Neutral Citation [2013] IEHC 122

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 153 JR]

IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACT 2000 AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 50

BETWEEN

JOE KELLY

APPLICANT

AND

CORK COUNTY COUNCIL

RESPONDENT

AND

NOEL KELLEHER

NOTICE PARTY

JUDGMENT of Kearns P. delivered the 22nd day of March, 2013

These proceedings concern the adequacy of site notices on lands at Moneycusker, Tomes, Macroom, Co. Cork in respect of which the notice party on 16th September, 2011 lodged a planning application for a development comprising an extension to an existing farm building. The respondent herein granted planning permission for the said extension on 11th November, 2011.

The applicant is a neighbour of the notice party and lives in residential property virtually opposite the site of the proposed development. He owns a small plot of land on the other side of the public road over which the notice party enjoys a right of way into the site of the proposed develepment. The proximity of the proposed development to the applicant's dwelling house, and the location of the right of way enjoyed by the notice party are best understood by reference to the map annexed to this judgment. That map indicates an access or entrance point to the notice party's lands from the public roadway opposite the applicant's house. The right of way is over a dirt road the surface of which shows evidence of user by vehicular traffic. There is a gate at the road end of the right of way and another gate at the point where the right of way enters the notice party's property at a point very close to the proposed development. As is also apparent from the map, there is a separate or main entrance to the notice party's lands some distance away along the same road at or near a bend in the roadway.

It is common case that the notice party, in the context of his planning application, posted a site notice at the main entrance to his property but did not erect any site notice at the point opposite the applicant's house where the right of way commences.

In these circumstances the applicant seeks an order of *certiorari* quashing the decision of the respondent to grant planning permission for the proposed development on the basis that there was non-compliance with the requirements of the Planning and Development Regulations 2001 (as amended).

Article 17 of the Regulations provides:-

"(1) An applicant shall within the period of two weeks before the making of a planning application –

(a) give notice of the intention to make the application in a newspaper in accordance with article 18, and

(b) give notice of the intention to make the application by the erection or fixing of a site notice in accordance with article 19."

Article 19 provides:-

"(1) A site notice erected or fixed on any land or structure in accordance with article 17 (1)(b) shall be –

(a) in the form set out at Form No. 1 of Schedule 3, or a form substantially to the like effect,

(b) subject to sub-article (4), inscribed or printed in indelible ink on a white background, affixed on rigid, durable material and secured against damage from bad weather and other causes, and

(c) subject to sub-article (2), securely erected or fixed in a conspicuous position on or near the main entrance to the land or structure concerned from a public road, or where there is more than one entrance from public roads, on or near all such entrances, or on any other part of the land or structure adjoining a public road, so as to be easily visible and legible by persons using the public road, and shall not be obscured or concealed at any time.

(2) Where the land or structure to which a planning application relates does not adjoin a public road, a site notice shall be erected or fixed in a conspicuous position on the land or structure so as to be easily visible and legible by persons outside the land or structure, and shall not be obscured or concealed at any time."

Article 20 provides:-

"In addition to the requirements of article 17 (1)(b), a site notice shall be maintained in position on the land or structure concerned for a period of 5 weeks from the date of receipt of the planning application by the planning authority, shall be renewed or replaced if it is removed or becomes defaced or illegible within that period and shall be removed by the applicant following the notification of the planning authority decision under article 31."

The grounds upon which judicial review are sought may be summarised as follows:-

(a) The site notice at the main entrance to the development was in breach of Article 19 (1)(c) of the 2001 Regulations in so far as it was not erected "in a conspicuous position on or near the main entrance to the land or structure concerned from a public road … so as to be easily visible and legible by persons using the public road …"

(b) The notice party failed to comply with the requirements of Article 19 (1)(c) to erect a site notice "where there is more than one entrance from public roads, on or near all such entrances …" in circumstances where no sign was erected or fixed on or near the entrance to the right of way to the application site.

(c) The application failed to comply with the requirements of Article 23 (1)(a) whereby site or layout plans are required to show "bored wells, … and other features on, adjoining or in the vicinity of the land or structure to which the application relates …". In particular, the application drawings failed to show a public well located 65 metres from the proposed site and adjacent to the right of way into the site, and a stream located 85 metres from the site and downhill from it.

(d) The application and/or the statutory notices failed to comply with the requirement to state the "nature and extent" of the proposed development having regard to the provisions of Article 17, 18 and 19 of the 2001 Regulations, as amended. In particular, the description of the proposed development as, "an extension to an existing farm building comprising of a slatted unit and machinery shed" did not accurately describe the nature of the proposed use of the machinery shed, namely the storage of equipment and plant for hire, which is a commercial, as distinct from agricultural, use.

Both sides to the case agreed that if the requirements of Article 19 with regard to the site notice were not complied with, the decision by the respondent to grant permission in this case would inevitably fall to be quashed. The hearing before this Court thus focused almost exclusively on that issue.

In its Statement of Opposition, the respondent contends that the site notice which had been posted by the notice party was fully in compliance with the requirements of Article 19 and, in particular, the notice party was under no obligation to erect any other site notice. The respondent's defence may be summarised as follows:-

(a) The site notice was erected on or near the main entrance to the land or structure concerned from a public road in accordance with Article 19 (1)(c).

(b) The requirement to erect site notices on or near all entrances from public roads, only applies where there is more than one entrance from public roads (plural). If there is more than one entrance to the site, such entrances in this case were on the same public road, namely the local secondary road.

(c) If, which was denied, there is a multiplicity of accesses to the development site, the requirement is to erect a site notice on or near entrances from public roads and not at access points from public roads. The right of way was an access point and not an entrance.

(d) If (which was denied) there were other access/entrances to the site, the site does not adjoin a public road at such points and there is no requirement to erect a site notice at such accesses/entrances.

It was contended by the respondent that the only entrance/access where the lands adjoin a public road is the entrance where the site notice was erected.

Alternatively, in so far as there were access/entrances at or near the applicant's property, the lands at such points of access were not under the ownership or control of the notice party so that he was precluded from erecting a site notice on such lands which do not form part of the site.

In all these circumstances, it was contended that the erection of a single site notice was sufficient and in accordance with Article 19 of the Planning and Development Regulations 2001, as amended.

DECISION

It is clear that Article 17 of the Planning and Development Regulations 2001 (as amended) requires compliance with both the newspaper notice and site notice requirement under Article 17(1) of the Regulations. In *Marshall v. Arklow Town Council* [2004] 4 I.R. 92, Peart J. stated as follows at p.122:-

"It is true that Article 17 (1)(a) of the Regulations requires the insertion in a newspaper of an intention to apply for permission, but for that to be a fail-safe method, or even a reasonable method of protecting the interests of persons likely to be affected, it would be necessary for citizens each day to purchase a copy of each newspaper in which such a notice might appear. It was presumably to give added protection to citizens likely to be affected by a planning permission, that the legislature introduced the additional safeguard of requiring a site notice to be put into position in a conspicuous manner at the proposed site."

In this case the notice party only erected or fixed a site notice on the gate post at the entrance to his dwelling. This gate post is located at a distance of between 5 and 6 metres from the metal surface of the public road and is somewhat recessed from it. While under Article 19 (1)(c), the site notice is required to be erected or fixed "in a conspicuous position", so as to be "easily visible and legible by persons using the public road", I do not accept the applicant's submissions that the site notice at the main entrance to the

applicant's property failed to satisfy tests of visibility or legibility. It was further submitted that the site notice which had been erected must be "easily visible" by persons travelling the public road in both directions. It was submitted that the notice was only visible by persons using the public road in one direction. I think this is an over-exacting interpretation of the statutory requirements. The requirement is not to be measured against what someone passing by motor car along the roadway might or might not see. In reality the kind of site notice employed in this jurisdiction admits only to being read by pedestrian traffic. This is because of its size and dimensions. I am of the view that this particular site notice complied with the requirements of Article 19.

The real contest in this case turns on whether or not the requirements of Article 19 (1)(c) were complied with. More particularly, was there compliance with those words of Article 19 (1)(c) underlined hereunder which require that a site notice be erected in a conspicuous position on or near the main entrance to the land or structure concerned of a public road, or where there is more than one entrance from public roads, on or near all such entrances ?

Quite apart from the technical requirements of Article 19, it is common case that the notice party approached his neighbour, the applicant herein, prior to taking any steps in respect of the planning application to ascertain if Mr. Kelly was agreeable to the development, or at least would acquiesce in it and not object. Mr. Kelly made clear his strong objection to such a major development being carried out in close proximity to his dwelling house, not least because in his view the applicant had substantial other lands which would have permitted him to locate the development elsewhere than at the proposed location. It is, I think, fair to describe this particular entrance as being almost straight in front of Mr. Kelly's dwelling house. Of course, had a site notice been posted at that location it would have been visually prominent from the perspective of the applicant in exiting his own property.

While the respondents have argued with great vigour that the entrance opposite the applicant's house is nothing more than an "access" point, I am satisfied from the photographs, map and other evidence placed before the court that it is both an access and an entrance to the development site and I accept the applicant's submissions in this regard. A photograph exhibited in the third affidavit of the applicant shows the notice party closing the gate at the entrance to the right of way on 28th February, 2012. The notice party himself does not deny using the right of way, although he contends it is used by him on a limited basis only. The fact of limited user does not convert the entrance from the public road into something else merely by dint of the fact that it is used on a limited basis.

Counsel for the applicant argued that the reference to "from public roads" in the passage underlined in Article 19 (1)(c) should, in accordance with the Interpretation Act 2005, be read to include both the singular and the plural. I agree. It seems clear to me that this particular portion of the regulation was worded to cover a situation where a development site might have several entrances bounded by more than one public road. For example, if the applicant's lands were bounded by another roadway some miles away, and if there was an entrance to the site from that location, there would clearly be an obligation to post a site notice there also. However, the critical consideration is not just the number of roads but the existence of more than one entrance and in this context I am satisfied that the words "public roads" must be interpreted as including a single stretch of roadway, as otherwise the intention of the statutory requirement could be nullified. The submission advanced on behalf of the respondent that an applicant effectively can 'opt' for any one of the three alternative scenarios outlined in Article 19 (1)(c) because the word "or" separates them in the statutory provision strikes me as illogical. The provisions of Article 19 (1)(c) are clearly addressed to different "on the ground' situations and the obligations on an applicant clearly hinge and depend on which particular ground conditions apply in his case. This is a case where there are two entrances from public roads.

I find it equally difficult to accept the notice party's contention that it was impossible to post a site notice at this particular entrance because the notice party did not own the lands in question. It is clear that the notice party never sought the permission or consent of the applicant to the posting of a site notice at this location. In the alternative I would in any event be of the view that the consent of the applicant was not required as the notice party must be taken as enjoying all ancillary rights as are reasonably necessary to the exercise and enjoyment of his easement. (See Bland, *Easements* (2nd Ed., Roundhall,). paras 2-45 at pp. 63-64.) The posting of a site notice for a mere 5 weeks must be seen as such a right.

This brings me to the fourth and final point. The respondent contends that the requirement under Article 19 (1)(c) does not apply in relation to any second entrance because the land or structure to which the planning application relates in this case does not adjoin a public road. In this regard the respondent relies on Article 19 (2) of the regulations.

However, counsel for the applicant contends, and I accept, that the main entrance to the land or structure is from a public road and the line delineating the application site includes the main entrance/access to the development which itself adjoins a public road. Therefore, I am satisfied that the relevant land or structure does adjoin a public road. Furthermore, the right of way forms part of the land to which the application relates. It therefore follows that Article 19 (2) is not applicable in the present case as it only applies "where the land or structure to which a planning application relates does not adjoin a public road …". Accordingly, the requirements under Article 19 (1)(c) are applicable where there is at least one entrance from the public road. There is no requirement that the application site should adjoin the public road at the point where there is a second entrance from public roads before the site notice requirement under Article 19 (1)(c) applies.

For all these reasons, I am satisfied that the failure of the notice party to post a site notice at the entrance opposite the applicant's house amounted to a non-compliance with the requirements of Article 19. It follows therefore that the decision to grant planning permission in this case must in consequence be quashed.

I should in conclusion perhaps briefly address the contention that the application drawings failed to identify significant features as required by Article 23 (1) of the Regulations. Article 23 (1)(a) provides as follows:-

> "(1) Plans, drawings and maps accompanying a planning application in accordance with article 22 shall all be in metric scale and comply with the following requirements:-
>
> > (a) site or layout plans shall be drawn to a scale (which shall be indicated thereon) of not less than 1:500 or such other scale as may be agreed with the planning authority prior to the submission of the application, the site boundary shall be clearly delineated in red, and buildings, roads, boundaries, septic tanks and percolation areas, bored wells, significant tree stands and other features on, adjoining or in the vicinity of the land or structure to which the application relates shall be shown …"

In the instant case the application drawings failed to identify a public well located 65 metres from the proposed site and adjacent to the right of way into the site and also failed to display the stream located 85 metres from the site and downhill from it. These omissions were, in my view, material departures from the requirements of Article 23(1)(a).