

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 524 J.R.]

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

BETWEEN

NAVAN CO-OWNERSHIP

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

MEATH COUNTY COUNCIL, SHOWTIME CINEMAS LIMITED, OMNIPLEX HOLDINGS, ALAN LATIMER, LIZ EGAN AND PAUL EGAN

NOTICE PARTIES

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 12th day of April, 2016

1. In these proceedings, the applicant seeks an order of *certiorari* quashing the decision of the respondent dated 30th July, 2015, refusing planning permission for a development of a cinema theatre complex at Navan, Co. Meath. The main thrust of the application concerns the respondent's interpretation of section 4.5.3 of the Navan Development Plan 2009 – 2015. That section provides as follows:-

"The long-term expansion of the town centre is envisaged towards the proposed central rail station. This area is currently characterised by underutilised industrial and commercial uses and benefits from extant permissions and an agreed Master Plan for a significant mixed use town centre development incorporating the reserved site as agreed with Iarnród Éireann for the future Navan Central Rail Station and railway line that is envisaged to be delivered as Part of Phase II of the Dublin-Navan railway line, a feature that must be maintained for possible future use. It provides for the creation of a new attraction poll (retail, business and an element of residential) around this central station, which together with the existing Shopping Centre will establish the broad axis in which most densification and mix of uses should occur."

2. On 3rd March, 2012, the first named notice party issued a Notification of Decision to grant planning permissions subject to nineteen conditions. The Notification of Decision to that planning permission was the subject of five third party appeals to the respondent. The first named notice party was invited to make observations. After setting out the relevant planning policies and zoning of the land, the notice party concluded *"therefore the principle of development would be accepted as subject to normal planning considerations"*.

3. The board appointed a senior inspector to prepare a report on the appeal and, by order dated 30th July, 2015, the board refused planning permission for the following reason:-

"Having regard to the location of the site remote from the established town centre of Navan, the isolated nature of the development as a consequence in a location that is currently poorly accessible and the creation of a development that would be primarily car-dependant, the prematurity and consequent piecemeal approach to development in the context of the orderly phased development of lands designated for future expansion of the town centre in accordance with the requirements of Navan Town Development Plan 2009 – 2015, and the prematurity of the development at this time in the context of the delivery of, and inter-relationship with, a central railway station in the vicinity of the site, it is considered that the proposed development would fail to consolidate the town centre, would fail to deliver any synergies with established town centre activities, and would conflict with retail policy RET DEV POL 2 as set out in the Navan Town Development Plan 2009 – 2015, which seeks 'to protect and enhance the vitality of Navan Town Centre and promote this area as the main commercial core where an appropriate mix of commercial, retail, recreational, civic, cultural and residential uses are provided.' The proposed development would, therefore, be contrary to the proper planning and sustainable development of the area."

4. The inspector's recommendation, subject to some minor amendments, was accepted by the respondent.

5. The application for *certiorari* is grounded upon the following propositions:-

(i) that the inspector erred in his interpretation of the Navan Development Plan 2009 – 2015, as varied, in particular section 4.5.3 thereof;

(ii) that the inspector erred in his interpretation of the Navan Development Plan 2009 – 2015, as varied, in concluding at para. 6.3.2 of his report that the development of the lands, the subject matter of the planning application are *"unquestionably linked to the development of the central rail station"* and to conclude that the proposed development is premature;

(iii) that the inspector erred in law in misinterpreting section 4.5.3 of the Navan Development Plan 2009 – 2015; and

(iv) that the respondent erred in law in that it took into account irrelevant considerations and failed to take into account relevant

considerations and failed to have any or any adequate regard to the development plan, properly interpreted.

Issues

6. The lands which are the subject matter of these proceedings were zoned "B1" in the Navan Development Plan 2009 – 2015 (*"the development plan"*) incorporating Variation No. 1 made on 19th May, 2014, in which such zoning was characterised as *"Commercial / Town Centre"*. A major point of disagreement between the parties to this application turns on the meaning of *"Town Centre"* and how this concept is understood having regard to Retail Development Policy No. 2 which states:-

"To protect and enhance the vitality of Navan Town Centre and promote this area as the main commercial core where an appropriate mix of commercial, retail, recreation, civic, cultural and residential uses are provided."

7. The applicant contends that the respondent was in error to have found that the proposed development conflicted with that policy.

8. The respondent contends that the *"B1"* zoned lands comprised distinct areas including (i) the *"Town Centre area"*; and (ii) the *"Town Centre expansion area"*. It argues that it was entitled to make a finding that the proposed development in the Town Centre expansion area would conflict with the desire to enhance the vitality of the Town Centre area.

9. The importance, or indeed relevance, of the proposed railway station and the linkage of the proposed development to the railway station was also a significant issue in the hearing. The respondent referred to the 2014 development plan on strategic guidance on the location of retail development which states that:-

"The long term expansion of the Town is envisaged towards the proposed central rail station...it provides for the creation of a new attraction poll...around this central rail station..."

10. Accordingly, the respondent argues that both the inspector, in his report, and the respondent, in its decision were entitled to take the position of the central rail station in this development plan into consideration in coming to a decision on the application.

11. All parties to these proceedings accept that the subject lands are zoned *"B1"* which is described as *"Commercial / Town Centre"*. The development plan uses the phrases *"Town Centre"*, *"Town Centre core area"* and *"Town Centre expansion area"* for different and inter-related purposes. Among the objectives set out in the development plan are the following:-

(i) Settlement Strategy OBJ 7 – *"to consolidate the existing Town Centre Development and the identified Town Centre expansion area as the principal shopping area in the town."*

(ii) Settlement Strategy OBJ 19; Master Plan 6 – *"relates to land adjoining the existing town centre which provides primarily for the area designated for town centre expansion and will benefit from the influence of the proposed Navan central train station in the long term..."*

(iii) Paragraph 4.5.3; Meath County Retail Strategy – *"[including] a health check assessment of Navan and the development of policies for retail development and measures to support town centres on a county wide basis."*

The health check assessment concluded that:-

'In accordance with its role as a County Town, Navan town centre is generally attractive with a good level of footfall. The town centre is compact, allowing ease of movement and accessibility for pedestrians between the key retail streets and the Shopping Centre. It has good accessibility by car and has a good provision of car parking in the town. Pedestrian permeability is generally good due to the compact form of the town centre..."

12. A number of key recommendations arising from the *"health check"* are set out and they comprise, *inter alia*, the following:-

"(v) Identify appropriate town centre and edge of centre sites which can accommodate additional retail development, and particularly sites which have potential to attract national and international multiples..."

In addition, the development plan continues to note the following, at pp. 109-110:-

"Navan Town Centre

...

In order to encourage investment in the town centre and to improve retail conditions, the environmental upgrading of the town centre must continue as a priority. Measures such as traffic management, traffic calming, parking, improvements to street pavements, the urban townscape and landscape, and environmental improvements should be implemented.

The maintenance of the town centre as the primary location for comparison shopping is a central objective of Navan Town Council's and Meath County Council's retail policy and developments, which militate against this policy, will not normally be permitted. The town centre will be protected as the principal shopping area and out of town shopping other than small scale local shopping will not be generally accepted as it is considered that it would undermine the role of the town centre..."

The following appears, at p. 111 of the development plan:-

"Strategic Guidance on the Location of Retail Development

...

Navan has potential for expansion of the town centre on sites and areas adjacent or close to the existing centre including the identified town centre expansion area on lands identified with a B1 'Town Centre' land use zoning objective centred on the future Navan Central Rail Station..."

Lastly, the policy notes, at p. 112:-

"Retail Development Policy 5: To promote the continued development of the town centre in a manner which provides permeability between the existing town centre and designated expansion areas.

Retail Development Policy 6: To encourage and enhance the range of shopping facilities and particularly major comparison retail provision, in Navan Town Centre as defined by lands identified with a B1 'Town Centre' land use zoning objective."

13. The subject lands of these proceedings are located in an area where the local authority proposes to improve connectivity. There are infrastructural deficiencies in the area and there are proposals to put in place pathways and cycle tracks. It was not in dispute that the proposed development site would largely only be accessible by motor vehicles. The County Development Plan emphasises that the town centre area is one to be accessible by pedestrians and which would benefit by increased traffic management. A significant issue in this case is whether the County Development Plan can be reasonably understood to identify several different types of area within zone "B1" which would enable a distinction to be drawn between the "Town Centre area" and the "Town Centre expansion area".

General Legal Principles Applicable

14. In *Tennyson v. Corporation of Dun Laoghaire* [1991] 2 I.R. 527, Barr J. held that the court is not an appropriate body to adjudicate on purely planning matters. At p. 534, he said:-

"However, where the dispute raises an issue regarding a matter of law such as the interpretation of the wording of a development plan in the light of relevant statutory provisions and the primary objective of the document, then these are matters over which the court has exclusive jurisdiction. An Bord Pleanála has no authority to resolve disputes on matters of law."

At p. 535, he said:-

"Principles regarding the true construction of planning documents were considered by the Supreme Court in In re X.J.S. Investments Ltd. [1986] I.R. 750. The judgment of McCarthy J., which was that of the Court, contains the following passage at p. 756:-

'Certain principles may be stated in respect of the true construction of planning documents:-

(a) To state the obvious, they are not Acts of the Oireachtas or subordinate legislation emanating from skilled draftsmen and inviting the accepted canons of construction applicable to such material.

(b) They are to be construed in their ordinary meaning as it would be understood by members of the public without legal training as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning..."

Barr J. went on to state at p. 535:-

"In the light of these authorities it seems to me that a court in interpreting a development plan should ask itself what would a reasonably intelligent person, having no particular expertise in law or town planning, make of the relevant provisions?"

15. In *Tesco Stores Limited v. Dundee City Council* [2012] UKSC 13, the UK Supreme Court reiterated that the proper interpretation of a development plan was a matter for the courts but Lord Reed added the following about the application of statements of policy, or conflicting policies to a given set of facts:-

*"19. That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (*Tesco Stores Ltd v. Secretary of State for the Environment* [1995] 1 WLR 759, 780 per Lord Hoffmann). Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean."*

16. In *William Davis Limited v. Secretary of State for Communities and Local Governments* [2013] EWHC 3058 (Admin) Lang J. said at para. 46:-

"The task of reconciling different strands of planning policy on the facts of a particular case has been entrusted to the planning decision-maker. Such planning judgments will only be subject to review by this court on very limited grounds."

17. In *Murphy v. Secretary of State for Communities and Local Government* [2012] EWHC 1198 (Admin), Foskett J. held that the concept of "prematurity" in a planning context is:-

"A matter of planning judgment and planning policy which is essentially a matter for the decision maker..." (para. 90)

18. Section 34(2)(a) of the Planning and Development Act 2000, states:-

"When making its decision in relation to an application under this section, the planning authority shall be restricted to considering the proper planning and sustainable development of the area, regard being had to[inter alia] -

(i) the provisions of the development plan..."

Section 37 applies this statutory restriction equally to the respondent when determining a planning appeal. Whether a particular development is in accordance with proper planning and sustainable development is a matter within the particular competence and expertise of the planning authority or, as the case may be, *An Bord Pleanála*, a specialist body established by statute. Such an assessment would only be subject to very limited review on the grounds of unreasonableness or irrationality following *O'Keeffe v. An*

Relevant and Irrelevant Considerations

19. The planning authority enjoys a broad discretion in relation to the matters which it considers consistent with its jurisdiction under the Act of 2000. *An Bord Pleanála* is obliged to consider the proper planning and sustainable development of an area whilst having regard to the development plan. A decision of the authority or board can be set aside when a decision maker takes into account irrelevant considerations: see *Flanagan v. Galway City and County Manager* [1990] 2 I.R. 66; and *Griffin v. Galway City and County Manager* (Unreported, High Court, Blayney J., 31st October, 1990).

20. Section 34(1) of the Act of 2000, requires that the decision itself shall state the reasons and considerations upon which they are based. The inspector's report is not part of the reasons. This should only be read to inform the decision of the board when it has been expressly stated that the decision is made with reference to the inspector's report: see *Ní Eilí v. Environment Protection Agency* (Unreported, Supreme Court, 30th July, 1999).

21. In these proceedings, the respondent did not adopt the conclusions of the inspector in their entirety. In fact, the respondent did not agree with the conclusions of the inspector in relation to traffic and traffic management. In *P&F Sharpe Limited v. Dublin City and County Manager* [1989] I.R. 701, Finlay C.J. said at p. 717:-

"It is, of course, clear, and has been consistently laid down by this Court that the making of a decision to withhold or grant permission on an application for planning permission under the Act of 1963 is a function of a planning authority which must be exercised in a judicial manner. The practical consequences of that are that the decision-making authority must have regard to all relevant and legitimate factors which are before it and must disregard any irrelevant or illegitimate factor which might be advanced."

Discussion

22. It is a question of law and a matter for the court as to how zone "B1" and "Town Centre" are to be interpreted. The court has to approach this task and construe the meaning of zone "B1" and "Town Centre" appearing in the development plan in their ordinary meaning "...as it would be understood by members of the public without legal training as well as by developers and their agents, unless such documents, read as a whole, necessarily indicates some other meaning..." or - to apply the test of Barr J. in *Tennyson v. Corporation of Dun Laoghaire* - the court must ask itself what a reasonably intelligent person having no particular expertise in law or town planning would make of the relevant provisions. That is the test I apply in looking at the relevant zoning in this case ("B1") and in construing what is meant by "Town Centre" in the context of the application for planning permission. Taking a holistic approach and looking at the development plan in its entirety, it is clear that the object of the plan was to preserve Navan Town Centre as a core area for business and shopping. Insofar as the development uses phrases such as "Town Centre", "Town Centre core area" and "Town Centre expansion area", this seems to do no more than reflect the observations of Lord Reed in *Tesco Stores Limited v. Dundee City Council* where he talked about development plans being "...full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to the other". He added that many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of a judgment and that these matters fall within the jurisdiction of planning authorities rather than the courts. The overriding obligation of the planning authority and the respondent is to make a decision based on the proper planning and sustainable development of the area having regard to a number of features including the provisions of the development plan.

23. While the site which is the subject matter of this application is zoned "B1", it is clearly not part of the historic town centre or the town centre core area but is obviously within what has been referred to as the "Town Centre expansion area". Within the applicant's lands is an area in respect of which an earlier permission was granted but not acted upon. The application, which was refused in this case by the respondent, concerns the portion of the lands which is most remote from the existing town centre and can, effectively, only be accessed by motor vehicles. There can be no doubt but that there are numerous references to the proposed Navan Central Rail Station in the development plan and the linkage of the "Town Centre expansion area" to the future building of the train station which is now recognised as a "long term" proposal.

24. Reading the development plan as a whole and attempting to discern the planning objectives of the local authority from that document, there can be no doubt that the document envisages an orderly expansion from the existing town centre into other lands zoned "B1" in a manner which provides permeability between the existing town centre and designated expansion areas. (See: p. 111-112 of the development plan). While the proposed central rail station has been deferred and is now a long term aspiration, references to it have not been removed and it remains a relevant ingredient in the overall development plan for the area. It has clearly been identified by the local authority as having a linkage with the Town Centre expansion area lands identified in zone "B1". In deciding that the development was premature in the context of the delivery of, and inter-relationship with, a central railway station in the vicinity of the site, it cannot be said that the respondent had regard to an irrelevant or illegitimate factor which must be disregarded.

25. It seems to me that the approach being taken by the applicants in their submissions to the court is one which involves parsing and analysing the development plan in an unnecessarily technical and over legalistic manner which is precisely what the Supreme Court in *X.J.S. Investments Limited* cautioned against. In effect, the applicant invites the court to look at the development as though it was an Act of the Oireachtas or subordinate legislation which had been drafted by parliamentary draftsmen rather than a plan for the town of Navan which includes broad statements of policy.

26. I can see nothing wrong with the way in which the respondent interpreted the development plan and, in particular, the meaning of zone "B1" and "Town Centre" in its various manifestations as expressed in the plan.

Conclusion

27. I conclude that the respondent correctly construed the development plan in accordance with the jurisprudence which I have outlined earlier in this judgment. The plan was to consolidate and protect the existing town centre and ensure that the town centre expanded in a progressive and orderly manner through the expansion area encompassed in zone "B1" towards the future railway station. The reasons given by the respondent in refusing planning permission were entirely consistent with the development plan and most importantly were based on a consideration of the proper planning and sustainable development of the area. While the inspector, in his report stated that the subject matter of the of the planning application was "unquestionably linked to the development of the Central Rail Station" these words were not used by the respondent although its decision referred, *inter alia*, to the "...prematurity of the development at this time in the context of the delivery of, and inter-relationship, with a Central Railway Station in the vicinity of the site...". There is nothing inconsistent between that decision and the development plan when considered in the overall context of the development under consideration and the other matters referred to in the decision of the respondent.

28. Having correctly interpreted the development plan, the other matters arising out of the decision appear to be particularly within the sphere of the respondent, including the issue of prematurity. I find no evidence of unreasonableness or irrationality in the decision that would meet the criteria outlined in *O’Keeffe v. An Bord Pleanála* or *Meadows v. Minister for Justice and Equality*.

29. In short, I hold that the decision of the respondent did not involve a misinterpretation of the development plan and is not amenable to challenge on the grounds of unreasonableness or irrationality.

30. I, therefore, refuse the application for certiorari.