Neutral Citation Number: [2009] IEHC 202

THE HIGH COURT

2005 1179 JR

BETWEEN:

JOE O'NEILL

APPLICANTS

AND

AN BORD PLEANÁLA

RESPONDENT

AND

WICKLOW COUNTY COUNCIL and BLARNEY WOOLLEN MILLS

NOTICE PARTIES

Judgment of Mr. Justice Hedigan, delivered on the 1st day of May, 2009

1. The applicant is a businessman, who lives in Laragh Village in the County of Wicklow. His residence is in close proximity to the development site which forms the subject matter of these proceedings.

2. The respondent is an independent appellate body, established under the Local Government (Planning and Development) Act 1976 for the determination of certain matters arising under the Planning and Development Acts 2000 to 2006.

3. The first named notice party is a local authority with responsibility for the administrative area of County Wicklow. Its functions include the management of building developments in the county, in particular by means of the grant or refusal of planning permission.

4. The second named notice party is a limited liability company specialising in the sale of Irish gifts and memorabilia. Its proposed development in County Wicklow forms the subject matter of these proceedings.

5. The applicant seeks the following relief:-

(a) An order of *certiorari* quashing the decision of the respondent, dated the 12th September, 2005, to grant planning permission for a development consisting of a craft/retail store on a site at Laragh in the County of Wicklow;

(b) A declaration that the respondent determined the application other than in accordance with the statutory scheme as set out in the Planning and Development Acts, 2000-2004; and

(c) A declaration that in determining the application the respondent failed to accord the applicant fair procedures.

I. Factual and Procedural Background

6. By application dated the 18th December, 2003, the second named notice party applied to the first named notice party for planning permission in respect of a proposed three-storey craft and retail centre at Laragh East, Laragh, County Wicklow. The proposed development, which was designed to include a mixture of restaurants and retail outlets, measured 3,257 square metres in total, including 1,806 square metres of retail space.

7. On the 29th January, 2004, the applicant filed a submission with the first named notice party setting out his grounds of objection to the proposed development. His primary complaints in relation to the proposal were:

(a) that it would constitute overdevelopment of the site;

(b) that it would seriously damage the qualities, setting and character of a landmark;

(c) that it would seriously injure the visual amenities of the area;

(d) that it would endanger public safety by reason of traffic hazard;

(e) that it would materially contravene the county development plan;

(f) that it would materially contravene the national, regional and county retail strategies; and

(g) that it would contravene the national spatial strategy and the strategic planning guidelines for the greater Dublin area.

8. Despite the objections of the applicant, the first named notice party nonetheless proceeded to grant permission for the

proposed development on the 7th December, 2004.

9. On the 10th January, 2005, the applicant appealed the decision of the first named notice party to the respondent. In support of this appeal, he filed a detailed submission from a planning consultant which alleged *inter alia*: breaches of the retail planning guidelines and regional and local retail strategies; breaches of the Wicklow County Development Plan ('the Development Plan') policies on heritage, landscape and visual amenity; and breaches of the Development Plan's zoning requirements.

10. For the purposes of assessment of the applicant's appeal, the respondent appointed as inspector, Ms. Oznur Yucel-Finn ('the inspector'). She submitted a detailed report on the 4th May, 2005 which included a review of: the site for the proposed development and its location; the nature and scale of the proposed development; the Council's decision; the applicant's grounds of appeal and the second named respondent's replies to those grounds; other observations received; the provisions of the Development Plan; and applicable policy guidelines.

11. The inspector concluded that the proposed development should not be permitted and submitted three reasons in the following terms:

> "(a) Having regard to its height, footprint and generally excessive scale, it is considered that the proposed development, located on exposed and rising ground in an area of high visual amenity would seriously injure the visual amenities of the area and be contrary to proper planning and development of the area.
>
> (b) It is considered that the proposed development by reason of its large floor space, mall style design, terraces and large car park would constitute a form of development out of character with the development pattern of the immediate area, characterised by Protected Structures. The proposed development would therefore be contrary to the proper planning and sustainable development of the area.
>
> (c) Having regard to its scale, layout and in particular its floorspace, it is considered that the proposed development would be an unacceptable form of development at this unique tourism resource and would contravene the provisions of the current County Development Plan."

12. The main concern of the inspector, therefore, was that the proposed development was, and would look, too big. This meant that it would be: out of character with the area; damaging to visual amenities, particularly certain protected structures; and contrary to the Development Plan. In the alternative to an outright rejection of the proposal, the inspector suggested a number of conditions, among them an emphatic reduction of the floor space to no more than 600 square metres and a requirement of retention of woodland along the western side of the development to a minimum width of 18 metres.

13. By letter dated the 19th May, 2005, the respondent notified the second named notice party of a direction under Article 73 of the Planning and Development Regulations 2001 ('the 2001 Regulations'), inviting it to submit a revised proposal involving a reduction of 300 square metres in the retail space of the development. The respondent expressed the view that while the original proposal might involve an excessive floor area, it would be willing to consider a proposal in which the retail space did not exceed 1500 square metres. The respondent also invited the second named notice party to revise the details of its proposals in relation to the attenuation tank, the car park and the service compound. Revised drawings were required in respect of all of these amendments pursuant to section 132 of the Planning and Development Act 2000 ('the 2000 Act').

14. The second named notice party responded by letter dated the 14th June, 2005 and submitted a revised set of plans for the development. The plans were compliant with the size reduction recommended by the respondent and were said not to result in any changes to the external appearance of the complex. As such, the revised plans included a corresponding reduction in the size of the car park, the lowering of certain walls and the retention of additional trees.

15. The revised proposal was copied to the applicant who submitted a response, through his planning consultant, on the 11th July, 2005. The applicant contended that the revised plans did not adequately address the issues raised in his appeal. He therefore requested that the respondent refuse planning permission in light of the documentation which he had already submitted.

16. By letter dated the 29th July, 2005, the respondent invited the second named notice party to submit a full set of revised plans, showing all elevations of the revised building together with a full set of cross sections. Once again, revised drawings were required pursuant to section 132 of the 2000 Act.

17. The full set of revised plans was supplied by the second named notice party to the respondent on the 12th August, 2005. These were not circulated to the applicant, nor was the applicant made aware that the respondent had sought them. Furthermore, neither the revised plans of the 14th June, 2005, nor those of the 12th August, 2005 were forwarded to the inspector. The inspector's opinion on the alterations was therefore not sought.

18. By decision dated the 12th September, 2005, the respondent granted planning permission for the proposed development based on the revised plans. Permission was therefore granted for a development of 2,957 square metres, exactly 300 square metres less than the original proposal. The respondent provided the following reasons and considerations in respect of its decision:

> "Having regard to the location of the site at the edge of the village of Laragh, the tourist related nature of the development and the availability of natural screening, it is considered that, subject to compliance with the conditions set out below, the proposed development would not seriously injure the amenities of the area, would be acceptable in terms of traffic safety and convenience and would be in accordance with the current County Development Plan for the area and the Regional Planning Guidelines for the Greater Dublin Area 2004-2016. The proposed development would, therefore, be in accordance with the proper planning and sustainable development of the area.

> In deciding not to accept the Inspector's recommendations to refuse permission, the Board considered that the serious concerns relating to size were dealt with in the reduced floor area submitted to An Bord Pleanála on the 14th day of June, 2005 and considered that the natural screening on the site and the proposals for landscaping the development would ensure assimilation of the development."

In addition to this, the respondent also laid down 21 specific conditions, some of which had previously been imposed by the first named notice party.

19. On the 3rd November, 2005, the applicant sought leave to apply by way of judicial review for a number of reliefs, including *certiorari* of the respondent's decision to grant permission for the proposed development. The statement of grounds contained three main areas of challenge: flaws in the respondent's procedures for seeking modifications/additional information from the second named notice party on the 19th May, 2005; the failure of the respondent to circulate the plans and documentation on which its decision was ultimately grounded; and the adequacy of reasons provided for the decision. Leave was granted by O'Higgins J. in respect of the issue of adequacy of reasons alone. The case came on for hearing in this court on the 24th March, 2009.

II. Submissions of the Parties

20. The applicant submits that the legality of the respondent's decision is conditional upon the adequacy of the reasons provided to justify its conclusions. It is argued that the extent of the duty to give reasons is not diminished by the appointment of the inspector in the present case; the applicant contends that the reasons provided for not accepting the inspector's recommendations must be sufficient to enable the courts and interested persons to review the legality of the decision and specifically to satisfy themselves that the respondent has directed its mind adequately to all of the issues which it is obliged to consider. In the present case, the applicant asserts that the respondent has failed to adequately address the very specific conclusions reached in the inspector's highly detailed report and, for that reason, its decision is unlawful.

21. The applicant also argues that the respondent is obliged, through the reasons it provides, to address the objections or submissions received by it in opposition to a proposed development. The applicant contends this has not been done. He maintains that the reasons provided are wholly insufficient and that, as a result, he is unaware of the basis upon which the respondent chose to reject his submissions.

22. The respondent emphasises that the grounds upon which the applicant has been permitted to challenge its decision are very limited, that is, solely on the basis of the adequacy of the reasons provided for rejecting the inspector's recommendations. It contends that the specific statutory duty which it is alleged to have violated is a very light one and that in fact no discursive judgment is required. In this regard, the respondent argues that its obligation is merely to provide its broad reasons for disagreeing with the inspector, as opposed to an individual rebuttal of the submissions made in the inspector's report.

23. The respondent further submits that the decision must be read in light of the conditions which were attached to the approval, which in its submission shed further light on its reasoning. The respondent contends that when the decision is read as a whole, it is patently evident that the concerns of the inspector were adequately considered. It argues that the minimum standard required of reasons has evidently been satisfied since the applicant was sufficiently well-informed to bring judicial review on a number of other grounds for which leave was ultimately refused. In all, the respondent asserts that the reasons provided form an adequate explanation of the logic being employed and, in light of this, the Court should not engage in a quasi-appellate assessment of the merits of the decision.

III. The Decision of the Court

24. As has already been noted, the present case concerns only the obligation of the respondent to explain its decision to reject the recommendations of the inspector. The applicant has not been granted leave to impugn the reasons provided by the respondent to justify the decision generally. The duty to provide reasons is placed on a statutory footing by section 34(10) of the 2000 Act, which provides as follows:-

> "(a) A decision given [on the issue of planning permission] 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 .
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> (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:-
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> (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
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> (ii) a report of a person assigned to report on an appeal on behalf of the Board,
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> 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."

25. In *Grealish v. An Bord Pleanála* [2007] 2 I.R. 536 at p. 553, O'Neill J. described the legal duty arising under section 34(10) of the 2000 Act as "a very light one, one could even say almost minimal". This statement is particularly apposite in cases where only the rationale for rejecting the recommendation of an inspector, and not the reasons underlying the decision generally, comes under challenge. In *Mulholland v. An Bord Pleanála (No. 2)* [2006] 1 I.R. 453, Kelly J. drew a distinction at p. 464 between section 34(10)(a), which requires that the main reasons and considerations should be provided for a decision to grant or refuse permission, and section 34(10)(b) which requires that a decision to differ from the recommendation of an inspector should be supported by the main reasons alone.

26. It is clear that the concept of the "main reasons" for a decision will vary according to the circumstances of each individual case. More or less may be required depending on the complexity of the subject matter as well as the number of

areas of conflict to be resolved. In *Deerland Construction Ltd. v. Aquaculture Licences Appeals Board* [2008] IEHC 289, Kelly J. approved of the statement of Brown L.J. in *South Bucks County Council v. Porter* [2004] 1 W.L.R. 1953 to the effect that:-

"Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision."

27. There are, nonetheless, a number of general principles which have developed with specific reference to the area of planning and development law and section 34(10) of the 2000 Act in particular. First, it is well-established as a general rule that reasons need not be discursive. This was made clear by Murphy J. in the decision of *O'Donoghue v. An Bord Pleanála* [1991] I.L.R.M. 750. He stated at p. 757:-

> "It has never been suggested that an administrative body is bound to provide a discursive judgment as a result of [its] deliberations."

However, this principle is not without limits and it is apparent that a standardised or forumlaic decision will not suffice. Indeed, in *O'Donoghue*, Murphy J. went on to state, also at p. 757:-

> "[T]he need for providing the grounds of the decision… could not be satisfied by recourse to an uninformative if technically correct formula."

28. The respondent, therefore, is not obliged to engage in a lengthy review or analysis of its own reasoning when communicating its decision. Furthermore, and of particular relevance for present purposes, section 34(10)(b) only requires that the respondent should explain its decision to differ from the overall recommendation of an inspector, as opposed to the specific conditions suggested by him or her. In *Dunne v. An Bord Pleanála* [2006] IEHC 400, McGovern J. stated as follows:-

> "It seems to me that the submission of the first respondent is correct and that there is no obligation on the first named respondent to give reasons why it disagreed with its planning inspector on a particular condition which was recommended by the inspector to be imposed."

29. The second principle of general application is that the adequacy of reasons should be assessed from the perspective of an intelligent person who has participated in the relevant proceedings and is appraised of the broad issues involved. This requires that the respondent's decision should not simply be read in isolation but rather in conjunction with any conditions attached thereto. In *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, Finlay C.J. stated the following:-

> "I am satisfied that there is no substance in the contention made on behalf of the plaintiff that the Board should be prohibited from relying on a combination of the reason given for the decision and the reasons given for the conditions, together with the terms of the conditions. There is nothing in the statute which would justify such a rigid approach and it would be contrary to common sense and to fairness. What must be looked at is what an intelligent person who had taken part in the appeal or had been appraised of the broad issues which had arisen in it would understand from this document, these conditions and these reasons."

30. As such, in the present case the Court is required to construe the respondent's main decision in conjunction with the 21 conditions which were simultaneously imposed. For example, there are 6 conditions which address the issue of visual amenity, the primary concern of the inspector. These are:-

> (a) Condition 15 requiring that all service cables should be underground;
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> (b) Condition 16 requiring that signs should not be more than 2 metres in height or width;
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> (c) Condition 17 requiring that landscaping should be carried out as detailed in a submitted landscaping masterplan;
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> (d) Condition 18 requiring that landscaping should commence during the first planting season and be completed in full upon occupation;
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> (e) Condition 19 requiring that certain steps be taken to prevent undue damage to trees; and
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> (f) Condition 20 requiring details of all materials, colours and textures of external finished to be submitted for agreement.

31. The third and final general principle is that the reasons should provide a certain minimum standard of practical enlightenment. In *Mulholland v. An Bord Pleanála* [2006] 1 I.R. 453, Kelly J. held at p. 465 that a statement of reasons must:-

> "(1) give to an applicant such information as may be necessary and appropriate for him to consider whether he has a reasonable chance of succeeding in appealing or judicially reviewing the decision;
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> (2) arm [the applicant] for such hearing or review;
>
> (3) [enable the applicant to] know if the decision maker has directed its mind adequately to the issues which it has considered or is obliged to consider; and
>
> (4) enable the courts to review the decision."

32. The decision of *Fairyhouse Club Limited v. An Bord Pleanála* [2001] IEHC 106 also bears relevance to this principle. In that case, Finnegan P. held that even in circumstances where the reasons provided in support of a determination were terse, the decision maker would not have acted unlawfully unless the applicant had been prejudiced in some way. The Court must therefore consider whether its role, or indeed the position of the applicant, has been appreciably hampered by the respondent's formal decision.

33. Applying the above principles to the present case, it seems clear to me that although the reasons provided by the respondent were in some respects quite limited, they were not so insufficient as to be unlawful. It is clear that the respondent did, through the main body of its decision as well as the appended conditions, adequately address its mind to the concerns which were raised by the inspector. Although the respondent's conclusions on the issues of size and visual amenity differed from those of the inspector, it is nonetheless clear that these considerations were to the forefront of the respondent's deliberations.

34. Indeed, a number of the recommendations of the inspector on the issue of visual appearance were explicitly adopted, such as that contained in Condition 16 pertaining to signs. There was no obligation to provide detailed reasoning equivalent to the highly professional and highly detailed report of the inspector herself. Only the main reasons were required and, in my opinion, they were amply provided.

35. I do not, however, accept the argument of the respondent that the fact that the applicant was capable of bringing a challenge by way of judicial review *per se* excludes him from contending that the reasons provided for the decision were inadequate. The true question is whether the applicant has suffered any prejudice arising out of the brevity of the respondent's rationalisation, something which has not occurred in the present case.

36. In all, the burden placed on the respondent by section 34(10) of the 2000 Act is quite clearly not an onerous one. The case is readily distinguishable from other decisions in which the reasons provided have been found to be inadequate. For example, in *Grealish v. An Bord Pleanála*, O'Neill J. found that the parties would have had to rely on a bald assumption to distil the supposed reasoning of the decision-maker from its extremely limited explanation. No such assumption has been required of the applicant in the present case. The respondent simply decided that the concerns in relation to size and visual amenity could be adequately addressed by a less severe reduction in the retail area and the imposition of a series of specific and well-contemplated conditions. This is something which it was undoubtedly entitled to do.

IV. Conclusion

37. In light of the foregoing, it seems clear to me that the reasons provided for the respondent's decision in the present case were in compliance with section 34(10) of the 2000 Act. The respondent was not required to deliver a discursive judgment nor to engage in a full re-evaluation of the inspector's report. The reasons provided were ample in order to allow the applicant and the Court to review the decision in the manner required. I will therefore refuse the relief sought.