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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

Wood's Application's (Peter, Patrick, Mary and Peter Gary) [2009] NIQB 34

AN APPLICATION FOR JUDICIAL REVIEW BY PETER WOODS, PATRICK WOODS, MARY ELIZABETH WOODS AND PETER GARY WOODS

WEATHERUP J

The application

[1] This is an application for judicial review of the decision of the Department of the Environment for Northern Ireland, Planning Service, dated 30 July 2007 granting planning permission to Fraser Houses (NI) Limited and Snodden Construction Limited ("the developers") for a proposed development at Mealough Road, Carryduff, County Down, by approving the alteration of a previous condition relating to road improvement works at the nearby Saintfield Road/Knockbracken Road junction. The original condition in relation to the road improvement works had been imposed on the earlier grant of outline planning permission for the development at Mealough Road on 10 May 2004. The applicants, who object to the alteration of the original condition, own land near the junction and are adversely affected by the decision. Mr Beattie QC and Ms Comerton appeared for the applicant, Mr Larkin QC and Mr McLaughlin appeared for the Department and Mr Lockhart Mummery QC and Mr Scoffield appeared for the developers as Notice Parties.

The original grant of outline planning permission.

[2] The grant of outline planning permission to the developers on 10 May 2004 described the proposal as a site for a new suburban village to include a mixed use centre and housing and was granted subject to 27 conditions.

Condition 1 dealt with "Reserved Matters" and provided that approval of the details of the siting, design, external appearance of the buildings, means of access and landscaping of the site was to be obtained from the Department in writing before any development commenced.

Condition 3 provided, as required by Article 35 of the Planning (Northern Ireland) Order 1981, that the application for approval of the Reserved Matters was to be made within three years of the date of permission and the development was to begin within five years from the date of permission, or from two years after the date of approval of the last Reserved Matter, if later.

Conditions 9-13 dealt with landscaping matters and required approval by the Department of a tree survey, a landscaping scheme for retained trees and hedgerows and planting belts, the protection of trees and hedgerows, the planting of semi-mature trees on the main boulevards and a ten year landscape management plan.

Condition 18 provided:

> "No more than 150 of the dwellings, hereby permitted, shall be occupied until the road improvement works at Saintfield Road/Knockbracken Road junction, generally as indicated on plan PAC/TRAN 3 dated 9 July 2002, have been completed within accordance with detailed plans to be submitted to and approved in writing by the Department."

[3] The relevant part of the plan referred to in condition 18 concerned the requirement for the construction of what was described as a "flare lane" on Knockbracken Road, some distance along the Saintfield Road on the city side of the proposed development. The flare lane was to provide a five car left turning lane for traffic emerging from the Knockbracken Road and travelling countrywards along the Saintfield Road. At a Public Inquiry into the proposed development, traffic consultants had considered that by 2018 the traffic flow on the Saintfield Road would be such that the provision of the flare lane at Knockbracken Road should be a condition of development. This condition had been recommended by the Planning Appeals Commission in their decision to recommend approval of the proposed development.

The application to alter the original condition.

[4] However on 28 July 2006 the developers applied under Article 28 of the Planning (Northern Ireland) 1991 Order for permission to develop the land without compliance with condition 18. By 2006 the traffic assessment had been revised and the developers sought removal of the condition requiring the construction of the flare lane.

[5] On 30 July 2007 the Department granted the Article 28 application and stated the condition as follows-

> "No more than 150 dwellings shall be occupied until the road improvement works at the Saintfield Road/Knockbracken Road junction, generally as indicated on drawing No 01 date stamped 28 July 2006 have been fully completed in accordance with the detailed engineering drawings to be submitted to and approved by the Department. All works shall comply with requirements of the Design Manual for Roads and Bridges and all other relevant standards and technical guidance."

An Informative to the grant of planning permission stated "The applicant should note that all other conditions and informatives of the previous approval (of 10 May 2004) remain valid and must be adhered to."

[6] The effect of the Article 28 grant of planning permission on 30 July 2007 was that the road improvement works providing for the flare lane at Knockbracken Road would no longer be required.

The application for Reserved Matters approval.

[7] Meanwhile, on 8 July 2005 the developers had applied for approval of Reserved Matters. In default of determination the matter was decided by the Planning Appeals Commission on 16 December 2006. By its decision the Planning Appeals Commission granted Reserved Matters approval. The Report of Commissioner O'Hare concluded that the objectors concerns would not justify rejection of the proposal. Further it was stated that "…. in regard to conditions I agree with the Department that the requirements of the landscaping conditions 9,10,11,12 and 13 of the outline approval remain to be satisfied by the submission of the required details for approval."

The Planning (Northern Ireland) Order 1991.

[8] Article 27 of the 1991 Order provides for the conditional grant of planning permission. The present case raises issues about the operation of Articles 28, 35 and 36.

Article 28 provides for permission to develop land without compliance with conditions previously attached and reads as follows –

> (1) This Article applies to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.
>
> (2) A development order may make special provision with respect to-
>
> (a) the form and content of such applications; and
>
> (b) the procedure to be followed in connection with such applications.
>
> (3) On such an application the Department shall consider only the question of the conditions subject to which planning permission should be granted, and-
>
> (a) if it decides that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, the Department shall grant planning permission accordingly; and
>
> (b) if it decides that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, the Department shall refuse the application.
>
> (4) This Article does not apply where the application is made after the previous planning permission has become time-expired, that is to say, the previous permission having been granted subject to a condition as to the time within which the development to which it related was to be begun, that time has expired without the development having been begun.
>
> (5) Planning permission shall not be granted under this Article to the extent that it has effect to change a condition

subject to which a previous planning permission was granted by extending the time within which—

(a) a development must be begun;

(b) an application for approval of reserved matters (within the meaning of Article 35) must be made.

[Paragraph (5) applies to applications received by the Department from 10 June 2006, thus extending to the developers Article 28 application in the present case.]

Article 35 provides for the duration of outline planning permission, which shall be deemed to have been granted subject to conditions to the following effect –

"(a) That in the case of any reserved matter, application for approval must be made within three years of the grant of outline planning permission; and

(b) That the development to which the permission relates must be begun by whichever is the later of the following dates –

(i) The expiration of five years from the date of the grant of outline planning permission; or

(ii) The expiration of two years from the final approval of the reserved matters or, in the case of approval on different dates, the final approval of the last such matter to be approved."

Supplementary provisions are contained in Article 36(4) -

"Where planning permission (whether outline or otherwise) has conditions attached to it by or under Article 34 or 35 –

"(a) Development commenced and carried out after the date by which the conditions of the permission required to be commenced shall be treated as not authorised by the permission; and

(b) An application for approval of a reserved matter, if it is made after the date by which the conditions required to be made, shall be treated as not made in accordance with the terms of the permission."

<u>The applicants grounds for Judicial Review.</u>

[9] The applicants' grounds for judicial review may be summarised under the following headings –

(A) The "lapse" of the outline planning permission of 10 May 2004.

(B) Disregard of planning policy.

(C) Taking into account irrelevant considerations or acting for an improper purpose.

(D) Failing to take into account the "Merit Homes" permission.

(E) Failing to make adequate inquiries.

<u>Ground A – The "lapse" of the outline planning permission of 10 May 2004.</u>

<u>The operation of time limits – for Reserved Matters approval.</u>

[10] The applicants contend that the outline planning permission has lapsed by reason of the failure of the developers to apply for all Reserved Matters approvals within the time limits. Under the original outline planning permission granted on 10 May 2004 the application for Reserved Matters had to be made within three years, namely by 10 May 2007. The developers made a Reserved Matters application on 8 July 2005, which was within the statutory time. The applicants contend that the developers made no application for Reserved Matters in respect of landscaping and that the time for making such application expired on 10 May 2007. The developers contend that they made an application in respect of all Reserved Matters, including landscaping, in their application of 8 July 2005 and thereby satisfy the statutory requirements in relation to the time limits for Reserved Matters. It will be necessary to consider below whether the application for Reserved Matters made by the developers on 8 July 2005 extended to landscaping.

<u>The operation of time limits – for development to begin.</u>

[11] Further, the development approved by the outline planning permission of 10 May 2004 had to begin within five years, namely 10 May 2009 or the expiration of two years from the final approval of Reserved Matters, if later. If the application for Reserved Matters did not extend to landscaping matters then, subject to the effect of the Article 28 decision referred to below, it would now be too late to apply for Reserved Matters

approval and the time limit for development to begin could not be later than 10 May 2009. Accordingly the developers would still have time to begin the development on foot of the outline planning permission of 10 May 2004, subject to compliance with any relevant conditions of that permission relating to the commencement of development.

The operation of time limits – on the Article 28 application.

[12] The Article 28 application to complete the development without compliance with the condition previously attached that required the construction of the flare lane at Knockbracken Road was a new application for planning permission. The time limits for Article 28 applications are contained in Article 28(4) which provides that such applications cannot be made after the previous planning permission has become "time expired". That time is defined as being the time within which the previous planning permission required the development to being, namely 10 May 2009. Accordingly the Article 28 application was made within time.

[13] Article 28(5) prohibits any change of condition of a previous planning permission that would involve the extension of time within which a development must be begun or the extension of the time within which an application for approval of Reserved Matters must be made. The Informative to the Article 28 permission applies the conditions in the original permission of 10 May 2004, but that can not have the effect of extending the time limits for an application for Reserved Matters or for the development to begin. If the application for Reserved Matters in respect of the original outline planning permission has become time expired then it cannot be extended by the new grant of planning permission under Article 28. If the application for approval of a Reserved Matter was not made within the required time, namely by 10 May 2007, any application for approval of a Reserved Matter made after that date shall, by virtue of Article 36(4), be treated as "not made" in accordance with the terms of the permission.

The operation of time limits – on the original outline planning permission.

[14] The applicants contend that the outline planning permission granted on 10 May 2004 "lapsed" by reason of the developers' failure to apply for approval of the Reserved Matters in relation to landscaping within three years. However the statutory scheme does not provide that the failure to comply with such a condition of planning permission has the effect of invalidating the planning permission. Under Article 36(4) a late application for Reserved Matters is treated as "not made" and a development commencing after the specified date is treated as "not authorised" by the permission.

[15] The implementation of a planning permission in respect of which there has been non-compliance with a condition will depend not only upon the terms of the legislation but upon the terms of the grant of planning permission. Insofar as there are conditions that have not been met the developers may be able to make a new application for planning permission in respect of the matters covered by those conditions.

The equivalent legislation in England and Wales.

[16] An earlier equivalent to Article 28 in the English legislation appeared in section 73 of the Town and Country Planning Act 1990. At that time section 73(4) prohibited an application where there was a time limit on the beginning of development and the development had not begun within that time. In R (Corby Borough Council) v Secretary of State for the Environment (1994) 1 PLR 38 a grant of outline planning permission included a condition that required an application for approval of Reserved Matters to be made within two years. The application was made after the expiry of that time limit. The developer then applied under section 73 for a grant of permission that altered the condition imposing the time limit. This was opposed on the ground that the outline planning permission was said to have lapsed under the terms of the conditions. Pill J stated that the only inhibition upon a section 73 application was that contained in sub-section 4, namely that the time for the development to begin had not expired. A section 73 application could be made after the time for application for approval of Reserved Matters had expired, which would almost always be different from the time that the development was to begin. Further Pill J rejected the submission that by reason of the passing of the time limit for an application for Reserved Matters, no permission, upon the basis of which a section 73 application could be made, existed.

[17] The operation of section 73 was further considered by Sullivan J in Pye v Secretary of State for the Environment (1998) 3 PLR 72. Outline planning permission was granted on conditions that included a requirement to apply for approval of Reserved Matters within three years and to begin the development within five years, or two years from final approval of Reserved Matters. After four years the developer applied for an extension of the time limit for application for approval of Reserved Matters, which was refused on the basis that it was contrary to current policies. Sullivan J stated that an application made under section 73 was an application for planning permission; while section 73 applications were commonly referred to as applications to "amend" the conditions attached to a planning permission, a decision under section 73 leaves the original planning permission intact and unamended; if the decision is to grant planning permission the developer may choose whether to implement the original planning permission or the new planning permission; if the decision is to refuse the application the developer is still free to implement the original planning permission; if an

application is made to extend the period for submission of Reserved Matters at a time when the original planning permission is no longer capable of implementation because the time for submission of Reserved Matters has expired (under the equivalent of Article 36(4)(b)) such an application shall be treated as "not made" in accordance with the terms of the permission; regard should be had to the factual circumstances as they exist at the time of the decision including whether the original planning permission is incapable of implementation. In R (Powergem UK Plc) v Leicester City (2000) All ER (D) 696 the Court of Appeal approved Pye v Secretary of State for the Environment.

[18] The above cases preceded the introduction of section 73(5) in 2004 (which is the equivalent of Article 28(5) introduced in Northern Ireland by the Planning Reform (Northern Ireland) Order 2006). Moore in A Practical Approach to Planning Law 9th Edition at paragraph 15.120 states that the effect of adding subsection (5) to section 73 means that once planning permission has been granted for development, no conditions as to time are capable of being altered. If a developer finds that existing time conditions in a planning permission cannot be met, he must submit another application for planning permission for that development, which he may do at any time, even where the time limits for commencement imposed in the earlier planning permission have not expired. Thus, states Moore, the previous litigation, in particular Pye v Secretary of State for the Environment, will be consigned to history.

Application for Reserved Matters approval for landscaping.

[19] The developers contend that its application for approval of Reserved Matters of 8 July 2005 extended to landscaping as well all other Reserved Matters and accordingly there was compliance with the conditions of the original planning permission. The application as originally submitted and the application for Reserved Matters did include landscaping proposals. However there was no tree survey submitted for approval by the Department (condition 9); no landscaping scheme for retained trees and hedgerows and planting belts submitted for approval by the Department (condition 10); no measures for the protection of trees and hedgerows submitted for agreement in writing with the Department (condition 11); no proposed species of trees to be planted along the main boulevards (condition 12) and no ten year landscape management plan for the approval of the Department (condition 13). That these matters were outstanding was the position of the Department at the Planning Appeals Commission hearing on 18 October 2006 where the Commissioner's Report at paragraph 3.5 states the Department's case that "while the layout plans indicate general landscaping proposals, a detailed landscaping scheme needs to be submitted for approval". At paragraph 6.8 of the Report the Commissioner states that the developer was to submit required details for approval of landscaping conditions 9,10,11,12 and 13. The

developers have not made the requisite application for approval of the landscaping details.

[20] Further the developers contend that conditions 9-13 do not constitute Reserved Matters. In the interpretation section of the Planning (General Development) Order (Northern Ireland) 1993 "Reserved Matters" in relation to an outline planning permission or an application for such permission, means any of the following matters in respect of which details have not been given in the application, namely (a) siting (b) design (c) external appearance (d) means of access (e) the landscaping of the site.

"Landscaping" means the treatment of land (other than buildings) being a site or part of a site in respect of which outline planning permission is granted, for the purpose of enhancing or protecting the amenities of the site and the area in which it is situated and includes screening by fences, walls or other means, the planting of trees, hedges, shrubs or grass, the formation of banks, terraces or other earth works, the laying out of gardens or courts, and the provision of other amenity features.

[21] Conditions 9-13 constitute "landscaping" conditions and are Reserved Matters. Reserved Matters are defined in condition 1 of the original planning permission in accordance with the above statutory definition as referring to siting, design, external appearance, access and landscaping. Conditions 9-13 do not cease to be Reserved Matters because they have not been referred to expressly in condition 1 or because they are not described as such in conditions 9-13. Nor do conditions 12 and 13 cease to be Reserved Matters because they do not state that approvals must be obtained within three years – this is provided for under condition 3.

[22] The implementation of the outline planning permission of 10 May 2004 will be affected by the failure to apply for approval of Reserved Matters on landscaping within the required time. Conditions 9, 10 and 11 provide that "No development shall take place until …. " there has been approval of the specified matters. None of those approvals having been obtained no development may take place on foot of the permission. Condition 12 is of a different order in that the required approval by the Department of the species of trees relates to planting along the main boulevards in the first planting season "…. following construction of those streets". Condition 13 is also of a different order in that it requires approval of the landscape management plan "…. before any buildings are occupied". The terms of conditions 12 and 13 do not alter the effect of conditions 9 – 11.

[23] The outline planning permission of 10 May 2004 has not "lapsed" but its implementation is affected by the failure to comply with the timescale for approval of Reserved Matters in respect of landscaping. The further grounds

for judicial review are considered below on the basis that the Mealough Road development is capable of implementation.

Ground B – Disregard of planning policy.

[24] The applicants contend that the respondent misapplied a relevant planning policy. Planning Policy Statement 3 (PPS3) on "Access Movement and Parking" contains policy AMP3 "Access to Protected Routes" as clarified in October 2006. Policy AMP3 provides that the Department will restrict the number of new accesses and control the level of use of existing accesses onto protected routes. The overall approach is that it is essential that accesses that would compromise road safety or prejudice design standards are severely restricted.

[25] The applicants contend that policy AMP3 applies because the proposed development impacts on the road traffic arrangements for access to the Saintfield Road from the Knockbracken Road, where the former is a protected route. The respondent contends that policy AMP3 only applies where there is a new access or intensification of use of an existing access from the development site to the protected route, which does not occur in the present case.

[26] The policy is concerned with accesses onto protected routes. It does not provide that there must be direct access to and from the protected route and the proposed development site. A new development may provide an access on to a road that joins a protected route and that may be covered by policy AMP3, but that is not this case. In the present case there is clearly a connection between the proposed development and the junction at Knockbracken Road and Saintfield Road because the original planning permission made it a condition that road improvements should be completed at that junction. However the proposed development, while affecting the junction, does not affect access to the protected route, even though it is the case that the condition sought an improvement in the access from Knockbracken Road to the Saintfield Road. I am satisfied that policy AMP3 on access to protected routes does not apply in the present case in relation to the access from Knockbracken Road to Saintfield Road.

[27] The appropriate policy under PPS3 is policy AMP6 which requires the preparation of a transport assessment. A full traffic assessment had been carried out at the time of the Public Inquiry that preceded the grant of outline planning permission. The Department did not carry out a full traffic assessment as part of the Article 28 application. Philip Arnold, a Principal Planning Officer with the Department, avers that as the Article 28 application related to only a small part of the overall scheme of road design and traffic

mitigation measures, it was not considered necessary to conduct a full traffic assessment of the entire scheme. This raises the issue of the manner of assessment of the overall road design, which is considered below.

Ground C – Taking into account irrelevant considerations or acting for an improper purpose.

[28] The applicants contend that the Department, in making the Article 28 decision, undertook the assessment of the roads issues by taking into account irrelevant considerations or acting for improper purpose of seeking to facilitate the developer because of difficulties that have arisen in relation to the Knockbracken Road junction. Carswell LCJ considered the issue of improper purpose in Kelly and Sheils Application [2000] NI 103 and referred to the traditional test as being whether the permitted purpose was the true or dominant purpose. At page 116 it was stated that the test of asking whether the improper purpose demonstrably exerted a substantial influence on the relevant decision provided a useful alternative to the test of true or dominant purpose and that "…. each constitutes an application of the basic principle that the donee of a power must act within the limits of the discretion conferred upon him".

[29] When the Article 28 application was made in July 2006 the matter was referred to Roads Service. They found the proposal unacceptable. What emerged during consideration of the application was that a decision had been taken to install a cycle lane along the Saintfield Road that crossed the junction with Knockbracken Road and which required an additional width of footpath to accommodate pedestrians and cyclists. The impact of the proposed cycle lane affected the land available for the flare lane on Knockbracken Road and created the prospect that there was insufficient public land available. Work on the proposed cycle lane was to commence in January 2007. There had been no public notice of the proposed cycle lane as it had been decided upon to coincide with the proposals for the resurfacing of part of the Saintfield Road. There was reference to the cycle lane being a 'blight' on the construction of the flare lane. The developers wanted the Department to vest any additional land that would be required at the Knockbracken Road junction rather than requiring the developers to acquire the land at commercial rates. The prospect emerged of widening the carriageway on the Saintfield Road, if additional lands could be acquired by the developers opposite the Knockbracken Road junction. Officials talked of 'relenting' on the issue of the flare lane if additional lands were to be acquired to widen the carriageway. A series of meetings took place and there was talk of 'compromise'. There was much detailed evidence filed on these deliberations, expanding upon or refuting the applicants' contention that decisions were not being made on proper roads and planning grounds.

[30] Thomas McCourt the Divisional Roads Manager considered that it was entirely inappropriate for Roads Service to vest land in order to assist developers to comply with the requirements of a planning permission. He was advised by Graham Beckett a Principal Engineer in Roads Service that they should not insist upon a design for the Knockbracken Road junction that would prejudice the developers' ability to implement the planning permission. Mr McCourt spoke to a senior colleague in a different division of Road Service who gave the same advice as Mr Beckett. Accordingly Mr McCourt attended a meeting on 21 March 2007 with the developers where Mr McCourt stated his conclusion in relation to Knockbracken Road that there could be an achievable solution within the existing land take. By stating that conclusion I understand that Mr McCourt was prepared to accede to the removal of the flare lane from Knockbracken Road, on the basis of the advice he had received from his colleagues, because the developers' ability to comply with the condition for a flare lane had been prejudiced by the cycle lane.

[31] The Department describes the exercise that was undertaken as being to ascertain whether a solution to the Knockbracken Road junction was achievable, otherwise described as feasible. For this purpose the considerations extended not only to the Knockbracken Road junction but to the wide area that included the adjacent junction 85 yards away at the Healthcare Centre. Roads Service continued to raise issues with the proposals for the extended junction that included the alignment of the road, the removal of bus laybys and the compliance with design standards. However the Department contends that the decision being made on the Article 28 application concerned whether the removal of the flare lane would prevent the completion of an 'achievable' or 'feasible' overall road scheme for the area, on an outline basis only, with decisions on the final design of the junction being determined at a later stage.

[32] Accordingly the Roads Service deliberations over the Knockbracken Road junction extended to matters affecting the wider junction, further plans were produced for the road layout, many issues raised by Roads Service remained unresolved and final design details for the extended junction not achieved. However it was concluded that an acceptable design would be 'achievable'. In the Roads Service report from Colin Sykes, Senior Engineer in Roads Service, on 3 May 2007 it was stated that any relaxation or departure from design standard was to be "provided at detailed design", reference was made to the 2006 revised drawing, to further details requested to ensure the achievability of the design, to subsequent amended drawings received and to traffic modelling. The conclusion was that the removal of the flare lane would "…. not impact on the capacity of the proposed junction." The recommendation was for no objection, subject to conditions. The condition that appeared on the approval of the Article 28 application referred to road improvement works at the junction "in accordance with the detailed

engineering drawings to be submitted to and approved by the Department" and further that all works were to comply with "the Design Manual for Roads and Bridges and all other relevant standards and technical guidance."

[33] The Planning Service case officer recommended approval of the Article 28 application and the Development Control Group approved the application subject to the new condition. Philip Arnold, Principal Planning Officer and member of the Group, states that, as the Knockbracken Road junction could function without the flare lane, a condition that required its construction was not reasonable nor necessary and not relevant to the proposed development. In view of the terms of the new condition, Mr Sykes states that the Department was satisfied that the final layout would meet all appropriate public safety standards.

[34] Did the matters taken into account invalidate the grant of the Article 28 application? Was the true and dominant purpose of the decision a purpose related to achieving the appropriate roads and public safety standards or did an improper purpose demonstrably exert a substantial influence on the decision? The Roads Service approach did seek to accommodate the developer in securing removal of the flare lane because of the difficulties created by the unannounced introduction of the cycle lane. However while the Article 28 decision was a final decision on that application it was not a final disposal of the roads issues in relation to the extended junction. The flare lane was no longer required. The final arrangements for the extended junction have yet to be determined, but will be required to meet design standards for roads and public safety. Roads and public safety considerations have been preserved by the condition attached to the Article 28 permission that provides that the Department will have to approve the detailed engineering drawings and that all relevant standards and technical guidance will apply.

[35] I am satisfied that while the Department has been influenced by the impact of the cycle lane on the developers capacity to complete a flare lane at Knockbracken Road, the decision on the Article 28 application to remove the flare lane has been made in circumstances that maintain the necessary road and public safety considerations and that has been the true and dominant purpose. Whether the Department's approach has been effective to achieve their purpose is a different issue.

Ground D – Failing to take into account the Merit Homes permission.

[36] The applicant contends that the Article 28 decision was flawed because account was not taken of an outline planning permission for the development of 13 dwellings at 366 Saintfield Road, Belfast (known as Merit Homes), which is in close proximity to the Healthcare Centre junction and the

Knockbracken Road junction. The Merit Homes planning application was made in 1996 and outline planning permission was granted on 10 January 2007 and was thus granted after the Article 28 application, but prior to the Article 28 decision. The outline planning permission for Merit Homes, at condition 5, required a new access to the site on to the Saintfield Road on the same side of the road as Knockbracken Road. When travelling from Belfast the Merit Homes site at 366 Saintfield Road is on the left; almost immediately after the proposed access there is a right turn access to the Healthcare Centre; almost immediately after that there is a left turn into Knockbracken Road; the proposed Mealough development site is further along the Saintfield Road.

[37] It is apparent that Roads Service was aware of the Merit Homes application as it had been consulted by Planning Service in relation to the application. However Roads Service was not informed of the grant of outline planning permission to Merit Homes prior to it providing advice to Planning Service on the Article 28 application. Colin Sykes, a Senior Engineer in Road Service, states that it was not considered necessary to factor in the Merit Homes development when considering the Article 28 application.

[38] A new access at 366 Saintfield Road servicing the Merit Homes development would undoubtedly have an impact on the extended junction from the new access to the Healthcare Centre to Knockbracken Road. Roads Service referred to this consideration at a meeting on 5 January 2007 relating to the Knockbracken junction. Roads Service carried out modelling of the junction but did not include the impact of the new Merit Homes access in that modelling. It is the position of Roads Service that the Article 28 application was concerned with the flare lane at Knockbracken Road and hence it was not necessary to model the impact of the new Merit Homes access. However Mr Skyes of Roads Service arranged for new modelling of the Knockbracken junction to be carried out, to include the impact of the new Merit Homes access. The result of the new modelling was stated to be that irrespective of whether the model included the Merit Homes access or did not, the removal of the flare lane made very little, if any, impact upon the overall operation of the junction. When the Merit Homes access was included within the modelling, the junction continued to operate within capacity both with and without the flare lane.

[39] Thomas O'Hagan a transport engineer engaged by the applicants considers that Mr Skyes exercise was "littered with errors". Mr O'Hagan sets out particulars of the errors said to be contained in the modelling. In reply Mr Skyes states that the purpose of the new modelling was not to conduct an enquiry into the extended junction based on a final design but rather to consider only the effect of the absence of the flare lane. It was acknowledged that many of Mr O'Hagan's criticisms would be well made if the modelling related to a final design of the extended junction but, says Mr Sykes, that is not the case. When the final design of the junction has been settled the whole

scheme will then be examined. Modelling is said to be an affirmative tool and will be but one aspect of the design process for the junction. The final design proposals will have to meet road safety standards. On the issue of the flare lane it is said to be capable of working within capacity when taking account of the new Merit Homes access.

[40] In relation to the impact of the new Merit Homes access, this has now been taken into account and included in the modelling and is said by the Department to be of no significance. The issue thus turns to the effectiveness of the modelling and the relevance of final designs for the extended junction having yet to be agreed.

Ground E – The adequacy of Road Service enquiries

[41] The applicants contend that there were inadequate enquiries into the proposals for the junction at Knockbracken Road. There were six plans produced in relation to the lay out of the junction for the purposes of the Article 28 application. Two of the plans were dated July 2006 and the other four were dated in March and April 2007. The discussions about the developers' proposals led to revisions. The Article 28 planning permission referred to the 2006 plan. The modelling that was carried out did not relate to the 2007 plans. Roads Service was never presented with acceptable proposals for the extended junction. The applicants say that the exercise was incomplete.

[42] The applicants rely on Girvan LJ in Bow Street Mall's Application [2006] NIQB 28 and the need for planning authorities to approach their functions "in a questioning frame of mind". A central aspect of the application had gone unexplored and unquestioned. The decision was found to be Wednesbury unreasonable.

> "If after proper consideration of the issues properly explored the decision is in favour of planning permission the decision-maker could not be challenged as having acted irrationally or perversely. In the present circumstances, in the absence of any real exploration of the issues relating to the alleged financial imperatives of an overall development of this magnitude, the conclusion that it was an appropriate development was one which no reasonable planning authority properly directing itself could have reached having regard to the Departmental conclusions that the vitality and viability of other centres could be significantly affected by a development of this size."

[43] The position of the Department was that the outline planning permission referred to an indicative plan only and that the final detailed design had to be approved by the Department. Similarly when the Article 28 application was submitted the respondent was dealing with an indicative plan only. In considering the Article 28 application Roads Service sought to ascertain the developers likely proposals for the final design without the flare lane and a number of meetings and amendments of drawings occurred. Mr Skyes states that the purpose of the meetings with the developer was not to approve the final layout of the junction but to ascertain the developers' likely proposals and to establish whether an appropriate design was feasible. Accordingly the condition attached to the Article 28 application refers to the 2006 plan "generally as indicated" and further that detailed engineering drawings are to be submitted and approved by the Department and further that all work shall comply with the requirements of the Design Manual for Roads and Bridges and all other relevant standards and technical guidance. Thus Road Service did not undertake a full analysis of the design of the extended junction nor regard the additional drawings as embodying the final design.

[44] It is clear that there are many unresolved issues in relation to the roads layout over the extended junction. Discussions have ranged over road widths and alignments and levels and turns, pedestrian crossings and islands, bus lay-bys and cycle lanes. The final design of the extended junction has yet to be submitted by the developer and agreed by the Department. The applicants expressed their anxiety about there being no further opportunity for objectors to make representations on any final designs. Counsel for the Department acknowledged that the process of securing approval for the final design of the roads is a matter in respect of which the applicants as objectors would have access to the materials submitted by the developers and may make their representations to the Department prior to any decision being taken on the final design.

[45] Appropriate investigations have to be undertaken by the planning authority before making a determination on an application for planning permission. The Article 28 application concerned itself with the alteration of the flare lane at Knockbracken Road. Roads Service considered that issue in the broader context of the feasibility of an extended junction that met appropriate standards for roads and public safety, without the completion of the flare lane. In so doing the decision was made at an achievability or feasibility level with final designs to be determined at a later date. Thus detailed enquiries into the roads layout at the extended junction have yet to be made. This is not a case of the Department failing to made adequate enquiries but of the Department postponing the making of those enquiries, which in the circumstances they were entitled to do. The final design of that extended junction is a matter in respect of which an application has yet to be

made by the developers and a decision made by the Department. At that stage the applicants will be entitled to make their objections and the Department will take all matters into account in making its decision whether to approve the final design. However there remains the applicants' complaint that the modelling adopted by the Department is flawed and is not fit for purpose in contributing to an assessment of the roads and public safety considerations.

- Traffic modelling

[46] The applicant contends that the Department did not undertake appropriate traffic modelling in relation to the extended junction on the Saintfield Road or make an appropriate assessment of the roads and public safety considerations at that extended junction.

[47] Such modelling as was carried out was said to be based on the 2006 revised drawing and not the 2007 drawings, did not take account of the removal of the bus lay-bys and contained multiple errors. The applicants produced a matrix setting out variations on the modelling exercise with and without a flare lane on Knockbracken Road and set against nine issues raised by the applicant. Two of the issues related to simultaneous green lights for right turn traffic in one direction and straight ahead traffic in the opposite direction. Three of the issues related to excessive vehicles in queue lanes having the effect of blocking carriageways. One of the issues concerned the inaccurate measurement of link lengths. Two of the issues concerned the timing for a pedestrian crossing of the Saintfield Road. The final issue concerned the correct capacity of the flare lane. Mr O'Hagan for the applicants produced extensive data and arguments for the inadequacy of the modelling conducted by the Department.

[48] Mr Sykes on behalf of the Department did not contest the accuracy of many of the criticisms made on behalf of the applicants. Indeed the Department did not engage with the applicants on their detailed criticisms on the ground that the approach of the applicants was inappropriate. The Department repeats its position that the exercise undertaken in response to the Article 28 application concerned the flare lane at Knockbracken Road and most of the applicants criticisms of the modelling are said to relate to matters that are relevant to the extended junction. Again the Department takes the position that all of the issues raised by the applicants will be addressed at final design stage.

[49] The Article 28 exercise concerned the feasibility and achievability of a junction without a flare lane on Knockbracken Road. The Department has concluded that an overall roads scheme, without a flare lane, but to the required roads and public safety standards, is capable of being achieved. Mr

O'Hagan in effect does not accept that such a conclusion can be reached at this stage in view of the errors in the modelling exercise. Ultimately Mr Sykes of Roads Service states that, in the event that the developers final design proposals do not meet the standards specified in the Article 28 condition, Roads Service will not recommend approval of the final design.

[50] The many detailed issues that are outstanding in relation to the final design of the extended junction are matters that have yet to be determined when the developers apply for final approval. The ultimate assessment of the roads and public safety requirements has yet to be made. A full and final traffic assessment will be required. The modelling that will be adopted in order to assist the necessary assessments has yet to be determined. All these matters will be open to the applicants and subject to their representations to the Department. I have not been satisfied that there are any judicial review grounds for interfering with the decisions made by the Department.