Neutral Citation Number: [2010] IEHC 255

THE HIGH COURT

JUDICIAL REVIEW

2009 521 JR

BETWEEN

WESTON LIMITED

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

SOUTH DUBLIN COUNTY COUNCIL

AND

COMBINED ACTION ON WESTON AERODROME

NOTICE PARTIES

JUDGMENT of Mr. Justice Charleton delivered on the 1st day of July, 2010

1. Weston Aerodrome has recently been renamed Weston Executive Airport. It is controlled by the applicant Weston, which has recently become an unlimited liability company. This airfield is situated in a green belt area of West County Dublin near Lucan.

2. Weston seeks to challenge a decision of An Bord Pleanála ("the Board") dated the 20th March, 2009, whereby it was refused permission to erect six conjoined light aircraft hangars, together with all associated site works and services, at the northern end of Weston Executive Airport. Weston argues the refusal was wrong, basically because they claim that the Board arrogated to itself from the planning authority powers to stop an intensification of use by decision as to what buildings were appropriate to the current use.

3. The airfield has a history dating back to the 1930s. It began as some basic kind of landing strip. At some stage prior to 1964 the commencement of planning controls by legislation, apparently, a tarmac landing strip was laid down. Within the era of planning control, various applications for retention permission, or for development, were granted either by the local authority or by An Bord Pleanála, on appeal. These included the extension of the existing runway into a nearby farm which had been bought for that purpose. This increased the size of Weston Executive Airport to around 120 hectares. Because the long taxiway associated with the runway was an exempted development under the Planning Acts 2000 – 2007, this was also built in recent times. The premises originally had some outbuildings in which some business associated with an airfield might be transacted and these were developed in accordance with planning permissions or retention permissions.

4. For the purpose of this judgment I need to refer in detail to two prior planning decisions and the conditions attaching thereto before dealing with the decision under consideration in this judicial review. This is both an application for leave, where substantial grounds for challenging the decision must be shown, and a final hearing; as the procedure has been telescoped by order of Kearns P.

Planning Decisions

5. By decision of An Bord Pleanála, having the reference number PL 06S 131149 dated the 5th December, 2003, the applicant was refused permission to build six aircraft hangars on the northern end of Weston Executive Airport. This is very close indeed to the location in respect of which planning permission was sought in 2008 for six aircraft hangars in the decision now under review. The Board made a split decision in 2003 whereby one hangar of around 3,500m² was permitted, together with an office and clubhouse, car parking spaces, aircraft parking and a new access for vehicles to the nearby minor road. An Bord Pleanála considered this development to be on a scale consistent with the existing use and character of what was then called the Weston Aerodrome. Permission for five further airport hangars, having a total area of 11,200m², was refused. The reason for refusal was given in the Schedule, which I now quote:-

> "It is considered that the development of hangars A-E and associated car parking would constitute a greatly expanded development resulting in a significant intensification of use of Weston aerodrome which would be inconsistent with the existing use and character of the aerodrome. The Board is not satisfied, on the basis of the submissions made in connection with the planning application and the appeal, that such intensification of use would not seriously injure the amenities of the area or of property in the vicinity. The development of hangars A-E would, therefore, contravene the zoning provisions of the area – to preserve a green belt between development areas – and would be contrary to the proper planning and development of the area."

6. Notwithstanding the clear reasons for this refusal, Weston then made a further application for planning permission to develop hangar space amounting to a further 3,000m² at the southern end of the aerodrome. This was in the vicinity of the agricultural buildings at Egan's farm, which Weston had bought for the ostensible purpose of extending the runway. By decision of An Bord Pleanála having the reference number PL 09.213348 dated the 16th December, 2005, this plan was turned down. The reasons were given as follows by the Board:-

> "Having regard to the location of the site in an isolated and separate location away from the main aerodrome facilities to the North East of the aerodrome, it is considered that the proposed development is unacceptable in terms of the orderly

development by reason of facilitating an intensification of use of the aerodrome in a piecemeal way, which would conflict with the terms and conditions of the permission granted on the site Reference No. PL 06S.131149, which provided for the overall reordering of the aerodrome. The proposed development would, therefore, be contrary to the proper planning and sustainable development of the area."

7. This decision was the subject of a judicial review taken by Weston. By decision of O'Keeffe J. dated the 19th May, 2009, (Unreported, High Court, O'Keeffe J., 19th May, 2009), it was decided that a single arguable ground had been made out whereby leave would be granted to initiate judicial review proceedings. This ground related to the intensification of use reason which was argued, by Weston, not to form part of the application. On the substantive hearing, Kearns P. dismissed the application on 24 March, 2010 No note of this decision is available.

8. Notwithstanding this rejection, the application now under consideration was made. This was an application for six aircraft hangars having an area of 11,103m² on the northern end of the aerodrome, near the boundary and orientated to face south west. The area involved is virtually the same as in the 2003 rejection and the location is the same general area, though the orientation is different and the height of the buildings a bit smaller. By decision reference number PL 06S.231394 on the 20th March, 2009, An Bord Pleanála refused permission. The reasons were stated as follows:-

> "Having regard to the scale of development proposed relative to permitted operations at Weston Aerodrome, it is considered that the proposed development would constitute a greatly expanded development resulting in a significant intensification of use of Weston Aerodrome which would be inconsistent with the existing use and character of the Aerodrome. The Bord is not satisfied, on the basis of the submissions made in connection with the planning application and the appeal, that such intensification of use would not seriously injure the amenities of the area or of property in the vicinity. The proposed development would, therefore, be contrary to the proper planning and sustainable development of the area."

Principal Argument

9. Previous planning permissions had, on being granted, made it clear that any such permission to develop or retain an unauthorised development was not to be construed as allowing for any intensification of use of the aerodrome. The decision of the 20th March, 2009, of An Bord Pleanála, under review here, is principally impugned on the basis that An Bord Pleanála has committed an error of law, and has acted unreasonably, in conflating the entitlement of planning authorities, and the general public, to enforce planning controls under s. 160 of the Planning and Development Act 2000, and by criminal prosecutions, with a false entitlement to enforce planning controls over intensification of use by refusing permission in the first place. Since, it is argued, it is perfectly clear that previous planning permissions have limited Weston Aerodrome to the low level of use that obtained prior to 1964, there is no legal basis upon which An Bord Pleanála could anticipate an intensification of use and thereby refuse planning permission for what otherwise would be a lawful development. In consequence, it is urged, An Bord Pleanála has entered into the realm of enforcement by unlawfully joining its role in deciding on planning decisions with the role of the planning authority, and the general public, to pursue appropriate enforcement or prosecution.

10. In addition, points are argued to the effect that the inspector's report under s. 34(10) of the Planning and Development Act 2000, which is part of the decision, is irrational and speculative, compounding an error on the face of the record by contaminating the process. That report, it is said, makes an error of law on the issue of intensification of use. By using that erroneous inspector's report, it is urged, the reasons given for the decision are undermined. The reasons chosen are argued to be incorrect and deliberately chosen to exclude compensation.

Correction of Record

11. Before turning to a consideration of this series of arguments, there is one other point which I can dispose of straightaway. The relevant minutes of An Bord Pleanála make reference to the inspector's report and indicate that the Board had decided to refuse permission in accordance with the recommendation therein made "subject to the amendments shown in manuscript on the attached copy of the inspector's draft reasons and considerations". It is argued that this direction is an error of law on the face of the record. Firstly, it is not an error of law. Secondly, as a matter of fact the inspector's recommendation is not in any way altered by any manuscript amendment. The entire file of An Bord Pleanála was produced in Court, and properly proved. It shows no manuscript amendment to the inspector's report. This may have arisen out of the use of standard wording, or it may be a mistake. Section 146A of the Planning and Development Act 2000, as amended, allows the Board to amend a decision where an error of a clerical or technical nature appears. Section 146A provides that such an alteration cannot be made if it would result in a material alteration in the terms of the development, the subject of the permission or the decision concerned. Such does not arise here, the section clearly applies, subject to that:-

> "(a) a planning authority or the Board, as may be appropriate, may amend a planning permission granted by it, or
>
> (b) the Board may amend any decision made by it in performance of a function under or transferred by this Act or under any other enactment, for the purposes of -
>
> (i) correcting any clerical error therein,
>
> (ii) facilitating the doing of any thing pursuant to the permission or decision where the doing of that thing may reasonably be regarded as having been contemplated by a particular provision of the permission or decision or the terms of the permission or decision taken as a whole but was not expressly provided for in the permission or decision, or
>
> (iii) otherwise facilitating the operation of the permission or decision."

Burden of Proof

11. The burden of proof of any error of law, or fundamental question of fact, leading to an excess of jurisdiction, or of demonstrating

such unreasonableness as flies in the face of fundamental reason and common sense, rests on Weston the applicant in these proceedings. Once there is any reasonable basis upon which the planning authority or An Bord Pleanála can make a decision in favour of, or against, a planning application or appeal, or can attach a condition thereto, the court has no jurisdiction to interfere. Furthermore, where, as a colourable device, a reason is chosen for refusing permission which does not give rise to an entitlement to compensation under the legislation, the burden of proving that a decision choosing such an incorrect reason for that improper purpose rests on the applicant. The presence in the planning file, including the report to the manager, or in the case of An Bord Pleanála, the report of the inspector, of any material which could rationally justify a refusal on a non-compensatory ground is sufficient to support the lawfulness of a decision. Of course, in an appropriate case, it might be possible to prove that a decision was made for an improper purpose or that a conclusion or recommendation in an inspector's report was not arrived at in good faith. That burden however, rests on the applicant for judicial review who seeks to impugn such a decision. Some material ground, upon which such an attack might reasonably be regarded as being capable of being mounted, must be shown in evidential terms before even leave to argue such ground would be granted. In accordance with the legislative circumscription of judicial review appeals against planning decisions, substantial grounds would have to be shown to justify granting leave on such a point.

12. In *Lancefort Limited v. An Bord Pleanála* (Unreported, High Court, McGuinness J., 12th March, 1998), the following passage on the burden of proof, at pp. 21-22, which applies as much to a planning authority as to An Bord Pleanála appears:-

> "Counsel for the Notice Party also submitted that where the evidence as to whether a statutory body entrusted by the legislator with a particular function did not exercise its statutory duties, there is presumption of validity in favour of the decision under attack … Finlay P. … in ***re Comhltas Ceolteorí Éireann*** (High Court unreported 14th December, 1977)… said (at pages. 3-4 of the transcript of his Judgment):
>
> > "A planning authority is a public authority with a decisionmaking capacity acting in accordance with statutory powers and duties. In my view, there is rebuttable presumption that its acts are valid."
>
> It appears to me that this submission… is wellfounded. The onus of prove [*sic*] in establishing that An Bord Pleanála did not consider the question of environmental impact assessment… and thereby rebutting the presumption of validity of the Bord's decision, lies squarely on the Applicant. That burden of proof, it seems to me, has not been fully discharged.
>
> In addition, the Court has discretion in regard to Orders sought by way of judicial review. In this case, the Bord had before it ample material on which to make its decision. The report of the inspector raises and refers to many of the matters which would also be covered in a environmental impact assessment. Finally, no participant in the oral hearing suggested that an environmental impact assessment was required. … Bearing all these matters in mind I would be reluctant to exercise my discretion in favour of the Applicant on this point".

13. There is, in fact, no basis upon which the decision of An Bord Pleanála can, as a matter of evidence, be impugned in respect of the board having chosen a ground which does not carry any entitlement under the legislation to compensation in respect of refusal. As this judgment proceeds, it would be apparent, that, on the contrary, the ground chosen was both rational and correct in law.

Reasons

14. Section 34(10) of the Planning and Development Act 2000 constitutes a statutory code where, with a single important modification contained in subs. (10)(b) a planning authority, or on appeal, An Bord Pleanála, is required to state reasons for its decisions. I now quote the subsection:-

> (10) (a) A decision given under this section or *section 37* and the notification of the decision shall state the main reasons and considerations on which the decision is based, and where conditions are imposed in relation to the grant of any permission the decision shall state the main reasons for the imposition of any such conditions, provided that where a condition imposed is a condition described in *subsection (4),* a reference to the paragraph of *subsection (4)* in which the condition is described shall be sufficient to meet the requirements of this subsection.
>
> (b) Where a decision by a planning authority under this section or by the Board under section 37 to grant or to refuse permission is different, in relation to the granting or refusal of permission, from the recommendation in -
>
> > (i) the reports on a planning application to the manager (or such other person delegated to make the decision) in the case of a planning authority, or
> >
> > (ii) a report of a person assigned to report on an appeal on behalf of the Board,
>
> a statement under *paragraph (a)* shall indicate the main reasons for not accepting the recommendation in the report or reports to grant or refuse permission.

15. I have no doubt that An Bord Pleanála has given proper reasons for its decision. In general administrative law, apart from the express requirements of the statute just quoted, the requirement of a decision-making body to give reasons arises in order to enable access to the courts on a meaningful basis; to indicate on what ground an application is refused in order that it can become known as to whether it is appropriate to make a further application or not; and for general reasons of justice. This is so fully covered in other decisions of the courts as to make repetition unnecessary in this context. The extent and nature of the reasons may depend on the importance and complexity of the administrative decision under review. Notwithstanding that, once a clear reason is given for a refusal, it must ordinarily be deemed to be adequate. It can be the case that the stated reason whereby an administrative or quasi judicial body states that the report of a particular official or individual, or the testimony of a particular witness is accepted, is sufficient to abide by this aspect of the concept of fair procedures. Within other legislative contexts, the statutory framework may require a more complex approach. For instance, under s. 40(8)(a) of the Fisheries (Amendment) Act, 1997 as amended, it is provided that a decision on appeal against refusal of an aquaculture licence was required to state "the main reasons and considerations on which the determination" was based. Whether under statutory formula, or by reason of general administrative law, the duty to give reasons is not fulfilled by a general formula of words which makes a vague reference of an inexplicit kind to some document or piece of testimony. Rather, the requirement for reasons arises as a matter of justice so that those who are the subject of an administrative decision will not only know that a conclusion was reached on their case in relation to their application but will also have a fair indication of how it was reached.

16. In *Deerland Construction Limited v. The Aquaculture Licences Appeal Board* [2009] 1 I.R. 673, the statutory provision just quoted was under review. A general reference was made in the decision to refuse such a licence by reference to the mater before the appeals board. Kelly J. struck down this approach stating at p. 695 of the report that:-

"(91) ...It is not too much to expect that a body such as the first respondent carry out its statutory obligation in the precise terms in which the legislature has directed. It did not do so here.

(92) I do not see why an applicant such as the applicant should not know from reading the decision the reasons for it. That is what the legislature expressly required when it passed s. 10 of the Fisheries (Amendment) Act 2001. It is not good enough that an applicant, in order to find out the reasoning, if any, should have to trawl through board minutes and then through a technical adviser's report running to some 52 pages in order to try and glean the reasons for the decision in suit.

(93) Even at that it is to be noticed that the first respondent did not utilise the formula suggested in the final paragraph which I have quoted from Simons' work, but contented itself by merely saying that it decided to issue a licence as recommended in the technical adviser's report.

(94) Even if I am wrong in the approach which I have adopted and a more indulgent view of the first respondent's performance should be taken, I note that the technical adviser made a single recommendation based on eight separate conclusions. Is the court to assume that some or all eight conclusions were concurred in by the first respondent? If just some, which ones? And what of their juxtaposition with s. 61 of the Act of 1997?

(95) It has also been suggested that no prejudice was suffered by the applicant because it was put in receipt of the technical adviser's report within a few days of being told of the first respondent's decision. True it is that the technical adviser's report was furnished to the applicant within days of the decision in suit, but the actual approach of the first respondent only became clear in the course of these proceedings and in particular, when the affidavit of the first respondent's secretary was sworn and filed."

17. Earlier in the decision, Kelly J. had approved a passage in Simons, *'Planning and Development Law'* (2nd Ed, 2007). This approved of a practice whereby an inspector's report can be formally adopted by An Bord Pleanála or similarly a report on a planning application to the manager. Such a decision can lawfully adopt the recommendations made. At para. 89 of the report Kelly J. states:-

"(89) On dealing with recourse to a planning inspector's report in the absence of reasons being given on the face of the decision, Mr. Simons observes at p. 706, following an analysis of the case law, that:-

> "One device often employed by the courts to overcome the paucity of reasoning in the formal statement of reasons was to supplement same by reference to the planning officer's, or the inspector's internal report ('planning reports'). The reasoning contained in the report would, in effect, be imputed to the planning authority or An Bord Pleanála. With respect, this practice is undesirable and, hopefully, will not survive the amendments introduced under s. 34(10). The statutory requirement (now) is that the decision *itself* state the main reasons and considerations on which it is based. The report is not part of the decision, and thus no matter how detailed the reasons contained therein, it cannot be regarded as fulfilling the statutory requirement. This would be the position even were the formal decision to include an express cross-reference to the report, such as 'the board decided to grant permission in accordance with the inspector's recommendations'. The decision itself must state the main reasons and considerations.
>
> If, contrary to what is suggested above, it is acceptable to supplement the formal decision by reference to the contents of the planning report(s), this should only be done where the formal decision expressly adopts the recommendations, findings and conclusions of the inspector or planning officer. One of the more questionable aspects of the earlier case law was the eagerness with which the courts were prepared to *assume* that the members of the board were in full agreement with the inspector."

18. I agree fully with Mr. Simon's view. In the adoption in the decision under review of the reasons in the inspector's report there is nothing which is any way likely to lead to confusion or a denial of fair procedures through vagueness, inconsistency or evasion of the issues. Rather, the formula used in the decision whereby those recommendations are adopted by An Bord Pleanála are more than adequate.

19. But, in addition, of themselves, Weston seeks to argue against the incorporation of the inspector's report and that the inspector should not have reached any conclusion which he did in his report, because of serious error by the inspector.

The Inspector's Report

20. It is argued that the inspector's report is irrational, speculative and redolent of error, thereby contaminating the process of appeal. I do not agree.

21. The inspector's report is a carefully drafted and closely considered document that deals with the site of the aerodrome, the level of activity that might reasonably be regarded as having been permitted prior to 1964, the retention of unauthorised development permissions and planning permissions that are relevant to its operation, the appropriate planning considerations, the objections of those who appealed and the situation on the ground. All that was in the inspector's report is germane to the appeal. It is both careful and objective. It is honest and it is reliable.

22. Planning applications seek to change the character of a neighbourhood and landscape. The granting of permission can be the fulfilment of a modest domestic ambition or the opening up of what is perceived to be the path to riches. Human nature, with its inescapable tendency to exaggeration, evasion and deception, is an integral part of this process. The role of an inspector under the planning code is to bring objectivity to bear in circumstances where assertions may be made that are unsupported; where what appears on the ground may be different to the maps and plans supplied; and where wishful thinking may be seen in the cold light of reality. An inspector is entitled to make his own observations not only in the context of the arguments advanced in favour of a planning permission, but as to how facts may be assessed. It may be fair to observe, in the context of planning applications especially, that those who seek permission rarely make errors against their own interest.

23. The inspector's assessment of the application is scrupulously balanced. The proposed development is considered in the context of its overall relationship with the usage of the existing aerodrome. The inspector is not guilty of speculation to suggest that the granting of permission for 11,103m² of light aircraft hangar space suggests an intensification of the use of the aerodrome or a change in the type of aircraft using the facility. Any argument against that obvious proposition in his report is placed in his report in the

context of the planning permissions which have already been refused, those which have been granted and what was asserted by Weston when, essentially, a similar application had been made on a previous occasion in 2003. In the context of this application, Weston claimed that it was accommodating some 100 aircraft on the aerodrome. In fact, 30 aircraft were found to be outdoors on site during the inspector's visit and 20 were in the hangar. It is said on affidavit that aircraft disappear in the morning and come home at nightfall; rather like some species of roosting birds. In previous planning applications, Weston had indicated that 80 aircraft were accommodated on site. No justification at all is given by Weston for the change. The inspector was right to query a 25% increase in recent years in the total number of aircraft claimed to be serviced on site, from 80 to 100, and to compare that with the 50 aircraft actually present on the day of his inspection. A 25% increase, in the context of airport activities, might reasonably be regarded as substantial in terms if intensification of use. The absence of an explanation is also important.

24. Whereas Weston have claimed on affidavit that the use of the airport is controlled by previous planning permissions and by the Irish Aviation Authority, that is a statement that needs to be qualified. It should not be taken at face value. Previous retention of unauthorised development decisions or planning permissions had been granted for the retention or development of limited facilities at the aerodrome, on the basis that any increase in the intensity of use of the aerodrome, now called an airport, requires a separate planning permission. The Irish Aviation Authority has had no role in deciding on the number of flights to and from what is now called Weston Executive Airport. Instead, they have restricted the range and capacity of aircraft entitled to use its runway by reference to approach speed, thereby ruling out heavier jets, and by reference to capacity and aircraft type. This has no effect on the number of flights. While the Irish Aviation Authority has control over Irish airspace and Irish registered aircraft, it is inaccurate for Weston to aver on affidavit that they have any power to control the use of an airport or the buildings that may be appropriate for an established use. That requires planning permission and the democratic consultative process which goes with any application to intensify use or otherwise develop land. These controls are vital to the local, and to the national, community.

25. Any planning application must be processed with scrupulous rigour. The inspector was right to query the figures proffered in the context of aircraft movements; meaning take-offs or landings. These supposedly indicate an established user according to Weston. The aerodrome was, in fact, previously used extensively for training flights which could include 12 or more take offs and landing as part of pilot training, called "touch and go". The inspector noted that prior to the acquisition by Weston of the aerodrome in 2002 detailed records of flight movements to and from the site had not been maintained. Between 2005 and 2007 a 10% increase of movements were recorded. This, for an aerodrome, is capable of being regarded as substantial. The relationship of "touch and go" landing and take off for training pilots with the aircraft movement numbers claimed now by Weston could reasonably have been queried.

26. Having taken these matters into account the inspector recorded:-

> "I would have concerns that there appears to have been a 20% increase in the number of aircraft based at Weston since 2005…which would correspond with the gradual increase (C.10%) in total aircraft movements noted from 2005 – 2007 as detailed in the environmental report. In addition, in my opinion further details are required in respect of the overall changing trends at the airfield with regard to the type of aircraft movements (training, business, executive flights etc). I am inclined to concur with the previous Inspector in that whilst the type of flight of activity in to and out of Weston is ultimately controlled by the Irish Aviation Authority, the provision of such large scale ground facilities would change the character of the existing use of Weston from a mainly training – general aviation orientated facility to one of a far more commercial nature and this could have implications for the numbers, type and size of aircraft. Furthermore, the proposed development would result in a significant over-supply of hangarage beyond the current needs of the aerodrome which I would consider to be indicative of increased aircraft numbers which may translate into additional movements beyond permissible numbers without an appropriate assessment of the affects of same on the surrounding areas. On the basis of the foregoing, whilst I would accept the desirability of providing improved services at Weston including the provision of additional hangarage and designated hard standing parking aprons, I am not satisfied that a development of the scale proposed relative to existing operations at Weston Aerodrome would not result in, or possibly necessitate, an intensification of use of the aerodrome through additional aircraft numbers and associated movements."

27. The inspector, therefore, concluded that having regard to the planning history of the site, he was not satisfied that the building of six hangars with an area of 11,103m² and housing 110 further aircraft was appropriate. That is a fair observation. It is rational and it is independent-minded; as the planning code implies that an inspector should be.

28. Whereas Weston have argued that the nature of aircraft have changed over time so that it is now less appropriate to leave aircraft in the open air, because of their sophisticated computerised avionics, it should be borne in mind that permission has already been granted for 3,500m² space of hangarage accommodating 20 or more such sophisticated aircraft, a substantial number given what can be objectively gleaned as to the established user at this airfield.

29. The Court has no legal authority to substitute any view which it might have for the views expressed by the inspector, unless they are shown to be manifestly unreasonable so that they fly in the face of fundamental reason and commonsense. That case has not been made out.

Intensification of Use

28. A planning permission is, of its nature, relatively precise. Planning permissions should never be departed from as a matter of law; the development is required to take place as the grant of permission allows. In this, as in other areas of law, the courts will not injunct very small development deviations; the *de minimis* rule. That toleration is not an exception to planning controls; it is an acceptance of minor errors that do not have a real planning impact and so do not require to be corrected. Planning controls operate within the community on the basis that the developer will make an honest application for planning permission, stating precisely what is proposed; the public will, on reading that application, realise what affect the grant of permission may have on them and make observations accordingly; and the planning authority will, after independent inspection and verification, adjudicate on the application objectively to ensure that there is proper and sustainable development within an area in accordance with the environmental contract as to planning that the development plan for the area represents. In consequence, planning permissions are construed not simply on the basis of the decision, but by reference to an active consideration as to what has been sought. As O'Hanlon J. stated in *Coffey v. Heborn Homes* (Unreported, High Court, O' Hanlon J., 27th July, 1984):-

> "I am satisfied that where the documents lodged in support of the application for planning permission include plans and specifications, and permission is granted by reference to these documents, then the developer must be regarded as being in breach of planning permission if he fails to buil[d] in accordance with those plans and specifications."

30. In contrast to the precision that may be extracted as to what is permitted at a site from the grant of planning permission, the level at which a pre-1964 use is to be construed may be criticised as being redolent of uncertainty. That uncertainty as much, or more, affects the proper planning of an area than it does those who are not amenable to regulation provided that they stay with their pre-1964 level of use. Professor Scannell in her work Scannell, *'Environmental and Land Law Use'* (Dublin, 2006) states at para. 2 – 100:-

> "The concept of intensification is open to abuse by the over-zealous or ill motivated. It can have the effect of penalising a landowner for being a commercial success and of unduly restricting an owner's freedom to expand businesses. Problems caused by intensification can frequently be remedied using common law or other statutory remedies and it is preferable to use these that to distort planning laws. While there may be special circumstances where resort may be had to the doctrine, it is best avoided."

31. While admiring this scholarly work, and having learnt much from it, I do not agree with the view expressed. A pre-1964 use is often referred to as establishing a baseline against which any issue as to intensification of use may be judged. More properly, it may be regarded as a line that wavers up and down to a small, but reasonable, extent. In human affairs, a business may improve or it may become depressed. The issue is what is reasonable use of the particular site in accordance with a measurement as to the intensity with which that contended for prior activity may be expected, in an objective way, to be carried on. It should also be remembered that resort to the law of nuisance, while relevant to planning considerations as to whether it is appropriate to grant permission for a proposed development, is entirely separate. A grant of planning permission does not authorise the commission of a nuisance. A change in the development plan for the area may, however, change what is regarded as reasonable within the context of appropriateness to neighbourhood whereby the common law tort of nuisance is adjudicated. Thus, an area that is zoned as a green belt area, or an agricultural area, will give rise to an easier finding that industrial noise constitutes a nuisance rather than a factory zone; the rezoning of that area into an industrial area will tend to undermine such contentions because then a claim of nuisance has to be seen in a different context. Furthermore, the test for nuisance is far different to the test for a breach of planning. A planning permission is to be construed objectively as to what development is lawful. A nuisance is only made out in law where, in the context of the characterisation of the neighbourhood, a reasonable person would find the activity complained of to be intolerable or, in the case of a nuisance affecting a business, its profitability is substantially undermined. Planning controls relate to general environmental control and impact. This is a much wider consideration than any individual wrong. The tort of nuisance is solely concerned with interference or substantial annoyance to individuals arising from activities.

32. The law as to intensification of use is not, in my view, either a judicial invention that is subject to abuse or a distortion of planning laws. Rather, it is an integral part of the planning code whereby what could reasonably be regarded as authorised prior to the introduction of planning regulation in 1964 may be held to that level so that development through stealth, that undermines the character and amenity of an area, is not made an exception to proper control under planning legislation. Had the law not developed control over intensification, a large gap in regulation would have been opened up. The *de minimis* exception to the enforcement of planning controls where permission is granted should be born in mind in this context. That is the standard for accepting a departure from development, and an intensification of use beyond what may reasonably be expected at a site should not be made an exception to planning controls. To do that would be to modify the law.

33. With these considerations in mind, and having regard to the case law, I wish to offer some further observations. It seems to me that the decided cases, up to this point, have identified five principles by reference to which a material change of use through the intensification of, ostensibly authorised, activity may be found to exist:-

> (1) If a different product is being produced, the object of the operation may have changed to the extent that an unauthorised intensification of use may have occurred. In *Butler v. Dublin Corporation* [1999] 1 I.R. 565 at p. 593, Keane C. J. referred to a particular use being "so altered in character" that an unauthorised intensification might be found. Within that context, he was referring to volume. In *Patterson v. Murphy* [1978] I.L.R.M. 85, Costello J. had found that the production of four inch stone blocks was so different in character to the previous production of shale so as to amount to intensification. The instances where intensification has been found merely on this basis, however, seem to be rare.
>
> (2) A change in the method of production, whereby a low level of production is geared into an industrial scale, through the application of chemicals or machinery, may lead to a finding of intensification. In *Patterson v. Murphy* [1978] I.L.R.M. 85 blasting had replaced manual extraction. In addition, stone crushing and grading plant and machinery had been introduced. The labour force had also expanded. These factors may be identified as important
>
> (3) The most common complaint of intensification of use, amounting to an unauthorised development, arises in a comparison of the scale of operations at the time when an application is brought to injunct that level of use pursuant to s. 160 of the Planning and Development Act 2000 as amended, as compared with the prior use. Here, as I have previously said, some reasonable, but not extensive, level of variation should be seen as integral to any business. This should not be used, however, as an excuse to circumvent planning controls through gradual accretion. If the base line is a pre-1964 use, a historical comparison of what was then done, and what was then possible, in terms of technology, labour force and output is a right point for comparative purposes to the date of proceedings. If there was a grant of planning permission, after a pre-1964 use or independently, then what might objectively be regarded as authorised is a point of comparison. Using a motor racing track every day is an intensification of use, as compared to a planning permission which authorises it on a weekend, or during a particular part of the year; so is using screeching drag racing cars in place of quieter motor vehicles; *Lanigan v. Barry*, [2008] I.E.H.C. 29 (Unreported, High Court, Charleton J., 15 February, 2008). Markedly increasing extraction from a quarry so that there is substantial increase in the toeing and froing of lorries can also amount to an intensification; *Cork County Council v. Slaterry Pre-Cast Concrete Limited* [2008] I.E.H.C. 291 (Unreported, High Court, Clarke J., 19 September, 2008). A material change by increase in production process can amount to an intensification of use: *Galway County Council v. Lackagh Rock Limited* [1985] I.R. 120.
>
> (4) Since the concept of intensification of use is one which relates to considerations of proper and sustainable planning, the Court has regard to "the effects in planning or environmental terms of such intensification in order to assess whether there has been a material change for planning purposes"; per O'Sullivan J. in *Molembuy v. Kearns* [1999] I.E.H.C. (Unreported, High Court, O' Sullivan J., 19 January, 1999). A more successful use of particular land, which has a low impact in terms of such planning considerations as traffic, visual amenity, appropriateness to the area, strain on infrastructure and sustainability, will not necessarily be found to be an intensification of use; *Dublin County Council v. Carty Builders and Company Limited* [1987] I.R. 355. In *Cork County Council v. Slattery Pre-Cast Concrete*, Clarke J. at para. 7.5 stated:-

> "The assessment of whether an intensification of use amounts to a sufficient intensification to give rise to a material change in use must be assessed by reference to planning criteria. Are the changes such that they have an effect on the sort of matters which would properly be considered from a planning or environmental perspective? Significant changes in vehicle use (and in particular heavy vehicle use that might not otherwise be expected in the area) or one such example, changes in the visual amenity or noise are others".

The nature of the activity in question is therefore vital. An airport can be regarded as causing high environmental stress and, from the point of view of the community living in its vicinity, a close need for appropriate regulation. Whereas it might be thought that an increase by a chicken farm in the number of eggs or live birds produced might be within the range of appreciation that is integral to the law in this area, a much smaller increase in the traffic to an airport is to be regarded from a planning perspective as considerably more serious. As the de minimus rule is the only exception to full compliance with a planning permission, it is hard to see how substantial deviation from an established use can be regarded as consistent with the legislative intent enshrined in the Planning and Development Act 2000, as amended, that any development be subject to proper scrutiny. I do not see intensification, either gradual or sudden, openly or by stealth, as capable of being lawfully used to avoid planning controls.

(5) If there is a planning permission in an intensification of use claim, then it must be construed objectively as to what it permits. If there is pre-1964 use, then the gathering of evidence by way of ordinance survey photographs and the testimony of those in the area is a useful way of finding the historically appropriate level of usage. In principle, both pre-1964 use and existing planning permission construction are the same. The question is: what is permitted by law on this site? The intensification of the use of development which is already subject to planning permission can give rise to a material change in use. What one has regard to in these instances is the documents lodged in support of planning permission, the nature of the permission granted, and any conditions attached thereto. As is pointed out in Simons '*Planning and Development Law'* (2nd Ed., 2007) at para 2- 64, even if no use is formally specified, the letter in support of planning and the documentation accompanying the planning application, will imply "the level or scale at which the development is to be carried on". That statement is correct. In the planning permissions referred to here and, as I understand from Simons, it is "almost a universal condition of all planning permissions that the development be carried out in accordance with the plans and particulars lodged with the application, or as part of a response to any request for further information". Therefore, a court adjudicating on whether there has been a material intensification of use looks, in the context of existing planning permission, to what has been allowed, seen against the backdrop of what has been sought. It seems to me to follow that where an industrialist has lawfully carried on an activity of manufacturing with twenty machinists, that a grant of planning permission for a factory accommodating 200 such machinists is, of the nature of that process, an authorisation of intensification of use. Older applications used to be less detailed, so what was permitted is harder to construe from them. This issue of the implication of use from the grant of planning permission will rarely cause problems in the context of modern applications. Detailed applications are appropriately made to planning authorities asking for a development in order to do something like live in a bigger house, or operate a pharmaceutical factory, or process fish in a massive factory. If there are any areas of uncertainty the planning authority can ask questions both as to the physical development and what is to be done on site. Both are within planning controls. If there is ambiguity as to what is sought, the planning authority should ask appropriate questions. The purpose for which planning permission is sought, and its relationship to the development plan for the area, is integral to the planning process. Thus, in the last example given, no industrialist would seek permission to build an empty factory. That flies in the face of common sense. Rather, it is specified in the planning application what is proposed to be done there and how many people will be employed in that activity. It is possible that earlier planning permissions, when the process was less precise, will have to be construed closely so as to seek out, by reasonable and necessary implication, what it is that was permitted.

34. It is correct that a planning authority take into account how a development by way of building will fit in with the lawful use that is established at a site. It would be wrong for a planning authority to grant permission, for instance, for a factory that is markedly larger than that which will fulfil the needs of the established use of the site. Of course, in that context, an industrialist might apply for a larger factory, specifying a marked increase in the activity, the number of persons to be employed, the nature of the product produced and the means by which that production is to be affected. That is to be expected. It is what the regulation of development by an independent planning authority requires in law. Objectively considered, such an application is not simply for a building on a site, but an intensification of the existing use of the site so as to incorporate the full usage of the building. It does not accord with the proper and sustainable development of an area that buildings are permitted to be constructed which, as to the established use, will require them to be left underused or empty.

35. It is not wrong for a planning authority, or An Bord Pleanála on appeal, to refuse planning permission on the basis that the development proposed is consistent with a more extensive use of an existing facility such as that which would amount to an intensification of use. In *Kelly v. An Bord Pleanála* (Unreported, High Court, Flood J., 19th November, 1993), the applicants had been engaged in scrapping motor cars at an address in County Kildare, but without planning permission. They applied in 1987 to regularise their position. Kildare County Council granted permission for retention of the development but subject to a condition that it should not be intensified "in scale, area or mode of operation from the level at the date of granting of this permission". Four years later the applicants made an application for a planning permission to erect a new and larger workshop with stores on the site of the existing buildings. This application was refused by Kildare County Council, inter alia, on the basis that the new development would involve the erection of a "new permanent structure on the site, which would permit and facilitate an intensification of use and increase in activity on the site which would materially contravene" the prior condition as to intensification of use. The decision was appealed to An Bord Pleanála and permission was refused. The schedule indicated that the Board considered that the size of the proposed building was excessive in relation to the scale of the scrapyard business carried on at the site and "it is considered that intensification of use, and, increase in activity on the site, which would be likely to arise from the said proposed development, would be contrary to the proper planning and development of the area". Blayney J. struck down that decision in an unreported judgment of 6th April, 1992, quoted by Flood J. in his judgment in *Kelly v. An Bord Pleanála* (but otherwise unavailable). Blayney J. held:-

> "The decision of the Board is therefore flawed because it is going against reason and a common sense to refuse permission because the building might be used for purposes for which it could not be used without obtaining a new permission for change of use. The Board had no reason upon which it could come to the decision which it reached. In taking into account, intensification of use, they were not acting reasonably because they were paying attention to something they could not take into account, as the planning authority could stop any new activity on the site on the grounds of it not being a permitted use."

36. When the matter was reconsidered by the Bord, they again refused permission. The ground stated, at pp. 7-8, was:-

> "It is considered that the proposed development would lead to an increase in the throughput and intensification of the

existing use over that permitted by the planning authority [in 1987]. Condition number 12 of that permission stated, inter alia, that the development shall not be intensified in scale or mode of operation from the level at the date of granting of the permission. The proposed development would, accordingly, contravene materially a condition attached to an existing permission for development."

37. Flood J. upheld this decision when a fresh judicial review application was made against this decision. His reasoning is directly applicable to the conclusions to which I am driven in this case. At p. 9 of his judgment he stated:-

> "Prior to reaching its decision, the Board had the problem reviewed again by its inspector who came to the conclusion that the operation presently carried on on site only required a building half the size of that proposed. The building of the size proposed gave rise to an intensification of the existing use of the site. Such an intensification would, for example, be an increase in the number of cars that were stripped or, alternatively, a more systematic and more extensive degree of demolition…
>
> In my opinion…the Board's decision is not in disregard [of the decision of Blayney J.] of April 6th, 1992 and does not proceed upon the same defective and incorrect assumptions. It proceeds on the basis that the proposed building was inappropriate to the authorised throughput of the scrap-yard and unnecessary."

38. The reasoning of Flood J. is undoubtedly correct. I agree with it. It accords with good reasoning and fits properly into the purposes for which planning regulation was introduced.

39. I am assisted by this authority to reach a decision that An Bord Pleanála was correct in refusing this application for six hangars at Weston Executive Airport covering some 11,103m² and catering for potentially a further 110 sophisticated aircraft. On the prior planning applications of Weston, it cannot have been expected by any reasonable planner that they exaggerated the number of planes using the airport. That would have been a mistake against their commercial interest and, in this context, very unlikely. Since that level was set at 80, and since a more recent planning permission has given the space for 20 to 30 aircraft in hangars covering 3,500m², and since 30 aircraft are parked outdoors, it has become impossible to attempt to undermine this decision by reference to any alleged error of law, or any basis whereby it is asserted that it flies in the face fundamental reason and common sense.

40. On the contrary, the refusal of any further hangar space to Weston by An Bord Pleanála is impeachable. A reasonable intelligent person reading the decision of objectively would find that it accords with the proper use of Weston Executive Airport and has been arrived at in consequence of a proper process and for rational and legally correct reasons.

Other Arguments

41. I have also had regard to all other arguments advanced on behalf of Weston. The applicants have not met the burden of proof, notwithstanding powerful advocacy, on any of their arguments. Many are dependent on the decision already made, and I do not need to refer to them. I would find that the Board had regard to all submissions in an appropriate way. The role of the inspector was not in any way misused by the Board. The planning file was properly proved before the Court. It does not contain any error of law on the face of the record. The continued use of an inappropriate formula in rejecting the application on appeal is merely surplusage. There is no basis upon which it can be alleged that An Bord Pleanála gave a reason for refusal that excluded compensation by statute. Rather, the overwhelming preponderance of the material before An Bord Pleanála supported the reasons for refusal which was given. It would have been irrational to apply any other reason since the decision is clearly directed at the appropriate reason for refusing this development so as to accord with the proper and sustainable planning of this area in accordance with its zoning as a green belt. I have earlier rejected any contention of improper motive in this regard. I do not believe that An Bord Pleanála approached this case through the use of any "empty formula", as has also been argued on behalf of Weston. Rather, the matter was approached rationally and appropriately.

Result

42. None of the arguments advanced met the standard of showing substantial grounds to initiate judicial review proceedings. In one instance, that is the argument advanced that there was the use of an incorrect reason to enforce planning controls as to intensification, the full text of the decision of Flood J. in *Kelly v An Bord Pleanála* had decided this issue already. Further analysis fully supports his reasoning. On both the full hearing and the application for leave, the grounds are not made out. In the result, this judicial review application is dismissed.