Neutral Citation: [2012] IEHC 539

THE HIGH COURT

[2012 No. 761 J.R.]

LEEFIELD LIMITED

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

O'FLYNN CONSTRUCTION B.T.C. AND CORK COUNTY COUNCIL AND DAMIEN O'SULLIVAN AND JANET WALKER

NOTICE PARTIES

JUDGMENT of Mr. Justice Birmingham delivered on the 4th day of December 2012

1. By order of Murphy J. dated the 30th August, 2012, the applicant obtained leave to seek an order of *certiorari* of the decision of An Bord Pleanála (the Board) dated the 6th July, 2012, granting planning permission to the first named notice party (O'Flynn Construction) for the construction of a retail store and ancillary developments at Ballincollig, County Cork.

2. The application was for the erection of a Tesco store. The applicant for judicial review is an existing retailer in Ballincollig where it operates a SuperValu store.

3. The applicant's complaint is that the Board failed to provide adequate reasons and consideration for its decision, and in particular, failed to give adequate reasons for declining to follow the recommendations of its Inspector who had recommended that planning permission be refused.

4. By way of background, it should be explained that O'Flynn Construction lodged a planning application with Cork County Council on the 29th March, 2011, for a retail development at Ballincollig Shopping Centre. The proposed development site is located west of the surface car park serving the existing Ballincollig Shopping Centre and is bounded to the north by an area of woodland, to the south by Ballincollig Main Street and to the west by the Old Fort Road. While Cork County Council is a notice party, it has not participated in the present proceedings.

5. Observations in relation to the planning application were lodged with the Council by the applicant.

6. In the light of what has subsequently developed, it is of some interest to note that by letter dated the 19th May, 2011, Cork County Council sought further information from O'Flynn Construction as to the extent of encroachment onto the woodland and as to pedestrian connectivity to the adjoining Ballincollig Shopping Centre. A response was submitted on behalf of O'Flynn Construction on the 4th July, 2011. Then, on the 27th July, 2011, the Board of Cork County Council decided to grant planning permission subject to 38 conditions. An appeal was lodged with the Board by the applicant, Leefield Ltd., and also by Mr. Damien O'Sullivan and Ms. Janet Walker. Mr. O'Sullivan and Ms. Walker did not participate in the proceedings before me.

7. A detailed submission had been made to Cork County Council on behalf of Leefield Ltd. by Spatial Planning Solutions. In summary, they argued that the proposed retail store would serve to diminish the viability of exiting retail outlets in Ballincollig Town Centre.

8. When the decision to grant planning permission was appealed, An Bord Pleanála appointed Mr. Brendan Wyse, an Inspector, to present a report. Once more, a detailed submission was made on behalf of Leefield Ltd. by Spatial Planning Solutions. The Inspector's report dated the 29th November, 2011, was a very detailed one. It recommended that planning permission be refused. His decision to recommend refusal of planning permission was based on two factors. These were as follows at p.22:

> "(i) Having regard to the layout and form of the exiting town retail area, that is based on a coherent network of retail streets, malls and squares, it is considered that the proposed development, by reason of its layout and design, would not link effectively to the existing town centre and would tend to function as a 'stand-alone' entity. The proposed development would not contribute to the creation of an attractive and safe town centre environment for pedestrians or support its continuing development in this regard. The proposed development, therefore, would be contrary to the proper planning and sustainable development of the area.
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> (ii) Having regard to the significant amenity value of the mature woodland over part of the site and on the adjoining lands the Board is not satisfied that the extent of encroachment proposed, notwithstanding the proposals for replacement planting, can be justified in this instance. It is considered, therefore, that the proposed development would seriously injure the amenities of the area."

9. While the Inspector's ultimate decision was to recommend refusal of planning permission and so the report is a very welcome one from the perspective of Leefield Ltd., it is of some interest that the Inspector rejected a number of arguments that had been advanced on behalf of Leefield Ltd. The Inspector rejected submissions on behalf of Leefield Ltd. that the proposed development exceeded the floor space cap for superstores as provided for in the Regional Planning Guidelines. In doing so, the Inspector observed that the proposed development could best be described as a small hypermarket. The Inspector was also satisfied that the proposed site was located within the designated town centre area and was in accordance with the zoning objectives for the area. He specifically rejected the contention put forward on behalf of Leefield Ltd. that the proposal relates to an "edge-of-centre" site. Furthermore, the Inspector was satisfied that the scale of the proposed retail development should be capable of being absorbed within Ballincollig and that it was not excessive.

10. However, notwithstanding the fact that significant arguments advanced by Leefield were rejected, the Inspector firmly favoured rejection. He saw the question of "urban design" as the critical issue on the appeal including, in particular, the issue of connectivity/integration with the existing town centre development and the issue of the design of the proposed building. He felt that the proposed new retail store was very poorly connected to the existing town centre retail area and that the proposed store had essentially been designed as if it was a stand-alone outlet. The Inspector was of the view that the design of the proposed building served to emphasise its separateness from the remainder of the town centre retail area. He felt that the design adopted appeared to

be the product of prioritising the requirements of car-borne shoppers to the proposed store over the achievement of good urban design and integration with the existing town centre. Again, so far as the woodland encroachment issue was concerned, he was not satisfied that the encroachment as proposed could be justified and saw this as a further reason for refusing planning permission.

11. The submissions made and the Inspector's report were considered at a Bord Pleanála meeting held on the 29th June, 2012. By a decision of the 4th July, 2012, the Board granted permission subject to fourteen conditions. The "Reasons and Considerations" section of the decision was as follows:-

> "Having regard to the location of the site on the Main Street in Ballincollig, where the site is zoned for town centre uses, the nature of the proposed development, which requires a large floor plate and the significant population catchment the proposed development would serve west of the town centre it is considered that, subject to compliance with the conditions set out below, the proposed development would not adversely affect the vitality and vibrancy of the town centre, would not seriously injure the visual amenities of the area and would be acceptable in terms of traffic safety and convenience. The proposed development would therefore, be in accordance with the proper planning and sustainability of the area.
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> In deciding not to accept the Inspector's recommendation to refuse permission, the Board considered that the site was located on the Main Street, was zoned for town centre use and noted that the life of a permitted development east of the site had been extended. The Board was, therefore, satisfied that the development would contribute to the town centre and that pedestrian connections were acceptable.
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> The Board considered that the mature woodland, though decreased in size would still function as an amenity for the area and that the loss of some trees could be ameliorated by way of conditions."

The applicant categorises the reasoning of the Board as expressed in its decision as terse and perfunctory and says that the decision does not in any way explain how the Board reached a contrary decision to that of its Inspector. The applicant complains that so far as the first reason the Inspector had for recommending refusal that the Board's decision does not properly engage with the reasoning of the Inspector. The applicant protests that the decision of the Board does not in any way explain how the Board reached a contrary decision to that of its Inspector. It is said that it remains entirely unclear how the Board reached the conclusion that it did.

12. In the course of an affidavit sworn in support of the applicant by Mr. David Moore, planning consultant of Spatial Planning Solutions, Mr. Moore comments that as a planner, he has no idea how the Board reached their decision, he has no way of knowing how they in fact resolved the Inspector's concerns, whether they adequately addressed their minds to the issues raised or, whether there were good reasons for not following the Inspector's recommendations.

The Statutory Provisions

13. Section 34(10) of the Planning and Development Act 2000 provides as follows:-

> "(10)(a) A decision given under this section or *section 37* and the notification of the decision shall state the main reasons and considerations on which the decision is based, and where conditions are imposed in relation to the grant of any permission the decision shall state the main reasons for the imposition of any such conditions, provided that where a condition imposed is a condition described in *subsection (4),* a reference to the paragraph of *subsection (4)* in which the condition is described shall be sufficient to meet the requirements of this subsection
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> (b) Where a decision by a planning authority under this section or by the Board under *section 37* to grant or to refuse permission is different, in relation to the granting or refusal of permission, from the recommendation in—
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> (i) the reports on a planning application to the manager (or such other person delegated to make the decision) in the case of a planning authority, or
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> (ii) a report of a person assigned to report on an appeal on behalf of the Board,
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> a statement under *paragraph (a)* shall indicate the main reasons for not accepting the recommendation in the report or reports to grant or refuse permission."

In summary, the obligation on the Board is to state the main reasons and consideration on which the decision was based, and insofar as conditions are imposed state the main reasons for the imposition of such conditions and insofar as this was a case where the Board was differing from its Inspector, there was an obligation to indicate the main reasons for not accepting the recommendation in the Inspector's report.

14. There have been quite a number of cases in recent times where decisions have faced challenge on the basis that the reasons provided were inadequate. Indeed, I have given two judgments myself on this topic namely, *Mulhaire v. An Bord Pleanála* [2007] I.E.H.C. 478 and *Sweetman v. An Bord Pleanála* [2009] I.E.H.C. 599.

15. Given the frequency with which cases have been brought before the courts in recent times raising issues about the adequacy of reasons that were provided, it is scarcely surprising that at this stage there is little disagreement about the legal principles that are applicable and the real dispute centres on how those principles are to be applied in practice. Indeed, the frequency with which complaints are made that the reasons set out for a decision are inadequate bring to mind the observations of Simon Brown J., who dealing with a reasons challenge in *The London Residuary Body v. The Secretary of State for the Environment & Ors*. [1988] J.P.L. 637 at 646 and 647 observed as follows:-

> "The duty of the Secretary of State to give reasons arises under rule 13(1) of the 1974 Inquiry Procedure Rules. As to the nature of the obligation the authorities are clear; see particularly *Re Poyser v. Mill's Arbitration* [1964] 2 Q.B. 467 and *Westminster Council v. Great Portland Estates plc* [1985] 1 A.C. 661 at p. 673. In all cases the reasons had to be intelligible, proper and adequate. They could be briefly stated but they had to deal with the substantial points that had been raised. A decision would only be challengeable for breach of rule 13 if there was something substantially wrong or inadequate in the reasons given. Very often this ground was invoked in a last desperate effort to unseat a decision when all else failed. It was a basis of challenge which should be advanced sparingly, scrutinised critically and not readily acceded to. That certainly was the approach to be adopted in the general run of cases."

16. In the course of his judgment in the case of *O'Neill v. An Bord Pleanála* [2009] I.E.H.C. 202, Hedigan J. at para. 24 and subsequent paragraphs sought to distill the principles that emerge from earlier cases. He did so in the context of a challenge to a decision of An Bord Pleanála to grant permission for a craft and retail centre, including a mixture of restaurants and retail outlets at Laragh East. It is noteworthy that the case was concerned only with the obligation of An Bord Pleanála to explain its decision to reject the recommendations of the Inspector. The applicant for judicial review in that case had not been granted leave to impugn the reasons provided by the respondent, An Bord Pleanála, to justify its decision generally. In a situation where the case was really about scale and whether, as Hedigan J. put it, the proposal was too big and looked too big for the location in question, it is worth considering the reasons and considerations that were put forward in that case. The reasons and considerations were in these terms at para. 18:-

> "Having regard to the location of the site at the edge of the village of Laragh, the tourist related nature of the development and the availability of natural screening, it is considered that, subject to compliance with the conditions set out below, the proposed development would not seriously injure the amenities of the area, would be acceptable in terms of traffic safety and convenience and would be in accordance with the current County Development Plan for the area and the Regional Planning Guidelines for the Greater Dublin Area 2004 – 2016. The proposed development would, therefore, be in accordance with the proper planning and sustainable development of the area.
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> In deciding not to accept the Inspector's recommendations to refuse permission, the Board considered that the serious concerns relating to size were dealt with in the reduced floor area submitted to An Bord Pleanála on the 14th day of June, 2005, and considered that the natural screening on the site and the proposals for landscaping the development would ensure assimilation of the development."

17. The question of scale emerges more clearly if one considers that the planning application as originally submitted was for a proposed development of 3,257sqm. When permission was granted based on a revised plan it was in respect of a development of 2,957sqm, a mere 300sqm less than the original proposal. In contrast, the Inspector who had recommended rejection of the permission had offered as an alternative to outright rejection a dramatic reduction in floor space to no more than 600sqm. If one has regard to the nature of the controversy that was in issue in the Laragh case and that is at issue in the present Ballincollig case and compares the reasons and considerations offered in each, then at first blush it might seem that the reasons and considerations in the present case compare favourably with what passed muster in the earlier case.

18. From the exercise engaged in by Hedigan J. and from the earlier decisions, there are a number of matters that emerge clearly. First of all, it is not the case that the onus on An Bord Pleanála is a burdensome one. On the contrary, it has been described by O'Neill J. in *Grealish v. An Bord Pleanála* [2007] 2 I.R. 536 at p. 553 as a "very light one, one could even say almost minimal" albeit in a situation where he was making the point that light as the obligation was it had not been fulfilled. The concept of the "main reasons" for a decision will vary according to the circumstances of each individual case. The obligations such as they are relate to the main reasons and it is not necessary to deal with all subsidiary reasons that may have come into play. It has long been established that there is no obligation on an administrative body to provide a discursive judgment. See the observations in that regard of Murphy J. in the case of *O'Donohue v. An Bord Pleanála* [1991] I.L.R.M. 750. It follows that the respondent Board is not obliged to engage in a lengthy review or analysis of its own reasoning when communicating its decision. It is also clear that the adequacy of reasons should be assessed from the perspective of an intelligent person who has participated in the proceedings to date and is aware of the broad issues involved. The reasons should provide a certain minimum standard of practical enlightenment. In that regard in *Mulholland v. An Bord Pleanála* [2006] 1 I.R. 453, Kelly J. indicated that what was required of reasons was that they would be sufficient to (1) give to an applicant such information as may be necessary and appropriate for him to consider whether he has a reasonable chance of succeeding in appealing or judicially reviewing the decision, (2) arm the applicant for such hearing or review and, (3) enable the applicant to know if the decision maker has directed its mind adequately to the issues which it was required to consider, (4) put the courts in a position to review the decision. Applying those principles which are now well established to the present case, it seems to me to be the case that the reasons provided by the respondent could certainly not be described as discursive, though there was no requirement to provide a discursive judgment. Neither, would the reasons be described as elaborate but again, elaborate reasons are not required. It seems to me that the reasons provided are brief certainly, but are concise and focused. In my view the reasons offered are more than adequate. It seems to me that any informed reader of the reasons and consideration section would be left in no doubt that in relation to the connectivity/integration issue that the Board was having regard to the location of the proposed site on the Main Street in Ballincollig on a site that is zoned for town centre uses. It does seem to me that where an issue arises in relation to the extent to which a proposed development integrates effectively into an existing town centre that questions of location and zoning are always likely to be central to any consideration. It appears that the Board was also mindful of the requirement of what was described as a large floor plate and to the fact that a significant population catchment to the west of the town centre would be served by the proposed development. This led the Board to say that subject to compliance with the conditions that it was imposing that the proposed development would be in accordance with the proper planning and sustainable development of the area. Dealing specifically with the Inspector's recommendation for a refusal, the Board referred once more to its location and zoning. So far as the woodland issue is concerned the reason given could, I think, be fairly described as terse. However the question posed for consideration was a straightforward one. The proposed development was one that was going to impact on the woodland and the question was whether the scale and severity of the impact could be tolerated. The Inspector stated clearly and succinctly his view that the level of encroachment could not be justified, while the Board acknowledged that there was an impact on the woodland but was of the view that the extent of the impact was not such as to prevent the woodland area from continuing to function as an amenity. Once the Board had decided to differ with its Inspector there was really little more to be said. The conditions imposed by the Board when granting permission provide further evidence, if such is needed, that the Board was fully conscious of the Inspector's concerns in relation to woodland and sought to ameliorate the situation.

19. In *Mulhaire v. An Bord Pleanála* [2007] I.E.H.C. 478 I commented as follows:-

> "Here, if one has regard to the decision and the conditions and reasons, it is clear, therefore, that the Board has applied its mind to the issues before it. Indeed, the reasoning of the Board clearly emerges from the decision with the attached conditions. Mr. Mulhaire may, understandably, be very aggrieved at the outcome, particularly, as his arguments had carried the day before the planning authority, and with the Inspector, but he cannot be left in any doubt as to why the decision went against him."

20. Save that the arguments advanced by Leefield had not persuaded the planning authority those remarks apply with equal force. An informed and intelligent observer could have been left in no doubt as to what the issues were on the planning appeal and in absolutely no doubt as to the view formed on the issues by An Bord Pleanála. Understandably, Leefield may not like the fact that its arguments did not carry the day but it can have no real doubt as to why it lost and why An Bord Pleanála reached the decision it did. Leefield may not like that decision, may think that the decision is wrong, may even go so far as to believe that the decision was, in a legal sense irrational, but they cannot be in any doubt why their arguments failed to carry the day.

21. Counsel on behalf of the applicant has disavowed any intention to seek a discursive judgment accepting that his client is not entitled to one. However, it seems to me that what emerges from the written and oral submissions is that the applicant in fact seeks something that is very much of that order. In particular, one has the sense that the applicant would have wished to see An Bord Pleanála engage in a detailed debate with its Inspector and engage in a point by point refutation of the Inspector's views and conclusions. However, there is no obligation on the Board to embark on such an exercise. In summary then it is my view that the reasons and consideration section is more than sufficient to meet the statutory obligations and accordingly, I must refuse the applicant the relief that it seeks.