

Judicial Communications Office

Tuesday 7 June 2011

COURT OF APPEAL DISMISSES APPEAL IN SPRUCEFIELD PLANNING CASE

Summary of Judgment

The Court of Appeal today dismissed an appeal by Central Craigavon Limited, the landlord of the Rushmere Shopping Centre in Craigavon, in respect of a planning application for development at Sprucefield.

In 2010 Central Craigavon Limited (“the appellant”) challenged the decision of the Department of the Environment (“DoE”) to adopt draft Planning Policy Statement 5: Retailing, Town Centres and Commercial Leisure Developments (“draft PPS5”), a draft policy statement which had previously been formulated by the Department of Regional Development (“DRD”). In his judgment, Mr Justice Treacy rejected two of the appellant’s grounds of appeal namely:

- The contention that the DRD had no lawful power to formulate and produce PPS5 having regard to its restricted powers in the field of planning law; and
- In the formulation of draft PPS5 the DoE had not complied with the mandatory environment assessment requirements of EU law or the domestic law regulations giving effect to the EU Directive.

The appellant had sought to challenge this decision in the Court of Appeal. The Court said that in the period since Mr Justice Treacy’s judgment, the issue of the lawful power to formulate and produce PPS5 has been overtaken. The DoE has decided not to give any weight to the draft PPS5 until such time as it has been approved by the Assembly’s Executive Committee. The Court of Appeal said it was therefore unnecessary for it to say anything further on this issue.

The main ground of appeal was therefore whether draft PPS5 constituted a “plan or programme” under the terms of the EU Directive and as a result required a Strategic Environmental Assessment (“SEA”). The appeal was heard by Lord Justice Higgins, Lord Justice Girvan and Lord Justice Coghlin. Lord Justice Girvan delivered the judgment of the Court.

Judicial Communications Office

Lord Justice Girvan said that a draft PPS proposing to alter an earlier PPS is not something which the Department was obliged to produce. It is a statement of evolving departmental policy thinking. While the DoE is required to formulate and co-ordinate policy for securing the orderly and consistent development of land and the planning of that development, the ongoing duty to formulate policy did not oblige the DoE to introduce draft PPS5 or to produce it in the form which it did. The judge said that draft PPS5 represents a policy choice and, at this stage, it is a preliminary policy choice which will not be finalised until the consultation process is exhausted.

The Court of Appeal concluded that draft PPS5 was not required by legislative, regulatory or administrative provisions and did not constitute a plan or programme providing a framework within the EU Directive. Lord Justice Girvan said that the appellant's argument must therefore fail for this reason:

“Draft PPS5 currently has no legal status until Executive Committee approval is obtained and, thus, cannot constitute even a material consideration of any weight in a planning application”.

The Court of Appeal went on to consider whether, if approved by the Executive Committee, draft PPS5 would constitute a plan or programme under the EU directive thus necessitating a SEA. Lord Justice Girvan concluded that the Regional Planning Policy RPP2 relating to Sprucefield did not lay down anything that would fall into the category of a framework. He said that RPP2 indicates the material planning considerations to be taken into account: “Pointing to existing material considerations cannot be said to lay down a framework for development.” While the appellant sought to argue that RPP2 constituted a clear shift in policy for Sprucefield, the Court of Appeal considered that such shift as it created was modest. Lord Justice Girvan said that the shift emanated from the draft Belfast Metropolitan Area Plan which had been subjected to an SEA:

“In reality draft PPS5 was a policy statement that the framework set out in the draft [Belfast Metropolitan Area] Plan was the appropriate consideration. Draft PPS5 cannot be considered to be a plan within Article 2.”

Judicial Communications Office

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Court Service website (www.courtsni.gov.uk).
2. In June 1996 the DoE published Planning Policy Statement 5: Retailing in Town Centres (“the original PPS5”). Paragraph 35 dealt with regional shopping centres and identified Sprucefield as the only purpose built out of town regional shopping centre in NI. It provided that the Department would continue to control the scale and nature of the Sprucefield Centre taking into account all relevant policies in PPS5 and in particular the impact of any proposed development at Sprucefield on the environment generally, existing centres and traffic. In April 1998 responsibility for strategic planning passed to the newly established DRD. It published “Shaping the Future: The Regional Development Strategy for Northern Ireland 2025” (“the RDS”) in September 2001. As part of the implementation of the RDS the DRD initiated consultation with key interests on draft regional planning policy statements including one on retailing in town centres. This work was carried out in conjunction with officials from the DoE. In February 2004 a joint working group was established between the DRD and DoE to oversee preparation. In late February the Minister of DRD gave his approval for the proposed draft PPS5 and it was adopted in July 2006. Following a decision of the High Court which held that the DRD had not statutory authority to make substantive planning policy (In re Omagh District Council’s Application [2007] NIQB 61), a joint letter signed by the Ministers of the DRD and DoE issued to all members of the Executive indicating that they had agreed to the transfer of PPS 5 and other relevant planning policy statements to the DoE. The DoE adopted draft PPS5 on 15 January 2008. It has, however, decided not to give draft PPS5 any weight until such times as it has been approved by the Assembly’s Executive Committee.

Judicial Communications Office

ENDS

If you have any further enquiries about this or other court related matters please contact:

Alison Houston
Judicial Communications Officer
Lord Chief Justice's Office
Royal Courts of Justice
Chichester Street
BELFAST
BT1 3JF

Telephone: 028 9072 5921

Fax: 028 9023 6838

E-mail: alisonhouston@courtsni.gov.uk