

**THE HIGH COURT
JUDICIAL REVIEW**

[2004 No. 241 JR]

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

BETWEEN

KEVIN HODGERS AND ELIZABETH HODGERS

APPLICANTS

**AND
CORK COUNTY COUNCIL**

RESPONDENT

Judgment of Mr. Justice Roderick Murphy dated the 5th day of May, 2006

1. Background

Over two years ago, on 28th January, 2004, Cork County Council, the respondent, refused to grant planning permission for works consisting of a dwelling house and lands situate at Garryvoe Lower in the County of Cork bearing planning reference 03/5294.

This application for a certificate for leave to appeal to the Supreme Court was made on behalf of the applicants on 15th March, 2006 following this court's refusal by way of *ex tempore* judgment delivered the 22nd day of December, 2005, for leave to apply for judicial review. The court had also refused an application to amend the grounds for ease to apply for judicial review.

The grounds of that application were, *inter alia*, that the respondent's use of the procedures under Article 33 of the Planning and Development Regulations, 2001 requiring further information by way of letter dated 15th December, 2003, was an improper and invalid use of that power.

The reasons given for refusal was that the proposed location would "result in an undesirable density of development in a rural area where public water supply and sewage facilities are not available and would therefore be contrary to proper planning and development of the area".

The site on which it was proposed to build the applicants' dwelling house was located in an area where the Coastal Housing Control Policy, set out in the County Development Plan 2003, applied. The development plan recognised that sensitive, scenic and coastal parts of the county had relatively limited capacity (both environmentally and in terms of scenic amenity) to accommodate individual houses in significant numbers. It was considered that priority should be given to the fulltime housing needs of local people who live in the area.

The respondent had written to the applicants by registered post on 15th December, 2003 at the address on the planning application and on the planning notice, asking whether the applicants currently owned a residence in Midleton. The applicants averred that they had not received that letter. Nonetheless the applicants, by letter dated the 22nd day of December, 2003, headed Planning Application No. S/03/5294 Response to (Certain) objections/observations ... the applicants referred to that house as follows:

"As to the property at 21 Midleton Downs, this is not suitable and does not meet our needs. That said, we are not answerable to anybody about 21 Midleton Downs."

The respondent did not reply but, on 28th January, 2004, refused to grant planning permission.

The applicants had pleaded that the respondent had acted unreasonably and *ultra vires* its powers and in violations of the principles of natural and constitutional justice in determining the applicants application for planning permission by reference to an alleged facility in the area in relation to people from, or living in, that area whom the respondent considers to have a genuine housing need and in failing to advise would be applicants for planning permission, including the applicants, of such policy and/or facility.

On 21st December, 2005, the court refused leave to seek the judicial review as well as refusing the applicants liberty to amend their statement of grounds to add a further ground thereto and refused leave to seek judicial review.

Development Plan

2.1 The Cork County Development Plan, 2003 (issue 1: February 2003) provides, in relation to overall strategy, certain requirements in relation to rural, coastal and island areas as follows:

"Strategic Principles – Rural, Coastal and Islands

23.10 Policies relating in particular to Rural, Coastal and Island areas are set out in Chapter 8 of the Plan. The strategic requirements can be stated as follows:

What are the strategic principles for Rural, Coastal and Island Areas... ?

- a. Communities in rural, coastal and island areas have many separate but distinctive needs from those in urban areas and this should be recognised in developing planning policy;
- b. Population loss and persistent rural decline are key issues for many rural and island areas, and also for many coastal areas, and planning policy should be directed at reversing these trends;
- c. Island communities need particular support in their economic, social and cultural development to ensure equality of opportunity with the mainland;
- d. Many coastal areas have limited capacity to accommodate large scale development and their environmental assets should be protected. Other coastal areas are more robust but they can still be threatened by inappropriate development and management measures."

2.2 The special requirements in such areas, following the policy of the previous Development Plan, are stated as follows:

"Special Requirements in Scenic and Coastal Areas

3.3.10 This plan continues the policy of the 1996 Development Plan which recognised that the sensitive scenic and coastal parts of the county have relatively limited capacity (both environmentally and in terms of scenic amenity) to accommodate individual houses in significant numbers. In such areas, where there are high levels of pressure for development of this kind, it is considered that the priority must be given to the full time housing needs of local people who live in the area.

3.3.11 Allowing exceptions for local people in such scenic and coastal areas also allows local people to have access to sites which otherwise might be prohibitively expensive."

2.3 Three objectives for rural houses in such areas are specified in the Development Plan of 2003:

"Rural Houses in Scenic and Coastal Areas

(a) It is an objective to recognise that the scenic and coastal parts of the county generally have limited capacity, both in environmental and scenic amenity terms, to accommodate individual dwellings in the countryside.

(b) It is an objective to strongly discourage new dwellings in such areas except within established villages (or village nuclei). This restriction is relaxed in principle for the year-round occupation of people from the local area and subject to suitable sites being available.

(c) For the purposes of this objective, 'coastal areas' means those areas within sight of the sea, a lake or an inlet and 'scenic areas' includes those areas identified as scenic landscape on the scenic amenity maps in Volume 4 of this plan."

2.4 Finally, the Implementing and Monitoring of Settlement Policy is stated to be:

"3.3.12 The planning principles and objectives presented in this chapter have set out a settlement policy that seeks to establish a strong network of settlements throughout the county, to build up rural villages and to safeguard the needs of rural communities in a practical way. An important effect of this is that in certain circumstances there will be strict policy controls on individual rural dwellings."

3. Planning and Development Regulations

The applicants submit that the respondent improperly and invalidly sought information relating to the applicants' existing dwelling house under the Planning and Development regulations. Article 33 of those regulations falls under the heading of "further information" and provides as follows:

Article 33. – (1) Where a planning authority acknowledges receipt of a planning application in accordance with Article 26, it may, by notice in writing, within eight weeks of receipt of the planning application, require the applicant –

(a) to submit any further information (including any plans, maps or drawings, or any information as to any estate or interest in or right over land), which the authority considers necessary to enable it to deal with the application, or

(b) to produce any evidence which the authority may reasonably require to verify any particulars or information given in or in relation to the application.

(2) A request under sub article (1) may not require the submission of any further information in respect of the matters specified in Articles 18, 19(1)(a) or 22, save the proposals referred to in Article 22(1)(h).

(3) The planning authority shall not require an applicant who has complied with a requirement under sub article (1) to submit any further information or evidence save – paragraph

(a) as may be reasonably necessary to clarify the matters dealt with in the applicants response to a requirement to submit further information or evidence or to enable them to be considered or assessed, or

(b) where a request for further information is made under Article 108(2) or 128(1).

(4) Where a requirement under sub article (1) is not complied with, the planning application shall be declared to be withdrawn after a period of six months from the date of the requirement for further information or evidence has elapsed.

4. Certificate for Leave

Assuming that the respondent improperly and invalidly required information the applicants submit that they are entitled to have this Court certify a point of law by way of appeal in relation to the issue of the propriety and validity of requiring information.

Section 50(2)(f) of the Planning and Development Act, 2000, provides:

"(f) (i) The determination of the High Court of an application for leave to apply for judicial review, or of an application for judicial review, shall be final and no appeal shall lie from the decision of the High Court to the Supreme Court in either case, except with the leave of the High Court, which leave shall only be granted where the High Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court."

The applicants submitted that, in relation to each of four questions following, there is a point of law of exceptional public importance

which transcended well beyond individual facts or parties. The applicants pointed to the uncertainty in the law and the desirability that an appeal be taken in the public interest.

5. First questions for appeal

The applicants posed the following first question for appeal:

5.1 Is a planning authority, in exercising the power under regulation 33(1) of the Planning and Development Regulations 2001 (SI 600 of 2001), entitled to seek further information from an applicant relating to the existence of a right or interest in lands other than lands the subject of the planning application and/or ownership of a home, where information relating to such an interest or ownership was not sought in the original planning application form?

Mr. Brian Murray SC, for the applicants, contended that the request as to whether the applicants owned a residence in Midleton was not a proper request for information within the meaning of Article 33. As Article 33 was in practical terms a critically important provision, utilised frequently, it was of exceptional importance that the scope and operation of the provision insofar as applied in the present case be clarified as there is a clear public interest in obtaining such clarification.

In relation to the first question, Mr. Holland SC, for the respondents, says that it is unclear whether the question merely suggests that a planning authority may never seek information about a right of interest in lands other than lands the subject of the planning application or whether it is precluded from seeking this information because it has not been sought in the original planning application form.

5.2 The information requested in the letter of 15th December, 2003 was as follows:-

"It has been represented to the planning authority that you may currently own a residence in Midleton. In the interest of transparency and clarity please in this context, please (sic) submit documentary evidence to clarify whether of (sic) not of both of you currently owns a residence or otherwise."

The court had held that the planning authority was entitled to make such request in the context of the Coastal Housing Control Policy.

The applicants did not challenge the development plan nor seek to quash it on grounds that the "housing need" criterion therein was invalid.

Indeed, where neither the development plan nor the criterion was challenged then, following *Kinsella v. Dundalk Town Council* (Unreported, Kelly J., 3rd December, 2004), they are not entitled to raise this point on appeal.

The meaning of "housing need" did not need to be and was not determined in the judgment of 22nd December, 2005 and therefore certification of such a point would constitute a moot and would therefore be inappropriate.

As leave for judicial review had not been granted the question does not arise. It cannot be a point of law. It is a factual issue relating to the particular planning application lodged to be determined by the planning authority. It is not a point of law of exceptional public importance.

The issue in question relates to sub para. (1)(b) of Article 33 which would appear to extend beyond the submission of further information in relation to plans, maps or drawings or information regarding estate or interest in or right over land as it relates to information given in or in relation to the application.

The planning authority is entitled to seek further information which was not sought in relation to the application. Such information relates to the matters referred to in Regulation 33(1)(a) and necessarily, in relation to the relaxation of restrictions on developments, (posed in the second question), requires the information requested extends to housing need. The court had already held that housing need assessment requires information as to the current ownership of a residence before such a decision can be taken.

The court, accordingly, refuses to certify the first question

6. The second question

6.1 The second question posed is as follows:

Is the fact that a person owns a home, a legitimate or proper consideration to have regard to in determining an application for planning permission for the construction of a dwelling and it is lawful for a planning authority to relax restrictions on development in relation to people from or living in an area who are considered by the local authority to have a genuine housing need?

The applicants say that this question is fundamental to the operation and extent of the powers vested in law in the planning authorities. It was agreed that the phrase "*local people who live in the area*" in the County Development Plan; Coastal Housing Control Policy, is clear. The applicants submit that the phrase "fulltime housing need" is not.

In relation to the second question it is submitted by the respondent that there are two elements:

1. The legality of deeming relevant to the decision of the planning application the fact that the applicant looking for permission of a dwelling already owns a home, and
2. The legality of relaxations of development plan housing policy in favour of local residents.

In relation to the latter it was submitted that it can only arise in the context of the proposed amended ground of review which leave in respect of which was refused.

6.2 The first sub question raises in substance the same issues as the first question.

The County Development Plan, 2003 at 3.3.10 provides in relation to the special requirements in scenic coastal areas as follows:

In such areas, where there are high levels of pressure for development of this kind, it is considered that the priority must

be given to the full time housing need of local people who live in the area.

Housing need is not defined. It is not a technical term. In relation to coastal housing control it is clear that control may be attenuated by reference to the housing demand of local people who live in the coastal area. Such demand or need is for permanent or full time residence use not for ancillary or holiday demand and for residential rather than commercial purpose.

It would seem to follow that the authority may, indeed, must inquire whether the applicant has already residential accommodation.

Moreover, the applicant has not challenged the validity of the housing need criterion in these judicial review proceedings. It is not, accordingly, a matter fit for certification as it does not arise in these proceedings. The point of law must arise out of the decision of the court. See Kearns J. in *Ashbourne Holdings v. An Bord Pleanála*, unreported, High Court, 19th June, 2001.

The second sub-question as to the legality of the relaxing of restrictions on development in scenic and coastal areas is a matter of policy for the local planning authority. The parameters of the implementation of such policy is specified in the Development Plan.

No issue had been raised in the judicial review application as to the exercise of such policy.

7. Third Question

7.1 The third question is as follows:

Is it a breach of the principle of fairness and/or the requirements for Article 33 as aforesaid, to determine a planning application where a request for further information is made under Article 33 of an applicant for such permission, before the applicant has responded to that request, and based upon information obtained elsewhere?

The applicants submit that this is a matter of considerable practical importance.

The respondent submitted, in relation to question 3, that the "information obtained elsewhere" in fact consisted of the exactly the information sought in the request for further information and referred to by the applicants themselves after the service of the request.

7.2 While the applicants asserted that he had not seen the request when furnishing that information and did not believe themselves to be responding to such a request the court had found as a fact that the request had been served by registered post on the applicants, at the address given in the application, within the relevant time. No evidence was given as to who accepted the registered letter. The applicants' letter of 22nd December, 2003 was headed in the matter of the planning application as well as in the matter of certain objections.

Even if there were some issue in relation to the reply, the circumstances in which the reply was made was unique to the applicants and can in no sense be "desirable in the public interest that an appeal should be taken".

It would appear that this question is an attempt to revisit the arguments rejected at the hearing under the guise of a point of law. It is not an appropriate basis for a certificate.

The applicants, whether aware or not of answering the question raised, did not deny the ownership of 21 Midleton Downs but simply said that it was not suitable to their needs.

The court had noted the applicants' submissions that they did not receive the notice of request dated 15th December, 2003 before they replied on 22nd December, 2003. This Court had already found that the request had been served within the relevant period. On its face it appeared to address the query even if in a somewhat dismissive manner.

It does not seem that this question is of practical importance given that the respondents, on their understanding, provided the information without being requested to do so. The information acted up was provided by the applicants even if it had been prompted by objectors.

8. Fourth question

8.1 The fourth question is as follows:

Was the existence of an alternative remedy such as to preclude the applicant from seeking relief from this court where the essential claims were to the effect that the respondent had not raised a valid request for further information pursuant to Article 33 of the Planning Regulations, and that the refusal of planning permission was affected in a manner violative of the applicants' right to fair procedures?

8.2 The court had indicated that it was more appropriate for the applicants to have appealed to Bord Pleanála rather than proceed by way of judicial review. However, as acknowledged by the applicants, this was not the *ratio decidendi* of the court's judgment.

Accordingly, as the question does not arise out of a decision of the court, it is not appropriate to certify this question.

9. Fifth question

9.1 The fifth question was as follows:

Is it ever possible to clarify an issue to the Supreme Court where leave to seek judicial review has been refused and/or leave to amend a statement of grounds refused?

The applicants submit that it is self evidently a matter of critical public importance as to whether an unsuccessful applicant for judicial review can invoke certification. The respondent urges that leave may only be granted where the High Court certifies that its decision involves a point of law of exceptional public importance.

9.2 In order to obtain leave for judicial review an applicant must establish to the satisfaction of the court that it has an arguable case. In statutory review applications such as under the Planning Acts, an applicant must establish, to the satisfaction of the High Court, substantial grounds for contending that the decision is invalid or ought to be quashed (see s. 50(4)(b)).

The determination of the High Court is final save by certification that the decision involves a point of law of exceptional public

importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court (s. 50(4)(f)(i)).

In the present case the applicants had not satisfied the court that they had substantial grounds for judicial review. The decision of the court does not appear, for the reasons given, to involve a point of law of exceptional importance. It would not appear to be in the public interest that an appeal should be taken to the Supreme Court.

McKechnie J. in *Kenny v. An Bord Pleanála* [2001] 1 I.R. 704 at 715-6 remarked *obiter* that he found it difficult to see how a party who was refused leave could satisfy the court that grounds involved a point of law of such importance.

It would seem that the observations of McKechnie J. apply. Accordingly, the court refuses to certify the question posed as there has been a failure to establish substantial grounds. The standard required to establish a point of law of exceptional public importance must necessarily be greater than that required to establish substantial grounds.

10. Several independent criteria must be satisfied in order for an applicant to be granted a certificate. *Begley v. An Bord Pleanála* (Unreported, Ó Caoimh J., High Court, May 23rd, 2003); *Raiu v. Refugee Appeals Tribunal* (Unreported, High Court, Finlay Geoghegan J., February 26th, 2003) and *Gritto v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, March 16th, 2005) where the provisions were held to cumulative and mandatory.

The court will refuse the application in respect of each of the questions proposed.