

THE HIGH COURT

JUDICIAL REVIEW

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACTS 2000-2015

[2017 No. 105 J.R.]

BETWEEN

MCCAUGHEY HOMES LIMITED

APPLICANT

AND

LOUTH COUNTY COUNCIL

RESPONDENT

JUDGMENT of Mr. Justice Eagar delivered on the 20th day of October, 2017.

1. This is a judgment on an application by the applicants for:-

(1) A declaration that the respondent's chief executive's order (or apparent chief executive's order) purporting to change the development contribution due under Condition 13 of the Permission for Development Register Reference 05/1061 insofar as it relates to thirty-three unsold houses in that development and purporting to have been made in accordance with the provisions of s. 29 of the Urban, Regeneration and Housing Act, 2015 is *ultra vires*, invalid and void *ab initio*.

(2) An order of *certiorari* quashing the said chief executives order.

(3) A declaration that the development contribution is €8,400.00 per house.

(4) An order of *mandamus* requiring the respondent to issue and deliver to the applicant a Certificate of Compliance with the financial conditions of the said permission for development for each house in the said development upon receipt of the development contribution to the value of €8,400.00 per house.

(5) Such further or other order as necessary to effect the relief sought herein.

(6) Such further or other orders as the court deems fit and just.

2. The proceedings were initiated by an *ex parte* motion docket together with statement required to ground the application for judicial review and the grounding affidavit of Martin McCaughey, company director of McCaughey Homes Ltd.

3. On the 6th of February, 2017 Noonan J. granted leave for the applicant to apply by way of application for judicial review on the grounds set out above.

4. On the 22nd of March, 2006 the respondent granted permission for the development to McCaughey Developments Ltd. that is the subject of this application. It was a development consisting of forty-three houses. In relation to Condition 13 of that permission the development contribution condition was based on a Development Contribution Scheme made in 2004.

5. Condition 13 states:-

"In accordance with the Council's Development Contribution Scheme 2004 made under the provisions of s. 48 of the Planning and Development Act, 2000 the developer shall pay a contribution to the planning authority in the amount specified below for such (or such increased amount in accordance with the changes on an annual basis to the wholesale price index for building and construction published by the Central Statistic Office) towards the costs already incurred or to be incurred by the planning authority on the provision of each of its public facilities listed below, which will benefit development in the area of the planning authority. Unless otherwise agreed with the planning authority before development is commenced the said contribution should be paid in full before such commencement and it has:-

(a) road improvements;

(b) water;

(c) sewage;

(d) surface water;

(e) community, recreational and amenity

The reason for the provision of these facilities in the area will facilitate the proposed development and it is considered reasonable that the developer should contribute towards their cost."

On the date of the grant of the permission the development contribution payable was €8,946.00 per house but was subject to increase in accordance with the relevant wholesale price index and by 2016 was approximately €10,000.00 per unit.

6. In or about 2007 the forty-three houses were built in accordance with the permission and ten were sold. The development contribution was paid for each of those ten houses and they were sold. Thus there were thirty-three unsold houses and no contribution was paid for those thirty-three houses. This remained the case until the events that are the subject of this application

occurred in 2016.

7. On the 8th of April, 2015 monies payable for development contributions for *inter alia* water and sewage into this structure became vested in Irish Water. On or about the 19th of May, 2016 McCaughey Homes Ltd. acquired the thirty-three unsold houses.

8. On or about the 19th of September, 2016 the respondent made a new Development Contribution Scheme (the 2016 Scheme) which changed the basis for contributions by reducing it to €5,400.00 per unit (€4,200.00 per unit of which is for infrastructure and €1,200.00 per unit which is for amenity). On or about the 6th of December, 2016, the 9th of January, 2017 and the 10th of January, 2017 the applicant sold four houses. At the closing date of each sale the applicant sent a letter to the respondent informing it of the sale of that house requesting a letter confirming compliance with the financial contribution condition for that house and enclosing a cheque in each case for €5,400.00. In relation to House Nos. 4, 15 and 16 the respondent between the 22nd of December, 2016 and the 12th of January, 2017 the respondent sent the requested letters of compliance to the applicant with respect to House No. 4, 15 and 16. On or about the 20th of January, 2017 the respondent made the impugned order. The respondent asserted that the order was made to amend Condition 13 to reduce the financial contribution payable thereunder and the order states: the development contribution due under Condition No. 13 in relation to the thirty-three unsold houses, be reduced by €9,336.03 to €323,872.89 and on the 9th of February, 2017 the respondent informed the applicant that it had referred the matter of confirmation of compliance with respect to House No. 18 to its legal advisors.

9. The recommendation set out the increases in contributions in accordance with the Condition:-

(a) The contribution had increased to €10,097.28 per unit;

(b) The unpaid balance for the unsold thirty-three houses was €333,208.92 of which Irish Water's share was €145,672.89. The Scheme's new rate of €5,400.00 per unit multiplied by thirty-three units resulted in a total due of €178,200.00. This sum when added to the Irish Water charge is €328,872.89.

10. Since December 2016 the applicant has sold twenty-three houses and sent €124,200.00 to the respondent but has not received letters of compliance other than the three letters referring to House Nos. 4, 15 and 16. There were no only thirty unsold houses and in relation to three houses that had been sold the respondent had acknowledged receipt of the contribution for the three houses that had been sold.

11. The applicant's case is that:-

(a) The 2016 Scheme is made under s. 48 of the Planning and Development Act 2000-2016 (the PDA) and it must be interpreted having regard to that section's interpretation.

(b) In accordance with s. 48(17)(c) of the PDA the development contribution identified in the 2016 Scheme must include any amount owed by the applicant to the respondent (whether on behalf of Irish Water or otherwise for public infrastructure and facilities for "public infrastructure facilities" including "sewers, waste water, water treatment facilities, drains, water mains service connections, water mains and flood relief work" which counsel submitted on behalf of the applicant includes any amount received from the buyer on behalf of Irish Water.

(c) The 2016 Scheme measures the development contribution of €5,400.00 per unit of which no more than €4,200 per unit may lawfully be payable for infrastructures defined in s. 48(17) of the PDA and accordingly:-

(1) a demand for development contribution in excess of €5,400.00 per unit may not lawfully a condition of a permission for development; and

(2) a demand in excess of €4,200 per unit for infrastructure (including monies payable to Irish Water if any) may not lawfully be a condition of a permission for development. As a result, the respondent may not lawfully deem non-payment of any of these sums by the applicant to the respondent to be a breach of Condition 13.

(d) The respondent is obliged by s. 48(3A) of the PDA to levy the development contribution identified in the 2016 Scheme that is €5,400 per unit because doing so reduces the amount of the contribution payable.

(e) The order of the respondent purported to increase the development contribution payable under Condition 13 from €5,400 to €9,814.33 per unit by adding to the said €5,400. Certain monies are receivable by the respondent and/or Irish Water and counsel for the applicant submitted that the order was made without authority and was a breach in s. 48 of the PDA and in effect unlawfully amended the 2016 Scheme other than by resolution of the elected members of the respondent.

12. Counsel submitted that the order purports to apply to thirty-three unsold houses whereas there were only twenty-nine unsold houses on the date of the making of the order and the respondent issued the letters of compliance and by the said the respondent is estopped from disputing that the development contribution payable in respect of all unsold houses is €5,400.00 per unit. Alternatively, the respondent is estopped as to the three houses to which the said letters relate.

The Law

13. Section 48 of the PDA relates to development contributions. Section 48(1):-

"A planning authority may, when granting a permission under section 34, include conditions for requiring the payment of a contribution in respect of public infrastructure and facilities benefiting development in the area of the planning authority and that is provided, or that it is intended will be provided, by or on behalf of a local authority (regardless of other sources of funding for the infrastructure and facilities)."

14. Section 48(2)(a) subject to para. (c) the basis for the determination of a contribution under subs. (1) shall set out in a development contribution scheme made under this section and a planning authority may make one or more Schemes in respect of different parts of its functional area.

15. Subsection 2(b):-

"(b) A scheme may make provision for payment of different contributions in respect of different classes or descriptions of development.

(c) A planning authority may, in addition to the terms of a scheme, require the payment of a special contribution in respect of a particular development where specific exceptional costs not covered by a scheme are incurred by any local authority in respect of public infrastructure and facilities which benefit the proposed development."

16. Subsection 3:-

"(a) A scheme shall state the basis for determining the contributions to be paid in respect of public infrastructure and facilities, in accordance with the terms of the scheme."

(b) In stating the basis for determining the contributions in accordance with paragraph (a), the scheme shall indicate the contribution to be paid in respect of the different classes of public infrastructure and facilities which are provided or to be provided by any local authority and the planning authority shall have regard to the actual estimated cost of providing the classes of public infrastructure and facilities, except that any benefit which accrues in respect of existing development may not be included in any such determination.

Counsel referred the court to s. 3A(b):-

"Where a permission which includes conditions referred to subsection 1 has been granted under section 34 in respect of a development and the basis for the determination of the contribution under subsection 1 has changed "... (b) where the development comprises of houses and one or more of those houses has not been sold, the planning authority shall apply that change to the condition of the permission where to do so would reduce the amount of the contribution payable."

17. Counsel submitted that Article 5 of the 2016 Scheme states that the contribution to be paid in respect of the different classes of public infrastructure and facilities are a total of €5,400.00. He also quoted s. 12 of the Water Services (No. 2) Act 2013 in relation to the property vesting day for the purpose of s. 12 of the Act and Article 4(1) on the property vesting day referred to an Article 3 the following property, which immediately before this day was vested in a water services authority shall stand vested in Irish Water ... any monies received or due to be received in accordance with s. 48 or s. 49 of the Planning and Development Act 2000 which relates to a function transferred to Irish Water in accordance with s. 7 of the Act.

18. He submitted that there is no ambiguity in s. 48, accordingly there is no warrant for the application of any rule of statutory construction other than that of the literal and grammatical meaning and he quoted from *J.C. Savage Supermarket Ltd. v. An Bord Pleanála* and Denham J. in *D.B. v. Minister for Health and Children* [2003] 3 I.R. 12 where Denham J. on behalf of the Supreme Court said:-

"In construing statutes, words should be given their natural and ordinary meaning. The approach taken by the courts to the construction of statutes was described by Blayney J. in *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101. He emphasised that the cardinal rule for the construction of statutes was that they be construed according to the intention expressed in the Acts themselves. If the words of the statute are precise and unambiguous then no more is necessary than to give them their ordinary sense."

He submitted that the literal rule is all the more applicable as the statute is a planning statute and the condition of planning a Condition.

19. He submitted that whatever private law arrangements were made between Irish Water and the respondent are of no concern to the applicant. He submitted that the respondent purported to change the contribution payable by the applicant pursuant to the permission by amending Condition 13 by order pursuant to s. 48(3C) of the PDA and he submitted that the quantum of monies due to be received by Irish Water under development contribution condition may only be lawfully measured with reference to s. 48 of the PDA which provides for changes to development contributions. He submitted that the respondent's reliance on an agreement with Irish Water as to the recovery of contributions for water services infrastructure but said clearly no such agreement could override or alter the laws laid down in statute.

20. The applicant reasonably relied on expressed assurances from the respondent that the development contribution was €5,400.00 per unit only and not any other amount.

21. The respondent's case is that Condition 13 required a development contribution of €384,678.00 or €8,946.00 per unit. Of that sum (€168,173.00 or €309.11 per unit related to water and sewage infrastructure).

22. The amount of the contribution increased annually in accordance with changes and CSO Wholesale Price Index for building and construction. Immediately prior to the making of the 2016 Order the development contribution had risen to €10,097.28 per unit.

23. Prior to the 8th of April, 2015 ten houses have been sold and development contributions have been paid pro rata. On the 8th of April, 2015 the unpaid balance of the development contribution due pursuant to Condition 13 was €333,208.92 of which €145,672.89 or (€4,414.36 per unit) for water and sewage infrastructure vested in Irish Water and the respondent is obliged to collect the amount on Irish Water's behalf from the applicant.

24. The development contribution of €5,400.00 per unit identified in the 2016 Scheme does not include the amount owing by the applicant to Irish Water for water and sewage infrastructure. Thus, €4,414.33 per unit is the amount owed by the applicant to Irish Water for public water and sewage infrastructure and facilities must be added to the €5,400.00 per unit discharged for a sum of €9,814.33 per unit.

25. Section 48(3A) of the PDA required that Condition 13 be changed to reduce the contribution payable from €10,097.28 per unit payable immediately prior to the making of the 2016 Scheme to €9,814.33 per unit. The person to whom certain relevant powers had been delegated by the respondent chief executive had not been aware of the sale of those houses and letters of compliance when he had recommended that the chief executive make the impugned order in relation to thirty-three houses (whereas on the relevant date only twenty-nine unsold houses remained).

26. By letter dated the 26th of November, 2016 the council requested the applicant to furnish an affidavit confirming that the houses where unsold and unoccupied as of the 1st of September, 2015 together with a site map outlining the relevant houses so that the

financial contribution could be recalculated and the necessary order prepared. The affidavit and site map were forwarded to the council by the applicant on the 28th of November, 2016. Between the 6th of December, 2016 and the 10th of January, 2017 the applicant sold three houses and in correspondence submitted payments in the amount of €5,400.00 in respect of each house and requested the respondent to issue letters of compliance. An active staff officer issued a letter of compliance dated the 22nd of December, 2016 in respect of No. 4 Cois Farriage and two letters of compliance dated the 12th of January, 2017 in respect of No. 15 and No. 16 Cois Farriage. Before the council made an order amending Condition 13 for the purpose of applying a change in the basis for the determination of development contributions payable under Condition 13.

27. On the 16th of January, 2017 the applicant's solicitors were informed by the staff officer that in respect of those three houses the water and sewage portion of the development contribution was still due and owing and on the 19th of January, 2017 the respondent made an order that the development contribution due under Condition 13 of the Planning Registration Reference No. 05/1061 in relation to the thirty-three unsold houses be reduced by €9,363.03 to €323,872.89.

Grounds of Challenge

28. The applicant's contention is that council purports to require the applicant to make a contribution to Irish Water in addition to the contribution provided for in 2016 Scheme in order to comply with Condition 13.

29. Under Condition 13 the developer is liable to pay a development contribution in respect of water and sewage infrastructure provided or to be provided by the council in its administrative area.

30. Following the establishment of Irish Water almost all the functions of water services authorities pursuant to the Water Services Act 2007 were transferred to Irish Water by s. 7 of the Water Services (No. 2) Act 2013 including the provision of water and sewage, public infrastructure.

31. Section 12(6) of the Water Services (No. 2) Act 2013 provides:-

"On a property vesting day all property (other than land), including choses-in-action, designated by the order by which the property vesting day was appointed that immediately before that day, was vested in the water services authority concerned shall, without any assignment, stand vested in Irish Water."

and in exercise of the powers conferred by s. 12 of the Act the Minister made the Water Services (No. 2) Act 2013 Property Vesting Day (No. 3) Order 2015 which appointed the 8th of April as the property vesting day for "any monies received or due to be received in accordance with s. 48 or 49 of the Planning and Development Act 2000 which relates to a function transferred in Irish Water in accordance with s. 7 of the Act, which immediately before the vesting day was vested in a Water Services authority to stand vested in Irish Water.

32. Section 12(7) of the 2013 Act provides:-

"Every chose-in-action vested in Irish Water by virtue of subs. (6) may, on and after the property vesting day concerned, be sued on, recovered or enforced by Irish Water in its own name, and it shall not be necessary for Irish Water or the water services authority concerned to give notice to any person bound by the chose-in-action of the vesting effected by that subsection."

33. Section 12(8) of the 2013 Act provides:-

"Any moneys received by a planning authority in accordance with s. 48 or 49 of the Act of 2000 and vested in Irish Water pursuant to an order under this section, shall be expended by Irish Water for the purposes of the provision of water services in the functional area of that planning authority."

34. The respondent argued that the effect is that development contributions of these subsections is that the development contribution imposed by Condition 13 which were due and owing to the planning authority as that the vesting day in respect of water services became vested in Irish Water on that day and therefore became due and owing to it. The respondent had no power to relieve the applicant of its obligation in respect of those development contributions.

35. The respondent submits that the applicant is liable to pay the contribution to the Irish Water and Irish Water as the legal right to sue on or discover the money from the applicant. The respondent collects the sum due to Irish Water pursuant to an agreement between the local authorities and Irish Water and the applicant will not secure full compliance with Condition 13 until that part of the development contribution payable to Irish Water is always part-payable to the council is full discharged.

Ground 2

36. The second ground of contention by the applicant is that contrary to s. 48(2)(a) of the 2000 Act the respondent purports to fix the quantum of the contribution in Condition 13 otherwise than by reference to the 2016 only.

37. However, the order of the 19th January, 2017 does not fix the quantum of contribution in Condition 13 otherwise than by reference to the 2016 Scheme. Section 29 of the Urban Regeneration and Housing Act 2015 amends s. 48 of the 2000 PDA by inserting a new subs. 3(A) as follows:-

"Where permission which includes conditions referred in subs. 1 has been granted under s. 34 in respect of a development and the basis for the determination of the contribution under subs. 1 has changed:

(a) where the development is one which Part 2 of the Building Control Regulations 1997 and a commencement notice within the meaning of that Part in respect of the development that has not been bound; or

(b) where the developer comprises houses, and one or more of those houses has not been sold the planning authority shall apply

that change to the condition of the permissions where to do so would reduce the amount of the contribution payable."

38. It is clear that Condition 13 requires the developer to pay a financial contribution towards the costs already incurred or to be incurred by the planning authority in the provision of five class of public infrastructure:-

- (1) road improvements;
- (2) water;
- (3) sewage;
- (4) surface water; and
- (5) community recreation and amenity schemes.

The 2016 Scheme changed the basis for the determination of contributions payable only in respect of three classes of public infrastructure, road improvements, surface water and community recreation and amenity.

39. By reason of the operation of the Water Services (No. 2) Act 2013 the provision of public infrastructure in respect of water and sewage was no longer the function of the planning authority and therefore no longer required to be produced and provided for in development contributions schemes. The 2016 Scheme therefore did not change in any way the sums due and owing to Irish Water on foot of Condition 13.

40. The respondent submits that while it is quite clear from s. 48(3)(C) is that the power to amend a planning condition is a restricted power. Any amendment of the condition is limited to reflecting the change in the basis of the determination of the contribution. Accordingly, as the basis for the determination of the contribution payable under Condition 13 was only amended in respect of three of the five classes of public infrastructure for which payment is required to be made by the developer. The council's powers to amend Condition 13 for the purpose of reducing the amount of contributions payable by the applicant was limited to those three classes of public infrastructure.

41. The power did not extend to amending the contribution payable in respect of the two other classes of infrastructure namely water and sewage as the basis for determining those contributions have not changed.

Ground 3

42. The applicants argue that the order of the 19th of January, 2017 purports to make a new Development Scheme. Counsel for the respondent argued that this is a misreading of the order on pertains to a misunderstanding about which the council has expressly decided which was to amend the development contribution payable under Condition 13 of the planning permission granted under the Planning Register in respect of thirty-three unsold houses by reducing the amounts of that contribution by the sum of €9,336.03. The amendment of a planning condition under s. 48(3)(C) of the 2000 Act as amended is not a result but an executive function and the order of the chief executive was lawfully made in the performance of the executive functions of the council.

Ground 4

43. The respondent submits that in order for the applicant to satisfy the court that the council's order of the 19th of January, 2017 is irrational and unreasonable so that the court can intervene and quash the order it is necessary for the applicant to establish to the satisfaction of the court that the council's decision plainly and unambiguously flies in the face of fundamental reason and common sense. Applying that test to the circumstances of this application counsel for the respondent said it was respectfully submitted that there is no basis to conclude that the council's decision involves a rejection or disregard of fundamental reason or common sense.

The Decision of the Court

44. Condition 13 imposes on the developer an obligation to pay to the planning authority a development contribution for:-

- (a) road improvements;
- (b) water;
- (c) sewage;
- (d) surface water;
- (e) community, recreational and amenity.

The establishment of Irish Water and in particular the property vesting day provided for in s. 12 of the Water Services (No. 2) Act 2013 in relation to the property vesting day clearly provides a legislative basis for the separation of the responsibilities for the provisions of water and sewage being disprovided for by Irish Water. The balance of the development contribution is in relation to road improvements, surface water and community, recreational and amenity purposes.

45. The property vesting day provided for by the Water Services (No. 2) Act of 2013 was the 8th of April, 2015. The court is of the view that the respondents order of the 19th of January, 2017 was made in accordance with s. 48(3C) of the Planning and Development Act 2000 as inserted by s. 29 of the Urban Regeneration and Housing Act 2015.

46. The court also notes that the respondent reduced the financial contribution payable in respect of unsold houses pursuant to the planning permission. Such an order can be lawfully made by the respondent in the performance of the executive functions of the respondent.

47. The court is of the view that the appropriate statutory construction of the legislation makes it clear that the applicant has a liability to both Louth County Council and to Irish Water in respect of the financial contribution payable under Condition 13.

48. The court is also of the view that because of the actions of the council, the court directs that the amendment to Condition 13 is only in respect of the thirty unsold houses.

49. It is clear that as the water and sewage functions relating to the development were vested in Irish Water, the applicant has a liability to Irish Water in respect of part of the financial contribution payable under Condition 13.