Neutral Citation [2015] IEHC 433

HIGH COURT

JUDICIAL REVIEW

[2013 No. 635 J.R.]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT, 2000 (AS AMENDED)

BETWEEN

GILLIAN BROPHY AND DAVID NULTY

APPLICANTS

AND

AN BORD PLEANÁLA

RESPONDENT

AND

SOUTH DUBLIN COUNTY COUNCIL

NOTICE PARTY

JUDGMENT of Ms. Justice Baker delivered on the 3rd day of July, 2015

1. The applicants seek to quash the decision of the respondent, An Bord Pleanála (the "Board"), dated the 14th June, 2013 refusing planning permission for the construction of a dwelling house and various structures associated with the establishment of a horticultural business on a 0.996 hectare site owned by the applicants at Glassmucky Brakes, Glenasmole, Tallaght, Dublin (the "Glenasmole/Bohernabreena site"). The permission was refused as being in material contravention of the relevant Development Plan.

Background

The applicants were married on 1st August, 2009 and have a young son. When the first applicant, Ms. Gillian Brophy, was 11 years old her family moved to Amberville, Friarstown, Bohernabreena, Dublin 24. She lived at this address until 2005 when she, and her then intended husband, purchased a dwelling house at 20 Ellensborough Copse, Kiltipper Road, Tallaght, Dublin 24. Ms Brophy works as a process engineer and Mr Nulty as a project manager. In her affidavit sworn on the 8th August, 2013, Ms Brophy avers that she and her future husband purchased the dwelling at Kiltipper in 2005 in order to "get a foot on the property ladder" in the face of quickly rising house prices, but it was always their intention to establish a home in Bohernabreena. The applicants remortgaged this house in Kiltipper Road when an opportunity arose in July 2007 to purchase the subject site which lies just two kilometres from her parents' house at Glenasmole/Bohernabreena. They moved to reside with her parents and let the house at Kiltipper to South Dublin County Council for a minimum period of eight years from 2007 under the rental accommodation scheme. Their young son is looked after by his maternal grandparents while the applicants are at work. The commitment and family ties of the applicants to the area can scarcely be doubted

2. The couple was aware of the restrictive planning requirements in the Glenasmole/Bohernabreena area but believed, following consultation and pre-planning meetings with planning officials, and the engagement of their planning consultant with the planning authority, that they were likely to meet the criteria. In the events they have failed to obtain planning permission, and prior to the refusal which gives rise to this judicial review they failed on three occasions to obtain planning permission

The subject planning application

3. The site in respect of which planning was sought was below the 350m contour line and in accordance with the zoning objectives in the South Dublin County Council Development Plan 2010-2016 (the "Development Plan") was "open for consideration" in the light of Policy H30. The applicants submitted a planning application to the notice party, South Dublin County Council, on 29th June, 2012 for permission to construct a private dwelling and a horticultural business on their site.

4. The local authority sought further information, and it would be fair to say that the applicants engaged very fully with the process and submitted reports in particular to deal with a question which ultimately led to the refusal of permission, namely their need to live in the area. The proposed horticultural business was intended to, at least initially, be run on a part-time/weekend basis and the planning authority expressed a concern that the business itself did not require the applicants to reside in the area. The link between this proposed business venture and the expressed need of the applicants to reside in the area was the focus of the refusal, and both the local authority, and the Board on appeal, took the view that the business would not require daily attendance on site and could not form the basis of a genuine need to reside close by.

5. The local authority by decision dated 16th January, 2013 refused permission for the following reasons:

> "The applicants have not adequately demonstrated a genuine need for housing in this particular area in order to progress their proposed horticultural business.
>
> Therefore, the applicants do not satisfy the 'genuine need' criterion detailed in Policy H32 of the County Development Plan 2010 – 2016. Thus the proposed development would materially contravene the zoning objective for the area and policies regarding rural housing in the County Development Plan 2010-2016 and would be contrary to the proper planning and sustainable development of the area."

6. This decision was appealed on 11th February, 2013 to An Bord Pleanála and a particular submission was made in the course of the

appeal that the applicants did need to live on the site by reason of the need for proximity to the proposed horticulture business to ensure its long term viability. The Board refused the permission on the 14th June, 2013 for reasons stated as follows:

> "…it is considered that the applicants have not demonstrated their need for a dwelling at this particular location. The Board is not satisfied that the proposed dwelling is needed in order to progress the proposed horticulture business. In this regard, it is considered that the applicants have not demonstrated that they comply with all of the criteria set out under Policy H32 of the South Dublin County Council Development Plan 2010-2016 for a dwelling at this location. The proposed development would, therefore, materially contravene the zoning objective for the area and rural policies as set out in the Development Plan and would, therefore, be contrary to the proper planning and sustainable development of the area".

Essentially the Board found that the applicants met three of the four criteria in Policy H32 but failed to show "a genuine need for housing in that particular area".

7. Application for leave to bring judicial review was granted by McDermott J. on the 8th August, 2013.

8. The decision of the Board is to be understood in the context of the Development Plan and the Department Guidelines which I now detail.

The Sustainable Rural Housing Guidelines for Planning Authority (April 2005)
9. These Guidelines (the "2005 Guidelines") were issued by the Department of the Environment, Heritage and Local Government under s. 28 of the Planning and Development Act 2000 (the "Act of 2000").

10. Chapter 3.2.3 the 2005 Guidelines headed Rural Generated Housing states:

> "Development plans in defining persons considered as constituting those with rural generated housing needs, should avoid being so prescriptive as to end up with very rigid development control system. For example, specifying that persons engaged in full time agriculture only will be considered as constituting a rural generated housing need, could preclude other family members being accommodated on the family farm. An overly vague approach should be avoided, as this would be of little practical use."

Section 3.2.3 lists as examples of categories of persons who would fit into the definition of having a rural housing need: persons who are an intrinsic part of the rural community and persons in full-time or part-time work in rural areas. The first example encompasses those who have spent a large part of their lives integrated in the rural community such as farmers, offspring of farmers, those taking over the running of farms, persons building their first homes near their families, or emigrants returning to work locally. The second example includes those who are involved in farming, forestry, inland waterway or marine related occupations on a full-time basis, and also those whose part-time occupations are predominantly farming or natural resource related.

The 2002 Glenasmole/Bohernabreena Housing and Planning Study
11. The housing policy study conducted in 2002 informed Policy H32. The definition of persons qualified for new housing contained in the rural housing policy of the Glenasmole/Bohernabreena area (the "rural housing policy") is set out as follows in section 9.2.1 of the 2002 Glenasmole/Bohernabreena Housing and Planning Study (the "2002 Planning Study"):

> • Persons who were born in the Study Area, or
>
> • Persons who have resided in the Study Area for at least 15 years and who do not own a dwelling and who have not owned a dwelling in the past, or
>
> • Persons who have immediate family ties with the rural community e.g. they are the sons or daughters or grandchildren of persons from the Study Area

The Development Plan
12. The Glenasmole/Bohernabreena site is located in the Dublin Mountain Area which attracts the objective to protect and enhance the outstanding natural character of the mountain area, (Objective H) under the South Dublin County Council Development Plan 2010-2016. Policy H32 deals with permissions for dwelling houses and provides the criteria for the grant of permission for residential dwellings as follows:

> "It is the policy of the Council that within areas designated within a Zoning Objective "H", ("to protect and enhance the outstanding natural character of the Dublin Mountain Area") new or replacement dwellings will only be permitted where the:
>
> • Applicant is a native of the area and,
>
> • Applicant can demonstrate a genuine need for housing in that particular area and,
>
> • Development is related directly to the area's amenity potential or to its use for agriculture, mountain or hill farming and,
>
> • Development would not prejudice the environmental capacity of the area, and that it would be in keeping with the character of the mountain area.
>
> These criteria are in accordance with the Sustainable Rural Housing Guidelines (2005), having regard to the outstanding character of the area and to its exceptional landscape quality."

I note that the criteria are expressed prescriptively and as cumulative.

The refusal to grant planning permission at first instance
13. The refusal by the planning authority was based on the recommendation of Jim Johnson, senior planner with the Council, who at p.16 of the Record of Executive Business and Manager's Order states that, while the applicants comply with the rural housing policy in section 9.2.1 of the 2002 Planning Study, they have not demonstrated "a necessity to reside in close proximity to the proposed business." Mr Johnson noted their stated desire to reside close to the proposed horticultural business, recognising that this would

allow them a reduction in overheads such as rent, which would in turn contribute to the profitability and viability of the venture. He noted that the applicants intend to continue their respective present employment "until the business develops", and that, while it might be "convenient to reside adjacent to your own business, on this occasion it is not considered essential."

The Inspector's Report
14. The Board's decision relied on the evidence before it including a comprehensive report of its appointed inspector Mr. Paul Caprani dated 7th June, 2013. The inspector considered that the applicants did not demonstrate a genuine need to reside in the area under Policy H32, but noted that, had their needs been assessed in accordance with the criteria under the 2005 Guidelines and Circular SP 5/08 then it could be reasonably argued that they would have demonstrated in some respects such a need. He considered the South Dublin County Council Development Plan 2010-2016 to be "very prescriptive with regard to suitable locations for housing.", and to impose "more strict criteria" than that found in the national guidelines.

15. He states the following:

> "It is assumed that such a stringent test is predicated on the fact that the foothills of the Dublin Mountains represent a very desirable place to live in the southern environs of the city and as a result this whole area is under very strong urban based pressure for development. The Planning Authority in my view is therefore justified to apply very stringent policies and tests in relation to controlling development in this area. The applicant in my view has not demonstrated any specific need to reside and develop a house adjacent to the proposed horticultural business."

16. The inspector, in his report at p. 20, noted the categories and circumstances contained in section 3.2.3 of the 2005 Guidelines that planning authorities should consider, including persons "who are intrinsic to the local community" and those "working full-time or part-time in rural areas".

17. At p.21, he notes the two most important issues in determining the appeal were the "potential environmental impact arising from the proposed development plan" and the "issue of housing needs and the housing policy criteria set out in the Development Plan and the planning study of 2002".

18. The inspector took the view that the applicants arguably satisfy three of the four criteria set out under Policy H32 and deals with the issue of the horticultural business as follows at p. 26:

> "In my view it could be reasonably argued that the applicant has demonstrated a bona fide commitment to operate a business from the site which would contribute to the local community and where the predominant occupation associated with the activity is farming/resource related as per paragraph 3.2.3 of the Sustainable Rural Housing Guidelines."

19. He concludes at pp. 22 and 23 in relation to the environmental impact that:

> "I am satisfied therefore that the site, assisted by the engineering solutions set out in terms of the proprietary wastewater treatment plant proposed, together with the proposed polishing filters, would be capable of accommodating an onsite wastewater treatment system without adversely impacting on the sensitive receptors referred to above….
>
> I would be in agreement that the proposed wastewater treatment plant together with the horticultural nursery is unlikely to have a significant impact on the environmental integrity of either the surface water reservoirs or the SAC in the vicinity of the site."

20. However, the applicants failed to satisfy him that they had a housing need as requested by the Development Plan and the 2002 Planning Study, and he notes that as the dwelling at Kiltippter is 6.5km from the Glenasmole site by road, that having a dwelling house in such close proximity would not be materially less favourable to the profitability of the business venture than having a dwelling house on site, in terms of overheads, costs for the start up period and consequentially profitability. In fact he states that the cost of building a dwelling house on site could significantly add to initial cost in setting up the business.

Submissions of the applicants
21. The applicants argue that the Board erred in law in failing to interpret the Development Plan and in particular in the interpretation of Policy H32 as it failed to have regard to the general terms of the second criterion namely that the applicants "demonstrate a genuine need for housing in that particular area". They submit that both the Board and the inspector focused on a much narrower test than that set out in the Development Plan and the 2005 Guidelines, and that the Board should have considered the applicants' need to reside in the Dublin Mountain Area and that it wrongly focused on the proposed development of the horticultural business and tested the matter of need by reference to that business project and not to what they assert is the broad question of their general need. The requirement imposed of the Board and the inspector, that an applicant demonstrate a need for a dwelling "at this particular location", is more stringent than the requirement of Policy H32 that an applicant demonstrate "a genuine need for housing in that particular area". The distinction drawn is between "area" and "location", and the test is argued to be less site specific than the one applied

22. The applicants also submit that the Board misinterpreted the 2005 Guidelines, and so could not be said therefore to have had regard to them as required by s. 28 of the Act of 2000. Therefore it is contended the Board's decision was based on irrelevant considerations. The applicants argue that, as they complied with the needs criteria under the 2005 Guidelines, that of itself suggests that the needs criteria in Policy H32 is not consistent with the 2005 Guidelines, and the Guidelines should inform the interpretative process.

Submissions of the respondent
23. The respondent argues that the 2005 Guidelines are intended to assist planning authorities in the formulation of the relevant development plan who in turn may tailor the application of same to their particular locality and their particular environmental objectives. The "genuine need" in this instance was the need to reside adjacent to the proposed horticultural business, and not to reside in the general area. Counsel says there was no error in interpretation and that the Development Plan must be the primary guide in the assessment.

Error of interpretation
24. The applicants first argue that the Board applied the incorrect test in considering whether they had shown a genuine need to reside in the area, and that the Board in particular failed to have regard to the guidelines. I accept the argument advanced by the applicants that a failure to correctly interpret a development plan, or indeed any other relevant planning documentation, does amount to an error of law and as such is amenable to judicial review. Barr J. made this clear in his now much quoted judgment in *Tennyson v.*

Dun Laoghaire Corporation [1991] 2 I.R. 527 as follows:-

> *"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."*

25. I pause here to note however that the *dicta* of Barr J. refers to the interpretation of the wording of the development plan in the light of relevant statutory provisions, and the argument contended for by the applicants in this case is not that the Board failed to properly interpret a statutory provision, but the far more reaching argument that the Board ought to have had regard to the guidelines issued under a statutory power in interpreting a development plan. There could be no doubt that in the interpretation of a development plan any statutory provisions must inform the interpretation, but the extent to which the guidelines, which, while they are statutory in origin, do not have a statutory force, is quite a different question to which I now turn.

The law: guidelines as interpretative tools

26. Section 28 of the Act of 2000 gives the Minister the authority to issue guidelines to planning authorities and s. 28(1) of the Act provides that:-

> *"The Minister may, at any time, issue guidelines to planning authorities regarding any of their functions under this Act and planning authorities shall have regard to those guidelines in the performance of their functions."*

27. Equally the Board is required under s. 28(2) to have regard to any such guidelines.

> *"Where applicable. The Board shall have regard to any guidelines issued to planning authorities under subsection (1) in the performance of its functions"*

28. The applicants' main argument in this case is that the 2005 Guidelines, the relevant guidelines which inform South Dublin County Council in the preparation of its development plan or in its consideration of applications for planning permission, ought to inform the application of the individual policy decisions made by the local authority. What is argued is that as the relevant guidelines themselves suggest a broad category of persons who might have established a need to reside in a sensitive rural area, that the local authority was incorrect as a matter of law to apply a more stringent test.

Discussion

29. In *Evans v. An Bord Pleanála* (Unreported, High Court, 7th November 2003), Kearns J. considered the interplay between ministerial guidelines and an individual development plan. He followed Quirke J. in *McEvoy v. Meath County Council* [2003] 1 I.R. 208 that the requirement in s. 28 of the Act of 2000 that the planning authority "have regard" to a guideline is "*permissive in nature*" and does not require the planning authority to follow or "*slavishly adhere to*" those guidelines. Kearns J. expressed the matter as follows:-

> *"The respondent's duty was to inform itself fully and to give reasonable consideration to any regional planning guidelines with a view to accommodating the objectives and policies of such guidelines. Further, Quirke J. held that planning authorities could depart from any regional planning guidelines for bona fide reasons consistent with a proper planning and development of the areas to which they have responsibility."*

30. Thus in matters of interpretation either the planning authority or the Board, as the case may be, in considering a planning application must consider the planning guidelines, inform itself of these and give reasonable consideration to the relevant provisions in the interpretation of a planning policy, I consider, however, that in the case of a conflict between the general provisions contained in relevant guidelines and a specific provision contained in a planning policy, that the latter must prevail for the following reasons.

31. Each planning authority is obliged to make a development plan to set out the overall strategy for the proper planning and sustainable development of its relevant area. The development plan must take account of certain mandated statutory objectives, and, as shown above, the planning authority in preparing a development plan must have regard to the relevant guidelines.

32. A development plan is arrived at following a democratic, public consultation process. As McGuinness J. said in *Blessington Heritage Trust Ltd v. Wicklow County Council* [1999] 4 I.R. 571 :-

> *"The framework and scheme of our legislation on local government planning and development is essentially one of balance between a number of interests….The rights of all these individuals and groups are carefully and in detail spelt out in the planning legislation and the courts should at all times endeavour to maintain the balance envisaged in the legislation."*

33. In that judgment McGuinness J. adopted the *dicta* of McCarthy J. in *Attorney General (McGarry) v. Sligo County Council* [1991] 1 I.R. 99 where he said with regard to the development plan that:-

> *"When adopted, it forms an environmental contract between the planning authority, the Council, and the community, embodying a promise by the Council that it will regulate private development in a manner consistent with the objectives stated in the plan and, further, that the Council itself shall not effect any development which contravenes the plan materially."*

34. McKechnie J. in *Byrne v. Fingal County Council* [2001] 4 I.R. 565 identified the element of common good and public confidence in the process:-

> *"In my opinion, a development plan, founded upon and justified by the common good and answerable to public confidence, is a representation in solemn form, binding on all affected or touched by it, that the planning authority will discharge its statutory functions strictly in accordance with the published plan. This implementation will be carried out openly and transparently, without preference or favour, discrimination or prejudice. By so doing and by working the plan as the law dictates, the underlying justification for its existence is satisfied and those affected, many aversely, must abide the result. They must suffer the pain, undergo the loss and concede to the public good."*

35. While none of these cases is directly on point, I consider that, in the case of the determination of a particular planning application, and where a difference is apparent, or where a test is more or less stringent in one than in the other, the "solemn and common public contract" contained in the development plan itself must prevail. This is not merely on account of the solemnity of the

document, and the requirement of the common good that the contract, once it has been adopted for the common good, carries with it an obligation on the part of the planning authority to implement its statutory functions in accordance with that plan, but also because the consideration of a development permission in each case is specific to, and intended to be specific to, an individual location and in respect of which it is to be assumed that the individual local authority adopting a plan has a particular and specialist knowledge.

36. Were I to consider otherwise it seems to me the entire basis on which a local authority, or the Board on appeal, is entitled to grant or refuse planning permission by reference to a development plan, and the particular basis on which planning was refused in this case, namely that there was a material contravention of the development plan, would be set at nought. The deciding authority is mandated to come to its determination by reference to the individual development plan applicable to the application and while guidance may be sought from the guidelines, the development plan is a particular and concrete reflection of the principles of those guidelines for the purpose of an identified functional area. Further the ministerial guidelines are what they are described to be, namely guidelines, and while they cannot by statute be ignored, and indeed while the obligation to have regard to them is one stated in positive terms, they are not prescriptive or mandatory in the sense in which a development plan is, in the language of McKechnie J. in *Byrne v. Fingal County Council*, "*a representation in solemn form*" binding on the local authority and in respect of which it is not merely mandated as a matter of law, but also required as a matter of both public and private law, to frame its deliberations.

37. I am further fortified in this view by the express provisions of the 2005 Guidelines themselves. Section 3.2.3 of which provides:-

> "Each planning authority should make its assessment of the scope and extent of rural housing needs to be considered in its development plan having regard to the framework outlined above and taking into account local conditions and planning issues".

38. South Dublin County Council took particular account in the formulation of Policy H of the environmental sensitivity of the Dublin mountain area, and of the concern to avoid an over development of individual housing in the area which of its nature is desirable, and that policy is the consideration most directly applicable to the considerations of the decision maker determining an application for permission.

Conclusion on the first question
39. Accordingly, I reject the argument of the applicants that the Board fell into legal error in applying the test it did, and consider that the Board was entitled to apply the strict test of "need" identified in Policy H32 of the relevant Development Plan.

Reasonableness
40. While the primary focus of the application for judicial review was the argument of the applicants that the Board erred in law in its interpretative process, the applicants also make the argument that the decision of the Board is unreasonable and/or that it was made without adequate evidence, the so-called *O'Keeffe* Test. It is well established that a relatively high threshold is required by an applicant in seeking to establish unreasonableness in this sense as explained by Finlay C.J. in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 at p. 72:-

> *"I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision-making authority has 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."*

41. The case law is replete with examples of this principle, which finds its origin partially in the curial deference that the High Court will show to an expert body such as the Board, but also comes from the fact that the High Court in its process may not replace its findings with those of the decision-making body.

42. The Board, and before it the local authority, had a considerable amount of information and submissions from the applicants for the purposes of coming to its decision, including a water services report, a hydrological characterisation report, a Natura impact statement, and a detailed and considered planning report. It also had a business plan which dealt in particular with the sustainability of the proposed horticultural business. The planning authority sought further information, and the inspector appointed by the Board prepared a 28 page detailed submission in which he expressed himself satisfied that no environmental capacity issue arose, that the applicants had a sufficient connection to, and were a part of, the rural community in question, and that they had a genuine desire to live in the area. The inspector identified the most contentious issue for the purposes of the planning application as being "housing need", and it was he who identified the different emphasis between the general proposition contained in the planning guidelines that accepted the desirability of granting planning permission to persons with a genuine and established connection to an area, and the fact that South Dublin County Council had opted, for the purposes of the Development Plan for this particular area, to also require an applicant to identify a genuine housing need for housing in a particular location. In that context the inspector noted the strong commitment of the applicants to the area and said the following:-

> "I do not consider that the Board or South Dublin County Council could question the applicants' motivation, commitment or raison d'être with regard to the intention of starting a business of the nature proposed."

43. The planning inspector regarded the application and the business plan as being genuine and, correctly in my view, did not consider it to be an appropriate planning consideration to engage with questions of whether the business plan could reasonably be expected to succeed. His contention however was that while the applicants did appear to satisfy the criteria set out in the 2005 Guidelines, that these were not the relevant test applicable to the subject application, and, as he put it, the test was "more stringent".

44. Furthermore, the planning inspector explained the reason for the strictness of the approach taken by South Dublin County Council to development in this area, and the sole remaining test was whether the applicants could demonstrate a need to live in a house adjacent to the proposed horticultural business which he held they could not.

45. I consider that the inspector, and it is clear in this case that the inspector's report was a significant factor in the decision of the Board, engaged fully with the facts, explained the elements of the test where the applicants succeeded, but continued to express the same disquiet that had been expressed at local authority level, and indeed by An Taisce in its objection to the proposed development, namely that the applicants could not meet the strict hurdle imposed by the development plan for this area.

46. Furthermore, I note that the Board in its refusal states that it had regard to the 2005 Guidelines, and to the Development Plan itself, and I consider that its approach was legally correct, namely it looked to whether the proposed development would amount to a material contravention of the zoning objective for the area, and considered that it did so. There is nothing irrational or legally

incorrect in that approach. The Board had adequate and fulsome documentation and argument before it. The inspector had engaged very fully with the applicants, and while he did recommend refusal, he was supportive of the applicants to a large degree in that he accepted that they satisfied all but the individual criterion of need.

47. Accordingly, I am of the view that the applicants have not made out their case for judicial review of the decision of the Board and I refuse the application.