

THE HIGH COURT

[2015 No. 317JR]

**IN THE MATTER OF AN APPLICATION ON NOTICE FOR LEAVE TO APPLY FOR JUDICIAL REVIEW, AS PRESCRIBED UNDER
SECTION 50A(2) OF THE PLANNING AND DEVELOPMENT ACT, 2000, AS AMENDED OF A DECISION OF CLARE COUNTY COUNCIL
REGARDING PLANNING APPLICATION REFERENCE P15/88**

BETWEEN:

MICHAEL DUFFY

APPLICANT

- AND -

CLARE COUNTY COUNCIL

RESPONDENT

- AND -

BOARD OF MANAGEMENT, SCOIL NAOMH PHÁDRAIG

NOTICE PARTY

JUDGMENT of Max Barrett delivered on 8th November, 2016.

I. Background

1. On 19th February, 2015, Clare County Council received an application from the above-named Board of Management for permission to replace an existing septic tank serving Scoil Naomh Phádraig in O'Callaghan's Mills, a village in County Clare. At all times thereafter, this application was available for public inspection at the Council's offices and at an online address.

2. Pursuant to Article 29 of the Planning and Development Regulations 2001, as amended, Mr Duffy had the opportunity during the five-week period from 19th February, 2015, to 25th March, 2015, to make a submission or application to the planning authority in respect of the application aforesaid. Throughout this five-week period, no submission or observation was made by Mr Duffy about the application. Nor was any submission or observation received from anyone else about the planning application.

3. On 7th April, 2015, the Council received a letter dated 2nd April from Mr Duffy. Having regard to the contents of the letter, the Council considered it to be a submission/observation on the planning application and thus received out of time. This being so, the Council returned the letter to Mr Duffy. On 10th April, 2015, the Council decided to grant a conditional planning permission for Scoil Naomh Phádraig's development.

4. On 9th June, 2015, Mr Duffy commenced the within proceedings by which he prays for an order of *certiorari* quashing the Council's decision of 10th April, 2015.

5. At the outset of the hearing for leave, counsel for Scoil Naomh Phádraig contended that there was a significant issue arising as to the timing of the within leave application and that it might make sense to proceed with that aspect of matters first. With the agreement of the parties, the court therefore heard each of them, and Mr Duffy again in reply, as to the issue of the timing of the leave application only. The court then adjourned the proceedings until it returned with its findings on the issue of time. As it happens, the court has concluded that the leave application is out of time and cannot proceed further.

II. Summary Chronology

6. Given the extent to which this judgment focuses on the issue of time, it is helpful to provide a summary chronology of some key dates arising:

- 06.02.15. Newspaper Notice concerning proposed development.
- 17.02.15. Site Notice erected.
- 19.02.15. County Council receives planning application.
- 20.02.15. Application Validated and Acknowledgement Sent.
- 13.03.15. Site Inspection by County Council.
- 25.03.15. Expiry of Timeframe for Submissions/Observations.
- 07.04.15. Letter of 2nd April received by Council and returned as out-of-time.
- 10.04.15. Respondent makes decision to grant conditional planning permission.
- 11.05.15. Planning permission granted.
- 09.06.15. Applicant commences proceedings.

III. The Timing of the Within Application

7. So far as relevant to the within proceedings, s.50 of the Planning and Development Act 2000, as amended by the Planning and

Development (Strategic Infrastructure) Act 2006, provides as follows:

"(2) A person shall not question the validity of any decision made, or other act done by –

(a) a planning authority, a local authority or the Board in the performance or purported performance of a function under this Act...

otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts...(the 'Order')....

(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...

(8) The High Court may extend the period provided for in subsection (6)...within which an application for leave referred to in that subsection may be made but shall only do so if it is satisfied that— (a) there is good and sufficient reason for doing so, and (b) the circumstances that resulted in the failure to make the application for leave within the period so provided were outside the control of the applicant for the extension."

8. In the judicial review that will follow if the leave now sought is granted, Mr Duffy seeks to challenge the validity of the following decisions of the Council:

(1) that the planning application made was valid;

This decision was made on 20th February, 2015. So the relevant eight-week period expired on 16th April, 2015.

(2) that the letter of 2nd April, 2015 was a submission/observation on the planning application, and out of time;

(3) that the letter of 2nd April, 2015 was not the receipt of further information within the meaning of Article 35 of the Planning and Development Regulations;

(4) not to consider whether the contents of the letter of 2nd April, 2015, contained significant additional data;

These decisions were made on 7th April, 2015. So the relevant eight-week period expired on 1st June, 2015.

(5) the decision to grant planning permission.

This decision was taken on 10th April, 2015. So the relevant eight-week period expired on 4th June, 2015.

9. Mr Duffy, an experienced lay-litigant who has previously been involved in separate planning litigation, commenced the within proceedings on 9th June, 2015, and thus they were commenced out of time. Mr Duffy has not identified any good reason why the eight-week period should be extended by the court. Nor is there any suggestion that the failure to make the application on time was outside Mr Duffy's control. So far as the decisions previous to (5) are concerned, Mr Duffy appears to the court to be and represent an *exemplum classicum* of that litigant referred to by Murray C.J. in *Harding v. Cork County Council* [2008] 4 I.R. 318, 340, who *"sit[s] back and let[s] the process proceed at length until it reaches its final conclusion and then seek[s] to impugn the final decision where it would have been properly open to such a person to seek a remedy at an earlier stage, such as by way of mandamus"*.

IV. The Three-Day Issue

10. Mr Duffy claims that just prior to the hearing of the within application, he realised that there had been a contravention of the effective requirement under reg.31 of the Planning and Development Regulations 2001, as amended, that following on a decision to grant permission, the actual permission must not issue sooner than three working days after the expiration of the period for the making of an appeal to An Bord Pleanála. Here, the Council made the decision to grant the permission on 10th April, 2015. The four-week period for bringing an appeal to An Bord Pleanála ended on 8th May, 2015 (a Friday), and the permission issued on 11th May, 2015 (the following Monday), so less than three working-days later. Notification requirements are clearly of considerable importance, given the significance attached by the planning code to public participation in the planning process. That said, it is difficult to see that in a context where no appeal was ever brought or sought to be brought to An Bord Pleanála and no prejudice of any nature has arisen as a result of the early issuance of the planning permission, the breach of reg.31 identified falls to be ascribed especial significance.

11. No mention of the line of complaint concerning reg.31 appears in Mr Duffy's pleadings, despite the fact that all of the relevant facts were available to him before he brought the within application. To allow Mr Duffy to amend his pleadings at this time so that he could now plead a new but patently out-of-time complaint in order to breathe fresh life into proceedings that must otherwise fail as out-of-time would be greatly to prejudice the rights of the other parties to these proceedings at the time of the amendment and thus to contravene a long line of case-law commencing with the 19th century decision in *Weldon v. Neal* (1887) 19 QBD 394, echoed in the prominent 20th century decision of the Supreme Court in *Bank of Ireland v. Connell* [1942] I.R. 1, and of continuing vitality in the 21st.

V. Conclusion

12. For the reasons identified above, the court concludes that (1) the within application is out-of-time, and (2) no amendment of the pleadings should be allowed at this time.