Neutral Citation No: [2017] NIQB 116 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **McC10483** **JR 17/76799/01** *Delivered: 30/11/2017*

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

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IN THE MATTER OF AN APPLICATION BY DERMOTT NESBITT FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

-v-

NEWRY AND MOURNE DISTRICT COUNCIL

[CHOICE HOUSING IRELAND LIMITED – INTERESTED PARTY]

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McCloskey J

Preface

In this judgment:

"A" = Applicant
"**R**" = Respondent
"IP" = Interested Party
"**PAC**" = Planning Appeals Commission

The Contours of A's Challenge

[1] A seeks leave to apply for judicial review of the decision of Newry and Mourne District Council ("R") granting outline planning permission to Choice Housing Ireland Limited ("IP") for the development of four two bedroomed apartments destined for social housing use, together with a new access to and parking at 19 Downpatrick Road, Crossgar ("the site") which adjoins A's place of residence at 21 Downpatrick Road. R's decision is dated 02 June 2017 and A initiated these proceedings on 15 August 2017. The impugned decision was corporate, or collective, in nature, being made by R's Planning Committee. A is self-representing. The court has had the benefit of the considered and focused submissions, both written and oral, of A, Ms Kiley (of counsel) representing R and Mr Beattie QC on behalf of IP.

[2] In very brief compass, the salient topographical features are:

(i) A and his wife are the owners and residents of 21 Downpatrick Road, Crossgar. This forms part of a line of four adjoining dwelling houses – numbers 15, 17, 19 and 21. The subject site is number 19.

(ii) All four properties are withdrawn from the main road, being accessed by lengthy driveways and share the characteristics of generously proportioned gardens front and rear. All but the subject site, which has fallen into extreme disrepair, are in individual family occupation and are detached residential properties.

(iii) The grant of outline planning permission authorises the development on the subject site of four apartments, each with two bedrooms in a single storey block which will extend beyond the building line to the front, together with a new vehicular access to the side of the development, five parking spaces to the rear and one to the front. Existing boundary hedgerows will be retained, some new fencing will be installed along the boundary with A's residence [No 21] and there will be gardens front and rear.

(iv) The proposed development will consist of two single storey inter-linking blocks.

The Grounds of Challenge

[3] The grounds of challenge are:

(a) R's failure "*to have regard properly or at all*" to a material consideration, namely setting an undesirable precedent.

(b) R's failure "*to have regard properly or at all*" to the decision of the PAC (04/04/16) dismissing an appeal against a refusal of planning permission to develop the site on the main ground that the proposed development "*… would set an undesirable precedent for more intensive development on other sites along this road frontage and elsewhere in Crossgar and the plan area generally*". In the particulars of this ground, A asserts that R failed to make "*any assessment*" of this issue.

(c) R erred in law in concurring with IP's interpretation of the character of the area in question.

(d) While the appearance of the proposed development was considered, its form was not considered, in contravention of PPS7 and thereby leaving out of account a material consideration.

(e) There was a failure to properly consider the "*pattern*" of the proposed development consequential upon a failure to analyse the site characteristics.

(f) The decision making committee was not provided with A's detailed written submission of objection, resulting in the neglect of a material consideration and a breach of the so-called "Operating Protocol".

The 2015 PAC Decision

[4] The previous refusal of planning permission and ensuing dismissal of the developer's appeal to the PAC related to a development proposal entailing the replacement of the existing single storey detached dwelling by two inter-linked one and a half storey blocks consisting of seven apartments with the provision of 12 parking spaces and an associated widened access, extensive hardstanding and loss of vegetation. The PAC dismissed the appeal on the following grounds:

(i) The layout of the proposed development would be in conflict with the prevailing pattern of development in the area.

(ii) The proposed development would set "*an undesirable precedent for more intensive development on other sites along this road frontage and elsewhere in Crossgar and the plan area generally without having due regard to the prevailing character and density of the surrounding area*", in contravention of Policy QD1, criterion (a) and Policy LC1 of APPS7, criteria (a) and (b).

(iii) The "*consequent increase in noise and disturbance associated with multiple vehicle movements would have an unacceptable impact on the amenity of the existing dwellings*", in contravention of Policy QD1, criterion (h).

The overarching basis for dismissing the appeal was that the proposed development would not provide a "*quality and sustainable residential development*".

The Case Officer's Report

[5] The planning case officer's report to R, which recommended approval of IP's development proposal, has the following noteworthy features:

(a) At the outset the officer provided a brief description of the "*predominantly residential*" location and certain features of the subject site, followed by a description of the "*area*". When considered in tandem with certain passages around the middle of the report (page 5), it is clear that the officer defined the "*area*" as the four residential addresses noted in [2] above, certain other residential properties on the same road and a more recent development of mixed residential properties to the rear (Rocksfield).

(b) The report drew attention to the aforementioned previous refusal of planning permission and unsuccessful appeal to the PAC, describing the proposed development as "*one block of seven apartments which was one and a half stories high*".

(c) The six objections to the proposed development were noted and the substance thereof was summarised in approximately one A4 page as: conflict with local character and existing development; setting an undesirable precedent; an unacceptable increase in density of development; loss of amenity (noise and nuisance); the availability of more suitable sites in the Crossgar area; the planning history, with specific reference to [3] above; and contravention of specified planning policies. This part of the report ends with the statement:

> "*See file for full content of representations received, as the above is only intended to give a summary of the main issues raised.*"

(d) The outline nature of the planning permission sought was noted.

(e) The twin factors of the clear need for social housing in Crossgar, which the proposed development would address and the consideration that this would not contravene either the Area Plan or applicable policies were noted.

(f) Certain characteristics and use of the three adjacent sites, including A's, were addressed.

(g) The residential character of the area was highlighted more than once.

(h) The officer commented "*.. although it is acknowledged existing development in this area is characterised by dwellings in single family occupation, it is considered there is no policy that prejudices apartment*

development within this residential area as long as the development creates a quality residential environment in accordance with PPS7 and the Addendum to PPS7."

(i) The report noted that the footprint of the proposed development was similar to that involved in the previous planning refusal and unsuccessful appeal.

(j) The officer considered that the 'front' block "… *will appear like a single dwelling/residence, with entrance and driveway to one side*".

(k) The proposed floor area of each of the apartments was compliant with the space standards of the PPS7 Addendum.

(l) The single storey nature of the proposed development "… *will respect the height, scale and massing of the existing character*".

(m) Taking into account the aforementioned characteristics, together with the distance of approximately 4 – 5 metres from A's boundary and 6 – 8 metres from the boundary on the other side of the site, there would be "…. *no unacceptable amenity issues …. in terms of overlooking, over-shadowing, loss of light or dominant impact in this urban context*".

(n) The proposed car parking arrangements "…. *will not result in any unacceptable noise or nuisance on the adjoining properties*".

(o) As regards site density, the proposed development equated to a density of approximately 20 units per hectare and, having regard to the surrounding area, although larger than other developments, it was not significantly so and thus did not offend PPS7 Addendum Policy LC1.

(p) The amenity space to be provided by the proposed front and rear gardens was adequate.

(q) As regards pattern, "…. *it is considered the pattern of development as indicated on the plans submitted is in keeping with the overall character and environmental quality of this established residential site*".

The planning officer's report concludes in these terms:

> "*While it is noted there is opposition to this proposal from local residents and elected representatives, it is considered the development as proposed complies with the requirements of the area plan and applicable policy test and*

will not result in any unacceptable impact or harm the amenity of any existing residence/properties or character of the area, for the reasons outlined above, and there are no grounds to sustain a refusal."

Governing Legal Principles

[6] These are conveniently summarised in Re Bow Street Mall Limited and Others Application [2006] NIQB 28 at [43]:

"(a) The judicial review court is exercising a supervisory not an appellate jurisdiction. In the absence of a demonstrable error of law or irrationality the court cannot interfere. The court is concerned only with the legality of the decision making process. If the decision maker fails to take account of a material consideration or takes account of an irrelevant consideration the decision will be open to challenge. (per Lord Clyde in City of Edinburgh Council v Secretary of State [1998] 1 All ER 174).

(b) It is settled principle that matters of planning judgment are within the exclusive province as the local planning authority or the relevant minister (per Lord Hoffmann in Tesco Stores v Secretary of State [1995] 2 All ER 636 at 657).

(c) The adoption of planning policy and its application to particular facts is quite different from the judicial function. It is for Parliament and ministers to decide what are the objectives of planning policy, objectives which may be of national, environmental, social or political significance and for those objectives to be set out in legislation, ministerial directions and in planning policy guidelines. The decision of ministers will often have acute social, economic and environmental implications. They involve the consideration of the general welfare matters such as the national and local economy, the preservation of the environmental, public safety and convenience of the road network and these transcend the interests of particular individuals (see R (Alconbury Limited) v Secretary of State [2003] 2 AC 327 per Lord Slynn, Lord Nolan and Lord Hoffmann).

(d) Policy decisions within the limits imposed by the principles of judicial review are a matter for democratically accountable institutions and not for the courts (per Lord Hoffmann in Alconbury at 327).

(e) In relation to statements of planning policy they are to be regarded as guidance on the general approach. They are not designed to provide a set of immutable rules. The task of formulating, co-ordinating and implementing policy for the orderly and consistent development of land may require the resolution of complex problems produced by competing policies and their conflicting interests. Planning polices are but some of the material considerations that must be taken into account by the planning authority in accordance with the 1991 Order (per Carswell LCJ in Re Lisburn

Development Consortium Application [2000] NI JB 91 at 95( ) – (e), per Coghlin J in Re Belfast Chamber of Trade Application [2001] NICA 6.

(f) If a planning decision maker makes no inquiries its decision may in certain circumstances be illegal on the grounds of irrationality if it is made in the absence of information without which no reasonable planning authority would have granted permission (per Kerr LJ in R v Westminster Council ex parte Monahan [1990] 1 QB 87 at 118(b) – (d). The question for the court is whether the decision maker asked himself the right question and took reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly (per Lord Diplock in Tameside).

(g) Where the Department has issued an art. 31 notice indicating the Department's proposed decision the applicant is entitled to expect that it will be implemented in the absence of some good reason to the contrary. It is open to the Department to change its mind for sufficient reasons and give a different final decision on the application if it is desirable in the public interest to do so (per Carswell LCJ in Re UK Waste Management Application [1999] NI 183).

(h) In the context of planning decision the decision making process may take place in stages. Thus, for example, a resolution by a local authority proposing to permit or refuse a planning application may be later followed by a grant or refusal of planning permission. The decision of the planning authority passing the resolution does not grant the permission but it is susceptible to review as will be the later decision to grant or refuse planning permission. An applicant will not be precluded from challenging the latter if he acts timeously after the grant or refusal on the ground that he should have challenged the earlier step (R (Burkett) v Hammersmith & Fulham [2002] 1 WLR 1593 (I).

(i) The planning decision-maker's powers include the determination of the weight to be given to any particular contention. He is entitled to attach what weight he pleases to the various arguments and contentions of the parties. The courts will not entertain a submission that he gave underweight to one argument or failed to give any weight at all to another (per Forbes in Sedon Properties v Secretary of State for the Environment [1978] JPL 835)."

[7] There are two further principles to which I would draw attention. First, in Re SOS' Application [2003] NIJB 252 the Court of Appeal held, at [19]:

> *"It is for an applicant for leave to show in some fashion that the deciding body did not have regard to such changes in material considerations before issuing its decision. It cannot be said that the burden is imposed on the decider of proving that he did so. There must be some evidence or a sufficient inference that he failed to do so before a case has been made out for leave to apply for judicial review."*

Thus in any case where a judicial review challenge is based upon the contention that a material factor was disregarded by the deciding authority bare, unsubstantiated assertion will not suffice. The second further principle which I would highlight is that, this being a leave application, the test to be applied is whether the Applicant has established, in whole or in part, an arguable case with a reasonable prospect of success.

The Court's Assessment

[8] The following is the court's evaluation of A's assorted grounds of challenge, mindful that this is the preliminary, leave stage. Adhering to the subparagraphs in [3] above:

(a) The issue of setting an undesirable precedent was explicitly raised in the case officer's report; the decision makers were invited to consider the full file, including the detail of the objections; the committee members were expressly alerted to the 2016 PAC decision; the unsustainability of recommending a refusal on this ground (precedent) was implicit in the report considered as a whole; and, finally, the treatment of this issue at the decision making stage gave rise to what was quintessentially a matter of evaluative assessment. Stated succinctly, the assertion that this factor was disregarded is bare, unsubstantiated assertion, evidentially, untenable. While I recognise that this ground proceeds on the alternative basis of an asserted failure to have proper regard to the issue of precedent, this engages the Wednesbury principle and I can identify no semblance of arguable irrationality in the impugned decision in this discrete respect.

(b) The second ground of challenge, which to some extent merges with the first, also rests on bare, unsubstantiated assertion and, further, is confounded by the case officer's report and is defeated by the SOS principle (*supra*). Its alternative formulation invites the same assessment and conclusion as are set forth in (a) above.

(c) The complaint that R concurred with IP's interpretation of the character of the area is a challenge to what is quintessentially a matter of evaluative planning judgement containing no identifiable hint of irrationality and is manifestly inconsistent with the PAC's assessment of this issue which, in planning law terms, I consider unimpeachable.

(d) **The "form" challenge.** In examining this ground of challenge I consider it both appropriate and important to venture beyond

the "headline" as pleaded – see [2](d) above – into both the supporting particulars and the more detailed outworkings in the Applicant's affidavit, at [63] – [72]. The real essence of this ground has in my estimation two components. First, the various planning policies identified by the Applicant, whether in whole or in part, sounded on the development proposal in question and, hence, had the status of material considerations in public law. Second, they had to be taken into account. Developing these starting points, it may be argued that the discharge of this duty required the exposure, both sufficient and correct, of these policies in the case officer's report – to be contrasted with, for example but in particular, the bare headline found at page 3 thereof ("Policy ….. and Supplementary Guidance") such as to warrant the conclusion that the policies were correctly construed and understood by the decision makers: this was, on any showing, a key aspect of the sustainability in law of their ensuing decision. I am satisfied that this ground of challenge overcomes the leave threshold.

(e) **The "pattern" challenge.** "*Pattern*" in common with "*form*" is one of those words in the planning legal lexicon which may correctly be viewed as an undefined term of art. I have certain reservations about whether it was correctly and fully explained to the deciding committee in the case officer's report and, furthermore, my assessment in [d] above also applies. Accordingly, this too is an arguable ground of challenge.

(f) A's objection to the proposed development formed part of the materials made available to R. There is no identifiable public law misdemeanour in the absence of any reference thereto in the Area Planning Manager's oral presentation to the Planning Committee. The lack of merit in this ground is compounded by the terms of the case officer's report and the fact that A attended the committee meeting in question and made oral representations. Finally, no breach, even to the level of arguability, of the two provisions of the "Operating Protocol" on which A relies, namely paragraphs 25 and 41, is demonstrated.

Delay

[9] The consideration that this leave application could have been initiated more quickly does not impel to the conclusion that it infringes the requirement of promptitude. It is trite that this is an intensely case sensitive requirement. It is patent from the papers lodged by, and the oral presentation of, A that impressive and extensive research and industry have been invested in the formulation of this challenge. The court has benefited accordingly.

Furthermore, no economic imperative requiring greater speed has been identified. The subject site remains unoccupied, the extant residential building is undemolished and no steps of any kind to implement the impugned grant of outline planning permission have been executed. Taking all of these factors into account, and recognizing that unrepresented litigants are normally to be accorded no greater latitude in this context than that available to those who are represented, I am satisfied that there has been no infringement of the requirement of promptitude in the initiation of these proceedings.

Protective Costs Order: The Aarhus Convention Application

[10] The Applicant's claim for a protective costs order is based on what he asserts as "*the major impact of this decision on the environment in both a local and wider context in circumstances where the intended Respondent failed entirely to consider the issue of precedent.*"

[11] This invites the following twofold riposte. First, the court has rejected the precedent based aspect of the Applicant's challenge: see [8](a) and (b) above. Second, the assertion of major impact on the environment is manifestly without foundation. I consider it clear that the Convention is not designed to provide financial protection in a neighbour/occupier v developer challenge of this *genre*. The application for a protective costs order is refused accordingly.

Conclusion

[12] The order of the Court at this stage has the following components:

(a) Leave to apply for judicial review is granted, confined to the two grounds identified at [8](d) and (e) above.

(b) Leave is refused on all other grounds.

(c) The application for a protective costs order is refused.

(d) Costs are reserved.

(e) There will be liberty to apply.

Case Management Directions

[12] While the Judicial Review Practice Note will apply fully, the following specific directions are hereby made:

(i) The affidavit evidence of the Respondent and the interested party will be provided by **11 January 2018**.

(ii) Any rejoinder by the Applicant will be made by **01 February 2018**.

(iii) The substantive hearing, with a time allocation of half a day, will take place on **15 February 2018**.