Neutral Citation Number: [2009] IEHC 228

THE HIGH COURT

JUDICIAL REVIEW

2008 1199 JR

BETWEEN

DEREK QUINLAN

APPLICANT

AND

AN BORD PLEANÁLA

AND

DUBLIN CITY COUNCIL

RESPONDENTS

JUDGMENT of Ms. Justice Dunne delivered on the 13th day of May, 2009

The applicant herein is the owner of premises known as 43 Ailesbury Road, Dublin 4 (hereinafter referred to as "the property"). The applicant applied for two separate planning permissions, namely 5718/07 and 5719/07 to Dublin City Council. The first of the applications was in the following terms:-

"The alteration and refurbishment of the exterior and interior of the existing offices comprising:
Removal of a free standing brick pier pergola at the rear of the property and the gates at the side of the property;

Alterations to combine existing kitchen and store at garden level to form larger kitchen;

Minor alterations to the window and door openings on the rear elevation and building return;

Installation of new window on rear of building return at garden level;

Replacement of all facing bricks on front and side elevations with salvage or custom made facing bricks;

Rendering of sides and rear elevation;

Re-slating of roof using existing slates and matching replacements;

Installation of damp proofing at garden floor level;

Replacements of all non-original internal doors and joinery with new to match existing;

Upgrading of existing bathrooms;

Minor modifications to internal walls and openings;

Repair and refurbishment of existing windows; and

Replacement of all gutters and downpipes."

The above permission will be referred to hereinafter as the "refurbishment permission".

The second permission (hereinafter referred to as "the extension permission"), is in the following terms:-

"The refurbishment and extension of the existing offices comprising:
Removal of a freestanding brick pier pergola at the rear of the property and gates at the side of the property;

Construction of a single storey extension at the rear of the property;

Alterations to combine existing kitchen and store at garden level to form larger kitchen;

Installation of damp proofing at garden level;

Minor alterations to the window and door openings on the rear elevation and building return at garden level to facilitate access to the proposed extension at enlarged kitchen area;

Installation of new window on rear of building return at garden level;

Replacement of all facing bricks on front and side elevations with salvage or custom made facing bricks;

Re-rendering of side and rear elevation;

Re-slating of roof using existing slates and matching replacements;

Repair and refurbishment of windows; and

Replacement of all gutters and downpipes."

The works comprised in the applications would have been exempt from the necessity to obtain permission were it not for the fact that the property is a protected structure.

Dublin City Council granted both applications on the 16th January, 2008, subject to a number of conditions applicable to the each of the grants of permission. It is necessary to refer to two of the conditions imposed on the grants of permission at this point:-

"1. Insofar as the Planning and Development Act 2000 – 2006 and the Regulations made there under are concerned, the development shall be carried out in accordance with the plans, particulars and specifications lodged with the application, as amended by the further information received on the 21/12/07, save as may be required by the conditions attached hereto. For the avoidance of doubt this permission shall not be construed as approving any development shown on the plans, particulars and specifications, the nature and exempt of which has not been adequately stated in the statutory public notices.

Reason:

To comply with Planning Regulations.

3. The use of the entire premises shall be solely for use as an embassy as defined at Appendix 13 of the 2005 – 2011 Dublin City Development Plan and shall not be used as general offices or any other uses unless authorised by a prior grant of planning permission.

Reason:

To control development, to protect the amenities of this residential conservation area as zoned in the current development plan and to facilitate the zoning objectives of that plan."

The applicant appealed on the 12th February, 2008, to An Bord Pleanála (hereinafter referred to as "the Board") against the imposition of Condition No. 3 in each of the notifications of decision to grant planning permission. Having considered the appeal, the Board, by order dated the 3rd September, 2008, directed Dublin City Council to attach Condition No. 3 to the grants of permission. In making that decision, the Board did not accept its inspector's recommendation to omit Condition No. 3.

The applicant herein instituted these proceedings seeking to quash the decision of the Board of the 3rd December, 2008, and the consequent notification of grants of planning permission of the Dublin City Council of the 9th September, 2008, on the 28th October, 2008. The proceedings were admitted in to the commercial list of the High Court and it was directed that the application for leave to institute judicial review proceedings and the substantive hearing be heard together. At the commencement of the hearing before me certain assurances were given by the applicant to Dublin City Council and as a result of those assurances, Dublin City Council limited its representation before the court and effectively took no further part in the hearing.

Background
It is important to note at the outset that each of the applications for planning permission described the property as "the existing offices". The property is a protected structure as mentioned previously and is located within the zoning objective Z2 of the Dublin City Development Plan 2005 – 2011, which provides that it is "to protect and/or improve the amenities of residential preservation areas". A conservation architect's report was submitted with the applications which sets out the history of the property. There is little or no dispute between the parties as to the history of the property. In the conservation architect's report it was stated that:-

"In 1962 the house was taken over by the German Embassy which continued in residence there through the 1980s. By the end of the 1980s the Embassy was joined in the building by Silvermines Limited and stayed at the address until the mid 1990s when the Mexican Embassy took over residence."

Following the placing of a site notice and the publication of a notice in a newspaper, the only observation received by Dublin City Council in relation to the applications for planning permission was in the form of a letter sent to Dublin City Council by Nuala Johnson of the Ailesbury Road Residents Association asking Dublin City Council to take account of the following matters:-

"1. That no planning application for office use has ever been made with regard to this residence going back to 1962 when such permission became obligatory.

2. The reversion of embassy offices to residential dwellings has been the rule for many years. No. 43 has been used for embassy offices since 1973 and so strictly should return to domestic use."

A request for further information was sent by the deputy planning officer of Dublin City Council to the applicant's planning consultants in the following terms:-

"The submitted documentation is unclear concerning the present, intended and authorised uses of the subject premises. The site is zoned Z2 (residential conservation) where the primary land use objective of the planning authority is residential and where office use is not permitted and embassy use is only open to consideration. Prior to determining this application the applicant is requested to submit the following:"

A series of questions were then raised. The applicant responded to the request for further information as follow:-

"A. A statement indicating by what grant of planning permission the stated embassy use was authorised.

The stated embassy use is not authorised by way of a grant of permission. The use is authorised by virtue of being legally established on the appointed day of 1st October, 1964. the attached affidavits sworn by officials of the Embassy of the Federal Republic of Germany show that the premises were used as an embassy from 1960 to 1985. (See Appendix A).

B. A statement indicating by what grant of planning permission the stated office use was authorised.

The authorised embassy use is a particular type of office use whose character is principally administrative or office in nature whose principal function is not to provide services to visiting members of the public. Accordingly, it would fall within Class 3 of the use of Classes Order. The stated office use being of the same character and description in land use in that it does not provide services to visiting members of the public also falls within Class 3. As the stated office use and the authorised embassy use fall within the same use, no change of use requiring planning permission arises."

It is apparent from the history of the premises that from time to time part of the premises was used as offices occupied by non embassy users. It is also clear that the property has not been used as a residence since the 1st October, 1964.

The deputy planning officer of the Dublin City Council in his report dated the 15th January, 2008, stated:-

"The applicant appears to be trying to establish a general office use in this premises on the basis that on the 1st October, 1964, there was no differentiation between use as an embassy and use as an office, and that the use classes are interchangeable suggesting that they both fell in to Class of Part 4 of the Second Schedule of the 2001 Planning and Development Regulations."

He then recommended the grant of permission subject to the imposition of Condition No. 3 in respect of each application. Following the recommendation of the deputy planning officer, Dublin City Council granted the permissions subject to the conditions referred to above.

I should also refer briefly to the conduct of the appeal before the Board. The Board's inspector considered the evidence that had been before the planning authority and reported on the 4th June, 2008. In the course of her report she referred to the development plan. She noted that the property is located within an area zoned with the objective Z2 which seeks "to protect and/or improve the amenities of residential conservation areas" in the 2005 – 2011 Development Plan. On that basis office uses are neither permissible nor open for consideration; however embassy uses are not permissible although they are open for consideration. She observed that:-

"Paragraph 14.7.0 states that when extensions to or improvements of premises accommodating such uses are proposed, each shall be considered on their merits, and permission may be granted where the proposed development does not adversely affect the amenities of premises in the vicinity and does not prejudice the proper planning and development of the area."

The Board's inspector then carried out a review of the issues and an assessment in relation to the appeal and in the course of which she stated as follows:-

"The first party submits that the planning authority have no grounds on which to base Condition No. 3. They state that the use of the premises as an embassy, which also included offices, existed prior to October, 1964 and that it therefore, has established used rights and that the subsequent Planning and Developments Acts and Regulations do not differentiate between embassy and office use.

The Compact Oxford English Dictionary defines an embassy as 'the official home of offices of an ambassador' and an office as 'a room, set of rooms, or building in which business or clerical work is carried out.'

The 1963 Act and subsequent Planning Acts/Regulations do not make a distinction between embassy and office use. In the absence of any other definitions, embassy and office use appear to fall within Class 3, Part 4 of the Schedule of the 2000 Act 'use as an office, other than a use to which Class 2 of this part of this Schedule applies' (i.e. where the services are not provided to visiting members of the public).

Appendix 13 to the Development Plan defines an embassy as a building/land used by a foreign Government for diplomatic purposes which may include a residential content for staff but does not include a foreign trade delegation or trade office. An office is defined as a building in which the sole or principal use is the handling and processing of information and research, or the undertaking of professional, administrative, financial, marketing or clerical work.

The appeal premises was used as an embassy before 1963, and this is supported by two written affidavits from officials of the German Embassy. The officials' state:-

'That the premises was in the sole occupation of the German Embassy since 1960 and that the normal use of the premises on the 1st October, 1964, was solely for office purposes with no chance of use

occurring during their period of occupation. There is also no record of any previous planning applications for the appeal premises.'"

On that basis the Board's inspector was satisfied that the existing embassy and office use fall within the same use class and that the embassy and office use of the appeal premises constitutes an established non-conforming use within the Z2 zone and she concluded that Condition No.3 should therefore be omitted.

Notwithstanding the recommendation of the Board's inspector, the Board rejected the appeal and directed that Dublin City Council attach Condition No. 3 to the grant of planning permission in respect of each application. The reasons and considerations for that decision were stated to be as follows:-

> "It is considered that the established/permitted use of this site is an embassy and that such use does not come within the meaning of office use as defined under Class 3 of Part 4 of the Second Schedule of the Planning and Development Regulations 2001. Furthermore, having regard to the location of the site in a residential conservation area, zoning objective Z2 in the current development plan for the area, and also to s. 15.18.0 where objectives regarding embassy use are set out, it is considered that the attachment of the condition is warranted being in accordance with the provisions of the current development plan for the area.
>
> In deciding not to accept the inspector's recommendation to omit Condition No. 3, the Board considered that use as an embassy does not come within any of the classes set out in para. 4 of the Second Schedule of the Planning and Development Regulations 2001, and concurred with the view of the planning authority."

Planning and Development Regulations 2001 and

Dublin City Development Plans 2005 – 2011

At this point it would be helpful to refer briefly to relevant provisions of the Planning and Development Regulations 2001 and the Dublin City Development Plan. Article 10(1) of the Planning and Development Regulations 2001 provides:-

> "1. Development which consists of a chance of use within any one of the classes of use specified in Part 4 of Schedule 2, shall be exempted development for the purposes of the Act, provided that the development, if carried out would not –
>
> A. Involve the carrying out of any works other than works which are exempted developments,
>
> B. Contravene a condition attached to a permission under the Act,
>
> C. Be inconsistent with any use specified or included in such a permission, or
>
> D. Be a development where the existing use is an unauthorised use, save where such change of use consists of the resumption of a use which is not unauthorised and which is not being abandoned.
>
> 2. A use which is ordinarily incidental to any use specified in Part 4 of Schedule 2 is not excluded from that use as an incident thereto merely by reason of its being specified in the said part of the said schedule as a separate use."

The relevant provision of Part 4 of the Second Schedule is as follows:-

> "Class 2
>
> Use for the provision of –
>
> A. Financial services,
>
> B. Professional services (other than health or medical services),
>
> C. Any other services (including use as a betting office), where the services are provided principally to visiting members of the public.
>
> Class 3
>
> Use as an office, other than a use to which Class 2 of this part of this schedule applies."

The following parts of the Dublin City Development Plan are of relevance:-

> "Zoning objective Z2:
>
> Permissible Uses
>
> Buildings for the health, safety and welfare of the public, childcare facility, home based economic activity, medical and related consultants, open space, public service installation, residential.
>
> Open for Consideration Uses
>
> Cultural/recreational building and uses, guest house, media recording and general media associated uses, place of public worship, restaurant, veterinary surgery, embassy."
>
> "15.18.0
>
> Embassies

> Where permission is granted for the use of a dwelling house as an embassy, such permission will be regarded as limited in duration to the period of such use by the applicant or other embassy use, after which the building (s) will be returned to residential use."

Finally a number of land use class definitions are given in the Development Plan. The following are relevant to the facts of this case:-

> "Embassy
>
> A building, or part thereof, or land used by a foreign Government for diplomatic purposes. The use may include a residential content for the staff of the embassy which is ancillary to the embassy activities. The use does not include a foreign trade delegation or trade office.
>
> Office
>
> A building in which the sole or principal use is the handling and processing of information and research, or the undertaking of professional administrative financial marketing or clerical work and includes a bank or building society but not a post office or betting office."

The Issues
Counsel on behalf of the applicant, Mr. Galligan S.C., at the outset of the hearing before me identified the five main issues that arise for consideration before me, namely

> 1. Condition No. 3 is not reasonably related to the permitted development in that the applications for planning permission were applications relating to the carrying out of works, whereas the Condition imposed is a Condition relating to use.
>
> 2. Whether office use for embassy purposes does or does not come within Class 3 office use.
>
> 3. Whether the imposition of Condition No. 3 in relation to the entirety of the premises was unreasonable and disproportionate.
>
> 4. Whether the imposition of Condition No. 3 was warranted by reason of the provisions of the Development Plan.
>
> 5. Whether Condition No. 3 was imposed for an ulterior purpose, that is, for the purpose of controlling development.

Issue No. 1
I now want to consider the arguments of the parties herein in relation to Issue No. 1. A fundamental part of the applicant's arguments herein is that as the applications for planning permission related to refurbishment and extension of the premises, both permissions fell into the category of "works" conditions. As such it was argued that a condition as to use could not be attached to a "works" permission. It was further argued that a planning condition must fairly and reasonably relate to the permitted development. Further it was argued that the applications described the nature and extent of the development sought to be carried out and that it was clear that what was sought was not permission in relation to a change of use. It was therefore contended that as there was nothing in the applications to indicate that a change of use from embassy use to office use was involved, the Board was seeking to prevent a change of use, which had not been sought, by the imposition of Condition No. 3.

It was pointed out that there was a distinction within the Planning Regulations between applications in respect of works and applications for change of use. (See Regulation 22.3 A and B of the 2001 Regulations).

Counsel for the applicant pointed out that Dublin City Council had furnished an acknowledgment of receipt of the application in accordance with Regulation 26(2) and therefore, the Board could not go behind that acknowledgement and treat the applications as applications for change of use. It was unnecessary to clarify or regulate the use to which the premises were put.

Ms. Butler S.C., responded by saying that both the applications for planning permission described the property as "existing offices". This use was considered by Dublin City's Conservation Architect to be a non conforming use (see her report of 27 November 2007). The issue of the use of the premises required to be clarified and further information had to be obtained from the applicant's planning consultants. Dublin City Council and the Board were both of the view that the established use of the premises was embassy use and not office use as contended by the applicant. It is interesting to note in this context that in the verifying affidavit of Ian McGrandles, sworn herein on behalf of the applicant on the 28th October, 2008, that he noted in para. 3:-

> "The property has an established use as an embassy as of the 1st October, 1964."

Counsel for the Board made a number of submissions in relation to the manner in which conditions can be imposed under and by virtue of s. 34(1) of the Planning and Development Act 2000. I will return to the issue of s. 34 later.

The Established Use of the Property
In the course of the arguments in respect of the first issue identified by Mr. Galligan it became clear that underlying the arguments of both the applicant and the Board lay a fundamental question – namely what is the established use of the premises? Ancillary to that question was the further issue as to whether or not this Court is the appropriate body to determine that question.

The argument on behalf of the applicant is that on the appointed day of the 1st October, 1964, the property was used as the offices of an embassy. There was no residential component in the property and, therefore, the only evidence before

the Board was use of the property as offices. Accordingly, the applicant argues that any distinction made by the Board between the use of the building for the offices of an embassy and non-embassy use based on the fact that some embassies incorporate an ancillary residential element is not supported by the evidence of actual user.

Reliance is placed on the fact that there is no distinction made in the local Government Planning and Development Act 1963 or the Regulations made there under in 1964 between different types of office. Equally no distinction is made in the 2000 Act or in the 2001 Regulations as between different types of office for the purposes of Class 3 of Part 4 of the Second Schedule to the 2001 Regulations. Embassy use has not been expressly excluded from the use classes. No reference is made in either the legislation or the Regulations to embassies. Accordingly, it is submitted that the use of the property on the appointed day was that of an office. On that basis it was submitted that the use of the property falls within Class 3 of Part 4 of the Second Schedule to the 2001 Regulations.

Ms. Butler on behalf of the Board argued that embassy use could not be considered to be office use. She pointed out that the definition of embassy may include a residential element, whether used or not, which differentiates it from an office. She added that because embassy use necessarily connotes the possibility of a residential component, those using the property as an embassy would have been entitled to convert some or all of it for residential purposes without requiring planning permission for a change of use. That would not be the case of a general office user. She further argued that the diplomatic nature of the business undertaken at an embassy differentiates it from a general office user. She identified some of those differences for example, the element of formal entertaining which would not be a feature of normal office use and the security considerations that would be appropriate to embassy use but would not be required for normal office use. She argued that there may be office use in an embassy but that the Board considered that an embassy is not an office and conversely an office is not an embassy. On that basis she submitted that the use of a property as an embassy and the use of a property as an office, give rise to different planning considerations. Accordingly, she submitted that the use as an embassy did not fall within Class 3 of Part 4 of Schedule 2 of the Regulations of 2001.

It was, however, a fundamental part of the arguments of Ms. Butler that the issue of the use of the premises was an issue lawfully before the Board, even though the application before the Board related to works. She added that in those circumstances the finding of the Board that the "established/permitted use of the site is an embassy and that such use does not come within the meaning of office use as defined under Class 3 of Part 4 of the Second Schedule of the Planning and Development Regulations 2001" was not a matter that could be considered by this Court. In other words, this Court does not have the jurisdiction to decide whether the use of the property is as an embassy and that such use does not come within the meaning of office use. In making that point she relied on the decision of the Supreme Court in the case of *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, in which Finlay C.J. set out the respective roles of the planning authority/the Board and the High Court in relation to the determination of planning matters at pp. 71 and 72:-

> "Under the provisions of the Planning Acts the legislature has unequivocally and firmly placed questions of planning, questions of the balance between development and the environment and the proper convenience and amenities of an area within the jurisdiction of the planning authorities and the Board which are expected to have special skill, competence and experience in planning questions. The court is not vested with that jurisdiction, nor is it expected to, nor can it, exercise discretion with regard to planning matters."

She also relied on the more recent decision in the case of *Grianan an Aileach Centre v. Donegal County Council (No.2)* [2004] 2 I.R. 625. I would just refer to one passage from the judgment of Keane C.J. at p. 639 when he commented as follows:-

> "Some responsibility may be attributed to the defendant for the difficulties that have arisen in determining to what uses the premises may be put without a further planning permission: they might well have been avoided by the use of more precise language when the permission was being granted. I am satisfied, however, that the High Court cannot resolve these difficulties by acting, in effect, as a form of planning tribunal. As I have already indicated, if enforcement proceedings were brought in the High Court, that court might find itself having to determine whether particular operations constituted a "development" which required permission and the same issue could arise in other circumstances, e.g., where a commercial or conveyancing document containing a particular term dealing with compliance with planning requirements was the subject of litigation. But in every such case, however it came before the court, the court would resolve the issue by determining whether or not there had been or would be a development within the meaning of the planning code. The only circumstance in which the court could find itself making a declaration of the kind ultimately granted in this case would be where it had been drawn into a role analogous to that of a planning authority granting a permission. That is difficult to reconcile with the law as stated thus by Finlay C.J. in *O'Keeffe v. An Bord Pleanála* [1993] I I.R. 39 at pp. 71 and 72."

Keane C.J. then quoted the passage referred to above from *O'Keeffe*.

I was referred to two further decisions in relation to this issue namely the decision in the case of *B&Q Ireland Limited v. An Bord Pleanála* (Unreported, High Court, Quirke J., 10th November, 2004) in which Mr. Justice Quirke at p. 12 of the extempore judgment therein stated:-

> "The Planning Authority (and subsequently the Board) are vested with the jurisdiction to determine whether the units of occupation are or are not physically separate and distinct areas and whether or not they are occupied for "substantially different and unrelated" purposes. Furthermore they have been provided with the resources, the expertise and competence necessary to make such determinations.
>
> Equally they have the capacity to establish the nature and extent of activities which are conducted on or in individual premises or "planning units". And they are entitled to reach conclusions and make decisions on such matters provided that they do so in accordance with law.
>
> In the instant case the Planning Authority (and subsequently the Board) conducted inquiries and considered evidence in respect of the question as to whether or not the units which were the subject of the application for a declaration were or were not physically separate or distinct and whether or not they were occupied for 'substantially different and unrelated purposes.'"

Ms. Butler also referred to the decision in the case of *Dublin City Council v. Liffey Beat Limited* [2005] 1 I.R. 478, in which Quirke J. stated at p. 492 of the judgment:-

> "Although the instant proceedings comprise enforcement proceedings within the jurisdiction of this Court, I am, nonetheless, satisfied that the fundamental principle identified by Keane C.J. in the foregoing passage applies with equal force to the facts of these proceedings. Matters involving planning policy lie within the remit and competence of the planning authorities and tribunals established by the legislature. It is not the function of the courts to seek to resolve questions involving planning policy by 'acting, in effect, as a form of planning tribunal.'"

In reality, the question that arises for determination at this point is whether embassy use is the same as office use within the meaning of Class 3 of Part 4 of the Second Schedule to the 2001 Regulations. I accept that the planning legislation and the Regulations made thereunder do not refer expressly to embassies but the issue of what does not does not come within the scope of office use seems to me to be quintessentially a matter for the planning authorities and in this case, the Board and not the court. As Keane C.J. noted in his judgment in *Grianan an Aileach Centre Limited v. Donegal County Council (No.2)* [2004] 2 I.R. at p. 639,:-

> "In the present case, the trial judge, quite understandably, was concerned to resolve issues which had been brought before the High Court in a manner which was fair to both the defendant and the public interest which it represents on the one hand and the legitimate interests of the plaintiff on the other hand. This resulted, however, in the granting of a declaration in a form which had not been sought by either party and which clearly creates further difficulties. It cannot be said that the prohibition on weddings (presumably intended to exclude the social function which normally takes place in a hotel or restaurant following the wedding itself) extends to other social functions and, if so, how are they to be defined? Does the prohibition on 'non cultural activities' extend to every form of pop or rock concert? What precisely is meant by 'use as a nightclub'?"

In the course of the submissions on behalf of the applicant on this point, counsel referred to the case of *Rehabilitation Institute v. Dublin Corporation* (Unreported, High Court, Barron J., 14th January, 1988). He referred to a passage from that judgment which concerned the established use of No. 1 Northbrook Road, which had been used by the plaintiff in conjunction with an adjoining property, No. 30 Leeson Park, for the assessment, training and placement of handicapped persons. Use of the rooms in the premises changed from time to time and part of the premises was used as administrative offices and part for the purposes of training handicapped persons. Barron J., held that the before the appointed day, the plaintiff had used the premises mainly for the purposes of administration and that the use as a small part for secretarial training was a minor ancillary use which did not alter the nature of the main use of the premises. In the course of his judgment in that case Barron J. commented at p. 10 as follows:-

> "The evidence adduced on behalf of the defendant reflected the desire of the defendant to keep this area of the city residential in accordance with its zoning on the town plan. There was however, little evidence bearing upon the materiality of the change of use, if such there has been. Evidence was given that greater consideration would be given to the question of car parking in relation to premises used for offices as opposed to premises used for educational purposes. But no evidence was given to indicate whether this consideration would have been material in considering the actual alleged change of use in the present case, i.e., the change of use from either general administrative purposes or educational purposes to office purposes. On balance it seems to me that the defendant has been unable to show that the alleged change of use on the first floor amounts to a material change of use.
>
> In my view, however, the question of material change of use does not arise. The premises had ceased to be residential and had acquired a general administrative use on the appointed day. This was 'use as an office for any purpose'. Accordingly, the present office use is not a different use to that on the appointed day so that there has been no development. Alternatively, if the present use is to be regarded as a different use since the purpose for which the premises is used has changed, then such different use is still "use as an office for any purpose" so the definition for such different use is not required since it is exempted development by reason of the provisions of Article 12(1) of the Local Government Planning and Development Regulations 1977."

The applicant relied on that decision to say that if office use by the applicant is different from office use by an embassy, it is still "use as an office for any purpose" and, therefore, is exempted development within the meaning of Class 3 of Part 4 of the Second Schedule of the Regulations of 2001. On that basis it was argued that the provisions of the Dublin City Council Development Plan 2005 – 2011 and in particular, the provisions regarding the permitted uses in areas zoned Z2 and the definitions of an embassy and an office could have no bearing in determining whether the existing use of the premises falls within the office use class for the purposes of the exempted development Regulations.

I have to say that I disagree with that proposition. The Board in this case did have regard to the question of the established use of the property. It considered that the established use of the property is as an embassy. It also considered that such use did not come within the meaning of office use as defined under Class 3 of Part 4 of the Second Schedule. It also had regard to the Dublin City Development Plan and the objectives regarding embassy use. I am satisfied that it was within the remit of the Board to consider what the established use of the premises was on the appointed day. Indeed, as I previously noted, Mr. McGrandles in his verifying affidavit stated that the property had an established use as an embassy on the appointed day. The question as to what was the established use of the property on the appointed day was clearly an important part of the consideration by the planning authority and was an important factor in the request for further information during the planning process. Having determined that the established use was embassy use on the appointed day, I cannot see any basis for arguing or contending that the provisions of the Development Plan have no bearing in determining whether the existing use of the premises falls within the office use class for the purposes of the exempted development Regulations. The issue as to whether a use comes within a specific use class is a matter which is appropriate for determination by the Planning Authority/the Board. I would have thought that it is precisely the sort of question that should be left to planners who have the appropriate knowledge and expertise to evaluate the different use classes and what may or may not fall within a particular class. I would accept that the Development Plan cannot be determinative of the issue as to whether the use of premises falls within the office use class for the purposes of exempted development Regulations but it seems to me that the Development Plan has a role to play in informing the decision of the Planning Authority/Board. As Quirke J stated in the passage referred to above in the case *B & Q Ireland Limited*:

"They have the capacity to establish the nature and extent of activities which are onducted on or in individual premises or planning units."

In the circumstances, I am satisfied that the Board was entitled to conclude that the established use of the site is as an embassy and that such use does not come within the meaning of office use as defined under Class 3 of the Part 4 of the Second Schedule of the Planning and Development Regulations 2001.

I am therefore of the view that the determination of the issue of the established use of the property as of the appointed day is a matter which is properly within the domain of the Planning Authority/ the Board. In reaching that conclusion, I accept that it is not for the court to consider objectively the evidence and information before the Board and come to its own conclusion. Provided that the Board has reached its decision in accordance with the law there is no basis for interfering with its decision. There is no evidence before me to suggest that the Board took into account any irrelevant or inappropriate matters in the course of it's considerations.

Decision on Issue No. 1
S. 34(1) of the Planning and Development Act 2000, provides:-

"34.—(1) Where—

(a) an application is made to a planning authority in accordance with permission regulations for permission for the development of land, and

(b) all requirements of the regulations are complied with,

the authority may decide to grant the permission subject to or without conditions, or to refuse it."

Section 34(4) outlines the conditions which can be imposed in respect of a grant of permission. Although it was contended by Mr. Galligan on behalf of the applicant herein that it was not permissible to attach a condition as to use in respect of a permission for works, no authority to that effect was provided.

I was referred to a number of decisions in which the nature and extent of conditions attached to a planning permission were considered. The first of those was *Pyx Granite Company Limited v. The Minister for Housing and Local Governmen*t [1958] 1 Q.B. 554, in which Lord Denning stated:-

"Although the planning authorities are given wide powers to impose such conditions as they think fit, nevertheless, the law states that those conditions, to be valid, must fairly and reasonably relate to the permitted development."

Reference was also made to the decision in the case of *Newbury District Council v. Secretary of State for the Environment* [1981] A.C. 578 in which Viscount Dilhorne stated at p. 599:-

"It follows that the conditions imposed must be for a planning purpose and not for any ulterior one, and they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed them."

Reliance was also placed on the decision in the case of In *Re Viscount Securities Limited* [1976] 62 I.L.T.R. 17, in which Finlay P. held in the context of an application for compensation under s. 55 of the Local Government (Planning and Development) Act 1963, that the section excludes only from compensation a development consisting of or including a material change in the use of a structure or land other than the carrying out of works on the land. The arbitrator in this case was therefore not precluded from awarding compensation for the reduction in the value of the interest of the claimant in the land by reason of the refusal of permission to develop. In the course of his judgment Finlay P. stated at p. 20 as follows:-

"By section 2 of the Act of 1963 use in relation to land does not include the use of the land for the carrying out of any works thereon and works includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal. By section 3 of the Act of 1963 development in the Act means, save where the context otherwise requires the carrying out of any works on, in or under the land or the making of any material change in the use of any structures or other land."

Mr. Galligan relied on that decision to establish that there was a clear distinction between use and works in the planning code. There can be no doubt that such a distinction exists. However, Mr. Galligan also relies on that decision to indicate that what was at issue in this case was an application for permission to carry out works and not an application for a material change of use. By way of response Ms. Butler contended that the decision in the case of *In Re Viscount Securities* was not such as to support the argument that a planning application for works could not be regarded as an application for a change in use. In support of her contention she relied on the decision in *Kildare County Council v. Goode* [1999] 2 I.R. 495. In the course of his judgment in that case Keane J. at p. 498 considered the definition of works and use. He went on at p. 499 of his judgment to state:-

"Counsel for the respondents relied on the decision in *In Re Viscount Securities Limited* [1976] 112 I.L.T.R. 17. In that case, it was held by the High Court (Finlay P., as he then was) that a developer who was carrying out an extensive residential development on agricultural land in County Dublin was not deprived of his right to compensation in respect of the refusal on the ground that the development constituted a material change in the use of the land. Under the compensation provisions of the Act of 1963, compensation is payable in respect of such a refusal, save where it is based on specific grounds (such as interference with amenity) or where the development would constitute "a material change in the use" of the land. In a passage relied on by counsel for the respondents, Finlay P. said at p. 21:-

'Broadly speaking it seems to me possible to elucidate in particular from the provisions of s. 3 of the Act, which defines development, and from the general provisions of the Act two broad categories of

development. One consists of works in the sense as defined of building, demolition, extension, alteration, repair or renewal and the second category being a change of user excluding such change as emanates from the act of building, demolition, extension, alteration or repair.'

However, Finlay P. went on to point out that these two categories were "not necessarily always exclusive, and sometimes inevitably overlapping…" It should also be remembered that the case was concerned with an entirely different subject, that is the right of developer refused permission on admittedly compensatable grounds to be paid such compensation and the need to adopt a strict and, from one point of view, somewhat artificial construction of the relevant provisions so as to avoid a conflict with private property provisions of the Constitution…

The decision, accordingly, does not in my view, lend any support to the argument advanced on behalf of the respondents in the present case."

As I have said, I accept that there is a distinction between use and works. I also accept that there may be an overlap to some extent between use and works. However, it seems to me that this aspect of the argument in relation to the imposition of conditions seems to me to be somewhat strained and artificial. The fundamental question seems to me to be whether the imposition of Condition No. 3 fairly or reasonably relates to the subject matter of the proposed developments.

I was also referred to the decision in the case of *Ashbourne Holdings v. An Bord Pleanála* [2003] 2 I.R. 114, by Ms. Butler. That case concerned a privately owned golf club at the Old Head of Kinsale. No public right of way had existed over the headland prior to the development and, insofar as the public had in fact used the lands as an amenity, they had done so as trespassers. Ultimately in 1997, the applicant applied to retain and complete certain works carried out. The application subject to certain conditions was granted. The applicant appealed to An Bord Pleanála against the conditions attached by the second respondent. The application for retention was granted subject to conditions that public access be provided at all times to the peninsula at a charge which was to be agreed with An Bord Pleanála. Judicial review proceedings were sought seeking to quash and set aside the decision of An Bord Pleanála. In the High Court it was held that the conditions were void and *ultra vires* An Bord Pleanála. That decision was appealed to the Supreme Court who dismissed the appeal and held that the public access condition and the other conditions that assumed public access were *ultra vires* the powers of the Board and void. In the course of his judgment in that case at p. 122, Hardiman J. considered the provisions of s. 26 of the Local Government (Planning and Development) Act 1963, which is the precursor of s. 34 of the 2000 Act. He stated:-

"Despite the strong positions adopted on each side, the question of vires comes down to a consideration of section 26. If the power to create conditions of this sort is within s. 26 then only a successful attack on the constitutionality of that section could prevent its exercise in an appropriate case. If it is not within the section it is legally irrelevant that the first respondent may think it should be. The rights of property and the imperatives of public access are alike irrelevant to the question of vires, which is a wholly legal one. Ample authority was cited on both sides of the question, some of which will be considered below. Firstly, however, it is interesting to see how the Department of the Environment's Development Control Advice and Guidelines deal with the matter. In the Department's view, a condition must:

- Serve some genuine planning purpose in relation to the development permitted,
- Be directed at securing the object for which the powers of the Act were given,
- Fairly and reasonably relate to the permitted development.

The document goes on to suggest basic criteria to be considered in deciding whether to impose a condition. These involved considering whether the condition is a series of words:

- Necessary,
- Relevant to planning,
- Relevant to the permitted development,
- Enforceable,
- Precise,
- Reasonable.

Though this document cannot be said to be legally authoritative, it appears to me to be a reasonable common sense view of section 26.

The section has been authoritatively construed in the judgment of this Court delivered by Hency J. in Killiney and Ballybrack Development Association Limited v. The Minister for Local Government [1978] I.L.R.M. 78. Having quoted s. 26(1) and referred to s. 26(2), the judge said at p. 80:

'It will be seen, therefore, that the power to impose a condition in development permission must be exercised within the limitations imposed by s. 26. In deciding whether the grantor of the permission has kept within those limitations, it is necessary to look not only at the terms of the condition but also at the reason which the section requires to be given in support of it. If the reason given cannot fairly and reasonably be held to be capable of justifying the condition, then the condition cannot be said to be a valid exercise of the statutory power. For instance, if the reason given is the attainment of an objective, and compliance with the condition could not possibly attain that objective, the condition will be held bad because it was given for an unreasonable reason.'"

Therefore, it seems to me that I should consider the terms of Condition No. 3 and the reasons given by the Board for retaining it. Condition No. 3 is as follows:-

"The use of the entire premises shall be solely for use as an embassy as defined at Appendix 13 of the 2005 – 2011 Dublin City Development Plan and shall not be used as general offices or any other uses unless authorised by a prior

grant of planning permission."

The reason given by the Board for its decision is as follows:-

> "It is considered that the established/permitted use of the site is as an embassy and that such use does not come within the meaning of office use as defined under Class 3 of Part 4 of the Second Schedule of the Planning and Development Regulations 2001. Furthermore having regard to the location of the site in a residential conservation area, zoning objective Z2 in the current development plan for the area and also to s. 15.18.0, where objectives regarding embassy use are set out, it is considered that the attachment of the condition is warranted being in accordance with the provisions of the current development plan for the area.
>
> In deciding not to accept the inspector's recommendation to omit Condition 3, the Board considered that use as an embassy does not come within any of the classes set out in Part 4 of the Second Schedule of the Planning and Development Regulations 2001, and concurred with the view of the Planning Authority."

The first comment I would make is that I can see no basis for the contention on the part of the applicant that because the applications for planning permission were "works" applications that a condition as to use could not be imposed. As I have already mentioned, no authority was produced to support that proposition. Indeed, one can think of situations where an application for a works condition may result in the imposition of conditions as to use and *vice versa*. Secondly, I am satisfied that the condition imposed herein comes within s. 34 of the Planning and Development Act 2000. It was never suggested in the course of argument before me that the Planning Authority and subsequently the Board was not entitled to consider the established use of the premises. The issue taken was that the use as an embassy was the same as use as an office and thus, was exempted development. I have already dealt with this issue and concluded that the Board was entitled to consider that the established use of the property was as an embassy and that such use did not come within the definition of office use. In considering the basic criteria as to whether it is appropriate to impose a condition, I am satisfied that the condition imposed in this case comes within the criteria identified by Hardiman J. in the case of *Ashbourne Holdings Limited v. An Bord Pleanála*. It does seem to me that the condition is necessary and relevant to the permitted development and is reasonable. If I were to adopt the approach taken by Henchy J. in the case of *Killiney and Ballybrack Development Association Limited v. The Minister for Local Government*, I would say that the reason given can fairly and reasonably be held to be capable of justifying the condition imposed. Accordingly, so far as Issue No. 1 is concerned, I am satisfied that the Board did not act *ultra vires* in imposing the condition at issue in this case. Quite clearly the Board had formed a view as to the established use of the premises and was, in my view, entitled to clarify the use to which the premises could be put by the imposition of the condition which reflected the established use and ensured that there could be no misunderstanding as to the permitted use of the property, bearing in mind the necessity to do so in circumstances where the property was described in the applications for planning permission as "existing offices".

Other issues
I have already dealt with the issue as to whether office use for embassy purposes does or does not come within Class 3 office use.

The remaining issues that require to be considered are the issue of proportionality; whether the condition imposed is justified by the development plan relied upon and whether the condition was imposed for an ulterior purpose, namely, to anticipate enforcement as opposed to controlling development.

The essence of the argument put forward on behalf of the applicant in regard to the question of proportionality was that, the permissions applied for were relatively minor works of refurbishment and permission in relation to a small extension. On that basis it was argued that if it was appropriate to control the use of the extended part of the property, the application of the condition to the entirety of the property was disproportionate and/or not fairly or reasonably related to the subject matter of the extension application. Ms. Butler on behalf of the Board emphasised that the Board was considering the structure as a whole and that, therefore, it could not be said to be disproportionate to impose Condition No. 3 in respect of the entire structure, regardless of whether the condition was imposed in respect of the extension or of the whole structure. I am satisfied that the imposition of Condition No. 3 in relation to both the refurbishment condition and the extension permission is not disproportionate. There were two applications for planning permission and it is fair to say that the extension permission related to what was in the context of the property as a whole, a relatively small extension. There is no suggestion whatsoever that the extension is not an integral part of the property and in those circumstances it seems to me that, to impose Condition No. 3 on the entirety of the property is not disproportionate.

The next issue related to whether the condition imposed is justified by the Development Plan relied upon. Having referred to the reason given by the Board for the imposition of Condition No. 3, it was submitted that as referred to in the Development Plan, an embassy is a use open for consideration within a Z2 zoned area and an office is neither a permitted use nor a use open for consideration. It was also noted that the principal land use in residential conservation areas is housing, but can include a limited range of secondary and established uses. Paragraph 15.18.0 of the Plan was referred to which provides as follows:-

> "Where permission is granted for the use of a dwelling house as an embassy, such permission will be regarded as limited in duration to the period of such use by the applicant or other embassy use, after which the building(s) will be returned to residential use."

It was submitted on behalf of the applicant that Condition No. 3 was not imposed in accordance with para. 15.18.0 of the Plan and that that objective was not relevant to the applicant's position because the applicant had not applied for planning permission to use the property as an embassy. Rather, this was a case in which the Board was required to consider the established use of the premises in question on the appointed day. It was further pointed out that the property was not a dwelling house on the appointed day. For that reason it was contended that the Board should not have placed any reliance on Article 15.18.0.

Ms. Butler in her submissions on this point submitted that it was clear from the Development Plan that embassy use may be considered in a residential area but the fact that there was embassy use was not a springboard to a different use that

could have a greater impact on a residential area. She pointed out that the reference to para. 15.18.0 in the course of the Board's decision did not impose any obligation on the applicant but that it simply made clear that the decision of the Board was informed by para. 15.18.0 in addition to a number of other matters referred to in the reasons and considerations for the decision.

I accept the submission of Ms. Butler on behalf of the Board in relation to this issue. It is clear that the Board considered the relevant provisions of the Development Plan having regard to the location of this property. Whilst I accept that the appeal before the Board was not an application for permission to use a dwelling house as an embassy, I think it was appropriate to have regard to this provision together with the other provisions contained in the Development Plan in order to inform its decision on the approach to the issue before the Board. It is also clear from the reasons and considerations furnished by the Board, that it was only one of the matters taken into consideration by the Board and as such, I am satisfied that the decision of the Board cannot be impugned on that basis.

Issue No. 5
The final issue raised on behalf of the applicant is that Condition No. 3 was imposed for an ulterior purpose. It is contended on behalf of the applicant that in effect, the Board was attempting to anticipate the enforcement of the planning code. It was pointed out that what was before the Board was an application in relation to refurbishment and an extension but not an application for a material change of use. Accordingly, it was submitted that it was inappropriate to impose a condition in relation to the use of the property. In making this submission, reliance was placed by Mr. Galligan on the decision in the case *McDowell v. Roscommon County Council* (Unreported, High Court, Finnegan P., 21st December, 2004). In particular he referred to p. 17 of the judgment in which it was stated as follows:-

> "I am satisfied that the Planning Authority misconstrued the scope of their function under s. 42 of the Act of 2002. They took into account their conclusion that there was non-compliance with the planning permission and relied upon such non-compliance simpliciter as the reason for their refusal. This they were not entitled to do and the decision accordingly was *ultra vires*. The decision to refuse accordingly must be quashed."

By way of response Ms. Butler on behalf of the Board contended that that decision was not of relevance to the facts of the present case. Section 42 allows a Planning Authority to extend the period for permission to enable a development to be completed. There is no issue of discretion in relation to planning obtained in the section. She pointed out that the thrust of the Act as a whole was to provide for planning control. This was, therefore, an appropriate reason for imposing the condition.

Enforcement simply did not arise.

I have already referred to the Development Management Guidelines for Planning Authorities which was set out by Hardiman J. in the course of his judgment in *Ashbourne Holdings v. An Bord Pleanála* and I have had regard to that decision in considering this issue. In the appeal before An Bord Pleanála the only issue before the Board was the imposition of Condition No. 3. The decision was predicated on the established use of the property as an embassy and whether or not that use came within Class 3 of Part 4 of the Second Schedule of the Planning and Development Regulations 2001. That being so, I am satisfied that the imposition of Condition No. 3 was relevant to the proper planning of the area which was as noted previously zoned Z2. It also seems to me that it was necessary for the purpose of clarifying and regulating the use of the property, particularly in the context of applications which described the property as "existing offices". In those circumstances I do not accept the arguments of the applicant to the effect that the purpose of imposing Condition No. 3 was for an ulterior motive.

Conclusions
I should briefly refer to one point which was raised on behalf of the Board in relation to *locus standi*. The issue in this regard related to one small part of the argument of the applicant herein. The issue concerned related to whether para. 14.7.0 of the Dublin City Development Plan was considered by either the Board or Dublin City Council in the course of dealing with the application. The provisions of para. 14.7.0 were referred to by the Board's inspector in the course of her report. Thus, it is difficult to see the point of the applicant's submissions on this issue as it would appear that those provisions must have received some consideration by Dublin City Council. This issue was not raised before the Board and I accept the Board's contention that an issue not raised by the applicant in its appeal to the Board could not be raised before this Court.

Finally, there is no dispute that the applicant had a substantial interest in the matter which was the subject of the application as required under s. 50(a)(iii) of the Act of 2000, save to the extent of the issue of *locus standi* referred to above.

In conclusion, I am satisfied that there are no grounds upon which I could hold that the Board's decision is invalid or ought to be quashed and, therefore, I am refusing the applicant the relief claimed herein.