THE HIGH COURT

[2012 No. 16 JR]

BETWEEN

BALLINASLOE CHAMBER OF COMMERCE LIMITED

APPLICANT

AND

BALLINSLOE TOWN COUNCIL

RESPONDENT

JUDGMENT of Mr. Justice Birmingham delivered the 8th day of June 2012

1. This is a challenge by Ballinasloe Chamber of Commerce ("the Chamber of Commerce") to a decision of Ballinasloe Town Council ("the Council") taken at a council meeting held on 8th November 2011, to approve the Ballinasloe Town Enhancement Scheme ("the Enhancement Scheme") in accordance with the provisions of Section 179(4)(b) of the Planning and Development Act 2000, as amended.

2. By agreement of the parties, the application for leave to apply for judicial review and the substantive proceedings have been heard together in a so-called telescoped hearing. The factual background to the present proceedings begins in 2009, when pay-parking was introduced in Ballinasloe Town. In the course of the discussions that took place in relation to that development it was agreed that funds generated would be ring-fenced and used to facilitate a Town Enhancement Scheme. Thereafter, even before the formal process leading to the decision to approve an enhancement scheme was initiated, a considerable amount of discussion took place which saw modifications of the scheme as first conceived.

3. It may be noted that in the pre-initiation discussions, the formal consultations that followed and even the debate that took place at the council meeting on the 8th November 2011, the question of the extent to which car parking spaces would be provided was a major concern. In particular, it was a cause of concern for the members of Ballinasloe Chamber of Commerce and the members of the Ballinasloe Business Alliance; there is a significant overlap in the membership of the two organisations. It may be noted that the proposed works which would comprise the Enhancement Scheme included re-surfacing and re-alignment of the carriageway, under-grounding of overhead cables, provision of new paving to footpaths, re configuration and paving of parking bays, paving of the central junction, provision of traffic-calming measures including rumble sets on the approaches to the central junction, provision of new public lighting and signage, provision of new street furniture, tree planting and the provision and improvement of pedestrian crossings and associated works.

4. In essence the applicants now advance four grounds of challenge and these might be summarised as follows:-

> (i) The Enhancement Scheme is a "plan or programme" within the meaning of Council Directive 2001/42/EC (the "SEA Directive") and that accordingly, the Council was required to carry out a Strategic Environmental Assessment (SEA) and failed to do so. I think it is fair to characterise this as the primary ground on which the applicant relies;
>
> (ii) The Council wrongly informed parties that had submitted observations that a decision taken by the Council could be appealed to An Bord Pleanála when this was not the case;
>
> (iii) The Council failed to fulfil the obligation imposed on it by Article 82 of the Planning and Development Regulations 2001, to notify certain prescribed bodies and in particular to notify Galway County Council;
>
> (iv) Inadequate reasons were provided for the conclusions reached in relation to parking. It is fair to say that this ground received less attention than the others.

5. It is convenient to consider these four issues that have been raised in reverse order.

The adequacy of reasons provided

6. Unusually in the planning code, the decision whether or not to approve the town enhancement plan was one to be taken by the elected councillors. In the nature of things, recording the reasons for a decision taken by vote after debate can prove to be problematic. It is the nature of things that individual decision-makers, whether jurors in the jury room or councillors in the Council chamber, may have different considerations to the forefront of their minds. However, while there may be some difficulties involved, the decision in *Tristor Limited v. The Minister for the Environment and Others* [2010] IEHC 397 put beyond doubt that there are instances where reasons have to be provided and also beyond doubt that councillors are capable of achieving this.

7. A detailed report on the Enhancement Scheme carried out by the Ballinasloe town manager and given to each member of the Town Council identified the key issues that had emerged from the public consultation process. It contained within it a section headed "loss of car parking" which dealt with the number of spaces available in the town centre and the number that would be available if the Town Enhancement Scheme proceeded. Arising from the public consultation process, and with an input from the elected representatives, the scheme was modified by increasing the number of spaces from 125, which was first proposed, to 132 spaces, a reduction of five spaces on what was there previously, if a consistent measurement method was applied. Then, in the course of the debate that took place at the council meeting of the 8th November 2011, the majority of the councillors agreed on a further modification which saw three further spaces provided with the result that the reduction from what had previously been available in the town was now just two spaces. In part this was achieved by removing designated marked-out spaces from car parking parallel to the kerb, a decision taken by the councillors to maximise parking opportunities.

8. If one looks at the pre-launch discussions, the public consultation process, the discussions with elected members and the debate

at the council meeting on the 8th November 2011, what emerges is an awareness of the concern of the business community in relation to the provision of parking spaces, a willingness to modify the proposal to maximise the provision of parking spaces and indeed a willingness to compromise on other objectives in order to achieve that. So, in order to maximise car parking spaces some pedestrian crossings were removed and there was a reduction in the number of trees to be planted.

9. Apart from the report of the town manager, the minutes of the council meeting of the 8th November 2011, are themselves extremely detailed. The contributions of individual councillors are recorded, as are questions that were posed to the manager and the details of his response. Following the discussion, two motions were proposed and seconded. The first to be put to the meeting, which in essence was to approve the proposal set out in the manager's report with certain modifications, was carried by five votes to three with one councillor abstaining, while the counter-motion was defeated by a similar majority. No-one reading the report that was submitted to the councillors and the minutes of the meeting could be left in the slightest doubt as to why the decisions reached were taken. The majority took the view that the proposed scheme offered an opportunity to develop the town centre and create an attractive urban environment. Every effort was made to minimise the impact on the availability of car parking spaces but in so far as that could not be entirely achieved, the majority clearly took the view that the balance of advantage lay with proceeding with the scheme. The members of the applicant company may not like the decision reached and may be disappointed that their campaign did not produce a different result but they cannot be in the slightest doubt as to why the decision was reached, much as they disagree with it.

10. Reference has been made to the decision of Clarke J. in *Christian v. Dublin City Council* (Unreported, High Court, 27th April 2012) sometimes referred to as the "*Sisters of Charity* case". However, apart from confirming that there are cases where elected members can be expected to state reasons for their decisions and indeed instances when they are specifically obliged to do so, the decision does not appear to be on point. In that case the elected members were departing in a very radical way from the course of action recommended by the manager, as of course they were perfectly free to do, but they were doing so in a way that left one searching for the reasons for their approach. In stark contrast, in the present case the elected members were broadly supporting the contents of the manager's report and in so far as they were modifying the proposals, they were doing so for a clearly identified and obvious reason. In my view no substantial ground for challenging the decision by reason of the alleged inadequacies of the reasons provided has been made out and I refuse leave on this ground.

Failing to notify prescribed bodies
11. Article 82 of the Planning and Development Regulations 2001, provides, so far as material:-

> (1) A local authority shall send notice of a proposed development to any relevant body or bodies.
>
> (3) A notice in accordance with sub-article (1) shall be sent-
>
> > (d) where it appears to the authority that the area of another local authority might be affected by the proposed development - to that local authority.

No formal notice was sent to Galway County Council. On a number of levels it is arguable that the scheme might affect Galway County Council's area. Ballinasloe is situated within the boundaries of Galway County Council and, significantly, it was envisaged that the project would proceed in conjunction with a Galway County Council water project. In these circumstances it is at least arguable, and perhaps more than that, that there has been a non-compliance with a statutory obligation. In these circumstances, I would be inclined to the view that substantial grounds for challenging the decision on this basis have been made out. However, that of course is not the end of the matter.

12. In considering whether the decision should be quashed, there are a number of factors to be considered. The entitlement to be notified, if there is such an entitlement, vests in Galway County Council, which has raised no complaint whatever. In these circumstances, the applicant is seeking to assert a third party right. That Galway County Council should not protest at any non-notification is scarcely surprising. As indicated, it was envisaged that the Town Enhancement Scheme and the Galway County Council Ballinasloe Main Drainage Advance Works Scheme would be carried out in tandem. So, there can be no doubt but that Galway County Council was fully aware of what was contemplated. That is put beyond doubt by the fact that the Director of Services for Planning for Galway County Council, Mr. Kevin Kelly, is also the Ballinasloe town manager. Seen in that light the complaint by the applicant is that Mr. Kelly did not look at himself in the mirror. How little substance there is in this complaint emerges if one considers the contents of the grounding affidavit which raises as an issue the question of non-compliance with Article 82 of the Regulations. It does so by reference to the obligation to send the proposal to the Arts Council, Fáilte Ireland, An Taisce, the Minister for the Environment and the Heritage Council but makes no reference whatever to Galway County Council. In fact the bodies referred to in the grounding affidavit had all been notified. It is only in an affidavit sworn in reply to the affidavit grounding the statement of opposition that a reference to Galway County Council emerges. In the circumstances, even assuming in favour of the applicant that the scheme would affect the area of another local authority, Galway County Council, the failure to send formal notification was a non-compliance of the most formal and technical nature and could not provide a basis for quashing the decision.

Mis-information in relation to the availability of an appeal
13. The background to this issue is that some 57 submissions were received by the Council, including one from the applicant. All those making submissions received a standard form receipt/acknowledgement. The document is headed as follows:

> "Ballinasloe Town Council
>
> Acknowledgement of receipt of submission or observation on a planning application
>
> [This is an important document!]
>
> Keep this document safely. You will be required to produce this acknowledgement to An Bord Pleanála if you wish to appeal the decision of the Planning Authority. It is the only form of evidence which will be accepted by An Bord Pleanála that a submission or observation has been made to the Planning Authority on the planning application."

14. Two arguments have been formulated in this regard. It is suggested that the receipt may provide evidence that Ballinasloe Town Council and those within it whose task it was to reach a decision believed that their decision was subject to an appeal. Secondly, it is said that there may have been individuals making submissions who were caused to alter their approach by this misleading information; the suggestion is that there may have been individuals who decided to hold back and reserve their best arguments for the appeal stage. Neither theory has been supported by any evidence whatever. The affidavit sworn on behalf of Ballinasloe Town Council avers

that, due to a clerical error, a letter which is sent to people making submissions in respect of planning applications was sent to those who made submissions in relation to the Town Enhancement Scheme.

15. In my view, the suggestion that some individuals were lulled into holding back their best arguments is fanciful. By definition, no receipt or acknowledgement issued until after the submission was delivered. The applicant is forced to speculate that there may have been someone who received the acknowledgement with its reference to An Bord Pleanála and then went and told someone else who then decided to alter the submission that would otherwise have been made. That seems unlikely. It is even more unlikely if one considers that local newspapers were carrying reports that there was no appeal to An Bord Pleanála and reported the activities of the Ballinasloe Business Alliance which had engaged a planning consultant and was quoted as saying at a public meeting that no appeal was possible. Neither argument in relation to this document has been made out and therefore, I do not propose to grant leave on this ground.

Requirement for a Strategic Environmental Assessment
16. The applicant contends that the Town Enhancement Scheme is a plan or programme within the meaning of the SEA Directive and that accordingly an SEA was required but was not carried out. The applicant argues that if an assessment was required and was not carried out it would be appropriate to quash the decision. In my view that latter proposition is clearly correct and self-evidently so. The real question however, is whether the Directive has any application to the Town Enhancement Scheme. That, in turn, requires consideration of the meaning of the term "plan and programme" as it appears in the Directive. The Directive, in so far as it is relevant, is in these terms:-

> "1. The objective of this Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment.
>
> 2. For the purpose of this Directive:
>
> > (a) "Plans and programmes" shall mean plans and programmes, including those co-financed by the European Community, as well as any modifications to them:
> >
> > - which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by parliament or government,
> >
> > - and which are required by legislative, regulatory or administrative provisions."

There is no doubt that the Town Enhancement Scheme was subject to preparation and/or adoption by an authority at local level pursuant to legislative provisions. Article 3 of the Directive provides:-

> (1) An environmental assessment, in accordance with Articles 4 to 9, shall be carried out for plans and programmes referred to in paragraphs 2 to 4 which are likely to have significant environmental effects.
>
> (2) Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes
>
> > (a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC, or (b) ... Directive 92/43/EEC.

17. The European Commission, in its document entitled "implementation of Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment", offers assistance in determining whether the Directive applies. It will be noted that Smyth J., in the course of his judgment in *Kavanagh v. Ireland* [2007] IEHC 296 (Unreported, High Court, 31st July 2007), commented that the Commission document, although not binding, was a reasonable pointer as to how, in practical terms, the Directive may be viewed. Smyth J. provided guidance as to the meaning of the term 'plan' in the context of the Directive. He did so as follows:-

> "In my judgment a plan is envisaged as a framework against which decisions are made concerning development consents: e.g. a development plan sets a framework against which individual planning permissions for specific projects are to be granted ... which is the requirement of Article 3.2(a) of the 2001 Directive."

The Town Enhancement Scheme does not meet the definition there referred to. In particular, there is no basis for suggesting that the Enhancement Scheme sets the framework for future development consents. The Town Enhancement Scheme does not provide a back-drop or framework against which future development consent applications will be judged in the meaning of the Directive, but is a once-off operative project. No substantial grounds have been advanced to suggest that the Town Enhancement Scheme was a plan or development within the meaning of the Directive, indeed in my view any such suggestion is misconceived and accordingly, I must refuse leave on this ground.

18. Save that I have indicated that I would be willing to grant leave on the point relating to the failure to notify Galway County Council, I am of the view that the applicant has failed to make out any of the grounds of challenge. In these circumstances I must refuse the reliefs sought.