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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Lamont's (David John Stewart and Elaine) Application [2014] NIQB 3

IN THE MATTER OF AN APPLICATION BY DAVID JOHN STEWART LAMONT AND ELAINE LAMONT FOR JUDICIAL REVIEW

AND

IN THE MATTER OF A DECISION OF THE DEPARTMENT OF THE ENVIRONMENT (PLANNING SERVICE) MADE ON 7 MARCH 2011

TREACY J

Introduction

[1] The applicant challenges a decision by the Department of Environment Planning Service ("the Department") made on 7 March 2007 whereby it granted planning permission to Mr Leslie Millar for the erection of an additional dwelling on his farm. The applicant alleges that in granting the permission the Department did not properly interpret and apply policy CTY10 in reaching its decision.

Background

[2] On 10 November 2009 Mr Leslie Millar made a planning application for planning permission to erect an additional dwelling on his farm holding. Objections followed on the basis that the farm was not compliant with policy PPS21, in particular policy CTY10 (Dwellings on Farms), amongst other concerns.

[3] Mr Millar's holding is split by the Ballyclough Road and the larger part of the holding sits on the other side of the road, with the smaller part being adjacent to the applicant's house. On the smaller part of the holding there is one stable building in a field.

[4] On 15 March 2010 the Planning Officer recommended refusal on the basis first that policy CTY10 was not satisfied and second that there would be a lack of integration. On 29 June 2010 there was a further site visit from the Planning Service official and planning permission was again refused.

[5] On 16 June 2010 Mr Millar transferred the relevant part of the holding to his daughter without informing the Planning Service. On 22 June 2010 the Development Control Group re-considered the proposal but again recommended refusal on the ground that there had been no material change.

[6] Alterations were made to the application by altering the siting of the dwelling and a revised proposal was submitted on 29 June 2010. On 9 July 2010 further objections to the revised proposal were submitted by the applicant again on the basis of, *inter alia*, non-compliance with CTY 10. On 24 August 2010 this re-siting was considered sufficient to meet the policy test and approval of the application was recommended.

[7] On 25 August 2010 the Development Control Group agreed with the reconsideration and recommended approval. On 23 September 2010 the applicant submitted further objections, again on the same basis. On 17 October 2010 there was a further reconsideration and a further confirmation of the recommendation for approval.

[8] On 9 November 2010 a further office meeting was held and on 7 March 2011 the planning application was formally approved.

Order 53 Statement

[9] The applicant sought the following relief:

> (a) An order of certiorari to quash the decision of the Department of the Environment for Northern Ireland (Planning Service) made on or about 7 March 2007 whereby it granted planning permission (reference S/2009/1105/F) for the erection of a farm dwelling and garage at lands 80m South of 7a Ballyclough Road, Lisburn, Co Antrim;
>
> (b) An order of certiorari quashing the planning permission granted;
>
> (c) A declaration that the decision and planning permission are, and each of them is unlawful, ultra vires and of no force or effect;

(d) A declaration that the planning service 'internal guidance' document entitled advice on the Implementation of Policy CTY 10 - Dwellings on Farms - Criterion 3(c) where there are no buildings on the farm was not, and is not, a material consideration to be taken into account in development control decisions.
..."

[10] The grounds on which this relief was sought included:

(a) Inasfar as the Planning Service considered that the requirement of Policy CTY 10 of PPS21 that there be linkage to a 'group of buildings' was satisfied by linkage to a single building, the Planning Service misinterpreted or misapplied said policy;

(b) In the alternative, if the policy was correctly interpreted, but there was a policy failure, the Planning Service has not identified any sound basis for departing from the policy as required by law;

(c) The 'pragmatic approach' expressly adopted by the Planning Service is unlawful since it amounts to a decision to ignore Policy CTY10 without taking it into account in the manner otherwise required by law;

(d) In any event, the Planning Service misdirected itself in relation to the 'pragmatic approach' since, properly understood, the Planning Service HQ advice on which it is based applies only to a case where there are no buildings on a farm or cases where there is only one building on the farm which was not the situation in the present case;

(e) In addition, the Planning Service has failed to have regard to the requirement of 'exceptionality' where a dwelling is to be located away from the group of buildings on the farm;

(f) The Planning Service has failed to consider the availability of an alternative site for the proposed dwelling on the farm. In particular, this is contrary to the approach required by Policy CTY10 and the Planning Service HQ advice on its implementation;

(g) The Planning Service failed to take into account a relevant consideration and/or erred as to a material fact in that it was unaware that the applicant for planning permission had sold off the site to his daughter in the course of the application, which:

(i) Was, or may have been, a relevant disposal for the purposes of Policy CTY10; and / or

(ii) Meant that the proposed dwelling was no longer a dwelling on a farm so that Policy CTY10 simply did not apply.

(h) Without prejudice to the generality of paras (b)-(d) above, the Planning Service 'internal guidance' document entitled 'Advice on the Implementation of Policy CTY10 - Dwellings on Farms - Criterion 3(c)' where there are no buildings on the farm was wrongly taken into account by the Planning Service and ought not to have been since:

(i) It represented planning policy which was not consulted upon and/or was undisclosed and unpublished, contrary to the legitimate expectations of the applicants (and others) engendered by the terms of Planning Policy Statement 1: General Principles; and/or

(ii) In formulating the said document the Planning Service misdirected itself in law by failing to consider that it was making new policy and/or materially altering the approach contained in the published policy document PPS21.

Relevant Law

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

> "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, and –

- subject to articles 34 and 35, may grant planning permission, either unconditionally or subject to such conditions as it thinks fit; or

- may refuse planning permission"

[12] Section 5.0 of Planning Policy Statement 21 ("PPS21") – Sustainable Development in the Countryside states:

> "In exercise of its responsibility for development management in Northern Ireland, the Department assesses development proposals against all planning policies and other material considerations that are relevant to it.
>
> The planning policies of this statement must therefore be read together and in conjunction with the relevant contents of development plans and other planning policy publications, including the Regional Development Strategy. The Department will also have regard to the contents of published supplementary planning guidance documents.
>
> The following policies set out the main planning considerations in assessing proposals for development in the countryside. The provisions of these policies will prevail unless there are other overriding policy or material considerations that outweigh them and justify a contrary decision."

[13] Policy CTY1 – Development in the Countryside at p11 of PPS21 states:

> "There are a range of types of development which in principle are considered to be acceptable in the countryside and that will contribute to the aims of sustainable development. Details are set out below.
>
> Other types of development will only be permitted where there are overriding reasons why that development is essential and could not be located in a settlement, or it is otherwise allocated for development in a development plan"

[14] CTY10 – Dwellings on Farms at p27 of PPS21 states:

> "Planning permission will be granted for a dwelling house on a farm where all of the following criteria can be met:
>
> (a) the farm business is currently active and has been established for at least 6 years;
>
> (b) no dwellings or development opportunities out-with settlement limits have been sold off from the farm holding within 10 years of the date of the application. This provision will only apply from 25 November 2008; and
>
> (c) the new building is visually linked or sited to cluster with an established group of buildings on the farm and where practicable, access to the dwelling should be obtained from an existing lane. Exceptionally, consideration may be given to an alternative site elsewhere on the farm, provided there are no other sites available at another group of buildings on the farm or out-farm and where there are either:
>
> - demonstrable health and safety reasons; or
>
> - verifiable plans to expand the farm business at the existing building group(s).
>
> In such circumstances, the proposed site must also meet the requirements of CTY13(a-f), CTY14 and CTY15.
>
> Planning Permission under this policy will only be forthcoming once every 10 years."

[15] CTY10: Justification and Amplification Text states:

> 5.41 To help minimise impact on the character and appearance of the landscape such dwellings should be positioned sensitively with an established group of buildings on the farm, either to form an integral part of that particular building group, or when viewed

> from surrounding vantage points, it reads as being visually interlinked with those buildings, with little appreciation of any physical separation that may exist between them. If, however, the existing building group is well landscaped, or where a site adjacent to the building group is well landscaped planning permission can be granted for a new dwelling even though the degree of visual linkage between the two is either very limited, or virtually non-existent due to the amount of screening vegetation. It will not be acceptable to position a new dwelling with buildings which are on a neighbouring farm holding.

[16] Para59 of PPS1 - General Principles states:

> "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."

Arguments

Applicant

[17] The applicant argues that any policy applying to the application is a relevant consideration for the purposes of A25(1) of the 1991 Order. Where a policy is a relevant consideration the approach to be taken by the Planning Authority is that they must (a) take the policy into account, (b) correctly construe the policy and (c) correctly apply the policy.

[18] In order to correctly apply the relevant policy, the Planning authority must either comply with that policy, or, if the policy is to be departed from, the Planning Authority must (a) clearly appreciate that the policy is being departed from (and the significance of any such departure) and (b) give reasons for any such departure.

[19] The applicant argues that if a policy is to be departed from, the reasons for departure must be valid planning reasons. It cannot be a case of the planning authority simply deciding not to apply the planning policy for some reason which

amounts to leaving it out of account or failing to apply it all. The reasons for disapplying a policy must be stated clearly.

[20] The applicant argues that the proposed development does not meet the policy test in CTY10(c) as it is not proposed that it will visually link or cluster with an 'established group of buildings on the farm'. Further the proposed development does not fall in one of the stated exceptions to the test in CTY10.

[21] The applicant argues that either the Planning Authority has failed to have regard to the policy test or has failed to understand it, or has failed to provide valid planning reasons for departing from it and that the taking of the 'pragmatic approach' is not a valid reason for departure from CTY 10 but is an arbitrary decision to disregard it.

[22] The applicant argues that reliance on the internal document 'PPS21 - Advice on the implementation of Policy CTY10 - Dwellings on Farm – Criterion(c) where there are no buildings on the farm' was unlawful because (a) it was used as supplementary planning policy without being publicly available/consulted on (b) it wrongly contravenes policy without having any policy basis and (c) it is not relevant to the instant facts in any case.

[23] Any guidance document cannot fill policy gaps without having a basis in policy, ie it must yield to and cannot add to or contravene the policy wording itself. The policy itself should have been amended. The internal guidance departs from the policy since it dispenses with the requirement of Policy CTY10(c) in a broad category of cases. Further in relation to the internal guidance the applicant argues that it is simply not applicable in the instant case as the guidance is aimed at addressing a situation where there are one or less buildings on the farm, while on the applicant farm there is more than one building.

[24] The applicant argues that the internal guidance could never apply to a situation which is specifically covered by the primary policy - ie in this case where there is a group of buildings on the farm with which a proposed development could link. For internal guidance to overturn the plain wording and intention of published policy is a wrongful use of power.

[25] The applicant argues that the Planning Service failed to consider a material consideration, that is, whether there was an alternative site which could accommodate the dwelling. It is argued that such consideration is specifically mandated by Policy CTY10.

[26] The policy only permits the siting of a proposed dwelling away from a group of buildings exceptionally in two situations neither of which are applicable in the instant case. Relying on the pragmatic approach meant that the Planning Service did

not consider the material issue of exceptionality. It is explicitly stated that the planning service would not look at other sites. The permissible exceptions must be convincingly established by appropriate evidence from an independent authority.

[27] The Planning Service did not take into account the material consideration that the relevant land had been transferred to Mr Millar's daughter. This is potentially material for two reasons since CTY10 provides that a sell-off is a bar to the grant of permission under the policy, and transfers to family members are specifically noted as potentially relevant sell offs. Further, the applicant argues that having sold off the land it was no longer Mr Millar's farm and reliance on CTY10 did not arise at all, therefore the site was no longer on a host farm. This was not considered by the Planning Service as it was not known to them.

[28] In supplementary submissions the applicant argues that as the Planning Service was unaware of the correct ownership of the various parts of the farm at the material time, it has erred/or left relevant considerations out of account in determining the application. Mr Watson on behalf of the department has confirmed that if he had been aware of the true position he would have required a revised plan with redefined boundaries.

[29] The applicant argues that there was no recognition given to the fact that if CTY10 is not relied upon or not met, development should only be allowed if there are 'overriding reasons why the development is essential as per CTY1. Further, the applicant submits that authority shows that if a policy requires exceptionality this must be appreciated and reasons why a case is exceptional must be explained. There is no such reasoning by the Department.

Respondent

[30] The respondent argues that the proposed development fell outside the scope of CTY10, that the content of CTY10 was properly taken into account and that the decision was a proper exercise of planning judgment. The respondent accepts the relevant principles in Gransden & Co Ltd v Secretary of State for the Environment (1987) 54 P & CR 86 regarding the status, interpretation and application of planning policy.

[31] The respondent submits that the applicant has mischaracterised the Department's consideration of CTY10. The Department does not contend that the permission was granted by applying CTY10 rather it fell outside the scope of the policy and was decided on its planning merits, since CTY10 is not an exclusive policy test.

[32] The respondent argues that the opening lines are in permissive terms, ie 'Planning permission will be granted for a dwelling on a farm where all of the

criteria can be met…". Therefore the policy provides guidance as to when a dwelling will be approved in principle. The respondent argues that on a correct interpretation of principle the policy leaves open and does not exclude the possible grant of permission in circumstances in which all three criteria are not met.

[33] The permissive approach in PPS21 in general and CTY10 in particular is evident from consideration of many of the other policies. See policy CTY1 for an overview of the operation of the policies. One of the types of development identified as acceptable in principle in CTY1 is housing. It continues ... "Planning permission will be granted for an individual dwelling house in the countryside in the following cases…" The list that follows includes all of the policies which refer to housing including CTY10. The Respondent argues that CTY1 does not state that the list of policies relating to planning permission for dwellings is exclusive, or that permission cannot be granted for a dwelling in a case which falls outside the scope of the listed policies.

[34] The respondent submits that its interpretation of PPS21 as evidenced by Mr Ward's affidavit, (Principal Planning Officer in the Department) is correct, that is that the policy did not apply and the Department was required to determine the application on its planning merits.

[35] The internal guidance is a rational and appropriate approach to the determination of applications which fall outside the scope of CTY 10. If a different approach were taken it would never be possible to have a dwelling on a farm with less than a group of buildings. In the instant case there are strong and documented planning reasons for justifying the grant of planning permission. For example the proposal meets the other criteria including that it is on an active farm, there is access to the road from established laneway, its design preserves the rural character and appropriate integration is achieved. The Respondent argues that as integration is the purpose of CTY10 the achievement of integration is a proper consideration and one which the department was entitled to give substantial weight.

[36] The Respondent argues that the applicant overstates the nature of the guidance note. The guidance note only advises on the boundaries of the existing policy and guides officials as to how to apply it in cases which fall outside the policy. It would be practically impossible to require the Department to prepare policy which anticipated all circumstances.

[37] Even if the Department misinterpreted PPS21, and CTY10 is in fact an exclusive policy code, it does not follow that the Department was bound to refuse this application as they are not bound to follow the policy slavishly. In this case the department paid clear attention to PPS21 and CTY10 and identified clear and proper planning reasons which justified the decision.

[38] The respondent argues that the decision is one which would properly fall within Woolf J's fifth principle identified in Gransden ie that even if the policy had been properly applied, the ultimate decision would have remained the same. Further, the alternative site arguments are irrelevant as the application was determined on the basis that the application fell outside CTY10.

[39] The transfer of land issue is not relevant as it was not sold off during the 10 years prior to the application and was therefore not relevant for the purposes of the policy. This is not a perverse interpretation as the existence of the 'farm' for the purposes of criterion (b) is determined at the date of the application. This is made clear in the amplification and justification text which reads: 'Planning permission will not be granted for a dwelling under this policy where a rural business is artificially divided solely for the purposes of obtaining planning permission or has recently sold-off a development opportunity from the farm such as a replacement dwelling or other building capable of conversion.'

Notice Party

[40] The notice party broadly adopts the points raised by the respondent and submits that the proper interpretation of PPS21 involves the following:

(a) Presumption in favour of development.

(b) Recognition that where all criteria in CTY10 met planning permission will be granted, however it does not follow that in circumstances where all criteria are not met, planning permission will automatically be refused.

(c) A need to consider all relevant matters.

[41] Mr Watson (the senior Planning Officer) *did* have the clustering criteria in mind, and he considered this in terms of the overall visual impact which he was entitled to do. While the first proposal may have fell within CTY10 (c), the revised proposal did not. Therefore, as it did not fall within the four corners of the policy the respondent was obliged to consider the case on its planning merits.

[42] Having regard to all planning considerations, not just those in the guidance constituted by PPS21 the respondent was not bound to refuse the application simply because it did not fit neatly into CTY10.

Discussion

[43] The applicant submits that this is a case regarding the correct interpretation of planning policy and not about planning judgement. The question to be answered is, given the application made in November 2009, was the correct policy identified, correctly interpreted and applied?

[44] The planning application was made in respect of a dwelling on a farm, therefore the relevant policy was CTY10 – Dwellings on Farms set out at para[14] above.

[45] The first part of this policy is straightforward: if your farm has been in operation for 6 years AND there have been no relevant sell-offs within 10 years from the date of application AND the proposed dwelling will link with or cluster with a group of established buildings on the farm planning permission will be granted.

[46] If it is a case in which there is no site available by a group of buildings the Planning Service may exceptionally grant a planning application if there are health and safety reasons for doing so, or if there are plans to develop the farm at the existing group of buildings.

[47] It is quite clear that Mr Millar's application fell squarely within this policy and on a simple reading of the policy should have been refused for non-compliance – the proposed dwelling did not link/visually cluster with a group of buildings as there is only one building on the development site to link with.

[48] Of course, the Planning Service need not 'slavishly' follow the policy. The policy is one of many under the Planning Policy Statement 21 which focuses on sustainable development in the countryside. Within PPS21 a number of like situations are grouped together, for example, proposals for dwellings on farms. The policy indicates the preferred approach to these like cases in order to achieve the broader social and environmental goals relating to development in the countryside. However, the policy itself, and much case law on this and similar issues, acknowledges that no policy can take into account the myriad considerations that may arise in individual fact scenarios that arise in the broad policy area. No planning policy can anticipate the personal, environmental, logistical etc circumstances of all the individual planning applications made under the policy that need to be considered. However, what is contained in the policy, which cannot be ignored is the thrust of the desired result of the policy.

[49] In short compass, the policy should be adhered to where possible. It can and should be disapplied in circumstances where there is good reason to do so for example if strict adherence to the policy would damage some other important interest unacceptably and a balance needs to be struck. It is entirely lawful for the department to choose to disapply or modify a policy. The key test for when a department can be said to have lawfully disapplied a policy is found in ***Gransden***:

"... It seems to me, first of all, that any policy, if it is to be a policy which is a proper policy for planning purposes, must envisage that in exceptional circumstances the minister has the right to depart from that policy. If the situation was otherwise it would not be a statement of policy but something seeking to go beyond that and, bearing in mind the terms of section 29 of the Town and country Planning Act of 1971, it would be an improper attempt to curtail the discretion which is provided by the Act, which indicates that in determining planning applications regard is not only to be had to the provisions of the development plan so far as material, but also to any other material considerations.

... I first of all bear in mind that, as the circular must in these matters speak for itself, its interpretation remains a matter for the court...

What then is the significance of the inspector having failed to follow the policy? Does that mean that this court has to quash his decision? The situation, as I see it, is as follows: first, section 29 lays down what matters are to be regarded as material, and the policy cannot make a matter which is otherwise a material consideration an irrelevant consideration. Secondly, if the policy is a lawful policy, that is to say, if it is not a policy which is defective because it goes beyond the proper role of a policy by seeking to do more than indicate the weight which should be given to relevant considerations, then the body determining an application must have regard to the policy. Thirdly, the fact that a body has to have regard to the policy does not mean that it needs necessarily to follow the policy. However, if it is going to depart from the policy, it must give clear reasons for not doing so in order that the recipient of its decision will know why the decision is being made as an exception to the policy and the grounds upon which the decision is taken.

Fourthly, in order to give effect to the approach which I have just indicated it is essential that the policy is properly understood by the determining

> body. If the body making the decision fails to properly understand the policy, then the decision will be as defective as it would be if no regard had been paid to the policy.
>
> Fifthly, if proper regard, in the manner in which I have indicated, is not given to the policy, then this court will quash its decision unless the situation is one of those exceptional cases where the court can be quite satisfied that the failure to have proper regard to the policy has not affected the outcome in that the decision would in any event have been the same."

[50] As the proposed development fell squarely within CTY10 the next questions to ask are:

(a) Did the Planning Service have regard to the policy?

(b) Did the Planning Service give clear reasons for departing from the policy?

(c) Did the Planning Service understand the policy?

(d) Would the decision have been the same either way?

Did the Planning Service have regard to the Policy when reaching the impugned decision? Did the Planning Service Understand the policy?

[51] The impugned decision is the final formal grant of planning permission. The final grant of planning permission was based on many site visits and meetings in which considerations were weighed. Importantly it was based on the decision to recommend approval. It is necessary to look at the meeting notes relating to this decision and understand what considerations the Planning Service considered when coming to this decision.

[52] The first consideration of the proposal, in the site visit of 20 January 2010 there is a section entitled 'Planning Policy and Other Material Considerations'. In this section the planning officer outlined the Planning policies to be considered. The policies listed in this section are: PPS1 – General Principles; PPS3 – Access, Movement and Parking, PPS21 – Development in the Countryside (draft) and Draft Belfast Metropolitan Area Plan 2015. The planning officer identified that the main policy consideration would be PPS 21 – Development in the countryside.

[53] Within this main policy the planning officer identified that the applicable sub-policies would be in relation to Housing Development covered in general terms in CTY 1. CTY 1 states:

> (a) 'Planning permission *will* be granted for an individual dwelling house in the countryside in the following cases: (my italics)
>
> (i) A replacement dwelling in accordance with Policy CTY3;
>
> (ii) A dwelling based on special personal or domestic circumstances in accordance with Policy CTY 6;
>
> (iii) A dwelling to meet the essential needs of a non-agricultural business enterprise in accordance with Policy CTY 7;
>
> (iv) The development of a small gap site within an otherwise substantial and continuously built up frontage in accordance with Policy CTY 8;
>
> or
>
> (v) *A dwelling on a farm in accordance with Policy CTY 10 (italics in original)*

[54] The original planning officer then continues to consider that this application is made under Policy CTY 10. He then goes on to consider the requirements of this policy in order. First he confirms that under CTY 10 (a) the farm has been active for at least 6 years; then he confirms that under CTY 10 (b) having conducted a planning history search there is no evidence that the dwelling has been sold off in the last ten years, finally in relation to CTY 10 (c) he states:

> 'New dwelling to be built 35m northeast of the aforementioned stable block. The above policy test states that the new building should be visually linked or clustered with a 'group of buildings' on the farm. It is doubtful given there is only one small stable block that this could constitute a 'group of buildings. While there are situations where a farm business contains no buildings and this test may not apply, I do not believe this is one such case.... I suggest that this policy criteria has not satisfied [sic]'.

The planning officer recommended refusal of the application on this basis (and on the basis of non-compliance with CTY13).

[55] On 15 March 2010 Development Control (DC) confirmed this recommendation based on the same reasons. A further reconsideration on 17 June 2010 did not change the DCs opinion. Revised plans were submitted and a further reconsideration took place on 24 August 2010.

[56] A different planning officer, Senior Planning Officer David Watson, completed the site reconsideration on 24 August 2010. In relation to the original refusal based on CTY 10, this planning officer stated:

> 'I feel ..[this] .. reason for refusal could not be sustained. The building in question is a stable and is on the host farm. The proposed dwelling is some 30 metres from the stable is I feel this does meet the policy test for visual linkage [sic]'.

Later, in relation to his assessment of the new siting proposed he states:

> 'The proposed dwelling is now some 15 metres from the stable and I feel this meets the policy for clustering and the visual linkage'.

He then goes on to recommend approval of the new site.

[57] This planning officer does refer to ***a*** policy test, however he does not refer to the policy test as laid out in CTY 10. Specifically, he reduces the test of CTY 10 (c) to being 'visual linkage' or 'clustering' only, and there is no regard to the second part of the test, that is, that the visual linkage or clustering must be to a 'group of buildings'. There is no mention of the full wording of the test and for this reason it is clear that the Planning Officer did not have regard to the policy as it is clearly written. On 25th August 2010 Development Control agree with the reconsideration and change of opinion. Their change of opinion appears to be based entirely on the Planning Officers reasons. For this reason it is clear that Development Control similarly failed to have regard to the policy test as written.

[58] An office meeting was held on the 15 September 2010 to discuss the applicants' concerns. John Warke, the planning consultant on behalf of the applicants discussed the requirements of CTY10 and pointed out that it required that any new building was required to be clustered with a group of buildings and that in the application under scrutiny the proposal sited the new dwelling with only one dwelling. He drew attention to the fact that there was an alternate group of building on the farm holding with which the dwelling could cluster.

[59] One of the attendees of the meeting, Councillor P. Porter Mayor, stated that he was amazed that the application was recommended for refusal in the first place. In relation to the CTY 10 test the note of this meeting reads:

> 'PP stated.... felt it met the policy content; The building it was grouped with was the only farm building on the farm...'.

He later asked the Planning Officer what the Planning Service's position was when there were no buildings on a farm to which the Planning Officer replied:

> 'DW stated the Planning Service had taken a pragmatic view and have granted planning permission were in such cases provided the site met all other policy criteria'.

[60] DW (the Planning Officer) then:

> 'went through his re-consideration and stated that clustering was one part of CTY 10, the policy also talked about being visually linked, he stated the revised siting now placed the proposed dwelling 15 metres from the existing building on the farm and he felt that this met the policy on visually linking'.

[61] Another attendee at the meeting, Councillor John Craig MLA then stated:

> 'he felt it would be difficult to refuse planning permission in this case and that he felt given the distance between the proposal and the existing building they did visually link'.

Leslie Millar then stated that he:

> *'felt the existing building could be taken as a group as it was made up of a number of stables and tack room'.*

He then stated that:

> 'He had no other farm buildings'.

[62] David Wilson (the planning officer) stated:

> 'The policy did not require the proposal to the [sic] visually linked or clustered with farm buildings the policy referred to an established group of buildings on the farm'.

John Warke:

> 'stated he felt there was a group of buildings on the farm which the proposal could group with and therefore meet the policy on clustering'.

[63] Leslie Millar:

> 'sted the site were'[sic] there was a group of buildings did not have access'

A McCready (an agent for the applicants):

> 'felt that as the site map identified all the farm land as the site then Planning Service could ask for the dwelling to be sited anywhere within the red line'.

Councillor Porter Mayor:

> 'Stated that as there was a farm building at this location the proposal met the policy.'

[64] To summarize the treatment of the policy test in this meeting:

(a) Councillor Porter Mayor incorrectly identified the policy test as requiring linkage with a 'farm building' and as such noted that the stable was the only available farm building on the holding.

(b) There was irrelevant consideration of what the policy would be if there were no buildings on a farm. (This was an irrelevant consideration as the Millar farm is not such a farm and in fact is a farm which falls squarely within CTY 10 as discussed above). The planning officer's view on this was that in such cases the planning service would take a pragmatic view and grant planning permission were all other policy criteria were met.

(c) The planning officer again incorrectly reduced the test to being that of visual linkage/clustering with no reference to a group of buildings (though see below).

(d) Councillor John Craig also incorrectly reduced to test to that of visual linkage only.

(e) The planning officer then correctly identified that the policy did not require linkage with a ***farm*** building but to ***any established group of buildings on the farm.***

(f) There was discussion about the availability of an alternative site which would meet the policy test.

(g) Councillor Porter Mayor again incorrectly reduced the policy test to the mere existence of a farm building on the proposed test.

[65] It is clear then, at this meeting that while there was consideration of *a policy* the minds of those present were not clearly directed to the actual policy in question. They either did not consider the policy (as they did not in the main consider the actual written requirements of the policy) or they did not understand the policy.

[66] Following the meeting McCready architects on behalf of the applicants wrote again to the Planning Service highlighting *inter alia* that the proposed dwelling did not link with a group of buildings on the farm and therefore fell foul of CTY 10 and further that there was an alternative site available.

[67] There was a further site visit on 17 October 2010. The only reference to the visual linkage/clustering concerns is the following: *'The proposal is grouped with a building on the farm'*. The note then goes on to confirm that there should be no change of opinion and the proposal should be approved. Here it would appear that the policy test is twisted from '*The new building is visually linked or sited to cluster with an established group of buildings on the farm'* to *'The proposed building is grouped with a building on the farm'* which is a manifestly different test. Again it is clear that the actual wording of the policy was not given any regard.

[68] On 25 October McCready architects again wrote to David Watson at the Planning Service requesting, in essence, reasons why the policy was not being complied with in this case. Specifically the letter states:

(a) If the proposal is to be treated as an exception under the policy, please supply 'appropriate supporting evidence demonstrating to the satisfaction of Planning Service that it is not appropriate or feasible to position the dwelling in close proximity to existing buildings on the farm'.

(b) 'The published advice does not state that a single building such as a stable, even if large, can be considered as an established group of buildings on a farm'.

(c) If the department is using the part of the policy which 'allows for the selection of a well landscaped site adjacent to a building group on a

farm where there is a degree of visual linkage' the letter asks for evidence as to how this is being met as the site is not in fact well landscaped.

[69] This letter of the 24 October was considered in a meeting on the 25 October. The contents of the meeting note, as far as relevant state:

(a) As of the reconsideration of 19 October, the objections at that time were not of sufficient weight to warrant a refusal in that case.

(b) 'The objection referred to an alternative site on the farm, the Planning Service is statutorily bound to consider the applications which are presented to it. In this case the Planning Service was asked to consider the proposal at a specific location, following an amended scheme being put forward the Planning Service found the proposal to be acceptable. Reference to an alternative has therefore not been considered to be of determining weight in the decision making process'.

(c) 'The objector rightly states that, in this case, the proposed dwelling is to be grouped with a single building on the farm and therefore does not meet the policy test. The Planning Service have taken a pragmatic approach to Policy CTY 10 in that, provided the site is acceptable in all other respects, it will approve a dwelling on a farm where that farm has no farm buildings. In this case it was found to be unreasonable, in light of our pragmatic approach, not to allow this proposed dwelling to group with a single building on the farm. The Senior Planning Officer outlined this approach to the objector at the deferred office meeting.'

(d) The Planning Service then decides to put forward the application with an opinion to approve to the council.

[70] The treatment of CTY 10 in this reconsideration meeting can be summarized as follows:

(a) In the quote at (b) above the Planning Service does not appear to have had *any* regard for the policy requirement that the site be linked with a group of buildings and that a site ***not*** so linked can be considered only exceptionally. Instead, the site with one building was assessed as acceptable despite not having the requisite group of buildings (this assessment appears to be based on the flawed application of the policy in the site reconsideration by David Watson).

(b) In the quote at (c) above, because of a pragmatic approach taken to farms with no farm buildings, by analogy, the Planning Service extends this approach to the planning application at hand by finding

> that it would be unreasonable not to apply the same pragmatic test in the instant case. There is no identification of where the authority to take the 'pragmatic approach' comes from or for what reason it is being applied to the instant case.

[71] Again in this document, while there is an acknowledgement that there is a relevant policy test, the understanding and application of that test has become so murky at this stage that it is impossible to tell if the proper test was considered at all, whether it was misunderstood or whether it was wilfully and perversely misconstructed to rationalise a decision *ex post facto.*

[72] A further meeting was called on the 9th November 2010 by Councillor Lunn MLA to discuss further information which he believed to be relevant to the application. This information was that:

> 'The applicant owned or controlled additional lands (a laneway) which would allow him access to sites which, he felt better clustered with buildings on the farm. He further stated this information was contrary to information the applicant had provided at the deferred office meeting.

[73] The Planning Officer replied that:

> 'The Planning Service had assessed the site, as currently submitted against all the material considerations and found it to be acceptable on planning grounds. As such, the Planning Service would not now look at other sites on the farm to see if one was more suitable. [He] further stated that when the Planning Service found the submitted site to be unacceptable they may on occasion look for a more acceptable site. This was not the case here, the submitted site was acceptable'.

[74] At this point, the decision of the Planning Service had already been made and Councillor Lunn was entering further information in order to try and shake that decision. The Planning Officer relied on his original decision (based on the flawed logic as discussed above) and declined to reconsider. While it may be the case that the Planning Service will only look for an alternative site if the original site is unacceptable, and there is nothing wrong with that, the grounds on which the Planning Service considered the proposed site to be acceptable in the first place were based on an incorrect interpretation of the policy.

[75] Planning permission was then granted on 7 March 2011. This planning permission was expressly granted under Policy CTY 10.

[76] From all of the above it is clear that at all material times the decision makers either did not have regard for the policy or did not understand the policy and for this reason cannot have lawfully departed from it. For this reason the decision must be quashed.

[77] In view of the court's clear conclusion that the Planning Service have failed to properly have regard to and/or understand the relevant policy it is not proposed to deal with the other arguments in great detail. In short compass however I would say the following:

(a) CTY 10 makes no mention of proposals on farm holdings on which there is one or less buildings for the proposed dwelling to group with. The Planning HQ unpublished guidance seeks to remedy this deficiency by giving guidance to planning officers in making decisions on applications in these situations. As a matter of common sense it is not a 'guide' as to the application of the CTY 10 as written, but in fact adds to that policy and creates more policy to be relied upon. As a document creating policy to be followed it should have been composed within the guidelines set out in the Planning (Northern Ireland) Order 1991.

(b) In any event, as the Millar farm is not a farm on which there is one or less buildings for the proposed dwelling to group with, inasfar as the department purport to have relied upon it, it was an irrelevant consideration.

(c) In relation to the sell-off issue, the clear wording of the policy reads:

> 'Planning permission will be granted for a dwelling house on a farm where all of the following criteria can be met... (b) no dwellings or development opportunities out-with settlement limits have been sold off from the farm holding within 10 years of the date of the application'.

(d) The concerns that this seems to be intended to address are elucidated at para 5.40 of the justification and amplification text, namely (a) a situation where a rural business is artificially divided solely for the purpose of obtaining planning permission – I take this to cover a situation where, for example, a farm is split into two in order that planning permission can be obtained for one of the parts which would

otherwise not benefit from planning permission under the policy and (b) where the rural business has recently sold-off a development opportunity from the farm such as a replacement dwelling or other building capable of conversion, the concern clearly being excessive development. The over-arching concern is to limit and control development in the countryside and to ensure that the rules and ultimately the policy objectives aren't flouted by changes to the ownership or extent of the farm holding. In this regard relatively long timelines are applied to when planning permission can be granted – i.e. the farm must be active for six years and planning permission can only be granted once in every ten years. In the instant case, Mr Millar applied for planning permission on his *existing* farm holding and there was no attempt to sub-divide to maximise development opportunities.

(e) However, as there is an application *process*, the resulting planning permission would have been void anyway as the documents on which the application were based (the certification of ownership) ceased to be true between the application date and the application outcome and as such no valid planning permission could have issued on foot of the certificate of ownership.

Conclusion

[78] For these reasons I would grant the relief applied for.