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Judgment: approved by the Court for handing down | *Delivered:* **09/09/2003**
(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 NICK ROWSOME FOR JUDICIAL REVIEW

WEATHERUP J

The application

[1] The applicant applies for judicial review of the decision of the Department of the Environment for Northern Ireland dated 6 October 2001 granting planning permission to a developer for the change of house types on three sites on a housing development at Tarmon Brae, Rossorry, Enniskillen, Co Fermanagh. The original grant of planning permission had involved the construction of three split level houses on the three sites and the impugned grant of planning permission involved the construction of three blocks of apartments on the three sites, each containing six apartments. The applicant is the owner of another property in the development.

The background

[2] The original grant of planning permission for the development was made on 13 May 1993 for the construction of 16 dwellings of three different designs erected on a 1.9 hectare site. On 6 December 1999 the developer applied for the construction of the 18 apartments on three of the undeveloped sites, being sites 5, 6 and 7 overlooking the Sillees River. Neighbour notification was given to five neighbouring owners, including the owner of 97 Tarmon Brae, being the property now owned by the applicant. The applicant purchased the premises in April 2000 after visiting the offices of the Planning Service in Enniskillen where "we were told by an official of the Planning Service in Enniskillen that the Service were going to refuse the planning permission and that the matter merely had to be raised at the Planning Committee of the Council where it would not be approved". The neighbours objected to the proposed development of apartments and sent standard letters

of objection to the respondent indicating objections on the grounds of the impact of traffic and the proposed departure from the original planning permission which was said to form part of the contract for the purchase of the houses. Of particular relevance in the light of the subsequent treatment of the application by the respondent were additional objections based first of all on the contrasting character of the existing dwellings and secondly on the contrasting design of the existing dwellings.

[3] The application was considered by the respondent's development control officer who was "undecided" about the application. He concluded that there was no objection in principle to the construction of apartments on each of the three sites but he entertained objections to the particular design of the proposed apartments. The modern design of the apartments was stated to be "completely alien" to surrounding buildings and further there was considered to be a need for further details of levels, cross sections, landscaping and amenity space.

[4] The application was then considered by the respondent's development control group and the group reached a preliminary opinion that recommended refusal of the application on two grounds. The first was that the proposal was out of character "with the existing detached single family occupancy dwellings on sizable gardens". The second was that the design was "out of keeping and (*with the)* character of the area", otherwise expressed as being "unacceptable form of dev. including layout, design and materials". It appears that the development control group, as was the case with the development control officer, did not consider there to be any objection in principle to the construction of apartments on the three sites but the objection was to the particular character and design of the proposed apartments. The two grounds for the preliminary opinion that the application be refused were set out in the paper presented to Fermanagh District Council.

[5] The respondent's preliminary opinion that the application be refused came before Fermanagh District Council on 16 March 2000 and the Council did not accept the respondent's preliminary opinion and deferred the matter to enable an office meeting with councillors to be held. That meeting was held on 10 May 2000 where it was agreed that the developer should be given the opportunity to address the respondent's concerns in relation to the proposal. Amended details of the proposal were submitted on behalf of the developer but on 17 August 2000 the respondent notified the developer that the amended proposal remained unacceptable.

[6] After correspondence and telephone calls between the respondent and the developer's representative the developer indicated that he would submit a revised scheme to the respondent. On 10 January 2001 the developer submitted two alternative proposals for the development of 18 apartments on the three sites. Further amendments were made and a meeting of planners

and the developer's representative took place. The amended proposals were considered by the development control group on 9 April 2001 where it was concluded that the amended proposals were acceptable and the decision was made to amend the preliminary opinion to approval of the grant of planning permission. The departmental control group's conclusion was stated to be:

> "All objections considered. Approval of amended scheme eliminating retaining walls and introducing new landscaping scheme."

Fermanagh District Council accepted the recommendation to approve planning permission on 19 April 2001.

[7] Accordingly the revised schemes had been sufficient to alter the respondent's preliminary opinion that the application by refused to one that planning permission be granted. The original grounds of objection had concerned both the contrasting character of the existing development and the proposed development and the contrasting design of the existing development and the proposed development. In the replying affidavits the respondent emphasised that the essential nature of the application had not changed; that the number and footprint of the apartment blocks had remained constant and was broadly similar to that of the original proposal for individual dwellings; that the dimensions of the apartment buildings had not significantly deviated. Changes concerned the external appearance and finishing materials as well as the car-parking, retaining walls, service areas and landscaping. Changes to the structures involved altering the roof line so that it was parallel to the road and more in keeping with existing dwellings, reducing the glazing and replacing finishes of render and cladding with brick and render in keeping with adjacent development.

The applicant's grounds

[8] The grounds relied on by the applicant for judicial review were:

(1) The respondent's failure to take into account relevant considerations, including various planning documents, the objections to the proposed development and the applicant's rights under Article 8 and Article 1 of the First Protocol of the European Convention.

(2) Procedural unfairness in that the respondent changed its preliminary opinion to refuse the application without requiring re-advertisement or notifying the applicant or affording the applicant an opportunity to make further representations.

(3) The respondent 's failure to give adequate reasons for its decision.

(4) Interference with the applicant's rights under Article 8 and Article 1 of the First Protocol of the European Convention in not providing for compensation to be paid to the applicant for such a breach.

Relevant considerations

[9] Article 25(1) of the Planning (Northern Ireland) Order 1991 provides that:

> "Where an application is made to the Department for planning permission, the Department, in dealing with the application, shall have regard to the development plan, so far as material to the application, and to any other material considerations."

The Fermanagh Area Plan 2007 states the objectives in relation to housing to include protection of the character and amenity of the existing residential areas and settlements and the encouragement of a range of housing types and new developments to meet the different housing needs of the community.

[10] Fermanagh Area Plan, policy H2 in respect of housing layout, provides that the Department will require high standards of design and layout in all new housing developments and have regard to the following:

(a) The scale and density of the proposed scheme which should be appropriate to the location of the site given its context and characteristics including demography, landscapes and other site features including archaeological sites and monuments.

(b) The layout which should contribute to townscape and provide for the privacy and residential amenity of both existing and prospective occupiers normally including minimum rear gardens of 10 metres.

(c) House type and design.

(d) Landscaping proposals which should include the retention of existing vegetation worthy of protection and appropriate planting and boundary treatments particularly to the site frontage.

It is further provided that densities for particular housing areas have generally been specified but in all cases account should be taken of the character and density of adjoining development.

[11] Particular reference is made to housing zone H4 Tarmon Brae which states that:

> "New developments should respect existing slopes and contours and lower density developments should be located on the slopes towards Lough Erne and the Sillees River. Care must also be take with the siting of any development on lower slopes having regard to views along the Erne and the impact of development on the old Rossorry graveyard and church site which is a local landscape policy area."

Planning Policy Statement 7 (PPS7) on Quality Residential Environments published in June 2001 in the same terms as a draft PPS provided in policy QD1 "Quality in new residential development" that:

> "All proposals for residential development would be expected to conform to all of the following criteria –
>
> (a) The development respects the surrounding context and is appropriate to the character and demography of the site in terms of layout, scale, proportions, massing and appearance of buildings, structures and landscapes and hard surfaced areas.
>
> …
>
> (h) The design and layout will not create conflict with adjacent land uses and there is no unacceptable adverse effect on existing or proposed properties in terms of overlooking, loss of light, overshading, noise or other disturbance."

[12] The applicant submitted that in granting planning permission the respondent departed from the policy documents referred to above and gave no reason for such departure. The respondent contended that it had not departed from the planning policy documents and that the development accorded with those policies. In particular the applicant objected to the housing density arising from the creation of 18 housing units on the three sites as being contrary to the area plan requirement for "lower density development" on the slopes where the three sites were located. The respondent interpreted "lower density" by reference to the number and size of buildings (which remained the same as the original planning permission, being three houses and three sites) as opposed to the number of housing units

within the buildings. On the respondent's approach the low occupancy of the existing dwellings and the higher occupancy of the proposed buildings were not matters concerned with "density". I accept the respondent's approach that density of development is determined by the number, siting and scale of buildings and sites.

[13] The applicant further submitted that the respondent failed to require the developer to provide a design concept statement. PPS7 and the earlier draft provide that the Department will require the submission of a design concept statement to accompany all planning applications for a residential development. Paragraph 4.45 provides that:

> "The statement should outline in writing the overall design concept of objectives for the site and include and indicative concept plan based on the appraisal of the site and its context. The amount of information and level of detail required will depend on the nature, scale and location of the proposed development."

The respondent accepted that no formal requirement was made for the submission of a designed concept statement with the planning application but contended that the materials submitted by the developer complied with the substance of a design concept statement. The applicant and the respondent disagree as to whether the information furnished by the developer was sufficient to comply with the requirements of a design concept statement but as the amount of information and the level of detail required depends on the nature, scale and location of the proposed development it is a matter for the judgment of the respondent in each case as to whether the requirements have been met. In the present case it has not been demonstrated that the respondent's judgment on this issue is flawed.

[14] The applicant further submitted that the respondent had departed from the other statements of policy set out above. Of particular relevance in view of the character objection is the inclusion, in the Area Plan objectives in relation to housing, of protection of the character and amenity of the existing residential areas, and the statement in PPS7 that all proposals for residential development would be expected to respect the surrounding context. In forming the first preliminary opinion the respondent considered character and context and treated the contrast with the character of the existing development as a material consideration, and undoubtedly it was such. At that stage the respondent accepted the character objection in terms that contrasted the single family occupancy in the existing development. The applicant submitted that the respondent's eventual decision to grant planning permission failed to understand properly and to take into account that material consideration.

[15] From a consideration of the decision making process I am satisfied that -

(a) The respondent had no objection in principle to the development of apartments on the three sites.

(b) There were two reasons for the original preliminary opinion to refuse planning permission, being first of all the contrasting character of the proposed development and secondly the contrasting design of the proposed development.

(c) The character objection was based on the particular apartment proposal being out of character with the existing detached, single-family occupancy dwellings on sizeable gardens. A central element of that character objection related to the low occupancy units on the existing sites.

(d) The absence of any objection in principle to the construction of apartments on each site indicated that the respondent was not wedded to single family occupancy sites.

(e) The objection based on the contrasting designs of the proposed and existing developments was addressed between the initial proposal and the final proposal.

(f) There were no substantial changes between the initial proposal that resulted in a preliminary opinion for refusal and the amended proposal which was approved.

[16] The applicant and the respondent differed on whether the objection based on the contrasting character of the proposed and the existing developments had been addressed after the proposals had been amended. The applicant contended that the objection to the overall character of the development had not been addressed and had not been met. The applicant relied on the respondent's letter to the developer of 17 August 2000, rejecting the initial amendments to the proposal, as indicating that the respondent was failing to maintain the two grounds of objection as separate matters and thus allowed the character objection to submerge into the design objection. The respondent contended that the objections on character grounds and design grounds were each matters of degree and the amendments made by the developer addressed both objections. No doubt the alterations required to address each objection would overlap and would be matters of degree.

[17] There were no working papers from the respondent dealing directly with the respondent's treatment of the character objection in the light of the amended proposals, and the available evidence appeared in the respondent's

affidavits. In the respondent's first affidavit, at paragraphs 5 and 10, the emphasis was on the essential nature of the application not having changed, and the details of changes made to the developer's proposals illustrate that the alterations concerned details of design of the sites and the structures. When the respondent returned to the same theme in paragraph 10 of the affidavit of 2 May 2002 it was stated that the respondent had not advised the developer "that the scale density or siting of the proposals (for) apartments were unacceptable". However the developer had been advised that his proposal was unacceptable on grounds of character. The full scope of that objection is not addressed by consideration of scale density and siting.

[18] The character objection was addressed directly at paragraph 11(ix) of the respondent's first affidavit. It was there stated that it was not accepted that the proposal "as it evolved" was out of character with the area. Reference was made to the mix of housing types in the estate and to the Area Plan's encouragement for a range of housing layouts types and densities. It is stated that the steeply sloping site lends itself to a design solution that respects the contours of the site and that this is evident from the previous planning permission and the proposed apartment development. Neither the desirability of a range of housing layouts types and densities nor a design solution reflecting the contours of the site address the low units of occupancy that were a central element of the character objection. The reference in the affidavit to the evolution of the developer's proposal implies that the amended proposal had overcome the character objection. As the proposal's occupancy level was unaltered it is not apparent how the alterations that were made impacted on that central element of the character objection. I find no evidence that the later evaluation of the character objection considered units of occupancy. I conclude that the respondent did not address the proper nature of the character objection when reaching the decision to approve the application. Accordingly the respondent failed to take into account a material consideration and the decision will be quashed.

Procedural fairness

[19] As I find in favour of the applicant on the first ground it is not necessary to deal with the issue of procedural fairness. However as there was considerable argument on this ground I make the following observations. The respondent is under a duty to deal with applications for planning permission in accordance with the requirements of procedural fairness. This duty extends to objectors and may require the respondent to provide objectors with an opportunity to make additional representations. In the first instance the Department operates a system of neighbour notification which applied in the present case and resulted in objections being submitted by a number of neighbours. The grounds of objection included the two grounds relied on by the development control group in forming its initial preliminary opinion to refuse planning permission in March 2000. The objectors were not made

aware of the revised scheme submitted by the developer in January 2001 or the respondent's revised preliminary opinion to grant planning permission in April 2001 and became aware of the position only after the final decision was made in October 2001.

[20] In R v Monmouth District Council ex parte Jones & Ors [1987] 53 P&CR 108 an application for further development of the site was approved by the planning committee of the Council and was then to come before the full Council. An objector re-examined the plans and found they had been amended and were inaccurate and the matter was referred back to the planning committee. However the planning committee endorsed its previous decision without hearing any representations from the objectors. Woolf J granted the application for judicial review on the basis that the requirements of fairness in the circumstances required that the objectors be allowed to make representations on the amended plans and that such representations might have affected the outcome of the application for planning permission.

[21] The respondent submitted that it was not necessary, further to any of the amendments made to the developer's application, to re-advertise the application or to issue further notices to the objectors, because there had been no substantial change to the proposed development. I accept that the amendments did not effect a substantial change in the proposed development. The amendment of preliminary opinions was described as commonplace. I accept that such amendment would not of itself require notice to the objectors. In the present case there was a lengthy period of consultation between the respondent and the developer in relation to the objections to the development, as the developer attempted to overcome the objections. During that time the objectors had no notice of the evolution of the application.

[22] Objectors are in a position to keep themselves aware of the progress of applications as they are entitled to consult the planning service and to consider the plans, but fairness requires that there be reasonable limits on the extent to which the onus remains on the objector to discover the current state of the application. By August 2000 the developer's amendments had been rejected. Then the process effectively began another cycle. In January 2001 the revised schemes were submitted and the application came back to the development control group for reconsideration in April 2001, over one year after initial consideration, at which stage the preliminary opinion was altered to one of approval of the amended proposal. Had the revised scheme involved what the respondent regarded as substantial changes to the proposal then notice would have been given to the applicant. I consider that fairness would require notice to objectors not only where there had been a substantial change to the application but also where there had been any other significant change of circumstances that might affect the outcome of the application.

[23] When a matter goes to the Council and is deferred for consideration at a meeting, it will be apparent to objectors that amendment of the proposal is in prospect and amendment of the preliminary opinion may follow. But when that amendment takes place and is rejected by the respondent, and after a lapse of time the developer then submits a revised scheme that the respondent considers may affect the preliminary opinion, in my opinion there has been a significant change of circumstances. When that happens, fairness requires that the objectors have notice of the proposed reconsideration, or at least of the amended preliminary opinion, so that they may be placed in a position to make representations on the revised scheme.

[24] It might be suggested that it would be difficult for the respondent to know that there had been such a degree of change of circumstances as could be said to be significant. To that suggestion I would say that the respondent presently determines whether the degree of change of the development proposals could be said to be substantial and apparently is able to do so without particular difficulty. Each case will, of course depend on its own particular facts but there is no reason to anticipate undue difficulty in identifying those cases where rejected amendments have resulted in a delayed relaunch of the proposal leading to active consideration being given to amendment of the respondent's position.

[25] As to whether any representations might have had any effect in the circumstances of the present case, I am satisfied that the objectors would have relied on the proper nature of the character objection and the respondent would have taken into account the full extent of that material consideration. It is at least distinctly possible that representations by objectors would have made a difference to the outcome of the application.

[26] The applicant's evidence on affidavit was that the decision to purchase his property had been made after an official of the planning service had told the applicant that planning permission would be refused. The applicant relied upon this representation as creating a legitimate expectation that the respondent would not change the preliminary opinion without consultation with the applicant. The respondent did not accept that the representation was made but I proceed on the assumption that it was made. The legitimacy of an expectation must be objectively justified. In the present case the conversation took place before the application had been considered by the Council. The applicant knew, or ought to have known, that consultation was progressing, and that preliminary opinions can change, and at that stage no final decision had been made on the application. Given the nature of the representation and the circumstances in which it was made and the nature of the decision making process, the applicant could not legitimately expect that the respondent's preliminary opinion would be the final opinion or that any amendment of the preliminary opinion would necessarily require that notice would be given to the applicant.

Reasons

[27] The applicant contended that the respondent had departed from planning policy and had failed to give reasons for that departure. Wycombe District Council v Secretary of State for the Environment (1989) 57 P & CR 177. The interpretation of policy is in the first place a matter for the respondent. In the course of applying planning policy the respondent initially treated the character objection, taking account of occupancy levels, as a material consideration and accepted the objection. I have found that when the respondent revisited the application to consider the developer's revised schemes it did not give consideration to the proper nature of the character objection. That approach did not amount to a decision to depart from planning policy that required an explanation, but amounted to a failure to consider a material consideration. I have not accepted any of the applicant's other examples of departure from planning policy. This ground does not add to the applicant's case.

European Convention

[28] The applicant claimed that the grant of planning permission amounted to a breach of Article 8 and Article 1 of the First Protocol to the European Convention and that the absence of provision for compensation also amounted to such a breach. These issues were considered by the Court of Appeal in Stewart's Application [2003] NI 149. The Article 8 right to respect for private and family life and the Article 1 of the First Protocol right to the peaceful enjoyment of possessions may be engaged if a person is particularly badly affected by development carried out in consequence of a planning decision made by the State. As both rights are subject to certain public interest exceptions the public authority has to carry out a proper balancing exercise with respect to the public and private interests engaged in order to satisfy the requirement that it acts proportionately. It is possible that in some cases the effect on an individual of a planning decision may be such that the failure to provide compensation would constitute a breach of Article 1 of the First Protocol but the case must be sufficiently extreme to qualify.

[29] The applicant submits that there has been a breach of Article 8 and Article 1 of the First Protocol by reason of the proposed development overlooking the applicant's property and its effect in reducing the value of the applicant's property. I accept the averments that the respondent had regard to its obligations under the Human Rights Act 1998 and to the need to consider any potential impact of the development on the individual rights of those living in the vicinity of the development. I am satisfied that any interference with the applicant's right to respect for privacy and family life or the right to peaceful enjoyment of possessions satisfies the requirements of proportionality and does not constitute a breach of Article 8 or of Article 1 of

the First Protocol. Assuming that the development will have the impact claimed by the applicant on the value of the applicant's property I am satisfied, as was the case in Stewart's Application, that the present case is far from being sufficiently extreme to qualify as a breach of Article 1 of the First Protocol for failure to provide compensation to the applicant.

[30] I find that in making the decision to grant planning permission the respondent failed to take into account the proper nature of a material consideration, namely whether the proposal was out of character with the existing detached single family occupancy dwellings on sizable gardens. Accordingly it is ordered that the decision of 6 October 2001 granting planning permission be quashed.