

THE HIGH COURT

RECORD NO: 2001/993 P

BETWEEN

CHARLES McHUGH

PLAINTIFF

AND

KILDARE COUNTY COUNCIL

DEFENDANT

Judgment of Mr. Justice Gilligan delivered on the 26th day of October, 2005.

1. In or about 1993 Kildare County Council commenced a review of their County Development Plan. The draft of the proposed revisions went on display from the 10th of October 1998 to the 10th of November 1998. Following amendment the draft was on display from the 26th of March 1999 to the 27th of April 1999 and the plan was adopted in May of 1999.

2. Charles McHugh is the owner of lands at Newhall/Jigginstown Naas in the County of Kildare. During the course of the review of the plan and in particular during the time the draft was on display from August 1998 to November 1998, consultants acting on behalf of Charles McHugh made submissions to the council proposing the re-zoning of his lands at Newhall/Jigginstown. Following receipt of submissions from the said Charles McHugh and others relating to the plan, the County Council made a decision on November 30th 1998, to authorise the County Manager to appoint members of his staff to hear oral submissions from those who had made written submissions. By managers order made on the 10th of December 1998, Mr. Philip Jones and Miss V Cooke were appointed to hear oral submissions. On the 11th December 1998 a meeting was held with Charles McHugh, his auctioneer Mr. Charles Coonan and his engineer Mr. Tom Maguire for the purposes of receiving oral submissions. During the course of the said oral submissions, it was proposed on behalf of Mr. McHugh that up to 20% of his land, if re-zoned, would be dedicated to Kildare County Council and that the dedication would be on a pro rata basis subject to an agreement on zoning. Following receipt of the oral submissions the council proceeded to consider the adoption of the draft plan. Prior to the adoption of same, Charles McHugh entered into a written agreement dated the 13th of May 1999 for the purposes of regulating and developing his lands in accordance with the provisions of section 38 of the Local Government (Planning and Development) Act 1963. The agreement declared that Charles McHugh would dedicate 20% of his lands to Kildare County Council, for the use of the Council for its statutory purposes, if the remainder of his lands were re-zoned. The Agreement confirmed that he had been independently advised before signing the documents and the signature thereon is witnessed by his solicitor, Aisling Lupton. The plan was adopted by resolution of the council held at a meeting on the 24th of May 1999. At this meeting there was a particular discussion as regards the lands of Mr. McHugh which is recorded in the following detail.

"In all cases the landowners had confirmed in writing their offers of land to the Council, which they had previously indicated at draft plan stage during the oral hearing. Councillor Conway requested clarification regarding the offer of the 20% of road frontage to Kildare County Council and Mr. Jones stated that he had met with the agents of these land holders (at the agents request) and confirmed that council's position concerning the offers of land – that the layout of the lands would be such that the council would develop them for small industry etc independently of the adjoining private industrial developments in each case."

3. The plaintiff in these proceedings seeks the following reliefs

- (a) A declaration that the confirmation undertaking and agreement dated the 13th May 1999 is illegal, ultra vires, void and/or voidable and of no effect.
- (b) A declaration that the Defendant is not entitled having regard to the provisions of section 38 of the Local Government (Planning and Development) Act 1963 and in the circumstances which have arisen to require the Plaintiff to transfer his said lands to the Defendant without consideration
- (c) A declaration that the Plaintiff is not bound to transfer that land referred to in agreement of the 13th May 1999 to the Defendant.
- (d) Further or other relief
- (e) Costs

The Plaintiff's Submissions

4. The plaintiff submits that the defendant is limited to considering the proper planning and development of the area when carrying out its statutory obligation to amend the Development Plan and cannot seek any consideration or other advantage in lieu. The plaintiff argues that the agreement of 13th May 1999 is void or voidable as s.38 does not give the defendant the power to require the plaintiff to cede land in consideration of carrying out its statutory functions as a planning authority. Alternatively the plaintiff argues that the agreement is void and unenforceable by the defendant as there is a lack of any lawful or proper consideration for the transfer of lands.

The Defendants Submissions

5. The defendant denies the plaintiff was "required" to sign the agreement of the 13th May 1999. The agreement was entered into by the two parties pursuant to a proposal made by the plaintiff to the defendant. It was made lawfully pursuant to section 38 of the Local Government (Planning and Development) Act 1963. The defendant denies using its powers improperly, illegally and/or ultra vires. The defendant submits that the plaintiff received full independent legal advice in relation to the agreement. The defendant denies that the agreement is void or voidable or that there was any lack of lawful or proper consideration for the land transfer.

The law in relation to development plans

6. Under s. 19 of the Local Government (Planning and Development) Act 1963 (This duty now exists in s. 10 Planning and Development Act, 2000) local authorities are obliged to make a development plan for their respective functional area. Under s. 19(7) the making of a development plan or any variations of such plan is a reserved function. S. 19(2) states that development plans shall contain development objectives for the area in question. For urban areas certain objectives are mandatory e.g. the use solely or primarily (as may be indicated in the development plan) of particular areas for particular purposes (whether residential, commercial, industrial agricultural or otherwise) {per s. 19(2)(a)(i)} i.e. zoning. Zoning of land in other areas such as rural areas is not a

mandatory objective. However s. 19(3) allows the local authority to include discretionary objectives such as those set out in Schedule 3 of the 1963 Act and in the case of land in rural areas allow the inclusion of objectives for the use solely or primarily (as may be indicated in the development plan) of particular areas for particular purposes (whether residential, commercial industrial, agricultural or otherwise) i.e. re-zoning.

7. Section 38 of the Local Government (Planning and Development) Act 1963 states as follows:

38.-(1) A planning authority may enter into an agreement with any person interested in land in their area for the purpose of restricting or regulating the development or use of the land, either permanently or during such period as may be specified by the agreement, and any such agreement may contain such incidental and consequential provisions (including provisions of a financial character) as appear to the planning authority to be necessary or expedient for the purposes of the agreement.

(2) An agreement made under this section with any person interested in land may be enforced by the planning authority against persons deriving title under that person in respect of that land as if the planning authority were possessed of adjacent land and as if the agreement had been expressed to be made for the benefit of that land.

(3) Nothing in this section or in any agreement made thereunder shall be construed as restricting the exercise, in relation to land which is the subject of any such agreement, of any powers exercisable by the Minister or the planning authority under this Act so long as those powers are not exercised so as to contravene materially the provisions of the development plan, or as requiring the exercise of any such powers so as to contravene materially those provisions.

(4) Particulars of an agreement made under this section shall be entered in the register. It is clear in the circumstances of this case that it was the plaintiff who made the initial offer to transfer to the council free of charge or expense the relevant 20% of his lands as bounded in red on a plan annexed to the agreement which he entered into for use by Kildare County Council for such of its statutory purposes as it may decide. It was the plaintiff who sought to gain profit for himself in having the remainder of his lands zoned industrial and he had at all times the benefit of independent legal advice and subsequent to the lands being rezoned industrial he has not sought in anyway to challenge the validity of the decision of the planning authority in respect of the re-zoning.

8. It is clear from the submissions that were made on the plaintiff's behalf in respect of the re-zoning that there are a number of valid reasons as to why the relevant lands should have been rezoned.

9. In my view the only issue to be determined is as to whether or not Kildare County Council had power vested in it pursuant to s. 38 of the Act of 1963 to accept the plaintiff's proposal in respect of 20% of his lands and enter into the agreement of 13th day of May 1999.

10. It is in my view important to bear in mind that the subject matter of the s. 38 agreement which is in issue is not connected in anyway to a planning permission and in particular is not a condition of a grant of planning permission. What is in issue is an agreement pursuant to s. 38 of the Act in connection with the re-zoning of certain lands pursuant to a development plan.

11. Section 52 of the Town and Country Planning Act 1971 in England contains exactly the same wording as s. 38 of the Local Government (Planning and Development) Act 1963 as amended and was extensively discussed in the decision of the Court of Appeal in *Ja Pye (Oxford) Limited and South Gloucestershire DC and Others* (2001) EW CA Siv 450.

12. Lord Justice Latham at p. 6 of the judgment states in the clearest possible terms in relation to the validity of a s. 52 agreement as follows;

"It is therefore clear that it is not a pre-condition for the validity of a s. 52 agreement that it should relate to any proposed development. The vires of any such agreement depends simply and solely upon whether or not it was entered into "for the purpose of restricting or regulating the development or the use of the land".

The October 1979 agreement was clearly entered into for the relevant purpose. Indeed there is, in effect, no dispute about Avon's powers to enter into it. The question is whether or not in doing so it acted unreasonably in a *Wednesbury* sense."

Conclusion

13. In my view in the particular circumstances of this case the purpose of the agreement was to accept the offer of 20% of the plaintiff's lands so that they would be developed for small industry independently of the adjoining private industrial development and in my view this purpose comes within the ambit of restricting or regulating the development or use of the land.

14. I take the view that the defendant clearly conferred a benefit on the plaintiff and that consideration moved from the defendants to the plaintiff. I adopt the rationale of Denning LJ as expressed in *Ward v. Byham* (1956) 2 AER 318 at p. 319 wherein he state

"I have always thought that a promise to perform an existing duty or the performance of it should be regarded as good consideration because it is a benefit to the person to whom it is given."

15. I accordingly come to the conclusion that the agreement as entered into between the parties hereto is valid and enforceable and the plaintiff is bound to honour his obligations pursuant thereto. In these circumstances I decline to grant the plaintiff the relief as sought and I dismiss the claim.