Neutral Citation Number [2005] IEHC 372

THE HIGH COURT
JUDICIAL REVIEW

2005 No. 488 JR

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000

BETWEEN

MAURICE FITZGERALD

APPLICANT

AND
AN BORD PLEANÁLA

RESPONDENT

AND
KERRY COUNTY COUNCIL

FIRST NAMED NOTICE PARTY

AND
MÁIRE NÍ IARLAITHE

SECOND NAMED NOTICE PARTY

Judgment of Mr. Justice Roderick Murphy dated the 11th day of November, 2005.

1. Outline

1.1 This is an application for leave to quash a decision of the respondent to grant permission for a dwelling on the Ring of Kerry where there was a concern regarding sight lines from the entrance from the dwelling. By a decision dated 12th October, 2004, of the first named notice party, Kerry County Council, refused planning permission for the construction of a similar dwelling described as a dormer dwelling house, garage, septic tank and all associated works at An Charraig, Baile na nGall, Tralee, County Kerry. That refusal was appealed to An Bord Pleanála by Máire ní Iarlaithe, the second named notice party.

1.2 By decision and order of An Bord Pleanála dated 15th March, 2005, the board granted planning permission being reference PL 08.209562. The decision related to premises on the R.559 on the regional road, the site map in relation to which showed a 55 metre sight line to the west on a straight road and to the east around a slight bend.

The planning history noted a previous decision, reference 1281/00. to grant planning permission for a dwelling on the site which was upheld on appeal by An Bord Pleanála subject to the imposition of a condition requiring that "vehicular entrance should be located at the western end of the site frontage". It would appear that Kerry County Council, the first named notice party, did not raise the issue of road safety in relation to that application.

1.3 Previously, in July, 1999 the planning authority decided to grant permission for a "traditional house with rooms in the attic" on the site (ref. 3106/98). On a third-party appeal, the board decided to refuse permission for two reasons: the impact on local amenities and the existing houses of the height and mass of the house; and the design being out of character of the area.

There had been two previous grants, in 1984 and 1978. In the vicinity planning permission was granted for a small development of five dwelling houses on a site several hundred metres to the west of the appeal site but in November, 2004 the planning authority decided to refuse permission for a dwelling on land immediately east of the appeal site, giving a reason for refusal as being a traffic hazard. The inspector's report also refers to a number of permissions on file for individual dwellings, mainly to the west of the appealed site, being five in number.

The site did not have any specific zoning objectives on the Kerry County Development Plan, although the area immediately across the R.558 to the south is designated as a secondary special amenity.

1.4 This is an application for leave for an order of *certiorari* quashing the decision of the respondent and a declaration by way of an application by way of judicial review that the said decision is *ultra vires*, null and void and of no legal effect.

It is common case that the applicant, pursuant to s. 50(4) of the Planning and Development Act 2000, has a substantial interest in the matter as his property is immediately adjacent to the appealed site and that he has made objections, submissions and observations during the planning process. The applicant firstly bases his case on the unreasonableness of the board's decision insofar as the only reason offered for overruling the single ground of refusal by the planning authority (that of traffic safety, being poor sight lines at the entrance to the proposed development), was because of the existence of a previous council decision granting permission for a similar, although not identical, application.

The second ground is that both the council and its inspector allowed themselves to be fettered in the exercise of their discretion to grant or refuse planning permission by the earlier decision.

It is necessary, accordingly, to consider the inspector's report.

2. Inspector's report of 9th March, 2005

2.1 The inspector refers to the R.559 road running in a loop from Dingle town, around the tip of the Dingle peninsula, where a dense network of minor third class roads and tracks run off providing access to the coast and clusters of dwellings in the area. The road is a single carriageway, lacking a footpath or hard shoulder.

He refers to the grounds of appeal as being the submission that a sight line of 55 metres can be achieved in both directions from the proposed entrance. Various other arguments were made in favour of the proposed development that are not relevant to this application.

Under the heading of "highway safety" the inspector, referring to the council's refusal, says as follows:

> "The single reason for refusal relates to highway safety. The reason given is poor sight lines in either direction, but particular concern was expressed by the area engineer at the view east along the R.559 from the proposed access. The plans submitted indicated that this sight line is 55 metres. Normally, I would consider 100 metres to be the absolute minimum that would normally be acceptable on a regional road in a 100 kph zone (although I note that there is a school

warning sign at the corner – this has been erected since the last appeal). I observed high speeds during my site visit, but there was a general tendency for motorists to slow down in proximity to the school – but this may not be the case outside school hours.

In my report on the previous appeal on the site I raised the issue of highway safety as 'a new issue'. I had strong concerns about permitting any access close to the blind corner to the east although at that time (and in the appeal before that), the planning authority never raised the issue of highway safety.

In the last appeal, the board addressed the issue of highway safety by setting a condition (No. 2) such that the access is set to the western-most corner of the site. The applicant has complied with the general aim of this condition, although it would seem that agreement with the planning authority might be difficult to achieve since they now have decided that it is dangerous in principle.

While I have not changed my opinion that the safety of the road access to this site is questionable, I do not consider that any circumstances have changed since the last appeal to justify a refusal. I therefore conclude that, having regard to the existing permission on the site, a refusal for this reason is not justified."

Accordingly, the inspector concluded that the proposed development was acceptable in principle having regard to the previous permission, in particular, condition 2 that access be set to the western-most corner of the site. He therefore recommended that, subject to that and other conditions, planning permission for the proposed dwelling be granted.

The reasons and conditions given in the inspector's report as follows: "Having regard to the planning history of the site, particularly condition 2 of the planning permission PL 08.12132 granted by the board on 1st June, 2001, it is considered that the proposed development would not constitute a traffic hazard and would otherwise be in accordance with the proper planning in a sustainable development of the area."

2.2 By board direction, the submissions on the file and the inspector's report were considered at a board meeting held on 14th March, 2005. The board decided to grant permission generally in accordance with the inspector's recommendation, subject to the amendments shown in manuscript on the attached copy of the inspector's draft reasons, considerations and conditions. The reasons and considerations then read:

"Having regard to the planning history of the site, it is considered that the proposed development would be in accordance with the proper planning and sustainable development of the area."

3. Decision of An Bord Pleanála
The board decided to grant permission in accordance with the plans and particulars based on the reasons and considerations under and subject to the conditions set out below:

" Reasons and Considerations

Having regard to the planning history of the site, it is considered that the proposed development would be in accordance with the proper planning and sustainable development of the area."

Then followed ten conditions.

The relevant conditions provided that the entrance gates be set back not less than 4 metres from the edge of the public road with wing walls made of local stone being bell-mouthed and not exceeding 1 metre in height in the interests of traffic safety and also surface water at the site not being permitted to drain onto the adjoining public road in the interests of traffic safety.

4. The applicant's case
The grounds on which the applicant's case is based are interrelated.

It is submitted that the board's decision was unreasonable insofar as the only reason offered for overruling the single ground of refusal by the planning authority, that of traffic safety, was the existence of a previous decision of the board for a similar application.

The second was that the board and its inspector allowed themselves to be fettered in the exercise of their discretion to grant or refuse permission by the board's earlier decision to grant permission in respect of a different planning application.

The applicant referred to *Fairyhouse Club & Ors. v. An Bord Pleanála and Meath County Council* (Unreported, High Court, Finnegan J., 18th July, 2001), where the court held that the inspector's report had formed part of the reason for the board's decision.

The applicant submitted that the inspector's report in relation to the critical issue of traffic safety was not a proper basis for the rejection of the traffic safety objection. The inspector indicated that he would consider 100 metres to be the absolute minimum on a regional road in a 100 kph zone. The inspector referred to the fact that he himself had raised the issue of highway safety as "a new issue" in the previous appeal but that the planning authority had not raised the issue. He had not changed his opinion but that a refusal for this reason was not "justified" on the basis that there was an existing permission on the site. The applicant said that the board should not have allowed its discretion to be fettered where the inspector was still of the opinion that the sight lines were not adequate. The inspector had erred in fettering his discretion to consider the issue of traffic safety afresh.

The applicant referred to *North Wiltshire District Council v. Secretary of State for the Environment* [1992] 3 P.L.R. 113, where it was stated:

"What makes such a decision potentially relevant is that, as a matter of public policy, it is desirable that there should be consistency … a previous decision is potentially relevant not because there is a duty to decide similar cases in the same way. Clearly there is not. The authority must decide each application under considerations that are material to that application. Potential relevance arises because consistency is desirable and inconsistency may occur if the authority fails to have regard to a previous decision."

The applicant submitted that the inspector and the board should have taken a different decision in the context of the most recent planning application where the planning authority had indicated that it was not satisfied with safe access. The inspector had referred

to an email from the Dingle Area Engineer dated 12th October, 2004, which stated that the latter considered the proposed development to be a traffic hazard due to the limited sight distances and that the planner's report had recommended refusal on the basis of the Area Engineer's report.

The applicant finally referred to *Aprile v. Naas Urban District Council* [1985] I.L.R.M. 510, where it was held that the planning authority could extend the reasons for refusal on a second similar application. Accordingly, the planning authority were entitled to raise traffic safety objections in relation to the subject planning application although these had not been raised in the context of the previous application.

The applicant submitted that as a consequence of both the inspector and the board regarding themselves as bound by the earlier decision, the objections of both the applicant and the planning authority on grounds of traffic safety were rendered completely nugatory. Both the inspector and the board effectively disregarding the suggested reasons and considerations. This was illogical having regard to the inspector's position and the inspector's conclusions were untenable in the light of his finding in relation to traffic safety.

The board too considered itself bound by earlier decisions insofar as the reasons and considerations simply stated as follows:

> "Having regard to the planning history of the site, it is considered that the proposed development would be in accordance with the proper planning and sustainable development of the area."

It was submitted that the decision of the board was irrational and illogical in allowing itself to be fettered by its earlier decision and not taking into account the *bona fide* traffic safety objections of the planning authority, the applicant or, indeed, its own inspector's grave reservations about the traffic safety of the proposed development. In the circumstances there were substantial grounds on the basis which the applicant should be entitled to leave to apply for judicial review.

5. Respondent's submissions
An application for leave to apply for judicial review is governed by the provisions of s. 50 of the Planning and Development Act 2000. Leave should not be granted unless the court is satisfied there are substantial grounds, arguable and weighty (see *McNamara v. An Bord Pleanála* [1995] 2 I.R.L.M. 125, per Carroll J.) The test of substantial grounds has also been approved in *Kenny v. An Bord Pleanála* (No. 1) [2001] 1 I.R. 565 and other cases.

The applicant's contention is essentially that the decision of the board to grant permission was unreasonable because Kerry County Council had refused planning permission on the basis that the proposed development constituting a traffic hazard. The circumstances where the court can intervene with a decision of an administrative body on the grounds of unreasonableness is that set out by Finlay C.J. in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. The court cannot interfere merely on the grounds that it is satisfied that on the facts it would have raised different inferences and conclusions or that it was satisfied that the case against the decision made by the authority was stronger than the case for it. Finlay C.J. held at p. 72.

> "I am satisfied that an order for an applicant for judicial review to satisfy a court that the decision-making authority had acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision."

See also Peart J. in *M.A. Ryan & Sons Ltd. v. An Bord Pleanála*, (Unreported, High Court, 6th February, 2003 at 39).

The respondent referred to the second named notice party's appeal before the board. The appeal was on the ground that the vehicular access had been located at the western-most corner of the site frontage in order to obtain the necessary 55 metre sight line in both directions. This submission was supported by a site plan lodged with the planning application and stated that the sight lines were in compliance with building regulations and also the requirements of the Kerry County Development Plan.

The appeal concluded:

> "Secondly, we submitted a valid planning application comprising of six number copies of complete drawing sets, *including site layout maps*. The Dingle Area Engineer should have had the courtesy to look for this map before recommending refusal. He would have seen that the sight lines are in compliance with building regulations and the Kerry County Development Plan. Instead he has based his recommendation for refusal on an incorrect impression instead of technically correct facts. Furthermore, the Dingle Area Engineer apparently was not aware of the earlier permission granted by Kerry County Council for a house on this site. The decision to follow the Dingle Area Engineer's recommendation is thus based on an incorrect and uniformed perception and should therefore be rectified." (5th November, 2004).

The respondent says that while the planning inspector does state that normally he would consider 100 metres to be the absolute minimum, he adds that there are factors present which allow him to conclude that the proposed sight lines of 55 metres are adequate, such as the school warning sign and the provisions of condition 2 which required the access to the site to be located at the western edge of the site frontage in the interests of traffic safety. As that condition had been complied with, the planning inspector considered that the circumstances had not changed to justify a refusal.

There was, accordingly, sufficient material before the board upon which it could reach its decision that the proposed development was in accordance with the proper planning and development of the area. Moreover, the board, in choosing to impose condition 2 regarding the entrance gates being set back not less than 4 metres from the edge of the public roadway, had clearly considered the issue of traffic safety.

In relation to the fettering of the board's discretion, the respondent referred to the permission granted on 1st June, 2001. Although the issue of traffic safety had not been considered by the County Council in determining this planning application, the board's planning inspector did consider whether the proposed development would create a traffic hazard and considered that this could be adequately addressed by way of condition No. 2, requiring that the access be located at the western-most corner of the site frontage. The respondent submitted that details of the revised access were to be agreed between the developer and the planning authority.

The respondent referred to *Stack v. An Bord Pleanála* (Unreported, High Court, Ó Caoimh J., 7th March, 2003) where the board, in determining a planning appeal was held to be entitled to take into account the reasons why planning permission was refused on an adjoining site without notifying the applicants of their intention to do so. The planning history of the site and the area was taken into account and was also taken into account by the report prepared by the applicant's engineer. Ultimately the planning inspector

concluded that there were no major changes in planning policy in the area since the last appeal and that the proposed development would not result in a traffic hazard as the developer had located the site access to the western-most corner of the site which the board considered, in the context of the previous appeal, would ameliorate any possible traffic hazard associated with the proposed development.

Moreover, the wording of the board's decision does not support the applicant's contention that the board consider themselves as being bound by their previous decision on the site. The reason given for the decision was:

> "Having regard to the planning history of the site, it is considered that the proposed development would be in accordance with the proper planning and sustainable development of the area."

The term "having regard to", was considered by Quirke J. in the different context of regional planning guidelines in the case of *McEvoy v. Meath County Council* [2003] 1 I.L.R.M. 431. Quirke J. stated at p. 446 that this phrase obliged a planning authority "to inform itself fully of and give reasonable consideration to any regional planning guidelines which are in force in the area which is the subject of the development plan". The board did not treat themselves as bound by the earlier decision but had regard to its previous decision and decided to follow it where there had been no change in planning policy.

6. Decision of the Court

6.1 The applicant, in the present case, seeks leave to quash the decision of Kerry County Council dated 15th March, 2005, and for a declaration that the decision was *ultra vires*, null and void and of no legal effect.

The grounds upon which the relief was sought were that the decision was so unreasonable that no appellate authority acting reasonably could have made the decision having regard to the evidence before it.

The ground relied on is that of unreasonableness. The decision of Finlay C.J. in O'Keefe v. An Bord Pleanála [1993] 1 I.R. 39 and subsequent cases are, accordingly, relevant.

It is clear that in order for an applicant for judicial review to satisfy a court that the decision-making authority had acted irrationally in the sense referred to in that case, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making body had before it no relevant material which would support its decision.

6.2 It seems to me to be necessary to distinguish between the decision of the inspector, dated 9th March, 2005, which, concluded that the proposed development was acceptable in principle, having specific regard to the previous permission. But he did add that it was acceptable having specific regard, in particular, to condition 2 of appeal ref. PL 08.121332. That, of course, referred to the siting of the entrance to the western-most point of the site and the subsequent condition of receding the entrance 4 metres at least from the roadway and the positioning of a low wall.

While the reasons and considerations were altered by the deletion of reference to condition 2 and the deletion of the phrase "would not constitute a traffic hazard and … otherwise" was amended in the board direction of 14th March, 2005, it remains the position that the inspector concluded that the proposed development was acceptable on principle having regard to the previous permission, in particular, condition 2 of the appeal reference. Notwithstanding, the inspector had maintained regarding the sight line.

The court has not been made aware of the provisions of the regulations with regard to sight lines nor, indeed, on what the County Kerry Development Plan provided in relation thereto. The appeal of the second named notice party, dated 5th November, 2004, submitted by Dr. Wittmann, asserted that the sight lines were in compliance with building regulations and the Kerry County Development Plan and referred to the Area Engineer's refusal being based on an incorrect impression instead of technically correct facts and his apparent unawareness of the earlier permission granted by Kerry County Council for a house on the site. This does not appear to have been controverted.

Accordingly, it is clear that there were reasons why the board decided to grant permission generally in accordance with the inspector's recommendation and referred to the inspector's draft reasons, considerations and conditions.

6.3 Counsel for the respondent referred the court to The State (Kenny) v. *An Bord Pleanála and Patrick E. Meenan*, (Unreported, Supreme Court, 30th December, 1984. McCarthy J. did not believe that what he understood to be the principles of natural justice (not to be a judge in one's own cause and to hear both sides of the case) were breached in that case where outline planning permission had been obtained, was still valid, and further permission was sought in circumstances where no reasons were given for the grant of the subsequent permission. The Supreme Court believed that the board did give such reasons as it was bound to do, when the approval was being granted. The trial judge, Carroll J., expressed her opinion that the principle of *res judicata* can be applied to a decision of the board. In the view of McCarthy J. she was correct in that conclusion. He did not find it necessary to express a view as to whether an application of *res judicata* in respect of such decisions [applied] although he found it difficult to see how a planning authority could be permitted to come to a new or different view when circumstances did not change (p. 8 of the judgment).

6.4 Ó Caoimh J., in *Stack v. An Bord Pleanála and Kerry County Council and McKernan* (Unreported, High Court, Ó Caoimh J., 7th March, 2003), was satisfied that the note indicating the reason for the refusal of planning permission indicated that the board was mindful of an earlier decision and, accordingly, it could advance same on the basis of consistency of approach in that the same reason for refusal was given in each case.

6.5 Mr. Galligan had relied on *Fairyhouse Club Ltd. and Ors. v. An Bord Pleanála*, (Unreported, High Court, Finnegan J., 18th July, 2001), for the proposition that the inspector's report is the basis of the board's decision and that the reasons for that decision clearly appear from the report which was to be read in conjunction with the decision.

The decision of the board contained a recital as follows:

> "Whereas a question has arisen as to whether the use of lands at Fairyhouse Racecourse, Rathoath, Co. Meath, for the holding of a two-day musical festival … is or is not development or exempted development."

The reasons stated in the decision did no more than state that the event constituted a material change of use and was not exempt development. However, the applicant was afforded an opportunity to comment on the submissions of the notice party. After the decision the inspector's report was made available, from which the reasoning clearly appears. The court held that, notwithstanding the terseness of the reasons, the applicants had not been prejudiced. Their submission, if correct, would result in an obligation on the board in every such case to give what would amount to reasoned judgment. In any event, the court held, the report of the inspector

amounted to nothing less than a reasoned judgment.

It is in these circumstances that the court held that the report had to be read in conjunction with the decision and was the basis of the board's decision. It does not seem to me that even if this were so in the present case that that would, of itself, fetter the discretion of the board.

6.6 The applicant further relied on *North Wiltshire District Council v. Secretary of State for the Environment & Ors*. [1992] 3 P.L.R. 113, where the Deputy Judge held that is was insufficient for the inspector in that case to have reached a conclusion different from his predecessor on essentially the same facts without explaining why he disagreed with the earlier decision. The Court of Appeal held that a previous appeal decision is capable of being a material consideration. One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process. It would be wrong to suggest that like cases *must* be decided alike: an inspector must always exercise his own judgment, but before disagreeing with the judgment of another, he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision (at 122 F-H).

It seems to me that the inspector in this case, while maintaining reservations, did follow the planning permission not without consideration, but in reliance on the condition imposed relating to traffic hazards. Accordingly, he did not fetter his discretion.

6.7 Finally, the applicant referred to *Aprile v. Naas Urban District Council* ([1985] I.L.R.M. 510. In that case, it was held that if a planning authority sees fit to confine its ground for refusal of an application to a single ground, it does not preclude itself from relying on other grounds if a similar application is made in relation to the same lands, after that first ground of objection has been successfully disposed of. Relief of *mandamus* should, in any event, be refused having regard to the alternative remedy of the right of appeal to An Bord Pleanála which is available.

6.8 In the present case the planning authority did raise other grounds. The raising of these other grounds does not seem to me to have involved a change of circumstances. However, they were entitled to raise these grounds and they were dealt with by the inspector and by the board. It does not seem to me that on the basis of *Aprile v. Naas Urban District Council*, that the court should grant leave.

6.9 The applicant submits that there has been a change in circumstances in that Kerry County Council raised the basis of traffic hazard which had not been raised when the original planning permission was refused. He submitted that the Council was entitled to treat the application *de novo*.

The court agrees that the application should be *de novo* but should also take into account the planning history of the site. It seems to me that the issue of traffic hazard had been dealt with by the board in imposing the condition to move the entrance to the western-most site. In the new application it does not seem to me that the attitude of the planning authority could be regarded as a changed circumstance. It was not an objective fact but rather a subjective view of the planning authority.

It does not seem to the court that the board had fettered its discretion. It had taken into account the recommendation of its inspector and, indeed, while granting permission generally in accordance with his recommendations, had done so subject to the amendments shown in the copy of the inspector's draft reasons, considerations and conditions. This seems to me to show a deliberation regarding the inspector's recommendations.

The grant of the board was based on the reasons and considerations under and subject to the conditions set out in the decision. The reasons and considerations were stated as being:

> "Having regard to the planning history of the site, it is considered that the proposed development would be in accordance with the proper planning and sustainable development of the area."

The conditions relating to the set-back of the entrance gates and the drainage of surface water were both imposed in the interests of traffic safety.

In the circumstances the court will refuse leave to apply for the reliefs sought.