

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

Delivered: 21/06/2011

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

---

TESCO STORES LIMITED

-v-

DEPARTMENT OF THE ENVIRONMENT  
PLANNING SERVICE

---

Before: Morgan LCJ, Higgins LJ and Coghlin LJ

---

**MORGAN LCJ**

[1] This is an appeal against a decision of Weatherup J whereby he refused judicial review of a decision of the Department of the Environment for Northern Ireland, Planning Service, dated 12 December 2008 granting Vico Kent Limited outline planning permission for a food store with access, servicing area and car parking at Edenderry, Portadown. Mr Elvin QC and Mr Lyness appeared for the appellant, Tesco Stores Ltd, Ms Leiven QC and Mr McMillen appeared for the Department and Mr Lyttle QC and Mr Ronan Lavery for the notice party Vico Kent Limited. We are grateful to all counsel for their helpful oral and written submissions.

**Background**

[2] The draft Craigavon Area Plan 2010 was published in April 2000. It proposed the inclusion of the subject lands within the Portadown town centre boundary. The lands in question were the site of an old gas works and accordingly had been heavily contaminated. Any development of the site will, therefore, be relatively expensive. The draft Plan also identified Development Opportunity Sites (DOS) within Portadown centre which included the subject site which was stated to be suitable for retailing or office or leisure or residential uses.

[3] The draft Plan was the subject of a Public Inquiry conducted by the Planning Appeals Commission (PAC) which reported on 12 June 2003 and recommended that the Department should carry out further work to consider

the physical definitions of town centre boundaries within the plan area. The Craigavon Area Plan was adopted by the Department in August 2004 without town centre boundaries or related retail designations. The site was still identified as a Development Opportunity Site on the same basis.

[4] On 23 March 2005 Vico Kent Limited applied for outline planning permission for a food store and related development on the site. In December 2005 the Department published the draft Craigavon Town Centre Boundaries and Retail Designations Plan 2010 (CTCBRDP 2010). That plan had been informed by a retail study carried out by Colliers, retail consultants. The draft Plan included the subject site within Portadown town centre. In pursuit of its planning application Vico Kent Limited submitted a retail impact assessment on 8 December 2006 and an amended report on 13 August 2007.

[5] On 21 December 2007 the Strategic Projects Team of Planning Service prepared a report which recommended approval of the application. It was noted that the retail impact assessment indicated that the proposal had the potential to cause harm to the town centres of Portadown, Lurgan and Craigavon. Despite that conclusion the application was considered acceptable because the site was a development opportunity site suitable for retailing, was within the draft town centre boundary, there was a qualitative need for additional retail floor space within the recommended town centre boundaries and the proposal would assist physical regeneration among other matters.

[6] On 31 December 2007 the PAC sent its report on the draft CTCBRDP 2010 to Planning Service. In relation to the criteria adopted by the Department the PAC noted the requirement to include sufficient sites to accommodate retail development required to meet any qualitative deficiency and/or regeneration need. The PAC commented that it was not necessary for a site to lie within the town centre in order for it to be successfully regenerated as a considerable number of uses do not require a town centre location. Planning permission can still be granted for land uses that normally require such a location if it can be shown that there is no alternative site available within the defined town centre and all the other tests required by paragraph 39 of PPS 5, dealing with regional policy in relation to retailing in town centres, are met.

[7] The PAC then considered the designation of the site as a DOS in the relevant area plan. The Commission advised that it was not necessary for such a site to lie within the town centre boundary in order for it to be successfully regenerated for the reasons set out in paragraph 6 above. The PAC concluded that PPS 5 which provided for out of centre developments in paragraph 39 remained the relevant policy document in relation to retailing and town centre uses and could apply to the development of opportunity sites. A DOS did not have to be included within the town centre boundary and there should be no change to the plan in this respect.

[8] In relation to Portadown town centre the PAC noted that this site was well removed and detached from the core of the town centre, unrelated to its primary function, relatively isolated and with no functional or visual linkages to the contemporary town centre. It concluded that shifting the focus of the town centre by inclusion of the site would extend Portadown's relatively large footprint and exacerbate its problems. The siting of mall-type retailing at this peripheral location would lead to the development of a distinct but poorly linked hub within the town centre outside the primary retail core and frontage. Retention of the site within the town centre boundary was unnecessary to meet Portadown's identified qualitative deficiency and the site did not require a town centre designation in order to obtain permission for comparison shopping or retail warehousing as long as it could comply with the out of centre requirements of PPS 5.

[9] In its consideration of the exclusion of this site from the town centre boundary and its development as an out of centre site the Commission specifically referred to paragraph 41 of PPS 5 which states that for food superstores edge of centre sites may provide a preferred alternative in many towns and in the interests of maintaining and strengthening the adjoining town centre this may require the reuse of derelict lands or the redevelopment of suitable sites.

[10] The PAC concluded that the DOS designation did not support the proposition that the site's inclusion in the town centre boundary was implicit or self evident. Retention of the site within the town centre boundary would lead to a wide dispersal of the retailing function away from the core of Portadown and weaken its attractiveness. It concluded that the inclusion of the site would not sustain and enhance the vitality and viability of Portadown town centre and accordingly recommended that it should be excluded.

[11] The Department reconsidered its recommendation to approve the application in light of the PAC report. In a memo dated 21 January 2008 Mr Mulligan noted that the proposal was likely to have an impact on Portadown town centre and noted the impacts on nearby town centres but concluded on balance that the proposal was still acceptable. He highlighted in particular that the proposal would contribute to the extension of retail choice in the area where there would appear to be a qualitative need for additional floor space. He commented that the proposal potentially could assist the regeneration of the town centre and that the PAC had noted that retailing was acceptable on the site in the context of PPS 5. A notice of opinion to approve the development was issued in February 2008.

[12] The appellant submitted an application for a food superstore to Planning Service in February 2007. The draft CTCBRDP 2010 identified the site as being located outside the Craigavon town centre boundary. The PAC

report of 31 December 2007, however, recommended the inclusion of the site within that town centre boundary and the report was subsequently adopted in June 2008. The Tesco application was approved by Planning Service on 12 November 2008.

[13] Mr Mulligan has averred that the potential implications of the Tesco approval for the assessment and processing of the subject application were discussed in November 2008 at an internal development control group meeting. He states that it is not standard practice to minute meetings of that kind. In particular he says that the group took into account paragraph 58 of PPS 5 which states that the Department will take into account the likely cumulative effects of recently completed developments and outstanding planning permissions for retail development where appropriate. The Department did not consider it appropriate to assess the cumulative effects of the Tesco and Vico stores as Tesco was located in a town centre and there was, therefore, no requirement to assess the impact of town centre development upon neighbouring town centres. Mr Mulligan noted that the Tesco approval would compete with the subject application for trade and therefore would serve to reduce the retail impact of the scheme on Lurgan and Portadown town centres. It would also help to strengthen the trading position of Craigavon town centre thereby reducing any potential loss of trade from central Craigavon to the new store.

### **The challenge**

[14] In this appeal the appellant relied firstly on the manner in which the Department had dealt with the Tesco permission which it issued one month before the impugned determination. It was contended that there was no proper evidence for the conclusion that the Tesco permission had been taken into account by the Department. Even if it was taken into account there was no rational justification for the conclusion that it was not appropriate under paragraph 58 of PPS 5 to assess the cumulative retail impact arising from the store. In any event any assessment of the Tesco permission that the Department purported to carry out was unreasonable.

[15] In addition it was submitted that the approach taken by the Department to the PAC report of 31 December 2007 was unlawful. It was submitted that although the Department placed reliance on the comment by the PAC that some retailing was acceptable that did not reflect the fact that any retail proposal brought forward on the site would have to meet the PPS 5 test for out of town centre development. In addition the reliance upon regeneration in the town centre did not, it was submitted, take into account the effect on the vitality and viability of the town centre if the development were permitted. Colliers had advised that additional retail floor space should be accommodated within the recommended town centre boundaries so did not support the subject application. Lastly it was submitted that the

conclusion that a new and modern food store would potentially serve to enhance the adjoining centre as a shopping venue was evidence that the Department had failed to grapple with the detailed criticisms of the PAC as to how retailing on the site would affect the town centre.

### **Consideration**

[16] There was no dispute about the applicable legal principles many of which were set out by Girvan J in Re Bow Street Mall Limited [2006] NIQB 28. The judicial review court is exercising a supervisory rather than an appellate jurisdiction. The court is concerned only with the legality with the decision making process. If the decision maker fails to take account of a material consideration or takes account of an irrelevant consideration the decision will be open to challenge (see City of Edinburgh Council v. Secretary of State [1998] 1 All England Reports 174). Planning judgments are within the exclusive province of the planning authority (see Tesco Stores v. Secretary of State [1995] 2 All England Reports 636). Planning policies are to be regarded as guidance on the general approach.

[17] The appellant submits that there is insufficient evidence for the conclusion reached by the learned trial judge that the Tesco permission, granted a month before the subject permission, had been taken into account. That submission is grounded on the proposition that there is no note of any meeting or any document to support the fact that it was taken into account. In his affidavit Mr Mulligan stated that the implications of the Tesco approval for the assessment and processing of the application were discussed in November 2008 at an internal Development Control Group meeting within Planning Service. He stated that it was not standard practice to minute meetings of that kind. There is nothing to suggest that his assertion in relation to the practice of not minuting internal Development Control Group meetings is inaccurate and no request was made to cross examine Mr Mulligan on this issue. We see no reason to differ from the conclusion of the learned trial judge that he should rely on the assertion in Mr Mulligan's affidavit.

[18] Paragraph 58 of PPS 5 is within that portion of the planning policy document dealing with the assessment of major retail proposals. It provides that the Department will take into account the likely cumulative effects of recently completed retail developments and outstanding planning permissions for retail development where appropriate.

[19] Mr Mulligan explained that the Department did not consider it appropriate to assess the cumulative effects of the Tesco and Vico stores as the Tesco site is located within a town centre. Under PPS 5 there is no requirement to assess the impact of a town centre development upon neighbouring town centres. Although we accept the argument that any

adverse impact on the vitality or viability of adjoining town centres would not have been material considerations for refusing the granting of the Tesco permission within the Craigavon town centre boundary it does not follow that the cumulative impact from the granting of permission to Vico would not fall for consideration under paragraph 58 of PPS 5. The Department did not, however, leave this issue out of account but concluded that the Tesco approval in competing with the application scheme for trade would serve to reduce the retail impact of the application scheme on Lurgan and Portadown town centres. The Tesco approval would also help to strengthen the trading position of Craigavon town centre by extending the quantum of retail floor space available within the town centre and by attracting further trade into central Craigavon from the surrounding catchment area thereby reducing any potential loss of trade from central Craigavon to the Vico store.

[20] The appellant submits that there were no reasonable grounds for the conclusions reached by the Department on these issues. In particular it is submitted that there was no retail impact assessment which would have informed judgments about the degree to which a new store would draw trade away from the town centre thereby affecting its trading characteristics. It was further contended that in the absence of such a retail impact assessment the conclusions reached by the Department were irrational.

[21] It is in our view relevant to note that the Department had a range of retail impact information available to it in connection with the Portadown area. This included the retail information provided by Colliers in the preparation of the initial plan and the more recent initial retail impact assessment and amended report prepared on behalf of the developer of the Vico store. The judgments which the Department made were informed by the pre-existing detailed retail information. There is no express requirement to conduct a retail impact assessment in relation to cumulative impact and the criticism in this case is of the planning judgments made by the Department in relation to the effect of the grant of the planning permission. There was no evidence to suggest that the conclusions reached by the Department on the nature of the likely impacts on other centres were flawed. The criticism was that information that would better evaluate the likely extent of those impacts was required. Having determined the nature of the likely impacts it was a matter of judgment for the Department to decide how much more detailed information it required. We see no basis for characterising the judgments made as irrational or even unreasonable and in agreement with the learned trial judge we reject these grounds of appeal.

[22] The appellant repeated an argument advanced to Weatherup J and rejected by him that in light of the PAC report of 31 December 2007 which was the basis for the CTCBRDP 2010 plan adopted in June 2008 it was irrational to grant permission for a new food superstore outside the town centre boundary. In support of its submissions on this issue the appellant

relied upon those matters set out at paragraph 8 above which led the PAC to the conclusion that the site should lie outside the town centre boundary. It is clear, however, that the principal concern of the PAC was the effect upon Portadown's comparison shopping core of the siting of mall type retailing at this peripheral location which would now properly be judged edge of centre. Such an activity according to the PAC would have acted as a counter magnet to the established shopping areas.

[23] These arguments do not, however, address the distinct contribution that food superstores on edge of centre sites can make to town centres. Such a contribution is recognised within paragraph 41 of PPS 5 and acknowledgment is given to the fact that such developments can lead to the reuse of derelict land or the redevelopment of suitable sites. It was in that context that Planning Service relied upon the comment by the PAC that some retailing was acceptable on the site in the context of PPS 5. The PAC report had specifically referred to development of this nature as a possible use for the site subject to the tests in paragraph 39 of PPS5. It was for the Department to evaluate the extent to which the proposal satisfied those tests and examine any countervailing factors.

[24] The appellant submitted that it was unreasonable for the Department to rely on the proposition that the proposal potentially could assist in the regeneration of the town centre since this site had been excluded from the town centre boundary in the adopted plan in June 2008. We do not accept that submission. The inclusion of the site within the town centre boundary could have led to the exacerbation of the town centre's problems as noted by the PAC. It is clear, however, from PPS 5 that different considerations arise in relation to different kinds of development located on the edge of or outside town centres and that is recognised in the different emphasis in policy at paragraphs 39, 41 and 42 of PPS5 dealing with comparison shopping, food stores and retail warehousing. The recommendation that the site should be excluded from the town centre was not a determination that the development of this site could not in certain circumstances contribute to the regeneration of the town centre. Whether a superstore would achieve that end was a matter well within the range of planning judgments available to the Department.

[25] Colliers advised that any qualitative need for additional retail floor space should be accommodated within the recommended town centre boundaries. Planning Service considered that this proposal would contribute to the extension of retail choice in the area where there was believed to be a qualitative need for additional floor space. The appellant argues, therefore, that in light of Colliers' advice only those developments located within town centre boundaries should receive favourable consideration in relation to qualitative need. We do not accept that in the exercise of its planning judgment Planning Service was so constrained. In its examination of this proposal the planning decision maker was entitled to examine the

contribution of the proposal to the extension of retail choice and if considered appropriate to give that substantial weight.

### **Conclusion**

[26] We do not consider that any of the grounds of appeal have been made out and accordingly the appeal must be dismissed.