

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 604 J.R.]

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

BETWEEN

PAUL PORTER AND TONY PORTER

APPLICANTS

AND

AN BORD PLEANALA

RESPONDENT

AND

WICKLOW COUNTY COUNCIL

NOTICE PARTY

AND

GARY O'NEILL

NOTICE PARTY

JUDGMENT of Ms. Justice O'Regan delivered on the 21st day of December, 2017**Issues**

1. The within matter was heard before the court on the 21st and 22nd November 2017 by way of telescoped hearing, the applicants having previously applied to Humphreys J. for leave to apply for judicial review on the 29th July, 2016. Such application was based upon a statement of grounds of the 25th July, 2016 and supporting affidavits of Paul Porter and Tony Porter, being the applicants and Vincent Farry, being the applicants' engineer. The respondents filed a statement of opposition bearing date 5th December 2016 and this is supported by an affidavit of Chris Clarke, in resisting the application of the applicants. Written submissions have been filed by both parties.

Background

2. Paul Porter and Tony Porter are brothers and each made an application to Wicklow County Council for planning permission to build a dwelling at Ballylug, Co. Wicklow. It is acknowledged that the applications of Paul Porter and Tony Porter are identical save that Paul Porter works part time for BAM and Tony Porter works part time as an actor. The decisions of Wicklow County Council and in turn An Bord Pleanala are also identical in each matter. Although initially the applicants complained that there was no individual assessment this argument was abandoned and not pursued given the fact that the applications themselves were identical.

3. The applicants are two of three siblings who were born in Laragh Village, Co. Wicklow and subsequently moved as a family with their parents to Trooperstown, Co. Wicklow (although the date when they moved is not clear as different documents submitted on behalf of the applicants suggest possibly in or about 1998 or in or about 2003 or alternatively in or about 2004. Nothing material turns on this date). The Trooperstown property was subsequently sold in or about 2008 and the family moved to their existing home in Ballylug thereafter. This property was in the name of Mr. Porter senior, who applied for planning permission but was refused because he had an alternate dwelling. Ultimately an application for retention permission was successfully made by the applicant's sister Stephanie Power, in 2010, following a prior unsuccessful application by her.

4. The applicants wish to build their own individual dwellings at Ballylug on lands gifted to them by Mr. Porter senior. The situation of these lands is comprised within a parcel of a 350 acre holding used for forestry, a portion of that holding is situated in Ballylug however there are two more parcels situated in counties outside Co. Wicklow.

5. The planning applications require being determined in accordance with Chapter 6 of Wicklow County Council Development Plan 2010-2016 and in particular having regard to the criteria in Objective RH 14 which in turn is divided into sixteen different criteria.

6. Wicklow County Council refused planning permission for three reasons on 25th January, 2016 namely that:-

- (1) the development would comprise a traffic hazard,
- (2) there were intrusive features, and
- (3) there was no housing need demonstrated in accordance with the Rural Housing Guidelines.

7. In turn, An Bord Pleanala rejected the applications on the 1st June, 2016 adopting the prior inspector's report of the 17th May, 2016, however by then the objection by way of traffic hazard had fallen away and the refusal was based upon essentially intrusive features and no housing need demonstrated.

8. Although the statement of ground complains the finding in respect of intrusive features was unlawful nevertheless the matter proceeded on the basis of the ground that no housing need was demonstrated as per the rural housing guidelines, this therefore is the singular portion of the conclusion of An Bord Pleanala which was the subject matter of the hearing.

Preliminary ruling

9. Following opening and submissions made on behalf of the applicants the respondent's counsel commenced his submissions, however objection was taken to the respondent relying on chapter 6 of the Wicklow County Council Development Plan aforesaid and in this regard two strident objections were raised, namely :-

(1) With regard to respondent counsel taking the court through the various levels contained within the development plan where such levels would inform the planning authority as to the suitability or otherwise of further development in a particular area;

(2) In addition the applicant argued that the respondent could not make submissions to the court that the effective birthright issue which arises in RH 14 Item 1 was in fact dealt with by the inspector or An Bord Pleanala in circumstances where this matter was not apparent (according to the applicants) from either the inspector's report, the decision of An Bord Pleanala, the statement of opposition or indeed the submissions filed on behalf of the respondent.

10. Because of the strident, forceful and persistent objections raised on behalf of the applicant in this regard, it was deemed necessary to deal with this issue as a discreet issue within the hearing and following submissions by both parties I made a ruling to the effect that the respondents were entitled to make submissions as to the levels of the various areas within the development plan and as to the birthright issue which arises under RH 14, item no. 1 on the basis that the development plan was a document which was before the inspector, was in fact exhibited in the affidavit of Paul Porter in his affidavit of 25th July, 2016 at para. 26 thereof when he says that this development plan sets out the principles and policies to be applied and indeed subsequent reference was made by him in paras. 27 and 28 of his affidavit. Further, the report or submission made by Mr. Farry on behalf of the applicant refers to the development plan. Finally the statement of grounds at paras. 12, 16 and 17 also make specific reference to chapter 6 of the development plan. Additionally no complaint is in fact made in the Statement of Grounds as to the manner in which RH14, item no.1, was dealt with (save for the more general complaint that it was irrational to refuse the applications when the prior application of Stephanie Porter, with similar personal circumstances, was successful).

11. As aforesaid RH 14 is divided into sixteen effective subsections thereafter. The submissions made on behalf of the applicant by Mr. Farry refer to items 1, 7, 9 and 12. A portion of the complaint made in the statement of grounds on behalf of the applicant is to the effect that the items within RH 14 other than 1, 7, 9 and 12 were not addressed by the inspector or An Bord Pleanala, however ultimately the applicants did not pursue this argument and confined their complaint to the assertion that neither the inspector nor An Bord Pleanala dealt individually with items 1, 7, 9 and 12 of RH 14.

12. By reason of all of the foregoing therefore, the following remaining legal grounds within the statement of grounds filed on behalf of the applicants fall to be determined by the court: -

(7) The respondent erred in the manner in which the criteria in objective RH 14 in chapter 6 of the development plan were interpreted and the sixteen eligible criteria are distinctive in nature. The applicants assert that it is evident that the appellants' applications were evaluated having regard to the first criterion only

(10) The term "definable social and economic need" is referred to in criteria 2, 3, 9 and 12 as specified in RH 14. However it is not the appropriate standard which is referred to in criteria 4-8, 10 -11 and 13-16 of the criteria specified in RH 14.

(12) The respondent erred in fact and/or in law in not evaluating the applicant's appeal in light of the different criteria in RH 14 in chapter 6 of the plan and/or in only and exclusively evaluating the appeals by reference to criteria 1, 2, 3, 9 and 12 as specified in objective RH 14.

(13) The respondent erred in fact and/or in law and/or acted irrationally in refusing permission for both applicants where permission was granted for their sister, Stephanie Porter, on the 25th November, 2010 (reference no. PL 27.236953), given the similar personal circumstances.

13. It will be recalled that Mr. Farry's submissions were made under criteria 1, 7, 9 and 12. Therefore, the complaint in my view at paras. 10 and 12 of the statement of grounds in the circumstances herein before outlined amounts to an argument that issue no. 7 of RH 14 should not have been assessed having regard to the term "definable social and economic need".

14. The respondents during the course of the hearing accepted that the items within objective RH 14 were to be considered disjunctively and argued that they did so consider them.

15. It is evident from the foregoing that the statement of grounds does not contain a complaint by the applicants that the inspector and/or An Bord Pleanala applied an incorrect test in assessing the term "definable social and economic need", however the applicant did make various submissions to the court at the hearing complaining of the interpretation of the social and/or economic need criteria within RH 14 (save for the irrationality point, aforesaid).

16. In addition it is evident from the outstanding legal grounds comprised within the statement of grounds that in fact no complaint is made by the applicants as to the manner in which An Bord Pleanala dealt with RH 14 item no. 1 – rather the complaint is confined to an argument that An Bord Pleanala dealt only with RH 14 item no. 1 and not the balance of the items within RH 14.

17. Given that the matter proceeded on the basis of the statement of grounds which was before the court and there was no application for an amendment (which presumably would have necessitated an adjournment) it is intended to confine this judgment to the matters raised in the statement of ground as opposed to also dealing with all extraneous matters actually raised in submissions before the court on behalf of the applicants and accordingly the queries raised which, fall to be considered, might be conveniently expressed as follows: -

(1) Was the decision of An Bord Pleanala confined to the first criterion set forth in objective RH 14, or did An Bord Pleanala deal with each of the relevant criteria raised on behalf of the applicants namely items no. 1, 7, 9 and 12?

(2) Was the term "definable social and economic need" applied in an assessment of the applicants submissions under RH 14 item no. 7 and if so was this the appropriate test?

(3) Did the respondent err in fact and in law and/or act irrationally in refusing permission having regard to the permission granted to Stephanie Porter on the 25th November 2010?

Submissions

18. Counsel on behalf of both parties in fact agreed as to the law to be applied in the within assessment including: -

(a) The board decision and the inspector's report may be read together - see *Craig v. An Bord Pleanala* [2013] IEHC 402.

(b) There is a presumption that the decisions of the board are valid unless the contrary is shown - see *Weston Ltd v. An Bord Pleanala* [2010] IEHC 255.

(c) Once there is any reasonable basis upon which the planning authority can make a decision, then the court has no jurisdiction to interfere - see *Weston Ltd aforesaid*.

(d) In assessing the boards' decision, what must be looked at is what an intelligent person who has taken part in the appeal or has been apprised of the broad issues which had arisen in it would understand from the documents the conditions and the reasons - see *O'Keefe v. An Bord Pleanala* [1993] 1 IR 39 and *Mulhaire v. An Bord Pleanala and Anor* [2007] IEHC 478.

(e) Where no evidence is put before the court to suggest that the view adopted by An Bord Pleanala differed from the view contained in the inspectors' report, the appropriate inference to draw is that the reasoning of An Bord Pleanala was the same as the reasoning of the inspector - see *Maxol Ltd v. An Bord Pleanala & Ors* [2011] IEHC 537.

(f) Reasons within the decision need not be discursive although the need for providing the grounds of the decision could not be satisfied by recourse to an uninformative yet technically correct formula - see *O'Donoghue v. An Bord Pleanala* [1991] ILRM 750 and *O'Neill v. An Bord Pleanala* [2009] IEHC 202.

(g) Where the decision of An Bord Pleanala differs from the recommendation of the inspector a heightened requirement for reasons would be required - see *Mulholland & Anor v. An Bord Pleanala* [2006] 1 IR 453. (h) In *Brophy v. An Bord Pleanala* [2015] IEHC 433 the applicant made an argument that South Dublin County Council had applied too strict a test of "need" identified in policy H. 32 of the relevant development plan, and accordingly fell into error, however Baker J. in the matter at para. 39 rejected the argument and upheld the board's entitlement to apply a strict test of "need" within the relevant policy of South Dublin County Council development plan.

19. In the impugned board's decision of the 1st June 2016, relative to the outstanding issues the permission was refused: -

"on the basis of the documentation submitted with the application and appeal, it is considered that the applicant does not come within the scope of the housing need criteria for a dwelling at this location as set out in the "Sustainable Rural Housing Guidelines for Planning Authorities" issued by the Department of the Environment, Heritage and Local Government in April 2005 and the current development plan for the area. Furthermore, the board is not satisfied that the applicant/appellants housing needs could not be satisfactorily met in an established settlement centre. Accordingly, it is considered that the proposed development would be contrary to the Sustainable Rural Housing Guidelines and to proper planning and sustainable development of the area."

20. It is common case that the foregoing although not identical to the reasons and considerations set forth in the inspector's report nevertheless mirrors same.

21. The relevant portion of the inspector's report of the 17th May, 2016 is contained at para. 4 which sets out some background to the application and the relevant development plan. Para 4.1.4 deals with RH 14 item 1. It will be recalled in this regard that the statement of grounds does not complain of the manner in which RH 14 item 1 was dealt with but rather that it was the only item within RH 14 that was addressed by the inspector. Notwithstanding that, in all submissions the applicants complained that an incorrect conclusion was reached. Para. 4.1.4 sets out the background of the applicants living in Laragh Village initially and thereafter in Trooperstown and subsequently at Ballylug as aforesaid, which in the events is identical in all material respects to the applicants sister Stephanie Porter, however at para. 4.1.5, the conclusion of the inspector is that the applicant has not demonstrated that they are permanently native residents of the rural area of Ballylug. In contrast, when the applicants sister Stephanie successfully applied for planning permission in 2010 compliance with policy SS9 was required which was permissive of rural residential development where a permanent need of residence which is defined as a person who was either born or reared in the immediate vicinity of the proposed site or resided in the immediate environs of the proposed site for at least ten consecutive years prior to the application for planning permission. In a report of Mr. Giddens, inspector, of the 7th April 2009, at p. 7 of 9 thereof, it is stated: -

"I am satisfied from the documentary evidence on the current file, that the applicant was born locally and lived her formative years in the family home in Laragh and later moved to the family house in Trooperstown Wood Lodge in Laragh East. While I note the various submissions in respect of the interpretation of "immediate vicinity" I consider both locations to be sufficiently close to fall within the reasonable ambit of that distance..I am also satisfied, through documentation, that the applicant is intrinsically linked to the local rural area through schooling, sporting activities and her full-time employment in the large and long established rural resource based family business."

22. In the event, that application on behalf of Stephanie Porter failed because of the view that it would seriously injure the visual amenity of the area. A subsequent application was processed and there is a report of Mairead Kenny, senior planning inspector, of the 14th of September, 2010, in the context of this appeal to An Bord Pleanala in respect of the subsequent planning application. Significantly, Ms. Kenny does not address the rural housing policy and her recommendation was to afford a grant of planning permission which subsequently was adopted by An Bord Pleanala and planning permission afforded.

23. The report of Siobhan Carroll of the 17th May, 2016 does not make any reference whatsoever to the foregoing planning history of Stephanie Power or the fact that she was deemed to come within the ambit of SS9 being the relevant rural housing policy at that time, notwithstanding that this history was before Ms. Carroll following representations made by Mr. Farry on behalf of the Applicants.

24. The respondent argues that it is clear from a perusal of the report of Ms. Carroll that she disagreed with the prior reports relative to Ms. Stephanie Power's application and in turn An Bord Pleanala could not ignore Ms. Carroll's effective submission that Ballylug came within a Level 10 area whereas Laragh village was within Level 7 area and therefore they were not comparable. The problem with the respondents argument in this regard is the fact that this explanation for departing from the previous planning permission afforded to Stephanie Power and the finding of Mr. Giddens is not referred to or developed at all in the report of Ms. Carroll and indeed the asserted explanation for departing from the prior report of Mr. Giddens based upon the various levels as aforesaid is not mentioned either.

25. I am satisfied therefore that Ms. Carroll's report in its current format in failing to address the findings of the inspector in respect of Stephanie Power's application, bearing in mind the shared background of all the Power siblings, to express a reasoned argument as

to why the prior inspector's report should be departed from is irrational in the legal sense. Further the argument on behalf of the respondent that An Bord Pleanála could not ignore findings of Ms. Carroll as to the different levels of *inter alia*, Laragh village, Trooperstown and Ballylug can not be sustained by reason of the fact that there is no mention of any of these items in the inspectors' report of Ms. Carroll.

26. Insofar as the remaining items of RH 14 are concerned, that is items 7, 9 and 12, para 4.1.6 of Ms. Carroll's report aforesaid deals with same which states: -

"In relation to his employment it is stated that Mr. Porter is primarily employed in the local family business "Porter's Christmas Tree Farms". The applicants' agent makes the case that the application be considered on the basis that he is a person whose principal occupation is forestry and that he has a definable social/economic need to live in the area. While I note that the applicant is employed in the family business some of which is located at Ballylug, having regard to the fact that there is an existing dwelling occupied by a family member at this location, I do not consider that an additional dwelling is warranted and I would concur with the planning authority that a defined social and economic need has not been adequately demonstrated."

27. Whereas social and/or economic need does dictate the ability of an applicant to come within item 9 or 12 of RH 14 that is not the case in respect of RH 14 item 7 which reads: -

"a person whose principal occupation is in a rural resource based activity (i.e., agriculture, forestry, mariculture, agritourism etc.) and who can demonstrate a need to live in the immediate vicinity of this activity."

28. It is noted that item 7 requires a person to demonstrate a need, item 9 requires a person to demonstrate a definable social and/or economic need and item 12 requires a person to demonstrate a definable social and economic need, accordingly it appears to me that the relevant needs anticipated by paras. 7, 9 and 12 in fact are different needs however the only needs addressed in the inspectors' report at para 4.1.6 is a definable social/economic need or a defined social and economic need.

29. In my view therefore there does not appear to be any evidence that consideration was afforded to the applicants claim under RH 14 item 7.

Conclusion

30. In conclusion therefore, based upon the aforesaid finding of irrationality vis-à-vis the within refusals and the prior successful planning application of Stephanie Porter, together with the failure of the respondent to address the applicant's claim under RH 14 item 7, in the decision of the respondent of the 1st June, 2016, I will grant the requested order of certiorari and direct that the appeal of the appellants be reconsidered having regard to the foregoing errors.