Judicial Review – challenge to decision of PAC refusing planning permission – prematurity – whether decision contrary to Department's Planning Policy – whether procedural unfairness

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(subject to editorial corrections)

2004 No. 93

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY THE LOGAN RODGERS PARTNERSHIP FOR JUDICIAL REVIEW

AND

IN THE MATTER OF A DECISION BY THE PLANNING APPEALS COMMISSION DATED 24 MARCH 2004

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GIRVAN J

[1] In this application the Logan Rodgers Partnership seeks judicial review of a decision of the Planning Appeals Commission ("the PAC") given on 24 March 2004 dismissing an appeal against the non-determination by the Department of the Environment ("the Department") of an application for planning permission for a residential development (including a site for primary school and neighbour centre) on lands to the west of Shore Road, Ballyhalbert, Co.Down ("the subject site").

The planning application

[2] The applicant submitted the planning application for outline planning for housing on the subject site on 22 December 2000. The applicant was required to submit an environmental statement which was submitted on 31 January 2003. This indicated that the application had been amended to include additional proposals for a primary school and neighbour centre. The

application was subsequently validated on 3 April 2003. A number of objections were received. Although it was an outline planning permission the plans indicated a development of some 200 houses on the site and the appeal proceeded on the basis that the application was for a development of that magnitude.

[3] The appeal site is a flat irregular shaped site measuring some 13 hectors. A significant section of the site takes in an existing caravan park that occupies part of a former air-strip. To the south of the site construction work is being carried on on an extension to residential development and this has planning permission for some 28 dwellings. There is a further area used for caravans to the west. To the north and north-west of the site is an area of land which is currently being developed for residential purposes pursuant to an existing planning permission granted in October 2000.

[4] The Department failed to give a decision in respect of the applicant's planning application and the applicant appealed in default of a decision on 7 August 2003 pursuant to Article 33 of the Planning (Northern Ireland) Order 1991. Such an appeal proceeds as if the Department has refused the planning permission sought by the applicant.

The Department's objections to the application before the PAC

[5] In line with standard practice the Department submitted to the PAC its view on why the application should be refused. The reason for objections were stated in the following terms:

> **"1. The proposed development is refused on the grounds of prematurity as the Ards and Down Area Plan 2015 has reached an advanced statutory stage of preparation and the cumulative effect of an approval for this proposal, in conjunction with that for other applications for housing developments in the proposed Green Belts in the Plan Area, would be prejudicial to the objectives of the Regional Development Strategy in relation to the designation of the Belfast Metropolitan Green Belt and contrary to Strategic Planning Guidelines RNI 51 and ENV 14.**
> **2. The proposed development is refused on the grounds of prematurity under Planning Policy Statement 1 'General Principles', as the Ards and Down Area Plan 2015 has reached an advanced statutory stage of preparation and the effect of an approval for this proposal, in the proposed Green Belt in the Plan Area, would prejudice the outcome of the planning process by predetermining decisions about the scale and**

location of new development which ought probably *(sic)* to be taken in the development plan process.

3. The proposed development is refused as it would be prejudicial to the emerging policies and proposals contained in the draft Ards and Down Area Plan 2015 in that the site lies within an area proposed to be designated as a Green Belt. The proposal would be contrary to Green Belt policies SP12 and GB/CPA1 contained within the Planning Strategy for Rural Northern Ireland.

4. The proposal is contrary to Policy QD1 of the Department's Planning Policy Statement 7: Quality Residential Environments in that it has not been demonstrated through the submitted Design Concept Statement that the development would create a quality and sustainable residential environment and fails to meet the requirements of criteria (a) of QD1 in that the layout is inappropriate to the character of the site and surrounding area.

5. The proposal is contrary to Policy DES 2 of the Department's Planning Strategy for Rural Northern Ireland in that the development would, if permitted, be detrimental to the character of the surrounding area by reason of its inappropriate land use and its scale and layout, which is unsuitable for this rural settlement and will adversely alter the character of the area.

6. The proposed development would, if approved, prejudice the safety and convenience of road users since a 2.0m wide foot-way link from the development, located along Shore Road, connecting with the conjunction of High Street–Victoria Road is required and cannot be provided with the applicant's holding.

7. The proposed development would, if approved, prejudice the safety and convenience of road users since a right turn facility cannot be provided to the required standard.

8. The proposed development would, if approved, prejudice the safety and convenience of road users since it would cause an unacceptable increase in traffic at the junction of Shore Road and High Street-Victoria Road.

The word "probably" in paragraph 2 of the reasons would appear to be a typographical area and should read "properly", reflecting the wording of paragraph 46 of PPS1 (see para [17] infra).

[6] The subject site lies within the area covered by the North Down and Ards Area Plan 1984-1995 ("the North Down Plan"). The site lies within the

boundary of the area around Ballyhalbert designated as being within the development limits of the village. The Department was, however, reviewing the North Down Plan and had come forward with a draft area plan, the draft Ards and Down Plan 2015 ("the Draft Plan"). Under the Draft Plan the subject site is shown as being outwith the development limits of Ballyhalbert and within the Green Belt. The Draft Plan was published in December 2002. The Draft Plan, the Department contended, had been prepared in the context of the Regional Development Strategy for Northern Ireland 2025 ("the Regional Development Strategy"). The Regional Development Strategy made clear that the strategy may take precedence over existing development plans and the weight to be attached to it was a matter of judgment.

[7] The Regional Development Strategy allocated 7,750 housing units as an appropriate housing growth indicator for the period 1998 to 2015 for the Ards Borough Council area. It was the task of the area plan to distribute the growth within the district in accordance with the strategic policy guidance in the Regional Development Strategy. The Draft Plan originally determined that 150 housing units would be allocated to Ballyhalbert for the period 1998 to 2015. However, it had to allow for an over provision of houses there to take account of the existing planning permissions given in the context of the North Down Plan but no such commitment existed in relation to the subject site. The number of units estimated within the existing development limits was 493, well beyond the figure of 150. An additional 200 houses on the subject site would exacerbate the situation. The Department contended that approval of the appeal site would potentially lead to the release of the rest of the caravan site for further housing development. That land, together with the subject site, would yield up to 700 additional houses. Approval of the appeal site would create a precedent for other settlement limits in the Draft Plan area. 43 parcels totalling 224.61 hectors were previously included in the development limits of 15 out of the 16 towns and villages in the Ards Borough Council area and had been excluded in the Draft Plan. The potential housing yield of those lands was between 2967 and 3726 dwellings.

[8] The Department contended that the Draft Plan allocated a substantial number of dwellings to the main and large towns of Newtownards and Comber in line with the Strategic Guidelines contained in the Regional Development Strategy. An excessive amount of development in the villages and smaller settlements would undermine the ability of the Draft Plan to release additional Phase 2 development lands in the main towns and undermine the functions of the review of the area plan. The programme gave rise to strategic policy issues which would only be properly considered within the context of the development plan process. The proposal should not be considered in isolation from the strategic issues relating to the distribution between and within settlements of the housing growth indicator for the Ards district and the designation and extent of the Green Belt and countryside policy area. The cumulative effect of allowing the appeal in conjunction with

the precedent effect for other similar proposals would undermine the plan process when it would allow a wider debate of housing allocation at the public enquiry. It was inappropriate to discuss strategic issues affecting the plan area at a planning appeal and in the absence of interested parties.

[9] The Department accepted that there was no other place within the plan area where there was a large airfield with a caravan park within the settlement limits which had the potential for year-round occupancy. It contended, however, that the fact that the appeal site had some unique characteristics did not override the weight to be attached to the reasons for refusal.

[10] The retention of the site in undeveloped form would assist in safeguarding the countryside, aid the concentration of development within existing built-up areas and on previously developed areas, and contribute to urban regeneration by re-directing houses to towns. Designation of most of the appeal site as Belfast Metropolitan Area Green Belt meant that the site was contrary to strategic aims of policy SP12 and GB-CPA1 in the Planning Strategy for Rural Northern Ireland.

The applicant's case before the PAC

[11] The applicant indicated that there were about 150 static caravans and ancillary facilities on the site. The Department had conceded that there was no limit to the period that they could be occupied. They could be permanent in the same way as a house was occupied. "Park Homes" development was occurring elsewhere on the site. "Park Homes" qualifying as caravans but being permanent and in may ways little different from small bungalows. There was approval for 1100 caravans on the whole area of the old airbase.

[12] In resisting the prematurity argument put forward by the Department the applicant contended that the application was submitted in 2000. There had been considerable slippage in the enquiry stage of the Draft Plan. The PAC itself in a recent appeal at Dundrum set out clearly the weight to be given to Green Belt prematurity objections. The Department was wrong to argue that the North Down Plan had no weight because it was superseded by the Regional Development Strategy. The Draft Plan indicated that the North Down Plan would remain a material consideration until superseded by a newly adopted plan. The Regional Development Strategy did not say that it superseded all or any of the pre-existing area plans nor was it intended to be an interim replacement area plan. The Belfast Metropolitan Area Green Belt was not regional development strategy policy and its boundaries and scale were an area plan matter. The proposed Ards Peninsula Green Belt had been the subject of considerable objection and there was no certainty that the boundaries would remain as proposed. It would not be right to consider the subject site as a green field site. The best that the Department could hope was

that the caravans would go away and runways would dug up. In reality mobile caravans sites of the type would increasingly attract permanent residence because they offer cheap accommodation in a pleasant location. It was wrong to argue that the Regional Development Strategy housing allocations must be rigidly imposed. The figures were not mandatory.

[13] The first two reasons for refusal did not suggest the proposal by itself was contrary to policy or premature but only as part of an accumulation of consensus. The characteristics of the appeal site were unique and would not create a precedent for the accumulation of other consensus. The caravan park sites at Millisle were smaller, were not previously on airfields, had holiday occupancy restrictions and were not surrounded by housing. No other sites in the Ards Council area had the combination of being within a settlement limited, being disused airfields, having a 1100 caravan consent with no limit of occupation, having housing development on three sites and a caravan site on the fourth and not affecting the urban edge defined in the North Down Plan. Ballyhalbert was identified as a village in the North Down Plan and in the Draft Plan. It was not an important settlement for the purposes of PPS1.

The relevant provisions of PPS1

[14] Planning Policy Statement 1 General Principles sets out the general principles that the Department observes in formulating planning policy, making development plans and exercising control of development and sets out the key themes that underline the Department's overall approach for planning across the whole range of land use topics.

[15] Paragraph 44 of PPS1 draws attention to the provisions of Article 25 of the 1991 Order which states that:

> "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."

[16] Paragraph 45 provides that:

> "The relevance of the development plan varies from application to application. A plan may not provide a clear guide to the determination of a particular application because, although it contains material policies, they pull in opposite directions. Moreover, plans cannot anticipate every possible development proposal that may be put forward during their life span and are often silent on issues raised by planning

applications. The number of years that have elapsed since the plan was adopted is not in itself important. Even after their stated end dates, plans continue to be a material consideration to the extent that their policies and proposals remain applicable to current circumstances. Regional strategies or policies published by the Department may take precedence over existing development plans, while developments that have taken place since the plan becomes operative may nullify some of its provisions."

[17] Paragraphs 46 – 48 set out the provisions relating to the concept of prematurity:

> "46. Where a plan is under preparation or review it may be justifiable, in some circumstances, to refuse planning permission on the grounds of prematurity. This may be appropriate in respect of the development proposals which are individually so substantial, or whose cumulative effect would be so significant that to grant permission would prejudice the outcome of the plan process by determining decisions about the scale, location or phasing of new development which ought properly to be taken in the development plan context. A proposal for development that has an impact on only a small area would rarely come into this category; but a refusal might be justifiable where a proposal would have a significant impact on an important settlement, or a substantial area, with an identifiable character. Where there is a phasing policy in the development plan, it may be necessary to refuse planning permission on grounds of prematurity if the policy is to have effect.
> 47. Other than in the circumstances described in paragraph 46, refusal of planning permission on grounds of prematurity will not usually be justified. Planning applications will continue to be considered in the light of current policies. However, account will also be taken of policies and emerging development plans that are going through the statutory procedures towards adoption. The weight to be attached to such policies depends upon the stage of planned preparation or review, increasing as successful stages are reached. For example:
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> - where a plan is at the preliminary proposal stage with no early prospect of reaching Draft Plan stage then refusal on prematurity grounds would

seldom be justified because of the lengthy delay which this would impose in determining the future use of the land in question;

- where a plan is at the draft stage but no objections have been lodged to relevant policies, then a considerable weight may be attached to those policies because of the strong possibility that they will be adopted and replace those in the existing plan. The converse may apply if there have been objections to relevant policies. However, much will depend on the nature of those objections and also whether there are representations in support of particular policies;

48. Where planning permission is refused on grounds of prematurity the Department will give clear reasons as to how the grant of permission for the development concerned would prejudice the outcome of the development plan process.

[18] Paragraph 50 provides that the Department's planning policy publications are material considerations and due regard will be paid to them. Emerging policies in the form of draft statements and strategies in the public domain, may also be regarded as material considerations, although less weight will be ascribed to them than to final publications. Paragraph 51 makes clear that the Department will base its decisions on planning applications on planning grounds alone.

The Commissioner's report

[19] Following the formal hearing before the Commissioner, Mr Scott, on 17 and 18 December 2003, the Commissioner furnished his report on 12 March 2004 setting out his recommendation that the appeal should be dismissed. He dealt in terms with the draft reasons for refusal put forward by the Department:

(a) In relation to the first draft reason (viz. that the proposal would be prejudicial to the objectives of the Regional Development Strategy in relation to the Belfast metropolitan area Green Belt and the strategic guidelines RN15.1 and ENV14) he concluded that the reason could not be sustained. The precise delineation of the Belfast Metropolitan Area Green Belt was an issue for consideration in area plans. It was far from clear that the extent of which the Ards Peninsula was included in the BMA Green Belt and the issue could be addressed at the area plan enquiry.
(b) He accepted the second reason (viz. prematurity and prejudice to the plan proposals) for reasons which will require greater analysis below.

(c) In relation to the third reason (viz. the proposal would be contrary to Green Belt policies SP12 and GB-CPA1) the Commissioner found the second sentence of the third reason to be unsustainable (that is the statement that the proposal would be contrary to Green Belt Policy SP12 and GB-CPA1 contained within the Planning Strategy for Rural Northern Ireland.
(d) In relation to the fourth reason (viz that the proposed layout was inappropriate to the character of the site and surrounding area) and the fifth reason (viz that it was inappropriate land use and unsuitable for a rural setting) he concluded that in view of his prematurity decision he did not need to consider those matters further. Had he not so concluded the detailed design matters of the development layout were capable of resolution and could be addressed through the reserve matters submission.
(e) In relation to the remaining reasons (which related to footway/road safety issues) the Commissioner rejected those reasons for reasons which it is not necessary to consider further in this application.

The Commissioner's reasoning on the issue of prematurity

[20] The Commissioner concluded that although the wording in the second reason made reference to the subject site's location within a proposed Green Belt, the wording of the remainder of the reasons and the Department's evidence focused on the issue of prematurity and prejudice to the Draft Plan if planning permission were granted. The Commissioner accepted that paragraphs 46 and 47 of PPS1 were central to the determination of the issue.

[21] The Commissioner noted that the appeal proposal was likely to involve around 200 houses. While that might not be significant in the context of the overall plan represented 2.6% of the 7,750 houses allocated to the Ards Borough Council area for the period for 2015, it would have a precedent effect in respect of the adjoining land within the existing settlement limits (land which was now proposed to be excluded from the development boundaries under the Draft Plan). That could add another 400-500 houses and a percentage proportion of the housing provision would rise from between 7.7% to 9% which the Commissioner did not consider to be insignificant. In addition the Department contended that a favourable decision here would raise the issue of precedent in respect of sites beyond Ballyhalbert. 43 parcels totalling 224.61 hectors previously included in development limits in 15 of the towns and settlements in the Ards area were affected. While not all this land would be suitable of housing development the appellant did not question the Department's figures (2967–3726 additional dwellings). Existing permissions added 1123 housing units to the HGI. All this would result in over-zoning of some 14.49%.

[22] The Commissioner in paragraphs 7.8 and 7.9 of his report stated:

> "7.8 I do not find convincing the appellant's argument that the appeal site has such unique characteristics (para5.18) that it can be distinguished from the 43 parcels of land identified by the Department. These parcels of land are spread over 15 different settlements in Ards Borough and in each case they are, like the appeal site, within settlement limits in (the North Down Plan) and outside them in the (Draft Plan). While there are a limited number of disused airstrips in the district the appeal site continues to be actively used as a caravan site….. The High Court judgment on the adjacent Park Homes Development has issued since the appeal hearing and has determined that some of the structures fall within the definition of a caravan. Notwithstanding this I consider that these structures cannot be necessarily equated with the type of permanent accommodation envisaged in the appeal proposal. There is as the appellant acknowledged no natural definition of the western boundary of the appeal site and it is difficult to see how it could be distinguished from the rest of the caravan park in terms of the use of land and its relationship to the form of the village. The Draft Plan puts the site outside a settlement limit, something that is not unique for caravans parks in the overall plan area (there are various examples around Millisle and Newcastle) as I find that there is nothing to distinguish between the appeal site from other sites currently within the development limits of the North Down Plan I conclude that the cumulative effect arising from its approval would constrain consideration of the various objections relating to the housing strategy and consequently would prejudice the outcome of the plan process by pre-judging decisions about the scale , location and phasing of housing land, one of the critical tests outlined in paragraph 46 of PPS1.
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> 7.9 Ballyhalbert is identified as a village settlement in the existing and successor plans and does not therefore appear to fall within the paragraph 46 definition of an important settlement. However, the circumstances outlined in paragraph 46 are not exclusive and the objectors argue that Ballyhalbert was, as described in the North Down area plan, a small seaside village and that the scale of the proposal would harm its character.

> Significantly Ards Borough Council who were not represented at the appeal also objected on this basis and their arguments are not known. There are five objections to the development limit for Ballyhalbert and three seeking inclusion of additional lands. The PAC has no information on the detail of those objections or of the some 130 objections to the overall housing strategy in the development plan, including some that there is insufficient land within a number of settlements. I consider that, in this context it would be premature to allow the appeal as it would prejudice or pre-judge the outcome of the area plan process as far as the overall extent and location of development in Ballyhalbert itself is concerned. I further conclude that the settlement strategy of the plan, which seeks to work through the implications of the RDS, will be prejudiced by the knock-on impact that approval of this site could have."

[23] The Commissioner considered a number of other appeal decisions (at Ballygowan, Cloughey, Dundrum and Portavogie) where planning permission was granted but concluded that they did not create a precedent which could equally be applied to the applicant's appeal and he concluded that there was no issue of administrative fairness with the proposal.

[24] The Commissioner concluded that the Department' second draft reason had been sustained and it was for that reason that he recommended that the appeal should be dismissed.

The PAC decision

[25] On 24 March 2004 the PAC dismissed the appeal having considered the report by the Commissioner, Mr Scott. The PAC accepted his assessment of the issues and his recommendation. In a section of his decision entitled "Reasoning" the PAC stated that they fully endorsed the appointed Commissioner's reasoning.

[26] The PAC in paragraph 2 of its reasoning stated:

> "Planning policy in respect of prematurity is set out in paragraphs 46 - 48 of Planning Policy Statement 1 (PPSI) General Principles. In essence these paragraphs provide a general guidance on the approach to be taken to the issue of prematurity rather than a set of rigid rules. The circumstances set out in paragraph 46 – whether the proposal would be substantial or have a cumulative effect which would prejudice the outcome of the plan

> process – represent the usual (but not exhaustive) circumstances which would justify a refusal for planning permission on grounds of prematurity. Given this, the Commission accepts the appointed Commissioner's conclusions that not only would the proposal prejudice the outcome of the planned process given the potential cumulative effect of approval on the housing strategy of the Draft Plan but also in terms of pre-judging the outcome of the planned process in respect of Ballyhalbert village, notwithstanding that, in terms of paragraph 46, it could not be regarded as 'an important settlement'.

The PAC went on to conclude that the appeal proposal was clearly distinguishable from the number of other appeal decisions raised during the course of the hearing.

The applicant's challenge to the PAC's decision

[27] Mr Shaw QC argued that a proper and lawful determination by the decision maker involved a proper analysis of the material planning policy to ascertain the requirements of the policy; an assessment of the evidence in the light of the policy requirements; and an articulation with clear reasons as to how planning permission would prejudice the outcome of the development plan process. Paragraph 46 of PPS1 described the circumstances where refusal of permission on the grounds of prematurity would usually be justified. The proposals of an applicant must be individually so substantial or have a cumulative effect with other proposals which would be so significant that to grant planning permission would prejudice the outcome of the development plan process by pre-determining certain decisions which ought to be taken in the development plan at context. If the proposal has an impact on only a small area then it would rarely be found prejudicial to the development plan process. By contrast a significant impact on either an important settlement or a substantial area (each with an identifiable character) might be justifiably refused on the basis of prejudice to the development plan process. Paragraph 47 makes clear that the circumstances described in paragraph 46 are the situations were refusal on the ground of prematurity may be justified. Otherwise refusal will not usually be justified on this basis. Planning applications are to be considered in the light of current planning proposals. The weight to be afforded emerging development plans depends on the stage reached. Paragraph 48 imposes the requirement to give clear reasons as to how the grant of planning permission would prejudice the outcome of the development plan.

[28] Mr Shaw QC stressed that the current statutory plan was the North Down Plan which remained in force until replaced and the proposed development was in accordance with the terms of that plan.

[29] Counsel argued that the analysis in this case had neither been rigorous nor correct. The PAC acted inconsistently in finding that the application was not a precedent for Green Belt policy within the Draft Plan but could be a precedent for housing policy. He argued that the decision was inconsistent with earlier decisions made by the PAC on issues of prematurity. He argued that the assessment of the materials before the Commissioner was flawed. The evidence did not justify the conclusion that there was "Nothing to distinguish the appeal site from other sites currently within the development limits of the North Down Plan". It was contended that the site was readily distinguishable from other sites but the PAC failed to take into account a material consideration, namely the effect of the fall-back position that permitted a large number of permanently occupied Park Homes on the appeal site within the development limits of Ballyhalbert.

[30] It was contended that the reasoning of the Commissioner was unsatisfactory. He appeared to accept the view that on its own the scheme was not so substantial as to spoil the development plan but he went on to consider cumulative effect considering development within Ballyhalbert and the effect on development beyond Ballyhalbert. He appears to have concluded that the scheme would have a precedent effect on adjoining land adding another 400-500 dwellings but stopped short of stating that conclusion. Beyond Ballyhalbert he accumulated the scheme with 43 other parcels of land spread around the plan area. Counsel condemned as unsustainable the Commissioner's conclusions that the cumulative effect would prejudice the development plan by pre-judging decisions about scale, location and planning of housing, He had insufficient information to reach the conclusion which he did. The 43 parcels were spread around 15 towns and village settlements. The Department conceded that not all were suitable for development. Some of the parcels were the subject of some of the 130 objections received. There was a paucity of data to lead to the conclusion that there was nothing to distinguish the 43 parcels from the subject site. So this was all the more surprising, it was argued, when it was recalled that the Department conceded that the appeal site had unique characteristics (being a large airfield with a caravan site with potential for all year round occupancy). The applicant had argued for nine distinguishing features about the appeal site and the Commissioner had failed to address these. He had himself found site specific considerations which allowed him to distinguish the appeal site from some of the 43 sites which replaced in Green Belt by the Draft Plan.

[31] The applicant contends that the Commissioner appeared to accept that Ballyhalbert was not an important settlement and it was not a substantial area with an identifiable character. He considered that the circumstances in paragraph 46 were not exclusive and concluded that the extent and location of development in Ballyhalbert would be prejudiced by allowing the appeal in the context of Ballyhalbert being viewed by objectors as a small seaside

village which would be harmed by the scheme. Mr Shaw QC argued that PAC was not in a position to assess what, if any, impact a planning permission here would have on the settlement strategy of the Draft Plan.

[32] The applicant criticised the PAC for failing to afford the parties any opportunity to comment on the relevance of the decision of Weatherup J in 57 Developments Ltd v Department of Environment which issued after the appeal hearing closed and which formed a material consideration in the PAC's decision. The Commissioner in his report made the equivocal assertion that the Park Homes structures cannot be necessarily be equated with the type of permanent accommodation envisaged in the appeal procedure. The parties should have been afforded an opportunity to comment on the judgement. Allowing the proposal could have reduced the impact of development on the site and housing allocation for the area. The applicant would have agreed to abide by a condition restricting the application for development on the adjourning lands until the area plan was adopted. On the question of whether the PAC could have imposed conditions to prevent development of adjacent land by the applicant PPS1 makes clear that the Department has a power to attach conditions to the grant of a planning permission to enable it to approve of development proposals where it would otherwise be necessary to refuse planning permission. The policy made clear that the power to impose conditions reposed with the Department and where the Department had defaulted in giving a decision it was a matter for the PAC on an appeal from a deemed refusal. It was contended that the PAC has a positive duty to consider and apply (and at the very least to raise with the parties) the enabling policy behind the conditions and provisions in the policy statements when relevant. The PAC failed to consider the policy provisions of paragraph 62 - 65 of PPS1 relating to Article 40 agreements. Article 40 expressly empowers the Department to enter into an agreement with any person who has an estate in land for the purpose of facilitating, regulating or restricting the development or use of land.

[33] Turning to the timing of the area plan proposals Mr Shaw QC said that before rejecting an otherwise apparently proper application for planning permission on the ground of prematurity the decision maker would have to have regard to the timescale within which the new proposals were likely to come to finality. An unjustifiable refusal on the grounds of prematurity could sterilise land for an inappropriately long period. When judged at the date of the decision on 24 March the outcome of the new area plan was an ever-receding event and the outcome or adoption would be complicated and delayed by the introduction of environmental assessment of Plans and Programmes and Regulations (Northern Ireland) 2004 giving effect to Directive 2001-142-EC. As at March 2004 the proposed start date for the public enquiry in October 2004 was in serious doubt and each missed deadline postponed the outcome of the development plan process. It was evident in March 2004 that the arrival of the Regulations made the question of

the timing of the new proposals less certain and impacted on the question of the likelihood of acceptance of the proposals.

The proper approach to PPS1

[34] In Re Lisburn Development Consortium's Application [2000] NIJB 91 Kerr J as he then was set out guidance on the proper approach to PPS1 in the context of decisions relating to prematurity:

(a) PPS1 paragraph 46 et seq are not designed be prescriptive of the circumstances in which planning permission must be refused nor are they exhaustive of all the circumstances in which planning permission may be refused.
(b) The court should not parse too closely the wording of a particular paragraph of a planning policy statement in an effort to discover whether a planning decision falls four-square within it. The purpose of such a statement is to provide general guidance. It is not designed to present a set of immutable rules.
(c) The decision maker must make an evaluation of the impact which the development could have on the planning process by pre-judging its outcome. The way in which such prejudice would be manifest is outlined in the succeeding part of paragraph 46. It is by the grant of planning permission having the effect of pre-determining decisions on scale etc, which are properly a matter for decision in the area plan context, usually in the course of a public area plan enquiry where the matter can be considered as a whole.
(d) It is contemplated that refusal of planning permission on the ground of prematurity will usually *but not always* be confined to the circumstance as outlined in paragraph 46.
(e) The stage which the plan has reached will obviously be important in deciding whether to refuse on this ground.
(f) The development plan is something to which the planning authority has to have regard along with other material considerations. The weight to be attached to it is a matter for the judgment of the planning authority. The decision maker is at liberty to depart from the development plan if material considerations indicate otherwise. (City of Edinburgh Counsel v Secretary of State for Scotland [1998] 1 All ER 174). This applies equally to the decision makers' approach to the planning policy statements. The appointed member and the PAC are not confined in their consideration of whether the application should be refused on the grounds of prematurity to an assessment of the precise correspondence of the circumstances affecting the application within the terms of paragraph 46.
(g) The appointed member and the PAC have a margin of discretion to conclude that the cumulative effect of a proposal as such is to prejudice the outcome of the plan process by determining decisions about the scale and effect of the development within the context of the proposals.

[35] In City of Edinburgh Council v Secretary of State for Scotland [1998] 1 All ER 174 Lord Clyde at 186 stated certain principles of relevance in the present content:

> "(The planning decision maker's) decision would be open to challenge if he fails to have a regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some consideration pointing in the opposite direction. He will require to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the applicant and to which he should have regard. He will then have to note which of them support the application and which of them do not and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations to such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it and having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse."

Later at 190 Lord Clyde went on to state:

> "Counsel for the respondents sought to criticise the quality of the evidence on which the reporter had relied. But it was not suggested that there was no evidence before the reporter which could entitle him to discount such other explanations and to hold that there was an expenditure surplus which pointed to a quantitive deficiency. Whether the evidence did or did not so point was a matter wholly for him to determine. Provided that the evidence was there it was for him to assess it and draw his own conclusions from it. It has not part of the

> function of a reviewing court to re-examine the factual conclusions which he drew from the evidence in the absence of any suggestion that he acted improperly or irrationally. Nor is it the duty of a reviewing court to engage in a detailed analytic study of the precise words and phrases which have been used. That kind of exercise is quite inappropriate to an understanding of a planning decision."

The Commission's decision

[36] The rationale lying behind a refusal on grounds of prematurity is that if planning permission were granted to a proposal it would prejudice the outcome of a planning process by pre-determining issues related to scale location or phasing of new development which ought properly to be taken in the development plan context. If a proposal has merely a small incidental impact then the risk of prejudicing the outcome of the development plan enquiry does not arise. If however a planning permission has a wider impact (for example by substantially affecting an important settlement or a substantial area with and identifiable character) then the risk of prejudice will be much greater and a refusal on that ground may be justified. The temporal issue of the timing of the new development plans is clearly a relevant factor because if the plan is at a very early stage the plan may take a very long time to come to finality and the proposals may change or develop or be dropped with the passage of time. Refusal in the meantime could sterilise development land which would not be in the interests of land management and proper planning. The earlier the stage of the development the less certain the final form of the proposals will be. The decision maker is bound to have regard to the timescale of events in relation to the development proposal which would be a material consideration. In this case the PAC clearly proceeded on the basis that the emerging development plans were at a sufficiently advanced stage to trigger the prematurity issue. In the hearing before the Commissioner the Department stated that the PAC had been invited to fix a date for the Draft Plan enquiry and the planning service would seek to adopt the plan within six to nine months of the PAC report. The Department argued that the five to six year adoption period suggested by the applicant was excessive. The applicant argued that by February 2004 the planning service had indicated that due to a change of circumstances the Department's rebuttal statements would not be available until May 2004. At a pre-enquiry meeting on 18 March 2004 counsel for the Department said that there could be no absolute guarantee that all rebuttals would be available by 11 May 2004. Commissioner Rue stressed that the PAC relied on the Department's co-operation and that the programme would grind to a halt if deadlines were not met. At the time of the appeal hearing and the appeal decision by the PAC had timetabled resources for a public enquiry hearing starting in October 2004. Since the decision the hearing has been postponed

to May 2005 but that occurred after the decision. As at the time of the impugned decision it cannot be said that the decision makers acted unreasonably or unlawfully in concluding that the stage reached in relation to the Draft Plan was sufficiently advanced that there was a live issue as to prematurity.

[37] Bearing in mind the margin of appreciation vested in the PAC within paragraph 46 et seq (as explained by Kerr J is Lisburn Development Consortium's Application) the conclusion by the PAC that the planning permission should be refused on the grounds of prematurity cannot be characterised as Wednesbury unreasonable nor can it be said that the PAC took into account irrelevant considerations or left out of account relevant considerations. The PAC recognise that taken on its own the proposal might not appear objectionable but concluded that it could not be viewed in isolation from its cumulative effect taken with other possible developments that could flow from the granting of remission in this case. In Ballyhalbert the grant of permission of the subject site could open the door to the grant of permission for a further 400-500 dwellings on the land behind. Thus the application, if granted, at Ballyhalbert could lead to considerable additional development there which, taken with pre-existing planning permissions, could result in the over provision of housing units in the Ards Borough Council area. Apart from the impact at Ballyhalbert itself the effect on other lands to be protected from house building under the Draft Plan would lead to constraining considerations of objections to housing strategy and could lead to a pre-judging of decisions about scale location and planning which would properly be considered at the draft planning enquiry stage. In Re Lisburn Development Consortiums Application at p99 in the context of considering objections under paragraph 47 of PPS1 the court concluded that the appointed member is not required to conduct a searching enquiry into the objections in order to assess their weight. To carry out an investigation of that kind properly would require the involvement of the objectives and effectively necessitate carrying out the sort of exercise which is to be carried out at the enquiry. Similar considerations apply in the present context. The PAC took account of the potential impact of the granting of permission for this type and size of development and on the wider area in the context whether it could prejudice the outcome of the enquiry which is the proper place to focus on the detail of such issues relating to the various sites and locations in the area. The approach adopted by the PAC was legally permissible in the circumstances - bearing in mind that in a planning application where an issue of prematurity arises the PAC must perforce approach the question in a more broad-brush way than would be the case in a long running and detailed enquiry. A prematurity decision must focus on the questions of whether and to what extent it was appropriate and fair to hold the fort in the meantime. I am not persuaded that the PAC's approach was flawed.

[38] Mr Shaw QC contended that the decision was internally flawed in logic since the PAC rejected the objections in reasons one and three and concluded that the proposed development would not prejudice the outcome of the planning process in terms of Green Belt considerations because of the sites of city features of the subject site. The decision does, however, distinguish between Green Belt considerations and housing strategy considerations and it cannot be said that the PAC conclusions on the second ground of the Department's objections in terms of the impact on proposals on housing strategy is logically inconsistent with the conclusion in respect of the first and third grounds in terms of Green Belt issues. The PAC concluded that the appeal site did not have such unique characteristics that it could be distinguished from the 43 pieces of land identified by the respondent. The Commissioner, in paragraph 78 of his report, does go on to say that there is nothing to distinguish the subject site from other sites within development limits of the North Down area plan. This, however, should be read in the light of the opening sentence in paragraph 7.8 and be read in terms of housing strategy considerations rather than Green Belt considerations. The PAC concluded that the grant of planning permission would "constrain consideration of objections relating to housing strategy" and that represents a tenable viewpoint. Other decision makers dealing with other applications might conclude that the subject site had such unusual features that it might be possible in other cases to distinguish it as a meaningful precedent. The existence of a favourable decision on planning permission for the subject site, however, would call for an exercise in distinguishing the subject site from others which introduces a constraint which the PAC concluded was undesirable in the light of the approaching enquiry.

[39] In relation to the question whether the PAC should have granted a planning permission and imposed a condition on the applicant or required it to enter into an article 40 agreement with the Department it is clear that neither the applicant nor the Department put forward any such suggestions to the Commissioner or the PAC. The applicant contended that it could not know what was going on in the mind of the Commissioner or the PAC and therefore could not come forward with such proposals. It was clear, however, that it was a live issue at the appeal what impact the grant of planning permission on the subject site would have on the rest of the caravan site and there clearly was evidence and a debate relating to the potential number of houses that might be built on the rest of the caravan site. An applicant seeking planning permission should normally be expected to put forward the considerations which he seeks to have taken into account in favour of the application. An applicant may tactically decide to make no reference to such a suggested condition in the hope that he will be granted a non-conditional planning permission which would keep all his future options open. I do not consider that it has been shown that the Commissioner or the PAC acted unfairly or can be faulted in failing to come forward with a

proposed condition or requirement that the applicant enter into an Article 40 agreement.

[40] On the fall-back issue the applicant contended that as the existing permission for a caravan site carries with it the right to construct Park Homes this pointed inevitably to the granting of permission for housing at the subject site. The PAC concluded that Park Homes were not inevitably to be considered as equivalent to the type of permanent accommodation envisaged in the appeal proposal. Such a conclusion was a tenable one and it was open to the PAC to consider the applicant's proposal as giving rise to a housing development of a different order and nature. The applicant contended that it should have been given an opportunity to comment further after the decision by Weatherup J in the 57 Developments Case. However, that decision confirmed the stance already taken by the applicant at the appeal hearing (see paragraph 5.1 of the Commissioner's report). It would have been open to the applicant to seek to persuade the PAC to re-list the appeal to make representations in the light of the decision if the applicant wished to pursue such points. It did not do so. It cannot be said that the PAC breached its duty of fairness in failing to recall the parties to deal further with the issue.

[41] The Commissioner and the PAC did consider earlier decisions relevant to development and other potentially relevant locations. Its conclusion that those decisions were distinguishable could not be categorised as so untenable as to be unreasonable.

[42] In the result the applicant has failed to establish that the impugned decision should be quashed and the application is dismissed.