Neutral Citation Number: [2007] IEHC 356

THE HIGH COURT

JUDICIAL REVIEW

[2007 No. 457 J.R.]

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

BETWEEN

GERARD DOONER AND TERESA DOONER

APPLICANTS

AND

LONGFORD COUNTY COUNCIL

RESPONDENT

AND

DAN MAGAN

NOTICE PARTY

Judgment of Mr. Justice Brian McGovern delivered on Thursday 25th October, 2007

1. The Facts

The notice party submitted an application for planning permission under the Planning Acts for construction of a mixed use development in the village of Killashee, Co. Longford. The development consisted of four parts:

(i) A three-storey block including

(a) a retail unit of 253 sq. metres;

(b) a crèche facility of 221 sq. metres; and

(c) 5 three-bedroomed town houses.

(ii) A two-storey block comprising a restaurant of 205 sq. metres;

(iii) Associated car parking, landscaping and other associated external works; and

(iv) A connection to a foul water treatment plant.

2. The location of the development was shown on plans and particulars submitted to the respondent by the notice party at the time of the application and in further information furnished on the 18th February, 2005 and 13th May, 2005. The applicants, who own a public house across the road from the proposed development objected to the application.

3. On the 8th June, 2005, the respondent granted permission to the notice party to carry out the development. The applicants appealed the decision.

4. On the 15th December, 2005, An Bord Pleanála granted permission for the proposed development subject to conditions. There were 20 conditions imposed. For the purposes of this case, the following conditions are relevant:

> "1. The development shall be carried out in accordance with the plans and particulars lodged with the application as amended by further plans and particulars received by the Planning Authority on the 18th February, 2005 and the 13th May, 2005, except as may otherwise be required in order to comply with the following conditions.
>
> Reason: In the interest of clarity.
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> 11. The two mature walnut trees and the mature beech tree in the vicinity of the agricultural access (as originally proposed) shall be retained on site. These trees shall be protected during the construction period by the erection of stout timber fences which shall extend to the branch spread of each tree. The areas beneath the trees shall not be used for the storage of any soil, topsoil, spoil, waste, construction materials or machinery, site compound or offices, car parking or any other use which could cause damage to the root systems of the trees.
>
> Reason: To protect these trees which contribute in a significant way to the character of the site and of the wider village, in the interests of visual amenity.
>
> 15. Alterations to the alignment of the N63, as provided for in the additional information submitted to the Planning Authority on 18th February, 2005, shall be carried out at the expense of the developer, to the standards of, and with the agreement of, the Planning Authority.
>
> Reason: In the interest of traffic safety."

5. The notice party responded to the planning section of the respondent through its engineer, Mr. Mark Cunningham. The date of the letter is not clear but it has been stamped by the planning department of the respondent as having been received on 8th January, 2007. In that letter Mr. Cunningham deals with the relevant conditions as follows:-

> "Condition No. 1:
>
> The developer shall comply fully with the Condition No. 1 in full from start to completion, accept (sic) as may otherwise be required in order to comply with the following conditions.
>
> Condition No. 11:
>
> In relation to the existing two mature Walnut Trees located to the rear of the site together with the mature Beech Tree,

we as Acting Consulting Engineers would like to point out that the existing mature Beech Tree is in our opinion not located on the developer's landholding and in any event in our opinion it is dead. In our opinion it should be removed as soon as possible as it is located in close proximity to the road frontage. In relation to the two mature Walnut Trees please note that the rear of the proposed structure is located approximately 4 to 5 metres away from the centre of the trees and we as Acting Consulting Engineers for the above-mentioned development have appointed a tree surgeon so as to monitor the two existing Walnut Trees and prepare a report on how best to ensure that these trees are protected during the course of construction. In addition, please note that the developer will construct a stout timber fence around the trunk of each tree out as far as possible so as to ensure that the branch spread of each tree is protected as much as possible during the course of construction. Please also note that the area beneath the trees shall not be used for storage of any soil, topsoil or other construction materials or machinery during the course of construction so as to ensure that no damage is caused to the root system of the trees.

Condition No. 15:

In relation to Condition No. 15 of the enclosed grant of Planning Permission by An Bord Pleanála in Appendix A, please note that it is our opinion that the building should be relocated in the north-eastern direction, i.e. in the direction of Longford, so as to facilitate a larger localised carriage widening so as to allow the safe negotiating of the nearby bend for larger articulated vehicles. In our opinion the relocating of this building in the north-eastern direction should be by approximately 2m past the building line of the right-hand gable wall of the building on the opposite side of the road in the south-eastern direction. In relation to the proposed finished floor level of the above-mentioned development, it is our opinion that the finished floor level should be located at a minimum of 150mm above the highest point of the adjacent public footpath."

6. On 22nd February, 2007 Mr. Cunningham wrote again to the respondent with particular reference to conditions 11 and 15 (which he erroneously referred to as conditions 10 and 14). He made reference to an arboricultural assessment carried out by J. M. McConville & Associates on behalf of the notice party, which he refers to as "Appendix A" in which it is recommended that the proposed building should be repositioned approximately 14.5m in the north-western direction in order to ensure the protection of the two walnut trees. A revised site layout drawing described as "Appendix B", showing the repositioning of the proposed building in accordance with the recommendations of J.M. McConville & Associates was enclosed. I have already indicated that the reference in the letter to conditions 10 and 14 clearly should have been to conditions 11 and 15. A further error crept in to the letter which seems to have had its origin in the report of J.M. McConville & Associates. This was a reference to the repositioning of the buildings 14.5 metres to the north-west. When the various drawings and plans were produced in the course of the hearing it became immediately apparent that the building could not have been moved to the north-west for two reasons. In the first place it would have brought the building closer to the N63 and secondly it would have encroached upon the walnut trees. It is difficult to understand how this fundamental error was allowed to appear in a report from the arboricultural consultants and then be repeated in the correspondence from a consulting engineer. Sadly, one of the features in this case was a significant element of vagueness and uncertainty in the positioning of buildings, trees and other relevant fixed data on the drawings and maps.

7. When An Bord Pleanála granted permission for the development subject to conditions it was clear that two of the matters of concern were the preservation of two mature walnut trees and the realignment of the N63. The development was to be carried out in accordance with the plans and particulars lodged with the application as amended by further plans and particulars received by the planning authority on 18th February, 2005 and 13th May, 2005. The document of 18th May, 2005 is a map dated 14th February, 2005 and described as "Appendix B". The map is stamped as having been received by the planning section of the respondent on 18th February, 2005. On the same date the respondent received the report from Colin Buchanan & Partners which has been submitted on behalf of the notice party. This dealt with the concerns raised by the respondent that the proposed development would further restrict the limited intervisibility between vehicles approaching the acute bend at the south-western corner of the site on the N63. The report dealt with how this problem would be addressed. It is not entirely clear what plans and documents were received by the planning authority on 13th May, 2005 although it seems to have been the correspondence between the respondent and the notice party that took place between 12th March, 2005 and 12th May, 2005 dealing with the issue of restricted visibility of the bend of the N63 close to the proposed development. (See affidavit of Donal Mac an Bheatha sworn on 5th June, 2007.)

8. On 7th March, 2007 the respondent wrote to the notice party referring to the proposals made by Mr. Mark Cunningham, Consulting Engineer on behalf of the notice party concerning conditions 11 and 15. Again this letter refers to the conditions incorrectly as conditions 10 and 14. The submissions of Mr. Cunningham appear to be those contained in his letter of 22nd February, 2007 to the respondent and included the proposal that the building be repositioned approximately 14.5m "in the north-western direction …" and a proposal to put in a raft foundation to support the building loads close to the walnut trees. The letter of 7th March confirmed that the notice party's proposals were acceptable subject to some further provisions of the road design department of the local authority. When the applicants became aware of this they wrote to the respondent on 14th March to the local authority pointing out that the conditions relating to the walnut trees had not been complied with and asking for confirmation that the letter purported to give permission to the notice party to reposition his building as per the revised drawing lodged by Mr. Mark Cunningham by his letter of 22nd February, 2007. The confusion about the direction in which the building was to be moved continued because he referred to it being moved in "the north-western direction" even though in a previous letter received by the respondent on 8th January, 2007 he referred to the fact that:

> "… it is our opinion that the building should be relocated in the north-eastern direction, i.e. in the direction of Longford. …"

In any event, what transpired was that he produced a plan on which the new position of the building was to be marked in blue and showed that it was to be located 14.5 metres to the north-east of where it had originally been shown. This was ultimately agreed with the respondent.

The applicant's case

9. An Bord Pleanála granted permission for the development subject to twenty conditions. Some of the conditions required agreement to be reached with the local authority concerning the realignment of the N63 which bordered the site and ancillary matters related to that. The applicant accepts that An Bord Pleanála is entitled to impose conditions leaving certain matters to be agreed between the developer and the planning authority but argued that such conditions only allow for a certain limited degree of flexibility having regard to the nature of the enterprise. See *Boland v. An Bord Pleanála* [1996] 3 I.R. 435. The applicant contends that in this case the local authority permitted the realignment of the road and the consequent movement of the main building in the development by a distance of 14.5 metres to the north-east from where it was originally shown on the plans and drawings submitted for the application for planning permission. The applicant contends that the moving of this building by an extent approaching 50% of its length immediately adjacent to a public highway and within an urban setting fell far outside the limited scope permitted in law and was, in effect, such a radical departure from the plans that it required a new planning application.

10. The applicant claims that while it took part in the planning process at the application to the respondent and on appeal to An Bord Pleanála, it was not a party to the discussions which culminated in the agreement between the respondent and the notice party as set out in the letter of 7th March, 2007. The applicant claims that since the letter of 7th March, 2007 constitutes an agreement between the respondent and the notice party going far beyond the permission granted by An Bord Pleanála, the respondent has acted *ultra vires*. The applicants also claim that the decision conveyed in the letter of 7th March is unreasonable in circumstances where it was based upon incorrect and misleading information, maps, plans and specifications.

11. The respondent and the notice party between them claim that the respondent had authority to conclude the agreement because of condition No. 15 which provided for the realignment of the N63. They contend that the respondent was not only empowered but obliged to enter into an agreement with the notice party pursuant to the Board's decision and that the movement of the building was necessary having regard to the alterations in the alignment to the N63. Further, they argue that the agreement between the respondent and the notice party was a valid exercise that the power to agree such alterations as were lawfully delegated to the respondent by An Bord Pleanála in condition 15 of the granted planning permission. It is contended on behalf of the respondent and the notice party that the movement of the principal building in the development was required both to comply with the condition related to the realignment of the adjoining road and also to protect the walnut trees which were referred to in condition No. 11. The notice party says that the applicants have not shown any prejudice and it is contended on behalf of the notice party and the respondents that the applicants delayed in making the application and do not have a substantial interest in the matter. The respondent asserts that if the applicants desire to restrain an unauthorised development the appropriate means of doing so is by way of application pursuant to s. 160 of the Planning and Development Act, 2000. They say that it is entirely inappropriate to seek such relief in judicial review proceedings seeking to quash a decision of the planning authority. The respondent is supported by the notice party on this issue.

The law
12. The court has been referred to a number of legal authorities by the parties and I will refer to those that seem most relevant in this case.

13. In *Boland v. An Bord Pleanála* [1996] 3 I.R. 435 the Supreme Court set out the criteria to which An Bord Pleanála was entitled to have regard in deciding whether to impose a condition leaving a matter to be agreed between the developer and the planning authority. Hamilton C.J. referred to the case of *Houlihan v. An Bord Pleanála*,(an unreported decision of Murphy J. on 4th October, 1993). In that case Murphy J. had expressed the view that An Bord Pleanála had the right to delegate to a planning authority power to agree with the developer the revisions of the layout which would be consequent upon re-siting of the boundary. He expressed the view that some degree of flexibility must be left to any developer who is hoping to engage in a complex enterprise and that the extent to which flexibility was permissible is largely a matter of degree. In the *Boland* case Hamilton C.J. stated at p. 466:

> "In imposing a condition that a matter be left to be agreed between the developer and the planning authority, the Board is entitled to have regard to:
>
> (a) the desirability of leaving to a developer who is hoping to engage in a complex enterprise a certain limited degree of flexibility having regard to the nature of the enterprise;
>
> (b) the desirability of leaving technical matters or matters of detail to be agreed between the developer and the planning authority, particularly when such matters or such details are within the responsibility of the planning authority and may require redesign in the light of the practical experience;
>
> (c) the impracticability of imposing detailed conditions having regard to the nature of the development;
>
> (d) the functions and responsibilities of the planning authority;
>
> (e) whether the matters essentially are concerned with offsite problems and do not affect the subject lands;
>
> (f) whether the enforcement of such conditions requires monitoring or supervision."

14. In *Boland v. An Bord Pleanála* the court held the matter stipulated in the conditions referred to in the case were essentially technical matters or matters of detail relating to the control of the flow of traffic. In the case of *O'Connor v. Dublin Corporation & Anor*. (Unreported, O'Neill J., 3rd October, 2000) the court held that significant changes in two internal blocks in part of a development were material alterations to the planning permission granted by An Bord Pleanála and an agreement between the planning authority and the developer which purported to permit these alterations was *ultra vires* the powers of the planning authority. In that case the court held that, "the reasonableness test" as laid down in *O'Keeffe v. An Bord Pleanála* was not the appropriate way of looking at the matter but rather it should be approached on the basis of ascertaining the true and correct meaning of the conditions and whether the respondents have power to agree to the conditions which were in issue. It seems to me that that is the way I should approach the issues which arise in this case.

15. I am satisfied that in deciding upon the issues which arise in this case I have to consider two matters. The first is whether the respondent had jurisdiction to conclude an agreement with the notice party? If the answer to that is yes, then I must consider whether the respondent had jurisdiction to conclude the particular agreement as evidenced by the letter of 7th March, 2007.

Findings
16. The parties to this application accept that the applicants have a substantial interest in the matter which gives them sufficient *locus standi* to bring the application.

17. I am satisfied that there was no unnecessary delay on the part of the applicants in bringing this application and that they acted promptly. The applicants were not contacted by the respondent or the notice party between 16th December, 2005 and January, 2007. I accept that the applicants called to the offices of the respondent on 5th January, 2007 and they commenced correspondence with the respondent on 14th March, 2007. In the course of that letter they raised their objections to what they described as a "… major/significant change in the original planning permission issued by An Bord Pleanála".

18. The respondent and notice party assert that the applicants should have brought an application under s. 160 of the Planning and Development Act, 2000 which provides for injunctions in relation to unauthorised development. The notice party was purporting to act on foot of a permission and the issue which arose in this case was whether or not the respondent had power to agree to conditions which permitted a movement of the main building by some 14.5 metres. In the circumstances it seems to me that the applicants were entitled to proceed as they did by way of judicial review.

19. The decision of An Bord Pleanála made on 15th December, 2005 has not been appealed by the applicants. I am quite satisfied that that decision imposed certain conditions which had to be complied with if the development was to proceed. These conditions included the requirement on the respondent and the notice party to agree certain matters relating to the preservation of two walnut trees and the realignment of the N63 road adjacent to the site. Clearly, therefore, the respondent did have jurisdiction to conclude an agreement with the developer relating to those matters. Not only did the respondent and the notice party have power to enter into an agreement but they were obliged to do so.

20. The real question in this case is whether the respondent had power to enter into the agreement which was concluded. In order to answer that question one has to determine whether it came within the ambit of the *Boland* case. In other words, was it an agreement which left to the notice party a "certain limited degree of flexibility having regard to the nature of the enterprise". In the *Boland* case the court held that one of the matters to be taken into account is the functions and responsibilities of the planning authority. Undoubtedly the respondents have functions and responsibilities with regard to the road network including the N63 where it passed the development site. It seems to me that it was entirely legitimate for the respondent to enter into an agreement with the notice party concerning the realignment of the N63 and how that could best be done.

21. The applicants engaged in the planning process and objected to the development when it was being considered by the respondent. The development was allowed to proceed and the applicants then appealed to An Bord Pleanála. Again they were unsuccessful. The conditions which have now been agreed resulted from information which evolved through reports long after the decision of An Bord Pleanála. The decision of An Bord Pleanála was made on 15th December, 2005. The first time the issue of moving the building some 14.5 metres to the north-east arose was in early 2007. The applicants had no involvement in the decision to permit that change in the development and they say that it is not within the sphere of limited flexibility that would be permitted by *Boland v. An Bord Pleanála.*

22. It is not the function of the court to decide whether any building within the development should be moved to one place or another within the site but the courts do have a function in deciding whether or not what was permitted by the respondent comes within the permissible limits which have been placed on local authorities when entering into agreements with developers following on conditions imposed by An Bord Pleanála. There is no dispute that the respondent has accepted proposals which will involve the moving of the main building in the development by 14.5 metres to the north-east. In my opinion this is a substantial movement having regard to the nature of the site and does not come within the limited degree of flexibility permitted to developers by *Boland v. An Bord Pleanála.* I hold that the respondent acted *ultra vires* in reaching an agreement with the notice party which permitted such an extensive departure from the drawings and plans which had been submitted to An Bord Pleanála and formed the basis of the decision by the Board. The court cannot express any view as to whether or not the applicants are succeed in their objections to the proposed site of the main building. This would be a matter for the planning authority and, on appeal, An Bord Pleanála should the matter come before them.

23. Since I have held that the respondent acted *ultra vires* in entering into the agreement reached on 7th March, 2007 I quash the decision. It follows that if the notice party wishes to proceed with the development in accordance with the terms agreed in the letter of 7th March, 2007 that this should form the basis of a new planning application.