Landmark Chambers

Case Law Update

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Themes

- Pre-application consultation for major developments
- Officer reports
- Habitats Regulations
- Reasons
- Conditions

Pre-application consultation – *Re Greencastle Rouskey Gortin Concerned Community Ltd* [2019] NIQB 24

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- Underground mineral mining and exploration + 147 ha surface infrastructure, e.g. processing plant, water treatment plant etc. on undeveloped agricultural land in County Tyrone

- Total 997 ha

- Major regional significance

Pre-application consultation – *Re Greencastle Rouskey Gortin Concerned Community Ltd* [2019] NIQB 24

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- Legal framework:
  - Section 27 of 2011 Act: obligatory pre-application community consultation for "*major development*"
  - Section 27(4):

    "A proposal of application notice must be in such form, and have such content, as may be prescribed but must in any event contain—

    (a) a description in general terms of the development to be carried out;

    …

    (c) a plan showing the outline of the site at which the development is to be carried out and sufficient to identify that site, and

    …" (emphasis added)
  - Mechanics of consultation fleshed out in Planning (Development Management) Regulations (NI) 2015

Pre-application consultation – *Re Greencastle Rouskey Gortin Concerned Community Ltd* [2019] NIQB 24

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- Legal framework:
  - Section 50 of the 2011 Act: duty to determine s27 compliance

  - Section 50(1):

    "A council or, as the case may be, the Department for Infrastructure must decline to determine an application for the development of any land if, in the opinion of the council or the Department for Infrastructure—

    (a) compliance with section 27 was required as respects the development, and

    (b) there has not been such compliance." (emphasis added)

Pre-application consultation – *Re Greencastle Rouskey Gortin Concerned Community Ltd* [2019] NIQB 24

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- Proposal of Application Notice 2-page document with map – 30 Aug 2016
- D engaged in proactive interaction with local community, structured feedback process, advertisements in newspapers, 2 public information events, 13,000 leaflets, 8,000 newsletters etc
- Planning application – 27 Nov 2017
- Department determined D had complied with s27

Pre-application consultation – *Re Greencastle Rouskey Gortin Concerned Community Ltd* [2019] NIQB 24

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- C challenged Department's decision – D failed to comply with s27 requirements:
  - PAN omitted significant elements of application, e.g. removal of 30 ha peatland, crusher installation, sewerage treatment plant etc.

- **Proposal consulted upon "*excessively embryonic and insufficiently advanced*"**

Pre-application consultation – *Re Greencastle Rouskey Gortin Concerned Community Ltd* [2019] NIQB 24

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- McCloskey J dismissed the claim
- **Main issue**: whether the Department could rationally form the opinion that there had been compliance with this free standing statutory requirement at the anterior, PAN/section 27 consultation stage: para 99
  - Considered background of 2011 Act in detail
  - Helpful distillation of 2011 Act consultation requirements at para 64
    - "the project concept must be sufficiently developed and advanced to facilitate informed and meaningful responses from those consulted. The phrase "*in general terms*" falls to be construed in this light. On the other hand, the project concept should not be so refined and advanced as to jeopardise the conscientious responses of consultees." (para 64(iv)

Pre-application consultation – *Re Greencastle Rouskey Gortin Concerned Community Ltd* [2019] NIQB 24

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- Question for Court is whether the evaluative judgment of Department *Wednesbury* reasonable: para 66

- Statutory duty of consultation did not override common law consultation principles – "*still at a formative stage"*: para 72

Pre-application consultation – *Re Greencastle Rouskey Gortin Concerned Community Ltd* [2019] NIQB 24

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"[107] Section 27 does not require attainment of the theoretically perfect. Its effect is to notionally stop the clock at a particular moment in time and to require the putative planning applicant to conduct a public engagement exercise which gives the community a fair and reasonable opportunity to express its views relating to the "*general terms*" of the project then in contemplation. Neither a completed project concept nor a highly advanced one is required by the statute or the associated common law principles.

[108]… It does not require the developer to publish and consult upon a completed project. Rather, what must be published is a general outline of the project then in contemplation. …

[109] Furthermore, it is the very essence of the new statutory regime that alterations, ranging from the minimal to the more significant, may legitimately be made to a planning project in the wake of a section 27 PAN consultation exercise."

Officer Reports - *Belfast City Council v Planning Appeals Commission* [2018] NIQB 17

- BCC challenged permission granted by PAC for 79-apartment student accommodation
- How are officer reports to be read?
  - Read and interpreted with appropriate degree of latitude but still penetrating examination of text (para 56)
  - Reference to *R v Mendip DC ex p Fabre* [2000] 80 PCR 500 (Sullivan J) (para 57)
  - Should not apply this with a broad sweep: not binding; different legal context; because new NI planning system in infancy no evidential basis warranting generous degree of latitude and defence to councils! (para 58)

Officer Reports – *Re Conlon's Application* for JR [2018] NIQB 49

- BCC granted permission for major office development which would "*tower over the Markets area"*. JR brought by resident

- McCloskey J, referring to the *Re Belfast CC JR* – "there will normally be an intense focus on the report/s prepared by planning officers for the assistance of planning committees of councils: see [51] – [56]." (para 12)

Officer Reports – *Re Allister's Application* for JR [2019] NIQB 79

- Causeway Coast and Glens BC granted permission for a 13-acre hotel and spa complex. Challenged by nearby residents
- One issue – officer report failed to relate main access in breach of policy (paras 111-128)
- McCloskey J emphasised:

> "the specific responsibility imposed on the case officer was to bring to the attention of the decision makers, the PC members, the relevant policy requirements in sufficiently detailed and accurate terms to ensure that they were properly understood by the reader, thereby facilitating the twofold exercise of relating them to the material aspects of the development proposal and forming a judgement accordingly." (para 125)

Officer Reports – *Re Allister's Application* for JR [2019] NIQB 79

- McCloskey J – officer report flawed due to policy incompatibility, leaving out of account material considerations, unlawful consultation and procedural impropriety (paras 124, 126):
  - Policy AMP3: prevented planning permission here unless existing vehicular access onto Protected Route made use of
  - Report fails to convey to the PC Mr Allister's objection based on Policy AMP 3.
  - Policy requirements governing utilisation of an existing access by relocation are not spelt out clearly or fully.
  - Officer addresses the issue of relocating an existing access in a single sentence which also addresses the issue of site access from a minor road.
  - The phraseology "*an existing relocated access*" is ambiguous: it could denote an existing access which has been relocated or one which is to be relocated.
  - There is no indication in the text that policy AMP 3 does not recognise the mechanism of relocating an existing access.
  - The developer's proposal to both relocate and enlarge the existing access is not addressed.

Reasons – *Re Sands JR* [2018] NIQB 80

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- McCloskey J –

> "the applicable legal framework is one in which excessive legalism and rigid prescription are intruders." (para 112)

Reasons – *Re Stuart Knox* [2019] NIQB 34

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- Development in area of Causeway Coast and Glens Borough Council – "conversion and alteration of historic vernacular building to provide new detached dwelling unit".
- Officer report recommended refusal – including because site lay within the Distinctive Landscape Setting of the Giants Causeway and Causeway Coast World Heritage Site and the proposal did not qualify as an exception (para 6.73 of SPPS and Policy COU4).
- Council disagreed and granted planning permission. Its stated reasons were:

  "● ***Consider that the conversation*** [sic] ***of the barn is acceptable in principle.***

  ● ***No policy requirement for private amenity space.***

  ● ***Proposed development would be an improvement to what currently on site*** [sic]".

Reasons – *Re Stuart Knox* [2019] NIQB 34

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- McCloskey J found that:
  - Obligation to give reasons existed based on (paras 30-34):
    - "Protocol for the Operation of the Causeway Coast and Glens Borough Council Planning Committee": referred to need to give "*sound, clear and logical planning reasons"* and also where disagreement with officer report
    - Common law, following Supreme Court decision in *R (CPRE Kent) v Dover DC* [2018] 1 WLR 108 – here World Heritage Site affected

Reasons – *Re Stuart Knox* [2019] NIQB 34

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- BUT, reasons given were (just about) sufficient (para 59)
  - "*Not easy…because the Council's [Planning Committee], with a little effort and at no additional cost, could have done so much better"* (para 58)
  - "…*considered in their full evidential and juridical contexts they are imbued with sufficient clarity, coherence and intelligibility."* (para 59)
  - *"The recorded reasons have been found to satisfy the legal minima. However, the court trusts that every Council in Northern Ireland will not satisfy itself with the bare minimum." (para 59)*

Habitats Regs - *Re Sands JR* [2018] NIQB 80

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- Newry and Mourne DC granted permission for 70-bed nursing home and 41 apartments

- Located in Mourne Slieve Croob AONB and adjacent to or bordering an ASSI wood, a Protected Route, Special Countryside Area, Local Landscape Policy Area, Carlingford Lough ASSI/SAC, Rostrevor Wood SAC

- S challenged on various grounds including: (1) non-compliance with Reg 43(1) Habitats Regs/ Article 6(3) Habitats Directive; (2) breach of Regulation 3 Habitats Regs/ Article 12 Habitats Directive (having due regard to prohibition of deliberate disturbance of protected species)

Habitats Regs - *Re Sands JR* [2018] NIQB 80

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- Reg 43(1) Habitats Regs/ Article 6(3) Habitats Directive on appropriate assessment:
  - At paras 43-47, McCloskey J summarised the case law, looking at *National Trust's Application* (NIQB), *Sweetman* (CJEU), *Champion* (UKSC), *Lee Valley* (E&W CA)
  - *Wednesbury* standard for challenging "*likely significant effect"* conclusion because of judgment and assessment involved (paras 43 and 47)
  - Adverse effect on integrity? "*Liable to prevent the lasting preservation of the constitutive characteristics of the site connected to the presence of a priority natural habitat"* which justified designation (para 45)
  - No special procedure prescribed – ultimately rests on authority's judgment (para 46)

Habitats Regs - *Re Sands JR* [2018] NIQB 80

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- Argument – updated assessment should have been undertaken following 2 years elapsing

- McCloskey J dismissed argument – decision not to require updated assessment lay within band of reasonable decisions (para 52):
  - Development had reduced in size and scale
  - NIEA itself thought revised proposal "*highly likely to pass a revised HRA*"

- See also *Re Blackwood's JR* [2018] QB 87, in which McCloskey J again rejected Art 6(3) argument

Habitats Regs - *Re Sands JR* [2018] NIQB 80

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- Regulation 3 Habitats Regs/ Article 12 Habitats Directive – Council had to have regard to following:

  "*Member States shall prohibit deliberate disturbance of* [protected] *species, particularly during the period of breeding, rearing, hibernation and migration.*"

- S argued Council did not acknowledge these impacts

Habitats Regs - *Re Sands JR* [2018] NIQB 80

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- McCloskey J dismissed argument –
  - Cited UKSC decision in *R (Morge) v Hampshire CC* [2011] 1 WLR 268 at length (para 58)
  - A "*less onerous, or exacting*" duty in the Habitats Regs regime, bearing in mind criminal sanction still remains for unlicensed offending activity.
  - Evidence establishes clearly that duty discharged by Council

Conditions

- Section 54 of the 2011 Act: Permission to develop land without compliance with conditions previously attached

- Materially identical to s73 of the Town and Country Planning Act 1990

- *Finney v Welsh Ministers* (2019)
- *Lambeth v SSHCLG* (2019)

Conditions - *Finney v Welsh Ministers* [2019] EWCA Civ 1868

- E&W Court of Appeal (Nov 2019)

- A granted planning permission for wind turbines “up to 100m”
- A then applies under s73 1990 Act to vary height to 125m. Refused but appeal allowed
- **Issue** – Inspector empowered to grant planning permission for development not covered by description of development in original planning permission?
- CA: no. Section 73 of the 1990 Act cannot be used to amend operative part of planning permission or to impose condition inconsistent with operative part of planning permission: para 42
- Supreme Court refused permission to appeal (May 2020)

Conditions - *Lambeth v SSHCLG* [2019] UKSC 33

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- Supreme Court (July 2019)
- DIY store and garden centre – condition restricted sales to non-food items
- Following s73 application to increase type of goods that could be sold, L granted permission in 2014 but (mistakenly?) did not include condition restricting sale of food items – this had not been applied for
- Landowner sought certificate of lawfulness for unrestricted retail on the land, including food. Refused by L, granted on appeal

- Supreme Court allowed appeal and quashed Inspector's grant:
  - Operative part of 2014 permission was clear and unambiguous
  - Nothing to indicate intention to discharge original wording or remove restriction on sale of non-food goods

Thank you for listening

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