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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 F P McCANN DEVELOPMENTS LIMITED and MAGHERA PRESBYTERIAN CHURCH FOR JUDICIAL REVIEW

WEATHERUP J

The application.

[1] The applicants apply for Judicial Review of decisions of the Planning Appeals Commission (PAC) dated 15 October 2004 dismissing appeals against the non determination by the Department of the Environment Planning Service (the Department) of applications for planning permission for residential development on lands owned by the first applicant at Fortwilliam Road, Tobermore and at Calmore Road, Tobermore and by the second applicant at Mullagh Road, Maghera. Mr Lindblom QC and Mr Orbinson appeared for the applicants, Mr Larkin QC and Ms Ross appeared for the PAC and Mr McCloskey QC and Mr O'Reilly appeared for the Department.

The background.

[2] The first applicant is a property development and house building company based in Magherafelt. On 5 January 2004 the first applicant applied for planning permission at Fortwilliam Road on a 1.44 hectare site with the potential to accommodate 22 housing units. On the same day the first applicant applied for planning permission on a 4.4 hectare site at Calmore Road with the potential to accommodate 70 housing units. On 6 August 2003 the second applicant applied for planning permission for a 2.8 hectare site at Maghera with the potential to accommodate 46 housing units. In each case no determination of the applications was made by Planning Service and the

applicants appealed to the PAC under Article 33 of the Planning (Northern Ireland) Order 1991. The Planning Service issued draft reasons for refusing the applications. On 15 October 2004 the PAC dismissed the three appeals on the ground of prematurity.

[3] The Magherafelt Area Plan 1976 – 1996 is the statutory plan for the area and was adopted in January 1981 following a public inquiry. The applications relate to lands within the development limits of the statutory plan. On 28 April 2004 a draft Magherafelt Area Plan 2015 was published and the proposed sites are outside the development limits of the draft plan. Overall there has been substantial exclusion of development land in settlements comprised in the Magherafelt area. Objections have been raised to the draft plan. Accordingly all three proposals for development share the fact that each relates to a location around Tobermore or Maghera that is within the development limits of the extant statutory plan but in each case the location is excluded from the development area of the draft plan.

Fortwilliam Road, Tobermore.

[4] In relation to the Fortwilliam Road site the Department's ground of refusal, which was accepted by the PAC, was that the proposal was contrary to Planning Policy Statement 1, General Principles (PPS1) on the grounds of prematurity as the draft Magherafelt Area Plan 2015 had reached an advanced state of preparation and the effect of an approval for the proposal, in addition to other recent housing proposals, would be prejudice to the outcome of the planning process by predetermining decisions about the scale and location of new development which should properly be taken through the development plan process, particularly in view of the obligation that development plans be in general conformity with the Regional Development Strategy.

[5] The Commissioner's commentary on the draft reason for refusal on the grounds of prematurity stated that the development of the site would not be significant within the total area plan; Tobermore may not be a significant settlement for the purposes of PPS1 but given the number and nature of objections to the draft plan relating to the village it would be premature to allow the appeal as it would prejudice the outcome of the plan process as far as the future scale of development and the village form of Tobermore is concerned; (there were stated to be 27 objections of which 24 were site specific and included the appeal site, the majority relating to land within the existing development limits being excluded by the draft plan and others referred to the proposed designation of the land, 3 objections to the overall limit rather than site specific, 1 strategic objection regarding the overall development limits for the draft plan); these matters should be properly considered within the context of the public inquiry into the draft plan when all interested parties

would have the opportunity to put forward their views; there was also the matter of the cumulative affect of the proposal in respect of all the objections to individual sites within Tobermore and the relationship of the proposal to the strategic objection regarding the overall development limits for the draft area plan; this raised the potential of a knock-on effect as far as the overall allocation of houses within the district was concerned if the Tobermore share were to be increased; the outcome of the plan process would be prejudiced in terms of the more strategic objections to housing numbers and allocations (paragraph 6.4 of the Commissioner's decision).

Further it was stated that a precedent can be limited by the facts of the case and a determining weight may be given to the existing plan as objections on grounds of prematurity have been outweighed; the Commissioner was not convinced by the appellant's arguments that the circumstances would limit precedent to the extent that objections on grounds of prematurity would be outweighed; the precedent was likely to be widespread given that a strategic objection had been received regarding the overall development limits of settlements within the plan area (paragraph 6.5).

Further it was stated that the issues raised on the appeal related to the strategic issues which should be debated comprehensively at the public inquiry; allowing the appeal would be premature because it would be a prejudgment of the issues and at that stage would prejudice the policies of the emerging plan; the application would have a significant cumulative effect and to grant permission would prejudice the outcome of the plan process (paragraph 6.6).

[6] The PAC adopted the Commissioner's approach and rejected the appeal. The PAC decision stated –

> "The development of this 1.44 hectare site is not substantial within the overall housing allocation for the draft plan area and Tobermore is not defined by the plan as an important settlement. However, the Commission finds that, because of the extent and nature of objections to the draft plan proposals for the development of Tobermore and the strategic objections to overall development limits in the wider plan area, it would be premature to allow this appeal as this would predetermine decisions about the allocation of development land strategically in around Tobermore. Such decisions are more appropriately taken in the development plan context following the public inquiry into the draft plan when all issues can be considered

> comprehensively and the views of all interested parties can be assessed.
>
> In addition the Commission considers it likely that if this appeal were allowed, a wide-ranging precedent would be established for proposals on other objection lands both around Tobermore and around other settlements in the plan area. The Commission's decision in …… appeals within the area of the draft Ards and Down area plan which raised similar conflicts between the existing plan and the draft plan, establish that, if precedent as a consequence of a decision to allow is limited, the provisions of the existing plan may prevail, overriding objections on grounds of prematurity. The Commission is not persuaded by the evidence presented that the appeal site is distinguishable from other objection sites around settlements or the precedent created by this approval would be limited to an acceptable extent. The Commission finds that the consequential cumulative effect would significantly prejudice the outcome of the plan process by predetermining decisions on the housing strategy. The Commission concludes that, notwithstanding the location of the appeal site within existing development limits of Tobermore, the departmental objections on grounds of prematurity should be accorded determining weight."

Calmore Road, Tobermore.

[7] In relation to the Calmore Road site the Department's ground of refusal, which was accepted by the PAC, was the same as that stated in relation to the Fortwilliam site.

[8] The Commissioner stated that it was clear that the debate in the public inquiry into the draft plan in respect of Tobermore would cover not only the extent of the provision for housing in Tobermore but also which additional lands if any ought to be included within the development limit; to approve the appeal proposal in advance of that debate would be prejudicial to the outcome of such debate and would set a precedent for also objection sites within Tobermore; it would increase the potential for housing in Tobermore and in consequence compromise the opportunity for the inclusion of other lands within the settlement limit; while the appellant presented evidence of

the comparable advantages of the appeal site that was an issue which should properly be considered within the development plan process; parties with an interest in other lands which are the subject of objection to the draft plan would not have had the opportunity to fairly present their case in the limited context of the appeal; the Commissioner was not persuaded that the appeal site was distinguishable and while each site is unique the generality of the advantages of the development of the appeal site were likely to be repeated; it was not disputed that Tobermore was not an important settlement (paragraph. 5.6 of the Commissioner's decision).

Further the proposal for 70 dwellings on the site could not be considered substantial in the context of Magherafelt district; while the department was concerned with the cumulative impact of an approval on the site together with other sites no evidence was presented as to the extent of objections in respect of excluded lands so the Commissioner was not in a position to conclude that approval of the proposal would set a precedent wider than Tobermore (paragraph 5.8).

[9] The PAC adopted the Commissioner's approach and rejected the appeal. The PAC decision stated –

> "The development of this 4.4 hectare site is not substantial within the overall housing allocation for the draft plan area. Tobermore is not defined by the plan as an important settlement. The Commission finds nonetheless that because of the extent and nature of the objections to the draft plan proposals for Tobermore, it would be premature to allow this appeal as this could pre-determine decisions about the extent and form of the limit around Tobermore. Such decisions are more appropriately taken in the development plan context following the public enquiry into the draft plan when all issues can be comprehensively considered and the views of all interested parties can be evaluated. The Commission agrees that the precedent arising from allow the appeal proposal would be confined to objection sites around Tobermore but is not persuaded by the evidence presented that the appeal site is distinguishable from other objection sites around Tobermore. The relative merits of all objection sites should be considered in the development plan context."

Mullagh Road, Maghera.

[10] In relation to the Maghera site the Department's relevant reason for refusal was one of two additional reasons advanced after the publication of the draft Magherafelt Area Plan on 28 April 2004, the other additional reason being rejected. The reason for refusal was again one of prematurity under PPS1 as a result of the draft Magherafelt Area Plan.

[11] The Commissioner found that the proposal represented a significant impact on an important settlement; there were strategic objections to the development limit for Maghera and to permit development at that stage would prejudice the outcome of the plan process by pre-determining decisions about the scale and location of new development around Maghera and in the proposed greenbelt which ought properly to be taken in the development plan (paragraph 6.10 of the Commissioner's decision).

Further the issue of precedent and cumulative effect was relevant and cases cited to the Commissioner demonstrated that precedent can be limited depending on circumstances and determining weight may be given to the existing plan; however the Commissioner had not been persuaded that the appeals site physical characteristics limited precedent to an acceptable level (paragraph 6.11).

[12] The PAC adopted the Commissioner's approach and rejected the appeal. The PAC decision stated –

> "The Commission agrees with the Department that the importance of Maghera is reflected in the fact that it is the second town within the district and concurs with the Commissioner Summerville's conclusion that it is an important settlement in terms of paragraph 46 of PPS1 General Principles. The DMAP makes provision for approximately 600 dwellings in Maghera on approximately 21 hectares of zoned housing land. The proposal is to build 46 houses on a 2.8 hectare site, a relatively modest density of over 16 dwellings per hectare compared to an average density for Maghera as a whole of over 28 dwellings per hectare (600 units divided by 21 hectares). The Commission considers that in terms of the overall housing allocation for Maghera and the amount of land zoned for housing, the number of units proposed, or which could be built, on the site and the extended area of land to be developed are significant in either numerical or ariel terms. It

agrees, therefore, that the appointed Commissioner's conclusion that the proposal would have a significant impact on an important settlement. Given this and in the context of other objections to the development limit around Maghera, the Commission concludes that if the appeal were allowed this would amount to pre-determining decisions about the scale and location of development around the settlement and in the preferable greenbelt, including the urban form of Maghera. These are matters which should be considered on a comprehensive basis at the public inquiry into the DMAP when objectors and other parties will have the opportunity to address all relevant issues. The Commission is satisfied that it would be premature to grant planning permission for this proposal as it would prejudice the outcome of the development plan process. The Commission finds that this factor should be given determining weight, notwithstanding that the site is within the development limited of the existing statutory MAP.

The issue of precedent was raised on behalf of the appellant and while not relevant in the context of the Commission's conclusion that the proposal would have a significant impact on an important settlement, it does arise in connection with the wider objections to the development limit of Maghera. The previous Commission decisions referred to on behalf of the appellant demonstrate that the circumstances of a particular case may limit precedent to the extent that determining weight may not be attached to the issue of prematurity related to the cumulative effect of the proposal. However, the Commission considers that the urban form argument advanced on behalf of the appellant would not, of itself, sufficiently limit the precedent to overcome the prematurity objection. In this connection the Commission does not accept that the proposal is readily comparable with the Dundrum or Cloughy cases where there were a number of factors which were considered to limit the precedent to an acceptable level."

The Planning (Northern Ireland) Order 1991.

[13] The Planning (NI) Order 1991 provides –

> "3. (1) The Department shall formulate and co-ordinate policy for securing the orderly and consistent development of land and the planning of that development.
>
> (1A) The Department shall ensure that any such policy is in general conformity with the regional development strategy.
>
> 4. (1) The Department may at any time make a development plan for any area or alter, repeal or replace a development plan adopted by it for any area.
>
> (1A) A development plan for an area must be in general conformity with the regional development strategy.
>
> 5. (1) Where the Department proposes to make, alter, repeal or replace a development plan for an area, it shall proceed in accordance with this Article, unless Article 6 (which provides a short procedure for certain alterations, etc) applies.
>
> (2) The Department shall consult with the district council for the area or any part of the area to which the plan or proposed plan relates.
>
> (3) The Department shall take such steps as will in its opinion secure –
>
> > (a) that adequate publicity is given, in the area to which the plan or proposed plan relates, to the Department's proposals or to the issues involved;
> >
> > (b) that persons who may be expected to make representations to the Department about those proposals or issues are made aware that they are entitled to do so;

(c) that such persons are given an adequate opportunity to make such representations,

and the Department shall consider any representations made to them within the prescribed period.

7. The Department may cause a public local enquiry to be held by the Planning Appeals Commission for the purpose of considering objections to a development plan or to the alteration, repeal or replacement of a development plan."

Planning Policy Statement 1 – General Principles.

[14] PPS1 provides –

Development Plans

"35. Development plans may be in the form of area plans, local plans or subject plans. They apply the regional policies of the Department at the appropriate local level. Development plans inform the general public, statutory authorities, developers and other interested bodies of the policy framework and land use proposals that will be used to guide development decisions within their local area. Development plans provide a basis for rational and consistent decisions on planning applications and provide a measure of certainty about which types of development will and will not be permitted. Development plans are the primary means of evaluating and reconciling any potential conflict between the need for development and the need to protect the environment within particular areas.

Prematurity

46. Where a plan is under preparation or review it may be justifiable, in some circumstances, to refuse planning permission on the grounds of prematurity. This may be appropriate in respect of development proposals which are individually

so substantial, or whose cumulative effect would be so significant, that to grant permission would prejudice the outcome of the plan process by pre-determining decisions about the scale, location or phasing of new development which ought properly to be taken in the development plan context. The proposal for development that has an impact on only a small area would rarely come into this category; but a refusal might be justifiable where a proposal would have a significant impact on an important settlement or a substantial area, with an identifiable character. Where there is a phasing policy in the development plan, it may be necessary to refuse planning permission on grounds of prematurity if the policy is to have effect.

47. Other than in the circumstances described in paragraph 46, refusal of planning permission on grounds of prematurity will not usually be justified. Planning applications will continue to be considered in the light of current policy. However, account will also be taken of policies in emerging development plans that are going through the statutory procedures towards adoption. The weight to be attached to such policies depends upon the stage of plan preparation or review, increasing as successive stages are reached. For example -

- where a plan is at the preliminary proposal stage, with no early prospect of reaching draft plan stage, then refusal on prematurity ground would seldom be justified because of the lengthy delay this would impose on determining the future use of the land in question;
- where a plan is at the draft stage but no objections have been lodged to relevant policies, then considerable weight may be attached to those policies because of the strong possibility that they will be adopted to replace those in the existing plan. The converse may apply if there have been objections to relevant policies. However, much will depend on the nature of those objections and also whether there are representations in support of particular policies.

48 – Where planning permission is refused on grounds of prematurity the Department will give clear reasons as to how the grant of permission for the development concerned would prejudice the outcome of the development plan process.

Refusal of Planning Permission

59. The Department's guiding principle in determining planning applications is that development should be permitted, having regard to the development plan and all other material considerations, unless the proposed development will cause demonstrable harm to interests of acknowledged importance. In such cases the Department has power to refuse planning permission. Grounds for refusal will be clear, precise and give a full explanation of why the proposal is unacceptable to the Department."

The applicants' grounds for Judicial Review.

[15] The applicant's skeleton argument sets out five main issues which reflect the 19 grounds for judicial review set out in the amended Order 53 Statement as follows –

(1) Whether the PAC properly applied the approach to the issue of prematurity required by paras. 46 to 48 of PPSI;

(ii) The Commission misdirected itself as to the meaning in policy of the concept of prematurity and as to the evidential standard to be applied in reaching a finding of prematurity;

(iii) The Commission failed to apply or otherwise understand and/or misapplied the prevailing planning policy contained in PPS1 relating to the role of the existing development plan and to prematurity;

(2) Whether the approach taken by the PAC to the issue of prematurity and in particular the approach taken by it in relation to "cumulative effect" was in all respects a reasonable one, in the Wednesbury sense, on the evidence it had before it;

(i) The said decisions were in the Wednesbury sense unreasonable;

(iv) The Commission failed to require planning service to discharge the evidential onus of demonstrating harm to interests of acknowledged importance as stipulated by paragraph 59 of PPS1;

(v) There was no evidence which could reasonably justify the Commission's conclusions that the appeal proposals were premature, whether individually or cumulatively;

(vi) There was no evidence which could reasonably justify the Commission's conclusions that the appeal proposals were prejudicial to the development plan process;

(viii) There was no evidence which could reasonably justify the Commission's findings that what the Commission regarded as strategic objections to the draft Magherafelt Area Plan's proposals contributed to the appeal proposals being premature;

(3) Whether the PAC adopted a proper and rational approach to the issue of "precedent" in the particular circumstances of each appeal.

(x) The Commission in the Fortwilliam Road appeal acted irrationally and inconsistently by on the one hand accepting the appointed Commissioner's analysis that there was mere potential for a precedent to be set by allowing the appeal and on the other hand concluding on the same evidential basis that allowing the appeal would be likely to set a widespread precedent;

(xi) The Commission in the Fortwilliam Road appeal erred in accepting the analysis of the appointed Commissioner of the precedent effect of allowing the appeal was likely to be widespread, when that conclusion was specifically grounded on an absence of evidence about the site specific characteristics of other lands which also were the subject of draft plan objections.

(xii) The Commission in the Calmore Road appeal mis-directed itself in concluding that it would be premature to allow the appeal because to do so "could" pre-determine decisions about the extent and form of the development limit around Tobermore as proposed by the draft Magherafelt Area Plan;

(xiii) The Commission in the Calmore Road appeal mis-directed itself in concluding that it would be premature to allow the appeal notwithstanding its finding that no wide ranging precedent would be set by allowing the appeal;

(xiv) The Commission in the Calmore Road appeal acted irrationally in concluding that to allow the appeal would be premature because of the implications for other draft plan objection sites around Tobermore, as the evidence was that those sites consisted of sites previously approved on appeal and the first applicant lands at Fortwilliam Road, so that no wide ranging precedent could be set by allowing the appeal.

(xv) the Commission in the Maghera appeal mis-directed itself in assuming that a number of distinguishing characteristics was required to prevent unacceptable precedent and cumulative impact arising;

(xvi) The Commission in the Maghera appeal had no evidential basis for its conclusion that the urban form argument advanced by the first appellant would not, of itself, sufficiently limit precedent to overcome the prematurity objection, as there was no evidence of any other sites within Maghera to which the argument would apply.

(4) Whether the PAC properly approached the task facing a decision maker by virtue of the provisions of paragraphs 35, 46 to 48 and 59 of PPS1 which, in the circumstances, of the three appeals was to identify and explain any instances of specific harm which would be caused to the outcome of the development plan process if planning permission for the proposal in hand were to be granted.

(iv) The Commission failed to require planning service to discharge the evidential onus of demonstrating harm to interests of acknowledged importance as stipulated by para. 59 of PPS1;

(vii) The Commission failed to take into account the material consideration that the appeal proposals were not inconsistent with objections to the draft Magherafelt Area Plan proposals for Tobermore and Maghera respectfully;

(xix) The Commissioner acted inconsistently in its decisions regarding prematurity from a series of its previous decisions.

(5) Whether the PAC in the circumstances of each of the three appeals, and in particular having regard to the fact that in each case the development proposed was consistent with the statutory development plan, could reasonably give determining weight to its conclusion on the issue of prematurity and generally whether it provided proper and adequate reasons for its decisions to reject the appeals;

(xvii) There was no evidence that could reasonably justify the Commission giving determining weight to its finding of prematurity rather than to the fact that each appeal proposal was consistent with the statutory Magherafelt area plan;

(xviii) The Commission failed to give any adequate reasons for its conclusions that determining weight should be given to its finding of prematurity rather than to the fact that each appeal proposal was consistent with the statutory Magherafelt area plan.

Recent authorities in Northern Ireland.

[16] In Re Lisburn Development Consortium's Application (2000) NIJB 91 Kerr J dismissed the application for judicial review of a decision of the PAC to refuse planning permission for a proposed residential development on a site designated a green field site in the statutory plan but designated for housing development in the draft area plan. Objections had been lodged to the proposed zoning and a public inquiry had been convened. The PAC dismissed the appeal on the basis of prematurity as approval would prejudice the outcome of the ongoing development plan process. Kerr J accepted that the PAC were entitled to conclude that the grant of planning permission would prejudice the outcome of the public inquiry into the draft plan and that they were right to consider that because of the imminence of the public inquiry and the impact that approval would have on investigation of the objections to the zoning of the area it would be wrong to accede to the application. In reaching that conclusion the PAC had not acted inconsistently with an earlier decision to grant planning permission to another proposal.

[17] Kerr J considered paragraphs 46 and 47 of PPS1 and the matters related to this application may be summarised as follows-

(i) Paragraph 46 is primarily concerned with the circumstances in which refusal of planning permission may be justified; it is not designed to be prescriptive of the circumstances in which planning permission must be refused nor is it exhaustive of all the circumstances in which planning permission may be refused; the

nature of planning policy is to give guidance to planners as to the general approach to be taken to regularly encountered planning problems; one should not parse too closely the wording of a particular paragraph of a planning policy statement in order to discover whether a planning decision falls four square within it; the purpose of such a statement is to provide general guidance and it is not designed to provide a set of immutable rules (page 95b-d).

(ii) There are two principal scenarios for the application of paragraph 46; the first is where it is concluded that the proposals are intrinsically substantial or have a cumulative effect which would prejudice the outcome of the plan process; this requires the decision maker to make some evaluation of the impact which the development would have on the plan process by prejudicing its outcome; this prejudice may be by the grant of planning permission having the effect of predetermining decisions on scale etc which are properly a matter for a decision in the area plan context; the second principal scenario is where an impact on a small area gives rise to a significant impact on an important settlement or a substantial area with an identifiable character (page 95 c - h).

(iii) Paragraph 47 contemplated that refusal of planning permission on the grounds of prematurity would usually but not always be confined to the circumstances outlined in paragraph 46; but the stage which the plan has reached will obviously be material in deciding whether to refuse on this ground; the question whether objections have been received would be important; the nature of the objections received and whether they are representations in support of the plan should be considered (page 96 c - d).

(iv) Neither the appointed member nor the PAC is confined in the consideration of whether the application should be refused on the ground of prematurity to an assessment of the precise correspondence of the circumstances affecting the application with the terms of paragraph 46; the conclusion reached by the Commission and the PAC that the application came within the terms of paragraph 46 could not be faulted, namely that the cumulative effect of the proposal was such as to prejudice the outcome of the plan process by pre-determining decisions about the scale of the lands for housing; the decision that the proposal was substantial in nature was likewise unimpeachable; the reasoning of the PAC in relation to paragraph 46 was sufficiently conveyed in its decision; similarly in relation to paragraph 47 the conclusions of the Commissioner and the PAC were beyond challenge (page 97d – 98g).

(v) In having regard to the nature of the objections it is not required of the appointed member that he should conduct a searching enquiry into the objections in order to assess their weight; such an exercise would be neither viable nor appropriate; to carry out an investigation of that type properly would require the involvement of the objectors to the proposals in the hearing of the appeal; that cannot have been the intended purpose of paragraph 47; it was sufficient that the appointed member and the PAC are aware that a number of people objected to the proposal for them to conclude that it would not be appropriate to allow the application for planning permission. (page 99a - d).

[18] In Logan Rodgers Partnership's Application [2005] Girvan J dismissed an application for judicial review of a PAC dismissal of an appeal against the non-determination of an application for planning permission for a residential development on a site within the development area of the statutory plan but outside the development limits of a draft plan. The PAC upheld draft reasons for refusal on the grounds of prematurity. The PAC accepted the Commissioner's conclusions that not only would the proposal prejudice the outcome of the plan process, given the potential cumulative effect of approval on the housing strategy of the draft plan, and also in terms of pre-judging the outcome of the plan process in respect of the village, notwithstanding that under paragraph 46 it could not be regarded as "an important settlement." The PAC distinguished the proposal from a number of other decisions.

[19] From the judgment of Girvan J the matters related to this application may be summarised as follows –

(i) The decision maker was bound to have regard to the timescale of events in relation to the development proposal and the PAC had proceeded on the basis that the emerging development plan was at a sufficiently advanced stage to trigger the prematurity issues and that decision could not be impugned (para. 36).

(ii) In relation to paragraph 46 of PPS1 the proposal could not be viewed in isolation from its cumulative effect taken with other possible developments that could flow from the grant of permission both in the village concerned and in other lands to be protected from house building under the draft plan (para. 37).

(iii) In relation to paragraph 47 of PPS1 the position of Kerr J in Re Lisburn Development Consortium's Application would be adopted and the Commissioner is not required to conduct a searching enquiry into the objections in order to assess their weight. In a planning application where initial prematurity arises the PAC must approach the question "in a more broad-brush way than would be the case in a

long running and detailed inquiry." A prematurity decision must focus on the question of "whether and to what extent it would be appropriate and fair to hold the fort in the meantime" (para. 37).

[20] In Windsor Securities Limited Application [2005] NICA 34 the Court of Appeal allowed an appeal from Girvan J in relation to a proposal to vary conditions in relation to the use of retail warehouse units. The applicant sought to have restricted use conditions removed and was opposed by the planning service. The application was dismissed by the PAC. PPS5 deals with retailing in town centres and paragraph 38 states that town centres are the preferred location for major comparison shopping and mixed retail development proposals and paragraph 39 states that major proposals will only be permitted in out of centre locations where the Department is satisfied that suitable town centre sites are not available and that the development satisfied specified criteria. In relation to the assessment of major retail proposals paragraph 58 states that the Department will consider the incremental effects of the new development on existing centres where appropriate and will also take into account the likely cumulative effects of recently completed retail developments and outstanding planning permissions for retail development where appropriate.

[21] Girvan J at first instance stated that the Commissioner and the PAC should have taken into account paragraphs 58 and 60 of PPS5 in considering the question of precedent effect. An applicant who obtains permission presents later applicants "not so much with a precedent that assists them but an added hurdle which they must overcome" if they are to succeed in their application. On that basis Girvan J considered that as each succeeding application proceeded the hurdle facing later applicants became higher the more permissions were granted. This construction of paragraph 58 meant that the effect of the precedent value of permission in that case was different from the effect it appeared to have on the PAC reasoning.

[22] On appeal by the PAC to the Court of Appeal the applicant sought to uphold Girvan J's decision on the basis that the Department has in effect eliminated precedent as a consideration by stating in paragraph 58 of PPS5 that it would take into account the incremental effects of the new development on existing centres and the likely cumulative effect of recently completed retail developments and outstanding planning permissions. This approach was rejected by Kerr LCJ delivering the judgment of the Court of Appeal and the matters related to this application may be summarised as follows –

(i) Precedent is always likely to loom large in any planning application or appeal if a pre-existing development that can be portrayed as a precedent is available (para. 28). The PAC was correct to conclude that precedent was a relevant issue to be considered in the

determination of the appeal. The continuing relevance of precedent does not rob paragraph 58 of meaning. The considerations there outlined remain valid and pertinent and they can comfortably with the principle of precedent (para. 30).

(ii) The contention was rejected that the PAC's view of the precedent issue was a "mere fear or generalised concern" and having referred to the Commissioner's report it was stated that the PAC's conclusion on this issue "was not Wednesbury unreasonable; it was virtually inescapable" (para. 32).

[23] The reference to a mere fear or generalised concern arises from Poundstretcher Limited & Another v Secretary of State for the Environment & Another [1988] 3 PLR 69. The applicants were occupiers of retail warehouses subject to conditional planning permissions and enforcement notices were issued alleging breach of conditions and on appeal the inspector dismissed the appeals. The applicants appealed to the court on the ground that the inspector had no evidence to justify his conclusion that by allowing the appeals it would inevitably encourage other similar proposals and make it difficult for the local planning authority to resist. The court dismissed the appeals. Mr David Widdicombe QC sitting as a Deputy High Court Judge stated that for a precedent relied on mere fear or generalised concern is not enough. There must be evidence in one form or another for the reliance on prejudice. In some cases the facts may speak for themselves.

The PAC approach to prematurity.

[24] The PAC decision in respect of Fortwilliam Road found that the proposed development was not substantial and Tobermore was not an important settlement. Prematurity arose because of the objections to the draft plan proposals for Tobermore as well as the strategic objections to development proposals in the whole area. Further the PAC considered that approval of the development would be likely to set a wide-ranging precedent in Tobermore and the other settlements in the area.

In relation to Calmore Road the PAC found that the proposed development was not substantial and again that Tobermore is not an important settlement. However approval of the proposal was found to be premature because of the objections to the draft proposals for Tobermore. Further the precedent arising from approval would apply to sites round Tobermore. The strategic objections to overall development limits in the wider area and the precedent effect around settlements in the area which were relied on by the PAC in relation to Fortwilliam Road were not relied on by the PAC in relation to Calmore Road.

In relation to Maghera the PAC found it to be an important settlement and that the proposed development would have a significant impact. This significant impact on an important settlement together with the objections to the proposed development limits around Maghera were the basis of the PAC's prematurity decision. Further the precedent effect arose in connection with the objections to the proposed development limit.

In all three cases the PAC found that there were not such circumstances as limited the precedent effect to an acceptable level.

[25] In considering the applicants' grounds I apply the approach set out above in Lisburn Development Consortium's Application and Logan Rogers Partnership's Application and the Court of Appeal in Windsor Securities Limited's Application. What is under consideration is the balance between the making of the decisions on individual proposals and decisions made in the process of review of a development plan. Prematurity of decisions on individual proposals may arise from significant cumulative effect creating prejudice by predetermining, for example, the location of development. The harm that arises from such prematurity is harm to the process of evaluating the proposals in the inquiry into the draft plan. This harm is the prejudice to decisions to be made in the inquiry, for example, as to whether there should be development within an area, when permission has recently been given on a proposal for development at a location within that area. Cumulative effect may arise from existing grants of permission, present proposals and future proposals. Evidence of future proposals will involve reasonable inferences being drawn in all the circumstances. Where such reasonable inferences may be drawn the decision maker will not be acting out of mere fear or generalised concern. The character of the matter in issue will be taken into account, for example, cumulative effect may differ in its impact in relation to the scale of development, which may involve a matter of degree, as opposed to whether there should be any, or any further, development within a particular area. There may or may not be existing grants of permission and/or other proposals for the location but in any event reasonable inferences may be drawn in all the circumstances as to the effect of an approval at the location on the process that has yet to determine the future location of development. This is a planning judgment.

[26] The applicants object to the PAC approach to "cumulative effect". It is contended that the PAC has proceeded on the basis of a misconception by addressing this concept by considering each proposed development together with the objections to the draft plan. Under paragraph 46 prematurity may arise from the significant cumulative effect of the grant of permission amounting to prejudice by predetermining decisions that ought to be taken by the inquiry into the draft plan. Objections to the draft plan will indicate issues arising in the public inquiry. When those objections indicate issues about scale, location or phasing of new development they may signify

decisions that ought properly to be taken in the inquiry and not on an earlier individual application. It is not the objections that are prejudicial but a decision on a proposed development in advance of proper consideration of the scale, location or phasing of development in the inquiry.

[27] This approach does not assume conflict or competition between the objections and the proposed development but rather it is a matter of the public inquiry completing consideration and determination of the issues raised by the objections without being undermined by earlier decisions on individual proposals. Nor does such an approach amount to speculation as to whether the objectors to a draft plan are future applicants for proposed development, which they may well be, bur rather it is a matter of recognising the issues that are properly for determination in a public inquiry without being undermined by earlier decisions in a proposal for development. Nor does the approach proceed on the assumption that an applicant's proposal might prevent objections to the draft plan being fairly and effectively dealt with in the course of the plan process. I do nor read any of the decisions of the Commissioners or the PAC as basing their conclusions on conflict or competition between proposals and objectors or speculation about objectors making future proposals or interference with objections but rather as expressing the conclusions that the appropriate forum for the debate on the development limits of the settlements in all the circumstances would be the public inquiry into the draft plan and that the approach of the present proposals would undermine that process.

[28] Further the applicants contend that the PAC relied on what was described as the logical flaw discerned by the Girvan J in Windsor Securities Application. While recognising the different contexts of the decision in Windsor Securities Application the applicants relied on the approach that a grant of permission operated not so much as precedent that assisted subsequent applicants but rather as a hurdle that subsequent applicants must overcome. This approach undermines the traditional approach to precedent. The philosophy underlying this approach has been rejected by the Court of Appeal on the PAC appeal in Windsor Securities Application. I find no basis for criticism of the PAC in this regard.

[29] I am satisfied that in each case the PAC did not misdirect itself as to the concept of prematurity or as to the evidential standard to be applied. Further I am satisfied that the PAC did not misapply the policy relating to the existing development plan and prematurity.

The PAC approach to the evidence of prematurity and cumulative effect.

[30] The applicants contend that there is not an evidential basis for the decisions on prematurity. In each case the details of other applications were

not adduced in evidence, whether around the settlements or around other settlements in the area. Nor were the details of the objections to the draft plan adduced in evidence. In the absence of such evidence there is said to be prohibited resort to mere fear or generalised concern. There was evidence concerning the draft plan and the proposals for housing development in the settlements and in the area and of the nature of the objections to the proposals. It is not a practical proposition in considering a particular proposal for development to undertake an inquiry into the details of other applications or objections, whether in relation to the immediate settlement or in relation to other settlements in the area. To fail to do so is not to act on mere fear or generalised concern. There must be evidence in one form or another for the reliance on prejudice, while recognising as did Mr Whiticombe QC in Poundstretcher Limited, that in some cases the facts may speak for themselves. I am satisfied that it was not necessary for the Commissioners or the PAC to examine the details of other applications or objections. The decision makers had sufficient evidential basis for their conclusions.

[31] The applicants contend that the PAC approach does not accord with paragraph 59 of PPS1. Under paragraph 59 development should be permitted unless the proposal will cause demonstrable harm to interests of acknowledged importance. The scheme of PPS1 is clear in recognising that the considerations of prematurity set out in paragraphs 46 and 47 envisage the refusal of planning permission in the circumstances there considered. Prematurity may be regarded as a freestanding ground for refusal of planning permission, though it may be regarded as an illustration of a proposed development that will cause demonstrable harm to interests of acknowledged importance for the purposes of paragraph 59. Such evidential burden as may be required to satisfy a finding of prematurity will be a sufficient evidential basis for the refusal of planning permission for the purposes of paragraph 59.

[32] Where there is considered to be a precedent effect it may nevertheless not be given determining weight where the precedent can be limited in the circumstances. The applicants made unsuccessful attempts to rely on circumstances that would limit the precedent effect. In relation to Culmore Road the Commissioner, at paragraph 5.6 of the decision, rejected the claim for limited precedent effect. The applicants refer to that rejection and contend that the Commissioner did not reach a firm conclusion as to the precedent effect of granting permission and that the finding was based on mere fear or generalised concern. However the Commissioner stated the basis for his conclusion in paragraph 5.6 and I am satisfied that on the material available to the Commissioner he was not acting out of mere fear or generalised concern.

[33] The applicants' approach would be to require details of the basis on which objections to the draft plan are likely to come forward as applications for planning permission. Otherwise, it is contended, there would be a general

restraint on housing development until the completion of the process for the draft plan. Of course the approach to prematurity must not operate as a freeze on development. Paragraph 47 of PPS1 recognises that while account must be taken of policies in emerging development plans the weight to be attached to such policies will depend on the circumstances. By way of example paragraph 47 refers to the draft plan stage, which has been reached in the present cases, and in then referring to objections paragraph 47 states that much will depend on the nature of the objections and whether there are representations in support of policies. In the present cases the PAC were aware of the nature of the objections and were well placed to make the judgment as to prematurity, and had the material upon which to make the judgment they did, and no basis has been established on this ground for interfering with those decisions.

[34] The conclusions reached by the Commissioners and by the PAC on the issue of prematurity in the circumstances of each of the cases were well within the scope of their judgment. I am satisfied that in each case the decisions were not Wednesbury unreasonable. Further I am satisfied that there was sufficient evidence for the findings on prematurity and prejudice.

The PAC approach to precedent.

[35] The applicants have objected to particular terms in each of the Commissioners and the PAC decisions. In relation to Fortwilliam Road the Commissioner referred to the "potential of a knock-on effect" (paragraph 6.4) and then to the precedent being "likely to be widespread" (paragraph 6.4). The PAC considered that there was "a likely … wide-ranging precedent". Reading the full text of paragraph 6.4 to 6.6 of the Commissioner's decision I do not accept there is any irrationality or inconsistency in the stated approach. The Commissioner and the PAC expressed a clear view of prejudice arising by reason of the objections. I consider that what are described as strategic objections render the decision-maker entitled to reach the conclusion that was reached. Nor does the absence of examination of site specific characteristics of other land which is the subject of objection disentitle the decision-maker from reaching the conclusion that a widespread precedent was likely. Such site specific characteristics are not a matter for examination on the particular application for planning permission as outlined above and the failure to undertake such examination of site specific characteristics does not result in the decision maker acting out of mere fear or generalised concern.

[36] In relation to Calmore Road the applicants object that the PAC misdirected itself by stating that to allow the appeal "could" predetermine decisions about development in Tobermore. Having considered the whole of the Commissioner's discussion of prematurity and the PAC reasoning I am satisfied that the PAC did not misdirect itself on the issue of prematurity. Further the applicants object that the PAC misdirected itself in finding

prematurity in the absence of wide-ranging precedent. In this regard the Fortwilliam Road decision was based on the impact on Tobermore as well as the impact on the whole area whereas Calmore Road was based on the impact on Tobermore. The PAC accepted the Commissioner's analysis. That analysis at paragraph 5.6 states:

> "It is clear to me that the debate in the public inquiry into dMAP in respect of Tobermore will cover not only the extent of the provision for housing in Tobermore but also which additional lands, if any, ought to be included within the development limit. To approve the appeal proposal in advance of this debate would be prejudicial to the outcome of such a debate and would set a precedent for other objection sites within Tobermore."

Paragraphs 46 and 47 of PPS1 are not stated in absolute terms. The absence of impact outside Tobermore, which is not classified as an important settlement, does not preclude the decision-maker from concluding that the conditions for a prematurity refusal had arisen. The Commissioner and the PAC so concluded and I am satisfied that that did not involve any misdirection nor was it irrational.

[37] In relation to Maghera the applicants contend that the PAC misdirected itself in assuming that a number of distinguishing characteristics was required to prevent unacceptable precedent and cumulative impact arising. Having stated its view on prematurity and precedent the PAC considered previous decisions that demonstrated that the circumstances of a particular case may limit the precedent to an acceptable level and determining weight would attach to the proposed development. I am satisfied that the PAC did not misdirect itself in its approach to this issue. Further the applicants contend that there was no evidential basis for not accepting the applicant's arguments on the distinguishing features of the proposed site. Again the proposed development is not the appropriate forum for evidence about other sites.

The PAC approach to the impact of the proposed development.

[38] The applicants formulate the fourth main issue in terms of the need for the PAC to identify and explain any instances of specific harm. The specific harm is the predetermination of decisions about the scale, location or phasing of new development. That specific harm has been identified and explained in each case.

Further the applicants contend that the PAC failed to take into account that the proposals for development are not inconsistent with the objections to the draft plan. Again it is not the consistency or otherwise of the proposal and the objections that is in issue but the determination of the proposal before the inquiry deliberates on the draft plan.

[39] The applicants contend that the PAC acted inconsistently with previous decisions on prematurity. I have not been satisfied that that was the case. Each case is fact specific. In each case the PAC makes a judgment in relation to prematurity, prejudice, precedent and predetermination. The PAC looks to features that might distinguish one case from another and reduce any precedent effect that might otherwise be said to exist. Different conclusions in different cases will arise not because of an inconsistent approach but because of the balance of circumstances that differ from case to case. In each of these three cases the PAC found an absence of features that would limit the precedent effect to an acceptable level. The PAC did not place any burden on the applicants. I find no basis for interfering with those conclusions.

The PAC reasons for refusal of planning permission.

[40] The applicants contend that in each case the PAC has not given adequate reasons for its finding. Paragraph 48 of PPS1 states that where planning permission is refused on grounds of prematurity the Department will give clear reasons as to how permission would prejudice the outcome of the plan process. Similarly the Commissioners and the PAC must give reasons for their findings. The issue of reasons for decisions in a planning context has been considered by the House of Lords in South Buckinghamshire District Council v Porter [2004] 4 All ER 775. Lord Browne reviewed the authorities governing the approach to a reasons challenge in the planning context and summarised the position at paragraph 36 as follows –

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant

> grounds. But some adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlining the grant of permission may impact upon future such applications. Decision letters must be read in a straight-forward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

[41] In each case I am satisfied that the PAC reasons for refusal are compliant with the above requirements. They are reasons with which the applicants do not agree but nonetheless they are adequate. According to the PAC the implications of permitting the proposed developments will prejudice the decisions yet to be taken in the inquiry, which inquiry may accept the proposals in the draft plan to exclude the locations from future development.

[42] As I am not satisfied on any of the applicants' grounds for Judicial Review for the reasons set out above, the application is dismissed.