Neutral Citation Number: [2010] IEHC 431

THE HIGH COURT

JUDICIAL REVIEW

2010 1 JR

BRIAN Mac MAHON

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

GALWAY COUNTY COUNCIL, SEAN FORDE, JANE JOYCE

NOTICE PARTIES

JUDGMENT of Mr. Justice Charleton delivered the 8th day of December 2010

1. In this planning judicial review the issues of leave to commence proceedings and the substantive merit of the application are merged by consent of the parties. This judgment addresses the jurisdiction of An Bord Pleanála ("the Board") to enquire on an appeal of the grant of planning permission into the validity of steps taken in a planning application before a local authority.

2. An application was made in 2008 to Galway County Council, the first notice party, for a 31 house development outside Kinvara town. Sean Forde and Jane Joyce, the second and third notice parties, objected to the development and their submission was formally acknowledged by Galway County Council. The submission, however, was late. Planning permission was granted. They appealed to the Board and lodged, as part of the appeal papers, the acknowledgment of Galway County Council, as required under the relevant statutory regulations. The Board took the acknowledgement at face value. There was no enquiry into whether the submission of Sean Forde and Jane Joyce was late. The Board allowed the appeal. It is claimed that this refusal of planning permission is invalid because the appeal was not valid due to the submission to Galway County Council being out of time. It is argued that the Board should have decided if the submission to Galway County Council was in time or not. The Board argues that it is not entitled to make such an enquiry. If the Board is entitled to make such an enquiry then, it is argued on behalf of the applicant, the proposed developer, an invalid appeal has been taken and the decision of the Board to refuse planning permission is accordingly invalid. If the appeal is found to be invalid, it is argued that the Court must declare the appeal unlawful and, in effect, reinstate the decision of Galway County Council granting the permission. This would establish a substantial housing estate outside Kinvara town on a blind corner on a main road to Ballyvaughan and the Burren area, within a 100 km per hour speed zone, and extend the effective boundaries of the town in a manner that the Board has declared in a reasoned decision is contrary to the proper planning and sustainable development of this area.

Jurisdiction

3. It is argued by the Board that this judicial review is out of time. The matter hinges on the correct interpretation of s. 50(2) of the Planning and Development Act 2000 ("the Act of 2000" or "the Act") as substituted by s.13 of the Planning and Development (Strategic Infrastructure) Act 2006. This provides:-

> "50(2) A person shall not question the validity of any decision made or other act done by -
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> (a) a planning authority, a local authority or the Board in the performance or purported performance of a function under this Act,
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> (b) the Board in the performance or purported performance of a function transferred under Part XIV, or
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> (c) a local authority in the performance or purported performance of a function conferred by an enactment specified in section 214 relating to the compulsory acquisition of land,
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> otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986) (the 'Order')."

4. Strict time limits, a feature of the planning code, are imposed by s.50(6) as follows:-

> "(6) Subject to subsection (8), an application for leave to apply for judicial review under the Order in respect of a decision or other act to which subsection (2)(a) applies shall be made within the period of 8 weeks beginning on the date of the decision or, as the case may be, the date of the doing of the act by the planning authority, the local authority or the Board, as appropriate."

5. Subsection 8 empowers the High Court to grant an extension of time for good and sufficient reason and where the reason for the failure to make the application for leave within the period of eight weeks was outside the control of the applicant for the extension. No reasons have been advanced for extending the time for this application. Any such reasons would also have had to encompass any argument that might have been made by Sean Forde and Jane Joyce, the second and third notice parties. I will return to this point as it is important.

6. The Act of 2000 as first promulgated, and prior to its amendment as aforesaid, prohibited the questioning outside the relevant time limits of any application for planning permission, which included an application on appeal to the Board, or any procedure by a local authority in respect of its own development under s. 179 or any confirmation of a compulsory purchase order under section 216. These, basically, are all planning permission decisions, as opposed to administrative steps that lead to such decisions. The amendment introduced by s. 13 of the Planning and Development (Strategic Infrastructure) Act 2006, in force since 17th October 2006, extends the remit of judicial review to "any decision made or any other act done by", and in the following subsection "a decision or other act"

of, the planning authority or the Board on appeal. Previously, it was clear that a final decision had to be reached before a judicial review could be commenced. Finlay Geoghegan J. in Linehan v. Cork County Council [2008] IEHC 76, (Unreported, High Court, 19th February, 2008) offered a view, in respect of the amendment to the Act as it now stands, that it might no longer be safe for an applicant to await a final planning decision before commencing judicial review proceedings. She queried as to whether decisions of a procedural kind during the course of an application might have to be challenged as they occur.

7. The view as expressed by Finlay Geoghegan J. is correct. In passing s. 50, and then amending it so as to extend its strictures to administrative steps, the Oireachtas clearly intended to impose strict time limits for the challenging of decisions in the planning process by way of judicial review.

8. Local authorities exercising the function of planning control for their area, and the Board on appeal, are inventions of statute. The Town and Regional Planning Acts 1934 and 1939 constituted an early legislative attempt to provide a statutory framework for the control of development in Ireland. The Acts were not, however, of nationwide application. It was up to each local authority to adopt the relevant provision on a voluntary basis. A local authority doing so had an obligation under the Acts to produce a planning scheme, the modern equivalent of which would be a development plan, under a statutory formula that required "convenient speed" in drawing one up. Only one such scheme was prepared up to the 1960s, and that was in respect of Dublin Corporation. Enforcement powers in respect of planning were inadequate and, in any event, were rarely used. With the coming into force of the Local Government (Planning and Development) Act 1963, planning controls became universal. Each local authority was under a statutory duty to prepare a set of guidelines for proper planning and development in its area in the form of a development plan. This legislation was much amended. A quarter of a century later it had become time to prepare new legislation and this was enacted in the form of the Planning and Development Act 2000; like its predecessor it has been later amended in response to perceived issues. This regulation is entirely statutory. The planning code is akin to legislation for the collection of taxation. Within the constitutional tradition which Ireland partially inherited on independence, taxation was only capable of being imposed by an Act of Parliament. Tax, in whatever form it took, replaced the medieval obligation of feudal service but, unlike that form of obligation to the central power, was made subject to restrictions on autocracy through requiring parliamentary assent. This later developed into a doctrine of the construction of taxation statutes requiring express legislation, thus circumventing the power of the central authorities to collect revenue in any arbitrary manner. This principle is curtly expressed among lawyers through the formula that there is no equity in taxation law. In the absence of statutory power, nothing can be collected from citizens by way of taxation.

9. I am obliged to circumscribe the rules set out in the Act of 2000, as amended, in a similar way. I am not dealing with a development of the common law. The roots of restrictions upon landowners from developing their property as they see fit, absent the tort of nuisance and interference with easements, are not grounded in any judicial decision. The planning code must therefore be construed within the limits set by statute. The remedies available within the scope of the power of the High Court to review administrative and quasi-judicial decisions are, in contrast, discretionary. It is to be doubted that, as has been argued by the applicant, the High Court, in exercising its power of judicial review in planning matters, is required to lend its aid unreservedly and without analysis to every application based upon a strict interpretation of the law, even where to do so would subject the travelling public to real danger and the environment to harm. This is a separate question to which I will return.

10. Analysing the powers of the Board to determine appeals, Costello J. in O'Keeffe v. An Bord Pleanála [1993] I I.R 39 at 52 made two observations which still apply:-

> "(i) The Board is required to determine the application as if it had been made to it in the first instance. This means that it is determining the matter de novo and without regard to anything that had transpired before the planning authority.
>
> (ii) The Board's decision, whatever it may be, has the legal effect of annulling the decision of the planning authority."

To those observations, one more should be added. Since the Board is a creature of statute, its obligation in considering an appeal is to check the validity of that appeal only against the conditions set out in the Act, and not by exploring as to what may have validly, or invalidly, transpired between a developer and a planning authority or an objector and the planning authority. Section 127(1) of the Act of 2000 makes this clear:-

> "127.—(1) An appeal or referral shall—
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> (a) be made in writing,
>
> (b) state the name and address of the appellant or person making the referral and of the person, if any, acting on his or her behalf,
>
> (c) state the subject matter of the appeal or referral,
>
> (d) state in full the grounds of appeal or referral and the reasons, considerations and arguments on which they are based,
>
> (e) in the case of an appeal under section 37 by a person who made submissions or observations in accordance with the permission regulations, be accompanied by the acknowledgement by the planning authority of receipt of the submissions or observations,
>
> (f) be accompanied by such fee (if any) as may be payable in respect of such appeal or referral in accordance with section 144, and
>
> (g) be made within the period specified for making the appeal or referral."

11. The Board is obliged to consider each of these conditions for an appeal. It does so, I understand, by checking each appeal against the statutory conditions establishing validity. That is all that is required under the Act. Further, in analysing those requirements, the Board is confined by the structure set out in section 127(2). Any appeal or referral which does not comply with the requirements just quoted is deemed to be invalid. Even absent any taxation-akin principle of confining the Board to its function as set out in statute, this latter provision makes it clear that there is to be no inquiry beyond administering the validity of an appeal against the requirements set out in section 127(1).

12. In O'Keeffe v. An Bord Pleanála a similar issue arose under the predecessor to the Act of 2000. Radio Tara Limited had applied to erect a 100 metre mast in County Meath. The county manager, despite being directed to refuse to grant permission by the county council, nonetheless granted it. An appeal was then initiated under the then applicable legislative provisions. After an oral hearing, An Bord Pleanála granted permission. Costello J. did not give a final determination as to whether the decision by the county manager was invalid. It is clear from the report of the case, however, that it was. Costello J.'s view was that even if the decision had been invalid, it constituted the necessary precondition for the purposes of an appeal to the Board. His observations on the jurisdiction of An Bord Pleanála, as set out at pp. 52-53 of the report, are pertinent to this appeal. These observations were not subject to any comment by the Supreme Court when the decision of Costello J. was ultimately reversed. I adopt them as correct as the decision fits within the scheme that is inherent in the structure of appeals under the Act of 2000:-

> "Turning then to the facts of this case I observe that there has been, as there had been in The State (Abenglen Properties Ltd.) v. Dublin Corporation [1984] I.R. 381 a "decision" made by the County Manager, that is, a decision on the 19th November, 1987 under s.26 of the Act of 1963 to grant permission. I will assume that it was made ultra vires and that as a matter of law he should have carried out the direction given to him by the Council's elected members. But I think I should construe the section as meaning that even though he may have acted ultra vires the decision is valid for the purposes of the appeal provisions of sub-s. 5 just as it is valid for the default provisions of sub-section 4. The Oireachtas clearly intended that if a notice of appeal was served within the statutory period then the Board should determine the application as if it had been made to it in the first place, and that it should not have any regard to what had happened before the planning authority. It would follow that I should construe this statute as meaning that no defect in the proceedings before the planning authority should have any bearing, or impose legal constraints, on the proceedings before the Board. The Board had no jurisdiction to consider the validity from a legal point of view of the County Manager's decision (see P. & F. Sharpe Ltd. v. Dublin City and County Manager [1989] I.R. 701) and it seems to me to be contrary to the proper construction of the section now to hold that the Board lacked jurisdiction to entertain the appeal merely because the County Manager's decision was ultra vires. There is no logical inconsistency in this conclusion for it would mean that as a matter of law (a) the County Manager's order did not confer permission to develop but (b) did enable the appeal machinery to be brought into operation—a result which seems to me to be a reasonable construction of the statute and to produce a sensible result."

13. Under reg. 29(1) of the Planning and Development Regulations 2001 (S.I. No. 600 of 2001) ("the Regulations"), as amended by the Planning and Development Regulations 2006 (S.I. 685 of 2006), where an application is made to a planning authority for planning permission, any person or body is entitled to make submissions or observations in writing on payment of the relevant fee. Such persons are usually referred to as objectors. They usually know that they need to make an observation or submission on a planning application because they live nearby and have seen a site notice; this is supposed to be prominently displayed on the public road nearest the site. Sometimes they read about a planning proposal in a newspaper. On receipt of a submission or observation, the planning authority is obliged to acknowledge same in accordance with Form No. 3 of Schedule 3 to the Regulations. Any submission or observation which is received after a period of five weeks beginning on the date of receipt of the application by the planning authority, must be returned together with the fee and a notification that it cannot be considered by the planning authority. In this instance, the planning authority acknowledged the submission in a formal way under regulation 29(2). Sometimes the planning authority may seek further information on a planning application, in which case a limited form of the process of public notification must be undertaken. Where, as happened here, further observations are sought from the person applying for planning permission, a notice of further information under the regulations must be published in accordance in a newspaper. If anyone wishes to make a submission or observation on this further information, supposing they had not already objected, they have two weeks in theory to do so under the Regulations. In practice, however, the date runs from the time when the further information or revised plans are received by the planning authority together with the newspaper notice and the site notice. This adds a potential measure of confusion. Under reg. 35(4) time, in effect, stops since the four week period, referred in s.34(8)(b) of the Act of 2000, within which the planning authority must make its decision, does not commence until the planning authority has received the newspaper notice and the site notice required under regulation 35(1). Be that as it may, it seems to me that any misrepresentation as to matters of a material kind, failures to comply with the site notice requirements, acts of deception on the part of a developer or acts by the planning authority which vitiate the purposes of planning controls by giving to the community at large an entitlement to make observations in respect of planning permission, may be taken into account by the court in considering a judicial review application. The question, ultimately, in respect of any such issues that might arise would be the effect of any such action or inaction and whether it constituted a substantial deprivation of the entitlement of the community, or of the developer, under the Act. Under s. 37(1) of the Act an entitlement to appeal a decision is limited to any persons who made submissions or observations on the original planning application and to the person applying for the permission. An exception arises in relation to adjoining landowners, which the second and third notice parties clearly are in this instance. Under s. 37(6) of the Act, the Board is required to follow a set statutory procedure for allowing such adjoining landowners appeal in accordance with the conditions therein set out. I regard the narrow lane in between the proposed developer and the objectors in this case, once used for herding cattle or sheep, as insufficient to bring the parties outside the category of adjoining landowners.

Chronology

14. I now set out the relevant steps taken by the parties in this case with a view to applying the analysis of the law just set out.

- 20th November 2008: the applicant applies to Galway County Council for a 31 house development up a laneway and outside the town of Kinvara, on the busy Ballyvaughan road where the speed limit is 100 km per hour.

- 26th November: the application is acknowledged by Galway County Council. There is then an initial period of five weeks, under reg. 29 of the Regulations, for the making of observations and submissions by those objecting to, or seeking that particular conditions be attached to, any grant of planning permission. This would have expired on 2nd January 2009.

- 21st January 2009: Galway County Council seeks further information from the proposed developer, the applicant in this judicial review.

- 20th March: this further information is given. Under the Regulations, the planning authority has now four weeks to make a decision. As and from the date of the newspaper notice, which I presume coincided with receipt by the planning authority of the information and notice, there was a two week period ending on 2nd April within which interested parties could make submissions.

- 14th April: Sean Forde and Jane Joyce, a married couple on adjoining land, and the second and third notice parties in this judicial review, object to the proposed development. They are outside the two week time limit. Galway County

Council, nonetheless, sends out an official acknowledgement.

• 15th April: Galway County Council grants permission for the proposed 31 house development, subject to nineteen conditions.

• 23rd April: Galway County Council writes to Sean Forde and Jane Joyce telling them that their observations to the planning authority were out of time and further informing them that they may appeal under s. 37(6) of the Act of 2000 as they are adjoining landowners.

• 12th May: Sean Forde and Jane Joyce lodge an appeal. The other objectors, there were two others, do not lodge an appeal.

• 14th May: Sean Forde and Jane Joyce write to the Board making observations and attaching the relevant documentation as proof that their appeal is valid, including the formal acknowledgement of their appeal received from Galway County Council.

• 18th May: Galway County Council writes to the Board claiming that the appeal is invalid.

• 8th July: further correspondence by Sean Forde and Jane Joyce is directed to the Board indicating that they are adjoining landowners. This is not analysed, as is required of the Board under the Act of 2000.

• 9th November: the Board refuses permission for the development in a reasoned decision related, in part, to traffic hazard and appropriateness.

• 25th February 2010: the solicitors acting on behalf of the Board responsibly point out to the applicant that if he is to challenge the decision of the Board then the acknowledgement of Galway County Council, on which the appeal was founded, dated 14th April 2009, must itself be challenged. Further correspondence ensued, but this did not happen.

Decision

15. The Board, being a creature of statute, is confined in its analysis by the Act of 2000, as amended, to such issues as to planning which arise on the appeal. The Board has not been granted authority to make any legal analysis of steps conducted in pursuit of a planning application by the planning authority. The statutory acknowledgment by Galway County Council of the submission by Sean Forde and Jane Joyce, the second and third notice parties, was valid on its face. That was the only matter to which the Board, in considering the validity of the appeal, was entitled to have regard. The Board has power to seek further information from a planning authority in relation to matters relevant to the proper planning and sustainable development of a site. Other powers of the Board under the Act of 2000, as amended, are similarly directed. The power argued for here on behalf of the applicant, to enquire into the validity of statutory notices, is of a quasi-judicial kind and is singularly absent from the statutory scheme for planning appeals. This application for judicial review must therefore be refused on that ground.

16. This decision is not made in isolation from what was argued by the applicant to be the complete absence of merit on the part of the Board and the notice parties. The Court does not accept that there is such an absence of merit. Had the matter as to the acknowledgement been argued in a judicial review on that issue, in the manner required as the law now stands under s. 50 of the Act of 2000, as amended, then a different party would be the respondent, namely Galway County Council. Furthermore, it is clear from the correspondence exchanged between the Board and the second and third notice parties, that Sean Forde and Jane Joyce were deeply concerned as to what they claimed to have been an apparently innocent misrepresentation by an official of Galway County Council. This representation was, they have asserted on affidavit, to the effect that the application for planning permission in question had been invalidly made and that a new application would be made in 2009 and referenced with that year. Whereas this allegation has been denied by Galway County Council, it would have been central to any issue as to the validity of the statutory acknowledgment that was received by Galway County Council out of time and as to whether the second and third notice parties had been put off guard in consequence of it. Were that to have happened, then their entitlement to make observations or submissions on the proposed development, fundamental to the structure of the correct operation of planning within the community, would arguably have been displaced. In addition to that, the Court must note that there were four previous planning applications for various schemes of development on this site. As to whether site notices were properly put up or taken down can cause an application to have been improperly made.

Discretion

17. Since the matter of discretion was raised in argument, and was made the subject of helpful written submissions by counsel, but is not now necessary to the decision that the Court must make, only a brief observation on that issue is appropriate. Default permissions are part of the structure of the Planning and Development Acts 2000 to 2007. A developer applies to his or her local authority for permission to build a structure or to change the use of a premises. If the planning authority does not make a decision within relevant statutory time limits, a planning permission may be granted by operation of law; this may also depend on conformity with the development plan. The situation in this litigation is different to an order of the court which enforces or confirms any such default permission. In the instance of a default permission there is never been any assessment as to whether a proposed development should or should not be granted. There was such an assessment here.

18. A judicial review application is not concerned with the merits of any individual application for planning permission or for any other form of statutory licence, but with the procedure followed in reaching that decision. It has been argued that an order of the court quashing a decision should automatically follow in every case where such procedures have been found to be defective. I cannot accept, however, that the court is to be shorn of its discretion in judicial review matters simply because the issue concerns planning. To my mind it is not the law that in every case the court must grant judicial review so as to effectively authorise a development where the proposal for development has been adjudged by the Board to, for instance, imperil traffic safety or to subject the water table to potentially life-threatening contamination or to further despoil the countryside with suburban development. Having read the appeal file in this case, it is clear that the Board had very strong reasons for refusing this application. In the context of the refusal of previous applications by the planning authority, and the clear reasons given by the Board for refusal in this instance, the initial grant of permission by Galway County Council for this proposed development is very difficult to understand.

19. Under s.10 of the Act of 2000, as amended, every local authority, and An Bord Pleanála on appeal, is obliged to have regard to

the proper planning and sustainable development of an area. This statutory obligation not only applies to the proposed scheme for the potential future development for an area that must be set out in the statutory development plan that each local development authority must produce, but is surely the central principle of planning law. Without that principle, it is difficult to think what the point is of statutory regulation of development. In that section there are examples given of what the provisions of the development plan should have regard to. None of these detract from that central principle; rather, they reinforce it. Instances set out in the section centre on proper area zoning with proper provisions of infrastructure, the protection of our physical heritage, the preservation of the character of the landscape, the conservation of the environment and the avoidance of accidents. These are not provisions which local authority planning departments are entitled to ignore. The priceless heritage of generations of work within the countryside, as reflected in our landscape and in the separation of town from rural areas, has been an invaluable economic resource to this country since the foundation of the State. Tourism is attracted by the very environment that the planning code is designed to foster and protect. The obligation to plan for sustainable development must take into account the need of the nation for revenue from this vital industry. To mix up the countryside with development only appropriate for suburbs and towns deforms the character of proper planning. Such an approach does not sustain an ever more important resource to the nation's economy.

20. In the instance of this development, some 31 houses were proposed to be sited by Galway County Council on a main roadway with vehicles limited to speeds of up to 100km per hour. The planning permission appealed to the Board also extended a town in an unplanned manner in an important tourist area. It would have resulted in the blind movement, in terms of sight lines for traffic, of many dozens of daily vehicle journeys to and from this suburban-type estate both onto and across the roadway. Traffic alone is an obvious and serious hazard in terms of proper planning and sustainable development, as the report of the statutory inspector to the Board states. It would be difficult to see why the Court should be required to authorise a public danger. It is also difficult to see why the aid of the Court must automatically be invoked through the discretionary order of certiorari in a manner that reverses a well-reasoned decision of the Board as to what is proper planning and which has regard to how the development of housing should be sustainable in the context of the national economic resource of our countryside and its delineation from suburban or town environments.

21. I would finally add that under the Planning and Development Acts 2000 to 2007, the Board is an appeal body. Therefore, the reasoning of its decisions should be studied at local authority level.