

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Heron Property Ltd's Application [2009] NIQB 75

IN THE MATTER OF AN APPLICATION BY HERON PROPERTY LTD
FOR JUDICIAL REVIEW
AND IN A MATTER OF A DECISION OF THE PLANNING APPEALS
COMMISSION DATED 12 JANUARY 2009

MORGAN LCJ

[1] This is an application for judicial review of a decision of the Planning Appeals Commission (the Commission) on 12 January 2009 which refused the applicant planning permission for a storage/distribution centre at land southwest of Nutts Corner roundabout, Antrim. The applicant was represented by Mr Beattie QC and Ms Comerton and the respondent by Mr Larkin QC and Ms Lynch. I am grateful to counsel for their helpful oral and written submissions.

Background

[2] The Antrim Area Plan is now long past its anticipated end date but remains a material consideration in relation to planning applications within the plan area. Paragraph 23 of the Plan sets out the relevant rural policies and in accordance with the practice at that time includes the strategic policies for rural protection which were applicable at the date of adoption. Among those policies at paragraph 23.7 is that relating to Road Frontage Policy Areas. This policy applies to the roads in the vicinity of Nutts Corner and extends for a distance of 100 m on each side of the road. The purpose of the policy is to protect various roads subject to pressure of scattered road frontage and ribbon development.

[3] Paragraph 25 of the Plan provides specific policies in relation to Nutts Corner.

"25.1 This is essentially a rural area isolated from the nearest town or village.

25.2 The area is not suitable for industrial/commercial activities since Water Service have indicated that they could only supply limited quantities of water, insufficient for the needs of industrial processing.

25.3 Further, any substantial development of this area would add to the danger and inconvenience of traffic in the vicinity of this important roundabout.

25.4 It is the Department's policy to encourage large scale commercial and industrial uses to locate within the District Town, in this case Antrim, where there is a readily available supply of fully serviced sites. Suitable small scale industrial uses will be welcome in appropriate sites in other settlements.

25.5 Permission will normally be given for small scale commercial and industrial activities in existing buildings such as disused agricultural or commercial buildings or on derelict sites provided there are no objections such as unsightliness, noise, smell and excessive or dangerous traffic generation."

It is common case that the constraints at paragraphs 25.2 and 25.3 no longer arise. In 1993 the Department published the Planning Strategy for Rural Northern Ireland (PSRNI). The development control policies for the countryside set out in that strategy came into effect immediately and superseded the previous expressions of policy in existing plans. The effect of the publication of the strategy was to change the Road Frontage Policy Areas to Green Belts.

[4] The applicant's proposal for a storage/distribution centre is made in the alternative. Option one is a proposal for a 36,000 square metre development which lies in part within the Green Belt area designated in 1993. Option two proposes a development of approximately 30,000 square metres with no part of the proposed development less than 50 m from the road frontage. This inevitably also lies in part within the same Green Belt area. Option three is a proposal for just under 20,000 square metres no part of which lies within the Green Belt area.

[5] The Commission adopted the report of the Commissioner who heard the appeal. He concluded that the appeal site contained parts of former airfield runways/manoeuvring areas and he considered the site to be derelict land. In relation to options one and two he noted that each lay in part within

the Green Belt. He recognised that the general policies for the countryside contained in the PSRNI do not take precedence over the specific policies for the Nutts Corner area found in paragraph 25 of the Plan but he concluded that the same did not apply to the areas which had been Rural Frontage Policy Areas. He accordingly gave precedence to the Green Belt policies which, it is accepted, those applications do not satisfy.

[6] In relation to option three the Commissioner concluded that the application constituted large-scale development and accordingly did not fall within paragraph 25.5 of the Plan. The Commissioner concluded that paragraph 25.4 of the Plan did not establish a need test for large-scale commercial development at Nutts Corner and further accepted that it did not have to be established that an alternative site for the appeal proposal was not available in Antrim town. He concluded, however, that the encouragement in paragraph 25.4 to locate large-scale commercial and industrial uses in Antrim made the availability of land in Antrim for large-scale development a material consideration. He concluded that there were a number of sites capable of accommodating a large-scale storage and distribution use in Antrim and that the Plan did not lend support to the proposal. He further considered Draft PPS 4 in relation to storage and distribution uses and concluded that he should give it weight as a material consideration. He found that the appeal site was contrary to the relevant policies in Draft PPS 4 for the location of storage and distribution uses in the countryside. He further concluded that the Nutts Corner area did not constitute a settlement and rejected the application on 2 further amenity grounds.

Consideration

[7] The applicant contended that the Department conceded at the appeal that the scale of the development was not material to the determination of the application. Affidavits have been lodged disputing this concession by the Department and there was no application by either party to cross examine. It was accepted that any concession by the Department could not, of course, bind the Commissioner. I accept that correspondence from the applicant demonstrates that prior to the second day of the hearing the applicant believed that the Department had made the concession. Although the applicant contends that it would have presented the case in a different way if the concession had not been made I have not been able to determine any respect in which the applicant's presentation would have differed. In those circumstances I do not consider that the issue of the concession is material to the outcome of this judicial review.

[8] The applicant contends that the Commissioner has erred in his approach to the weighting of the Antrim Area Plan and the PSRNI. This issue was considered by the Commission in the Erwin decision issued on 20 March 2007. The site in question adjoined the applicant's site and lay within the

Green Belt. The proposal was for a small-scale commercial development in a vacant building. The Commission considered that the specific locational policy at paragraph 25.4 of the Plan outweighed the Green Belt policies. The Commission reached this conclusion by interpreting the implementation provisions within the PSRNI which referred to the fact that its proposals and policies would be tailored to the specific circumstances and particular needs of each area. Since the policy in paragraph 25.4 of the Plan was a specific locational policy it must accordingly outweigh the Green Belt policy.

[9] Although the Commissioner has referred to the Erwin decision in his affidavit I do not consider that he has explained within the affidavit why it is that the facts of this appeal should lead to a different approach to the policy issues. This issue, of course, only arises in relation to options one and two since these are the only options within the Green Belt. The success of the argument also depends on the applicant being able to draw support from the policies within paragraph 25 of the Plan.

[10] That issue arose directly, of course, in relation to the consideration of option three and requires an analysis of the policies contained within paragraph 25. Paragraph 25.5 clearly gives positive support to small-scale commercial and industrial activities in existing buildings or on derelict sites. It is easy to see why such a specific locational policy should outweigh a general rural policy. Large-scale commercial and industrial uses are dealt with in paragraph 25.4. Such uses are encouraged to locate within Antrim. Although there is no express prohibition on the location of such uses at Nutts Corner I accept that the Commissioner was correct to conclude that the availability of fully serviced sites for such use in Antrim is a material consideration arguing against the location of such uses in Nutts Corner. I am aware that the Commission expressed the view in the Lidl decision issued by it on 11 March 1998 that there was no contra-presumption against large-scale development in this area. If this means that there is no needs test or alternative site test I accept the statement as correct. Such a test would present a considerable barrier to development even if there were other policies in favour of it. I consider, however, that the words of the policy clearly encourage such developments to be located in Antrim and it accordingly requires some countervailing consideration to justify development at this location. In the 1998 application that was readily found in the planning history demonstrating that the site had a historic permission for a Fire Brigade centre.

[11] I consider, therefore, that in relation to options one and two the Commissioner was correct to conclude that the policies in the Antrim Area Plan, the PSRNI and the Draft PPS 4 were contrary to the proposal and that option three was properly considered in relation to the Plan and Draft PPS 4. The Applicant advanced further arguments in relation to the application of the Regional Development Strategy and the contention that the Nutts Corner

area was a settlement. I consider that the Commissioner has set out the position in relation to those matters in his decision and I do not need to comment further.

[12] The remaining matter in contention at the hearing concerned Draft PPS 21 Sustainable Development in the Countryside. This policy was published in November 2008 after the dates of the two hearings but before the promulgation of the decision on 12 January 2009. The Draft PPS itself states that its policies should be accorded substantial weight in the determination of any application received after 16 March 2006. The subject application was submitted to the Department on 18 September 2003. It appears, however, that the Commission has in other cases accorded weight to Draft PPS 21 in respect of applications received prior to 16 March 2006. Although it was contended on behalf of the Commission that Draft PPS 21 would only be relevant where the Department contended that it was I accept the applicant's submission that it is for the Commission to determine the materiality and weight of planning considerations and that its judgment in relation to weight could only be challenged on strict *Wednesbury* grounds unless the ECHR required a proportionality approach. For perhaps understandable reasons no consideration was given to Draft PPS 21 and I consider that the applicant's challenge on that basis is made out. Accordingly I quash the determination made on 12 January 2009 and remit the matter to the Commission for determination according to law.