Neutral Citation No: [2013] NICA 58

Ref: **GIR9018**

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

Delivered: **21/10/2013**

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Sandale Developments Limited's Application [2013] NICA 58

IN THE MATTER OF AN APPLICATION BY SANDALE DEVELOPMENTS LIMITED FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE DEPARTMENT OF THE ENVIRONMENT IN NORTHERN IRELAND

Morgan LCJ Girvan LJ and Coghlin LJ

GIRVAN LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal from a decision by Treacy J given on 20 March 2013 by which he dismissed the appellant's application for judicial review of the decision of the Department of the Environment (Planning Service)("the Department") dated 5 July 2012 refusing to deem refused a planning application for a new secondary school at Dean Maguire College, 26 Termon Road, Carrickmore, Omagh, Co Tyrone pursuant to Regulation 15(2A) of the Planning (Environmental Impact Assessment)(Northern Ireland) Regulations 1999 (as amended) ("the "EIA Regulations"). The appellant is a development company which owns a nearby site and it applied for and had been granted planning permission for its site to develop a new school with accommodation for 450 pupils, including sports halls and external sports fields.

[2] Regulation 15 of the EIA Regulations 1999 provides the Department with a power to seek further environmental information about a proposed development for the purposes of carrying out an environmental assessment. Regulation 15(2A) provides that a response to a request for further environmental information shall be submitted within three months of the date of the request or within an extended period as agreed in writing. If the response is not submitted within such time limits, Regulation 15(2A) states that the application shall be deemed to be refused.

[3] In this case the Department made a request for further environmental information on 21 February 2012. The appellant asserts that the planning applicant did not submit the requested further environmental information within the three month time limit and, in light of established principles of statutory interpretation and the need for administrative certainty, the mandatory consequence of non-compliance with such a request expressed unequivocally in Regulation 15(2A) is that the planning application should be deemed to be refused. The appellant argues that once a request for further environmental information is made, the respondent does not have discretion to assess the sufficiency of a planning applicant's response but is instead fixed with the mandatory consequences in the event of non-compliance. It is the Department's case that the real issues for the Court in this appeal are:

i. Whether or not the planning applicant's response on 16 April 2012 did comply with the request for further environmental information;

ii. If there was a disparity between the scope of the request for further environmental information and the content of the information submitted, whether it was open to the Department to determine that the request had been complied with (thus avoiding the engagement of the deemed refusal provision in Regulation 15(2A)) and by what standard should its determination be judged?

The factual background

[4] The factual background to the application is set out in paragraphs [2] to [14] of the judgment at first instance. In brief, on 15 September 2008, Father O'Neill and the Trustees of Dean Maguire College (the "applicant") submitted an application for outline planning permission for the "*construction of a new 450 pupil secondary school with SMA, outdoor activity space, playing fields and demolition of the existing school. Provision for temporary construction vehicular access off Termon Road and 190m approximately south of the main school entrance*" at Dean Maguire College at Carrickmore, County Tyrone. As the application was in respect of development that required its environmental impacts to be assessed pursuant to the provisions of the Council Directive on the Assessment of the Effects of Certain Public and Private Projects on the Environment (85/337/EC) as amended ("the EIA Directive") and the EIA Regulations, the Department requested the applicant to submit an environmental statement in support of the application. The environmental statement was submitted on 18 August 2011. Thereafter the Department undertook a broad consultation process to assess the environmental impact of the proposed development. In particular, although it had no objection in principle to the revised proposals, one of the issues in the Landscaping Architects Branch's (LAB) consultation response dated 12 September 2011 was in relation to the type and depth of planting around the perimeter of the site in order to ensure visual integration with its surroundings. It was their view that in order to aid visual integration, substantial belts of structure planting should be established to the external boundaries of the site

to the north and east. LAB advised that these belts should be a minimum of 8m width whereas the submitted plan only indicated a row of trees which would be limited in terms of aiding visual integration.

[5] Pursuant to Regulation 15(2A) of the EIA Regulations, the Department requested further environmental information. On 8 December 2011, the applicant submitted an addendum to the environmental statement which included a revised plan and further detail of the proposed perimeter planting. Consultation continued with LAB in relation to how the perimeter planting could achieve visual integration. In particular, LAB submitted a consultation response on 24 January 2012 repeating much of its earlier comments on the planting scheme and adding that while the submitted plan was an improvement on the previous proposals it still only indicated rows of trees rather than belts of woodland.

[6] On 13 February 2012, Mr Barry Diamond, a senior planning officer in the Planning and Local Government Group who was involved in the processing of the application, telephoned John Lennon of LAB who felt that a belt of one metre whips, mixed species, spaced 1 metre apart would grow and provide screening much quicker. He felt that an 8 metre buffer was acceptable but if there were gaps or reductions in this it would not be a problem.

[7] By virtue of Regulation 15(2A) of the EIA Regulations, in a notice dated 21 February 2012 (the "FEI Request"), the Department required the applicant to provide further environmental information on a total of seven issues to enable it to give proper consideration to the likely environmental effects of the proposed development. The only issue relevant to this appeal related to landscaping:

> "Landscaping should be established to the external boundaries of the site to the north and east. We advise that these belts of woodland should be a minimum of 8m width. I discussed this issue with Landscape Architects Branch who state that you should not show standard tree planting but a woodland belt which should incorporate whips of mixed species and shrubs grown 1 metre apart as these grow much quicker and provide a visual screen much quicker. A landscaping proposal legend should be provided to supplement the block plan".

The FEI Request further expressly stated:

> "This information is requested under Regulation 15 of the Planning (Environmental Impact Assessment) Regulations (NI) 1999 as amended and the requested information should be submitted within three months of this request."

[8] Within the statutory three month period on 16 April 2012, the applicant provided a second addendum to its environmental statement accompanied by a further revised landscaping plan showing an 8m belt of woodland planting around the perimeter of the site which incorporated whips of mixed species grown one metre apart. At 5 points along the perimeter, the width of the proposed planting either narrows or a small gap is proposed. In his first affidavit dated 4 December 2012, Mr Barry Diamond made the following averments in relation to the second addendum to the environmental statement and accompanying plan as submitted by the Planning Applicant on 16 April 2012:

> "20. As appears from the revised landscaping scheme submitted on 16th April 2012, a planted buffer is proposed around the exterior of the site. The buffer zone contains small gaps in two locations and also narrows in three further locations. These proposals result from the location of the proposed playing fields and one building, the corners of which abut into the planting zone at these locations.
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> 21. The Department considered that this drawing was sufficient to meet the requirements of the request for further environmental information. While it is acknowledged that the proposal does not depict a continuous planted buffer zone which is 8 m in depth throughout, it is considered by the Department that the drawing does respond to point (v) of the request for further information. The Department calculates that the proposed planting buffer area is 8 m wide around 85% of the relevant site boundaries. The purpose of the further information request was not to prescribe what the new development must look like, but to ask the school to provide more detailed information on specific issues."

On 3 May 2012, in a further consultation response, LAB stated that it had no objection in principle to the revised proposals and recommended that a condition be included in any planning permission, requiring the submission of a detailed landscape plan for approval.

[9] On 18 June 2012 the Department decided to present the application for approval before Omagh District Council Planning Committee which was scheduled to occur on 2 July 2012. In the meantime on 20 June 2012, the appellant's solicitors wrote to the Department seeking confirmation that the application was deemed refused on the basis of their contention that the addendum submitted on 16 April

2012 did not fulfil the FEI Request and that, therefore, the applicant had fallen foul of Regulation 15(2A) of the EIA Regulations. On 25 June 2012, no response having been received within the time frame set out in such correspondence, the appellant's solicitors sent a pre-action protocol letter to the Departmental Solicitors Office ("the DSO") and to the office of the Department.

[10] On 29 June 2012, the DSO gave a preliminary response stating that the application would not go before the Council on 2 July 2012 because of an unrelated matter. Thereafter, the appellant's solicitors corresponded with the DSO at length. Over the course of such correspondence, the respondent did not confirm that the application was deemed refused.

[11] On 26 July 2012, the applicant submitted a further revised design proposal marked "no 4 rev 3" which involved a reconfiguration of the size and location of the playing fields together with a continuous planted buffer 8m wide, surrounding the site. On 11 August 2012, the respondent advertised this further environmental information including the amended drawing and advised the public it had four weeks within which to make representations regarding such information.

Decision of Treacy J dated 20 March 2013

[12] The Department's decision to present a recommendation for approval of the application to Omagh Council Planning Committee was challenged. Relief against the impugned decision was sought on the basis that the Department's decision of 5 July 2012 that the application did not lawfully require to be refused is contrary to Regulation 15(2A) of the EIA Regulations and is irrational and/or unlawful and/or unreasonable.

[13] Treacy J stated that the only question to be determined was whether or not the submission of 16 April 2012 satisfied the FEI Request adding that if it did, it was within the statutory time frame and was not open to challenge. On the other hand if it did not and there was no satisfactory response within the time frame the application fell to be deemed to be refused'."

[14] Treacy J found that part of the FEI Request referred to the consultation process and part referred to environmental information which must be submitted. He stated:

> "[24] While there is a lot in that paragraph [i.e. paragraph (v) of the FEI Request], the only parts of the paragraph which could be construed as a *request for information* are 'A landscaping proposal legend should be provided to supplement the block plan' and, arguably, 'you should not show standard tree planting ... [but you should show]… a woodland belt

> which should incorporate whips of mixed species and shrubs grown 1m apart.'
>
> [25] There are 2 strands of Para (v) of the FEI request as reproduced above. Part of it clearly refers to the ongoing consultative process ie what it is suggested would be acceptable or desirable based on the input of all stakeholders, and one which relates to the actual item of environmental information which must be submitted in response to the statutory request."

[15] The court held that the FEI Request was fully complied with on 16 April 2012; that it was within the time limit; and that the addendum submitted on 26/28 July 2012 was a response to LAB's recommendations. He concluded that the further addendum of 26/28 July 2012 seemed to have been a response to LAB's recommendations of 3 May 2012, in particular their recommendation that a condition precedent of planning being granted should be the submission of a detailed landscape plan. In paragraph [29] of his judgment, Treacy J concurred with the view of Sullivan J in R (Milne) v Rochdale Metropolitan (BC):

> "[29] Further, I would concur with the view expounded by Sullivan J in R (Milne) v Rochdale Metropolitan (BC) [2001] ENV LR 22 that:
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> > "It is for the local planning authority to decide whether it has sufficient information in respect of the material considerations. Its decision is subject to review by the courts but the courts will defer to the local planning authority judgement in that matter in all but the most extreme cases.""

Grounds of appeal

[16] The related grounds of appeal are that:

(i) the judge erred in law in finding that the applicant's submission of 16 April 2012 satisfied the respondent's FEI Request;

(ii) he erred in law in holding that the application did not fall to be deemed refused pursuant to the provisions of Regulation 15(2A) of the EIA Regulations; and

(iii) he erred in law in holding that the impugned decision refusing to deem the application dismissed was lawful and further erred in holding that the said impugned decision was not irrational and/or unlawful and/or unreasonable.

Relevant statutory provisions

[17] Regulation 4 of the EIA Regulations prohibits the grant of planning permission for EIA development without consideration of 'environmental information':

> "4. (1) Planning permission shall not be granted for EIA development, where the application is received on or after the date these regulations come into operation, unless the Department or the Commission, as the case may require, has first taken into consideration environmental information.
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> (2) The Department or the Commission, as the case may require, shall when granting planning permission in respect of an application to which paragraph (1) applies, state in the notice to the applicant of its decision, that it has taken environmental information into consideration."

In Regulation 2(2), 'environmental information' is defined as:

> "the environmental statement, including any further information, any representations made by any body required by these regulations to be consulted and any representations duly made by any other person about the likely environmental effects of the proposed development."

[18] Regulation 15 gives the Department a power to seek further environmental information about a proposed development for the purposes of carrying out an environmental assessment.

> "15(1) Where the Department or the Commission is of the opinion that –
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> (a) the applicant could have provided further information about any of the matters mentioned in Schedule 4; and
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> (b) that further information is reasonably required to give proper consideration to the likely environmental effects of the proposed development,
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> it may request the applicant, by notice in writing, to submit such further information.

> (2) The Department or the Commission may, by notice in writing, require an applicant to produce such evidence as it may reasonably call for to verify any information in his environmental statement.
>
> (2A) On receipt of a request under paragraphs (1) and (2) the applicant shall submit the further information or evidence within three months from the date of the request or such extended period as may be agreed in writing between the applicant and the Department, and if not so submitted the application shall be deemed to be refused and the deemed refusal shall not give rise to an appeal to the Commission by virtue of an Article 32 (appeals) or Article 33 (Appeal in default of planning decision)."

[19] Regulation 15(3) provides that once the further environmental information is received it is subject to the same obligations of consultation with the public and consultation with authorities as applied to the original environmental statement:

> "(3) Regulations 12 to 14 shall apply where such further information is received by the Department in relation to an environmental statement, as if references to "environmental statement" were references to "further information"."

[20] The provisions set out in Regulation 15 of the EIA Regulations are now contained in Regulation 19 of the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2012.

The appellant's case

[21] Mr Beattie QC on behalf of the appellant submits that the information and plan provided by the applicant in its second addendum on 16 April 2012 failed to include the further environmental information requested by the Department on 21 February 2012 in paragraph (v) of the FEI Request, namely plans showing the belts of woodland to a minimum of 8m width. It is asserted that a drawing submitted on 28 July 2012 did comply with the request but, as the time limit under Regulation 15(2A) expired on 21 May 2012, the appellant says that that the application should be deemed to have been refused. The consequence of non-compliance with such a request is expressed unequivocally in Regulation 15(2A). Applying the plain meaning or literal rule of statutory interpretation, it is contended that the legal meaning of "*shall*" is beyond debate. The time limit in Regulation 15(2A) within which to submit the requested information is mandatory and imperative. Any extension of the time limit has to be agreed in writing between the applicant and the

respondent and there is no right of appeal of a deemed refusal. The judgment below implies a finding that the respondent had a discretion as to whether the applicant satisfied the FEI Request after the FEI Request has been issued and after expiration of the time limits imposed for compliance with the request. This re-writes the mandatory wording of Regulation 15(2A). The Department prior to a decision to issue a Regulation 15 request has a discretion as to the steps available to the Department which fall short of the Regulation 15 request and to the steps which can be taken before the expiration of the time limit for compliance with a Regulation 15 request. However once the request is made in a Regulation 15 request, the Department has no further discretion and is fixed with the mandatory consequences in the event of non-compliance with the three month time limit. In light of established principles of statutory interpretation and the need for administrative certainty, as the requested information was not submitted within the three month time limit in Regulation 15(2A), the Department's decision should be quashed and the planning application should be deemed to have been refused.

The respondent's case

[22] Mr McLaughlin submits that the following principles should guide the approach to the interpretation of a request for further environmental information. The request for further environmental information should be interpreted in the context of prior communications between the Department and the developer. The words used in the request for further environmental information should be given their natural and ordinary meaning and should not be interpreted in an unnecessarily literal manner. The scope of the request for further environmental information should be interpreted in light of its purpose, namely to assist the Department in carrying out an assessment of the environmental effects of the proposed development. An assessment of the environmental effects of the proposed development involves two aspects. Firstly, the Department is required to understand the nature and detail of the proposed development. Secondly, the Department must understand the features of the environment which are likely to be affected. The function of a request for further environmental information within the overall scheme of the planning process is important when interpreting its scope. The purpose of the powers to obtain further information under Article 7(4) of the Planning (General Development) Order 1993 and Regulation 15 of the EIA Regulations is, ultimately, to assist the Department to "determine" the application, not to direct variations of it. If the Department offers advice in advance of determining an application, this should not be interpreted as an instruction to make variations to the planning application. If such advice is given at the same time as a request for further information, these two separate actions should be recognised when interpreting the scope of the information request.

[23] The FEI Request, when properly construed, seeks nothing more than the submission of additional planting details depicted on a block plan containing an explanatory legend. It is asserted that the remainder of the "request" is only "advice" about the detail of the planting scheme which the LAB would like to see in

a more detailed plan and this "advice" should not be interpreted as forming part of the Regulation 15 request. The response from the applicant on 16 April 2012 which included a revised block plan depicting the proposed areas of planting and the species to be used and an explanatory legend represented full compliance with the FEI Request. The "deemed refusal" provisions of Regulation 15(2A) therefore do not arise on the facts of this case. Counsel further argued that it is primarily a matter for the Department to decide whether or not the response is sufficient to avoid the deemed refusal sanction. In the interests of certainty in the planning process, it should only be in exceptional cases where the response is so clearly deficient that an application is deemed refused rather than being determined on the planning merits on the basis of the information which has been submitted. The wording and purpose of the EIA Regulations make clear that the Department has a role to play in determining whether a response is sufficient to avoid the deemed refusal provision. The statutory power to request further information is a means by which to obtain environmental information relevant to the assessment of the likely environmental effects of a development. The appellant's interpretation of this power would elevate the terms of the request to that of statute, thereby subverting rather than promoting the EIA process. The question whether the information requested has been properly submitted is one which calls for a judgment on the part of the Department. The legislative history of Regulation 15(2A) supports the view that the purpose behind the provision is to assist in speeding up the determination of EIA applications rather than to introduce a substantive change in the requirements for the content of the response. Article 5 of the EIA Directive does not require member states to introduce either a "further information procedure" or a "deemed refusal" sanction. It simply requires that "*necessary measures*" ensure that information necessary to conduct an environmental assessment is submitted by a developer. By reference to Regulations 2(2), 4 and 15(3) of the EIA Regulations the "further information" submitted has precisely the same status within the EIA process as the environmental statement and, in substance, forms part of it. The EIA process incorporates a procedural safeguard against either a deficit or inaccuracy in the information submitted as the "further information" must be the subject of statutory and public consultation before the application is ultimately determined. It would be wrong for Regulation 15(2A) to be interpreted as requiring a "deemed refusal" simply by reason of a perceived failure to submit information which had been requested if the issue can be addressed in another manner. It was submitted that the Department was perfectly entitled not to apply the "deemed refusal" provisions even if the information submitted could be considered not to match the precise scope of the request. The revised block plan contained sufficient information to enable it to assess the visual impact of the development and it would be contrary to the content and purpose of the EIA legislation to find that it was not entitled to do so.

[24] Relying on R (Buglife) v Thurrock Thames GDC [2009] EWCA Civ 29, R (Jones) v Mansfield [2003] EWCA Civ 1408 and R (Blewett) v Derbyshire CC [2008] EWHC 2775 Admin, the Department argues that it has been firmly established that the Department is the body which determines whether an environmental statement meets the relevant legal standard. Its judgment is subject only to rationality review.

The decision by the respondent as to whether an FEI request has been complied with should be subject to the same standard of review as the environmental statement. The Department's decision to accept the response to the FEI Request was plainly a rational one. Not only did the respondent enable the environmental assessment to take place, it expressly met with the approval of LAB whose consultation response had led to the request.

Conclusions

[25] The FEI Request falls to be construed in a fair and reasonable manner. It is designed to garner in good faith information to assist the planning authority in assessing the environmental impact of the planning proposal. It is not intended to be a trap for the unwary. The relevant portion of the FEI Request dealing with the question of landscaping does a number of things. Firstly, it states the principle that landscaping is required to the north and east of the external boundaries. Secondly, it records advice that belts of woodland to a minimum of 8 metres should be provided. Thirdly, it records the view of the LAB that the landscaping should comprise not standard tree planting but rather a woodland belt of mixed species 1 metre apart because they grow more quickly so as to provide visual screening. Fourthly, it effectively asks the applicant within three months to provide a landscaping proposal to supplement the block plan. Thus the relevant part of the FEI Request provides a statement of principle, advice as to what would be viewed as providing a suitable means of meeting the Department's concerns on the environmental visual impact of the application and asks for a landscaping proposal designed to meet the Department's concerns. The relevant portion of the FEI Request does not seek information in the sense of asking the answer to a specific question as such but in effect what it does do is to propose the following question: "What landscaping measures can you provide which meet the principle stated and which meets LAB's view as to what is required along the relevant boundaries to meet the identified environmental concerns?" Although unrecorded in the Request, it was the LAB's view that if there were gaps or reductions in the buffer zone that would not necessarily present a problem. The applicant did respond to that request within the requisite three month period by coming forward with its second addendum accompanied by a landscaping plan which the applicant considered met the principle stated by the Department and what was required in the Department's view. It thus satisfied Schedule 4 Part 1 paragraph 5 of the relevant Regulations providing as it did the planning applicant's measures envisaged to reduce and offset the significant adverse visual effects of the proposal identified by the Department.

[26] The Department was bound to consider the proposals with an open mind and having done so considered that what the applicant supplied constituted a sufficient compliance with the FEI Request. As Mr Mclaughlin correctly argued, the purpose of the power to seek information is designed to assist the Department in determining a relevant planning application. Matters of planning judgment fall within the Department's wide margin of appreciation and the width of that margin of appreciation must extend to the question whether an applicant has provided

sufficient information in support of its application (see Sullivan J in R(Milne) v Rochdale Borough Council [2001] Env LR 22. It was clearly open to the Department to conclude that there had been an adequate compliance by the applicant with the terms of the FEI request in this instance. Accordingly we are satisfied that the trial judge reached the correct conclusion. The appeal must accordingly be dismissed.