Neutral Citation Number: [2010] IEHC 21

THE HIGH COURT

JUDICIAL REVIEW

2008 1024 JR

IN THE MATTER OF SECTIONS 50 AND 50A OF THE PLANNING AND DEVELOPMENT ACT, 2000 (AS AMENDED)

BETWEEN

WEXELE

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

DÚN LAOGHAIRE-RATHDOWN COUNTY COUNCIL

NOTICE PARTY

JUDGMENT of Mr. Justice Charleton delivered on the 5th day of February, 2010

1. This case is mainly about parking in Dún Laoghaire. Can a planning authority take into account the loss of parking spaces if a development proceeds; even where the car parking on the site of a proposed development, has in the past been offered as a free gift to a nearby hospital? Additionally, the perennial question of fair procedures looms again.

2. By a decision of An Bord Pleanála dated 14th July, 2008, the applicant was refused permission to built an apartment and retail complex consisting of 80 apartments, two retail units and associated car parking for that development and for a development situated a short distance away, as a bird would fly, but accessible on foot only by way of a long detour. While three reasons were given for the decision of the respondent refusing planning permission, only one is attacked in this judicial review proceeding.

3. As a matter of fact, the development of this site, as proposed by the applicant, would have removed upwards of 100 car parking spaces at ground level, since the proposed site of the development is what has been for many used by St. Michael's Hospital as a car park for its staff and patients. The reason for refusal that is under review is as follows:-

> "Having regard to the existing use of the site for car parking, the parking needs of the proposed development and for other development in the area, it is considered that the proposed development, which entails the loss of an existing car park, would result in an under provision of car parking space in the area. The proposed development would, therefore, add to traffic congestion in the area, would seriously injury the amenities of the property in the area and be contrary to the proper planning and sustainable development of the area".

4. There were two other reasons given by the respondent for refusing planning permission on appeal from a similar decision of the planning authority. These related to the visual amenity of the area and to the siteing, design and layout of the proposed development and its relationship to adjoining properties. These, however, are not challenged in this review.

5. An order of *certiorari* is sought in respect of the decision as to car parking; a declaration is sought that this decision was beyond the powers of the respondent; an order is sought severing this reason from the decision and that it be amended accordingly, and an order is sought remitting the matter to the respondent for re-hearing. The grounds on which the relief is sought may be divided into broad categories. Firstly, after permission had been refused by the planning authority, certain third parties submissions were sent to an Bord Pleanála. The applicant complains that, in breach of fair procedures, they had no opportunity to comment on these as they were not furnished with notice of them. Secondly, it is pleaded that in breach of ss. 34 and 37 of the Planning and Development Act, 2000, as amended, the respondent took in to account non-relevant considerations, being the effect of the development to cause a change of use of a portion of its lands from an existing car park to the proposed development. The applicant argues that as the car park was owned by the applicant, and allowed under a caretaker's agreement to St. Michael's Hospital to be used by them free of charge, An Bord Pleanála was not entitled to take in to account the effect on the adjoining hospital of the use of this free car parking facility. Further, the applicant argues that the decision to refuse permission was beyond the powers of the respondent because it had regard to the existing use of the site of the car parking in respect of proposed development in the area and a projected under provision of car parking space. It is also argued to an error of law that the proposed development would result in the under provision of car parking space in the area. Further, it is claimed to be an error of law that the respondent concluded that the proposed development would add to traffic congestion in the area or would seriously injure the amenities of property in the area in that regard, or both of same.

Background

6. St. Michael's Hospital has been an integral part of Dún Laoghaire since the mid-19th century. In recent memory it was run by the Sisters of Mercy. More recently, this order of nuns had sold it to the Sisters of Charity. The planning map disclosed that the St. Michael's Hospital site once consisted of the hospital complex, with various adjuncts, a large nurses' home and this car park on Crofton Road. The Sisters of Charity intend to continue running the hospital but they no longer own the car park, which faces towards the DART line to the sea to the eastern end of the site, and they have also

sold to the applicant the nurses' residence which is pretty near that. Both of these were acquired by the applicant on 21st December, 2006. The applicant purchased both the nurses' residence and the car park for the purposes of development and immediately began formulating plans for submission to the planning authority. Whereas the nurses' residence has been used for many years, prior to its acquisition by the applicant, for just that purpose, there appears to be no relevant planning history in relation to the car park. This may mean either that the site was used as a car park prior to the 1st October, 1964, when the Local Government (Planning and Development) Act 1963 came into force; or that the use by St. Michael's Hospital of the car park has been informal and unauthorised. I am no not prepared to assume the latter, but it makes no difference my decision either way.

7. The car park is used by the hospital staff and by visiting patients. There are 90 formally laid out vehicle spaces. As is a matter of fact, 110 cars have been recently observed parked there. The site is .32 of a hectare or just under ¾ of acre. The hospital is not a party to this appeal. It is claimed that the applicant had discussions with the hospital authorities and offered, as part of the development of the site, to build in a similar number of car parking spaces at the cost to them of construction. It is also claimed that the applicant offered to sell the car park to the hospital but that this offer was refused. I have no idea as to the hospital's budget, to the cost of construction proposed or to the cost at which purchase of the car park was offered.

8. On 27th July, 2007 the applicant applied to Dún Laoghaire- Rathdown planning authority for permission to develop the car park site. On the same day, an application was submitted to develop the nurses' residence at Eblana Avenue. The car park development would have consisted of the demolition of one small dwelling along Crofton Road and then constructing a very long building comprising of two retail units and 80 residential apartments. There was to be a ground and basement car park over two levels with a 124 car parking spaces. There was to be one car parking space for each residential unit in the proposed car park development, none for the retail units, and then a further 44 car parking spaces for the non-contiguous, and difficult to access, Eblana Avenue nurses' residence development. This would have made 124 car parking spaces in all, while 110 car parking spaces were to be lost to the area in consequence of the development. This is, in itself, way below the guidelines in the development plan for supplying car parking spaces per unit of residence or retail unit built.

9. A notification of decision to refuse permission was issued by Dún Laoghaire-Rathdown County Council on 20th September, 2007. Ten reasons were given. The first three related to the car parking situation and I now quote these:-

> "(1) Having regards to the material change of use of the application site from a car park available for use by St. Michael's Hospital to a commercial development of residential apartments and shops, it is considered that the removal of car parking available to the hospital would weaken its long term viability and functioning and would, therefore, be contrary to the proper planning and sustainable development of the area.
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> (2) The lack of provision of parking for the staff of the existing hospital in this development will create serious traffic congestion in the immediate area and as such would be contrary to the proper planning and sustainable development of the area.
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> (3) Inappropriate/illegal parking in the local area due to the lack of provision of car parking for the staff of the existing hospital in this development will negatively affect the amenity and depreciate the value of property in the vicinity, and would therefore, be contrary to the proper planning and sustainable development of the area.

10. By a notice dated 17th October 2007, the applicants appealed this decision to An Bord Pleanála. Among the matters mentioned in the notice of appeal is that the applicants had told the planning officers that the car park was owned by them and that St. Michael's Hospital had no lease under which they used it. Instead, the applicant had granted the benefit of the use for free under a caretaker's agreement which could be revoked at any time. They complained to the hospital of the senior planner's view that irrespective of proposals for development, the survival of car parking for the hospital was critical to its survival.

The Appeal

11. Pursuant to its statutory duty, the respondent included in its inspector's report information which it had obtained from local authority, and other statutory bodies. These included information on water supply, parks, housing and transportation. I now quote from the concise recital in the report of the views of the transportation department:-

> "(1) During site inspection there were 110 number of cars parked on the subject site associated with St. Michael's Hospital at all time. There are no proposals to close the hospital with the application. The effect of the closing of the car park facility will overload the local parking provisions and may lead to illegal parking. This will impact on businesses in the area.
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> (2) The car parking for the Nurse's Home scheme (D07/1065) is being provided within this current proposal, and this is very remote from the Nurses' Home.
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> (3) The applicant has proposed 80 number of spaces for the current proposal and 44 number of spaces for the Nurse's Home proposal, and this is less on the development plan requirements. There is no justification for a reduction in provision, and the residential and commercial parking has not been segregated.
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> (4) The basement car park ramps do not comply with the relevant standards.
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> (5) No detail of how to prevent unauthorised parking.
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> (6) Insufficient cycle parking.
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> (7) Insufficient side line to the west when viewed from Crofton Road, which is being impeded by the adjoining boundary wall and utility poles.
>
> (8) Insufficient disabled spaces.

A refusal is recommended."

12. It is argued that strong indications that the respondent went outside its statutory remit and had regard to irrelevant considerations are provided from the inspector's report furnished to the respondent on 28th February, 2008. Having considered the appeal file, and inspected the site, the inspector recommended the proposal should be refused. Three reasons were given. These related to the scale of the development, the loss of privacy to adjoining properties and the failure of the proposed development to further the underlying objective of the Dún Laoghaire Urban Structure Plan on having a pedestrian link to the town centre.

11. When one examines Chapter 4 of the Dún Laoghaire Urban Structure Plan one notices that the hospital car park site in question has been designated as being underdeveloped. Car parking for the hospital is not addressed in the Plan. The inspector had the following to say concerning the issue of car parking:-

> "It would seem to me the necessity of the car park to St. Michael's Hospital was not taken into consideration when the plan was adopted, otherwise the blatant promotion of the site for the development in the plan may not have occurred. If the planning authority was so concerned about the viability of the hospital and the implications of the loss of the car park as a result of the development, then why was the site not zoned accordingly or a special objective included in the Plan that any development proposal of the site should include replacement parking provision for the hospital. I believe it is unreasonable of the planning authority to modify its priorities for the site by the development control process. I would consider it a reasonable expectation from the content of Chapter 4 of the Plan, that the planning authority would be positively inclined towards the development of the site, and not raise a new issue such as a replacement car park for the hospital.
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> In my view the car park is essential to the general operations of the hospital. On the day of my inspection I noticed C.90 number of cars and pay system in operation at the entrance to the hospital. There would appear to be very little space within the grounds of the convent to accommodate the replacement parking. The First Party claims that the hospital management were approached with a view to providing replacement spaces on a non-profit basis to the hospital but management declined this offer. The hospital management has not commented on this issue. The proposed parking provision is currently below the development plan standards for the proposed uses and floor area. I cannot comprehend how St. Michael's hospital could be accommodated under the current scheme. Car parking for St. Michael's hospital is not being assessed or applied under this current proposal, and the legality of same is beyond the remit of this application. However, it would seem logical that replacement car parking should be provided in the basement of the proposed building, because there is no pubic parking along Crofton Road, and public parking along the surrounding streets is very limited. Other pay car parks are not convenient to the grounds of the hospital. Therefore, any future development of the site should consider accommodating the hospital car park, based on a common sense approach and not a planning policy one. However, the onus on this issue is with the applicant's and the hospital and is not a matter for the Board".

Fair procedures

13. Any complaint of lack of fair procedures in the operation of a statutory body has to take into account as a primary factor the legislative scheme within which it operates. There is no warrant for judicial intrusion by way of reformulating procedures where these have already been set out in statute. In so far as a legislative scheme may require to be interpreted in accordance with the presumption of constitutionality, nonetheless, a clear wording as to the steps to be followed in decision making cannot be substituted with principles based upon the familiar argument that a plenary civil trial is the only available model for arriving at a fair conclusion. An Bord Pleanála is a statutory body which, with respect to its functions relevant to this judicial review, carried out a co-extensive responsibility with the local planning authority of ensuring that the uses to which land and structures are put, and the erection and modification that new buildings, accord with proper planning. Planning applications are not disputes between parties where people have the opportunity and the incentive to assert opposing facts. Falsehoods in planning applications are, of course, all too common but the planning authority and An Bord Pleanála carry out their own inspections and investigations and, pursuant to their statutory remit, seek the views of important public bodies such as, for instance, An Taisce. What does, or does not, constitute good planning is dependent less upon the aesthetic view that might be taken of a structure, or an alteration in the use of a site, but rather how a proposed development is correctly to be viewed within the context of an objective factual matrix which includes, among many other factors, the character of a neighbourhood, the needs of the people living in it, its ideal future as set out in the development plan published after consultation by the planning authority and, finally, what changes as between structures and people are likely to be brought about by a proposed development. It is therefore a function best fulfilled by those who are expert in the field of planning and within the context of an examination of plans and relevant points made by interested parties on what is proposed. In the *State (Haverty) v. An Bord Pleanála*, [1987] I.R. 485 at 493. Murphy J. made the following comments within the context of an argument that a person making a detailed observation on a planning appeal should have been allowed to make a further observation by a way of a response to further submissions from an interested party:-

> "The essence of natural justice is that it requires the application of broad principles of commonsense and fair play to a given set of circumstances in which a person is acting judicially. What will be required must vary with the circumstances of the case. At one end of the spectrum it will be sufficient to afford a party the right to make informal observations and at the other constitutional justice may dictate that a party concerned should have the right to be provided with legal aid and to cross-examine witnesses supporting the case against him. I have no doubt that on an appeal to the planning board the rights of an objector — as distinct from a developer exercising property rights — the requirements of natural justice fall within the former rather than the latter range of the spectrum. This flows from the nature of the interest which is being protected, the number of possible objectors, the nature of the function exercised by the planning board and the limited criteria by which appeals are required to be judged and the practical fact that in any proceedings whether oral or otherwise there must be finality. Some party must have the last word. The substantive reality of the present case is that the prosecutrix and the Sefton residents' association put forward a detailed professional argument before the planning authority in the first instance and the planning board in relation to the appeal. I can appreciate their concern that they might have wished to expand upon their argument or to raise counter-arguments to those made in reply by the developers but I have no doubt that the real substance of their case was before An Bord Pleanála and duly considered by it. If there was in fact a material

conflict of evidence that could not have been resolved by additional submissions or observations. Disputes of that nature could only be adequately dealt with in an oral hearing".

14. In *State (Genport Limited) v. An Bord Pleanála*, High Court, Unreported 1st February 1982, Finlay P. at p. 8 of the unreported judgment stated this proposition at a time which was prior to the implementation of the detailed statutory scheme to which I shall next refer:-

> "I am satisfied that as a matter of general law An Bord Pleanála carrying out a *quasi judicial* would have an obligation to take reasonable steps to ensure that every party interested in any application before it should be aware of the submissions or representations made by any other party: should have a reasonable opportunity of replying to them; and should have a general reasonable opportunity of making representations to the board".

15. I turn briefly to the statutory scheme under the Planning and Development Act, 2000. What is involved in planning is the making of an application to a local planning authority. They decide on what can properly be developed with the context of the legislation by which they are bound, the environmental contract that is the development plan made by them under statute following consultation with the people and by having regard to the proper planning of an area. If a party is dissatisfied it then appeals to An Bord Pleanála. This appeal is akin to an appeal from the District Court to the Circuit Court or from the Circuit Court exercising civil jurisdiction to the High Court. It operates as a complete rehearing. Unlike in oral rehearing, however, as there has been no oral evidence, nothing is lost and the party appealing has a statutory entitlement to all documents put before the planning authority. Section 37(1)(b) of the Planning and Development Act, 2000 makes this clear:-

> "Subject to paragraphs (c) and (d), where an appeal is brought against a decision of a planning authority and is not withdrawn, the Board shall determine the application as if it had been made to the Board in the first instance and the decision of the Board shall operate to annul the decision of the planning authority as from the time when it was given; and subsections (1), (2), (3) and (4) of section 34 shall apply, subject to any necessary modifications, in relation to the determination of an application by the Board on appeal under this subsection as they apply in relation to the determination under that section of an application by a planning authority".

16. Under s. 34(1) an applicant is required to comply with the relevant regulations and the planning authority is obliged to decide to grant permission subject to or without condition, or to refuse permission for a development. Under s. 34(2) the authority making the decision has to have regard to the provisions of the development plan, the provisions of any special amenity area, any European site prescribed for archaeological or other purposes, the relevant government policy, the nature of the conditions that might lawfully be imposed and all other relevant provisions of the Act. The overriding consideration, however, is that whether it is the planning authority or An Bord Pleanála that ultimately make a decision on a proposed development, the authorities are restricted to considering the proper planning and sustainable development of the area, regard being had to the factors just mentioned. Under s. 34(3) a planning authority has to have regard to both the information relating to the application and any written submissions or observations that are made by persons or bodies other than the applicant. Then a decision is made. It can be appealed. By this stage, all of the documents that have been gathered into the relevant planning file by the local authority will be released, on the payment of a small fee, to any interested party.

17. In considering any complaint as to unfair procedures, therefore, it must be borne in mind that the plans for the proposed development as lodged, any correspondence with the planning authority, and all observations made by interested third parties or by the statutory bodies who must be consulted under the Act, will then have come into possession of a developer appealing a decision. Once an appeal is commenced, the planning authority concerned must forward to An Bord Pleanála the relevant planning application, the submissions made on it, any report prepared for the planning authority and a copy of its decision. Section 128(2) provides that in determining such an appeal the Board "may take into account any fact, submission or observation mentioned, made or comprised in any document or other information submitted."

18. It is clear, reading through ss. 126 to 138, that strict time limits are to be observed in the progressing of appeals. Under ss. 129 and 130 parties to the appeal, and those who make observations or submissions on the appeal, cannot elaborate on submissions already made and must lodge their comments within a strict time period of four weeks. Under s. 131, An Bord Pleanála can ask for comments from those with an interest in the appeal. Sections 132 and 133 are concerned with the powers of the Board to gather information; akin to discovery power in the High Court. Section 134 is concerned with when an oral hearing into a planning appeal might be held, a topic outside the scope of this judgment. As s. 131 is germane I now quote it:-

> "Where the Board is of opinion that, in the particular circumstances of an appeal or referral, it is appropriate in the interests of justice to request any party to the appeal or referral,
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> (a) any person who has made submissions or observations to the Board in relation to the appeal or referral, or
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> (b) any other person or body, to make submissions or observations in relation to any matter which has arisen in relation to the appeal or referral, the Board may, in its discretion, notwithstanding section 127 (3), 129(4), 130(4) or 137(4)(b), serve on any such person a notice under this section—
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> (i) requesting that person, within a period specified in the notice (not being less than 2 weeks or more than 4 weeks beginning on the date of service of the notice) to submit to the Board submissions or observations in relation to the matter in question, and
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> (ii) stating that, if submissions or observations are not received before the expiration of the period specified in the notice, the Board will, after the expiration of that period and without further notice to the person, pursuant to section 133 , determine the appeal or referral."

19. To a limited extent, the principles of natural justice have an influence on the interpretation of this section. The Board is not obliged to bring every fresh submission to the attention of a party to the appeal and to ask for further observations. The first principal applicable is that of utility. The scheme under the Act is not to be replaced with a

mechanical application of the notion derived from civil law that everything before the decision maker must also be before the parties and that everything which is submitted must be known to all sides and that they must be given a reasonable opportunity to counter to with submissions of their own. That is clearly outside the scheme of the Planning and Development Act, 2000.

20. Fundamentally, if a complaint is made that an applicant was shut out of making a submission, that party must show that they have something to say. What they have to say must not be something that has already been said. Nor can it be a reiteration in different language of an earlier submission. If a party is to meet the onus of alleging unfairness by the Board in cutting them out for making a submission they must reveal what has been denied then, what they have to say and then discharge the burden of showing that it had been unjust for the Board to cut them out of saying it. In *Ryanair v. An Bord Pleanála*, [2004] 2 I.R 334 the applicant had been invited to make a submission under s. 131 but the time limit imposed by statute had not been adhered to. The question, as Ó Caoimh J. saw the matter was what else the applicant would have been able to say had the statutory opportunity been afforded to them. As a matter of fact as Ó Caoimh J. held, on p. 360, the applicant had made a submission. In a case decided under the equivalent of s. 131 of the Planning and Development, 2000, namely s. 7 of the Local Government (Planning and Development) Act 1992, *Evans v. An Bord Pleanála*, High Court, Unreported 7th November, 2003, Kearns J. focussed on the nature of the submission that might have been made and the effect that it could reasonably be argued to have had on the appeal. It is important to quote pp. 24 and 25 of the unreported judgment:-

> "I accept the respondent's contention that s. 7 of the Local Government (Planning and Development) Act, 1992 was designed to streamline the appeals process and to reduce the volume of repetitive submissions. The introduction of the measures contained in s. 7 was to bring an end to an endless ping-pong sequence of exchanges between the parties which delayed and frustrated the planning process. Obviously, however, there could well arise an individual case where An Bord Pleanála would feel that the interests of justice would demand that a further opportunity might require to be granted to a party to make further submissions or observations notwithstanding the general principle. The section confines the scope of the discretion "*to any matter which has arisen in relation to the appeal*", but does not otherwise fetter the discretion of the Board. As already noted, the invocation of s. 9 does not carry with it any obligation to notify other parties to the appeal of the fact of its invocation nor of the fact that a reply may have been received in response to the s. 9 request. However, the discretion of the Board extends to "*any party or any person*" who has made submissions or observations to the Board, so that if some new or additional element were to arise in the context of an appeal, the Board is not precluded from seeking submissions from more than one party in relation to that, or indeed any other matter which has arisen in relation to the appeal.
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> Obviously where the Board exercises its discretion in such a way as to permit one party to the appeal to introduce a new element of substance which might affect the outcome, fair procedures might demand that the party affected be given an opportunity to respond, even in the restricted environment of s. 9.
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> However, I do not think in reality any new element was ever introduced by the response of An Taisce to the request under s. 9. While it did focus to a significant degree on the nature and dimensions of the extension and to the alleged interference with views, these were all matters which had been fully canvassed and which were apparent from the plans and photographs at all stages. This is not a case where An Taisce availed of the opportunity presented to it to wheel in *sub silencio* a completely new ground of appeal or objection. I find no indication that the decision in the ***Grove Nursing Home*** case influenced or formed part of the respondent's decision. Indeed the Inspector had dismissed same as irrelevant.
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> In my view, there was no improper invocation of s. 9 by the respondent, nor was there any want of fairness in failing to seek further additional comments in response from the applicant in the aftermath of An Taisce's observations. I do not believe any substantial ground has been established on this part of the case either".

21. An argument has been advanced by the respondent that since s. 131 of the Act, in effect, gives a discretion to An Bord Pleanála, that it is only if that discretion were exercised in such a way as to be unreasonable, in the sense of flying in the face of fundamental reason and commonsense, that the court should ever interfere with the Board's decision. I have serious doubts about this submission advanced on behalf of the Board within the context of s. 131. Rather, it seems to me that s. 131 sets up an objective standard. The interests of justice are best met by selling the comments of an interested party where the Board receives a novel submission on appeal that, reasonably construed, might affect its decision to grant or refuse planning permission or to impose a condition, and where that observation is not in substance already part of the papers on the appeal which had been notified to the complaining party.

22. Here, that test is not met. All of the substance matters in complained about in the affidavit of Tom Walsh dated 14th January, 2010 as being submissions which were sent to interested statutory bodies but not to this applicant were already the subject of a comment by the appellant. And, further, all of the points had been made by the bodies consulted under the Act by the planning authority, in the inspector's report or in third party observations already received by the local authority or in the planning file of the local authority that can be accessed by the applicant for development once an appeal to An Bord Pleanála is taken.

23. It is correct that lengthy submissions were received from residents after the initiation of the appeal and that these were sent for observation to these interested public bodies, but not to the applicants. None of these observations, no matter how one would construe them, related to the closure of the hospital car park. In so far as they focussed on other issues as to the proper planning and development of the area, they were points already under investigation before the local authority and had been fully commented upon in the inspector's report. The relevant question that should be asked in the context of a complaint of an unfair procedure is whether an appellant knew the points that might reasonably move An Bord Pleanála to grant or refuse planning permission, or to impose conditions, when it made its appeal or whether, on the other hand, an injustice has been perpetrated through a new and objectively significant important point being brought into the equation of which they had no notice? No new and important point was brought into this appeal. The applicants had a full opportunity to make any reasonable or relevant point that they choose to pursue.

The Parking issue

24. An administrative body which exercises a decision-making function is bound by the limits of the statutory scheme whereby it is set up. The applicable legislative code circumscribes its area of operation. In consequence, a decision is likely to exceed jurisdiction where relevant considerations are not taken into account or where irrelevant considerations underline a decision. This principal is fundamental to the correct discharge of the functions of the planning authority and of An Bord Pleanála. The principle was thus stated, prior to the passing of the Planning and Development Act 2000 but in a sensible way in terms of principle, in *P. & F. Sharpe Limited v. Dublin City Manager*, [1989] I.R. 701 at 717 by Finlay C.J.:-

> "It is, of course, clear and has been consistently laid down by this court that the making of a decision to withhold or grant permission on an application for planning permission under the Act of 1963 is a function of the planning authority which must be exercised in a judicial manner. The practical consequences of that are that the decision-making authority must have regard to all relevant and legitimate factors which are before it and must disregard any irrelevant or illegitimate factor which might be advanced. Parties affected by such a decision must get a fair and proper opportunity of having their views conveyed to the decision-making authority which must act fairly in all respects in arriving at its decision".

25. Here, it is argued that the proposed development was not inconsistent with the zoning objectives of the area. That may well be true, but the issue for any planning authority is always the proper planning of an area so that there is sustainable and proper development. The applicant contends that the planning authority should have made a decision on what was before it. A current use of a site is said not to be relevant and, *a fortiori*, when the use is for free to an adjoining existing business. Once the car park was sold, it is argued, a new planning unit was created and, therefore, its use by an adjoining hospital owner became irrelevant. The hospital, it is contended, had no legal entitlement to the parking and should the applicant wish to revoke "its facilitating of the hospital on any given day, it can". This would render, it is contended, the ground of refusal of planning permission void. Moreover, the applicant could discontinue, it is agreed, the use at any stage by abandonment and then the application would be for a development with no current use and be properly described in a planning application merely as a site with a previous history as a car park. The use of the car park by the hospital is argued to be outside the planning unit. Increased traffic congestion, it is contended, might occur but that would be within a context where the applicant was entirely within its legal rights. Issues as to parking and traffic congestion in consequence are, therefore, said to be outside the scope of what the respondent could have regard to and, thus, irrelevant and immaterial to the application. Particular stress is laid on the fact that in Chapter 4 of the Dún Laoghaire-Rathdown Development Plan, no provision is made for car parking for the hospital.

26. I cannot accept that these arguments are correct. The inter-relationship between the development plan and the function of the planning authority, in this case the notice party, and on appeal An Bord Pleanála, can give rise to complex issues of law. Proper and sustainable planning remains paramount. I adopt as correct the relevant passage in Simons - *Planning and Development Law* (2nd Ed., 2007) at para. 1.23:-

> "In practice consideration of the proper planning and sustainable development of an area, and of the development plan, are often inextricably linked; development objectives may be characterised as an attempt to articulate in general terms the proper planning and sustainable development of the area. Whereas in the context of many applications the subject-matter of these twin considerations will coincide, the key distinction is that the consideration of the proper planning and sustainable development of an area underpins the discretionary nature of the planning process. Each application must be considered on its own merits, and factors such as, for example, personal planning application, notwithstanding the fact that such factors could not be properly be made the subject of a general objective such as might be included in a development plan.
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> The terms of the development plan are not conclusive: the overriding consideration must be the proper planning and sustainable development of the area. The language of s. 35 is noteworthy. A planning authority and An Bord Pleanála are "restricted" to "considering" proper planning and sustainable development, whereas they are only required to "have regard to" the provisions of the development plan. As discussed below at para. 1 – 27 to 1 – 32, express provision is made under the legislation for planning permission to be granted in breach (material contravention) of the development plan. The legislation, therefore, prescribes a hierarchy of matters which are to be taken into account in determining an application or an appeal. Thus, for example, an application for a proposed development which would accord with the zoning objectives in the plan, would nevertheless have to be refused if the proposed development would be contrary to the proper planning and sustainable development of the area."

27. A very useful passage also occurs in Scannell – *Environmental and Land Use Law* (Dublin 2006). I have regard to this analysis which, it strikes me, is made after long study of the legislation and the decided cases. It occurs at 2 – 294:-

> "Relevant criteria are principally stated in the development plan and guidance issued by Government Ministers. Some of the legitimate considerations that must, or may, be taken into account are stated in the planning and other legislation described above. Government policy about what constitutes legitimate planning criteria is somewhat obscure. The accepted view is that "in principle ... any consideration which relates to the development and use of land is capable of being a planning consideration" But this statement is so broad as to be misleading. The purpose of planning control, as stated in the Preamble to the 2000 Act, is "to provide in the interests of the common good for proper planning and sustainable development including the provision of housing". There has been no proper systematic attempt to define what sustainable development means in planning terms although the concept is frequently used to justify planning decisions. The common good is not necessarily identified with the private interests of neighbours or trade competitors . For example, the loss of a particular individual's view would not, on its own, be a material consideration in a planning decision but, where that view was appreciated by many or where it contributed substantially to the character of the locality, its loss might be harmful to the common good. Similarly, the fact that a huge shopping centre might replace numerous individual shops is not relevant to planning but the fact that the closure of the individual shops might result in urban dereliction or change the entire character of an area would be a very relevant planning consideration and it would also be relevant to the issue of sustainable development. Thus, the planning merits of a case depend on reference to some wider view of the public interest in land-use and sustainable development matters and not just (or only) the interests of particular individuals."

28. I have regard to these views as cogent and view them with the respect due to real legal scholarship. In my view, the previous use of a site is relevant in terms of planning considerations. The reality is that this site is and, as far as history can tell us, was at all times in the recent past, a car park. If this site were to be sold again, the relevant requisitions on title would not bring forth a planning decision authorising its use as car park. Instead, a statutory declaration would be made as to its use for a number of years, and possibly prior to the 1st October 1964, as a car park. That is what the applicant purchased. Were a grant of planning permission to be made in respect of any development then, under s. 39 of the Act, that grant would be enure for the benefit of the land and all persons for the time being having any interest therein. Ownership does not affect this issue. The owner could shut the car park but that car park site would still be part of the planning landscape. It would, as a matter of plain sense, also be part of the physical landscape.

29. Perhaps this issue is best approached by asking what affect there would be in the event that an extra 110 cars came to be parked in this immediate area by reason of a temporary attraction. That could be, for instance, a wildlife event announced over radio in Dublin. The area might be discommoded for some hours or for a day but any such problem would be likely to go away as soon as the event ended, be it a dolphin visit or whatever. Here, the planners are obliged to have regard to the fact that a similar parking situation would occur during business hours, at least five or six days, and maybe seven days a week, remembering that this is a hospital. This could be reasonably regarded as intolerable.

30. I am of the view that either carrying out works or changing use is a material development within the meaning of the Act and that this principle is not affected by any current use having been established prior to the Act or through a lengthy history; see the judgment of Keane J. in *Kildare County Council v. Goode*, [1999] 2 I.R. 495 at 500. My decision, in that regard, is not influenced by s. 2(1) of the Act whereby use is defined in relation to land as not including the use of the land by the carrying out of works. This, it seems to me, exempts the temporary change in a site from its previous use into a building site but only where a lawful planning permission has been granted. Nor do I regard it as significant that under s. 34(4)(j) of the Act, a condition could have been imposed in relation to constructing car parking. Car parking is part of the features of the planning code and is mentioned not just there but in paras. 5(c) and 6(d) of the First Schedule to the Act.

31. In *Westminster Council v. British Waterways Board*, [1985] 1 A.C. 676 the issue before the House of Lords was whether a new tenancy might be refused on the ground as the landlords intended to occupy the premises for the purpose of a business on determination of the tenancy. In the course of his judgment, Lord Bridge made certain observations which I regard as sustaining the decision which I make in this case. In the High Court Walton J. had, in the context of an argument as to whether planning permission was likely to be granted for a new use by the respondent, since the appellant was the planning authority, held that the desirability of preserving an existing use of land may by itself afford a valid planning reason for refusing permission for a change of use. Lord Bridge expanded on that proposition, having first agreed with it, in the following passage:-

> "First, however, I should advert to the second of the five propositions, as I have summarised them above, on which the appellants rely. This is a proposition of law which I fully accept. It is supported by the decision of the Court of Appeal in *Clyde & Co. v. Secretary of State for the Environment*, [1977] 1 W.L.R. 926. In that case it was held that the desirability of preserving for residential use, in an area suffering from a shortage of residential accommodation, part of new block of flats, hitherto unoccupied, was a valid ground for refusing permission for a change of use to office…

The refusal of planning permission for office use of part of unoccupied block of purpose-built flats in an area suffering a shortage of residential accommodation must, I should have thought, as a matter of overwhelming probability lead to the consequences that the accommodation would in due course be put to use for its designed residential purpose. Thus, in the concluding sentence of the passage quoted the phrase "at least a fair chance" on which counsel in this appeal particularly relies, suggests, in my respectful opinion, an unduly and, on the facts, unnecessarily lacks criterion. In a contest between the planning merits of two competing uses, to justify refusal of permission for use B on the sole ground that use A ought to be preserved, it must, in my view, be necessary at least to show a balance of probability that, if permission is refused for use B, the land in dispute will be effectively put to use A…

Conclusion

32. I have therefore concluded that there was no breach of fair procedures by An Bord Pleanála. On the contrary they acted fully in accordance with the code of procedure laid down in the Planning and Development Act, 2000. The decision which was made by them as to car parking and whereby the application for development was refused was based upon relevant considerations as to the proper and sustainable development of Dún Laoghaire.