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(subject to editorial corrections)\**

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**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

**Vico Kent's Application (Leave hearing) [2009] NIQB 16**

**IN THE MATTER OF AN APPLICATION BY VICO KENT LIMITED FOR  
LEAVE TO APPLY FOR JUDICIAL REVIEW**

**MORGAN J**

[1] In April 2000 the draft Craigavon Area Plan 2010 was published and a Public Local Inquiry was held by the Planning Appeals Commission during 2001 to consider the various objections received. The Commission concluded that the town centre boundaries and retail designations for Central Craigavon, Lurgan and Portadown should be redrawn on the basis of a series of broad principles set out in its report. The Department accepted this recommendation and the Craigavon Area Plan 2010 was adopted in August 2004 without town centre boundaries or related retail designations. In February 2005 Notice of Intention to Prepare a Plan was given to Craigavon Borough Council and the notice was published in the regional and local press. On 22 March 2005 the Department published the Craigavon Town Centre Boundaries and Retail Designations Plan 2010 Issues Paper. On 20 December 2005 the Department published the draft Craigavon Town Centre Boundaries and Retail Designations Plan 2010 and that plan was informed by a retail study carried out by external consultants (Colliers). The Planning Appeals Commission facilitated an independent examination of the representations made in relation to the draft plan between 3 and 5 September 2007. On 31 December 2007 the Commission forwarded its report on the examination to the Department. On 30 June 2008 the Department published the Craigavon Town Centre Boundaries and Retail Designations Plan 2010 and at the same time published the Plan Adoption Statement to explain the reasons for the decisions taken by the Department and their consideration of the Commission's report.

[2] The applicant is a developer with an interest in land in Portadown identified as a Development Opportunity Site. In the Preliminary Proposals published in 1995, draft Craigavon Area Plan published in 2000 and draft Craigavon Town Centre Boundaries Plan the site was included in the proposed town centre boundary. The recently adopted Craigavon Town Centre Boundaries and Retail Designations Plan 2010 has excluded the site from Portadown town centre and the attractiveness of the site for retail development has accordingly diminished. The applicant now seeks leave to challenge the adoption of the Plan.

[3] There are two aspects of the examination conducted by the Planning Appeals Commission in September 2007 which it is necessary to examine in a little detail. The draft plan published in December 2005 had included a retail strategy. That strategy comprised

- The promotion of Lurgan and Portadown town centres as the main foci for additional retail capacity; and
- the maintenance of existing retail activity levels at Central Craigavon town centre.

That strategy then translated into Plan Policy R1 which provided the planning permission would only be granted for the provision of additional comparison shopping floorspace within the designated town centre of Craigavon Central Area where it could be demonstrated that it would not adversely impact on the vitality or viability of Lurgan or Portadown town centres. This was an unusual fetter on the ability of Central Craigavon to expand which was apparently influenced by the fact that this location had been comparatively more successful than the other two town centres in recent years and a period should be allowed to enable them to catch up. The Planning Appeals Commission concluded that this policy represented a departure from regional planning policy on the vitality and viability of town centres which was unwarranted and recommended that the strategy and policy should be excluded from the Plan.

[4] The second issue of some importance concerns the approach of the Commission to the Colliers retail study. It is clear that this study had influenced the retail strategy and policy which had been adopted in the draft Plan. The study suggested that there was likely to be a modest population growth of approximately 3800 in the plan period and accordingly estimated that there would be no need for additional retail floorspace within the plan period in the area as a whole. The Commission noted that the Craigavon Area Plan 2010 reflected the regional policy context and planned for substantial growth potentially accommodating some 20,000 people. The Commission also noted that the narrow approach to the retail expansion of the town centres failed to take into account the regional policy that town centres should be the first choice and major location for service employment

including public administration, major office development, leisure and entertainment facilities. In light of their criticisms of the study and the recommendation that the retail strategy and policy R1 should be omitted from the plan the Commission considered whether the validity of the draft plan as a whole was affected. It concluded that the regional policies ensured that the absence of a retail strategy in the plan was not fatal. The consequence of this consideration of the retail study was that the Commission considered that there was greater scope for development throughout the plan area within the town centres as a whole.

[5] Of particular relevance to this application was the specific consideration given to whether or not the applicant's site should be included within the town centre boundary in Portadown. The Commission concluded that the 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. Shifting the focus of the town centre eastwards by inclusion of this site would exacerbate the problems caused by Portadown's relatively large footprint. Inclusion of the site would offend the Commission's criterion that generally one should focus all existing and planned commercial and civic investment in a relatively tightly drawn area. The northeastern boundary was undefined running through Chambers Park and offended the criterion that boundaries should reflect existing natural/physical barriers where possible. Its inclusion was unnecessary to satisfy Portadown's qualitative deficiency and its approved use did not require a town centre location. It occupied a transitional position between suburban housing and recreational open space and small-scale commercial/retail users so that it failed to reflect clear changes in property use. The Commission concluded that the regeneration element attached to this site did not override these strategic objectives for town centres.

[6] When it published the adopted plan on 30 June 2008 the Department published its statement containing its consideration of the Commissioners' report in chapter 2. In substance the adoption statement accepted the views of the Commission on the omission of the retail strategy and policy R1 and further accepted that the strategic policy context provided by the Regional Development Strategy and PPS 5 ensured that the absence of a retail strategy in the plan was not fatal provided town centre boundaries and primary retail cores were identified. The Department did not, however, accept the Commission's conclusions in relation to the issues of population growth and market share. It is not necessary in this application to go into the reasons for this but essentially the Department was of the view that there was evidence that the population growth was likely to be considerably smaller than the range contemplated by the Commission and further considered that the likelihood that Craigavon Borough would increase its market share of retail expenditure was unlikely. Essentially, therefore, the Department proceeded

on the assumption that growth and expansion was less likely to occur than the Commission concluded.

[7] In respect of the conclusion in the Commission's report that Development Opportunity Sites did not have to be included in the town centre boundaries the Department accepted that recommendation which it identified as part of the second of the key issues within the report. It specifically accepted a recommendation that those lands which had been excluded from town centre boundaries identified in the draft plan which remained within the development limit for the urban area would not be identified for any particular use but would be white land with development potential subject to the provisions of existing policy.

[8] Although the applicant identified 11 grounds in its Order 53 statement the substance of the applicant's challenge is contained in the following 5 claims.

- It was irrational for the Department to exclude the applicant's lands in the adopted plan when it relied on the retail study to include them in the draft plan.
- If the Planning Appeals Commission was going to disregard the retail study it should have commissioned a further study or invited submissions on such a study.
- In any event the Planning Appeals Commission did not provide an adequate opportunity for the applicant to address the retail study.
- Since the Planning Appeals Commission recommended excluding the applicant's lands because they ignored the retail study it was irrational for the Department to accept that recommendation when it had accepted the conclusions of the retail study.
- In fixing the boundaries of town centres the Department acted inconsistently in including lands particularly in Craigavon Town Centre while excluding the applicant's site.

This is a case in which I have had the benefit of full argument from the applicant, the proposed respondent and proposed notice parties. I am grateful to all parties for their helpful oral and written submissions. In light of those submissions I consider that the test that I should apply at this stage is that identified by the Court of Appeal in *Omagh District Council v Minister for Health, Social Services and Public Safety* [2004] NICA 10 namely whether there is an arguable ground for judicial review on which there is a realistic prospect of success.

[9] I will deal with the issues in turn. It is undoubtedly the case that the Department has relied on the retail study both in its consideration of the appropriate town centre boundaries in the draft plan and the adopted plan. It is clear that the Department's decision to include the applicant's site within

the town centre boundary reflected the second of the 7 criteria used to define town centre boundaries namely inclusion of sufficient sites to accommodate retail development required to meet any regeneration need. This criterion was given careful consideration by the Commission in its report where it recognised firstly 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. Secondly it noted that if all sites that required regeneration were included within the town centre boundary it could prove too large and dispersed to perform its strategic function. In those circumstances the second criterion would be inconsistent with stated strategic policy objectives for town centres and where there was a tension between that criterion and strategic policy the latter should prevail. It is clear that it was this consideration married to the physical examination of the site set out in paragraph 5 above which cause the Commission to recommend that the Development Opportunity Site should not be included within the town centre boundary and this recommendation was accepted by the Department. There is no arguable case on irrationality.

[10] It is common case that Regulation 11 of the Planning (Development Plan) Regulations (Northern Ireland) 1991 provides for the advertising and holding of an independent examination of representations made in relation to any development plan and Regulation 12 requires the department after consideration of the report of the Planning Appeals Commission to prepare a statement of the decisions it has reached in light of the report and recommendations contained in it and the reasons for those decisions. The Department has acted in accordance with those Regulations. The Planning Appeals Commission carefully considered whether in light of its conclusion on the retail study the validity of the plan as a whole was called into question. It concluded that the regional policies were sufficient having regard to the boundaries recommended by the Commission and the Department accepted that in light of the identification of the town centre boundaries and the primary retail cores regional policy was sufficient. In those circumstances there is no arguable case that there was an obligation on the Commission or Department to conduct a further retail study.

[11] The contention that the applicant did not have an adequate opportunity to address the retail study is apparently based on a briefing note prepared by the Planning Appeals Commission in May 2007. The note deals with the issues to be considered in the examination.

"What we are interested in is **the precise nature of each objection and how the plan should be modified to address the concerns.** We would ask objectors to concentrate on those matters. We are not considering representations in favour of the plan but counter objections are relevant in as much as the

matters raised are related to the plan. The statutory role of the examination is to consider objections to the plan. We cannot consider objections to the plan making process. The objection will relate to the plan and not to Collier's Report although we accept that any shortcomings therein could have contributed to shortcomings in the plan."

This passage merely makes plain the role of the Commission. Its obligation was not to conduct a free standing analysis of the retail study but to deal with objections. Where material in the retail study was relevant to the objections it had to be considered. The report of the Commission at paragraph 1.13 notes that concerns were raised by objectors at the examination to the detailed aspects of the assessment of future retail floorspace requirements within the retail study. Clearly this was appropriate as it related to the objection. There is nothing to suggest that there was any prohibition on addressing matters arising from the retail study which were relevant to objections.

[12] The submission that the Department was irrational in accepting the conclusions of the Commission in relation to boundaries when it did not accept the conclusion of the Commission in relation to the retail study is without foundation. The decision to exclude the applicant's site was carefully reasoned and the detail is set out in paragraph 5 above. Although the Department took a less optimistic view than the Commission about retail growth within the area as a whole this would have encouraged a reduction in town centre boundaries rather than providing a reason for the expansion of Portadown town centre to include the applicant's site.

[13] The final point made by the applicant is that the exclusion of his site was inconsistent with the inclusion of lands particularly in Craigavon Town Centre. There is no substance to this point. Each site was assessed on its merits and planning judgment applied to it. There is no reason or basis for the courts to interfere with such judgments.

[14] In the circumstances I am not satisfied that any arguable ground has been made out that offers any reasonable prospect of success for the applicant and accordingly I refuse leave.

