Neutral Citation Number: [2011] IEHC 143

THE HIGH COURT

2008 1341 JR

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

BETWEEN

FRANCIS SCANLON

APPLICANT

v.

SLIGO COUNTY COUNCIL

RESPONDENT

Judgment of Mr. Justice Hedigan delivered the 14th day of April, 2011.

1. The applicant seeks an order of *certiorari* quashing the decision of the respondent County Council dated 7th October, 2008, whereby the Council decided that its request for further information pursuant to Article 33 of the Planning and Development Regulations 2006 had not been complied with. The applicant also seeks an order of *certiorari* quashing the decision of the respondent dated the 16th October 2008, whereby it declared the applicant's planning application to be withdrawn pursuant to Article 33(3). The applicant seeks various declaratory reliefs' including a declaration that his application for planning permission has not been validly deemed to be withdrawn pursuant to Article 33(3), a declaration that no valid requirement under Article 33 (1) or (2) made by the respondent had not been complied with by the application, a declaration that if any requirements of the respondent had not been complied with within the period of time permitted, that such requirements were not valid requirements under Article 33(1) or Article 33(2) of the regulations, a declaration that the applicant's application for planning is valid, subsists and falls to be determined by the respondent. Finally, and as an alternative the applicant seeks an order of *mandamus* compelling the respondent to determine the applicant's application for planning permission.

2. The applicant is a quarry proprietor who resides at Lugnagall, Glencar, Co. Sligo.

The respondent is the County Council with responsibility for the administrative area of County Sligo.

3.1 The applicant is the owner of a quarry situate at Lugnagall, Glencar Co. Sligo. The quarry is partly located within the Crockauns/Keelogyboy National Heritage Area. The quarry commenced operation prior to 1st October, 1964, and therefore it did not require planning permission until the commencement of Section 261 of the Planning and Development Act 2004. Section 261 sought to apply planning controls to quarries which were in existence prior to the coming into effect of the 1963 Planning and Development Act.

3.2 The applicant was required, pursuant to section 261 to apply for registration of the quarry. This application was made on 20th April, 2005. On 7th December, 2005, the respondent wrote to the applicant to inform him that the quarry had been registered under Section 261. The respondent subsequently considered the issues raised by the quarry and a report prepared by a Council official. In light of this consideration it was determined that the applicant should be required to apply for planning permission for the quarry and the application should be accompanied by an Environmental Impact Statement (EIS). On the 22nd October, 2007, the applicant submitted the planning application accompanied by an EIS.

3.3 The due date for the determination of the planning application was 16th December, 2007, however on 12th December, 2007, the respondent served a notice seeking further information from the applicant. This notice was served pursuant to Article 33 of the Planning and Development Regulations 2006. Such a notice must be complied with within six months, that period may however be extended for a further three months. In the present case an extension was sought by the applicant and granted by the respondent which extended the period for complying with the notice until 11th September, 2008. The response to the notice seeking further information was received by the respondent on the last possible day for consideration of same i.e. 11th September, 2008. After considering the applicants response the respondent wrote to him on 7th October, 2008, stating that its request for further information had not been complied with in eight different respects. The respondent sent a further letter to the applicant on the 16th October, 2008, stating that his application for planning permission was deemed withdrawn pursuant to the provisions of Article 33 of the Planning and Development Regulations 2006. In the within proceedings the applicant seeks to quash the decision of the respondent that its request for further information had not been complied with and the decision of the respondent whereby it declared the applicant's planning application to be withdrawn.

4. Applicant's Submissions

4.1 The applicant submits that the exercise by the respondent of its functions in making the impugned decision was the exercise of an administrative or ministerial function as opposed to the exercise of a function vested in the respondent as a planning expert. The exercise of this function only required the respondent to decide whether the applicant had complied with its request for further information. The respondent was not required to decide whether the applicant had adequately complied with the request. This function was therefore of a ministerial rather than a judicial nature. A similar distinction was made in the case O'Connor v. Dublin City Council & Borg Developments (Unreported, High Court, 3rd October, 2000) where O'Neill J stated as follows at 29:-

> "…what we are dealing with here is the tail end of the planning process. …Ultimately, An Bord Pleanála finally determined the matter by its decision to grant planning permission on the 20th of March 1991. Thereafter all that remained to be done was to achieve compliance with the conditions in the planning permission by way of an agreement between the Notice Party and the Respondents or failing that by way of determination by An Bord Pleanála. This final leg of the

> procedure was confined between the Notice Party and the Respondents and did not include the Applicant or any other members of the public. It necessarily follows from this, that what is required of this compliance procedure is no more than faithful implementation of the decision of An Bord Pleanála. This jurisdiction so invoked on the part of the Respondents is a very limited one and of a ministerial nature… This exercise is wholly and radically different to the jurisdiction exercised by a planning authority after the statutory planning procedure has been gone through, in making its decision to grant or refuse an application for permission or approval. This latter exercise is clearly of a judicial nature and involves the local authority drawing on its resources of expertise in planning matters and having regard to the circumstances of each case and the relevant planning considerations making a decision which necessarily involves on its part an, extensive discretion."

In making the impugned decision the respondent was not exercising planning expertise. In these circumstances the applicant submits that the appropriate test to be applied by this Court in determining whether the decision was valid is not the test of reasonableness as envisaged in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. The test should be whether the decision of the planning authority was wrong as a matter of law.

4.2 Under article 33(3) of the Planning and Developments Regulations, 2006, a planning authority can declare a planning application to be withdrawn for failure to comply with a request for further information. It is submitted that the purpose of article 33(3) is to deal with circumstances where no genuine attempt was made by an applicant to deal with a request for further information and not to deal with circumstances where an applicant comprehensively replied to a planning authority's request for further information. It is argued that the response submitted on the applicants behalf was comprehensive and genuine. The applicant therefore submits that the impugned decisions by the respondent are invalid and wrong as a matter of law.

4.3 In the alternative and without prejudice to the aforesaid submissions, the applicant submits that the information submitted by his experts to the respondent on 11th September, 2008, comprehensively dealt with the respondent's request for further information and that, therefore, the respondent's decision that its request for further information had not been complied with was unreasonable and contrary to plain reason and common sense within the meaning of the test in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. The applicant submits that if the respondent's aforesaid decisions are invalid then it follows that the applicant's planning permission has not been validly withdrawn and that his planning application remains valid and falls to be determined by the respondent.

4.4 The applicant submits that in the event that this Court finds some of the respondent's requests for further information were not complied with by the applicant, such requests were not valid requests under Article 33(1) or 33(2). In this respect the applicant submits that the respondent's requests were not valid requests on the grounds that:-

> "a) a number of the matters referred to in the notice for further information were not matters permitted under statute to be included therein,
>
> b) a number of the matters were already clear from the applicants planning application,
>
> c) other matters were not valid request for further information at all but amounted to efforts by the respondent as planning authority to change the planning application and thereby reduce the amount of compensation payable to the applicant upon a refusal of that planning permission under Section 261.
>
> d) the respondent's purported request for further information was merely a device employed by the respondent in order to avoid complying with the statutory obligations to give a decision on the applicant's application for planning permission."

4.5 The applicant submits that the Council were attempting to use Article 33 to vary the permission sought. This, it argues, is impermissible as is clear from the decision in the case of *Illium Properties Limited v. Dublin City Council* [2004] IEHC 327, where O'Leary J held that at least four of five requests made of the applicant by the respondent in those proceedings under Article 33 in respect of the applicant's application for planning permission were not proper requests for further information under Article 33. The applicant, in particular, relies on the following extract from the judgment of O'Leary J where he states, at p. 326, as follows:-

> "The power of the planning authority to request further information under Article 33 is limited to matters which fall within Article 33. Article 33 requests should not be used to vary a planning application. Variation can only be done by agreement or by condition (and in these circumstances to a limited extent only in view of the public interest in planning applications) or by re-application. If a planning authority cannot get agreement or cannot apply suitable conditions to its decision it must accept or refuse the application as submitted."

In the event of this Court holding that the applicant failed to reply to some of the respondent's request for further information, the applicant seeks declaratory relief declaring that those requests were not valid requests under Article 33.

5. Respondent's Submissions

5.1 The applicant complains about the content of the request for further information made by the respondent however at no time following service on the applicant of the notice seeking further information did the applicant's advisers contact the respondent's officials to discuss difficulties being experienced in interpreting the requirements of the notice seeking further information nor was any issue raised as to the appropriateness or scope of the request. The respondent submits that the applicant's failure to lodge his response until 11th September, 2008, which was the last possible day for consideration of same gave rise to a situation whereby it was impossible to address the deficiencies identified by the respondent within the statutory period provided for in Article 33.

5.2 The entitlement to serve a notice seeking further information derives from s. 34 (8) (b) of the Planning and Development Act 2000. Where such a notice is served s.34(8) (b) makes it clear that the period within which the planning authority must make a decision on the application is extended until after such time as the notice has been complied with. Where the planning application has been accompanied by an EIS s. 34(8) (c) provides that that period is eight weeks of the date of the notice being complied with. The respondent therefore submits that once a planning authority serves a notice seeking further information, the period for making a decision on the planning application stands suspended until such time as the notice has been complied with. It is not sufficient for the applicant to merely comply with the requirements of the notice in order to activate the obligation on the part of the planning authority to make a decision on the application within the period stipulated in Section 34(8) (b) or (c).

Article 33 of the Planning and Development Regulations sets out how a notice seeking further information is to be dealt with. The

requirements of article 33(1) are not complied with simply by furnishing a response to the notice seeking further information. The response must be subject to a qualitative assessment by a planning authority to ascertain whether the requirements sought in the notice have been complied with. This is borne out by the fact that under article 33(2) it is open to the planning authority to seek further information by way of clarification of the matters dealt with in the applicant's response to the notice. However it is also clear from Article 33(3) that the clarification must be provided within the time period prescribed in Article 33(3), which has an outer limit of nine months. It is the respondent's position that by leaving it to the last possible date to submit the response to the request seeking further information the applicant himself created a situation whereby deficiencies in his response could not be raised by the council within the prescribed time limit under Article 33(3).

5.3 The respondent submits that in determining the question of whether there was compliance with the request for further information the respondent was using its planning expertise. This decision was not merely an administrative box ticking exercise. Where planning expertise is employed the appropriate test is the test of reasonableness as envisaged in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. The respondent therefore argues that in assessing its decision the question for this Court is whether no reasonable planning authority would have made this decision. The onus of establishing that the respondent acted unreasonably is on the applicant. The case of *Kinsella v. Dundalk Town Council* [2004] IEHC 373, involved a response to a notice seeking further information. The Council found that the response contained "significant additional data" triggering the statutory requirement for further public notice. Kelly J. held at 13:-

> "The task of assessing whether the response contained "significant additional data" involved the exercise of planning expertise and judgment and was precisely the kind of question, which falls within the competence of an expert decision maker."

It is submitted the question of whether there was compliance as per Article 33(3) was also a question of planning expertise. It is clear from his affidavit that Mr Ray O'Grady formed the view that the response was deficient in several aspects. Mr O'Grady had ample material before him on which to base his decision. Once this is shown to be the case it is submitted that this Court cannot interfere, even if the Court were to form a different view on the information before it.

5.4 The applicant has sought to level very serious allegations against the respondent. It is suggested that the decision to declare the planning application withdrawn was a device designed to avoid the respondent having to refuse planning permission and thus potentially expose itself to having to pay compensation to the applicant. It is submitted that this suggestion is inconsistent with the detailed analysis of the response to the request for further information made by Mr Ray O'Grady that is exhibited with his affidavit. It is further submitted that the allegations are effectively an assertion of misfeasance in public office, in circumstances where such serious allegations are made without foundation it is submitted that the Court should consider exercising its discretion against granting the relief sought.

6. Decision of the Court

6.1 The applicant is the owner of a quarry situate at Glencar, Co. Sligo. Pursuant to Section 261 of the Planning and Development Act 2000, the applicant was required to apply for the registration of his quarry. The respondent considered the issues raised by the quarry including its location in a National Heritage Area and decided that the applicant should submit a planning application accompanied by an Environmental Impact Statement. The applicant submitted these documents and his application was due for determination by the respondent on 16th December 2007. However on 12th December 2007, the respondent served a notice pursuant to Article 33 of the Planning and Development Regulations 2006 seeking further information from the applicant. At the applicants request the period for complying with this notice was extended from six to nine months. The response was received on 11th September 2008, which was the latest possible date for consideration of same. After considering the response the applicant determined that it was deficient in eight respects. The applicant was informed that pursuant to Article 33 his application for planning was deemed to be withdrawn.

6.2 The applicant argues that the respondent was exercising an administrative function in determining that the request for further information was not complied with. It is clear from the affidavit of Ray O'Grady executive planner with Sligo County Council that he carefully analysed the response provided by the applicant. Mr O'Grady prepared a detailed seven page report comprehensively outlining the inadequacies in the response. Mr O'Grady considered that the response was deficient in eight respects. It is clear when one looks at the defects identified by Mr O'Grady in his report that he undertook a qualitative assessment of the applicant's response. For example, at page seven of his report Mr O'Grady states:-

> "Point 10 – Having regard to the serious conflict between the proposed mitigation measures as contained in the Further Information response and the content of the proposed scheme, it is considered that this further Information request is not complied with.
>
> Point 11 –The applicant has reiterated Section 1.6 of the EIS originally submitted with the application which was already stated as being sub-standard. The applicant has not taken "into account the effects on the environment" regarding "the impact on landscape/visual amenity" or "the ecological value of the Natural Heritage Area" as required by this point of Further Information."

In my view Mr O'Grady consideration of the applicant's response was classically a matter of planning expertise and his decision in relation thereto was classically a planning function. As such, it falls to be assessed by reference to the *O'Keeffe* standard of reasonableness. I note the words of Denham J in *Meadows v. Minister for Justice* [2010] IESC 3 where she held at 24:-

"The decision in *O'Keeffe v. An Bord Pleanála* related to a specialised area of decision making where the decision maker has special technical or professional skill... The *O'Keeffe v. An Bord Pleanála* decision is relevant to areas of special skill and knowledge, such as planning and development."

I am satisfied that in judicially reviewing the decision of non compliance made by the respondent, the standard of review is reasonableness.

6.3 The applicant argues that even if the Court finds that the *O'Keeffe* test of reasonableness is applicable, the decision of the respondent that its request for further information had not been complied with was not reasonable. The applicant argues that the information submitted by his experts comprehensively dealt with the respondents request for further information. It is further submitted that the purpose of article 33(3) is to deal with circumstances where no genuine attempt was made by an applicant to deal with a request for further information and not to deal with circumstances where an applicant comprehensively replied to that planning authority's request for further information. I fully accept the applicant's contention that the response provided was elaborate and detailed however it seems to me that the requirements of article 33(1) are not complied with simply by furnishing a response, albeit a

comprehensive one. Important further information is being sought. The mere fact that an elaborate and detailed response has been furnished does not mean that the information sought has been provided. The response must be subject to a qualitative assessment by a planning authority to ascertain whether the requirements sought in the notice have been complied with.

6.4 The onus of establishing that no reasonable planning authority would have made the decision impugned rests with the applicant. The applicant submits that the respondent's request for further information was unreasonable in that a number of matters referred to in the notice for further information were not matters permitted to be included therein, other matters were already clear from the applicant's planning application and some requests were not requests for further information at all but amounted to efforts by the respondent to change the planning application. It's noteworthy that while the applicant now seeks to take issue with the notice for further information, no issue was taken following service of the notice. At paragraph 15 of the affidavit of Mr. Ray O'Grady it is confirmed that at no time following service on the applicant's agent of the notice seeking further information was any issue taken as to the scope, appropriateness or lawfulness of the requirements of the request. Furthermore, Mr O'Grady confirms that there was no discussion with the applicant's advisers in interpreting the requirements of the notice seeking further information, or as to what might be required, from the respondent's perspective, by way of adequate response to same. The applicant also seeks to impugn the request for further information on the basis that it was merely a device employed by the respondent in order to avoid complying with the statutory obligations to give a decision on the application. It is argued that this devise was utilised because compensation would be payable to the applicant under s.261 if there was a refusal of planning permission. It seems to me that the applicant's suggestion is clearly at variance with the careful and detailed consideration of the response to the request for further information made by Mr Ray O'Grady. His decision that this response was not in compliance was one that was fair and reasonable within the meaning of the decision in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. Whilst this finding disposes of the case I think I should make a few closing observations.

6.5 The legislative scheme allows for a period of 6 months to reply to a notice for further information, extendable by a further 3 months. It seems clear to me that this period commences when the notice is served. The response to the request for further information was received by the respondent on the 11th September, 2008, which was the last day of the nine month period. Had the response been provided earlier it would have been possible under Article 33(2) to seek clarification of issues raised in the response. Article 33(2) provides:-

"A planning authority shall not require an applicant who has complied with a requirement under sub-article (1) to submit any further information or evidence save-

> (a) as may be reasonably necessary to clarify the matters dealt with in the applicant's response to a requirement to submit further information or evidence or to enable them to be considered or assessed or where a request for further information is made under article 108(2) or 128(1)."

As the response was received on the latest possible day, the respondent was not in a position to revert to the applicant's agents to seek clarification on matters raised in the response. In effect, once it was determined that the information provided was not satisfactory the application was withdrawn by operation of law because article 33 (3) of the Planning and Development Regulations 2006 is automatic. It provides:-

> "A 33 (3) Where a requirement under sub-article (1) or sub-article (2) is not complied with within the period of 6 months from the date of requirement for further information, or such additional period, not exceeding 3 months, as may be agreed by the planning authority, the planning application shall be declared to be withdrawn and the planning authority shall, as soon as may be, notify the applicant that the application has been declared to be withdrawn and enter an indication that the application has been declared to be withdrawn into the register."

6.6 It seems to me that the outstanding clarifications sought by the Council were not and are not insurmountable obstacles for the applicant to overcome. At page seven of his report assessing the further information submitted by the applicant, Mr Ray O'Grady states:-

> "Point 3 – "The expected tonnage extracted" which was requested has not been submitted..."
>
> Point 6- "The applicant has not submitted a "comprehensive analysis" of "the proposed extended quarry area taken in conjunction with the existing quarry"... incorporating photomontages from several vantage points from a wider surrounding area."

Subsequent to the decision that the application was withdrawn the applicant's environmental consultants Euthenics delivered a response. This report was too late to be considered, however it did offer clarification on these issues. At page one of Euthenics response it stated:-

> "3. Expected tonnage- (Proposed values in RFI response exceed those in section 3.4.2 of the EIS.) We specified 1500 t/a.
>
> 5. … It is clearly stated in the text that this is effectively a hidden development and cannot be seen. We have provided photographic evidence backed up with detailed drawings, maps etc. A photomontage cannot be made when there is nothing to overlay on the photograph. Overheads were submitted. You cannot see this quarry-therefore you cannot show the excavations on a photograph from the surrounding area."

It was the applicant's own failure to lodge his response until 11th September, 2008, which gave rise to the situation whereby it was impossible for him to address the deficiencies identified by the respondent within the statutory period provided for in Article 33.

6.7 I do not accept the submission put forward on behalf of the applicant that he cannot apply again for planning permission for his quarry and that his quarry therefore falls into limbo as he put it. Section 261 of the Planning and Development Act 2000, does not limit quarry owners to a single application for permission. The purpose of s.261 is to apply planning controls to quarries that were in existence prior to the coming into effect of the Planning and Development Act 1963. A successful further application could lift the applicant's quarry 'out of limbo' and into the existing regulatory regime. The applicant argues that even if it were possible to make a fresh planning application this would serve no purpose. He submits that he would be met again with the same requests for information and that because he provided all the information that he possibly could in his response the process would therefore end in deadlock. I do not accept this argument. There were just eight remaining issues between the parties. The Euthenics response clearly contained new information which if contained in a new application may very well satisfy the respondents need for clarification.

6.8 As noted above, it seems to me that the applicant has not discharged the onus on him to demonstrate that the respondent's

decision was unreasonable in the sense of the *O'Keeffe* test. I am satisfied that the applicant is not entitled to the relief sought. This application is therefore refused.