHCBS makes a large number of complaints about DGC's behaviour, relating both to the period before it made its CAT request and to the period during which its request was under DGC's jurisdiction. These include the points made in emails dated [5 June 2019](#) and [24 June 2019](#). I can best deal with these by grouping the complaints into several distinct strands.

6.3 There is a range of complaints about DGC officers favouring PCDT at the expense of PHCBS. These range from officers secretly driving PCDT's formation to subsequently agreeing with PCDT to transfer the village hall to it. I have no doubt that discussions took place, before PCDT was inaugurated in October 2018, between DGC officers and one or more of the people who were probably playing, or were to play, a part in that inauguration. But I see nothing wrong in that: if someone wishes to raise matters with a relevant authority about a CAT he or she is fully entitled to do so, and it would have been both discourteous and improper if DGC officers had failed to respond. PHCBS does not have a monopoly right to engage DGC officers. DGC officers were in no position to strike a deal, and there is no evidence to suggest that they even claimed to do so.

6.4 Once PCDT was fully functioning in March 2019 and its stage 1 expression of interest had been submitted in the following month, contact between DGC officers and PCDT may well have increased, but again I see nothing inappropriate in that. DGC has indicated that it has a number of years' experience working closely with communities to establish options to ensure the sustainability of local buildings, and I have no reason to believe that its approach in Portpatrick was different from anywhere else in its area.

6.5 PHCBS makes a specific claim that a DGC officer report in June 2019 proposed to transfer the village hall to PCDT. This was very shortly after PHCBS's CAT request had been made. The facts are that the [report](#) in question – to DGC's Communities Committee on 11 June 2019 – contained five options. The most that any of those options proposed in favour of PCDT was this: *"Transfer responsibility for management of the Hall to Portpatrick Community Development Trust (PCDT) under a Standardised Management Agreement (SMA) for 2 years as requested within their stage 1 Community Asset Transfer request."* But that option was not recommended by officers, and members did not accept it. The clear recommendation by officers in the report was *"Review the current Service Level Agreement (SLA) with Portpatrick Community Council for a defined period to enable consideration of the current Community Asset Transfer requests, on the basis that current revenue costs are met by the Community Council."* The [minutes](#) show that that recommendation was accepted. It is clear to me that PHCBS has misread the report.

6.6 PHCBS claims that correspondence with DGC after it had submitted its stage 2 CAT request shows that DGC officers were delaying verification of its request. This appears to represent a fear that its request would not be considered in a timely manner. But the council email of [14 June 2019](#) to PHCBS makes clear that PHCBS's CAT request (submitted on 4 June) had already been validated, on 7 June. The email is crystal clear



that PHCBS would be wise to provide additional, and more specific, information to strengthen its request. It offered DGC officer assistance to PHCBS as a critical friend. However, PHCBS failed to respond positively to this.

6.7 PHCBS claims that if it had accepted the delay implicit in the DGC email, its CAT request would have clearly been undermined by DGC officers' proposal to transfer the hall to PCDT. But there was no delay, as the 14 June email explained that no council committee could consider any CAT request before September, and I have already indicated there was no proposal by DGC at that point to transfer the hall to any organisation. PHCBS's accusation of delay is without foundation. PHCBS's complaint that DGC officers deliberately prevented PHCBS from having any meaningful meetings with them is similarly belied by the contents of DGC's 14 June email. By rejecting DGC's approach, PHCBS was itself effectively rejecting Scottish Government guidance (paragraph 10.4) that dialogue between the relevant authority and the community transfer body should continue throughout the process. The guidance makes clear that an authority's proportionate request for more detail will help to avoid a situation where a request is refused on the basis of a lack of information. I see nothing disproportionate in the council's position on this.

6.8 PHCBS complains that the scores and statements applied to PHCBS's CAT request by DGC's officer panel misrepresented the request and the degree of local community cohesion. I have examined the panel's scores and statements in the light of PHCBS's claim and I accept that the panel appears not to have had all of the PHCBS documentation that is now before me. The panel says that PHCBS's "*professional report*" had not been provided. I take this to be a reference to the Here for Growth report. I note also that neither this report, nor what I regard as the hall business plan (see paragraphs 3.34-42 above) appears amongst the papers for the Wigtown Area Committee and the Finance, Procurement and Transformation Committee at their meetings on 4 September and 29 October 2019 respectively. It therefore seems likely that the officers panel did not see these documents. On the other hand, it remains unclear to me when PHCBS submitted these documents to DGC. Whether their omission from the panel deliberations and from the papers for the two committees results from PHCBS's failure to submit them at the appropriate time or from administrative failures on DGC's part, their absence will clearly have influenced views at those stages on PHCBS's CAT request. That is not to say, however, that the influence was necessarily critical to the adverse conclusion that DGC reached on the CAT request in October 2019.

6.9 The documents I refer to in paragraph 6.8 above were without doubt available to DGC at the review stage – they appear in the papers for its Ad Hoc Covid-19 Sub Committee which dealt with the review on 16 June 2020 – so there was opportunity for them to be taken into account at that later stage, and if appropriate, to reverse the earlier refusal decision. In addition, I am able to make my own independent assessment of PHCBS's CAT request taking full account of the documents referred to. In the final analysis, therefore, no prejudice to PHCBS has arisen in this respect.

6.10 PHCBS complains that the officer reports prepared for DGC's Wigtown Area Committee on 4 September 2019 and its Finance, Procurement and Transformation Committee on 29 October 2019 did not have PHCBS's approval. Similarly, PHCBS was not consulted on the June 2020 officer report for the review of the CAT request refusal. I do not see it as either normal or necessary practice for a relevant authority to carry out consultation or seek approval as in the complaint. Nor do I see why DGC should depart from normal practice in this case. The complaints in this respect are without proper basis.

6.11 PHCBS makes a range of complaints about the way in which DGC has dealt with third party representations and other documentation in relation to its CAT request. These points relate to some representations not being sent to PHCBS for comment, some representations that were regarded as defamatory by PHCBS being improperly taken into account by DGC, some people being denied the opportunity to make representations, and some documents indicating overwhelming support for PHCBS's position not being published by DGC. DGC responds, in essence, that PHCBS has had the opportunity to comment on all the representations that it took into account, that what PHCBS regards as defamatory remarks are no more than a mix of fact and opinion contributing to public debate, that proper procedures have been followed in identifying those people who should have an opportunity to make further representations, and that all submitted documents have been taken into account.

6.12 As PHCBS's concerns about third party representations and other documentation are expressed without, in the main, identifying exactly which representations and documents are in question I have not examined those concerns in great detail. I do note that some representations before me take a strongly adverse stance in relation to PHCBS's CAT request and some of its procedures. But the fact that they are strongly adverse does not mean they are defamatory, and PHCBS has not provided a detailed rebuttal of the representations that it regards as defamatory.

6.13 PHCBS's concerns include a [claim](#) at the appeal stage, that a number of people had been dropped from DGC's mailing list and so denied the right to make further representation. I therefore took the view that in addition to the third party representations that were before me being accessible on the DPEA case record on its website, I should make it clear to DGC and PHCBS explicitly which third party representations I would take into account in my consideration of the appeal and give them the opportunity to comment.

6.14 I therefore prepared a [table](#) listing the third party representations I proposed to take into account. DGC and PHCBS were given opportunity to comment on the completeness and accuracy of this table. A number of comments were made by both [DGC](#) and [PHCBS](#), but neither drew my attention to any specific third party representation not already included in my table that I should take into account.

6.15 There are further generalised complaints by PHCBS about it being obstructed by DGC. But in my assessment these have no substance. I accept DGC's view that, subject to the possible omissions I refer to at paragraph 6.8 above, it has treated PHCBS's request fairly and equitably. It certainly did not favour PCDT over PHCBS, with the CAT requests from both bodies being refused. I am [aware](#) that PHCBS made a formal complaint to DGC in September 2019; I am not aware of the [outcome](#) of that; I have not pursued it as it is a matter for DGC.

6.16 A further procedural point arises from the exploration by DGC's officers (as agreed by DGC members) of the potential for both PCDT and PHCBS to seek mediation through national organisations to reduce division within the local community. PCDT is willing to participate in mediation, but PHCBS is not. The latter's unwillingness reflects its non-recognition of the need for mediation, its view about the openness of its own processes through community meetings, and its view that public collaboration with PCDT in mediation would damage its reputation as a charity.

6.17 Irrespective of the outcome of its appeal, I see this matter differently from PHCBS. The need for mediation is evident to me from the existence of clearly rival CAT requests for the same asset by PHCBS and PCDT, coupled with the substance and tone of the representations, from both sides, that are before me. I comment elsewhere on the openness of PHCBS's processes. PHCBS's reference to public collaboration with PCDT in a mediation setting seems to misunderstand the private character of mediation. My view, for Ministers' consideration, is that mediation could open the way towards the difficult resolution of deep-seated issues, and that this would be very much in the public interest.

## THE AREA FOR POTENTIAL OWNERSHIP TRANSFER

6.18 Arising from paragraph 1.11 above, I regard the area for potential ownership transfer as all of that included within the black and red boundaries shown on this [plan](#).

## SUBSTANTIVE MERITS: INTRODUCTION

6.19 I deal with merits on the basis that PHCBS is entitled, in law, to make the CAT request that it did and to carry out a CAT arising from that request. My view on those matters is as I state it at paragraph 2.92 above. I set that view aside in this chapter so that Ministers can proceed if their view on eligibility is different from mine, or if they wish to consider the merits for other reasons,

6.20 Section 82(3) sets out matters which must be taken into account when a CAT request is made by a community transfer body. I itemise these matters in paragraph 1.4 above. In statutory terms the starting point for my assessment must therefore be section 82(3). Guidance on the decision-making process in relation to some of these matters is set out in chapter 10 of the Scottish Government guidance.

6.21 The assessment of CAT requests is also considered in chapter 13 of the guidance. The criteria set out there, in brief, are these:

- seven best value themes to ensure that a property can be sold or leased at less than market value where there are wider public benefits to be gained;
- alignment with one or more of the Scottish Government's [national outcomes](#); and
- consideration against a checklist of matters set out in paragraph 13.10 of the guidance for relevant authorities and paragraph 13.11 of the guidance for community transfer bodies

6.22 By way of introduction I note that Scottish Government guidance (paragraph 10.22) says that unanimous support should not be expected for a proposal. But a scheme that attracts substantial opposition and causes division in the community may not have a net benefit. It could also result in fewer people becoming involved or using the services.

## DELIVERY AGAINST SECTION 82 MATTERS

### *The reasons for the request*

6.23 I summarised PHCBS's reasons for making the request at paragraphs 3.3-12 above.

### *Reasons: the community*

6.24 PHCBS makes much mention of the community in its CAT request and the benefits that the community would derive from its ownership and operation of the village hall. But it is not clear to me exactly what the community is in this context. I deal at some length with the concept of community as it applies to this case in chapter 2 above. I comment here simply that, although the two communities overlap, there is a substantial degree of mismatch between the community that is PHCBS's membership and the community of Portpatrick as referred to in its objects.

6.25 If all the benefits that PHCBS claims for a CAT in this case were to arise, they would be primarily for the geographic community living and/or working in Portpatrick. To the extent that the hall might provide facilities for use by owners of second homes in Portpatrick, or by those holidaying there or making day trips, any benefits to those other categories could well result in positive economic spin-offs for permanent residents and workers.

### *Reasons: the 2016 letter of intent*

6.26 PHCBS begins its reasons for making its CAT request by referring to the 2016 letter of intent to DGC. The letter of intent is useful background material, and I refer to it elsewhere in this report. But I need add nothing on it here.

### *Reasons: avoiding closure of the village hall*

6.27 I appreciate that the impetus at various stages in the process leading to PHCBS's CAT request has been the possibility of the village hall closing. The continuation of the hall's use during a period of several years while this process was ongoing and while DGC retained ownership is some degree of testament, at least, to DGC's reluctance in reality to see the hall closing. The recent closure – which I take to be temporary because of the Covid-19 pandemic – takes nothing away from that view. Nevertheless, it has clearly been DGC's wish over those years to dispense with significant, if not total, responsibility for the building. A successful CAT with a sound long-term basis ought to remove the risk of closure for some considerable time.

### *Reasons: the Here for Growth report and consultation on it*

6.28 PHCBS puts forward the Here for Growth report as supporting its reasons for making the CAT request. I summarise the contents of that report as part of PHCBS's case at paragraph 3.5 above.

6.29 PHCBS says that, from the basis of the Here for Growth report, extensive consultation and engagement within the community has been carried out on community ownership of the hall. It has given information, too, on its increasing capacity and its own intentions for the use of the hall.

6.30 I acknowledge PHCBS's increasing capacity. In the last few years it has had a successful community share issue, it has improved mooring facilities at the harbour and resurfaced the quayside, completed two CATs, and provided a community hub at the harbour. Grant funding has been very important for much of this, but harbour income has increased too. This has been done more quickly than anticipated in PHCBS's harbour business plan. Having largely achieved its primary objectives it is understandable that it should look to support other infrastructure in the village.

6.31 The Here for Growth report, produced by professional consultants, was not commissioned by PHCBS, but it can readily be seen as a springboard towards this wider infrastructure support. I acknowledge generally the appreciable importance of the report in the process that led to PHCBS's CAT request. But I have significant reservations about the extent to which, during a considerable period, PHCBS took this report forward and developed its contents. These reservations focus, first, on the character of the community consultation that took place on the report, and, secondly, on how PHCBS responded to the report's references to difficulties that might lie ahead.

6.32 On consultation, the report was to be shared, in its own words, through "*a structured, community-wide engagement process*". However, I see very little in the way of structure in the process that followed. Public meetings were held when the Here for Growth report was in focus, or was part of the focus. But the process appears confused, and none of the meetings were structured in the sense of facilitating a response that could be regarded as a deeply considered one. There is no indication, in the minutes of the meetings that have been made available, of in-depth discussions of particular parts of the report or in-depth discussions with, or about, different groups in the population, such as might have taken place if, say, focus groups had been set up. Instead, the meetings appear to have proceeded with an impetus that led – perhaps inevitably led – to general acclamation. I am far from satisfied that this process allowed for a full range of opinions to develop in the way that it seems the authors of the Here for Growth report may well have expected. Nor is there any evidence of any attempt to carry out a structured engagement process outwith the public meetings

6.33 It is notable that very little appears to have been done between 2017, when the Here for Growth report became available, and the submission of PHCBS's CAT request in June 2019, to deal in any meaningful way with the obvious pointers in the report about what needed to be done in advance of a CAT request. I refer to these at paragraphs 6.39 and 6.44-45 below.

*Reasons: consultation on the community asset transfer request*

6.34 PHCBS's CAT request followed very shortly after public meetings in the first half of 2019. The consultation process surrounding the request appears to involve substantially the same kind of the approach as consultation on the Here for Growth report. As indicated in paragraph 5.3 above, PHCBS declared its intention to pursue a hall CAT at PCC's May 2019 meeting when it received overwhelming support. Its Newsletter No 6 referred to it having made an expression of interest in the hall and invited views on it taking ownership of the hall through a CAT.

6.35 I indicate in paragraph 3.33 above the way in which views were sought through the circulation of Newsletter No 6. There is no evidence of any other newsletter including a consultation element on the CAT request. Although circulation of Newsletter No 6 to over 500 individuals is impressive, the consultation had its limitations. There is no evidence of

any attempt having been made to obtain the particular opinions of minorities (such as the disabled, young people, old people, second home owners), or seek views on particular elements of, or reservations about, community ownership of the hall. There appears to have been little, if any, attempt to seek the views or intentions of user groups. For instance, there is no evidence that PHCBS's aim of providing access to healthcare facilities at the village hall has involved contact with healthcare providers. Although PHCBS states that it currently works alongside and enjoys the support of many other community groups in Portpatrick, such engagement as there has been with those groups is not translated into stated, or even implied, commitment by those groups to use the hall.

6.36 Newsletter No 6 called for "*the ideas of members and wider community with regard to this [CAT] proposal*", and that was to be followed by a further "*full and open community consultation*". It is not clear what the components of that further consultation were to be, or when it was to happen, but there is no evidence of it having taken place at any time before or after PHCBS's submission of its CAT request.

6.37 Noting the considerable overlap between the general public (of Portpatrick) and its own membership, PHCBS's approach to discussion of its CAT request within its own organisation is instructive. I specifically asked PHCBS (see paragraph 3.33 above) whether any general meeting of PHCBS members discussed in advance whether a CAT request should be made or considered the details of such a request. It is clear that that did not happen. As PHCBS's rules (particularly rules 66 and 71) give considerable authority to its board, I see nothing formally improper in this. However, a process which avoids airing such an important matter as this in a general meeting of its own members is not consistent with a process of full engagement. PHCBS's references to the overwhelming support it has received have to be seen in that context.

6.38 PHCBS makes numerous references to the three petitions that have been submitted. But others make important points about the way in which at least two of these were put together. In one case signatures were collected on blank sheets of paper and the petition heading composed and added later; in another case blank forms were delivered for signature with a soup run with a degree of implicit pressure, at least, to sign. To me, these approaches indicate something of a cavalier attitude to fair play in collecting and measuring support.

#### *Reasons: proposed uses of the hall*

6.39 The CAT request includes a statement of the uses that PHCBS would intend to promote for the hall. Although this is different from the list of possible activities included in the Here for Growth report some time earlier, there is considerable overlap and there is little to indicate that thinking had progressed very far beyond the earlier assessment. There is no firm commitment from any user group to use the building in the submissions before me. The extent to which the hall might meet the differing needs of the resident and tourist populations (another pointer in the Here for Growth report) is not dealt with. Market research to develop an appropriate pricing structure was regarded as a priority in the Here for Growth report, but there is no evidence of that having been done. Similarly, there is no evidence of any assessment having been made, as referred to in the Here for Growth report, of the ability of user groups to pay the fees. Although some of the submissions before me include offers by potential volunteers to help run the hall (or elements of it), no systematic attempt is made to quantify the level of volunteering that could be expected and to estimate whether that would be sufficient.

6.40 It is true that PHCBS does not make claims about future use increasing by 70% above recent levels (see paragraph 3.40 above), but there are extensive doubts about the amount and range of future use, and that does not support its overall case. I accept, in line with PHCBS's submissions, that the hall could have a role distinct from that of the community hub that it has created at the harbour. But there is very little flesh on the bare bones of what that role would be.

*Other supporting information: business plan*

6.41 PHCBS's claim that it can now further support and secure the future of the wider village infrastructure (beyond the harbour) depends partly on its business plan. I am satisfied that, prior to the CAT request being made, it was intended that there would be a well thought out business plan: the 2016 letter of intent looked forward to a well-defined business plan; the Here for Growth report referred to comprehensive business plans; PHCBS's own Newsletter No 6 saw the process of it taking ownership of the village hall being supported by a full and comprehensive business plan.

6.42 DGC officers noted a focus in the submitted business plan on the harbour and its regeneration, with no mention of the hall. That is not correct: the relevant PHCBS submissions were an 18-page untitled [document](#), which is clearly a business plan for the harbour and a separate one of three pages with the heading "[Basis for Business plan \(Hall\)](#)". I take the latter document, and no other, to be PHCBS's business plan for the hall. However, although I disagree with DGC officers' comment above, the very different lengths of the two documents and the different levels of detail they contain point to PHCBS's more limited approach to the hall business plan.

6.43 As noted at paragraph 3.36 above, PHCBS's hall business plan includes its forecast costs (excluding staff costs) for the hall for year 1 after transfer as £6,721. For years 2 and 3 it assumes those costs remain the same. Its income forecast for year 1 is taken to be £6,806, ie 30% above the annual average for 2012-15. Its income forecast for year 2 is assumed to be 30% above that for year 1, ie £8,849, and for year 3 to be 10% above year 2, ie £9,734. On that basis, surpluses would be £85, £1,128 and £3,013 in years 1, 2 and 3 respectively.

6.44 PHCBS makes no comment on, or adjustments arising from, the clarifications provided by DGC of its figures for costs and income in 2012-15 which provide the starting point for PHCBS's forecasts (see paragraph 1.31 above, with footnotes). Had it done so, it appears that it would have forecasted larger surpluses in years 1-3 after transfer. But that point is much outweighed by the concerns that I list below.

- PHCBS's business plan looks forward for only three years after transfer. That is in contrast to Scottish Government guidance which says (paragraph 13.10) that one of the matters that should be considered in reviewing a CAT request is the likelihood that benefits will be delivered over a 5-year period.
- There is no basis for PHCBS's complete exclusion of staff costs. Although there could be some reduction in hall costs because of administration and staff sharing with PHCBS's other facilities, it is unrealistic to expect that the hall would bear no costs at all of this sort.



- Although some repair and maintenance costs will be included in PHCBS's forecasts (because they will be included in the actual cost figures for 2012-15 which form the starting point for its cost forecasts), there is no allowance for dealing with any repair and maintenance backlog. The Here for Growth report referred to the fabric of the building and its energy efficiency as weaknesses, and its maintenance as a threat. DGC has taken a minimal approach to maintenance and repairs in recent years (see paragraph 1.19 above). PHCBS's response to these pointers in its business plan is inadequate. Moreover, my dialogue with DGC about works identified in the 2014 building survey that had and had not been carried out drew no response from PHCBS. Although PHCBS's cost forecasts include a contingency of £1,000 each year for additional internal repairs, it is questionable whether this would be sufficient for a building approaching 100 years old.
- There is little explanation of the justification for PHCBS's forecast income increases in the first three years after transfer of 30%, 30% and 10%. No detail is provided about the "*planned events*" at the harbour and the hall in year 1 or how any linkage between the two would generate increases in income. It is not clear how the £3,000 income from the Christmas fete constitutes additional income when it already raises that amount.
- PHCBS emphasises that its forecasts of income increases are not increases in use. But that very fact means fees per hour would have to rise to produce the claimed income increases. That might mean that user groups not able to pay might have to be excluded and/or that different user groups able to pay higher fees would have to be attracted. But none of this is explored. I have already commented on the absence of any market research to provide greater justification and precision on how the hall would be used. That carries through inevitably to produce further doubts about PHCBS's income forecasts.

6.45 These circumstances mean that the estimates of surpluses in paragraph 6.43 above must be treated with caution. I go further: I do not consider that PHCBS has clearly demonstrated how the village hall's losses that were incurred by DGC between 2012 and 2015 would realistically be converted into any annual surpluses in the years after transfer. That assessment aligns very much with the professional view expressed in the Here for Growth report that it is unlikely that the hall could become sustainable within the first two years after transfer. Even with the financial reliefs available to PHCBS as a charity, I see little basis for believing that the financial climate for the hall would be fundamentally improved by a transfer of ownership from DGC to PHCBS.

6.46 PHCBS does not address the possible need for additional financial resources, as future owner of the hall, in its business plan. It does so elsewhere in its submissions. One source of additional resources could be grant funding, and I fully accept that PHCBS's past ability to attract grant aid for the regeneration of the harbour is noteworthy. However, and I bear in mind here my serious doubts about the likelihood of financial surpluses being generated from the running of the hall, the Here for Growth report warned about the unlikelihood of securing revenue grant funding for a project that is predicted to be unsustainable at the end of the funding period. PHCBS asserts that it could attract several streams of grant funding. However, there is no reason to think that the availability of grants in the past for harbour regeneration would necessarily translate into grants for a different purpose, albeit under the aegis of the same organisation. In the light of this, it is significant that there is no evidence of meaningful discussions with funding bodies which might have

given some indication, at least, of funding levels likely to be available. Funding bodies' likely limitations in a post-Covid-19 world add to this concern.

6.47 Another possibility for additional resources exists. PHCBS's existing funds arise very much from its association with the harbour, and I take its references to "*combined income*" (paragraph 3.40 above) and "*collaboration of assets*" (paragraph 3.42 above) to amount to a suggestion that some of its "*harbour funds*" could cross-subsidise the village hall. I have also mentioned (paragraph 1.33 above) the 2016 letter of intent's reference to the harbour operation's surplus funds being "*utilized to help support other community infrastructure in the future.*" PCDT points to a possible conflict of interest in this area, but it is worth recalling PHCBS's objects at this point: "... *the restoration, preservation, conservation, maintenance and improvement of Portpatrick Harbour ... and to engage in other appropriate charitable activities ...*". On that basis cross-subsidisation would fall within the objects. However, it would be a significant change for PHCBS, so it ought to have been spelt out more clearly in its CAT request or supporting submissions than has been done.

*Other supporting information: joint staffing*

6.48 PHCBS's intention to use a staffed office at the harbour to manage both the harbour and the village hall represents good use of resources.

*Other supporting information: real burdens*

6.49 I see nothing in the real burdens affecting the village hall, or the parties' comments on them, that suggests that the CAT request for ownership should not be granted. Any release of the burdens, which has been promised (although nothing in writing on that has been put before me), may provide some useful added flexibility for PHCBS.

*Other supporting information: leadership and governance*

6.50 PHCBS regards its issue of community shares, with 554 shares issued and the 554 shareholders becoming members, as a great success. That is an entirely fair assessment of the position that arose in 2015-16 when the shares were issued and when PHCBS's first members joined.

6.51 However, the position now, and indeed ever since the share offer closed in 2015 or 2016, is that opportunities for people living in Portpatrick who are not already PHCBS members to join the organisation appear to be extremely limited. PHCBS had 554 members at March 2016, all of them shareholders. Membership about five years later is still exactly 554, with only nine membership changes since 2016, arising from deaths or share transfers. There is no indication that shares are openly available or have been openly available since the 2015 share offer closed. Although my view is that PHCBS does not need to meet the legal requirement in section 19(d) of the 2015 Act for its membership to be open to any member of the community<sup>19</sup>, to close off the most obvious route to membership does not, to my mind, demonstrate good leadership or governance and limits responsiveness, participation and the potential development of a wider consensus.

6.52 Similarly, the failure to engage in in-depth consultation, rather than what appears to be consultation by acclamation, and the failure to deal with the pointers in the Here for

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<sup>19</sup> This is because the legal requirements imposed on PHCBS's rules stem from section 34 of the 2003 Act rather than section 19 of the 2015 Act. This is explained in chapter 2 above.

Growth report about matters that ought to be addressed in the process of working towards a CAT proposal, do not demonstrate good leadership or governance in my view.

6.53 In challenging the need for mediation as suggested by DGC, PHCBS points out that it has acted openly and transparently, conducting its business through meetings held and chaired by PCC explicitly to consider the future of the hall. My paragraph 3.33 above is instructive in this regard. Proper governance, however, requires any organisation to include the conduct of *its* business through *its* meetings, not through another organisation's meetings. Elsewhere in this report I point out the mis-match between PHCBS's membership (predominantly living outside Portpatrick, although with some of the "outsiders" having Portpatrick connections) and the community based on the place Portpatrick. It may be that recognition of the mis-match prompted PHCBS's leadership to push for its CAT request through public meetings usually with a strong PCC involvement, rather than through its own structures. But if it were such recognition, what was needed in my view was a solution to the mis-match, not a process of working round it. Had that been done, the problems that I identify in chapter 2 above might have been avoided. That they have not been avoided must be counted as a failure of governance.

*Promotion or improvement of economic development, regeneration, public health, social wellbeing, and environmental wellbeing*

6.54 The provision of a wide range of community activities in one location could potentially have significant advantages under several of these headings. However, PHCBS's list of proposed uses for the village hall is no more than a wish-list which is not supported by any market research or in-depth contact with such user groups as may exist. PHCBS is itself emphatic that its claims of future growth for the village hall relate to income rather than usage, and that could well imply increased charges for those who would use the hall. It seems likely that most of the activities at the hall would either be the restitution of previous activities that took place there or new activities: it is not clear whether any transfers of activities from other locations are involved. As an example, the Here for Growth report included primary health care services as one of the types of activities that could take place within the hall, and PHCBS's proposal includes providing access to healthcare facilities and supporting opportunities around the Dumfries and Galloway Health and Social Care Partnership. But there is no evidence of contact between PHCBS and healthcare providers, so whether this element of PHCBS's proposal is realistic is simply not known.

6.55 PHCBS's proposal includes no targets which show how it would contribute to improved performance under any of the headings above. Construction of relevant and measurable targets is often far from easy, but as it stands it is not possible to have a clear idea of the quantum of benefits that PHCBS's proposal is likely to produce.

6.56 The Here for Growth report noted that employment opportunities are limited in Portpatrick. However, PHCBS's proposal foresees considerable use of volunteers: that point, coupled with the doubts I express in paragraph 6.54 above, suggests that the proposal's promotion of economic development would be somewhat limited.

6.57 The proposed transfer of ownership of the village hall from DGC would provide the latter with an annual cash saving which would have the potential to be devoted to other worthwhile spending streams. That is a benefit of PHCBS's proposal. But the converse of that is the absence from PHCBS's proposal of clear plans for tackling the backlog of repairs and maintenance of the hall. So the promotion of environmental wellbeing is far from certain with PHCBS's proposal.

### *Reducing inequalities of outcome*

6.58 PHCBS's proposal includes no clear aspirations for reducing inequalities of outcome which result in socio-economic disadvantage. This was one of the criticisms raised by DGC's officer panel. Nor do I detect any significant scope for such benefit in such detail of its proposal that has been provided. The provision of primary health care facilities could have that effect, but the doubts I express about that at paragraph 6.54 above remain.

### *Other possible benefits*

6.59 I am not aware of other possible benefits not mentioned elsewhere in this report.

### *Benefits of an alternative proposal*

6.60 DGC has made clear for some years that it does not wish to retain the village hall. I do not therefore consider the benefits that would arise from that alternative. Nor has DGC objected to the principle of disposing of the building for a nominal sum. So I do not consider disposal on the open market as an alternative.

6.61 As I have reported elsewhere in this report, an alternative proposal to transfer ownership of the village hall was put forward by PCDT in its CAT request in August 2019. However, also as reported elsewhere, that request was refused by DGC, and PCDT has not appealed against that refusal. I therefore do not accept PCDT's contention that its application for a CAT, in its words, "*still stands*". Nevertheless, its alternative proposal could be put forward again at some point in the future<sup>20</sup>, and there is no suggestion before me that PCDT is no longer interested in securing ownership of the village hall.

6.62 Consequently, it seems to me that sections 82(3) and 82(6) of the 2015 Act place a duty on me of considering benefits that might arise if ownership of the hall were to pass to PCDT as a result of it making a further CAT request and how such benefits would compare with any benefits arising from PHCBS taking ownership or relate to other matters DGC considers relevant. However, I believe there are limits to the extent I can reasonably and fairly proceed in doing that. These limits relate to the different positions that PHCBS and PCDT have with regard to the appeal on which I am reporting and which Scottish Ministers will decide. PHCBS is the appellant in this case, and PCDT is not. I have raised a substantial number of matters with PHCBS, as appellant, about its history, its organisation, the extent to which its rules meet the legal requirements for eligibility, and its case for taking ownership of the village hall. Its responses are an important input to my assessment. But I have not similarly enquired into PCDT's position: to do so would only have been reasonable if I were assessing an appeal from PCDT, which is not the case. There is another difference: third parties have had the opportunity to make supporting or opposing representations to Scottish Ministers on PHCBS's case for transfer; there has been no such opportunity for third parties on PCDT's alternative case for transfer.

6.63 As a result of these points I limit my assessment of the benefits that might arise from PCDT's proposal and the weight I give to that assessment in my overall conclusion.

6.64 My comparative assessment, in fact, reflects no more than the assessment that DGC's officer panel made of PCDT's CAT request. I summarise the scores for both that request and the one made by PHCBS in chapter 1 above. PCDT scores better than PHCBS on all three main headings – engagement, vision and impact, and sustainability. DGC officers commented on the moderate level of engagement that appeared to have been

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<sup>20</sup> Under section 93 of the 2015 Act, DGC could decline to consider such a new request if it were made before August 2021.

undertaken by PCDT, including direct engagement with the local primary school. However, the overall outcome of the consultation was not clearly presented in the business plan. PCDT's business plan was noted as having strong mention throughout of its vision and the positive change it looks to stimulate through the CAT. PCDT looks to work with the community to empower and build capacity across a wide variety of community sectors. It was noted that PCDT appears to have strong governance structures in place, with its executive team appearing to have a broad range of skills and strengths. A moderate degree of financial planning had been applied, but may have been slightly over-ambitious.

6.65 The DGC officer panel's overall advice was the same as its overall advice about PHCBS's CAT request: that PCDT's business plan would benefit from engagement across the entire community and that PCDT should work in partnership with organisations with similar objectives in Portpatrick to produce a more holistic plan to the benefit of all local residents.

6.66 Although PCDT's request was scored more highly than PHCBS's by DGC's officer panel, it did not gain favour overall with DGC. This was because, as reported in paragraph 1.65 above, there were an exceptionally high number of representations opposed to its request. I also report in paragraph 1.65 above on DGC's view that both PCDT and PHCBS should seek mediation, and I comment myself on that in paragraph 6.17 above.

6.67 Whatever view I reach about PCDT's proposal is subject to the limitations I express in paragraph 6.62 above. My view is that a preference for PCDT's proposal, albeit a seemingly better alternative to that put forward by PHCBS, cannot be reasonably sustained at present in the face of the expressed local opposition to it.

#### *Obligations on the authority that may affect its transfer ability*

6.68 Paragraphs 1.11-12 above indicate DGC's position on its title to the asset and its view that there appears to be no impediment to its sale.

6.69 The real burdens affecting the site do not include any prohibition on transferring ownership. Those burdens would pass with a change of ownership and be PHCBS's responsibility if the CAT proposed in this case were to be carried out.

6.70 As explained in paragraph 1.9 above DGC has a duty to secure best value under the Local Government in Scotland Act 2003 and, specifically, the Disposal of Land by Local Authorities (Scotland) Regulations 2010. This requires consideration of the benefits/discount relationship, and I do that at paragraphs 6.75-90 below.

6.71 I am unaware of any other obligations that would affect DGC's ability to transfer the land in question.

#### *Other matters which the authority considers relevant*

6.72 DGC has not raised any other significant relevant matter which I have not reported elsewhere.

#### *Section 82(3) matters: conclusion*

6.73 There is no requirement that a CAT request has to pass a test for each of the section 82(3) matters that form the subject-matter of my sub-headings above. A satisfactory assessment on one or more of them would take the request some way towards meeting the statutory test. Put another way, failure to evidence any significant positive contributions to any one of these would make it difficult to recommend allowing the CAT to proceed.

6.74 Looking overall at these matters, PHCBS's success in its regeneration of the harbour stands out. Its proposed use of the harbour office to manage the village hall as well as the harbour is commendable. However, my assessment is that a number of section 82(3) matters outweigh those points in its overall proposal for the village hall. Most notably these are:

- a failure to build positively on the Here for Growth report, both in terms of in-depth community engagement on its contents and in relation to the explicit points in its content about matters that needed to be examined further;
- a lack of in-depth community engagement on the CAT request itself;
- a failure to engage existing and potential user groups;
- a weak, short-term business plan with what amounts to a wish-list of proposed uses for the village hall.

## DEMONSTRATION OF BEST VALUE

6.75 The sum being offered for the village hall in the CAT request is a nominal sum, far less than its market value. I therefore draw attention to my remarks in paragraph 1.9 above about the Local Government in Scotland Act 2003 and the Disposal of Land by Local Authorities (Scotland) Regulations 2010. Scottish Government guidance similarly says (paragraph 13.1) that when the price offered for an asset is less than the market value of the property, consideration needs to be given to whether the proposed benefits to be delivered by the community transfer body justify the proposed discount. The benefits of the request should be proportionate to the value of the asset and the level of discount. Any decision to transfer an asset must represent good use of public resources.

6.76 In the absence of a joint valuation as recommended in Scottish Government guidance (paragraph 12.2), and in the absence of any other evidence, I take the market value to be as in DGC's valuation, ie in the order of £120,000.

6.77 Scottish Government guidance also states (paragraph 13.21) that demonstration of Best Value is one way to show that resources are being put to good use. Best Value is the requirement to make arrangements to secure continuous improvement in performance whilst maintaining an appropriate balance between effectiveness and economy. It also requires due regard to equal opportunities requirements, and a contribution to the achievement of sustainable development. The evidence provided to support the CAT request should be considered in relation to seven Best Value themes. These themes are vision and leadership, effective partnerships, effective governance and accountability, use of resources, performance management, sustainability<sup>21</sup>, and equality.

6.78 I therefore consider in paragraphs 6.79-90 below the extent to which PHCBS's proposal demonstrates Best Value against the seven Best Value themes.

### *Vision and leadership*

6.79 As I see it, PHCBS has a broad vision: it seeks to use its experience with the regeneration of the harbour, and the success of that endeavour (which I acknowledge), to provide community benefits at the nearby village hall. In principle, that is commendable.

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<sup>21</sup> The five broad principles of sustainability are stated as: promoting good governance; living within environmental limits; achieving a sustainable economy; ensuring a stronger healthier society; and using sound science responsibly.

But PHCBS's failure to respond positively to many of the pointers in the Here for Growth report (for instance about structured community engagement) suggests that it may not have a clear view of its own limitations. Its failure to accept DGC's offer of help to improve its CAT request, without proper justification – see paragraphs 6.6-7 above) is an even clearer example of a failure of vision and leadership. My view is that these imply over-confidence on the part of its leadership. They appear to be instrumental in the resultant insufficiency of detail and clarity in some elements of its CAT proposal. In turn, that casts some doubt on whether its vision is sufficiently attuned to the tasks ahead in the event of the CAT taking place.

6.80 I have reported above on the large number of complaints which PHCBS made about DGC and the lack of justification for many of them. To my mind, that plethora of misplaced complaints from PHCBS indicates an overly suspicious focus that was more concerned with seeking to establish blame rather than strengthening its CAT request. It is also a failure of vision and leadership. PHCBS's rejection of DGC's suggestion of mediation with PCDT is a further example of the same point.

#### *Effective partnerships.*

6.81 PHCBS has clearly worked with other organisations in relation to the harbour. But it is not at all clear to me that its CAT proposal demonstrates a sufficiently collaborative approach to the different challenges that taking over the village hall would bring. The information it has provided on its consultation does not include anything on dialogue in depth. PHCBS does not indicate how it would work with local interest-organisations to maximise use of the hall. In failing to do that, it has not shown how its own experience might be positively supplemented. Although I note that there are volunteering offers, there is no indication of either the sufficiency of these offers or, if necessary, proposals for further recruitment and training.

#### *Governance and accountability*

6.82 It is clear that PHCBS has an extensive set of rules which provide for general meetings of members and for a board of directors to have extensive powers to act on behalf of members. However, there is some evidence to suggest that the way it has approached its CAT request has not met the best modern standards of community engagement. I indicate in paragraph 6.32 above the way in which the response to the Here for Growth report was handled – through public meetings seemingly designed to result in general acclamation without examining the range of difficulties portrayed in the report. PHCBS's consultation on its CAT intention through public meetings and through its Newsletter No 6 (see paragraphs 6.34-36 above) displayed a similar limitation. Its own internal structures and arrangements seem to have been substantially ignored in its attempts to maximise support for its leadership's proposals. These points, coupled with the lack of responsiveness to the pointers in the Here for Growth report, demonstrate a failure of governance and accountability in practice. I suggest at paragraph 6.53 above that the eligibility problems I identify in chapter 2 might have been avoided with better governance. Moreover, there is no indication of how future accountability in relation to the village hall would work in practice if the CAT were to take place.

6.83 A further point arises from PHCBS's own evidence of its static membership and the barriers to new members. It is inevitable that, as the population of Portpatrick changes, PHCBS will become less and less representative of the local community. I regard this as a very important structural limitation.



6.84 Overall, therefore, I see PHCBS's structure as in need of improvement, and I disagree with the assessment by DGC's officer panel of PHCBS demonstrating policies and leadership behaviours that would support the application of good standards of governance and accountability.

6.85 All in all, I consider that important elements of the "*National Standards for Community Engagement*" have not been met. PHCBS has not used a sufficient variety of methods to make sure that a wide range of voices is heard. There have been limits on the extent to which the community has been able to influence different options and emerging decisions. Working with other agencies has not been developed effectively to deal with the issues Portpatrick faces.

#### *Use of resources*

6.86 PHCBS's intention to provide a joint harbour-hall office represents good use of resources. It operates the harbour with a surplus, and it is hinted (paragraphs 3.16-17 and 3.41-42) that that surplus could be used to make good any deficit in running the village hall. This might extend, although it is not clear, beyond providing a joint office. That specific point has generated third party objections (paragraphs 5.17 and 5.23), but I acknowledge that a further cross-subsidy could be regarded as efficient use of resources. PHCBS believes it is well-placed in that it has harbour income to soften any blows from the Covid-19 aftermath, but no indication is given as to amount of any likely or possible subsidy, or its implications, and the argument depends to a degree anyway on the harbour itself not being adversely affected by the Covid-19 aftermath. In addition, PHCBS's income and expenditure forecasts for its operation of the village hall are deficient in the absence of a firm basis for its aspirations about the extent to which the hall would be used, the failure to take full account of the maintenance and repair requirements of an ageing building, and the limited three years' time-frame of its forecasts.

#### *Performance management*

6.87 I fully acknowledge PHCBS's performance in the regeneration of the harbour. But my assessment here relates to a different asset, and it needs to be shown that there would be adequate performance management in relation to the village hall. This ought to be an ongoing or frequently recurring process which would demonstrate the extent to which objectives are being achieved. It requires the clear identification of objectives, lower-level targets and performance measures, a system for measuring, a clear process of reporting and communicating results, and an equally clear process for identifying potential changes of direction or practice in the light of the results. Not all of this is easy, particularly measurement in the area of social objectives. PHCBS gives no indication at all of any consideration it may have given to these matters.

#### *Sustainability*

6.88 Resources need to be used effectively over the long term, as well as the short term, if a contribution towards sustainability is to be demonstrated. However, PHCBS's plans for the village hall, as evidenced in the information presented to me, are relatively short term in nature. Its business plan looks ahead only three years, in contrast to the longer-term expectation in Scottish Government guidance. Its costs and income forecasts involve some dubious and unsupported assumptions. The hall is in a satisfactory location within the village to encourage its use, and I am not aware of any inhibiting planning factors. Those points contribute to sustainability. However, whether the fabric of the building has that attribute is less clear, and there is no evidence about how energy-efficient it is or about whether any improvements in that respect are needed and are practicable.

## Equality

6.89 If, under PHCBS's control, the village hall were to have the wide range of uses that it lists, that provision would no doubt reduce inequalities, simply because of the availability of those uses to people without access to them at present. However, PHCBS does not appear to be directing itself specifically in this direction. It does not estimate the scale of the likely benefit in this respect. Nor is there any systematic attempt to identify those groups (such as young people, the elderly, the unemployed and people with health problems) who might benefit particularly from positive steps to reduce inequality. My remarks at paragraph 6.87 above on performance management are relevant in this respect.

## Best value: overall assessment

6.90 PHCBS's CAT request and its supporting information do not show any of the Best Value themes being comprehensively met. For some themes the deficiencies are serious. Overall, therefore, I find that the proposed CAT would not represent Best Value.

## ALIGNMENT WITH SCOTTISH GOVERNMENT NATIONAL OUTCOMES

6.91 My assessment of the extent to which the CAT request is aligned with Scottish Government national outcomes reflects Scottish Government guidance (paragraphs 13.8-12). This states that it is helpful to have in place a framework to ensure that all issues have been considered fairly and recorded clearly and that this can be placed alongside a similar assessment of best value themes and any other relevant factors. The following matters are listed for consideration: value to relevant authority in existing use; value for alternative use/redevelopment; value for proposed and other community purposes; level of community benefits; likelihood that benefits will be delivered over a five-year period; and impact of project failure. Assessment on a five-point scale is suggested to provide an overview of the amount of contribution. This scale is from level one (very strong contribution), through levels two (strong), three (moderate), and four (weak) to level five (poor contribution). The elements to be considered to determine how the appropriate level is determined for any particular proposal are governance and financial arrangements, best value characteristics and related project benefits.

6.92 I have in fact already examined the proposed CAT in relation to each of the relevant matters. I need do no more here than draw a number of points together.

6.93 I have found deficiencies in PHCBS's governance and the proposed financial arrangements for the village hall. The absence of in-depth engagement with the local community in the build-up to PHCBS's CAT request and its failure to engage with DGC on the details of its request once it had been made have left important gaps in its proposals as they now stand. I have found that none of the Best Value themes is comprehensively met, with serious deficiencies for some of the themes. The existence of the eligibility problems I describe in chapter 2 is an indicator of failures in governance. Although PHCBS's successful experience in regenerating the harbour suggests that there ought to be project benefits arising from its CAT request for the hall, the lack of essential detail supporting that request provides no assurance that potential project benefits would be realised in practice.

6.94 Overall, I find that the overview which fits the proposed request, as it stands, most closely is that it would make a weak or poor contribution to meeting Scottish Government national outcomes. *"Weak" is defined in Scottish Government guidance as: "Governance and financial arrangements are weak. Best Value characteristics are not well demonstrated in the proposal. Related projected benefits are not based on robust information and*

*demonstrates questionable value for money.” “Poor” is defined as “Governance and financial arrangements are poor. There is little evidence of Best Value characteristics in the proposal. Related projected benefits are ill defined and/or unrealistic and do not demonstrate value for money.”*

6.95 Consequently I see no basis from the evidence put before me for thinking that PHCBS’s CAT request would contribute to the delivery of improved outcomes for Scotland.

6.96 Scottish Government guidance (paragraph 13.12) says that the strength of the proposals will then be considered against the financial implications of any decision both for short-term budget planning and long-term asset strategies. This will include consideration of the current use of the asset and any consequent implications that could arise from the CAT. A larger discount will require a stronger case to be made with an appropriate level of benefits demonstrated effectively.

6.97 I have found above that the proposal in question for the village hall would make a weak or poor contribution to the delivery of improved outcomes. That has to be set against DGC’s clear wish to relinquish financial responsibility for the building by one means or another. But I have no evidence that the building’s disposal is itself critical to any short- or long-term financial strategy. That points strongly, in the circumstances I have described, to the current CAT request being rejected.

## CHECKLIST OF MATTERS IN SCOTTISH GOVERNMENT GUIDANCE

6.98 I have substantially covered, under other headings, the matters included in the checklist in Scottish Government guidance. I can therefore be very brief here.

6.99 DGC would gain substantial revenue savings if the CAT were to proceed. No uses for the village hall have been suggested that are fundamentally different from its previous uses over many years. The hall has great value for community uses, but there is no clarity about the level of benefits that would arise from this particular proposal either in the short term or the long term. If the project were to go ahead and fail, the long-term future would be even more uncertain.

6.100 If the project were not to proceed as a result of this appeal being dismissed, DGC’s view (paragraph 4.28 above) is relevant. I recognise DGC’s commitment to reducing its costs, and I commend its intention to deliver on this commitment by working with the local community to find a suitable partner to achieve this.

## CONDITIONS

6.101 Relevant conditions on a decision to transfer the asset could include those which are appropriate and proportionate in order to protect the public purse where the CAT would be at a discounted price. The use of conditions to protect the discount is covered in chapter 14 of Scottish Government guidance.

6.102 I note at paragraph 4.24 above that, if the CAT were to take place, DGC seeks a condition requiring PHCBS in certain circumstances to pay back any increase in the value of the asset. I take increase to mean increase over and above the £1.00 purchase price. PHCBS has not commented on DGC’s wish in this respect.

6.103 Such conditions appear to me to broadly reflect the guidance, and I see no reason not to accede to DGC’s wish. Therefore, my view is that, if Ministers were to allow this

appeal, their decision should be subject to a condition requiring PHCBS, if the benefits it proposes were not to be delivered or the asset were to be sold by PHCBS, to pay to DGC any increase in the value of the asset above its purchase price. The precise terms of such a condition in a contract of sale would then be subject to negotiation between DGC and PHCBS. However, this is a matter on which Ministers may wish to seek their own professional advice in the event of them being minded to allow the appeal.

6.104 The appeal cases and my assessment relate primarily to a potential transfer of ownership. As noted at paragraph 1.61 above, PHCBS also requests other rights under section 79(2)(b)(ii) of the 2015 Act. In the event of the appeal relating to ownership transfer being allowed, and given DGC's comment on the point (see paragraph 4.27 above), I see no reason why DGC and PHCBS should not enter into discussions about early entry to the hall, pending a conclusion to the necessary legal transactions about ownership, to enable the hall to operate in the interim period. If Ministers consider that the ownership transfer should take place, I see no reason why their decision should not include a condition requiring such discussions on early entry to the hall.

## CHAPTER 7. REPORTER'S OVERALL CONCLUSIONS AND RECOMMENDATIONS

### OVERALL CONCLUSIONS

7.1 My first overall conclusion stems from the view I reached as a result of my analysis in chapter 2 above. This is that PHCBS was not eligible to make the CAT request that is the subject of this appeal, and that it would be unreasonable to impose a condition that would otherwise overcome its non-eligibility. My resultant conclusion from that for Ministers to consider is that the appeal should be dismissed for that reason.

7.2 I approach my remaining recommendations in line with the Scottish Government's guidance (paragraphs 13.13-17). My approach needs to reflect the financial implications, the Best Value considerations and/or the proposed benefits contributing to improved outcomes for Scotland. I need to assess whether clear benefits are demonstrated with information commensurate to the value of the asset and the level of discount. The important criterion is whether there are reasonable grounds for refusal.

7.3 Looking overall at these matters, PHCBS's success in its regeneration of the harbour stands out. But there is a substantial difference in range of content in the business plans for the two ventures. The plan for the village hall is weak. The lack of in-depth consideration by PHCBS of the Here for Growth report and its lack of in-depth community engagement are very evident. Those are amongst the main matters that lead me to an adverse overall view of the proposal before me in relation to section 82(3) matters. I find that the proposed CAT would not represent Best Value, making a weak or poor contribution to meeting Scottish Government national outcomes. Lack of detail shines through the proposal. Consequently, it does not provide a sure way forward.

7.4 In my view the matters in paragraph 7.3 above are reasonable grounds for refusal as referred to in section 82(5) of the 2015 Act.

### RECOMMENDATIONS

7.5 If Ministers are minded to agree with my assessment in chapter 2 above that PHCBS was not eligible to make the CAT request that is the subject of this appeal, and that it would be unreasonable to impose a condition that would otherwise overcome its non-eligibility, I recommend that the appeal be dismissed and the CAT request be refused for that reason.

7.6 If Ministers are minded to disagree with my recommendation in paragraph 7.4 above, or if they wish to reflect the merits of the proposal before them in their decision, I also recommend that the appeal be dismissed and the CAT request be refused for the reasons summarised in paragraph 7.3 above.

7.7 If Ministers are minded to uphold the appeal and approve the request for ownership contrary to my recommendations above, I recommend that

(a) they give consideration to whether their decision should be made subject to a condition requiring changes to PHCBS's rules (as described in chapter 2 above), and they consult PHCBS and DGC on such a condition before issuing their decision;

(b) their decision be made subject to a condition that DGC and PHCBS enter into discussions about early entry to the village hall, pending a conclusion of the necessary legal transactions about ownership;

(c) their decision be made subject to a condition requiring PHCBS, if the benefits it proposes from the CAT were not to be delivered or the asset were to be sold by PHCBS, to pay to DGC any increase in the value of the asset above its purchase price; and

(d) they issue a direction to DGC under section 85(5)(c) of the Act, as provided for by section 88(3), requiring it to issue a new DGC decision including any conditions arising from (a) to (c) above.

*Mike Croft*

Reporter