**Neutral Citation No. [2015] NIQB 20** | *Ref:* **OHA9569**

*Judgment: approved by the Court for handing down* | *Delivered:* **27/02/2015**
*(subject to editorial corrections)**

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

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

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**2013 No. 126032/01**

**Roberts' (Gregory) Application [2015] NIQB 20**

**IN THE MATTER OF AN APPLICATION BY GREGORY ROBERTS FOR JUDICIAL REVIEW**

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**O'HARA J**

[1] The applicant lives at Carnbane Road, Hillsborough, County Down. In this application he has challenged the grant of planning permission to the Cats Protection League ("CPL") on the immediately adjacent site. This permission dated 20 September 2013 is for the development of a Northern Ireland Headquarters for the CPL.

[2] Mr Scoffield QC appeared for the applicant with Mr M Maxwell. Mr P McLaughlin appeared for the respondent Planning Service. I am grateful to all counsel for their helpful and focused submissions.

**Background**

[3] The relevant site at 81 Carnbane Road is one for which planning permission was granted in 2001 for a veterinary centre. Some work was started which has kept the permission alive but the progress made has been very limited.

[4] In any event the CPL application was on a much greater scale entirely. The plans included three conference rooms, 15 toilets and a café as well as facilities for administration, for education and for treating and housing cats. The facility would be many times bigger than the one that was allowed in 2001. As a result the applicant was but one of many local objectors.

[5] Carnbane Road is a narrow rural road running directly off the dual carriageway between Sprucefield and Hillsborough. This location makes it easily

accessible because of the proximity of the M1 and the A1. However, despite the road network, the site in question is outside settlement limits and is in the countryside.

[6] The consideration by the Planning Services of the application was protracted and is marked by significantly different approaches having been taken by various officials. While the challenge is to the ultimate decision made in December 2013 on the recommendation of Mr O'Kane, the earlier approaches need to be taken into account, not least because on the applicant's case Mr O'Kane's approach is quite flawed and wrong. While the role of the court in judicial review is limited it is undoubtedly necessary to consider whether the officials properly interpreted and understood the policies by reference to which the application was considered.

[7] The CPL application was submitted in March 2011. The Department consulted with Roads Service which initially objected to the application in July 2011 but ultimately confirmed in May 2012 that it had no objections. That position was taken on the basis of the information it received about visit numbers and traffic movements. The applicant has raised contentions about that information which it will be necessary to return to.

[8] In any event on 28 May 2012 the relevant case officer, Ms Doak, recommended refusal of the application. She did so by reference to Planning Policy Statement 21 and specifically to Policy CTY1 entitled "Development in the Countryside". The points she made included the following:

(i) The CPL had advanced a case of need to justify the development, having outgrown its existing centre in Dundonald, County Down.

(ii) The area was not "semi-rural" as described by CPL but "extremely rural".

(iii) None of the reasons advanced by CPL was site specific to Carnbane Road i.e. why the centre was needed at this location and how the centre would meet a local community need.

(iv) The 2001 approval was small scale compared to this application.

[9] That recommendation by Ms Doak was accepted by the Development Control Group. However a change of opinion took place on 20 July 2012 when the group reconsidered the application and concluded:

> "The application was originally considered against CTY1 and while it was accepted that it was a 'necessary community facility' our opinion was that it did not meet or serve the local rural population. The Department now accepts that the proposal does meet a regional need, due to the use it requires a rural

> context with access to good road links. The site is acceptable in all other respects.
>
> NB. New info provided relating to strategic nature of the proposal."

[10] In fact, contrary to this note, there is nothing in the earlier decision which supports the assertion that the centre was accepted as a "necessary community facility". Apart from that, CTY1 refers to "a necessary community facility to serve the local rural population", not a facility to serve all or most of Northern Ireland.

[11] The reference in the change of opinion to "new info provided …" is to some information provided by the agents for the CPL at meetings and in writing. It is to be noted that the reversal of the previous decision made in May 2012 was without any reference back to the objectors for their observations or comments.

[12] At this stage therefore there were two different interpretations and applications of CTY1, one in May 2012 and the other July 2012, leading to quite different outcomes. In this context the following introductory paragraphs of CTY1 are significant:

> "There are a range of types of development which in principle are considered to be acceptable in the countryside and that will contribute to the aims of sustainable development. Details of these are set out below.
>
> Other types of development will only be permitted where there are overriding reasons why that development is essential and could not be located in a settlement or it is otherwise allocated for development in a development plan.
>
> All proposals for development in the countryside must be cited and designed to integrate sympathetically with their surroundings and to meet other planning and environmental considerations including those for drainage, access and road safety. Access arrangements must be in accordance with the Department's published guidance. …"

Those paragraphs are followed by two lists of acceptable developments, one list for housing and the other for non-residential. One of the cases under the latter heading is the one referred to above i.e. "a necessary community facility to serve the local rural population". If the subject application by the CPL does not fall within that description, which it clearly does not, then on the reasoning applied at that point

permission could only be granted where "there are over overriding reasons why that development is essential and could not be located in a settlement".

[13] In March 2013, as the exchanges continued between the objectors, the Planning Service, the CPL and others there was a further reconsideration of the proposal by Mr Watson. This confirmed that the proposal should be approved and continued to do so by reference to CTY1. In this analysis Mr Watson reasoned as follows:

(i) There is a need in Northern Ireland for the type of facility proposed by the CPL.

(ii) The facility is a necessary community facility but not one which serves a local rural population (i.e. it serves the whole of Northern Ireland, not this part of County Down).

(iii) A site which meets the needs of the CPL is "**acceptable** in the rural location" – (though he did not answer his own question which was whether it **requires** a rural location).

(iv) The scale of the development is such that it does not satisfy the criteria of serving the local rural population.

(v) Notwithstanding this, the location with its road links and proximity to Belfast and Lisburn is the "right location" for this development.

(vi) There is an existing approval for a smaller development on the site.

(vii) The proposal is acceptable in terms of integration, prominence, ribboning and the character of the area.

[14] This reconsideration of the application against CTY1 in Policy Planning Statement 21 clearly accepted that the proposal did not fit within any of the identified categories of non-residential development. On the face of it therefore the policy required "overriding reasons why that development is essential and could not be located in a settlement …". Detailed as the analysis by Mr Watson was, it did not answer or even address that issue.

[15] In light of continuing representations a further reconsideration was undertaken in September 2013 by Mr O'Kane, a Principal Planning Officer within the Department. The respondent relies on this as the basis for the grant of planning permission – it supersedes the earlier three analyses of May 2012, July 2012 and March 2013. Mr O'Kane's approach is markedly different from those earlier ones. He expanded on it in his affidavit in these proceedings. I summarise his approach as follows:

(i) He accepted that this application did not fall within PPS21 CTY1 at least insofar as it was not one of the specified cases for which non-residential development is acceptable.

(ii) However he stated that the list of cases is not exhaustive – other non-residential developments may be acceptable in principle in the countryside and were to be considered in accordance with existing published planning policy.

(iii) He was satisfied that this facility should have a rural location in light of the CPL's submissions that urban locations are generally unsuitable for cat welfare.

(iv) He asserted that CTY1 of PPS21 only requires that planning applicants demonstrate that a proposed use is acceptable in the countryside and that thereafter any relevant policy requirements are met.

(v) In this case the requirements of integration and rural character found in CTY13 and CTY14 were satisfied and there was no objection from Road Service.

(vi) There is no need to establish a specific need for development at this site nor the unavailability of other sites.

(vii) In light of the potential for employment creation at the site, PPS4 "Planning and Economic Development" was also relevant in the sense that that policy "may be useful in assessing proposals for other sui generis employment uses".

(viii) The fact that the proposal had the potential to create 18-20 jobs meant that PPS4 was of assistance, specifically policy PED9 within PPS4.

(ix) The 2001 grant of permission for a veterinary clinic established the principle of development on this site even if it was smaller in scale.

[16] While the principal dispute between the parties was about the interpretation and application of planning policy, there were also relevant disputes on related matters. They included:

(i) Whether there was in fact any reliable evidence to support the contention that there is potential to create 18-20 jobs.

(ii) Whether there had been any proper analysis of the increase in the volume of traffic on the Carnbane Road which the development would bring or whether unreliable self-serving assertions by CPL, accompanied by non-comparable comparators, had been relied on.

(iii) Whether there were any alternative acceptable sites which could be used instead.

(iv) Whether cats need a rural location at all, specifically by reference to Dundonald which is not said to be unsuitable, just to have been out grown.

**Submissions**

[17] There was no substantial difference between the parties on the correct legal approach. The applicant accepted and the respondent reminded me of the limits of the jurisdiction of this court. It is not for me to consider the merits of the respective contentions on the factual issues. Nor must I interpret the various policies as if they amount to statutory provisions – they are to be interpreted and applied as policies only but with some degree of consistency, coherence and respect. This is inevitably the case because they contain in certain places such broad statements that they may be difficult to reconcile. To the extent that any difficulty arises, any judgment as to their application is largely a matter for the planning authorities with the grounds of challenge being limited.

[18] That is not to say that the discretion of the authorities is unlimited. The relevant policies must be taken into account, they must be correctly understood and they must be applied logically. If policies are being departed from, that fact must be acknowledged, explained and reasoned.

[19] It is also important to record that there is in principle nothing wrong with a reconsideration of an earlier decision or approach as has happened in this case. Public bodies must be free to take a fresh look at any given set of facts in order to reappraise their position, especially when they continue to receive submissions from different sources.

[20] For the applicant Mr Scoffield emphasised the difference in scale between the proposal approved in 2002 and the CPL application. He also referred to an application made in 1994 for an equestrian village on the same site for which permission had been refused on traffic grounds, contending that in no material respect had the road or the use of the road changed since that time. His client's objection to the approval of the current application, so far as traffic was concerned, was that the CPL had not provided a reliable analysis and projection of how much additional traffic would be brought on to the road and that the Planning Service had failed to investigate that issue adequately. He adopted an equivalent submission in relation to jobs and economic development that contentions or suggestions about paid employment and volunteer workers had not been explored properly especially when Mr O'Kane developed the hitherto ignored economic basis for granting planning permission.

[21] Mr Scoffield's fundamental contention was that there was still no clear or coherent explanation of how planning permission had been granted and by reference to which policy. Instead, he suggested, in a case where there had been conflicting applications of CTY1, Mr O'Kane had picked some elements out of other policies in a fragmented way with the result that an approval based on an erroneous application of CTY1 (by Mr Watson) had been stood over in an illogical and entirely unreasonable way by reference to excerpts from other policies. In doing so he had, without justification, departed from the specific protection afforded to the countryside by a range of policies e.g. by invoking PED9 in PPS4 but disregarding PED2 which had an exceptional circumstances provision for economic development in the countryside.

[22] For the respondent Mr McLaughlin submitted that the material planning policies, which are only policies and not binding rules, were interpreted and applied correctly and certainly within a structure which no court should feel itself free to interfere with. That was especially so given that of necessity the policies overlap and allow discretion to the planners. On that approach the door was open to approval because on any view a development for animal welfare would be consistent with a rural environment. Once that was established, the discretion to permit development by reference to a policy such as PED9 was clear. Furthermore there was no need for Mr O'Kane to consider PED2 because he had already decided that it was acceptable to have this facility for animal welfare in the countryside.

[23] So far as economic development was concerned, it was submitted that the precise number of jobs created did not have to be analysed and in any event work for volunteers could legitimately count as jobs for the purposes of PED9.

[24] On the roads issue, more evidence was produced during the course of the hearing which showed that various calculations and analyses had been carried out. On the respondent's case this established to an acceptable level that the issue had been carefully considered and that the objectors' arguments had been taken into account even if they had not been accepted.

**Discussion**

[25] In my judgment the primary issue in this case is whether the analysis of Mr O'Kane on which the Department depends falls within the boundaries which the court must respect. There is no doubt that PPS21 CTY1 is of central relevance and that taken at face value it makes it difficult for this application for planning permission to be granted. It deals directly with development in the countryside. The proposed development did not fit within the list of cases for which non-residential development can expect to be approved. That is common case. The applicant contends that applying this policy, the Planning Service is then required to be satisfied that "there are overriding reasons why that development is essential and could not be located in a settlement".

[26] The Planning Service suggests that that approach is unduly narrow and that there are other relevant sui generis policies, in particular policy PED9 of PPS4. Accepting for the moment that the CPL proposal would bring economic development by employment with it, it is relevant to note how the policies within PPS4 are to be read. Under the heading "Planning Policies" the statement says:

> "In exercise of its responsibility for development management in Northern Ireland the Department assesses development proposals against all planning policies and other material considerations that are relevant to it.
>
> The planning policies of this Statement must therefore be read together and in conjunction with the relevant contents of the Department's development plans and other planning policy publications, including the Regional Development Strategy. The Department will also have regard to the contents of published supplementary planning guidance documents.
>
> The following policy set out the main planning considerations that the Department will take into account in assessing proposals for economic development uses and for proposals affecting such development or land and sites allocated for such uses. Please note Policy PED9 sets out general criteria that all such proposals will be expected to meet …"

[27] Policy PED2 specifically relates to "economic development in the countryside". It is therefore of direct relevance in this case. The policy provides for a number of proposals which will be permitted, none of which applies here. That is common case. It continues:

> "All other proposals for economic development in the countryside will only be permitted in exceptional circumstances."

[28] In his affidavit at paragraph 30 Mr O'Kane averred that policy PED2 "was not directly applicable nor was the exceptionality test which it encompassed". It was for this reason that he turned to PED9. This reasoning appears to me to be flawed. PED9 sets out the general criteria which all proposals are expected to meet. The other policies are specific to settlements, the countryside etc. I do not accept the proposition advanced by the respondent that "exceptional circumstances" can be ignored as inapplicable. On the contrary I conclude that the respondent has overlooked the introductory words to PED9 of PS4 which requires proposals to meet

the criteria to which Mr O'Kane has referred but to do so "in addition to the other policy provisions of this statement".

[29] In my judgment PED2 had to be considered to the extent that it required exceptional circumstances before a proposal could be permitted beyond those specifically identified. Mr O'Kane has been quite specific that it was not considered to be applicable by him. For that reason the decision to grant planning permission cannot stand. I am strengthened in this view by the similarity between the "exceptional circumstances" test in PED2 and the "overriding reasons" test in CTY1. The respondent's approach has been to disregard these very similar requirements as being unnecessary and inapplicable and it has therefore significantly and wrongly diluted and minimised the standard by which the CPL application for planning permission was assessed.

[30] Despite this decision on the main issue between the parties, I am obliged to give my decision on the other issues which were advanced by the applicant. I will do so as concisely as possible:

A. On the issue of roads, I found some aspects of the scrutiny of this issue by the respondent to be questionable but I accept that enquiries were made, that submissions were considered and that a decision was reached which is neither irrational nor untenable.

B. On the issue of cat welfare, I do not accept that there was evidence before the respondent to establish that this facility was **required** to be in the countryside as opposed to being in or close to a settlement. That may be an entirely understandable preference on the part of the CPL but a preference does not equate to a need and no need was proved.

C. On the issue of employment, Mr O'Kane's analysis accepted that the development would create 18 to 20 jobs. I am not satisfied that this was based on anything beyond an assertion by the CPL, one which was not probed or investigated as it should have been. In fact the submissions made by CPL are notably lacking in concrete information on this and other issues. Mr McLaughlin submitted that job creation was "self-evident" and the fact that some posts would be voluntary did not diminish the likelihood of the development being employment generating and contributing to community life in the area. This submission appears to be aimed at bringing the application within PPS4 and PPS21. I do

not accept that as a sufficiently rigorous analysis and I find that the employment issues were not properly investigated.

D. Alternative sites. It appears to be common case that there was no enquiry by the respondent into whether alternative sites were or could be available instead of this rural location. I have already held that I do not accept the respondent's September 2013 basis for granting planning permission. Subject to appeal, the respondent will have to reconsider this application (if it is pursued) by reference to exceptional circumstances or overriding reasons or an equivalent approach. If and when it comes to do so the availability or otherwise of alternative sites is likely to be a significant issue.

[31] In the circumstances I will quash the respondent's grant of planning permission to the CPL for the site at Carnbane Road, Hillsborough.