

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Tesco Stores Limited's Application [2010] NIQB 15

AN APPLICATION FOR JUDICIAL REVIEW BY

TESCO STORES LIMITED

WEATHERUP J

[1] This is an application for Judicial Review of a decision of the Department of the Environment for Northern Ireland, Planning Service, dated 12 December 2008 granting Vico Kent Limited outline planning permission for a foodstore with access, servicing area and car parking at Edenderry, Portadown. Mr Elvin QC and Mr Lyness appeared for the applicant, Ms Leiven QC and Mr McMillen for the respondent Department and Mr Lyttle QC and Mr Ronan Lavery for the notice party, Vico Kent Limited.

[2] The applicant is a major retailer with stores throughout Northern Ireland and in particular in the vicinity of the proposed development in Portadown, Lurgan and Craigavon. On 12 November 2008 the applicant was granted outline planning permission for a proposed superstore with associated car parking and petrol filling station at Marlborough Retail Park, Craigavon.

Craigavon Area Plan 2010.

[3] The draft Craigavon Area Plan 2010 was published in April 2000. It described Portadown town centre as the primary retail centre within Craigavon borough. It defined the boundary of Portadown town centre as extending eastwards across the river Bann to Edenderry, thus including the site of the later application by Vico Kent Limited. The draft Plan also

identified Development Opportunity Sites within Portadown town centre which included the Edenderry site, which was stated to be suitable for retailing or office or leisure or residential uses (as individual uses or as a mixed use proposal).

[4] The draft Plan was the subject of a Public Inquiry conducted by the Planning Appeals Commission (PAC) which reported on 12 June 2003. The report considered the three town centres of Portadown, Lurgan and Craigavon which make up the Craigavon urban area. It was recommended that the Department should carry out an exercise to consider the physical definitions of the town centre boundaries. The 2003 PAC report stated the primary purpose of defining town centres as relating to Planning Policy Statement 5 (PPS5) policy and the need to protect the vitality and viability of town centres through the control of future retail developments. The Craigavon Area Plan was adopted by the Department in August 2004, without town centre boundaries or related retail designations.

Craigavon Town Centre Boundaries and Retail Designations Plan 2010.

[5] Further to the 2003 PAC report and consideration of the town centres, the Department published the draft Craigavon Town Centre Boundaries and Retail Designations Plan 2010 in December 2005. The preparation of the plan had been informed by a retail study carried out by external consultants. The draft Plan included the Edenderry site within Portadown town centre. The PAC conducted a Public Examination into the draft Plan and reported on 31 December 2007.

[6] In general the 2007 PAC report stated that if a Development Opportunity Site were to fall outside the town centre boundary any proposal for retail development on such a site would be subject to PPS5 and the tests in paragraph 39. The report recommended that the Edenderry site should be excluded from Portadown town centre. The PAC considered the site to be well removed and detached from the core of the town centre; that the siting of mall type retailing at such a peripheral location would lead to the development of a distinct but poorly linked hub within the town centre and would act as a counter magnet to the established shopping areas; that retention of the site within the town centre boundary was unnecessary to meet Portadown's identified qualitative deficiency; that the designation as a Development Opportunity Site suitable for retailing did not justify inclusion within the town centre boundary; that paragraphs 43 of PPS5 provided that favourable consideration would be given to proposals for retail warehousing of an appropriate scale on suitable sites in edge of centre locations; that outside the town centre boundary, foodstores and comparison/mixed major retailing may be acceptable if they satisfied the criteria set out at paragraph 39 of PPS5 and suitable town centre sites were not available. The Craigavon

Town Centre Boundaries and Retail Designations Plan 2010, reflecting the PAC recommendations, was adopted by the Department in June 2008. The Edenderry site was excluded from Portadown town centre.

The application for development of the Edenderry site.

[7] Meanwhile on 23 March 2005 Vico Kent Limited applied for outline planning permission at the Edenderry site. The Planning Service sought a retail impact assessment and received a report on 8 December 2006 and an amended report on 13 August 2007. The Planning Service Strategic Projects Team prepared a report on the application on 21 December 2007. At that date the Edenderry site was included in the draft Plan within Portadown town centre. The PS report recommended approval of the Vico Kent Limited application. The PS report concluded by noting the analysis of the retail impact assessment that the proposal had the potential to cause harm to the town centres of Portadown, Lurgan and Craigavon. This was stated to be based on the site being treated as an out of centre site and not a town centre location. Notwithstanding the findings of the retail impact assessment the application was considered acceptable because the site was a development opportunity site suitable for retailing; within the town centre boundary; there was a qualitative need for additional retail floor space within the recommended town centre boundaries; the proposal provided additional retail floor space; there was no adverse amenity implications; Road Service were content; the proposal would assist physical regeneration.

[8] Ten days later, on 31 December 2007, the PAC published the report on the draft Plan for town centre boundaries recommending the removal of the Edenderry site from Portadown town centre, a recommendation subsequently adopted by the Department.

[9] Further to the PS report of 21 December 2007 on the application for the Edenderry site, the Planning Service Strategic Projects Team, by internal memo dated 8 January 2008 noted the publication of the 2007 PAC report and the PAC view that the site should lie outside the town centre. Planning Service remained of the view that the application should be approved. The memo was annotated to refer to the harm that the proposal would do to Portadown, Lurgan and Craigavon town centres and stated that this element needed to be updated. By further internal memo dated 21 January 2008 Damien Mulligan, Principal Planning Officer with Planning Service, stated that the 2007 PAC report recognised that certain types of retailing may be acceptable on out of town centre sites if they satisfied PPS5 and suitable town centre sites were not available. Further he stated that, while noting that the proposal was likely to have an impact on Portadown centre, it was concluded on balance that the proposal was still acceptable. Three considerations were highlighted. First, that the proposal would contribute to the extension of

retail choice in the area where there appeared to be a qualitative need for additional floor space. Secondly, that the proposal had the potential to assist the regeneration of the town centre. Thirdly, that the PAC had commented that some retailing was acceptable on the site in the context of PPS5.

[10] A submission along the same lines was made to the Minister on 25 January 2008 with a recommendation for the issue of a Notice of Opinion to approve the application of Vico Kent Limited. The Notice of Opinion to approve was issued on 11 February 2008. The Department adopted the Craigavon Town Centre Boundaries and Retail Designations Plan in June 2008. The applicant had applied for outline planning permission for the Craigavon site in February 2007 and permission was granted on 12 November 2008. Thus the applicant secured the permission for the Craigavon site one month before outline planning permission was granted to Vico Kent Limited for the Edenderry site on 12 December 2008.

The Applicant's grounds for Judicial Review.

[11] The applicant's grounds for judicial review are as follows:-

(1) Failure to have regard to material considerations - development plan

1. The decision to grant planning permission failed to take into account -

(a) the 2007 PAC report which assessed the retail merits of the site and recommended its exclusion from the designated town centre of Portadown; and

(b) the adopted Plan giving effect to the recommendations of the PAC and excluding the site from the town centre.

2. The decision failed to have proper regard to, or correctly understand, the terms of the PAC recommendations.

3. The decision to grant planning permission was unreasonable/irrational because it relied upon material considerations which ran contrary to the reasoning in the PAC report that the respondent accepted in adopting the Plan and in failing to reconsider the decision to grant permission in the

light of the later decision to adopt the PAC recommendations.

- (2) Failure to have regard to material consideration - Tesco permission.

The decision to grant permission failed to take into account the grant of planning permission to the applicant on 12 November 2008 for a foodstore in Craigavon town centre and consider its effect on the analysis of the retail policy issues that were raised by the Vico Kent Limited application.

Planning Policy Statement 5: Retailing and Town Centres.

- [12] PPS5 deals with retailing and town centres as follows -

Paragraph 38 provides that town centres will be the preferred location for major comparison shopping and mixed retailing development proposals. The availability of suitable sites within the town centre, in particular those which have been identified in the development plan, will be an important consideration where development is proposed outside the town centre. Applicants should be able to demonstrate that all potential town centre sites have been thoroughly assessed.

Paragraph 39 provides that major proposals for comparison shopping or mixed retailing will only be permitted in out of centre locations where the Department is satisfied that suitable town centre sites are not available and where the development satisfies all the following criteria -

- Complements or meets existing deficiencies in the overall shopping provision.
- Is unlikely to lead to a significant loss of investment in existing centres.
- Is unlikely to have an adverse impact on the vitality or viability of an existing centre or undermine its convenience or comparison shopping function.
- Will not lead to any unreasonable or detrimental impact on amenity, traffic movements or road safety.
- Will be accessible by a choice of means of transport.
- Will provide adequate car parking, cycle parking and facilities for other transport modes where appropriate.
- Is to a standard of design of both the buildings and the spaces around the buildings which contributes positively to landscape and is sensitive to the surrounding area.

- Provides suitable access for the disabled.
- Will be unlikely to add to the overall number and length of car trips and should preferably contribute to a decrease.
- Will be unlikely to prejudice the implementation of development plan, policies and proposals.

Where a proposed out of centre development satisfies the above criteria the Department will favour an edge of centre location over a location elsewhere out of centre.

Paragraph 41 deals with food supermarkets and food superstores. Food supermarkets and food superstores often play a vital role as an anchor store in maintaining equality and range of shopping in existing centres. In these locations they also provide an essential service for less mobile members of the community. Food superstores however rely on the close proximity of adequate car parking and for this reason location within existing town centres may be inappropriate. Edge of centre sites may provide a preferred alternative in many towns and in the interests of maintaining and strengthening the adjoining town centre this may require the re-use of derelict land or the redevelopment of suitable sites. Proposals for food supermarkets and food superstores on sites outside town centres including edge of centre sites may be acceptable provided that the proposal satisfies all the criteria set out in paragraph 39. In addition the availability of suitable sites for the proposed development within the town centre in particular those which have been identified in a development plan will be an important consideration.

[13] In relation to Judicial Review of planning decisions it is well established that matters of planning judgment are within the exclusive province of the planning decision maker and that the planning decision-maker's powers include the determination of the weight to be given to a particular matter – see the summary of legal principles outlined by Girvan J in Bow Street Mall and Others Application [2006] NI 28 at paragraph [43].

Ground (1) Failure to take into account the Development Plan.

[14] The first part of this ground relates to the applicants contention that there was a failure to take into account the 2007 PAC report and the adopted Plan that excluded the Edenderry site from Portadown town centre. However it is apparent that Planning Service did take these matters into account and that this aspect of the first ground of challenge is ill founded. Accordingly attention will focus on the second and third parts of this ground, namely the applicant's submissions that there was a failure to have proper regard to and to understand the 2007 PAC report and that there was unreasonable reliance on material considerations that ran contrary to the PAC report, the

recommendations of which were accepted by Planning Service in the adopted Plan.

[15] Mr Mulligan refers to consideration of the Strategic Projects Team report in the light of the 2007 PAC report and states that there were still considered to be overriding reasons for granting planning permission. These are set out in Mr Mulligan's memo of 21 January 2008 referred to above, with three particular considerations being the extension of retail choice to meet a qualitative need, the potential for regeneration of the town centre and the acceptability of retailing on the site where PPS5 was satisfied. The conclusion that the development should be approved was stated in Mr Mulligan's affidavit to be based primarily on the following grounds. First of all, the Edenderry site did not need to be included within the town centre in order for the site to be successfully regenerated. Reference was made to paragraph 41 of PPS5 dealing with food supermarkets and superstores which states that edge of centre sites may provide a preferred alternative in many towns. Further and contrary to the PAC comment that mall type retailing would act as a counter magnet to the established shopping area, Planning Service considered that an edge of centre foodstore would potentially serve to strengthen and enhance the adjoining town centre as a shopping venue, as well as bringing a large and redundant site back into use. Secondly, it was stated that the Edenderry site did not need to be located within the town centre to meet Portadown's identified qualitative deficiency. Planning Service was of the view that the proposal would contribute to the extension of retail choice in the area, where there appeared to be a qualitative need for additional floor space.

[16] The Planning Service report of 21 December 2007 considered the Edenderry site as a Portadown town centre development and found that it satisfied the paragraph 39 criteria. It noted the potential harm to the three town centres and concluded that the proposal was acceptable. The PAC report of 31 December 2007 recommended the exclusion of the site from the designated Portadown town centre. Planning Service nevertheless approved the application for the Edenderry site and adopted the recommendation to exclude the site from the town centre. The applicant referred to the decision not to incorporate the application site within the Portadown town centre in the adopted Plan as sitting uncomfortably if not inconsistently with the account of Planning Service's consideration of the PAC report.

[17] It is important to recognise the distinction between on the one hand the considerations that related to whether the Edenderry site was to be included in or excluded from the Portadown town centre boundary and on the other hand the considerations that related to whether or not there should be retail development on the Edenderry site. While there was overlap between those two different matters the approach to the issue of town centre boundaries was not coextensive with the issue of retail development at the Edenderry site. The PAC report recognised that Edenderry was included in a Development

Opportunity Site for retail development and recognised the potential for Article 41 development for an edge of centre food superstore. Further it is important to recognise the distinction between retail shopping in the form of comparison shopping and in the form of a foodstore. This difference is recognised in the consideration of retailing in PPS5. In addition it is important to recognise that the adoption by Planning Service of recommendations in a PAC report need not amount to the adoption of every aspect of that report.

[18] The applicant rejects the three considerations that were outlined by Mr Mulligan on behalf of the respondent as warranting the approval of permission for the proposed development after the publication of the PAC report on 31 December 2007. The first matter concerned the contribution the proposal would make to the extension of retail choice in the area where it was said that there appeared to be a qualitative need for additional floor space. The applicant referred to the retail advice relied on by the PAC in relation to the qualitative need for additional floor space being within the town centre. There had been retail impact assessments based on a variety of assumptions. In this case and in others there were references to retail assessments not being subjected to forensic examination. Planning Service was clearly aware of the retail assessments. Planning Service was also aware that the PAC report clearly contemplated retail development on the proposed site even if that site was excluded from the town centre boundary, provided that the paragraph 39 criteria were satisfied and suitable town centre sites were not available. In the end Planning Service considered there to be a qualitative need in the area that was not confined by the town centre boundary. Others may disagree. It may prove to be misguided. However this was a judgment Planning Service was entitled to reach.

[19] Secondly the respondent considered that the proposed development potentially could assist in the regeneration of the town centre. The applicant referred to the contrary conclusion in the PAC report that including the site within the town centre boundary would harm its vitality and viability. It is necessary not to treat as coextensive the grounds for removing the proposed site from the town centre and the grounds for permitting retail development on the proposed site. The applicant's objection also questioned whether the proposed development would assist in the regeneration of the town centre. However, in principle, certain edge of centre retail developments can be considered to have that effect if they meet the planning criteria for such development.

[20] Thirdly the respondent relied on the comment by the PAC that some retailing was acceptable on the site in the context of PPS5. The applicant objected that such a conclusion did not appear in the PAC report and on the contrary it was suggested that the report considered that retailing on the site would not be acceptable. Again it is necessary to separate out considerations in relation to town centre boundaries and considerations in relation to the

development of a site which was to be excluded from the town centre boundary. The PAC report recognised that there may be circumstances in which retailing on the site could be acceptable.

[21] Further the applicant challenged the suggestion by Mr Mulligan that the development represented an edge of centre foodstore that would potentially serve to strengthen the adjoining town centre as a shopping venue. The challenge was to the suggestion that the development would enhance retailing in the town centre, a suggestion that was said to be contrary to the PAC report. Again this is a judgment that Planning Service was entitled to reach. The applicant contends that this is an additional reason for the decision that was not included in the original reasons and should be disregarded. I do not accept that this is an additional point introduced by Mr Mulligan but rather that it is inherent in the approach taken by Planning Service. However, even if it were an additional point and even if it were disregarded, the other reasons for the decision are sufficient to sustain the decision.

[22] The applicant contends that all of the considerations bearing on the decision were not included in the submission to the Minister. However this was a decision of the Department, more particularly the Planning Service. The relevant officials completed the groundwork and constructed the basis for the recommended outcome. Officials should be in possession of all the information necessary to take account of all material considerations. The Minister may make a planning decision as the head of the Department on the basis of the knowledge and expertise of the officials. The relevant considerations were known to the relevant officials briefing the Minister. In any event this was not one of the grounds on which the applicant secured leave to apply for Judicial Review.

[23] The applicant contends that Planning Service lacked consistency in its approach to the PAC report and to the application for development of the Edenderry site. The PAC considerations in relation to the inclusion of the site within Portadown town centre boundary included the statement that the site was well removed and detached from the core of the town centre, that the siting of mall type retailing at such a peripheral location would lead to the development of a distinct but poorly linked hub within the town centre and would act as a counter magnet to the established shopping areas, that retention of the site within the town centre boundary was unnecessary to meet Portadown's identified qualitative deficiency and that the designation as a Development Opportunity Site suitable for retailing did not justify inclusion of the site within the town centre boundary. However it is also necessary to have regard to the PAC considerations in relation to retailing on the Edenderry site, which considerations included the statement that paragraphs 43 of PPS5 provided for favourable consideration of proposals for retail warehousing of an appropriate scale on suitable sites in edge of centre locations and that outside the town centre boundary, foodstores and comparison/mixed major retailing

may be acceptable if they satisfied the criteria set out at paragraph 39 of PPS5 and suitable town centre sites were not available. The reasons for excluding the site from the town centre cannot be treated as reasons for refusing foodstore development on the site.

[24] In respect of the matters relied on by the respondent in reaching its decision a number of planning judgments were required and determinations made as to the weight to be accorded to the relevant considerations. These were matters within the province of the planning decision maker. In many instances the applicant does not agree with those judgments or with the weight attached to considerations. However that does not afford any ground for setting aside the conclusion.

[25] In relation to the applicant's first ground it is clear that the 2007 PAC Report was taken into account and that the exclusion of the Edenderry site from the town centre was taken into account. I do not accept that in doing so the Planning Service failed to understand correctly the 2007 PAC Report. Nor do I accept that there was inconsistency of reasoning in the process of approving the application for the Edenderry site and also adopting the 2007 PAC recommendation on the town boundary.

Ground (2) The Tesco Planning Permission.

[26] The applicant contends that the respondent failed to take into account a material consideration, namely the Tesco permission for Craigavon, granted on 12 November 2008 in advance of the Vico Kent Limited permission for Portadown granted on 12 December 2008.

[27] Paragraph 58 of PPS 5 provides that in considering impact of major retail development proposals on the vitality and viability of existing centres the Department will consider the incremental effects of the new development on existing centres where appropriate. The Department will also take into account the likely cumulative effects of recently completed retail developments and outstanding planning permissions for retail development where appropriate.

[28] The respondent contends that the Tesco permission was taken into account. Mr Mulligan states that the potential implications of the Tesco approval for the assessment and processing of the application for the Edenderry site were discussed in November 2008 at an internal development control group meeting within Planning Service. The group concluded that, having regard to paragraph 58, it was not appropriate to re-evaluate the application in the light of the Tesco approval. Nevertheless Mr Mulligan states that the respondent was of the opinion that the decision to approve Tesco would in effect weaken the retail impact of the application upon Craigavon and other centres for two reasons. First of all, the Tesco approval, in competing with

the application scheme for trade, would serve to reduce the retail impact of the application scheme on Lurgan and Portadown town centres. Secondly, the Tesco approval would help to strengthen the trading position of Craigavon town centre, by extending the quantum of retail floor space available within the town centre, by attracting further trade into central Craigavon from the surrounding catchment area and by reducing any potential for loss of trade from central Craigavon to the new store at Edenderry.

[29] The applicant challenges whether the Tesco permission was indeed taken into account, given the absence of a minute to that effect and the absence of a reference to the Tesco permission in the submission to the Minister. I have no basis for refusing to accept the averments of Mr Mulligan. The ground of challenge is based on the Tesco permission not being taken into account. On the basis of Mr Mulligan's evidence I accept that the Tesco permission was taken into account.

[30] Further the applicant contends that, if the Tesco permission was taken into account, there was no proper inquiry into the effects of the Tesco permission and the conclusion that permission should be granted to the Vico Kent Limited proposal was irrational in the circumstances. It is said that Planning Service failed to have regard to the impact of the Tesco development permission on Portadown, both in diverting trade from Portadown so as to increase the impact of the Edenderry development and in attracting trade to Craigavon so as to exacerbate the impact of the Edenderry development. According to Mr Mulligan Planning Service did consider the impact of the Tesco development and concluded that it would reduce the impact of the Edenderry development on Portadown. It cannot be said to be irrational to have reached that conclusion.

The Reasons for the Grant of Planning Permission.

[31] The applicant contends that the respondent failed to give proper reasons for the decision to grant the Vico Kent Limited permission. Reference was made to the opinion of Lord Brown in South Buckinghamshire County Council v. Porter [2004] 1 WLR 1953 at paragraph 36 as follows -

“The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-

maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.

[32] The application of the above approach to reasons must reflect the nature of the process and the manner in which decisions are issued in that process. Planning decisions issued by the Planning Appeals Commission reflect one such process and planning decisions issued by Planning Service reflect a different process. The latter do not appear in the form of a judgment. Nevertheless they must allow interested parties with knowledge of the facts and the issues and with access to the necessary papers and reports to understand the basis of the decision and to mount a challenge to that decision if so advised. I am satisfied that a consideration by the applicant of the documentation in this case was sufficient to comply with the giving of reasons as set out in South Buckinghamshire.

[33] Accordingly I have not been satisfied on any of the applicant's grounds for Judicial Review and the application will be dismissed.

Delay in applying for Judicial Review.

[34] Vico Kent Limited, as notice parties to the application, also relied on delay on the part of the applicant as an additional ground of objection to the application. As I have decided to dismiss the application it is not necessary to consider the objection on the ground of delay but I make the following brief comments on the issue.

[35] The notice party contended that further to the Notice of Opinion to approve dated 11 February 2008 the applicant ought to have commenced proceedings for Judicial Review. I would reject that contention. The Vico

Kent Limited permission was granted on 12 December 2008 and I am satisfied that time began to run against the applicant from that date.

[36] The application for Judicial Review commenced on 9 March 2009 which was just within the three month period. The obligation to commence proceedings for Judicial Review is to apply promptly and in any event within three months, with the Court having power to extend time for good reason. The obligation in the first place is to apply 'promptly'. An applicant must explain any delay in applying promptly. The applicant states that it first became aware of the Vico Kent Limited permission in January 2009, whereupon the applicant engaged legal representatives and issued a pre action protocol letter on 2 March 2009. The explanation for events between 12 December 2008 and 9 March 2009 is lacking in particulars. The application could not be said to have been made promptly. The applicant was aware from 11 February 2008 of the prospect of approval of the proposed development at Edenderry. It is not disclosed why it was that the approval only came to the applicant's notice in January 2009, nor when in that month. In commercial matters and in relation to issues concerning planning permission there is a need for particular vigilance and for expedition in the response to decisions considered to be adverse to one's interests.

[37] If there has been delay the applicant must satisfy the Court that there is 'good reason' to extend time. Establishing good reason also requires that an explanation be provided of the reasons for delay. The applicant's present explanation for the delay is inadequate. There was prejudice to the notice party in the delay that occurred in commencing the proceedings for Judicial Review. The nature and character of the challenge and of the grounds of challenge and the prospects of success are considerations in the exercise of the discretion to extend time for good reason. Had I been persuaded of the substance of the applicant's grounds of challenge I would have been minded to exercise discretion in favour of the applicant to extend the time for the commencement of proceedings to 9 March 2009, provided the applicant furnished a full explanation for the delay. For that purpose the applicant would have been afforded the opportunity to file additional evidence on the issue of the delay and the respondent and the notice party would have been afforded the opportunity to reply.