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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY GLEBE HOMES LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

Adrian Colmer KC and Graeme Watt (instructed by Nelson-Singleton Solicitors) for the applicant
Stewart Beattie KC and Philip McEvoy (instructed by Cleaver Fulton Rankin) for the proposed respondent
The Notice Party appeared in person

HUMPHREYS J

Introduction

[1] By this application for leave to apply for judicial review, the applicant seeks to challenge the refusal by the proposed respondent, Lisburn and Castlereagh City Council ("the council"), of an application for planning permission for two dwellings with detached garages at a site between 26 and 30 Magheraconluce Road, Hillsborough, Co Down.

[2] The notice party to this application is Gordon Duff, an individual who had previously and successfully challenged the granting of planning permission for development on this site. Mr Duff has issued separate judicial review proceedings which relate to the application of the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2017 to the subject site.

[3] The application had been lodged on 15 August 2018 and the refusal decision was dated 28 September 2023. The delay between the making of the application and its determination can only be understood by reference to the chronology of events.

[4]

Date	Event
1 November 2016	Application made for outline planning permission
7 March 2017	Outline planning granted for two dwellings
29 January 2018	Applicant purchased lands for £170,000
15 August 2018	New full planning application made
November 2018	Changes made to access and dwelling positions
January 2019	Further changes made
9 April 2019	Glebe registered as owner of the lands
4 June 2019	Amendment to increase area of site for sightlines
19 August 2020	Further amendments to plans
April 2021	Amendments due to DfI roads concerns
6 September 2021	Planning permission granted
4 October 2021	Judicial review proceedings issued by notice party
19 November 2021	Judicial review proceedings issued by council
11 February 2022	Planning permission quashed by High Court
16 August 2022	Second grant of planning permission
15 November 2022	Judicial review proceedings issued by notice party
3 March 2023	Council concede procedural error
16 May 2023	Planning permission quashed by High Court
4 September 2023	Planning committee meeting recommends refusal
28 September 2023	Planning permission refused

[5] It will be evident from the above that the applicant chose not to make a reserved matters application following the grant of outline planning permission but rather proceeded to make a full planning application. Any reserved matters application

would have had to have been made by 6 March 2020 in accordance with the outline grant.

Planning policy

[6] At the time the 2018 planning application was made, the prevailing policy on ribbon development was CTY8, contained in Planning Policy Statement 21: Sustainable Development in the Countryside ("PPS21"):

> "An exception will be permitted for the development of a small gap site sufficient only to accommodate up to a maximum of two houses within an otherwise substantial and continuously built up frontage and provided this respects the existing development pattern along the frontage in terms of size, scale, siting and plot size and meets other planning and environmental requirements. For the purpose of this policy the definition of a substantial and built up frontage includes a line of 3 or more buildings along a road frontage without accompanying development to the rear."

[7] The Strategic Planning Policy Statement ("SPPS") issued by the Department of the Environment in September 2015 contemplated that when all local councils in Northern Ireland had adopted a new Plan Strategy for the whole of their council area, the existing Planning Policy Statements would be cancelled. In the meantime the following transitional arrangements applied:

> '1.10 A transitional period will operate until such times as a Plan Strategy for the whole of the council area has been adopted. During the transitional period planning authorities will apply existing policy contained within the documents identified below together with the SPPS. Any relevant supplementary and best practice guidance will also continue to apply.
>
> 1.11 Where a council adopts its Plan Strategy, existing policy retained under the transitional arrangements shall cease to have effect in the district of that council and shall not be material from that date, whether the planning application has been received before or after that date.'

[8] Between March and May 2022 the Planning Appeals Commission ("PAC") carried out its examination of the draft Lisburn & Castlereagh Local Development Plan 2032 ("the LDP"). The LDP is in two parts:

(i) Plan Strategy; and

(ii) Operational Policies.

[9] The PAC reported to the Department for Infrastructure ("DfI") on 30 November 2022. On 28 June 2023 the DfI exercised its duty under section 12(1)(b) of the Planning Act (Northern Ireland) 2011 ("the 2011 Act") to issue a direction to the council to adopt the LDP Plan Strategy with certain modifications.

[10] The LDP Plan Strategy was recommended for adoption by the planning committee of the council on 4 September 2023 and formally adopted by the council on 26 September 2023.

[11] One of the operational policies in the LDP, Policy COU8 (Infill/Ribbon Development) now states:

> "Planning permission will be refused for a building which creates or adds to a ribbon of development. Exceptionally, there may be situations where the development of a small gap, sufficient to accommodate 2 dwellings within an otherwise substantial and continuously built up frontage, may be acceptable. For the purpose of this policy a substantial and continuously built up frontage is a line of 4 or more buildings, of which at least 2 must be dwellings, excluding domestic ancillary buildings such as garages, sheds and greenhouses, adjacent to a public road or private laneway. The proposed dwellings must respect the existing pattern of development in terms of siting and design and be appropriate to the existing size, scale, plot size and width of neighbouring buildings that constitute the frontage of development. Buildings forming a substantial and continuously built up frontage must be visually linked."

[12] It is notable that there were no objections to the COU8 policy before the PAC.

The refusal decision

[13] The applicant complains that there was no assessment of the application against the criteria in policy CTY8, even though it was still extant at the time of consideration by the planning committee.

[14] In the planning officer's report it is stated (at para [69]):

> "As the retained regional policies still apply until the Plan Strategy is adopted, they are included in the report for completeness."

[15] The officer goes on to cite the relevant parts of PPS21, including policy CTY8, but the applicant says there was no proper assessment carried out as against these criteria.

[16] Previously in the report the officer had set out some commentary in relation to the draft Plan Strategy which was noted to have been subject to PAC examination and public consultation, and which set a clear direction for future policy. For these reasons, the officer concluded that the draft Plan Strategy was "a material consideration of determining weight" (para [33]). At paras [57] and [58], she states:

> "While the Plan Strategy is not yet adopted and the retained suit of regional planning policies (PPS's) continue to apply in accordance with the SPPS in light of the fact that a Direction to adopt the Plan is issued, these policies are now considered to be of little weight for the same reasons as explained earlier in this report."
>
> The operational policies in Part 2 of the draft Plan Strategy are considered to take precedence over the retained suite of planning policy statements and are considered to be of determining weight in the assessment of this planning application."

[17] The planning officer concluded that the proposal engaged ribbon development and the exception in policy COU8 did not apply since there was not a substantial and continuous built up frontage. Whilst there were two dwellings along the road frontage, the other building was an ancillary garage which is expressly excluded by the exception in COU8. The proposal was therefore contrary to policy and refusal was recommended.

[18] The planning officer made a presentation to the planning committee on 4 September at which she outlined the contents and recommendations of the report. The committee was also addressed by the notice party and by a planning consultant on behalf of the applicant. The planning history was central to the submission made by the consultant. The committee sat in a private session and took legal advice before voting to refuse the application.

[19] The council gave the following reasons for refusal:

(i) This was not a type of development which in principle was acceptable in the countryside as per para 6.73 of the SPPS and policy COU1;

(ii) The development was not contained within a substantial and continually built-up frontage and was not an exception to the prohibition of ribbon development as per para 6.73(5) of the SPPS and policy COU8;

(iii) The insertion of two new buildings in this gap would not respect the traditional pattern of settlement and would contribute to urban sprawl, thus harming the character of the countryside location contrary to policy COU16.

[20] The different treatment of the garage and the move from three to four properties to constitute a substantial built up frontage from policy CTY8 compared to COU8 explains the contrasting outcomes of the different decisions in relation to the same planning application.

The grounds for judicial review

[21] The applicant has two essential grounds of complaint:

(i) A policy adopted two days prior to the determination of an application which was over five years old caused the council to reverse its previous position and refuse the application; and

(ii) The council failed to take into account material considerations including policy CTY8, the previous planning decisions and the outline planning permission.

[22] The applicant seeks to translate these complaints into the following grounds for judicial review of the council's decision:

(i) Irrationality

It was irrational to effectively replace CTY8 with COU8 on the basis that there is a presumption that civil rights should be determined according to the law prevailing at the date of the commencement of the relevant proceedings.

(ii) Breach of a procedural legitimate expectation

The applicant had a legitimate expectation to a timely decision, and the failure to adhere to this materially prejudiced the applicant's position;

(iii) Material considerations

It was irrational to accord no weight to the extant policy, the planning history, in the course of which the site had obtained outline permission and twice been granted full permission.

The test for leave

[23] At the leave stage, an applicant must surmount the threshold of an arguable case having a realistic prospect of success which is not subject to a discretionary bar

such as delay or an alternative remedy - see *Re Ni Chuinneagain's Application* [2023] NIJB 330.

Alternative remedy

[24] In *Re Alpha Resource Management Ltd's Application* [2022] NICA 27, Keegan LCJ said:

> "Drawing together the authorities and texts we have referred to above, we summarise the principles as follows:
>
> (i) Judicial review is a remedy of last resort and may not be the only available avenue of challenging a particular decision. That is because statute may have provided an appellate machinery to deal with appeals against decisions of public bodies.
>
> (ii) A court may, in its discretion, refuse to grant permission to apply for judicial review or refuse a remedy at the substantive hearing if an adequate alternative remedy exists, or if such a remedy existed but the claimant had failed to use it.
>
> (iii) The general principle is that an individual should normally use alternative remedies where these are available rather than judicial review. The courts take the view that save in the most exceptional circumstances, the judicial review jurisdiction will not be exercised where other remedies were available and have not been used.
>
> (iv) The rationale for the exhaustion of alternative remedies principle is that it is not for the courts to usurp the functions of the appellate body which has the expertise and ability to determine disputes.
>
> (v) The courts will not insist that claimants pursue an alternative remedy which is inadequate. The principle can be defined as one that requires the use of adequate alternative remedies, or the fact that an alternative remedy is inadequate may be seen as an exceptional reason why judicial review may be used.
>
> (vi) There may be other exceptional reasons why judicial review is the preferred course as each case is fact

> sensitive and the court must consider in exercising its discretion to hear a judicial review where an alternative remedy is available the overall circumstances including in some cases the urgency of the case, delay, cost, or public interest concerns." (para [20])

[25] In *R (ex parte Watch Tower Bible) v Charity Commission* [2016] EWCA Civ 154, Lord Dyson MR stated:

> "It is only in a most exceptional case that a court will entertain an application for judicial review if other means of redress are conveniently and effectively available. This principle applies with particular force where Parliament has enacted a statutory scheme that enables persons against whom decisions are made and actions taken to refer the matter to a specialist tribunal."

[26] The PAC is a specialist independent statutory appellate body, entrusted with the task of hearing appeals from planning authorities; see *Re ABO Wind NI Ltd's Application for Judicial Review* [2022] NI 297 at para [34].

[27] In *Re SONI's Application* [2022] NIQB 21 I held, in relation to a right of appeal to the Competition and Markets Authority under the Electricity (NI) Order 1992:

> "This statutory right of appeal falls squarely within the principle laid down by Lord Dyson in *Watch Tower Bible*. The legislature has decreed that appeals against decisions which relate to the modification of licence conditions should be heard and determined by a specialist tribunal, exercising the powers created in a bespoke scheme. For the court to determine that such a remedy is somehow unsatisfactory or ineffective would be a wholly inappropriate exercise of judicial power."

[28] In the instant case not only is this alternative remedy available, the applicant has sought to avail of it. An appeal has been lodged and is under case management. The appeal to the PAC is demonstrably more efficacious than judicial review. The latter could only result in a quashing of the planning decision and remittal back to the council for redetermination. The PAC, by contrast, if it is so satisfied, can allow the appeal and grant the planning application. This would result in the outcome desired by the applicant in a manner which is bound to be quicker and more cost effective. The PAC can weigh up material considerations and interpret planning policy in the same manner as the council. I have therefore concluded that there is an adequate alternative remedy.

[29] This echoes the comments of Scoffield J in *Re Hartlands (NI) Limited's Application* [2021] NIQB 94:

> "In the vast majority of cases where a disappointed planning applicant seeks to challenge the refusal of planning permission by a council or the Department, the right of appeal to the Commission will not only represent an adequate alternative remedy but will be required to be pursued before this court would countenance any application for judicial review. Had the applicant's grounds of challenge been only those related to the Council's consideration of planning matters (addressed at paragraphs [26]-[76] above), I would have had little hesitation in concluding that the applicant ought to have appealed the Council's decision in preference to mounting judicial review proceedings. Those are precisely the type of matters on which the Commission enjoys expertise and which it is able to address on their merits." (para [107])

[30] For these reasons, in the exercise of my discretion, I refuse leave to apply for judicial review on the basis that there exists a suitable and adequate alternative remedy.

[31] However, having heard argument, I will proceed to consider the merits of the applicant's judicial review challenge.

The legal principles

(i) Irrationality

[32] The applicant seeks to rely on the principle in *Wilson v First County Trust (No 2)* [2004] 1 AC 816 whereby it is presumed legislation does not apply retroactively. This is entirely misguided. Planning policy is not legislation: indeed the ability of decision makers to take into account emerging policy is well recognised.

[33] The Joint Ministerial Statement ("the JMS") dated 31 January 2005 states:

> "21. Planning applications will continue to be considered in the light of both current policies and policies in emerging development plans that are going through the statutory procedures. However, in circumstances where development would accord with the provisions of an extant development plan but the development, either individually or cumulatively, would prejudice the ability of an emerging new or replacement development plan to achieve or retain general conformity with the RDS, or

> would prejudice the outcome of the plan process as outlined at paragraph 20(b), then greater weight needs to be given to the provisions of the emerging development plan than 11 to the extant plan. In all other circumstances the weight to be attached to policies in emerging plans will depend upon the stage of plan preparation or review, increasing as successive stages are reached.
>
> 22. Where a plan is at the draft plan stage, but no objections have been lodged to relevant proposals then considerable weight should be attached to those proposals because of the strong possibility that they will be adopted and replace those in the existing plan. In circumstances where there have been objections to relevant policies, lesser weight may be attached except for those situations outlined in paragraphs 20 - 21 above. Much will also depend on the nature of those objections and whether there are representations in support of particular policies."

[34] It is therefore clear that even when a decision maker is considering an application in light of an extant plan, the policies in an emerging plan can be taken into account and, indeed, may have determinative weight. This will particularly be so when the emerging plan is at an advanced stage of the process and no objections have been lodged to the particular proposal under consideration.

[35] It is therefore inaccurate to suggest that the decision on the instant application would have been different on 25 September 2023, the day before the LDP was adopted, than it was on 28 September. By November 2022 the PAC had reported on the LDP and by June 2023 the DfI had issued its direction to adopt. The planning committee met and considered the application on 4 September, prior to the LDP adoption, but when the plan process was at a very advanced stage.

[36] Moreover, by the time the council issued its decision on the application, the LDP was adopted. Section 6(4) of the 2011 Act provides:

> "Where, in making any determination under this Act, regard is to be had to the local development plan, the determination must be made in accordance with the plan unless material considerations indicate otherwise."

[37] By section 45(1) of the 2011 Act:

> "the council, in dealing with the application … must have regard to the local development plan, so far as material to the application, and to any other material consideration."

[38] The LDP therefore has statutory primacy subject to other material considerations.

[39] When a decision is quashed by a court and redetermined, the material considerations to be taken into account at the time of redetermination are those which exist at the date of the redetermination: see *Kingswood District Council v Secretary of State for the Environment* (1989) 57 P. & C.R. 153:

> "At the end of the day I am firmly of the view that the Secretary of State has to start again de novo with a clean sheet. In that clean sheet situation he is under the obligation to have regard to the development plan and other material considerations, and indeed he is obliged by virtue of the statutory provisions to have regard to matters that may be material considerations which have arisen since the date when the matter was originally considered. Otherwise, as explained by Forbes J., there will be an absurd artificiality about the whole exercise, apart from the fact that there would be a breach of the clear duty under the relevant sections."

[40] To assert that somehow the council ought to have applied the former policy CTY8 of PPS21 is to misunderstand the legal principles engaged. In fact, to have done so, would have rendered the decision susceptible to judicial review.

(ii) Legitimate expectation

[41] The applicant says that it had a legitimate expectation that its application would have been determined within a reasonable time. This, of course, is not a case where the council have failed to make any decision. It made two previous decisions both of which were successfully challenged by way of judicial review on the basis of procedural impropriety. The applicant contends that the delays associated with these decisions have led to the situation whereby planning policy has changed and its application therefore refused.

[42] The concept of legitimate expectation plays only a limited role in the sphere of planning: see *Henry Boot Homes Ltd v Bassetlaw District Council* [2002] EWCA Civ 983:

> "[Counsel for the respondent] invited us to say that legitimate expectation could never operate so as to enable the developer to begin development validly and effectively in breach of condition. I am not prepared to adopt so absolute a 8 proposition. It is possible that circumstances might arise where it was clear that there was no third party or public interest in the matter, and a court might take the view that a legitimate expectation could then arise from the

> LPA's conduct or representations. But, as was said in Coghurst Wood, one suspects that such cases will be very rare. The situation that normally arises in a planning context is very different from that which arises in cases such as Unilever, where the issue is essentially one as between the individual and the public body, in that case the Inland Revenue. Legitimate expectation has a far greater role to play in such circumstances." (para [56])

[43] The applicant could, at any time, have invoked its right under section 60 of the 2011 Act to appeal against the non-determination of its application to the PAC.

[44] Properly analysed, the delays in the decision making process do not rest exclusively at the door of the council. As the chronology demonstrates, the application was not ready for determination until June 2021 when DfI Roads confirmed no objection to the amended plans. Prior to that date, there were a number of amendments made to the application by the applicant which cannot be the responsibility of the council.

[45] The September 2021 permission was quashed, with the consent of all parties (including the applicant) in February 2022. The planning committee of the council reconsidered it in June 2022 and the second permission was granted in August 2022. There is no suggestion of any culpable delay. The second judicial review application commenced in November 2022 and in March 2023 the council indicated an intention to concede by reason of the failure to comply with the statutory requirement to provide the committee report to the public. The second grant was then quashed in May 2023 with the consent of all parties, including the applicant. The further consideration by the planning committee took place in September 2023. Again, no issue of culpable delay arises.

[46] Even if the applicant had a legitimate expectation of the nature outlined, the unusual facts of this case cannot be said to give rise to a breach of this expectation. All of the delay during the period 2018 to 2021 rested with the applicant and thereafter the principal reason for delay related to the judicial review proceedings, which the applicant chose not to contest. At all times, in any event, the applicant had the non-determination appeal remedy.

[47] There is therefore no basis to argue that the applicant is able to rely on a breach of the procedural legitimate expectation.

(iii) Material considerations

[48] The weight to be attached to any consideration is a matter of planning judgement. As a matter of fundamental principle, a judicial review court exercising its supervisory jurisdiction will not interfere in such matters, save on the basis of

Wednesbury irrationality. As McCloskey LJ stated in *Re Belfast City Council's Application* [2018] NIQB 17:

> "…the Court will be obliged to give effect to the entrenched principle that judicial intervention in matters of planning judgment, typically the weight accorded by the decision maker to specified material considerations, is appropriate only on the intrinsically limited ground of irrationality: the "Tesco Stores" principle." (para [30])

[49] This represents a significantly high hurdle for an applicant to overcome. If a decision maker decides to accord no weight to a particular consideration, in exercise of planning judgement, this can only be impugned on the basis that it was a decision no reasonable decision maker could have arrived at.

[50] The applicant criticises the reference to "for completeness" in para [69] of the planning officer's report as demonstrating a failure to carry out any proper assessment. However, that comment must be read in the context of the entire report which makes it clear that PPS21 is still extant but, for the reasons outlined, ought to be afforded little weight.

[51] The decision to accord determining weight to policy COU8 was an entirely rational one for the reasons outlined in the planning officer's report. The draft Plan Strategy was, by that time, at a very advanced stage, having been subject to the rigours of a PAC examination and was subject to a DfI direction to adopt. The policy in question had not been the subject of any objection. The decision to proceed on this basis is unimpeachable.

[52] The applicant invites the court to conclude that it was irrational to accord no weight to the planning history of the site, in circumstances where outline planning permission had been granted, thereby establishing the principle of development.

[53] It is, however, evident that the applicant made a commercial decision to pursue a fresh full planning application rather than rely on the extant outline permission and make an application for reserved matters. Presumably this was because it was believed or expected that some enhanced permission would be granted by this route.

[54] An examination of the respective applications reveals that the applicant's 2018 application was quite different from the outline consent:

(i) The application was for a site measuring 0.53 hectares whilst the outline consent was based on a 0.39 ha site;

(ii) The site was extended again by the amendment made in June 2019;

(iii) The full planning application was for development outside the red line of the outline grant;

(iv) The proposed development was for properties with ridge heights higher than those for which outline planning was granted.

[55] It could not be said, therefore, that the full planning application was in accordance with the outline permission or that, in some way, it fulfilled the same role as a reserved matters application.

[56] By the time of the consideration of this planning application, the outline permission had expired. No reserved matters application had been made. Planning policy had changed in a material way. It could not be said that the decision to accord no weight to the 2017 permission was an irrational one.

[57] In *R(Davison) v Elmbridge Borough Council* [2019] EWHC 1409 (Admin), the High Court in England & Wales addressed the question of the materiality of previously quashed planning permissions. It was held that a previously quashed decision may be a material consideration in a future application since the reasoning applied may still be of relevance.

[58] Thornton J stated:

> "…the previously quashed decision is capable in law of being a material consideration. Whether, and to what extent, the decision maker is required to take the previously quashed decision into account is a matter for the judgment of the decision maker reviewable on public law grounds. A failure to take into account a previously quashed decision will be unlawful if no reasonable authority could have failed to take it into account" (para [56])

[59] In this case, the planning officer had advised that the emerging policies of the Plan Strategy had determining weight, given the stage reached in the process. The extant policies were considered to be of little weight for the same reasons.

[60] It is inescapable therefore that the policy context had changed markedly since the previous grants of planning permission in 2021 and 2022. It could not be said that the failure to take the previous decisions into account was a decision no reasonable authority could have taken. The reasoning underpinning the previous decisions was based on policy CTY8 of PPS21 which was, by September 2023, of little weight.

[61] None of the grounds advanced by the applicant are arguable.

Conclusions

[62] Both on the basis of the availability of an alternative remedy, and since the applicant has failed to establish an arguable case with realistic prospects of success, the application for leave to apply for judicial review is dismissed.

[63] In accordance with the usual practice of the court, I propose to make no order as to costs between the parties, but I will hear any submissions to the contrary.