THE HIGH COURT

2015 No. 646 JR

IN THE MATTER OF SECTIONS 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

Between:

BOARD OF MANAGEMENT OF TEMPLE CARRIG SECONDARY SCHOOL

Applicant

– and –

AN BORD PLEANÁLA

Respondent

– and –

McDONALD'S RESTAURANTS OF IRELAND LIMITED, WICKLOW COUNTY COUNCIL. TOM FORTUNE, J.C. DURBIN, PHILIP MOYLES, MYRA PORTER, RATHDOWN PARK RESIDENTS ASSOCIATION, ANNE FERRIS, PARENTS' ASSOCIATION OF GREYSTONES EDUCATE TOGETHER NATIONAL SCHOOL, BOARD OF MANAGEMENT OF GAELSCOIL NA GCLOCHA LIATHA

Notice Parties

JUDGMENT of Mr Justice Max Barrett delivered on 11th July, 2017.

I. Overview

1. Within Blacklion stand various schools; one is Temple Carrig. It sits on a shared campus that, when fully operational, will have over 1,800 children attending on-site during term-time. Temple Carrig is a recognised school under the Education Act 1998. Its board of management has a statutory responsibility for the education and well-being of its students. These, per s.9 of the Education Act of 1998, include using its available resources *"(d) [to] promote the moral, spiritual, social and personal development of students and provide health education for them…".*

2. In November, 2014, McDonald's Restaurants of Ireland Limited sought planning permission for a two-storey 'drive-thru' restaurant that would sit (a) 30 metres from the main gate to Temple Carrig, (b) 48 metres from the principal school pitch, (c) 89 metres from the front door of the school, and (d) on the main route leading to and from the school. One does not require any especial insight to deduce why the Temple Carrig board of management would be concerned by such a prospect. In essence, the board does not consider that having a fast-food restaurant sitting almost on Temple Carrig's doorstep is conducive to healthy eating by impressionable children going to and from the school.

3. Over the objections of the board of management, in September, 2015, planning permission was ultimately granted by An Bord Pleanála, on appeal, for the proposed restaurant. In fact it appears that McDonald's has, for now at least, lost interest in proceeding with the restaurant; it is presently more likely that a supermarket will be erected on the site. But be that as it may, the planning permission that McDonald's obtained continues to inure for the benefit of the land to which it attaches. The concern of the board is that the pendulum of commerce may yet swing again and that a fast-food restaurant, unwanted by it, may yet be erected close by Temple Carrig.

4. In light of the foregoing, the board of management has proceeded with the present application challenging the decision of An Bord Pleanála. An order of *certiorari* and various declaratory reliefs have been sought, initially on numerous bases which were whittled down at hearing to but two. Thus before the court it was contended that An Bord Pleanála failed: (1) to comply with the requirements of s.177U of the Planning and Development Act 2000, as amended, and (2) contrary to s.143 of the Act of 2000, as amended, to have regard to Government policies and objectives. Both contentions are respectfully rejected by the court for the reasons set out hereafter.

II. Section 177U

5. Section 177U of the Act of 2000, as amended, provides as follows:

> *"(1) A screening for appropriate assessment of a draft land use plan or application for consent for proposed development shall be carried out by the competent authority [here An Bord Pleanála] to assess, in view of best scientific knowledge, if that Land use plan or proposed development, individually or in combination with another plan or project is likely to have a significant effect on the European site.*
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> *(2) A competent authority shall carry out a screening for appropriate assessment under subsection (1) before –*
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> *(a) a land use plan is made, including, where appropriate, before a decision on appeal in relation to a draft strategic development zone is made, or*
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> *(b) consent for a proposed development is given."*

6. A screening for appropriate assessment is often referred to as a Stage 1 Screening, with a 'full-blown' appropriate assessment often referred to as a Stage 2 Appropriate Assessment. The board of management of Temple Carrig does not: contend that a Stage 2 Appropriate Assessment is required on the facts of the case now presenting; raise any substantive issue in relation to any habitat; take any issue with the Natura Impact Statement. Its sole concern when it comes to s.177U, is as follows: although it is evident from the planning inspector's report which preceded the decision of An Bord Pleanála, that he conducted the necessary Stage 1 Screening and concluded that a Stage 2 Appropriate Assessment was not required, there is no evidence in the decision of An Bord Pleanála that it *itself* undertook a Stage 1 Screening or *itself* made a determination, pursuant to s.177U(4)/(5) of the Act of 2000, as amended, that a Stage 2 Appropriate Assessment was or was not required.

7. The court respectfully does not accept the contentions made by the board of management in this regard. This is not a case akin to *Kelly v. An Bord Pleanála* [2014] IEHC 400 where Finlay Geoghegan J. was confronted with a planning inspector's report that could not

possibly have supported the conclusion reached there by An Bord Pleanála. Nor is it a case akin to *Connolly v. An Bord Pleanála* [2016] IEHC 322, where what presented was, to borrow from the judgment that issued in that case, at para. 27, a "*rather contrary report that relates to a different development*." Instead, An Bord Pleanála expressly states in the introductory text to its Direction of 28th September, 2015, that:

> *"The Board decided to grant permission (by a 4:1 majority) generally in accordance with the Inspector's recommendation, subject to the amendments to the Inspector's draft reasons, considerations and conditions set out below."*

8. A fair reading of the last-quoted text is that, save insofar as the Board identifies otherwise, its perception of matters accords with that of the planning inspector, as evidenced in his report, and again there is no doubt on the facts of the within application but that the planning inspector undertook a Stage 1 Screening and rejected the need for a Stage 2 Appropriate Assessment. Planning decisions are not a form of incantation whereby a valid planning permission is conjured up solely through the recitation of a particular form of words; a court must be attentive to the substantive truth of matters presenting in any one set of proceedings. Here, what Temple Carrig would have the court accept is that despite An Bord Pleanála (i) bringing its knowledge and expertise to bear on the information before it, (ii) deciding to accept (save as it indicated) a planning inspector's report in which a Stage 1 Screening was done and a Stage 2 Appropriate Assessment was decided against, and (iii) not proceeding itself to a Stage 2 Appropriate Assessment, it (An Bord Pleanála) should nonetheless be found by the court to have failed (a) to undertake a Stage 1 Screening, and (b) to have decided that a Stage 2 Appropriate Assessment was unnecessary. An Bord Pleanála, on the facts as described, has clearly done what is required of it at law, and has clearly stated what it has done, even if it has not done so in the form that Temple Carrig contends for. The foregoing offers no basis for any of the reliefs by way of judicial review that are now sought.

III. Government Policies, etc.

9. Section 143 of the Act of 2000, as amended provides, inter alia, as follows:

> *"(1) The Board shall, in performing its functions, have regard to –*
>
> > *(a) the policies and objectives for the time being of the Government, a State authority, the Minister, planning authorities and any other body which is a public authority whose functions have, or may have, a bearing on the proper planning and sustainable development of cities, towns or other areas, whether urban or rural…".*

10. As Kearns J. pithily observed in *Evans v. An Bord Pleanála* (Unreported, High Court, 7th November, 2003), 23, "*The statutory obligation to 'have regard to' means precisely that, no more and no less";* it does not, for example, entail an obligation to follow. In terms of what the formula does involve, the court notes, by reference to the judgment of Quirke J. in *McEvoy v. Meath County Council* [2003] I.R. 208, 224, that such a formula obliges informing oneself fully of, and giving reasonable consideration to, those matters to which one is obliged to have regard.

11. The board of management maintains that there are certain government policy documents concerning healthy eating and living by children to which the planning inspector and, through its broad endorsement of his report, An Bord Pleanála, did not have regard. The following three points might be made in this respect.

12. First, the central theme of the board of management's submissions to An Bord Pleanála was that having a McDonald's restaurant in close proximity to Temple Carrig was counter-productive in terms of encouraging healthy eating and living in children attending at the school. This issue was undoubtedly before An Bord Pleanála and understood by it to be an issue.

13. Second, there are only so many ways that one can assert the need for children to 'eat healthy in order to be healthy'. So even if An Bord Pleanála, despite its being clear as to anti-obesity (healthy eating) being a public policy of relevance, did not have regard to a particular document in which that policy was touched upon in broadly similar terms to such documentation as that to which An Bord Pleanála did have regard, it does not seem to the court that it follows, as a consequence, that a breach of s.143 necessarily arises. Regard was expressly had by the planning inspector, in his report, to the *National Policy Framework for Children and Young People 2014/2020* which seeks, *inter alia*, to reduce childhood obesity; complaint is made that although the *Healthy Ireland Strategy* of March, 2013, which also touches, *inter alia*, on childhood obesity, was before the planning inspector, express reference was not made to same in his report. The court respectfully does not consider that a failing by a planning inspector to refer expressly to one public policy document, the objectives of which are broadly echoed in another public policy document to which he does expressly refer, necessarily yields a breach of s.143 when An Bord Pleanála later largely endorses the planning inspector's report, at least absent suggestion (of which there is none here) that some critical plinth or tenet of applicable public policy has been missed in the process.

14. Third, the planning inspector concluded, and An Bord Pleanála later clearly agreed, that absent the inclusion of specific aims and commitments in Wicklow County Council's County Development Plan and/or Local Area Plan, *the National Policy Framework* on its own did not provide a basis for refusal of permission in the "*specific circumstances"* presenting. Temple Carrig contends that the absence of *National Policy Framework*-related or like provision in the County Development Plan and/or Local Area Plan means that the planning inspector did not have regard to, and it follows that the Board did not therefore consider, that the application by McDonalds could (or should) be refused on the basis of anything in public anti-obesity (healthy eating) policies. But all the court sees, on the facts presenting, is a planning inspector, in the proper exercise of his duties, concluding (and having this conclusion effectively endorsed by An Bord Pleanála at a later time) that despite anti-obesity (healthy eating) policies being a good thing, in circumstances where there was no *National Policy Framework*-related provision in the applicable County Development Plan and/or Local Area Plan, a holistic view of the particular application at hand led him to the conclusion that those policies on their own did not offer reason enough to refuse the planning permission sought. That might not be the conclusion that the board of management would have reached if similarly placed, it might not be the conclusion that the court would have reached if similarly placed, but it was a conclusion properly reached by the planning inspector (and later effectively endorsed by An Bord Pleanála) and there appears to the court to be no legal basis on which that conclusion, however objectionable it may appear to Temple Carrig, can now be upset by the court through the granting of any of the reliefs that are now sought.

15. In passing, to the extent that it is suggested, if it continues to be suggested, that An Bord Pleanála did not have regard to the *Local Area Plans, Guidelines for Planning Authorities* (Department of Environment, Community and Local Government, June,2013), in particular para. 5.2 of same, which refers to local area plans promoting healthier lifestyles, inter alia by ensuring that "*exposure to children to the promotion of foods that are high in fat, salt or sugar is reduced [through]…the careful consideration of the appropriateness and location of fast food outlets in the vicinity of schools and parks",* the error of any such suggestion is quickly demonstrated by a consideration of pp. 9-10 of the planning inspector's report which has careful regard to the said *Guidelines* and their interaction with the Greystones/Delgany and Kilcoole Local Area Plan 2013–2019.

IV. Conclusion

16. Is it a good idea to place an alluring fast-food restaurant close by a school entrance? Many would perhaps instinctively answer 'no'. However, that is not what is in issue in the within application. All that is in issue is whether An Bord Pleanála erred in arriving at the decision impugned by the applicant board of management. The court's conclusion in this last regard, for all the reasons hitherto identified, is that An Bord Pleanála did not err in any of the ways contended for. The court must therefore decline to grant any of the reliefs that the board of management now seeks. However, though it was not a factor of relevance to the court's considerations, it may be that the board of management, and persons supportive of the within application, can take comfort in the fact that McDonald's Restaurants appear, at this time and for now, to have decided not to open one of their outlets in close proximity to Temple Carrig School.