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Welcome to Landmark Chambers' 'Planning in Northern Ireland' webinar

The recording may be accessed here.

Your speakers today are…

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David Elvin QC (Chair)

Topic: Planning hearings and inquiries during COVID-19: alternatives to hearings in person?

Timothy Mould QC

Topic: Vesting orders and compensation

Yaaser Vanderman

Topic: Case Law Update

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Planning hearings and inquiries during COVID-19: alternatives to hearings in person?

David Elvin QC (Chair)

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Hearings and inquiries: Northern Ireland and the Planning Appeals Commission (PAC)

PAC (1)

- 18 March 2020 “Coronavirus (COVID-19) PACWAC approach”
  - “... as far as possible we will try and continue to keep casework moving. We are however live to the exceptional situation that we are currently facing and may have to act quickly to changing circumstances in ways which do not align with our normal procedures…. ”
  - Conversion of appeals to written reps and cancellation of accompanied site visits and warnings about difficulties with hearings/inquiries
- 19 March list of appeals now to be written reps
- 24 March office closes
  - “PACWAC is very aware of the important public service that we provide but in dealing with this unprecedented situation in line with government advice our office will be closed effective from 9am on 24 March 2020.
  - All arrangements for submission of evidence and proceedings are suspended. Once our offices are open we will be in contact to make alternative arrangements.”

PAC (2)

- 3 April similar office closure position though
  - “During this time we are preparing advice and guidance on how we take the work of the Commission forward in this unprecedented situation.
  - We will continue to upload decisions to our website and issue them electronically where we hold email contact details.”
- 1 May reopening of office on 11 May (mornings only and reduced capacity)
- Guidance 1 May 2020 “**PACWAC COVID-19 Temporary Response Measures (**Version 1)
  - No hearings or inquiries where WR not suitable
  - “will be looking at the possibility of using alternative technologies pending an easing of restrictions. This presents a number of challenges which we will have to work through. A separate protocol for hearings to be conducted using alternative technologies will be produced as necessary.”
- No protocol published

PAC (3)

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- Decisions continue to be issued, and reports submitted, dealing with hearings prior to lockdown and written representations cases.
- 2 June 2020
  - "Our initial focus has been on dealing with new appeals and correspondence submitted during the office closure as well as other essential administrative matters. We are now in a position to move to the next phase of our recovery plan and as of Monday 1 June we will be writing to parties to set out revised arrangements for the submission of evidence on cases that are before us.
  - We continue with our efforts to provide an alternative to hearings in person pending an easing of government restrictions. In the interim we will be requesting evidence from parties in cases where an informal hearing has been requested in order that we can move forward at the earliest opportunity once a solution is in place."
- Still no protocol on alternatives to hearings in person
- See also Chief Planner's Update 6 (1 May 2020)

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Hearings and inquiries: England and Wales and the Planning Inspectorate (PINS)

Timeline

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- 12.3.20: PINS initial guidance
- 13.3.20: Written Ministerial Statement HCWS159, guidance on enforcement
- 18.3.20: All inquiries, hearings, and accompanies site visits postponed
- 20.3.20 & 23.3.20: Submissions from the Planning bar
- 23.3.20: Planning Update Newsletter from outgoing Chief Planner Steve Quartermain
- 24.3.20: All site visits suspended
- 01.04.20: PINS press release. PINS to begin exploring virtual methods of holding inquiries, hearings etc. Sets up working group. Will look for pilot cases. General principles -
  - Public confidence must be upheld
  - Events must not be downgraded
  - Recommendations and decisions must be fair and robust

Timeline (2)

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- 16.4.20: PINS press release
  - Virtual working practices being progressed “behind the scenes”
  - First digital pilot to be held in May
  - Trialling “virtual site visits”
- 28.4.20: PINS press release:
  - 1,625 decisions issued since lockdown
  - Site visits, hearings and inquiries postponed until mid-May
  - First digital hearing on 11.5.20
  - Digital site visit trial involving 13 inspectors
  - Five local advisory visits to help LPAs progress local plans
  - Targets (following trials)
    - 3 months – roll out good practice
    - 6 months – develop capability to conduct fully digital and hybrid events

Latest developments

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- 13.05.2020: Changes to “restart the housing market”
  - Written Ministerial Statement (HCWS235)
  - PINS Guidance
  - MHCLG Guidance
  - Government stops publishing average timescales
- 3 month/6 month timeline for move to digital events accelerated. Aim to progress cases with oral examination of complex issues, high levels of public interest, or where legislation requires
- Site visits to recommence where essential, but 60 cases in “no site visit” pilot
- Jenrick in House of Commons: all hearings to be digital “within weeks”

Ministerial Statement 13.5.20 (HCWS235)

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- **Move to digital -**

  Local planning authorities and the Planning Inspectorate drive the planning process forward and should ensure that it continues to operate effectively to support economic recovery. Moving to digital events and processes will be critical. This means adapting to working virtually, including virtual hearings and events (such as using video-conferencing and/or telephone) and making documents available for inspection online. The Government expects everyone involved in the planning process to engage proactively…

  The Government recognises that the method by which hearings and events are conducted is a matter for the Inspectorate, operating in accordance with their legal obligations, and it expects these arrangements to be made as the default method of operation in the vast majority of cases …

  The Government expects opportunities for virtual hearings and processes to be maximised. It will draw from current and emerging practice to inform policy and process in the longer term.

- **Site visits -** to be safe and employ social distancing

Ministerial Statement (cont.)

- **Virtual Events -**

  The Government fully supports the Planning Inspectorate's programme for moving to digital inquiries, hearings, meetings and other events. […]

  The Government expects Inspectors and Examining Authorities to take decisions about whether and how virtual events should proceed and to consider the practical measures needed to ensure fair participation.

  The Courts have led in demonstrating the successful use of technology to continue their work. Recognising that the use of technology to support virtual planning events may be challenging, the Government expects that appropriate measures are put in place by the Inspectorate to test the technology and ensure that it enables fair participation. It also expects the Inspectorate to identity those more exceptional circumstances where a virtual event may not be appropriate, making decisions about how to proceed based on the facts of each particular case.

- **Digital inspection of documents -** "*should be the default position across all planning regimes, and it is actively exploring all options to achieve this*" including considering options to ensure access is available to all

Other actions: local authority meetings

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- Legislation to allow remote local authority meetings, provision of information on websites, and provide remote substitutes to constitute being “open to the public”
- In England & Wales -
  - Local Authorities and Police and Crime Panels (Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales) Regulations 2020 (SI 2020/392)
  - Local Authorities (Coronavirus) (Meetings) (Wales) Regulations 2020 (SI 2020/442)
- In Northern Ireland
  - Local Government (Coronavirus) (Flexibility of District Council Meetings) Regulations (Northern Ireland) 2020/74

Other actions: use of electronic communications

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- England & Wales -
  - Town and Country Planning (Development Management Procedure, Listed Buildings and Environmental Impact Assessment) (England) (Coronavirus) (Amendment) Regulations 2020 (SI 2020/505)
  - Planning Applications (Temporary Modifications and Disapplication) (Wales) (Coronavirus) Order 2020 (SI 2020/514)
  - The Traffic Orders Procedure (Coronavirus) (Amendment) (England) Regulations 2020 (SI 2020/536)
- Northern Ireland (following Minister's announcement on 27.4.20) -
  - pre-application consultation requirements are temporarily relaxed by the Planning (Development Management) (Temporary Modifications) (Coronavirus) Regulations (Northern Ireland) 2020/72. See also DfI Emergency PAAC Guidance (May 2020)
  - EIA already allows for electronic communications Planning EIA Regs 2017 regs. 2(5)-(10), 44(11) and 46. Need to be careful whether other EIA regimes allow the same. Roads Order 1993?

PINS update 28 May

- 28.05.20: further update from PINS
  - 2,500 cases decided since lockdown
  - Site visits to continue where safe. 600 programmed in May.
  - 20 decisions issued in “no site visit” pilot.
  - 10 Virtual hearings in June, “vast majority” of postponed hearings to commence in July
  - 8 Virtual inquiries in June, remainder to be arranged “at the earliest opportunity”
  - Four NSIPs progressed to final stages, 15 virtual hearings in June
  - One local plan via telephone conference in June, one conducted virtually in July
- In light of this and timeline outlined on 13.5.20, expect wider use of virtual events and reduction in site visits in July and shortly thereafter.

PINS 28 May

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- *"Having explored the matter our current position is that physical events cannot be undertaken safely for both our staff and for participants. For the foreseeable future, therefore, we will not be arranging face-to-face inquiries or hearings. Wherever reasonable to do so we will seek to rearrange for site visits rather than events.*
- *The first fully virtual hearing took place on Monday 11 May as a pilot. Building on this successful trial we have started to make arrangements for at least 10 hearings to be held virtually in June. We are also working on re-arranging the vast majority of all postponed planning hearings in June to take place as soon as possible in the following months.*
- *On planning inquiries we have been and are holding numerous case conferences with a view for around 10 of these to turn into virtually held inquiries in June. We are expecting the remaining ones to be re-arranged at the earliest opportunity."*

- On PINS' April 2020 statistics determinations down c 200-400 but unclear what the current position is since the period covered the beginning of lockdown and Easter

Permanent change?

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- Clear from this response that slow pace of progress and the adjournment of many hearings and inquiries is to allow PINS to develop a standard procedure for cases across all types of casework in future, and not merely to deal with the current crisis. It does appear to have meant that there have been significant postponements of hearings and inquiries and plan examinations not simply to find a means to deal with lockdown but for a permanent change:

  We are learning from each event with the aim of making virtual events our standard option for the majority of events in future. This approach covers all hearings and inquiries for our different types of casework (including planning appeals, national infrastructure, local plans) that are currently held face to face.

- Not yet clear whether the extended timescale originally mentioned is likely to be speeded up and by how much in light of the Minister's Statement

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Court hearings of planning cases

Court hearings

- Northern Ireland
  - Generally only urgent JRs progressed
  - Administrative reviews of JRs in w/c 27.4 and 04.5, aim to gradually increase key non-contentious business
  - Interim Practice Direction on Remote Hearings issued 29.5.20
- England & Wales
  - Issue of guidance by 31.3.20 - remote hearings default position
  - Planning Court (and Admin Court) urgent business continues, non-urgent business progressing but with slight delays – remote hearings
  - Holgate J as lead judge of the Planning Court has issued guidance via professional channels (e.g. PEBA) on best practice, including using "core" bundles, and only "essential" bundles and authorities, and abandoning meritless points
  - LCJ has said courts system will not go back to pre-COVID ways

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Vesting orders and compensation

Timothy Mould QC

The nature of the power

- Compulsory purchase - expropriation of land or rights over land
- Interference with a fundamental right at common law
- Engages article 1 protocol 1 of the European Convention of Human Rights
- Acquiring authority must show that acquisition of the land or right is required for the infrastructure scheme.
- Acquiring authority must show that there is a compelling case for acquisition in the public interest.
- Fair balance – compensation payable on the basis of the principle of equivalence
- Director of Buildings and Lands v Shun Fung Ironworks Ltd [1995] 2 AC 111

Some vesting order statutes

- Local Government Act (Northern Ireland) Act 1972 sections 96/97
- Roads (Northern Ireland) Order 1993 articles 110-115
- Housing (Northern Ireland) Order 1981 articles 31-31B and 87

Justifying a vesting order

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- Procedure for acquisition – schedule 6 to the LGA(NI) 1972
- Purpose - what is the scheme?
- Need – why is the scheme necessary?
- Delivery – planning permission, finance, viability and investment issues
- Vesting order – why is the land required for the scheme?
- Alternatives – to the scheme, to the acquisition or use of the land for the scheme?
- Negotiation – why has the land not been secured by agreement?
- Compensation – what is the likely cost of acquisition?
- Settlement – what are the terms upon which objections might be resolved?

Compensation Code

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- Land compensation statutes, case law and practice
- Land Compensation (Northern Ireland) Order 1982
- Land Acquisition and Compensation (Northern Ireland) Order 1973
- Planning Blight (Compensation) (Northern Ireland) Order 1981
- Lands Tribunal and Compensation Act (Northern Ireland) 1964

Land compensation – the basics

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- Parts III & IV of the Land Compensation (NI) Order 1982
- Article 6(1) – rules for assessing compensation
- Rule 2 – the market value rule
- Rule 6 – disturbance
- Rule 5 – equivalent reinstatement where no market for the land
- Article 6(2) – scheme disregards
- Article 8 – severance and injurious affection
- Articles 12/17 – planning assumptions and certificates

Case law – four principles

- The principle of equivalence
- The presumption of compensation for expropriation
- Value to owner basis of assessment
- The no-scheme principle

- Horn v Sunderland Corporation [1941] CA
- Harvey v Crawley Development Corporation [1957] CA
- Director of Buildings and Works v Shun Fung Ironworks [1995] PC
- Pointe Gourde v Sub-Intendant of Crown Lands [1947] PC

The principle of equivalence

- The sum of money that will put the owner (as the injured party) in the same position as he would have been in if he had not sustained the wrong for which he is being compensated – value to owner principle
- The promoter is bound to compensate the owner for all the loss sustained by reason of the expulsion.
- The principle of equivalence is at the root of statutory compensation, which lays down that the owner shall be paid neither less nor more than his loss.
- Fair and full compensation.

Compensation rules – article 6(1)

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- Rule 1 – no allowance for compulsory nature of purchase.
- **Rule 2 – the open market value rule (the amount the land might realize if sold in the open market by a willing seller)**
- Rule 3 – disregard special suitability or adaptability for purpose that could be applied only in pursuance of statutory powers (or for which no market other than for the requirements of an authority with such powers).
- Rule 4 – disregard value increased by use of land that is contrary to law or public health.
- **Rule 5 – reasonable costs of reinstatement where the land is devoted to a purpose of such a nature for which there is no general demand or market for land (provided that there is a bona fide intention to relocate).**
- **Rule 6 – The market value rule shall not affect assessment of compensation for disturbance or any other matter not directly based on value of the land.**

The no-scheme principle – article 6(2)

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- Any increase or diminution in value of the land taken that is attributable solely to the promoter's scheme is to be disregarded – the Point Gourde principle.
- Because Parliament did not intend that CPO for the statutory scheme should increase or diminish the value of the compensation payable for the land taken.
- Modern terminology - the scheme cancellation assumption.

The basic elements of a claim

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- Land taken – open market value (rule 2)/ special cases (rule 5).
- Land retained – severance and injurious affection diminishing value of that land (article 8 of the 1982 Order)
- Disturbance – rule 6 – Horn v Sunderland Corporation/ Shun Fung Ironworks (preserves value to owner and equivalence).
- Disturbance – need to show causal connection, not too remote, consistent with duty to mitigate - Harvey v Crawley Development Corporation [1957] CA. Fact specific and wide ranging.
- Legal and conveyancing costs and other professional fees.
- Statutory loss payments – Part 4 of the 1973 Act.

Statutory planning assumptions

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- Articles 12 to 14 of the Land Compensation Order 1982
- Actual and potential value – statutory planning assumptions
- Articles 15 to 17 – Certificates of Alternative Development Value
- So that the claimant is able to bring into account the development potential of his land in the assessment of its open market value in the no-scheme world.
- A further aspect of the principle of equivalence.

Compensation for execution of public works

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- Land Compensation (NI) Order 1982 article 18
- In place of an action for damages at common law
- Aligns with the promoter's immunity from private action
- Only where the lawful execution of works interferes with legal right and results in diminution in value of land. No claim for environment effects per se: common law rule in Andreae v Selfridge [1938] applied by HL in Wildtree Hotels case [2001]
- Interference with property rights (easements, rights of way) – see Wildtree Hotels v Harrow LBC [2001] HL, Clift v Welsh Office [2001] CA.
- Negligent performance of public works remains actionable at law.

Compensation for use of public works

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- Part 2 of the Land Acquisition and Compensation (Northern Ireland) Order 1973
- Qualifying owner occupiers may claim for diminution in value of their property resulting from physical factors (noise, dust, fumes etc) due to operation of scheme.
- Residential owner-occupiers, agricultural units, owner- occupiers of small business premises.
- Measure of compensation is difference in value of the property with the scheme switched off and switched on in the market at the first anniversary of coming into use.

Procedure for claims

- Land Compensation (NI) Order 1982
- Article 5 – particulars of claim and costs
- Articles 3 and 4 – dispute resolution by Lands Tribunal
- Article 19 – right to advance payment of compensation

Advance purchase of land – blight notices

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- Blighted land – article 3 of the 1981 Order
- Qualifying interests – owner occupiers of dwellings, small business premises and agricultural holdings
- Notice requiring purchase – reasonable efforts to sell without success
- Objections - counternotices – land not needed/needed only in part
- Effect of valid blight notice – purchase on CPO terms
- Partially affected farms – unaffected area not reasonably capable of being farmed – article 9 of the 1981 Order
- Objections decided by Lands Tribunal – objection upheld - risks

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Case Law Update

Yaaser Vanderman

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

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Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.

Thank you for listening

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