Judgment 54/2003

Barrett and Barrett v Island Development Committee and Osprey Investments Limited
Court of Appeal
(Civil Appeal 335)
18th December, 2003

Island Development (Guernsey) Laws, 1966 to 1990 – appeal from refusal by Royal Court of application for leave to appeal or judicial review – nature of a preliminary declaration – relevant policies under Rural Area Plan (Phase 2) – IDC did not have sufficient information to enable it reasonably to conclude that the eventual application for planning permission was likely to be granted – preliminary declaration set aside.

IN THE COURT OF APPEAL OF GUERNSEY

Civil Division

The 18th day of December, 2003 before Richard Charles Southwell, Esq., QC Presiding, Peter David Smith Esq., QC and Patrick Stewart Hodge Esq., QC

DAVID ALAN ANDRE BARRETT

and

KAY MARY BARRETT

The Appellants

V

THE ISLAND DEVELOPMENT COMMITTEE

The Respondent Committee

and

OSPREY INVESTMENTS LIMITED

The Third Party

In the appeal of the above Appellants from the decision of the Royal Court given on 1st July, 2003 on an application for judicial review;

THE COURT, having heard the Appellants in person and Advocate R. J. McMahon for the Respondent Committee thereon, (the Third Party not being represented at the hearing) GAVE JUDGMENT in the attached terms, ALLOWED the appeal, SET ASIDE the preliminary declaration dated 13th December, 2002 and AWARDED COSTS to the Appellants, on the standard recoverable basis, both in this Court and in the Royal Court.

K. H. TOUGH
Registrar of the Court of Appeal

IN THE COURT OF APPEAL OF GUERNSEY

Civil Division

DAVID ALAN ANDRE BARRETT
and
KAY MARY BARRETT
V
THE ISLAND DEVELOPMENT COMMITTEE
and
OSPREY INVESTMENTS LIMITED

Hodge: JA

1. This is an appeal from the judgment of the Royal Court dated 1 July 2003, in which the Lieutenant Bailiff refused the Appellants' application to appeal from or be granted judicial review of a decision of the Island Development Committee ("IDC") dated 13 December 2002. The decision of the IDC which the Appellants challenge was a decision to grant a preliminary declaration on an application by Osprey Investments Limited in relation to a proposed development at Sandpiper Vinery, Route de Plaisance, St Pierre du Bois.

2. The Appellants before the Royal Court and before this Court have presented their application to the Royal Court as an application for judicial review. This is because the Bailiff pointed out that there might be difficulties in their statutory appeal in the light of *Green v IDC and Winslow* 1993 15 GLJ 18, which suggested that the Appellants are not aggrieved persons in terms of section 26(1) of the Island Development (Guernsey) Law 1966-1990 ("the 1966 Law") and therefore do not have a statutory right of appeal.

3. This appeal raises interesting questions about the status of a preliminary declaration and the steps which the IDC require to take before granting such a declaration.

The relevant statutory provisions

4. The relevant provisions are sections 27 and 28 of the 1966 Law.

   Section 27(1) of the 1966 Law provides:
   "A person who desires to carry out any development or work for which permission is required under this Law may, before making an application to the Committee in that behalf, apply to the Committee for a preliminary declaration as to whether, in principle, the Committee on the submission to it of an application with such detailed plans or information or both as the Committee may require, would be likely to grant permission for such development or work."

5. Section 27(2) provides that such a preliminary declaration shall remain valid for three years from the date on which it was issued.

6. Section 28 provides:
   " In the event of the Committee refusing to grant any application in pursuance of the provisions of this Law … no compensation shall be payable by the States for any loss suffered by the applicant for such permission … or by any other person by reason of such refusal…"

7. Part III of the 1966 Law deals with development control and sections 15 to 18 in that Part deal with the application for planning permission and the grant or refusal of permission. Section 17 sets out the considerations which the IDC have to take into account when deciding to grant or refuse planning

permission. Section 18 empowers the IDC to grant permission for a development which involves a departure from a Detailed Development Plan if the IDC is of the opinion that it is a minor departure. But where the IDC is minded to approve an application for permission for development or work which involves a departure from a Detailed Development Plan which is not a departure of a minor nature, the IDC may request the States to appoint an Inspector to hold a planning inquiry.

The nature of a preliminary declaration

8. From the terms of section 27 it is clear that a preliminary declaration is not a planning permission but is a declaration that in principle the IDC would be likely to grant planning permission for a proposed development. At the same time it was clear from the submissions of Mr Barrett, who is a member of the States and who has considerable experience as a member of the IDC, and also from the submissions of Mr McMahon that such a declaration is a significant step on the road towards obtaining a planning permission. We were informed that property may change hands on the Island at enhanced prices where such a declaration has been obtained. It is clearly intended to have a legal effect, section 27(2) providing that the declaration is valid for three years.

9. I note also that section 3 of the Island Development (Amendment) (Guernsey) Law 1990 ("the 1990 Law") under the heading "power to limit validity of consents" refers to the IDC "granting permission under …s 27". While I question whether it is technically correct to refer to the declaration as a consent or permission, the provision indicates that the States considered that the declaration was a significant step. I note also that in the preliminary declaration it is referred to as a permit.

10. The declaration cannot be equated with an outline planning permission in England and in Scotland, because it does not both establish the principle of the development and confine the subsequent application to an approval of reserved matters. Nevertheless, the declaration must constrain the IDC in its subsequent consideration of an application for planning permission under sections 16 and 17 of the 1966 Law. The IDC as a responsible public body is enjoined by administrative law to act reasonably and may expose itself to judicial review challenge if it acts inconsistently. Thus if it makes a declaration under section 27 of the 1966 Law and then changes its mind without having new factual material by which it can reasonably justify its *volte face*, it may be vulnerable to a judicial review challenge. No example was given of the IDC refusing an application for planning permission after granting a preliminary declaration; Mr Barrett suggested that it was unlikely that the IDC had ever done so.

11. In these circumstances it is not surprising that the IDC's practice is to assess the applicant's proposal against the relevant policies of the development plan when deciding whether to make a preliminary declaration.

The nature and location of the proposed development

12. Osprey Investments Limited ("Osprey") applied on 23 September 2002 for a preliminary declaration in respect of a proposal to demolish glasshouses and a packing shed and to erect a substantially larger packing and storage shed incorporating processing, laboratory and administrative facilities at Sandpiper Vinery.

13. The proposed demolition involves the removal of derelict timber glasshouses in the Northern part of the site. The metal glasshouses on the southern part of the site would be retained for the cultivation of high value herbs. The demolition would involve the removal of approximately 1.5 acres of glasshouses and approximately 2.6 acres of glasshouses would be retained. In place of the glasshouses and the packing shed in the northern part of the site the proposal is to erect a 30,000 square feet building which would comprise 20,000 square feet for packing and storage, 5,000 square feet for offices and laboratories and 5,000 square feet for processing. Osprey provided no details of the elevations of the proposed new building. Osprey indicated initially that it would be a single storey structure but by letter dated 28 November 2002 Healthy Direct Limited, an associated company, informed the IDC that there would be

30,000 square feet of floorspace on a 25,000 square feet footprint, necessitating a two-storey building at least in part. It would be a substantial building. Mr Barrett estimated that the ratio of the proposed building to glass on the site would be over 26% and pointed out that the building would have a larger floor area than Safeway, the largest supermarket on the island. The proposal also involved a new access from Rue des Heches, 37 staff and 4 visitor parking spaces and some landscaping.

14. Sandpiper Vinery, together with substantial areas of land to the east and south of the site is zoned as an Area of Rural Character (Green Zone 3) in the Rural Area Plan (Phase 2). Land to the west and north of the site is zoned as Areas of Landscape Value (Green Zone 2).

Planning policies: The Rural Area Plan (Phase 2)

15. The Rural Area Plan (Phase 2) covers the southern half of the island and has the strategic aim of the conservation and enhancement of the rural environment (para 1.7). To achieve this, the Plan has three zones covering predominantly open land, namely (1) Areas of Special Environmental Importance (Green Zone 1), (2) Areas of Landscape Value (Green Zone 2) and (3) Areas of Rural Character (Green Zone 3). The Plan provides for a gradation of protection in its policies, giving the greatest protection to Green Zone 1 areas and allowing the greatest flexibility to Green Zone 3 areas (para 2.9). In relation to predominantly developed land there are two zones namely, Conservation Areas and Built-up Areas, and the former has greater protection than the latter.

16. Areas of Rural Character (Green Zone 3) is a zoning which is intended to protect land which makes an important contribution to the open rural character of the Plan area. The explanation of policy CE 7 states that these are areas of predominantly open land which offer the greatest flexibility in considering applications for development. But there is still a strong emphasis on land uses appropriate to the rural area, such as agriculture, horticulture and outdoor recreation or tourism.

17. Policy CE 7 provides:
In Areas of Rural Character (Green Zone 3) the policy will be to retain the predominantly open, undeveloped character of the land but also, where appropriate, to accommodate essential development related to use of the land for agriculture, horticulture, outdoor recreation, tourism or the provision of access to an otherwise acceptable Designated Site for New Housing. The erection of new housing will not be permitted."

18. The Plan contains a group of policies in relation to horticulture, which historically has been a very significant industry in the island but which has contracted in recent years. The Plan seeks to facilitate the continued operation of productive horticultural holdings. Thus Policy HT 1 provides that in all areas permission will generally be given for works essential to the proper running of existing productive horticultural holdings. This policy is not directly relevant to this application as Sandpiper Vinery is not in productive horticultural use. Mr McMahon suggested that the policy would be relevant if the applicants were to recommence horticulture on the site before applying for planning permission for the proposed development. This is so but the applicants have not suggested that they plan to start growing plants before planning permission is obtained for their proposed development. I therefore agree with the Lieutenant Bailiff when she held that policy HT 1 did not apply.

19. Policy HT 3 reflects the policy that the greatest support to the horticultural industry is to be given to holdings in Green Zone 3, where most of the productive horticultural units in the Plan area are concentrated. The policy provides a mechanism by which owners of horticultural sites can redevelop existing glass and develop sites cleared of derelict glass within a specified timescale. Policy HT 3 provides:
In Areas of Rural Character (Green Zone 3) applications to redevelop or extend existing glass or to erect new glass, together with essential ancillary works will generally be granted provided that:
(i) at the time of the application the site is occupied by glass or at any time commencing five years prior to 1st October 1992 the site was occupied by glass;

(ii) the site constitutes a prime horticultural site;
(iii) the development does not intrude unacceptably into otherwise open areas of countryside; and
(iv) the development does not have an unacceptable impact upon important open views in otherwise developed glass areas."

20. Policy HT 7 provides:
"Land used for horticulture is legally defined as agricultural land and permission will not be given for the erection of new housing or for any other form of development on land in horticultural use unless the proposal falls within Built-up Areas, in which case it will be judged against the relevant policies for that planning zone."
The explanation for this policy (para 5.15) is to preserve the availability of suitable sites for glasshouses by restricting the prospect of those sites being re-zoned for residential development.

21. Other policies which are relevant to the judicial review application are RT 6, COM 6, COM 7 and IN 6.

22. RT 6 is a retail policy which is designed to assist the strategic policy of encouraging retailers to locate in St Peter Port and St Sampson's and to discourage large retail developments in out-of-town locations. RT 6 provides:
"Major new retail developments in the Plan area will not be permitted."
The strategic policy towards commercial premises is to support the commercial centre of St Peter Port and to resist the location in the Plan area of major new office development which would be more appropriately located in the urban area. To this end policy COM 6 provides:
"Major new office or other commercial developments will not be permitted."
COM 7 permits new small-scale commercial premises which are designed to meet local needs in Built-up Areas but only if the proposal meets specified criteria.
Strategic policy in relation to new industrial development (including warehouses) on new sites is to direct such development towards appropriate sites in the Urban Area Plan. To this end IN 6 provides:
"New industrial development on new sites will not be permitted anywhere in the Plan area."

23. I will discuss these policies when I consider whether the IDC was entitled to grant the declaration.

The consideration of the application for a Preliminary Declaration

24. Mr Lockwood, the Chief Planning Officer, in a report to the IDC dated 2 November 2002 described the proposal and suggested that policies CE 7 and HT 7 applied. He also suggested that policies COM 6 and IN 6 appeared to apply. He summarised the information in the applicant's brochure. The applicant intended to use the site for cultivation of high value crops of herbal raw material. At least 3 acres of high specification glass were required to grow one type of herb. Local access to experienced growers and greenhouses was important as demand grew. There would require to be drying and grinding facilities on site and possibly extraction and freeze-drying. He recorded the strong support for the proposal from the Committee for Horticulture and the Board of Industry which saw the development as important to the island in economic terms. He also recorded the objections of neighbours and the majority of St Peter's Douzaine who saw the proposal as a major industrial development.

25. On the information provided, Mr Lockwood expressed concern whether the substantial building which was proposed would be truly ancillary to horticulture on the site and suggested that the development would have a significant impact on the character and amenities of the locality. He recommended that the application be deferred to allow the applicant to give further clarification of these issues.

26. The IDC took Mr Lockwood's advice and directed its officers to seek further clarification. Mr Rowles, Development Control Manager of the IDC, in an affidavit dated 21 May 2003, described the further information which he and his colleagues gathered from the applicant and associated companies, including Healthy Direct Limited. Mr Rowles recorded that Mr Barry Smith, Technical Director of Healthy Direct Limited, explained that because the ultimate use of the herbs was in medical products, it

was necessary to ensure that the harvested crop was not contaminated. The crop therefore had to be dealt with by freeze-drying and grinding in order to extract the active ingredients in a proximate and regulated environment. Mr Winn, Managing Director of Healthy Direct, by letter dated 28 November 2002 suggested that the location of such a building away from the site of the horticulture would be likely to make the project commercially unviable. There would be a cropping cycle of between 4 and 6 times a year. The whole of each plant would be harvested in each crop cycle, necessitating substantial storage space, compared with traditional growing activities on the island. Once dried or ground the horticultural product would be despatched from the site for conversion into pharmaceutical end products.

27. Mr Rowles narrates the IDC's consideration of the additional information. He records that the IDC took legal advice before determining whether to give a preliminary declaration. The IDC considered the application against the policies of the development plan. They took the view that the proposal would not infringe policy IN 6 if an appropriately worded condition limited the use of the building to serving the growing operation and prevented it from operating independently of that operation. The IDC took the view that the proposal did not involve retailing and that the Rural Area Plan's retailing policies (including policy RT 6) were therefore not engaged. They also took the view that the office policy (COM 6) was not engaged because any office accommodation within the proposed building would be part and parcel of the growing and related operations on the horticultural site.

28. The IDC accepted that the authorised use of the site was as a horticultural site within Class 60 of the Island Development (Use Classes) Ordinance 1991 as amended. It required therefore to consider whether the proposal involved a material change of use from the horticultural or agricultural use which was authorised. Mr Rowles then stated (affidavit para 17):

> "The balancing exercise between principal and ancillary uses was resolved in favour of recognising that this would continue to be a growing operation but that this new departure for Guernsey from more traditional forms of growing required a fresh approach to what can properly be regarded as the required ancillary infrastructure. The activities proposed to be undertaken in the building had been explained by Osprey as all being so inextricably interwoven with the growing operation that the Committee determined that they did not qualify as independent uses."

29. The IDC then considered the proposal against the Plan's horticultural policies and concluded that the application did not have to be assessed against policy HT 7. The IDC concluded that policy HT 1 did not prevent them from issuing a preliminary declaration because the site was zoned as Green Zone 3. In relation to policy HT 3, Mr Rowles stated (affidavit para 20):

> "it is arguable that Osprey's proposals do not engage Policy HT 3, because what is being proposed is neither redevelopment or extension of existing glass, or the erection of new glass."

If the proposal fell within the phrase "essential ancillary works" in that policy there would be a presumption in favour of granting permission if the proposal met the specified conditions. He stated that "Osprey could readily demonstrate the potential for meeting these requirements." Accordingly, the IDC did not consider itself precluded from issuing the preliminary declaration which the applicants sought.

30. Mr Rowles continued (affidavit para 22):

> "…in issuing the Preliminary Declaration the Committee is not departing from RAP2 [the Rural Area Plan (Phase 2)], but has acted within its terms. Consequently, section 18 of the 1966 Law is not engaged….Because Osprey's proposals can be dealt with under the policies of RAP2, a decision on whether or not they amounted to a minor departure was not required."

31. The preliminary declaration which the IDC issued on 13 December 2002 stated that the IDC would in principle be likely to grant permission for the proposed development on submission of an application with such detailed plans and information as the IDC might require. The declaration was subject to conditions which included a requirement that detailed plans be produced and that in preparing the details, particular attention should be given to the scale, design and impact of the proposed buildings on the character and amenities of the locality. Condition 6 of the declaration required that the proposed development be used only in conjunction with and ancillary to the vinery at the site for purposes

incidental to the horticultural operation of the site within agricultural use class 60. It also required the removal of buildings from the site upon cessation of use of the site for agriculture or horticulture, unless the IDC authorised the buildings to remain.

The grounds of the Appellant's judicial review application

32. The Appellants' application was supported by a clear affidavit by Mr Barrett, together with supplementary affidavits and exhibits. We have also been assisted by his accomplished oral submissions.

33. The Appellants have a number of concerns about the intentions of Osprey and related companies. Those concerns include the possible use of the site by a warehousing and distribution company or a mail order company, which would involve commercial, industrial or retail uses rather than activities which are ancillary to horticulture. They are also concerned by Osprey's declared intention to process at the vinery the products of other horticulture sites. As neighbours of Sandpiper Vinery the Appellants are understandably concerned about the scale of the proposed building and its impact on the character and amenities of a rural area. They point out that in the letter from Mr Winn dated 28 November 2002 there is reference to a total footprint of 25,000 square feet but total space of 30,000 square feet "(2 floors)" and they not unreasonably conclude that a two-storey building is proposed. They are also concerned about the risk of setting a precedent for industrial development in a rural area.

34. The Appellants are also concerned that condition 6 of the preliminary declaration will in practice be unenforceable as the IDC would not require the removal of a £5 million building if horticulture were to cease on the site in future.

35. Their grounds for judicial review are, first, that the IDC did not have power to grant the preliminary declaration as the proposal was a major departure from the Rural Area Plan (Phase 2) requiring a planning inquiry under section 18(2) of the 1966 Law and, secondly, that no reasonable planning authority acting reasonably would have concluded that the proposed development was ancillary to horticultural uses or was a minor departure from the Rural Area Plan (Phase 2). They submit that the gateway policy HT1 is not applicable and that the proposal does not fall within HT 3. They also argue that the Lieutenant Bailiff failed to address policies COM 6, COM 7 and IN 6 in her decision.

Decision

36. The central question is whether the IDC was entitled on the information available to it at the time to conclude that it was likely that the proposal complied with policy HT 3 and that that policy was therefore likely to provide the gateway in the development plan by which planning permission could properly be granted.

37. While the Appellants criticised the Lieutenant Bailiff for not expressly addressing policies COM 6, COM 7 and IN 6 in her judgment, I consider that she was entitled to conclude that these policies did not bar the proposal if the proposal could properly be brought within the horticultural policy HT 3. At the same time, it would have been helpful if the Lieutenant Bailiff had considered the policies as it is appropriate to interpret each policy of the plan in the context of the plan as a whole. Thus the policy HT 3, which creates scope for authorisation of essential ancillary works which may give rise to commercial or industrial uses, requires to be interpreted in the context of the existence of, among others, the policies COM 6 and IN 6 which prohibit new commercial developments, and new industrial developments on new sites, in the plan area. I therefore turn to the requirements of policy HT 3.

38. First, the applications to which policy HT 3 applies are applications "to redevelop or extend existing glass or to erect new glass". There was no proposal to extend existing glass or to erect new glass. It is not clear from the information which the applicants put forward to the IDC and which was produced to this Court that there would be redevelopment of existing glass. Mr McMahon accepted that the

application did not explicitly seek to carry out such redevelopment but he submitted that the applicants had provided the IDC with information which made it clear that work would be done on the glass. He argued that the IDC required to be satisfied only that there was a route into the HT3 gateway, asserting that if the IDC concluded that it was possible for the applicants to comply with the policy there would be a likelihood that they would do so. For reasons to which I will shortly turn, I do not accept this submission.

39. Secondly, the policy allows not just redevelopment of glass but also "essential ancillary works". It was agreed by the parties, correctly in my view, that the proper construction of the policy was that these works were essential to, and ancillary to, the horticultural operations carried out under the glass within the site. I am not persuaded that on the information available to the IDC, they could reasonably have concluded that a building with 30,000 square feet of floorspace for warehousing, processing, packing and also laboratory and office space was "essential ancillary works" for the 2.6 to 3 acres of glass which would have remained on the site. As the Appellants pointed out, Osprey and associated companies had repeatedly made clear in documents which they provided to the IDC that they aspired to take produce not only from Sandpiper Vinery but also to utilise other horticultural sites if the business was successful. This aspiration is also evidenced by the more detailed explanation of the applicants' requirements for space which Mr Winn of Healthy Direct set out in his letter to the IDC dated 28 November 2002. There he speaks of a projected turnover of about 70 tonnes per year/6 tonnes a month of dried extract and about 700 tonnes per year/60 tonnes a month of dried raw plant material. Even on the basis of four to six harvests of the produce of the glass on the site per year, this throughput scarcely seems to be consistent with the likely produce of 2.6 to 3 acres of glass.

40. In order to comply with policy HT 3, the proposal had also to conform to each of the four criteria in that policy. The site clearly met criterion (i) as the site was occupied by glass. I am prepared to accept also that the site constituted a "prime horticultural site" in accordance with criterion (ii) as the Committee for Horticulture had expressed a favourable view on the commercial viability of the applicants' proposals and the IDC by issuing the preliminary declaration may be taken as having agreed with that view.

41. Criteria (iii) and (iv) are more problematic. The IDC had no sketches and no elevations of the proposed development or any drawings showing the visual impact of the proposal from any important vantage points. What they had, as Mr McMahon emphasised, was a plan of the proposed building and the proposed landscaping works to the north and west of the building. The IDC would, he submitted, know the site and would be able to form a view as to whether it would be possible for the applicants to produce a design which would meet the criteria. He referred in this regard to the letter dated 3 December 2002 from the Committee for Horticulture to the IDC which suggested that a steel-framed structure such as is used as storage barns around the Island <u>could</u> (my emphasis) be adapted for the purposes proposed by Guernsey Hydroponics. The letter went on to state:

> "In this respect, careful consideration must be given to the scale, siting and design of any proposed building and the ancillary works…Dr Marchant [the Committee's horticultural engineer] would be pleased to provide his services and expertise to work with both the clients and the officers of your Committee to ensure that any facilities are appropriate to the proposed vinery and its location".

42. Mr McMahon stated that the IDC gave comparatively little consideration to criteria (iii) and (iv). The IDC had the plan to which I have referred and the letter from the Committee for Horticulture of 3 December 2002. There was an oral presentation to the IDC, but we were not given any information as to the content of that presentation. The IDC did not request any elevations or sight lines. Mr McMahon submitted that on the information provided the IDC came to the view that it was not precluded by policy HT 3 from granting an application for the proposed development.

43. In his written case, Mr McMahon submitted (para 2) that the task of the IDC was to consider whether the plan precluded it from granting permission for the concept advanced, and, if not, whether the factors it would have to take into account were so heavily weighted against the applicant that the IDC would be unlikely to grant development permission. I do not have any difficulty with this description of the proper

approach. But I do not accept his suggestion (in para 4 of his written case) that the IDC can ignore the factors required to be taken into account in section 17 of the 1966 Law when considering an application for a preliminary declaration. The IDC must, in my judgment, at least take a *prima facie* view on such factors if it is to declare that it is likely to grant a permission. I consider that Advocate McMahon understates the test to be applied when he states (in the same paragraph of his written case) that “the preliminary declaration is an indication to the Applicant that the [IDC] would be able to consider the merits of an application for that type of development because the door is not completely shut to him”. That is not what section 27 provides that a preliminary declaration declares.

44. Advocate McMahon accepted in his written case (para 6) that if policy HT 3 did not provide a policy gateway for accommodating the proposed development within the Plan, there would be grounds for concluding that the IDC had exceeded its powers in making the preliminary declaration. That is so. But in my judgment the real question in relation to policy HT 3 is whether the IDC had sufficient information before it to enable it reasonably to conclude that it was likely that the proposed development complied with that policy.

45. Where it was not clear that the proposed development would necessarily involve the redevelopment of glass, where the scale of the proposed new building had not been demonstrated to be ancillary to the horticulture to be carried on within Sandpiper Vinery and on the contrary appeared to be designed to handle the produce of other sites, and where there was no indication of the mass and elevations of the proposed building which are relevant to criteria (iii) and (iv), I do not consider there was a basis upon which the IDC could conclude that the requirements of policy HT 3 were likely to be met.

46. I do not need to decide whether the IDC was irrational in making the preliminary declaration (irrationality being a difficult test for an applicant to meet). On the information provided in Mr Rowles’ affidavit and in Mr McMahon’s written case and submissions it appears that the IDC has posed the wrong question to itself. Mr Rowles (para 20) states that the IDC could not simply respond to Osprey’s application by saying that policy HT 3 could not be met and, therefore, it was precluded from issuing the preliminary declaration sought. The test is not whether the IDC at the stage of an application for a preliminary declaration is satisfied that a particular policy in the plan is clearly a bar to the proposed development. Nor is it whether there is a possibility that the criteria of a particular policy may be met, as Mr McMahon submitted (written case paras 9 and 10). The IDC has, as I have said, to form at least a *prima facie* view that the proposal is likely to meet the requirements of the relevant policy. This the IDC has not done.

47. In conclusion, I am satisfied that the IDC did not have sufficient information before it to enable it reasonably to conclude that the eventual application for planning permission was likely to be granted. In my judgment, therefore, the preliminary declaration dated 13 December 2002 should be set aside.

48. In reaching this conclusion, I stress that I am making no judgment on the merits of the proposal.

49. SOUTHWELL, JA: I agree and have nothing to add.

50. SMITH, JA: And I agree and have nothing to add either.

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