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(subject to editorial corrections)*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY PATRICK HEFFRON FOR JUDICIAL REVIEW

and

IN THE MATTER OF A DECISION BY THE DEPARTMENT OF THE ENVIRONMENT FOR NORTHERN IRELAND (PLANNING SERVICE) ON 23 MARCH 2015 TO GRANT PLANNING PERMISSION

KEEGAN J

Introduction

[1] This is an application for judicial review of a grant of planning permission of 23 March 2015. The impugned decision was made by the Department of Environment for Northern Ireland Planning Service. That Department has now been re designated as the Department for Infrastructure.

[2] Leave for judicial review was granted by the Court of Appeal on 20 April 2016. In the Notice of Motion the applicant applies for inter alia, the following relief:

(a) Declaratory relief that the respondent acted unlawfully in respect of the granting of planning permission on Reference M/2014/0288F and that the grant is null and void and has no effect in law.

(b) An Order or Certiorari to quash the impugned decision.

[3] The Court of Appeal expressly reserved the issue of delay to the trial judge. Order 53 Rule 4(1) is expressed in mandatory terms and it requires that an application shall be made promptly and in any event within 3 months from the date when grounds for the application first arose unless the court considers that there is good reason for extending the period within which the application shall be made. The grounds relied upon at this hearing by the applicant are grounds (c) and (d)

contained within the Order 53 Statement. In advance of hearing, the applicant abandoned ground (e) which related to the environmental impact assessment. During the hearing, the applicant did not pursue any argument regarding grounds (a) (b) and (f) and it was accepted that these grounds would not form the substantial basis of this application. As such, given the approach taken, the challenge was narrowed to a consideration of grounds (c) and (d).

[4] Mr Michael Potter BL appeared for the applicant. Mr Philip McAteer BL appeared for the respondent. I am grateful to both counsel for their oral and written representations.

[5] I will refer to the following relevant policy documents by way of abbreviation, throughout this judgment:

Planning Policy Statements: PPS

PPS 1- general principles
PPS 3 - access, movement and parking
PPS 4 - planning and economic development
PPS 21- sustainable development in the countryside

Within Planning Policy Statement 4
Planning and Economic Development: PED

PED 3-expansion of an established economic development use in the countryside
PED 9-general criteria for economic development

Factual background

[6] In determining this application I have considered three affidavits from David Worthington, Director of Pragma Planning and Development Consultants Limited. These are dated 22 June 2015, 5 November 2015 and 8 December 2016. One affidavit was filed by the applicant dated 5 November 2015. I also have before me two affidavits filed by the Notice Party. The first affidavit was from a Mr Eamon McVeigh dated 12 April 2016. He is the applicant for planning permission in this case. The other affidavit was from his architect Conor McGowan dated 11 April 2016. On behalf of the respondents I considered two affidavits namely those of Colin Harkness dated 27 October 2016 and Eamon Lynch dated 27 October 2016. I should say that the Notice Party did not appear before me and I was informed that the company he represents was now in liquidation.

[7] This case relates to premises at 61 Dungorman Road, Dungannon. On 23 March 2015 the respondent granted planning permission to F&N Hazelton, the owners of the premises. The permission was M/2014/0288/F and was for:

> "extension to existing B3 engineering works and retrospective approval to offices at premises located 50 metres north of 61 Dungorman Road".

[8] The development was for Predator Equipment Limited who leased the premises to expand the business in the manufacturing of agricultural trailers and other equipment. The premises are located in a rural setting. The applicant resides in a neighbouring property at 65 Dungorman Road. These are premises that he leased at the relevant time.

[9] In April 2007 the Department received a planning application which is referenced as M/2007/0569/F for change of use from agricultural store to workshop for the use of light engineering works with proposed prefabricated metal office located at 61 Dungorman Road. That planning permission was granted on 15 January 2008.

[10] In February 2011 by application reference M/2011/0109/F an application was made for a combination of change of use from light industrial to general industrial use, new build extensions for general industrial use and retrospective approval for existing general industrial use. A development control officer report was compiled dated 6 September 2007. This report contained a recommendation to refuse the planning permission. It is noted in the body of that report that the Department had received objections in relation to that proposal. The officer records that the recommendation "is to refuse, contrary to PPS4 Ped 3.

[11] The refusal reasons are stated in the concluding paragraphs as follows:

> "1. The proposal is contrary to Planning Policy Statement 4, Ped 3, expansion of an established economic development use in the countryside, in that it has not been demonstrated that the scale and nature of the proposal would not harm the character or appearance of the local area and there is a major increase in the site area of the enterprise.
>
> 2. The proposal is contrary to PPS4 Ped 4, redevelopment of an established economic development use in the countryside, in that the scale and nature of the proposal would harm the rural character and appearance of the local area, there is a significant increase in the site area and it has not been demonstrated that there would be environmental benefits as a result of the redevelopment."

[12] This recommendation was not taken up immediately and on 10 October 2011 the council requested that the decision be deferred to permit a meeting between the

council, the officer and the applicant's planning agent. That meeting took place on 17 November 2011 and is averred to in the affidavit of Conor McGowan. The outcome of this is that the Development Control Group deferred consideration, recommending grant of an amended application. An amended application was made and this ultimately resulted in the grant of planning permission on 29 March 2012.

[13] The deferred application consideration sets out the following:

> "I remain of the opinion that the original proposal is contrary to PPS4. This appears to have been accepted by the applicant/agent. Since the office meeting a further amended plan has been submitted. This shows a much reduced scheme with its western boundary rounding off the overall complex. I consider this to meet the Ped 3 test. The proposal is enhanced by a proposed landscaping buffer strip to the western boundary. This will serve to limit critical views of the yard and rare material storage area as well as visually containing the site. Subject to re-advertisement and re-consultation the application can be progressed on that basis. The application was progressed on that basis and the permission was granted. This was subject to conditions in relation to some of the recommendations previously made."

[14] On 5 June 2014 a third planning application was made No: M/2014/0288/F for "extension to existing B3 engineering works and retrospective approval to offices". On 11 June 2014 the Department concluded that environmental effects of the proposals were not likely to be significant and an environmental statement was not required. Consultations were issued to Transport Northern Ireland and the Environmental Health Department of Dungannon and South Tyrone Borough Council. In the week commencing 18 June 2014 the application was advertised in local newspapers. On 24 June 2014 the application site, adjacent buildings and immediate environs were site inspected by the case officer.

[15] On 2 July 2014 a consultation response from Transport Northern Ireland indicated that the proposed layout was unacceptable on the basis of substandard parking arrangements and an unacceptable exit poll for HGV traffic. Various other consultation responses were received and further comments were received from Transport Northern Ireland.

[16] On 16 January 2015 amended site layout drawings and a site location plan were submitted to include additional land that incorporated a revised access arrangement and additional car parking areas together with a landscaping buffer around the western and part of the northern site boundaries. These amendments

were advertised in the local press. Further consultation resulted in more information being provided by Transport Northern Ireland. By 12 March 2015 Transport Northern Ireland cited no objections to the proposal and recommended approval subject to conditions. This led to the development control officer's Professional Planning Report which is dated 18 March 2015. This report was agreed by the Development Control Group.

[17] The report in the section 'Assessment of Policy and other Material Consideration 'sets out as follows:

> "**PPS4 Planning and Economic Development**
>
> **Ped3: Expansion of an established economic development use in the countryside**
>
> This business has received planning permission under M/2007/0569/F which granted permission for change of use to agricultural store to workshop for the use of light engineering works with proposed prefabricated office. Subsequent permission was granted under M/2011/0109/F for change of use from B2: General Industrial, proposed extension to B3: General Industrial Workshop and retrospective approval for existing B3: General industrial extension.
>
> This permission included access arrangements and a car park to the side of the buildings. This car park and servicing arrangements have not been implemented in full. Given that these premises have received approval under the above it is accepted that the business is established. The access arrangements approved were conditioned to be in place within three months of the granting of permission on 29 March 2012.
>
> Given the nature of the rising land to the north the proposed extension will integrate and does respect the scale, design and materials of the original buildings.
>
> The landscaping shown around the previously approved car park has not been implemented neither has the car park. The current proposal includes the car park to be extended to the west at the Culnagrew Road.

Ped9: General Criteria for Economic Development

This proposal complies with all of the criteria.

Re-advertise and re-run when amended location plan is submitted.

Recommend approved subject to roads.

The character of the proposal will not significantly change as a result of this proposal.

Environmental health – no objections.

Transport NI – await response.

Case officer recommendations – brief summary of reasons for recommendation. There is a further written note in this document Transport NI – no objections 12 March 2015 response."

On the next page there is a reference to the DC Group recommendation –"approve as per case officer's report."

[18] The grant of planning permission is dated 23 March 2015 and it contains various conditions and time stipulations. On 1 April 2015 the applicant has averred that he became aware of the application and instructed a planning consultant on his behalf. That is Mr David Worthington who has sworn three affidavits in this case. Mr Worthington avers in his affidavit that on 8 April 2015 he became aware that the application had been granted on checking the planning online database for the second time. On 13 April 2015 Mr Worthington obtained stamped approval drawings. On 17 April 2015 Mr Worthington met with solicitors to discuss the merits of judicial review but he avers that they did not wish to take instructions. On 29 April 2015 Mr Worthington viewed the full planning file and contacted noise and road experts. Various roads experts were then instructed. On 22 May 2015 Mr Worthington met and instructed the applicant's current solicitors. On 28 May 2015 there was a further consultation with solicitors. On 31 May 2015 there was a report on the roads issues received.

[19] It was on 3 June 2015 that the pre-action protocol letter was received from the applicant. It is averred that counsel was briefed on 8 June 2015. It is further averred that there was a consultation with counsel on 16 June 2015. Proceedings were then issued on 22 June 2015 which is one day short of the 3 month long stop period.

Submissions

[20] Mr Potter had to deal with the live delay issue in this case although for understandable reasons this formed the latter part of his submissions. In relation to delay he referred to Re Zhanjes Application [2007] NIQB 14 and Musgrave Retail Partners (NI) Ltd's Application [2012] NIQB 109. Mr Potter accepted that there was delay but that should not be fatal to the case because of the importance of the issues which merit adjudication, the strength of the case and the public interest.

[21] In relation to the substantive case, he said this was essentially a rationality challenge. There was a 2011 recommendation for refusal of planning permission which was deemed a major expansion and the officer found that application contrary to PPS3 and PED4. Mr Potter argued that this was a material consideration that was not taken into account and he said that this was irrational when a relevant recent recommendation found a substantially less expansive proposal incompatible with planning policy. Mr Potter also relied on the failure to properly apply the relevant policies and the failure to give adequate reasons. He referred in this regard to a number of authorities namely the North Wiltshire District Council v Secretary of State for the Environment [1993] 65 P&CR 137 JJ Gallagher Ltd v Secretary of State for Local Government Transport and the Regions Gateshead Metropolitan Borough Council [2002] WEHC 1812 Admin and Rank v East Cambridgeshire District Council [2002] All ER (D) 90.

[22] In response, Mr McAteer dealt with the delay issue by referring to the fact that the judicial review was lodged one day within the 3 month long stop. Mr McAteer rightly referred to the fact that a planning permission by its character calls for a prompt challenge. He relied on the dicta of Maguire J in Musgrave Retail Partners(NI) Ltd's Application [2012] NIQB 109 case in this regard. Mr McAteer said that the relevant principles could be distilled from the case of R v Secretary of State for Trade and Industry ex parte Greenpeace Ltd [2000] ENVLR 221 and the dicta of Kay J followed by Gillen J in Re Sheridan Millennium Ltd [2007] NIQB 27. I was referred to three directive questions from that authority:

(i) Is there reasonable objective excuse for applying late?

(ii) What, if any, is the damage in terms of hardship or prejudice to the third party rights and detriment to good administration, which would be occasioned if permission were now granted?

(iii) In the event does the public interest require that the application should be permitted to proceed?

[23] Weatherup J referenced this issue in Laverty v PSNI and others [2015] NICA 75 at paragraph 21 and, inter alia, stated that on a substantive hearing delay may impact on the relief granted. Mr McAteer's written argument deals with all of the principles applicable in this area. He refers to the affidavit from the developer

which highlights the fact that the developer avers to having lost tenders and estimates within the 12 months after planning permission a loss of £450-490,000 was occasioned and that steps to obtain alternative premises proved difficult.

[24] Mr Mc Ateer then dealt with the substantive grounds at issue. Regarding Ground (c) Mr Mc Ateer said that the planning history in total was taken into account. He referred to Treacy J's dicta in the Newry Chamber of Commerce case [2015] NIQB 65 and he asserted that when looking at the respondent's treatment of policy the high hurdle of Wednesbury unreasonableness could not be established. As regards Ground (d) he stated that the relevant policy was applied. He said that there were two parts to this that PPS 4 applied and within that PED3 was clearly applied. He said that PED9 was also applied. He said that it was clear that PPS21 which is the governing policy formed the context for any consideration of planning approval in a rural area and whilst not specifically mentioned that was not fatal to the application.

Consideration

[25] I remind myself in beginning this consideration that the judicial review court is exercising a supervisory role and not an appellate jurisdiction. I am concerned with the legality of the decision making process and not the substance of the decision.

[26] I also bear in mind the context of this case. This is important as there are established principles in the planning arena which I have been referred to. It seems to me that a clear exposition of these principles is found in the dicta of Lindblom J in Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government [2014] EWHC 754. At paragraph 19 the judge sets out the relevant legal principles under seven headings. This authority has been consistently applied and it is a useful touchstone for me in dealing with a case of this nature. In terms of the principles they bear repeating in full as follows:

> "(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to "rehearse every argument relating to each matter in every paragraph".
>
> (2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the "principal important

controversial issues". An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under-Heywood in South Bucks District Council and another v Porter (No.2) [2004] 1 WLR 1953, at p.1964B-G).

(3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, "provided that it does not lapse into Wednesbury irrationality" to give material considerations "whatever weight [it] thinks fit or no weight at all" (see the speech of Lord Hoffmann in Tesco Stores Limited v Secretary of State for the Environment [1995] 1 WLR 759, at p.780F-H). And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector's decision (see the judgment of Sullivan J as he then was, in Newsmith v Secretary of State [2001] EWHC Admin 74, at paragraph 6).

(4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration (see the judgment of Lord Reed in Tesco Stores v Dundee City Council [2012] PTSR 983, at paragraphs 17 to 22).

(5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at

what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (see the judgment of Hoffmann LJ, as he then was, South Somerset District Council v The Secretary of State for the Environment [1993] 66 P&CR 80, at p.83E-H).

(6) Because it is reasonable to assume that national planning policy is familiar to the Secretary of State and his inspectors, the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored (see, for example, the judgment of Lang J in Sea Land Power & Energy Limited v Secretary of State for Communities and Local Government [2012] EWHC 1419 (QB), at paragraph 58).

(7) Consistency in decision-making is important both to developers and local planning authorities, because it serves to maintain public confidence in the operation of the development control system. But it is not a principle of law that like cases must always be decided alike. An inspector must exercise his own judgment on this question, if it arises (see, for example, the judgment of Pill LJ Fox Strategic Land and Property Ltd v Secretary of State for Communities and Local Government [2013] 1 P&CR 6, at paragraphs 12 to 14, citing the judgment of Mann LJ in North Wiltshire District Council v Secretary of State for the Environment [1992] 65 P&CR 137, at p.145)."

[27] Mr Potter referred me to the North Wiltshire District Council case and in particular the dicta that a previous decision is capable of being a material consideration. The quote from this case that is particularly relevant is as follows:

"The materiality of previous appeal decisions has not hitherto been discussed in this court but we were referred to some decisions at first instance. The most recent is Launchdeal Ltd v Secretary of State where at pages 1041 to 1042 Mr Roy Vandermeer QC, sitting as a deputy judge of the High Court, referred to the earlier authorities. I have read the judgments at first instance and, with one possible exception, I find what is said in them consonant with what I have said."

[28] Drawing on the decision in the JJ Gallagher case Mr Potter also referred to paragraph 56 of that decision where an appeal issue from a previous case was referenced. This says as follows:

> "The policy issues were the same, and the need issues were also the same, albeit related to a rather smaller development. The Secretary of State decided, in that case, that planning permission should be granted. Mr Dobb's first submission is that, since the Secretary of State did not refer to the Church Commissioners' Appeal Decision, it is to be inferred that he left it out of account. I find it impossible to draw such an inference. It seems to me to be inconceivable that the Secretary of State could simply have overlooked such an obviously relevant recent decision, and it would only be right to infer that he had deliberately left it out of account if there was some inescapable inconsistency between the grant of permission in the one case, and its refusal in the other. It did not seem to me, however, that one can say more than that there is an apparent inconsistency between the two decisions. But it is because of this apparent inconsistency that I accept the second way in which Mr Dobb puts the challenge. That it was incumbent upon the Secretary of State to explain what it was that distinguished the earlier proposal from the present one, so as to justify permission in the one case, and to require refusal in the other."

[29] In the East Cambridgeshire District Council case at paragraph 21 when looking at similar decisions , Deputy High Court judge, George Bartlett QC, said:

> "In my judgment, this conclusion was of such an obvious relevance to the determination that the council had to make on the 2002 application that their failure to have regard to it was an error of law that vitiates the decision. The same goes for the council's own refusal in 1988 – it should have been taken into account – although the force of the inspector's conclusion, given that it was a reasoned statement by the appellate authority is clearly greater." It seems to me that the determination of the application for this larger, two storey development could well have been different had the members had before them the 1998 refusal and the 1989 appeal decision."

[30] I am not persuaded by the applicant's arguments regarding the ground (c) challenge for the following reasons. The 2011 recommendation for refusal must be seen in context. It was a recommendation for refusal which began a process. It was followed by modifications and the 2012 grant as adaptations were made. The Order 53 Statement contains a flaw in referring to the 2011 decision in isolation. If it were the case that only the 2011 decision were to be referred to by the relevant planning authority that would lead to irrationality in that only part of the process is referred to and applied. It seems to me this is cherry picking at its best. I accept the points made by Mr Potter that determinations including recommendations may be material but that will depend on the circumstances and context of each case. In this case the recommendation was not accepted. The grant of planning permission was made in 2012. The decision maker cannot be straightjacketed by previous decisions but they are material. The development officer recites the entire planning history in the report. I can discern no error in relation to that and as such I do not consider that the decision can be said to be irrational.

[31] The challenge as to reasoning also only relates to the 2011 recommendation. Again there is an inherent flaw in this argument. It is clear to me that the reasoning in the impugned decision is not as expansive as the reasoning given by the development control officer in 2011 but that does not in itself render the decision of March 2015 Wednesbury unreasonable given the dicta in Bloor Homes which I have decided to apply. That decision allows for a reasonable degree of flexibility. It also allows for the court to decide whether or not the decision was adequate and intelligible. I consider that the decision was adequate and intelligible.

[32] In relation to the Ground (d) challenge regarding policy, this seems to be rooted in two points. Firstly, the issue is which policy applies. It seems clear that PPS4 and PPS21 apply. PPS21 is an overriding policy in relation to sustainable development in the countryside. PPS4 is in relation to planning and economic development. Within PPS 4 PED3 and PED9 apply. The decision references PPS4 but not PPS21. I have to decide whether or not that results in a failure to take into account relevant material. I note the position in the affidavit filed by Mr Harkness at paragraph 10 wherein he says that PPS21 provides an overall context which frames any decision making process notwithstanding the fact that it may not be specifically mentioned. I accept this argument and I do not consider that the failure to specifically mention PPS21 renders this decision unlawful.

[33] The second policy that is relevant is PPS4. This is specifically referred to in the decision making process. There are two aspects to this policy that are relevant, namely PED3 and PED9. In relation to PED3 the point is averred on affidavit that this application was not considered a major expansion. Mr Lynch also refers to the fact that he undertook a site visit. Mr Potter argued that this is entirely irrational given the increase in size heralded mainly by the large shed as part of this development and the increased car park. However, it seems to me that there is a flaw in the reasoning of Mr Potter because the fact that the 2011 recommendation considers a major expansion is different. This was a wholly different application

that was made. After it was made there were further adaptations. I accept the affidavit evidence filed by the Department that the expansion was not as significant from 2012 to 2015 as it may have been previously.

[34] The interpretation of the policy and the weight to be given to various matters within the policy are for the decision maker. I find no convincing argument that PED9 was not taken into account. These are the general criteria for economic development and whilst the decision maker does not expand on the various different subheadings within PED9 he says that the policy was taken into account and that the application complied with it. It is clear to me that the decision maker understood what the relevant policies were. As such I cannot see that the policy challenge is made out.

[35] It follows that I cannot find for the applicant on the two substantive grounds that were argued before me. In any event, I would have refused relief in this case due to lack of promptitude. This is a planning case where no objective reasonable excuse has been given for acting without promptitude. There is an affidavit setting out the potential prejudice occasioned to the applicant developer. There was no objection raised by the public or public interest groups to this application. This seems to me to have been a distinctly private matter. I was informed that in England and Wales there is a 6 week time limit for planning judicial reviews. That is not the law here but nonetheless the 3 month long stop does not provide any guarantee that cases will be entertained or relief granted for applications on the margins of time. In my view this is a clear case where lack of promptitude militates against the applicant and I much preferred the defendant's arguments on this issue. I do not consider that a good reason has been provided for extending the period within which the application shall be made.

Conclusion

[36] Accordingly, the application is dismissed on all of the substantive grounds advanced in this court and by reason of delay.