

*Judicial review of planning decisions – whether PAC decisions wrong in law – para 39 of Planning Policy Statement 5 – whether proposals complemented overall shopping provision – proper test for complementarity*

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2002/13

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

IN THE MATTER OF AN APPLICATION BY THE DEPARTMENT OF THE  
ENVIRONMENT FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

and

IN THE MATTER OF A DECISION BY THE PLANNING APPEALS  
COMMISSION FOR NORTHERN IRELAND DATED 7 DECEMBER 2001

(KILLULTAGH ESTATES LIMITED)

2002/35

IN THE MATTER OF AN APPLICATION BY THE DEPARTMENT OF THE  
ENVIRONMENT FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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COMMISSION FOR NORTHERN IRELAND DATED 7 DECEMBER 2001

(STARPLAN FURNITURE LIMITED)

GIRVAN J

## **Introduction**

[1] These two judicial review applications, which raise a common issue and accordingly were heard together, raise the question whether the Planning Appeals Commission ("the PAC") when deciding the separate planning appeals of Killultagh

Estates Limited (“Killultagh”) and Starplan Furniture Limited (“Starplan”) misconstrued and/or failed to properly apply the so called “complementarity test” set out in paragraph 39 of the Department of the Environment’s Planning Policy Statement 5 (“PPS5”) which deals with planning applications relating to retailing and town centres.

### **The Planning Appeals**

[2] Killultagh applied for planning permission for the construction and development of a local food store and associated car parking at the site of the Elim Pentecostal Church, Bloomfield Road, Bangor, Co Down. No decisions was made on the application which was received in February 2000 within the appropriate timescale and a notice of appeal to the PAC under Article 33 was submitted in April 2000. The Department opposed the application for planning permission on the grounds that the proposal was contrary to PPS5 since it would not complement or meet any existing deficiency in overall shopping provision in the centres within Bangor, it would have an adverse impact on their vitality and would undermine the convenience and comparison shopping functions (as defined in PPS5) of centres within Bangor. In addition the Department considered that the proposal was unacceptable in that the Department considered that alternative sites existed within the town centre and the question of their availability had not been satisfactorily addressed by Killultagh.

[3] A hearing before Commissioner Rue took place on 9<sup>th</sup> October 2001. In his report he recommended to the Commission that the appeal should be allowed and that subject to certain recommended conditions planning permission should be granted. In its decision of 7<sup>th</sup> December 2001, the PAC allowed the appeal and granted outline planning permission subject to certain conditions.

[4] In the case of Starplan, it applied for planning permission for a change of use of a former clothing factory and alterations there to to form a furniture retail showroom and retail warehouse units at 167-169 Clandeboye Road, Bangor. The application was made in October 2000 and, as in the case of Killultagh, it was the subject of an appeal under Article 33 which was lodged in July 2001. The Department opposed planning permission contending that the proposal was contrary to PPS5 since it could, if permitted, neither complement nor meet any existing deficiency in overall shopping provision. The proposal showroom was contrary to PPS5 since it would not by the nature of its description be considered a local shop and consequently would be unacceptable in this location. Thirdly, the proposed Starplan retail showroom was contrary to PPS5 since the circumstances did not exist which would afford the proposal favourable consideration as a local shop in that a local need for the proposal had not been defined and there were alternative premises in the area which were suitable and vacant.

[5] A hearing took place before Commissioner Rue on 8<sup>th</sup> November 2001. He recommended in his report that the appeal be allowed and that full planning

permission be granted subject to certain specified conditions. On 7<sup>th</sup> December 2001 the PAC allowed the appeal and granted planning permission for a change of use subject to certain conditions.

[6] Subsequent to the Killultagh decision, Killultagh proceeded expeditiously with the development, demolishing the old building on the site before it became aware of any judicial review challenge by the Department in relation to the PAC decision. The Department accepts that it would be unjust to question the PAC's decision at this juncture and on the opening of the hearings before me Mr Morgan QC on behalf of the Department, indicated that the Department was not now seeking to actually quash the PAC's decision but rather was seeking declaratory relief in relation to the decision. The Department also accepted that it would be unfair to press the Starplan decision to judicial review since the same reasoning process had been followed on that decision. In the result the Department sought leave to amend its applications in each case to seek declaratory relief. In the case of Killultagh, the Department seeks a declaration that the PAC decision was unlawful on the grounds that the Commission failed to consider whether the choice and competition anticipated in respect of the proposed development was beneficial, desirable or otherwise in the public interest. In the case of Starplan, the Department sought a declaration that the decision permitting the change of use and alterations to former furniture retail showroom and two retail warehouse units was unlawful in that the Commission failed to consider whether the choice and competition anticipated in respect of the proposed development was beneficial, desirable or otherwise in the public interest.

### **The Department's case**

[7] In presenting the case for the Department Mr Morgan contended that the primary purpose of the applications was to ensure that both the Department and the PAC interpreted and applied the complementarity test in paragraph 39 of PPS5 lawfully.

[8] It was contended that PPS5 sets out the Department's policy for town centres and retail developments for all of Northern Ireland. It was common case that because of its size and function the proposed food store was a supermarket as defined in the glossary of terms in PPS5. Accordingly it was necessary to have regard to paragraph 41 of PPS5 as a material consideration. Paragraph 41 provides that proposals for food supermarkets and food superstores on sites outside town centres, including edge of central sites, may be acceptable provided that the proposal satisfies all the criteria set out at paragraph 39.

[9] Paragraphs 42 to 44 deal with retail warehouses. It was common case that the Starplan application was an application for development at an out-of-centre location, out-of-centre being a location outside a town centre boundary but within defined development limits. Paragraph 43 provides that in exceptional circumstances a retail warehouse proposal elsewhere than in an out-of-centre location may be acceptable

where it cannot be practically or appropriately accommodated in either the town centre or on the edge of a town centre provided that the proposal satisfies the criteria set out at paragraph 39.

[10] The Department set out its approach to the application of the complementarity policy at paragraphs 5.14 to 5.15 of its statement of case in the appeals. The Commissioner addressed the relevant ground at paragraph 6.1 to 6.4 of his report. It was argued that the PAC's decisions were in error in deciding that once it was established that the proposals added to consumer's choice and added an element of competition, that was sufficient to satisfy the requirements of paragraph 39.

## **PPSS5**

[11] It appears from paragraph 4 of PPS5, that statement sets out the Department's policy for town centres and retail developments for all of Northern Ireland. Paragraph 14 states that town centres provide shopping and employment services and facilities for the community and an attractive and flourishing town centre can enhance the quality of life to visitors, stimulate economic development and support and encourage a whole range of cultural, leisure, social and commercial activity. Shopping largely underpins the use and value of town centres and makes a major contribution to their vitality and viability and accordingly town centres should normally be the first choice for major new retail developments. Paragraph 36 states that major retail development comprises retail development with over 1,000 sq metres of gross retail floor space. The Department's policies for types of major retail development are set out in paragraphs 38 to 48, proposals for major retail developments in the countryside outside the development limits of settlements would not be acceptable. Paragraph 38 states that town centres will be the preferred location for major comparison shopping and mixed retailing development proposals. The availability of suitable sites within the town centre will be an important consideration where development is proposed outside the town centre. Applicants should be able to demonstrate that all potential town centres have been thoroughly assessed.

[12] Paragraph 39 is at the heart of the present applications and it is necessary to set out paragraph 39 in full.

" Major proposals for comparison shopping or mixed retailing will only be permitted in out-of-centre locations where the Department is satisfied that suitable town centre sites are not available and where the development satisfies all the following criteria:

- complements or meets existing deficiencies in the overall shopping provision;

- is unlikely to lead to a significant loss of investment in existing centres;
- it unlikely to have an adverse impact on the vitality or viability of an existing centre or undermine its convenience or comparison shopping functions;
- will not lead to an unreasonable or detrimental impact on amenity, traffic movements or road safety;
- will be accessible by a choice of means of transport;
- will provide adequate car parking, cycle parking and facilities for other transport modes, where appropriate;
- is to a standard of design, of both the buildings and the spaces around the buildings, which contributes positively to townscape and is sensitive to the surrounding area;
- provides suitable access for the disabled;
- will be unlikely to add to the overall number and length of car trips and should, preferably, contribute to a decrease; and
- will be unlikely to prejudice the implementation of development plan policies and proposals.

Where a proposed out-of-centre location development satisfied the above criteria the Department will favour an edge-of-centre location over a location elsewhere out-of-centre.”

[13] In the context of retail warehouses, the material provision relating to the Starplan planning application, it is stated in paragraph 43 that favourable consideration will be given to proposals for retail warehouses of an appropriate scale on suitable sites in edge-of-centre locations. In exceptional circumstances a retail warehouse proposal elsewhere may be acceptable where it cannot be practically or appropriately accommodated in either the town centre or the edge-of-town centre provided that the proposal satisfies all the criteria set out at paragraph 39. In addition the proposal must be of an appropriate scale for the location.

[14] Dealing with food supermarkets and food superstores it is stated that proposals for food supermarkets and food superstores in sites outside town centres including edge-of-centre sites, may be acceptable provided that the proposals satisfies all the criteria set out in paragraph 39.

## The complementarity test

[15] In Re an application by Belfast Chamber of Trade and Commerce, Belfast City Council and North Down Borough Council for Judicial Review the Court of Appeal had occasion to consider the interpretation of paragraph 39 or PPS5. In that case a ministerial decision granting outline planning permission for the development of a retail food Sainsburys superstore, warehouse park, cinema and other units, was challenged (inter alia) on the grounds that the minister had failed to apply the complementarity test set out in paragraph 39, it being contended that the proposed development could not in any view complement the existing permitted developments in the vicinity.

[16] In that case it was not in dispute that the word “complements” should be construed with the words “the overall shopping provision” rather than the word “deficiency”. The Court of Appeal stated that the word “complements” means something different from meeting a deficiency. That reasoning is binding upon me in this case.

[17] In that case Mr McKay, the senior planning officer in the Department, in his evidence in the case stated that he explained the complementarity test in the context of that case in the following way:

"Following discussion with the minister regarding this particular test it was concluded that the proposal met the “complements” test as if offered a *beneficial* retailing opportunity providing choice and competition”. (Italics added).

It is important to note the addition of the word “beneficial” in its context.

[18] The Court of Appeal concluded at page 31 of its judgment that the word “complements” has no special definition. The word has a readily understood connotation of “fitting in or harmonising with” something which does not require further definition. In the circumstances of that case there was nothing to indicate that the minister misunderstood the proper meaning of the word. The Court of Appeal went on to state:

"The minister was in our judgement entitled to reach the conclusion that the proposed superstore complemented the existing shopping provision. It was argued that it would be a mere duplication of that provision especially as it was asserted that its range of goods would be closely similar to those sold in the Tesco superstore at Knocknagoney. We consider, however, that it was a tenable conclusion that the provision of another superstore would offer a *desirable* amount of choice to the shopper and supply an element of competition - different brands of goods and promotions, different facilities and a choice of access routes for people coming from different directions.” (Italics added).

In that passage the use of the word “desirable” is to be noted.

### **The Department’s contentions on complementarity in the appeals**

[19] In the hearings before Commissioner Rue the Department appeared to be contending that to complement overall shopping provision a proposal must “significantly contribute to the aspects of retail provision valued by shoppers such as greater competition, variety or accessibility”. On the hearing of the present applications Mr Morgan did not seek to argue that the interpretation put before the Commissioner by the Department was the only proper interpretation for the test.

### **The Commissioner’s approach**

[20] In referring to paragraph 39 of PPS5, the Commissioner pointed out that the test was disjunctive. The PPS5 did not contain a definition of the word “complements” and there was a range of meanings that could potentially be ascribed to it. The definition provided by the Chief Executive of the Planning Service (“a beneficial retailing opportunity providing choice and competition”) was applied by the minister in reaching a decision on the D5 site (which was the subject of the Court of Appeal decision and that decision had survived scrutiny by the court). At para 6.2 in the Killultagh report the Commissioner went on:

"In the light of the outcome of the debate in the courts about the meaning of the word ‘complements’, I do not see how the Department without amending PPS5 can reasonably resile from Mr McKay’s definition or seek to substitute something more onerous. The definition submitted by the Department’s representative in this appeal seeks to introduce a more stringent version of the test, namely that a proposal must significantly contribute to aspects of retail provision valued by shoppers. I reject this definition as inconsistent with the Department’s previous interpretation of its policy.

At para 6.3 he stated:

The appellant stated that the proposed food store has been designed to accommodate a discount supermarket of the type operated by Lidl and Aldi. They provided convincing and un rebutted evidence that such discounters have a style of operation that distinguishes them from conventional supermarkets and they offer steep price differentials on a relatively narrow range of goods. I am satisfied that such a store would present a beneficial retailing opportunity providing choice and competition and would thus complement overall shopping provision”.

The Commissioner expressed himself in similar terms in both appeals.

[21] Mr Morgan in his submissions conceded that the approach adopted by the Commissioner in paragraph 6.1 et seq in his report could not be challenged on any legal grounds.

### **The Department's attack on the PAC's reasoning**

[22] Counsel, however, did attack the approach adopted by the PAC in its decision. He focused his attack upon the second paragraph of the Killultagh decision in which the Commission after accepting Commissioner Rue's analysis of the issues and recommendation stated:

"The Commission judges that any supermarket at the location proposed, whether a discount store or otherwise, would provide additional choice to the shopper and supply an additional element of competition. It would thus satisfy the complements test in paragraph 39 of Planning Policy Statement 5: retailing and town centres as defined by the Chief Executive of the Planning Service in a recent case which was subject to judicial review."

A similarly worded view is expressed in the Starplan appeal. Mr Morgan argued that in expressing its decision in that way, the PAC was equating the provision of additional choice and supply of an element of competition as being in themselves sufficient to satisfy the complementarity test in paragraph 39. This, he argued, failed to satisfy the complementarity test which required the planning decision-maker to consider the application in the overall context of the case to satisfy itself that the proposal would represent a beneficial and desirable development in planning terms.

### **Whether the PAC's approach was flawed**

[23] The concept of complementarity is a subjective one. Any decision-maker called on to decide whether a proposal complements existing shopping provisions for the purposes of paragraph 39 of SSP5, must make a judgement in the light of all the circumstances. What may satisfy one decision-maker on the issue may not persuade another. That is the inevitable consequence of the Department's use of a subjectively worded criterion that does not lay down rigid or clearly formulated guidelines to be applied in deciding the issue. The subjective word "complements" is one that we find in many contexts (such as the field of art, architecture, clothes design, horticulture or cooking). People may hold strong views as to whether a particular design of building, a particular flavour or a particular item of clothing complements another building, flavour or article of clothing as the case may be. In the context of shopping facilities, the question whether a major shopping proposal complements the overall shopping provision, is a particularly imprecise and flexible concept. If it is accepted that all the other criteria set out in paragraph 39 are satisfied (as the Department concedes in the present case) and if it is considered that



the proposal, being otherwise acceptable in planning terms, adds to the choice of consumers and provides an additional element of competition, a decision-maker may readily conclude that the proposed development complements the overall shopping provision bearing in mind that the Court of Appeal has held that “complements” in the context of paragraph 39 points to “fitting in or harmonising with something”. Clearly the planning decision-maker has a judgement to make which goes beyond merely satisfying itself that the proposal adds to the competition and choice. The proposal must provide a retailing opportunity which the planning decision-maker concludes is beneficial in all the circumstances and provides an amount of choice and an element of competition which is desirable in the circumstances. If the PAC in its decisions was coming to the conclusion that any supermarket or retail warehouse at the relevant locations would provide additional choice to the shopper and supply an additional element of competition and would for those reasons alone satisfy the complements test in 39, then the decisions would be flawed in that the PAC would have failed to look at the question in the broader way demanded by para 39 as interpreted by the Court of Appeal. While the somewhat infelicitous wording of the PAC in the paragraph challenged by Mr Morgan lends support to his contention that the PAC had erred in its approach to the question, in fairness to the PAC one must consider the wording of the decisions as a whole read in their proper context. The decisions accepted the analysis of the issues and the recommendations of Commissioner Rue and as noted the Department did not challenge Commissioner Rue’s analysis of the issues in relation to complementarity. Furthermore, following the paragraphs in the PAC decisions challenged by Mr Morgan, the decisions go on to point out that the Commission noted that the Department had failed to support its arguments about adverse impact on the existing local centres with a quantitative assessment of likely trade diversion. Having regard to the different functions in the retail hierarchy of local shops and supermarkets the Commission considered it unlikely that there would be a significant transfer of patronage and expenditure from local centre to the proposed store or retail warehouses. The Department did not seek to argue that the proposed developments would lead to a significant loss of investment in the town centre or have an adverse retail impact on the town centre or harm the town centre in any other way. In those circumstances the PAC considered that even if suitable alternative sites in the town centre were shown to exist that would not in itself justify the refusal of the planning permission.

[24] Reading the PAC’s decisions as a whole and in conjunction with the reports of Commissioner Rue which were incorporated into the decisions I do not consider that the PAC’s decisions are open to legal challenge. Accordingly I conclude that the Department is not entitled to the declaratory relief that it is seeking.