



Northern Ireland Assembly

Review of Planning

Call for Evidence

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- 1.1 This paper is produced in response to a call for evidence by the Northern Ireland Assembly in respect of a review into planning decisions for Regionally Significant Projects, including the impact of Judicial Reviews on major capital projects.

INTRODUCTION

- 2.1 This submission is made on behalf of the Planning Appeals Commission (the Commission) which is an independent tribunal body established under statute to decide a wide range of appeals and to report on various matters under planning and other legislation. The Commission is not part of any Government Department. Financial and administrative support is provided by the sponsoring Department, the Department of Justice, through the Northern Ireland Courts and Tribunals Service.
- 2.2 The Commission is completely autonomous in its decision-making on planning appeals. In that context, it is not answerable to any government Department or any other agency or public body. The decisions of the Commission are subject only to the supervision of the Courts. This reflects its independent appellate role in planning and environmental matters.
- 2.3 Appeal work has been referenced above which is termed as ‘Hear and Decide’ work. However, the Commission is also engaged in referred work, termed as ‘Hear and Report’ which can encompass Regionally Significant Applications (RSA). The former is the appeal casework. Appellants lodge appeals mainly against the refusal of planning applications, and the Commission considers the evidence from the parties to the appeal and makes the final decision. In addition to the appeal decision the Commission may have to consider a ‘costs’ claim if it is submitted.
- 2.4 The Commission is not a planning authority. It does not process planning applications, rather it considers the merits of decisions taken by planning authorities such as local Councils. Therefore, the Commission does not consult with statutory or non-statutory consultees. All Commission decisions are based on the evidence submitted by the parties to the appeal. They can only be challenged by way of judicial review.
- 2.5 Hear and Report work is less predictable and more resource intensive. It can entail RSA. In these cases, most referrals are made from the Department for Infrastructure (DfI) to the Commission. The principal element of this work involves undertaking public inquiries or hearings into RSA and ‘called in’ planning applications. The Commission also undertakes independent examinations into local development plans (LDPs).
- 2.6 There are also a variety of other Hear and Report functions, including public inquiries into development schemes, vesting orders and road schemes, and hearings into the need for environmental impact assessments for planning applications.
- 2.7 The Commission has an agreed complement of 20 Full Time Equivalent Commissioners. However, it has only been at full complement for a short period over several years.

THE ROLE OF THE COMMISSION IN RELATION TO REGIONALLY SIGNIFICANT APPLICATIONS (RSAs)

3.1 As outlined above the Commission has a role in relation to RSAs. Section 26 of the Planning Act (NI) 2015 sets out the statutory remit thus -

(10) For the purpose of considering representations made in respect of an application for planning permission made to it, other than an application mentioned in subsection (9), the Department may cause a public local inquiry to be held by—

(a) the planning appeals commission; or

(b) a person appointed by the Department for the purpose.

(11) Where a public local inquiry is not held under subsection (10), the Department must, before determining the application, serve a notice in writing on the applicant and the appropriate council indicating the decision which it proposes to make on the application; and if within such period as may be specified in that behalf in the notice (not being less than 28 days from the date of service of the notice), the applicant or the council so requests in writing, the Department shall afford to each of them an opportunity of appearing before and being heard by—

(a) the planning appeals commission; or

(b) a person appointed by the Department for the purpose.

3.2 To date all such work has been carried out by the Commission.

3.3 The Commission considers the evidence presented by the parties involved and reports back to the referring authority with a series of recommendations. It is the referring authority who make the final decision in these cases. Please note that we will not discuss live casework.

3.4 The legal remit of the Commission in carrying out a public inquiry is to consider the representations made in relation to a proposal. Ownership of an application (whether a public inquiry or hearing case) remains with the referring authority, as does any requirement to process the application.

3.5 If an application is referred to the Commission for either a public inquiry or hearing, approximately 20% of the overall 'decision-making' time rests with the Commission. Therefore, the Commission's role in the process is an important one.

3.6 Judicial review challenges are a matter for the decision maker to consider before reaching a decision. As the Commission is not the final decision maker in RSAs, it would not be appropriate to comment in much detail on this matter. Suffice to say however that it would be considered prudent to adhere to the Commission's recommendations on RSAs as they are reached via careful analysis of the issues following ventilation at a hearing or

examination in public. It is trite that any departures from such recommendations by the referring authority should be robustly thought through to ensure their decision is robust and defensible if it was to be challenged in the courts.

CHALLENGES

- 4.1 The current system for processing regionally significant applications is unpredictable and resource intensive not only for the Commission but also for all parties to the process. Factors such as changes to proposals, the need for additional environmental information and issues with consultee responses are common. The threat of judicial review challenges for the decision maker can also result in delays.
- 4.2 The input of the Commission is a key part of the process. Experience has shown that the Commission carries out the 'lion's share' of assessing the planning merits of any given RSA. However, it is not funded for undertaking any of this work. Much of the time such applications have to be reverted back to the referring authority (mainly DfI) to process amendments to the planning application or to deal with environmental information submitted under the auspices of the Environmental Regulations.
- 4.3 Two case studies have been set out in Appendix A which highlight the reasons behind some of the delays, these include:
 - Amendments to schemes during the application process;
 - Changes to environment information submitted as part of the application process;
 - Requests for postponements, and
 - The limited legislative remit of the Commission given that the power to advertise and consult in respect of the application always remains with the referring authority.

OPPORTUNITIES FOR IMPROVEMENT

- 5.1 Certain options for streamlining the current process and reduce the risk of judicial review are set out below:
 - If public inquiries are to be called by a referring authority, the subject planning application should be progressed to an advanced stage meaning any issues raised by the statutory consultees should be addressed prior to referral. This would avoid potential delays arising from issues such as requirements for further environmental information. Moreover, it could reduce the risk of judicial review at a later stage due to allegations around the lack of scrutiny or consultation in respect of the further environmental information.
 - The option of introducing much stricter limits on the ability to amend an application at certain stages could be introduced. This would provide greater certainty to all parties to the process and limit the need for readvertisement and consultation.
 - Reforms to the statutory consultation process to ensure timely and informed responses.

5.2 Options for changing the current process which require legislative amendments include:

- The current operation of the Environmental Regulations in respect of RSAs can lead to long delays in managing planning applications, public inquiries, hearings and planning appeals. Reform in this area is needed to speed up the process.
- The purpose of a public inquiry is to “consider representations” made in respect of an application. However, because pre-application community consultation is now carried out and reported on at the start of the process, one must then question the utility of a public inquiry. If that process were to be removed, the ‘Notice of Opinion’ option would remain, allowing for a hearing to be requested in line with the legislation. This means that all of the papers which informed the draft decision would be available to all parties participating in the hearing process. This solo route would reduce the scope for judicial review if the recommendations arising from the Commission were to be followed.
- In respect of Sections 26 and 29 of the Planning Act, the word ‘local’ is problematic as it is taken to mean that hearing sessions must take place in the locality in which the application is proposed. Therefore, any remote participation could be seen to fall foul of the legislation as currently drafted. Removal of the word ‘local’ could avoid any potential legal challenges on the matter and provide greater flexibility for the Commission in organising the hearings sessions as well as for those participating in proceedings. It is noted that changes have been made to take account of new technology in respect of pre-application community consultation. The Commission has utilised remote attendance for a hearing on a Section 29 ‘called-in application as this does not have the legislative requirement to be ‘local’. Updating the legislative provisions in respect of public local inquiries (if they are to remain) to enable technology to be utilised would greatly assist in improving efficiencies in the planning system.
- Resourcing is a key challenge which the Commission has faced over recent years. Fulfilling the role of a Commissioner is difficult as all new appointees should have significant planning experience combined with gravitas and the ability to undertake a quasi-judicial role. However, the skills set required to deal with RSAs, which are usually very complex, are difficult to acquire without the relevant experience. Therefore, acknowledgement that there is a need to ‘skill up’ planners in general is needed as well as recognition that new appointees to the Commission must go through a rigorous training regime, which takes time. The remuneration of Commissioners is not as attractive as it once was, meaning that it is difficult to recruit at the desired level. This has knock on repercussions on the retention of Commissioners especially as local government pay bands are generally more attractive. This is especially important given the potential impact arising from changes to the Development Management Regulations which could result in an increase in the number of appeals before the Commission in respect of what is currently referred work.
- In terms of our budget from the sponsor body, the Department of Justice, they have more important priorities than us. Therefore, the Commission would advocate cost

recovery for all work referred to us. Legislation to secure this would enable the Commission to prioritise work in a manner which would better serve the planning system. It would also put us on an equal footing with our counterpart organisations in the UK. We provide a link to the Town and Country Planning Act 1990 which sets out the relevant legislation as it pertains to England and Wales. This provision has allowed certain work to be resourced and prioritised by the respective bodies and would provide capacity and justification for the Commission to prioritise this work.

[Town and Country Planning Act 1990](#)

APPENDIX A

CASE STUDIES

2019/C004 Elgin Energy Kells Solar Farm (closed case)

The following information has been extracted from the Commission's report to DfI.

Extract from report introduction:

'In 2014 the applicant undertook pre-application engagement with the relevant statutory bodies to identify the environmental assessments required for the proposal as well as commencing discussion with the local community. Their Agent requested a determination as to whether the development would be considered a major application under Section 26 of the Planning Act (Northern Ireland) 2011.

The Department confirmed on 5 June 2015 that the proposal met Regulation 3 Class 2 (Energy Infrastructure) Column 3(1) (The construction of an electricity generation station where its capacity is or exceeds 30MW) of the Schedule to The Planning (Development Management) Regulations (NI) 2015 as it involved the development of a 50MW Solar Farm and that the application should be submitted to the Department (Strategic Planning Division (SPD)) for determination. Planning application (Scheme 1) LA03/2015/0234/F was submitted on 12 June 2015 along with an Environmental Statement required in accordance with the Environmental Impact Assessment Regulations 2015 (EIA Regs). Whilst the application site boundary incorporated a total area of 94.9ha (234 acres), the development area on which solar panels and ancillary infrastructure would be situated extended to 79.3ha (196 acres).

The SPD issued a formal request for Further Environmental Information (FEI) under the EIA Regs on 4 December 2015. The FEI was submitted by the applicant on 19 February 2016 and included additional information on matters including noise, historic monuments and natural heritage issues. The applicant at that time amended the planning application (Scheme 2) by reducing the area on which the panels would be situated to 71.8ha (177.4 acres), although the site boundaries remained consistent throughout the planning process. This information was re-advertised in accordance with the EIA Regs on 23 February 2016. SPD then issued a further request for FEI in January 2017. The submission in April 2017 included a Consolidated Environmental Statement (ES) dealing with a further reduced scheme where solar panels and ancillary facilities were placed across 56.7ha (140 acres) of the site. This revised proposal (Scheme 2) was re-advertised in May 2017. Over that 2 year period from the original planning application was submitted, a total of 1158 objections were received along with 2 petitions with 647 signatures, plus one letter of support.

Based on the Scheme 2 where solar panels extended over an area of 56.7ha, the SPD issued a Notice of Opinion (NOP) to refuse planning permission on three grounds: roads, noise and visual landscape matters on 27 November 2017. The applicant requested a Hearing before the PAC on 18 December 2017.

At the first Pre-Hearing meeting held on 4 April 2018, the applicant advised that they wished to further reduce the scheme (Scheme 3). In a further meeting held with the PAC on 26 April 2018, it was agreed that the hearing should proceed to consider the latest revised scheme. Following the introduction of new legislation, namely The NI (Executive formation and Exercise of Functions) Bill on 1 November 2018, SPD determined that it could no longer stand over the NOP which it withdrew and put a halt to the Hearing process.

An amended application reducing the area with solar panels and associated infrastructure to 34.5ha (87.57 acres), along with an updated ES (replacing all previous ES and FEI submissions) was submitted to the PAC and the Department in June 2018 and advertised under the EIA Regs 2017. Neighbour notifications were carried out as well as re-consultations with their statutory and non-statutory Consultees. Forty-four further letters of objection were received raising concerns about the reduced scheme.

The SPD reconsidered the revised proposal (the third revision to the scheme), along with the revised ES and further environmental information, having regard to the relevant planning policy, the statutory Development Plans and all other relevant material considerations, including all third-party representations. Taking account of the revised consultation responses, they concluded that the landscape and visual impact of the solar farm as amended would be acceptable in terms of its scale and massing, with previous concerns about noise and road/traffic impacts addressed to the satisfaction of the Environmental Health Departments (EHDs) of both Antrim and Newtownabbey Borough Council (ANBC) and Mid and East Antrim Borough Council (MEABC) and DFI Roads. Having weighed all of these considerations, the SPD in their revised Development Management Report (DMR) - Annex 1(a) and Annex 1(b) clarified why they had revised their NOP in finding the reduced scheme to be policy compliant, satisfied that they had applied the correct planning policies. In reaching that conclusion, they explained why the concerns raised by objectors were not given determining weight. A revised NOP issued on 12 August 2019 which recommended that approval be granted, subject to conditions addressing issues such as noise ,traffic, ecology , drainage, pollution, landscaping and decommissioning and requiring the submission of further detailed reports including a Final Construction and Environmental Management Plan, a final Habitat management Plan, a Habitat Restoration and Management Plan, a programme of archaeological works, a noise assessment report and a programme of Works and Traffic Management.

Following the issue of their revised NOP, SPD wrote to ANBC and MEABC asking if they wished to avail of the opportunity to appear before and be heard by the PAC in accordance with Section 26 (11) of the 2011 Planning Act. Both indicated that whilst they had decided not to take a corporate stance on the proposal, they considered that the significant concerns raised by the local

community required independent scrutiny by the PAC to help inform the decision to be taken by the Minister.

By letters dated 5th and 6th September 2019 respectively, MEABC and ANBC both requested that the Department refer to the PAC for a full Public Hearing to allow the local residents to have a fair hearing. SPD wrote to the Commission on 19 September 2019 requesting that they make arrangements to convene and undertake a hearing.

This hearing was originally arranged for 20 May 2020, but was re-scheduled to 30-31 March 2021 as a result of the Covid Pandemic at this time. When the Commission requested submission of Statements of Case from all parties, both Councils advised that they had adopted a neutral stance and would not be participating in the proceedings. On this basis, the SPD then sought a postponement to the hearing scheduled for March 2021 to clarify the position of both Councils in relation to their participation in the proceedings.

In response, by letter dated 9 April 2021, MEABC stated that they had not and would not provide a view on the merits of the proposed development and that the corporate view of the Council was that local residents should be afforded an opportunity to a fair hearing before the Commission. In a letter dated 29 April 2021, ANBC confirmed that they “would seek to participate in a neutral capacity” and “would take the opportunity afforded under the legislation to outline their position to the Commission”. A single representative of both Councils was present at the hearing in the capacity as observers.

The SPD concluded that ANBC had altered their position and therefore “did meet the legislative opportunity to appear and be heard by the Commission” in accordance with Section 26 (11) of the Act. On this basis, SPD requested that the Public Hearing be reconvened by the Commission in a letter dated 3 May 2021.’

We understand that the decision granting planning permission was issued in October 2022.

2019/C006-8 Upperlands (closed case)

Regionally Significant Planning Applications and Listed Building Consent Application – Proposed Heritage – led Mixed Use Development (incorporating residential development, leisure and recreational uses and community facilities including museum / exhibition space) and works to Listed Buildings at Upperlands, Maghera, County Londonderry for JHT (Upperlands) Limited.
H/2009/0264/O H/2009/0270/F H/2009/0271/LB

The following information is extracted from the Commissioner’s report with supplementary administrative information.

On 6 May 2009, two planning applications and one application for listed building consent were submitted to the former Department of the Environment (DoE) in respect of the proposed development.

H/2009/0264/O – Demolition of unlisted buildings to facilitate the heritage led regeneration (restoration and retention of listed mill building) of the former William Clarke and Sons Linen Mill Complex incorporating: residential development, leisure and recreational uses, community facilities including museum/ exhibition space and other associated works.

H/2009/0270/F – Works to listed buildings to include: the extension, and conversion of the former Art Deco Building into a new factory (extending to 4,030 sq metres) : change of use and retention of 1a for car parking; change of use and retention of 14a as a communal space; change of use and refurbishment of buildings 3a and 13a to create 18 apartments; alterations and extension of 2 existing dwellings : building 2a and 21a; change of use, extension and refurbishment of buildings 4b, 4c, 4e and 25a for museum/exhibition space and other associated works.

H/2009/0271/LBC – Works to listed buildings to include: the extension, and conversion of the former Art Deco Building into a new factory (extending to 4,030 sq m); change of use and retention of 1a for car parking; change of use and retention of 14a as a communal space; change of use and refurbishment of buildings 3a and 13a to create 18 apartments; alterations and extension of 2 existing dwellings – buildings 2a and 21a; change of use, extension and refurbishment of buildings 4b, 4c, 4e and 25a for museum/ exhibition space and other associated site works.

The outline application was subsequently declared an Article 31 under the Planning (Northern Ireland) Order 1991. Following the transfer of powers in April 2015 to local Councils, the two planning applications and one application for listed building consent were retained by the newly formed Department of Infrastructure (DFI).

On 16 August 2019, DFI issued three Notices of Opinion (NOP's) to Approve the development proposals associated with the regeneration of the former William Clark & Sons Complex, Upperlands. By letter dated 10 September 2019, Mid Ulster Council wrote to the DFI requesting the opportunity to appear before and be heard by the Planning Appeals Commission. Accordingly, the Department requested that the Planning Appeals Commission convened a hearing into the 3 NOPs by way of a letter dated 18 November 2019.

PAC wrote to the parties on 6 February 2020 setting a date of 21 May 2020 for the opening of the hearing sessions and requesting statements of case by 30 March 2020. Extensions were requested by both DFI and the applicant due to the COVID 19 situation.

Statements of case were submitted and rebuttals were requested. DFI sent a letter stating:

'I refer to your letter dated 23 September 2020 regarding the above hearing and the deadline of Friday 9 October for receipt of rebuttal statements. The Statement of Case from Turley appears to contain an extensive voluntary submission of further environmental information (FEI) contained within the Appendices in relation to a range of topic areas including ecology, flood risk, transport, land contamination, air quality and noise. The information is unrelated to the main issues for the hearing raised by Mid Ulster District Council (MUDC) in their letter of 10 September 2019. Whilst the Department will be in a position to respond as necessary to the MUDC issues by

the deadline, the Department will be unable to provide a response on the Turley FEI submission by 9 October. The Department notes that the Planning (Environmental Impact Assessment) Regulations (NI) 2015 allows for the submission of further information for the purposes of a hearing. In order however to provide meaningful comment on the FEI submission the Department would need to consult widely and this will inevitably delay Departmental comment. In the interests of fairness, all parties should be given sufficient time to provide comment on the new information and I would be grateful if you would advise how to progress this aspect'

The Commission had arranged to convene a hearing on 17th December 2020 in order to discuss the proposed heritage-led mixed use development and works to listed buildings at Upperlands.

On 30th November 2020 the Department contacted the Commission requesting a postponement of the scheduled hearing in order to further assess a number of matters that arose as a result of what is referred to as 'further environmental information'. This information was submitted by the applicant in their Statement of Case dated August 2020.

On 4th December 2020 the Commission notified the Department that it acceded to its request for a postponement. The re-scheduled hearing was programmed to commence remotely on 4th February 2021.

The Department contacted the Commission on 7th December 2020 indicating that the re-scheduled date gave insufficient time to re-solve the outstanding matters especially when taking into account arrangements for advertising.

Given that these cases have been referred to the Commission and in the interest of case management, the Commission convened a short and focussed preliminary remote hearing on 4th February 2021 at 10:30am. The parties were advised that 'The hearing will not engage in any of the substantive matters pertaining to the planning merits or otherwise of the scheme. Rather, it will explore the nature of the information provided to date in order to determine if it is 'further environmental information' and the nature and parameters around any additional information. Implications for the current Notices of Opinion and an agreed date for reconvening the hearing will also be discussed in an open forum with the parties.'

The preliminary hearing was held on 4 February 2021. It considered information submitted to date, additional information required and the resultant implications for the NOPs. On 11 February 2021, the Commission wrote to the parties to confirm their position on the necessity of Planning Appeals Commission publicising the applicant's forthcoming hydrology study. This stated that the Planning (Environmental Impact Assessment) Regulations (NI) 1999 came into operation on 14 March 1999 with the Planning (Environmental Impact Assessment) Regulations (NI) subsequently coming into operation on 13 March 2012. One of the main changes to the 1999 Regulations under the 2012 Regulations was an amendment to the provision for further information or any other information received for the purposes of a public inquiry (Regulation 19). Regulation 19 (6) of the Planning (EIA) Regulations (NI) 2012 states that paragraph (5), which relates to the necessity for publicity of further information, shall not apply to further information and any other information provided for the purposes of a public local inquiry or hearing. Given that the hydrology information was being provided for the purposes of a public local inquiry or hearing, it was the Commissions' opinion that there was no legal requirement to publicise the submission once received. Such information was available for the public to inspect for not less

than 4 weeks prior to the hearing as per Regulation 19 (9) of the 2021 Regulations. However, it was pointed out that the Commission had no objection to the Department publicising the receipt of the information if they wished to do so.

On 25 March 2021 various information was submitted to the Commission and DFI.

The Commission set a revised timetable on 29/09/2021. Hearings took place in late November and the report was forwarded to the Department on 27 January 2022.

We understand decisions issued in October 2023 which agreed with the Commissioner's recommendations to approve the scheme.