Neutral Citation Number: [2009] IEHC 274

THE HIGH COURT

JUDICIAL REVIEW

2008 1398 JR

BETWEEN

P.J. FARRELL AND BARBARA FORDE

APPLICANTS

AND

LIMERICK COUNTY COUNCIL

RESPONDENT

JUDGMENT of Mr. Justice Brian McGovern delivered on the 17th day of June, 2009

1. The applicants are the owners of lands (hereinafter called "the lands") to the north of Adare, County Limerick. The lands are on the outskirts of the village. In these proceedings, the applicants seek to challenge an order of the County Manager made on 17th October, 2008, wherein he held that a resolution passed by the elected members of the respondent on 29th September, 2008, accepting the Manager's report in relation to the Adare Local Area Plan with certain modifications was invalid. He recommended that the final Adare Local Area Plan ("LAP") should be adopted in accordance with an earlier report of the Manager dated 22nd August, 2009.

2. The applicants had entered into agreements for the sale of their land to developers and were seeking the rezoning of their lands, which, under the draft LAP, had been zoned for agricultural use.

3. The resolution passed by the elected members on 29th September, 2008, was in the following terms:

> *"To accept the Manager's Report in relation to the Adare Local Area Plan with the following amendments included:*
>
> *Page 44 A18 Chieftain Construction*
>
> *Page 45 A7 Farrell Lands*
>
> *Page 41 A7 Hogan Lands*
>
> *That they would also be included."*

For the purposes of this application, I am concerned with what are referred to in the resolution as the Farrell and Hogan lands. The first named applicant's lands are at Ardshanbally and Gortagannif on the outskirts of Adare, and the second named applicant's lands are in the town land of Ardshanbally, Adare. The Manager's report - at pages 41 and 45 - summarises the submissions in respect of the two parcels of land as follows:

> *"Requests that lands at Ardshanbally (15.05 has) currently zoned agricultural be rezoned as Residential for low density serviced sites."*
>
> *"Requests that lands to the north of the village adjacent to proposed bypass and existing railway be zoned for mixed use development to include provision for residential development, the provision of a neighbourhood centre and community facilities."*

In other words, the submission on behalf of the first named applicant was to rezone his lands for mixed-use development and the submission on behalf of the second named applicant was to rezone her lands as residential for low-density serviced sites.

4. By making the resolution on 29th September, 2008, the elected members were, in effect, purporting to rezone the applicants' lands in the manner outlined above. The applicants contend that the resolution constituted a resolution for the purpose of s. 20 (3)(d)(ii)(I) of the Planning and Development Act 2000 (as amended in 2002). If this submission is correct, then the legal effect of the resolution would be that the elected members rezoned an area in excess of 100 acres, which at all material times, was in the ownership of the applicants. The respondent contends that the resolution did not constitute a resolution for the purpose of s. 20 (3)(d)(ii)(I) and that the Local Area Plan was, therefore, "made" in accordance with the recommendation set out in the Manager's report and that the zoning applicable to the applicants' land remained as set out in the initial draft of the LAP. In other words, the lands remain zoned agricultural. In order to resolve the conflict between the parties, it is necessary to determine what is required in order for a resolution to be effective under s. 20 (3)(d)(ii)(I) ("the sub-section").

5. In *P. & F. Sharpe Limited v. Dublin City and County Manager* [1989] I.R. 701, Finlay C.J. stated at p. -----:

"The decision making authority must have regard to all relevant and legitimate factors which are before it and must disregard any irrelevant or illegitimate factors 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 arriving at is decision."

While that decision referred to a s. 4 direction, it has, I believe, relevance to the type of decision being made by the elected members in this case.

6. Elected members, in performing their functions in respect of a Local Area Plan, *"…shall be restricted to considering the proper planning and sustainable development of the area, the statutory obligations of any local authority in the area and any relevant policies or objectives for the time being of the Government or of any Minister of the Government"*. See s. 20 (3)(i) of the Planning and Development Act 2000 (as amended).

7. Section 20 (3) of the Planning and Development Act 2000 (as amended in 2002), provides that the making of a Local Area Plan is a function of the Executive of a local authority. The elected members may, in certain circumstances,and following consideration of the manager's report, intervene in the process by way of a resolution pursuant to s. 20 (3)(d)(ii) and/or s. 20 (3)(g)(ii). On 31st May, 2008, the proposed draft Adare LAP containing a Strategic Environmental Assessment ("the SEA") was published in accordance with s. 20 (3) of the 2000 Act. Under this proposed draft, the applicants' lands were zoned agricultural. A notice invited submissions from members of the public and interested parties in response to the proposed draft LAP. These submissions included those made on behalf of the applicants for rezoning of their lands as referred to above. Following this process, the Manager prepared a report on or about 22nd August, 2008, recommending that the zoning of the lands remain agricultural. The elected members purported to pass a resolution on 29th September, 2008, accepting the Manager's report subject to the amendments I have referred to above and which, effectively, purported to rezone the applicants' lands.

8. On 17th October, 2008, the Manager made an order in the following terms:

"I, Edmund Gleeson, Limerick County Manager, having regard to,

(i) the terms of the resolution of the elected members of 29th September, 2008, in respect of the draft Adare Local Area Plan;

(ii) the terms of the draft Local Area Plan which had been put on display;

(iii) the provisions of section 20 (3) of the Planning and Development Act 2000, (as amended);

(iv) the provisions of the Planning and Development Regulations 2001 (as amended, in particular by the Planning and Development (Strategic Environmental Assessment) Regulations 2004), and Article 6 (3) of the Habitats Directive;

(v) the advice of Leahy & Partners, Solicitors, and the opinion of Garrett Simons Senior Counsel

am satisfied that the purported resolution passed by the Council members on 29th September, 2008, is not effective under section 20 (3)(d)(ii)(I) of the Planning and Development Act 2000 (as amended in 2002).

Under section 20 (3)(d)(ii), the Local Area Plan, is, accordingly, deemed to have been made in accordance with the recommendations as set out in my Manager's report of 22nd August 2008, on 3rd October, 2008, subject always to compliance with the requirement for further public consultation in accordance with the requirements of section 20 (3)(e) of the Planning and Development Act 2000 (as amended) and of Article 14 (g) of the Planning and Development Regulations 2001 (as inserted by the 2004 Regulations).

Consequently, I ORDER that those modifications recommended in the Manager's report which constitute 'material alterations' and/or are likely to have significant effects on the environment be put on public display.

For the avoidance of any possible doubt, the 'amendments' referred to in the purported resolution of 29th September, 2008, do not form any part of the Local Area Plan and will not form any part of the public consultation under section 20 (3)(e) of the Planning and Development Act 2000 (as amended) and Article 14 (g) of the Planning and Development Regulations 2001 (as inserted by the 2004 Regulations)."

9. In making his report, the Manager had available to him a comprehensive report from Nicholas de Jong Associates, which set out the development strategy and vision to be adopted in the preparation of the Adare LAP. This report included a reference to the Department of the Environment, Heritage and Local Government (DoEHLG) response dated 14th November, 2005, to a screening report presented to them for comment under a formal screening exercise conducted under the Planning and Development (Strategic Environmental Assessment) Regulations 2004. This exercise involved consultation with relevant Government departments and agencies in order to obtain specific guidance regarding the eligibility or requirement to conduct a full strategic environmental assessment. In the Manager's report to the elected members, he made reference to this response when dealing with the submissions made on behalf of the applicants for rezoning of their lands. He stated:

"The Development Boundary has been extended in this location to acknowledge the Proposed By-pass Corridor and to continue to provide for the development of agriculture by ensuring that the retention of agricultural uses protect them from urban sprawl and ribbon development and to provide for a clear physical demarcation to the adjoining built-up areas. The Maigue River will thereby continue to be the natural boundary to the 'built-up' area of this part of the village."

An addendum to the SEA dated 11th June, 2007, was a strategic assessment of this development option and another, which sought to extend the development boundary for residential purposes. The response from the DoEHLG in relation to the SEA Screening Report 2 in relation to the proposal to the zoning of lands at Ardshanbally and Gortaganniff indicated

that the proposed zoning could have a significant environmental impact on the setting of the historic town and other effects. In summary, the reasons outlined were:

> *"If these lands are now rezoned for residential/mixed use, it will have the effect of brining new and detached urban development right up to the edge of the northern bank of the river. This will have significant effect on the historic built heritage of Adare if the village is to be effectively spread across the river, either in the form of a detached suburb or a competing local centre. Therefore, it is considered that the proposed rezoning of these lands in the Local Area Plan could have a significant effect on the historic core of the town/village. Given the location of the areas proposed for rezoning, adjacent to and within the cSAC, combined with the uncertainty concerning the above effects of residential development proposed for the rezoned areas, it is considered that the rezoning is likely to have a significant adverse effect on the cSAC and an assessment is necessary."*

10. The Manager went on to state in his report that it was considered that the proposed zoning would be contrary to the County Development Plan 2005, in particular, Policies ENV31 and ENV32. These policies concern architectural conservation and preserving the character of mediaeval and post-mediaeval features and 18th and 19th century streetscapes.

11. It is clear that the elected members had this information available to them at the time when they passed the resolution on 29th September, 2008.

12. The respondents argue that the making of a Local Area Plan is a function of the Executive of a local authority and that the only circumstance in which the elected members can intervene in the making of an LAP is that specified at s. 20 (3)(d)(ii)(I) of the Planning and Development Act 2000 (as amended). I accept the respondent's argument on this point. Section 8 of the draft LAP (May 2008) contained an Environmental Report setting out a strategic environmental assessment of the draft plan. This was supported by the planning report from Nicholas de Jong Associates, dated 15th September, 2008, and the 'screening' submission from the Department of the Environment, Heritage and Local Government already referred to. In his report recommending that the zoning of the lands remain unchanged from that set out in the draft LAP, the Manager was supported by these matters and also by counsel's opinion on which he relied.

13. The procedure under s. 20 (3)(d) of the Planning and Development Act 2000 (as amended in 2002), should be read in the light of the obligations imposed on a planning authority under the SEA Directive, as implemented under the Planning and Development (Strategic Environmental Assessment) Regulations 2004 ("the 2004 Regulations") which in turn amend the Planning and Development Regulations 2001 ("the 2001 Regulations"). The respondent argues that unless a resolution complies with the requirements of the SEA Directive and implementing regulations, it cannot be effective to make the Plan otherwise than as recommended in the Manager's report. This would seem to be so. Under the SEA Directive, there is an obligation to state the reasons for making a development plan or a LAP in a particular form. This arises by virtue of Article 9 of the SEA Directive as implemented under Article 141 of the Planning and Development Regulations 2001 (as inserted by the 2004 Regulations). A local authority is required, as soon as may be following the making of a LAP, to prepare a detailed statement summarising the following:

> *"(a) How environmental considerations have been integrated into the Plan;*
>
> *(b) how*
>
> (i) the Environmental Report;
>
> (ii) submissions and observations made to the planning authority in response to public notice under section 20 (3); and
>
> *(c) any trans-boundary consultations have been taken into account during the preparation of the Plan;*
>
> *(d) the reasons for choosing the Plan, as adopted, in the light of the other reasonable alternatives dealt with, and*
>
> *(e) the measures decided upon to monitor the significant environmental effects of implementation of the Plan."*

The applicants claim that the resolution of 29th September, 2008, did contain reasons which are sufficient to make it a valid resolution.

14. The applicants contend that the oral submission of Councillor Clifford in support of the applicants' case for rezoning relied heavily on submissions made by McCutcheon Mulcahy, planning consultants, who were retained by the first named applicant and that therefore this constitutes a reasoned decision. The respondents say that this is merely an individual Councillor relying on the subjective submission of an interested party and that the views of one County Councillor cannot be imputed to the elected members as a whole who passed the purported resolution. Another elected member, Councillor Kavanagh, addressed the issue of providing facilities on the outskirts of the village *". . . without causing any harm or disturbance to the heritage of our area . . . "*, but he did not address the issues raised in the de Jong report. There appears to have been no meaningful discussion of the environmental report at the meeting of 29th September, 2008. Nor were the concerns of the DoHLG addressed. In short, the resolution does not appear to address the heritage and environmental issues which are unique to the village of Adare and which were considered by the Manager in his report, having received professional advice from Nicholas de Jong Associates and the views of the Department and also counsel's opinion.

15. One of the features of the draft LAP and contained in the Manager's recommendations was the importance of keeping development within the town boundaries on the basis that the River Maigue provided a boundary on the northern side of the village. It was argued by the respondent that this was an issue which required detailed consideration in any resolution to amend the draft LAP. A major planning concern was the issue of a detached development on the far side of the river from the village. This does not appear to have been dealt with to any significant extent by the resolution.

16. In *Malahide Community Council Limited v. Fingal County Council* [1997] 3 I.R. 383, at 398, Lynch J. said in the Supreme Court:

"Any court must be very slow to interfere with the democratic decision of the local elected representatives entrusted with making such decisions by the legislature".

17. It is a major plank of the applicants' claim in this case that the Manager disregarded the legitimate right of the elected members to amend the LAP. Article 28A of The Constitution provides that the State recognises the role of local government in providing a forum for the democratic representation of local communities, in exercising and performing at a local level, powers and functions conferred by law and in promoting by its initiatives the interests of such communities. In *Ring v. The Attorney General* [2004] 1 I.R. 184, Laffoy J. held that Article 28A:

". . . indicates limited constitutional protection for local government and local representative assemblies."

The powers and functions of local authorities are to be determined by the Oireachtas.

18. The applicants argue that the decision made by the resolution of 29th September, 2008, is valid until such time as it is set aside or otherwise held to be invalid by a court of competent jurisdiction. But it seems to me that this would be the case if the Manager had accepted the resolution and a third party was seeking to challenge it. In this case, the manager has not accepted the resolution as valid and it is that decision which is being challenged by the applicants.

19. This application comes before the court by way of judicial review. Although the respondent is the local authority, it is, in effect, a challenge to the decision of the manager to reject the resolution of the elected members made on 29th September, 2008. Neither the developers who were purchasing the lands, nor the elected representatives have made a legal challenge to the decision of the Manager. The applicants in this case are the owners of the lands who are seeking to have them rezoned. In my view, they are clearly an interested party with the *locus standi* to bring such an application.

20. A review of the minutes of the meeting giving rise to the resolution shows that it was made on the basis of perceived housing needs due to an anticipated rise in population in the area of Adare. Councillors supporting the proposed amendment to the zoning of the lands placed emphasis on the need for affordable housing and increased numbers of houses to cater for the proposed new hospital and a rise in population, generally. But there appears to have been no serious discussion on the environmental impact of the proposed rezoning and the importance of keeping development within the existing town boundaries as bordered by the river on one side. Nor did any significant discussion appear to take place on the question of the impact such rezoning would have on the River Maigue and its immediate environs.

21. Section 132 (1) of the Local Government Act, 2001 states; "It is the duty of every manager to carry into effect all lawful directions of the elected council of a local authority … for which he or she is manager in relation to the exercise and performance of the reserved functions of the local authority…" (I have highlighted the word "lawful"). The Manager does have power to treat a resolution as invalid where the elected members have ignored the local authority's expert advice to the effect that the development would be contrary to proper planning and development of the area, and where they fail to outline any proper planning-based reason for rejecting that advice. See *Child v. Wicklow County Council* [1995] 2 I.R. 447. Although that case concerned a s. 4 resolution, the principle does, in my view, apply to this case. It is not necessary for the manager to apply to the court to have such a resolution quashed. The manager is entitled to disregard such a resolution. In the child's case, Costello J. stated at p. 451 :

"Now the question does arise as to whether or not the County Manager is himself entitled to decide that the resolution was invalid without having it quashed by order of the court. If a County Manager decides that a s. 4 resolution is ultra vires, there is, it seems to me, authority to the effect that he is entitled to ignore it without applying to the court to have it quashed."

22. In *Wicklow County Council v. Wicklow County Manager & Ors.,* Unreported, High Court, Ó Caoimh J, 26th February, 2003, the High Court upheld a decision of the Wicklow County Manager to ignore a s. 4 resolution passed by the elected members. The court was satisfied that the Manager was, on the basis of legal advice, entitled to ignore the resolution and treat it as not binding upon him. I have considered the authorities raised in the submissions of the parties and there is a line of authority to the effect that a County Manager is only required to give effect to a lawful resolution of elected members.

23. I do not accept the submission made on behalf of the applicants that the elected members were not furnished with sufficient information before making their decision. They had before them the SEA addendum and also the Manager's report.

24. The report of Nicholas de Jong Associates, prepared in June 2007, was described as a *"strategic environmental assessment addendum".* It concluded that the zoning of the lands for residential use was likely to have significant adverse effects on the environmental resources of Adare and that:

"Taken together, the adverse effects on population well-being, biodiversity, cultural heritage and landscape will cumulatively result in undermining the distinctive character of Adare".

This document was not included in the SEA section of the draft Local Plan, although that section did provide an explanation as to why it was of *"huge importance"* that the lands remain zoned for agricultural use in order to prevent significant adverse effects on the historic built form of Adare. But the de Jong report was made available to at least some of the elected members in or about December 2007, and was circulated to all the elected members with the Manager's report in August 2008. In addition, a planning report of Nicholas de Jong Associates dated 15th September, 2008, was made available to them prior to their meeting of 29th September, 2008.

25. The Manager took the advice of Senior Counsel on the effect of the resolution of 29th September, 2008. The advice he received included the following observations:

(i) Unless the resolution complied with the requirements of the SEA Directive and implementing regulations, it cannot be effective to make the Plan otherwise than as recommended in the Manager's report. There is an obligation on the local authority to state the reasons for making a Development Plan or Local Area Plan in a particular form. The elected members failed to provide a statement of reasons in the resolution of 29th September, 2008, and, accordingly, the obligation under Article 9 of the SEA Directive, as implemented under Article 141 of the Planning and Development Regulations 2001 (as inserted by the 2004 Regulations), cannot be fulfilled.

(ii) The reasons for the rezoning, according to the resolution, cannot be gleaned from the SEA section of the draft Local Area Plan. The Manager's report contained the conclusion that the development should be confined within the proposed development boundary.

(iii) Under section 20 (3)(e) of the Planning and Development Act 2000 (as amended), a planning authority is required to engage in a further round of public consultation where the form of plan proposed by the elected members under a resolution constitutes a "material alteration" of the Manager's proposal. Article 14G of the Planning and Development Regulations 2001 (as inserted in 2004), provides that the public notices in respect of such further public consultation must state that information on the likely significant effects on the environment of implementing the proposed variation or modification of the draft Plan will be available for inspection, and that any submission or observation in relation to such information made to the planning authority within time will be taken into consideration before the making of any variation or modification. Counsel advised that the failure of the elected members to provide a statement of their reasons for rezoning the lands has the consequence that the planning authority is not in a position to comply with its obligation under Article 14G in the 2001 Regulations. This is particularly so as the SEA section of the draft Local Area Plan, the SEA addendum, and the Manager's report all contain material indicating that the proposed rezoning would have an adverse cumulative effect on the environment.

(iv) There was no meaningful discussion by the elected members of the environmental report at the meeting of 29th September, 2008, and no reference to it in the resolution. This report, which was included in section 8 of the LAP had stated, in terms, that the zoning of the lands for other than agricultural development would have an adverse environmental impact, and that it was of "huge importance" that the area remain zoned as agricultural. The resolution simply did not deal with this issue.

(v) A similar situation arises in relation to the Habitats Directive. Under the terms of Article 6 of the Habitats Directive, any plan or project not directly connected with or necessary to the management of the site, but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to "appropriate assessment" of its implications for the site in view of the site's conservation objective. Counsel advised the Manager that the elected members failed to advert to this issue, notwithstanding the fact that concerns as to the impact of rezoning on the cSAC had been flagged by the Department of the Environment, Heritage and Local Government, in its second screening submission, and had been emphasized in the planning report of Nicholas de Jong Associates on 15th September, 2008. Thus, the elected members failed to comply with the requirements of Article 6 (3) of the Habitats Directive and, accordingly, their failure to provide a statement of reasons has the effect that the resolution cannot be effective. Counsel also argued that there may be a further frailty in the decision for failing to have regard to relevant considerations.

(vi) Under section 20 (3)(i) of the Planning and Development Act 2000 (as amended), the elected members, in exercising their functions in respect of a LAP, are restricted to considering the proper planning and sustainable development of the area. It was argued that the local members failed to do so in this case.

(vii) Counsel, in his opinion, also referred to the fact that an indemnity was offered to the elected members on behalf of the applicants in the event that they were surcharged in respect of any decision made which would have the effect of rezoning the lands. No specific advice was offered to the Manager on the legal implications of this indemnity, other than to say that it would appear to be an irrelevant consideration in the context of a decision to make a Local Area Plan. An attempt by a third party to indemnify the elected members of a local authority in circumstances such as arise in this case, would undermine the regime which has been put in place by the Oireachtas and which includes the disciplinary effect of a possible surcharge.

26. I have considered these points in the context of the information available in this case, and it seems to me that they are points of substance on which the Manager was entitled to act. The planning process involves taking into account many considerations which may involve competing claims. The process exists for the benefit of the community at large and not for sectional interests, whether they be landowners, private individuals or developers, although there may be cases where these interests coincide. In this particular case, the unusual features of Adare brought into play many other considerations over and above mere housing needs. For example, there were environmental, cultural, architectural and heritage issues, which had to be addressed, having regard to the unique nature of the village. It seems to me that the resolution of 29th September, 2008, was made having regard to one consideration alone, namely, the perceived need for more housing. But insofar as that may have formed the basis of the resolution, it is not at all clear why this decision was arrived at, having regard to the fact that the elected members, in exercising their functions in respect of the LAP, are restricted to considering the proper planning and sustainable development of the area, the statutory obligations of the local authority in the area, and any relevant policies or objectives for the time being of the Government.

27. Apart from these matters, one of the recommendations in the resolution provides that the first named applicant's lands be zoned for *"mixed use development"* which does not coincide with any of the *"land use zoning categories"* identified in the Local Area Plan.

28. I accept the submission on behalf of the respondents that the reasons for making the proposed changes by resolution must be stated in the resolution itself. This, the elected members have clearly failed to do.

29. There is no statutory procedure for an appeal against the Manager's order. These proceedings are brought by way of judicial review which requires the court to look at the process involved whereby the Manager made his order and ignored the resolution of 29th September, 2008, on the grounds that it was invalid. I am satisfied that in the circumstances of this case, the Manager was entitled to reach that conclusion and that the resolution of the 29th September, 2008, was not a valid and effective resolution within the meaning of s. 20 (3)(d)(ii)(I) of the Planning and Development Act 2000, as

amended by the Planning and Development (amendment) Act 2002.

30. Accordingly, the applicants are not entitled to the reliefs sought.