

**THE HIGH COURT
JUDICIAL REVIEW**

[2003 No 626 J.R.]

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

BETWEEN

O'REILLY BROTHERS (WICKLOW) LIMITED

APPLICANT

AND
AN BORD PLEANÁLA

RESPONDENT

AND

WICKLOW COUNTY COUNCIL, GERARD HYNES, CHAIM FACTOR, CAROL FACTOR, SOFIA BURY AND RICHARD BURY

NOTICE PARTIES

Judgment of Mr. Justice Quirke delivered on the 22nd day of November 2006

By Order of the High Court (O'Neill J.) dated 14th January, 2005, the applicant was granted leave to seek certain declaratory and other reliefs by way of judicial review including an Order of *certiorari* quashing a decision of An Bord Pleanála (hereafter "the Board") made on 3rd July, 2003, in respect of a reference made to the Board by Wicklow County Council (hereafter "the Council") pursuant to the provisions of s. 5 of the Local Government (Planning and Development) Act 1963 (hereafter "the Act of 1963") whereby the Board decided that the intensification of use of a quarry at Ballylusk, Ashford in Co. Wicklow, comprised a development and was not an exempted development.

Relevant Facts

1. These proceedings relate to a quarry on the applicant's lands at Ballylusk, Ashford in Co. Wicklow. The quarry has been in existence since the mid-nineteenth century. It is acknowledged by the parties that quarrying had been carried out on the relevant lands during the 1940's, 1950's and 1960's and later during the 1980's. The lands were purchased in 1984, by the applicant which carried out quarrying activities during the succeeding years. These activities included drilling, blasting, extracting and crushing.

2. On a number of occasions during the 1990's and later, during the months leading up to November 2001, the Council received complaints from landowners adjoining the quarry. The complaints suggested that activities in and on the quarry had intensified so appreciably that they comprised a material change of use of the premises.

3. The Council investigated the complaints during 2001 and 2002 largely through its Executive Planner Ms. Tracey Flanagan and its Administrative Officer, Ms. Louise Casey.

A memorandum sent by Ms. Flanagan to Ms. Casey dated 2nd October 2002, outlined, (a) the history of the lands and complaints of alleged intensification of use during the ten years preceding the date of the memo, (b) additional complaints of alleged unauthorised development and, (c) steps taken by the Council (and the Garda Síochána) to issue warnings to the applicant in relation to the intensification of work at the quarry and to reduce the level of quarrying activity.

The memorandum concluded with the following recommendation:

"I refer to the recent meeting with David Sweetman, Law Agent, Wicklow County Council and his opinion that, given the lack of legislation for Quarries within the current Planning and Development Act 2000, it would prove difficult to succeed in taking this case to court and being successful.

In this regard and given the ongoing disruptive nature of this development, I consider that it is necessary to pursue this case further. However I recommend that the matter be referred to An Bord Pleanála for their Opinion."

3. As a consequence of that recommendation, a letter was sent to the Board. It was signed by Ms. Casey in her capacity as "Administrative Officer in charge of Planning Control" for the Council and it was in the following terms:

"Re: U. D. 649 – O'Reilly Brothers Limited, Ballylusk Quarry, Ashford, Co. Wicklow.

A Chara,

I wish to apply to An Bord Pleanála for a Declaration and Referral on Development and Exempted development under s. 127 of the Planning and Development Act 2000. This is with a view to determining whether O'Reilly Brothers Limited, Ballylusk, Ashford, Co. Wicklow have intensified the use of this quarry to the extent that planning permission is required. This quarry is pre-1963, but would appear to have increased in scale. However our Law Agent feels that we do not have enough evidence to secure a conviction and has suggested that a reference to An Bord Pleanála would be an appropriate way to determine the matter.

I am enclosing the appropriate fee and a full copy of the unauthorised development file. Obviously the names and addresses of the objectors have been given in confidence to the Planning Authority and should not be disclosed to the quarry owners.

The objector's Names and Addresses are as follows:

- 1. Chaim and Carol Factor, Ballylusk, Ashford, Co. Wicklow,*
- 2. Richard and Sofia Bury, Ballylusk Lodge, Ashford, Co. Wicklow,*
- 3. Gerard Hynes, Ballylusk, Ashford, Co. Wicklow.*

I would appreciate your response on this determination in due course. Please do not hesitate to contact the undersigned, should any further details be required."

Accompanying the letter was a file of papers. The papers comprised, (i) random correspondence between Council officials and persons

making complaints about the quarry, (ii) further random correspondence between Council officials and the applicant's solicitors in relation to allegations of intensification of use and allegations of excessive noise from the premises, (iii) random memoranda from Council officials to one another, and to and from the Council's Law Agent, (iv) correspondence between an engineer retained on behalf of the applicant and Council officials in relation to complaints of excessive noise and blasting operations on the lands, (v) correspondence between Council officials and members of the Garda Síochána and, (vi) copies of warning notices issued by the Council to the applicant which appeared to allege an unauthorised development of the lands by the applicant, (vii) warning letters which apparently were issued by the Council to the applicant in relation to alleged unlicensed blasting activities, and (viii) other random correspondence including copies of letters between the Council's Planning Department and a firm of Law Searchers.

The documents on the file were not paginated in any way and were not in date order. Some of the files comprised no more than a multiplicity of copies of the same document.

4. On 28th November, 2002, the applicant was provided with copies of the documentation which had been sent by the Council to the Board, (i.e. the Council's file and the accompanying letter), and was invited to make written submissions and observations upon the referral within a period of four weeks.

The applicant responded on 2nd January, 2003 by furnishing the Board with detailed written submissions and observations which included a submission that the reference should fail ab initio for non-compliance with the mandatory statutory provision contained in s. 127(1)(d) of the Act of 2000 which requires that referrals to the Board under the Act, shall *inter alia*;

..."state in full, the grounds of... the referral and the reasons, considerations and arguments on which they are based..."

5. Arising out of concurrent invitations, detailed written submissions and observations on the Council's referral were submitted to the Board by the second, third, fourth, fifth and sixth-named Notice Parties.

On 13th February, 2003, the Board issued notices to the applicant pursuant to the provisions of s. 131 of the Act of 2000. The notices enclosed copies of the Notice Parties' submissions and observations and invited further submissions and observations on those documents from the applicant.

A composite response to the Board's Notices was received from the applicant on 5th March, 2003. That response was contained in a detailed and comprehensive document.

6. On 10th March, 2003, the Board again wrote to the applicant enclosing copies of further written submissions which had been received by the Board from the Notice Parties together with notices pursuant to s. 131 of the Act of 2000, inviting additional submissions or observations from the applicant.

The applicant responded to the Board's invitation submitting a further detailed written composite response dated 31st March, 2003.

7. On the 15th May, 2003 the Board's Senior Planning Inspector submitted a Report to the Board on the question which had been referred by the Council. The Report outlined the history of the events which had given rise to the referral, identified relevant legislation and case law, summarised the submissions of the parties, and recommended *inter alia* that the Board should decide that the quarrying activity complained of comprised development and was not exempted development.

Under the heading "Assessment" the Inspector advised the Board *inter alia* that she considered that the main issues for consideration by the Board included the question "*whether the submission by ...(the Council)...in relation to this referral is invalid...*"

She continued (at para 8.2) as follows:

"The submission of the Planning Authority in this referral is quite deficient and barely complies with the requirements of s. 127 of the Planning and Development Act 2000. It does not state full grounds of the referral and the reasons, considerations and arguments on which they are based (as required in s. 127(1)(d) are not provided in the letter of Wicklow County Council. Reference to how the Law Agent feels about evidence to secure a conviction does not constitute a reasonable consideration for referral, but rather indicates deficiencies in terms of evidence which would be provided by the Planning Authority.....The Officers of the Board should not be subjected to sieving through copies of unauthorised development files as well as environmental section files containing mostly multiple copies of correspondence between Wicklow County Council and third party complainers and internal memos. Prior to forwarding of these to the Board, the Planning Authority could at least edit the files to remove extra copies."

Trenchantly, (and correctly), criticising the nature and quality of the information provided by the County Council to the Board and the failure of the Council to provide the Board with more useful and relevant information, the Inspector noted, that by way of contrast, the submissions of the Third Parties had contained "...reasonable amounts of reasons, considerations and necessary arguments" and had filled in "...the gaps in the information provided by the Planning Authority...."

She concluded that:

"...while I consider the submission of the Planning Authority deficient in supporting arguments and evidence, I do not consider that dismissal of this referral as being "invalid" is warranted. I further consider there is adequate information before the Board, to make a determination in relation to this appeal."

8. In evidence Mr. Gerard Egan who is the Senior Administrative Officer of the Board averred that the Board, with the benefit of the Inspector's Report, considered the question of the validity of the Council's referral and decided that the referral was valid and was in compliance with the provisions of s. 127 (1)(d) of the Act of 2000.

9. In a document dated 3rd July, 2003, the Board, having identified the question which had been referred to it by the Council, outlined its conclusions and made an Order in the following terms:

"An Bord Pleanála, in exercising the powers conferred on it by s. 5 of the Planning and Development Act 2000, hereby decides that the said intensification of use of a quarry is development and is not exempted development."

Relevant Statutory Provisions

Section 5 of the Act of 2000, provides *inter alia* as follows:

"(1) If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter...."

(4) Notwithstanding subsection (1), a planning authority may, on payment to the Board of such fee as may be prescribed, refer any question as to what, in any particular case, is or is not development or is or is not exempted development to be decided by the Board."

Section 127(1) of the Act of 2000 provides as follows:

"(1) An appeal or referral shall:

(a) be made in writing,

(b) state the name and address of the appellant or person making the referral and of the person, if any, acting on his or her behalf,

(c) state the subject matter of the appeal or referral,

(d) state in full the grounds of appeal or referral and the reasons, considerations and arguments on which they are based...

(2)(a) An appeal or referral which does not comply with the requirements of subsection (1) shall be invalid."

Issue

It is contended on behalf of the Applicant that the mandatory provisions of s. 127, (1) of the Act 2000 have not been complied with by the Council because the referrals made by the Council did not *"state in full that the grounds of ...referral and the reasons, considerations, and arguments on which they are based;..."* as required by subsection (d) of the section.

Mr. Gibbons SC, on behalf of the Applicant argues that, having regard to the provisions of subsection (2), (a) of the section, the referral must be deemed and declared to be invalid and the Board's decision quashed.

Ms. Butler SC on behalf of the Board acknowledges that the documentation submitted to the Board by the Council as a referral was wholly inadequate, deficient and unsatisfactory. She acknowledges further that it was necessary for the Board's officials and its Senior Planning Inspector to *"sieve" through "...copies of unauthorised development files as well as environmental section files containing mostly multiple copies of correspondence between Wicklow County Council and Third Party complainers and internal memos"* in order to discover many of the grounds of the referral and the *"reasons, considerations and arguments from which they are based"*.

She argues, however, that the Board was (and remains), prepared to undertake such onerous obligations in order to discharge its statutory functions and that it did so in this case.

Decision

The Act of 2000 forms part of a statutory planning regime which has been expressly designed by the Legislature to accommodate public participation in the planning process.

Section 5 of the Act of 2000 was enacted *inter alia* in order to enable interested parties to seek and obtain decisions from planning authorities on the status of individual "developments".

The section also confers upon planning authorities a right to refer such questions to the Board for determination. Where that occurs interested parties are permitted to participate in the referral process and to have their views and submissions considered and taken into account by the Board in its decision on the referral.

The participation of planning authorities and of interested parties and persons within the referral process is regulated by the provisions of Chapter III of Part VI of the Act of 2000.

That Chapter was enacted, *inter alia*, in order to enable appeals and referrals to be determined by the Board more expeditiously and efficiently than had formerly been the case.

Section 126 of the Act refers to the Board's obligation to ensure that *"...that appeals and referrals are disposed of as expeditiously as may be, and for that purpose, to take all such steps as are open to it to ensure that, in so far as it is practicable, there are no avoidable delays at any stage in the determination of appeals and referrals."*

The Chapter also, (a) identifies the procedures which apply to referrals to the Board, (b) defines the duties and objectives of the Board, and, (c) confers powers and imposes obligations upon the Board in order to enable it to achieve its objectives.

Subsection (2) of s. 126 prescribes certain time limits within which appeals and referrals should be determined. Sections 128, 129 and 130 set out procedures for the exchange of documents, submissions and observations between the participants within the appeal and referral processes. Sections 131 and 132 of the Act empower the Board to request submissions and observations from participants and to require the submission of documentations for particular purposes.

S. 133 empowers the Board to determine appeals and referrals after the expiration of specified periods and s. 128 of the Act empowers the Board in its absolute discretion to dismiss appeals and referrals on a number of grounds (including appeals which in the opinion of the Board, are vexatious, frivolous or without substance or foundation).

However, it is also clear from the provisions of the Chapter that it was enacted with the intention that public participation within the

planning process should be fully accommodated and facilitated.

The right conferred upon "*any person*" by s. 5 (2)(b) of the Act to refer questions for the decision of the Board may be exercised by members of the public subject to the same procedures which apply to the exercise by a Planning Authority of its right to refer questions to the Board pursuant to the provisions of s. 5(4) of the Act. Both referrals are governed by the procedures identified in Chapter III of the Act.

Ms. Butler S.C. has emphasised in argument the importance of public participation in the referral process. She points out that members of the public, who may be unfamiliar with maps, drawings, environmental impact statements and other technical documents and terminology have a statutory right to refer questions to the Board in simple, straight forward and sensible terms. She contends that the same considerations must apply to a referral submitted by a planning authority such as the Council.

She contends that if the grounds of a referral and the "*reasons, considerations and arguments on which they are based...*" can be discerned by the Board from a written document or series of documents submitted to the Board by an applicant, (whether a member of the public or a planning authority), then the referral should not be condemned as invalid for failure to comply with the mandatory provisions on subsection (d) of s127, (1) of the Act.

I accept Ms. Butler's contentions.

It is important to stress that the provisions of subsection (1) of s. 127 of the Act are mandatory in nature and may not be waived by the Board. Subsection (2), (a) of s. 127 clearly and unambiguously provides that "*an appeal or referral which does not comply with the requirements of subsection (1) shall be invalid*".

In this case the applicant's claim is confined to the contention that the grounds of the Council's referral and the "*reasons, considerations and arguments on which they are based...*" were not contained within the written documents which were submitted by the Council to the Board on the 6th November, 2002.

Mr Gibbons. S.C. argued that compliance with the provisions of s 127 (1), (d), required the Council's referral to be contained within a single written document which identified the grounds for the referral and the "*reasons, considerations and arguments*" upon which the grounds were based. I cannot accept his contention.

S. 127 of the Act requires that referrals submitted to the Board shall be... "*in writing...*". No provision of the Act requires that the grounds for a referral and the "*reasons, considerations and arguments*" upon which they have been based must be contained within one document. The terms of Chapter III of the Act would seem to suggest the contrary.

A large number of documents were submitted to the Board by the Council on the 6th November, 2002. They were accompanied by a letter signed by Ms. Casey in her capacity as "Administrative Officer in Charge of Planning Control" which expressly sought "*...a declaration and referral on Development and Exempted Development under s. 127 of the Planning and Development Act 2000. This is with a view to determining whether ... (the applicant)... (has)... intensified the use of this quarry to the extent that planning permission is required. This quarry is pre-1963 and would appear to have increased in scale*".

I am satisfied that the ground of the referral is contained within that letter. The subsequent exchange of documentation between all of the parties, (which was comprehensive in nature and detailed in evidential content), confirmed that the Council required the Board to determine whether the apparent intensification in the scale of quarrying operations at the relevant site was sufficiently large in scale that it comprised a "*development*" which was not an "*exempted development*".

What is contended on behalf of the applicant is that the "*reasons, considerations and arguments*" upon which the ground was based are not to be found within the letter. Undeniably that is so. However, as I have earlier found, the referral need not be contained within one document. It may be contained within one document or within a series of documents and it may be submitted in a relatively informal manner by a member of the public. What is mandatory is that the grounds of the referral and the "*reasons, considerations and arguments*" upon which they are based must be submitted in writing.

Mr. Gibbons S.C. contends that, in this case the "*reasons, considerations and arguments*" on which the grounds of referral were based were not to be found in the document submitted by the Council to the Board.

There is certainly substance in Mr. Gibbons' contention. The quality of the documentation provided by the Council and Board in support of its referral was deplorable.

The Board's Senior Planning Inspector referred to the Council's documentation on two occasions as "deficient". In her report to the Board she pointed out that "*Officers of the Board should not be subjected to sieving through copies of unauthorised development files as well as environmental section files containing mostly multiple copies of correspondence...*" seeking to discover the "*reasons, considerations and arguments*" on which grounds of referral were based. However, she concluded that "*... there is adequate information before the Board to make a determination in relation to this appeal*".

It is of course unnecessary to state that in proceedings such as these it is for this court, (and not the Board), to determine whether there had been compliance with provisions to s. 127, (1) of the Act.

Nonetheless it is relevant to the court's determination that the Board, in full session, has considered an application made on behalf of the applicant that the referrals should be rejected as invalid for failure to comply with the provisions of subsection (d) of s. 127 (1) of the Act. When considering that application the Board had before it the documentation submitted by the Council in support of its referral. The Board was understandably unhappy with the quality of the documentation submitted by the Council. It was, rightly, disappointed by the failure on the part of the Council to apply appropriate standards of care and courtesy in the submission of its referral. It was, nonetheless, satisfied that the reasons, considerations and arguments on which the Council's ground of referral were based could, with some difficulty, be discovered within the documentation provided to the Board.

Having read the relevant documents this court is of the same view. It was possible to discover the "*reasons, considerations and arguments*" on which the grounds of appeal were based within the documentation submitted by the Council. That was so because the Board was prepared, patiently and conscientiously to carry out a diligent search of the "rag-tag" bundle of documents submitted to it by the Council. It is regrettable and indeed it was discourteous and grossly unsatisfactory that any Planning Authority should refer a question to a Board pursuant to the provisions of s. 127 of the Act in such a deplorable manner.

I am satisfied also that neither the applicant nor any other party to the referral process were in any way prejudiced by the regrettable quality of the documentation provided by the Council. The issues which the Board was required to determine were identified by the Board and notified to the other interested parties. All of the participants within the referral process were provided with an opportunity to address those issues and to exchange submissions in accordance with the provisions of the Act.

During the subsequent careful and comprehensive process which was undertaken by the Board, all of the interested parties participated fully and comprehensively within the process.

It has been acknowledged by the parties that the documents submitted by the Council complied with all the provisions of s. 127 (1) of the Act other than subsection (d).

In summary, compliance with the mandatory provisions of s. 127 (1) of the Act of 2000 will be a question of fact for the court to determine in every case. The court will be mindful that the Board is an expert body empowered by the legislature to make decisions on a variety of important planning matters, many of them complex and technical in nature. The court will be slow to interfere with a finding of the Board on the issue of compliance with the provisions of s 127 (1), where the Board has heard and fully considered that issue but the court will do so where there is clear evidence of non-compliance.

It follows from what I have found earlier that the court will not interfere with the Board's decision in this case. Accordingly the applicant's claim fails.