

**THE HIGH COURT
DUBLIN**

DEERLAND CONSTRUCTION LIMITED

Case No. 2006/1013JR

**AND
WESTMEATH COUNTY COUNCIL**

APPLICANT

**AND
HABBINGLEY LIMITED**

RESPONDENT

NOTICE PARTY

Approved Judgment delivered Mr. Justice Peter Kelly on Tuesday, 12th 2006 December

1. Mr. Justice Kelly: On the 23rd October 2006, I admitted this case to the Commercial List and on the same day directed the trial of a preliminary issue to be heard today. This is my judgment on that preliminary issue.

2. The question for determination is whether or not the Applicant has locus standi to bring or maintain these proceedings having regard to the provisions of Section 50(4) of the Planning and Development Act 2000. The issue, if decided in a manner adverse to the Applicant, will be dispositive of the entire application.

3. The Applicant is the owner of Harbour Place ShoppingCentre in Mullingar, Co. Westmeath. The Notice Party is a rival to the Applicant at Grand Parade, Mullingar, Co. Westmeath. In these proceedings the Applicant will, at the next stage, if permitted, seek leave to apply for judicial review of a decision of Westmeath County Council of the 29th June of this year. If granted such leave it will at the full hearing seek *certiorari* directed to Westmeath County Council in respect of that decision.

4. The decision of Westmeath County Council granted permission to the Notice Party to change the use of three units of a retail development at Grand Parade, Mullingar, from bulky goods to general retail. It is common case that the application for a judicial review is covered by Section 50 of the Planning and Development Act 2000.

5. Section 50(2) mandates that a person shall not question the validity of a planning permission, such as the one in suit, otherwise than by an application for judicial review under order 84 of the Rules of the Superior Courts.

6. Section 50(4) fixes a short time within which such an application must be brought. It is 8 weeks. Whilst there is a jurisdiction vested in the Court to extend that time, the Court is forbidden to do so unless it considers that there is good and sufficient reason for doing so. The application for leave must be made on notice per section 50 (4)(b) and the Court is prohibited from granting such leave unless there are:

"Substantial grounds for contending that the decision is invalid or ought to be quashed and that the Applicant has a substantial interest in the matter which is the subject of the application".

7. Section 50(4)(C) reads, insofar as it is relevant to this application, as follows:

"Without prejudice to the generality of paragraph (B) leave shall not be granted to an Applicant unless the Applicant shows to the satisfaction of the High Court that the Applicant is a person who made submissions or observations in relation to the proposed development."

8. It is accepted by the Applicant that it did not make submissions or observations to Westmeath County Council in relation to the proposed development. It follows that in such circumstances the Court is prohibited from granting leave to apply for judicial review save where an Applicant can show that he, she, or it falls within the saving provisions of section 50 (4)(c)(ii). That provides that a person who, such as the Applicant, did not make submissions or observations to the Planning Authority may be given locus standi to apply for leave for judicial review if, "there were good and sufficient reasons for his or her not making objections, submissions or observations as the case may be."

9. Having read the papers in advance of the hearing I was unable to find any information or explanation in the affidavit evidence as to why and in what circumstances the Applicant had failed to object to Westmeath County Council in respect of the permission sought by and ultimately granted to the Notice Party. Still less could I find any reason for such failure. When I queried this with Counsel for the Applicant he accepted, with commendable candour, that there was in fact no reason whatsoever advanced nor was one being advanced for this failure.

10. The Court is therefore left with no explanation, still less good and sufficient reason, for the failure to object or to make observations to Westmeath County Council. That is a remarkable state of affairs particularly when one considers that when an earlier application for a change of use for one of the units from a bulky goods retail warehouse to catalogue retail store was made, the Applicant submitted to Westmeath County Council that such a proposed change of use would be in material contravention of the Westmeath County Council development plan. That submission was not accepted by Westmeath County Council and permission was granted.

11. What then is the basis for contending that the Applicant has locus standi by reason of section 50(4)(c)(ii)? It is sworn to at paragraph 6 of Mr. Phillips's affidavit of, I believe the 18th October 2006, though it is not entirely clear from the jurat as to whether that is the precise date of swearing. In any event at paragraph 6 of that affidavit he says:

"I say that whilst it is true that the Applicant did not make an observation to the planning authority within the period of 5 weeks from the date of receipt of the relevant Planning Application the Applicant was reasonably entitled to assume that the Respondent Planning Authority would either refuse planning permission in relation to the said application on the grounds that the proposed development would be in material contravention of the development plan, or if the Manager was minded to grant permission for the said development the material contravention procedure would have been invoked."

12. It is to be noted that this case of material contravention of the development plan sought to be made is the same argument as was made to Westmeath County Council by the Applicant on the earlier application for the change of use of one of the units.

13. I am quite satisfied that the Court could not consider this material, sworn to at paragraph 6 of that affidavit, as a good and sufficient reason for not making objections and submissions on the part of the Applicant to Westmeath County Council within the

meaning of Section 50(4)(c)(ii). To do so would dilute the statutory language and the legislative intent to a point where it would be meaningless and leave the judicial review procedure open to abuse.

14. The thrust of the legislative intent over recent years in respect of judicial review in planning matters is clear. It was referred to by Macken J in *Harrington v An Bórd Pleanála*, 26th July 2005, where she said:

"As has been stated in several cases consideration of the legislative scheme makes it clear that the Oireachtas intended that Section 50 be stricter than the equivalent section of the earlier local Government Planning and Development Act 1992 which itself adopted a stricter set of criteria applicable to challenges to the grant of planning permissions than previously existed. This is because there is in place an extensive statutory scheme under which members of the public may object to the original grant before a planning authority and may also appeal to and be heard by an independent appeal body, namely the Board. To that appeal scheme the Statute also provides for the nomination of certain designated parties who have an to ensuring wide ranging representation in planning matters from diverse interests Groups."

15. Later she observed:

"The foregoing extracts relevant to the issues in these proceedings demonstrate clearly that the Oireachtas has now adopted an evermore stringent set of obligations which must be met before the High Court should permit an Applicant to commence judicial review proceedings to challenge the validity of planning permissions."

16. Similar observations were made by Clarke J in *Harding v Cork County Council* 12th October of this year, where he said:

"It is clear, therefore, that the 2000 Act introduced a stricter set of criteria than had been in place under the 1992 Act and those authorities which stem from the period when that latter Act was in force need to be viewed against that background."

17. To approach the case, as I am invited to by the Applicant, would defeat that legislative policy as well as run counter to the wording of the Act. The gist of the Applicant's argument is that I should overlook the failure to give any reason for not making objection to Westmeath County Council but go on and assume that the development was, in fact, in material contravention of the development plan thereby triggering the statutory procedure which would enable the Applicant to make observations on that question.

18. I am unable to accept that approach. It upends the statutory scheme and involves me doing what ought not to be done.

19. There is much to be said for deciding *locus standi* if such can be done conveniently and justly. I agree with the views of Clarke J in *Harding* to that effect. There at paragraph 2.1 he said:

"The first question which needs to be addressed is as to whether objections to standing and objections based on the adequacy of an appeal to the Board as a remedy are, indeed, matters which should be determined before embarking upon a consideration of whether an applicant has established substantial grounds. In *Ballintubber Heights Ltd v. Cork Corporation* (Unreported, High Court, Ó Caoimh J., 21st June, 2002) Ó Caoimh J. noted that the Planning Acts envisaged that standing issues should be determined at the leave stage."

20. Clarke J says:

"Subject to one caveat, I am satisfied that it is appropriate to address standing before going on to consider the grounds of challenge."

21. I agree with that approach.

22. I do not disagree with him when later in the judgment at paragraphs 2.3 and 2.4 he says the following:

"It seems to me, however, that while the above should generally be the approach of the Court in such circumstances, it should not be adopted as a rigid or inflexible rule and there may be circumstances where, for a variety of reasons, it may be appropriate for the Court to adopt a different approach. One example of such circumstances arises, at least, in this case."

23. At paragraph 2.4 he says:

"In order to determine the standing of an Applicant to challenge a decision in the planning process it is, amongst other things, arguably necessary to consider the basis of the proposed challenge with a view to assessing whether the applicant has standing to raise the grounds sought to be relied on."

24. The passage which he refers to at 2.3 is that which occurs at paragraph 2.2, where he says:

"Subject to one caveat, I am satisfied that it is appropriate to address standing before going on to consider the grounds of challenge. Subject to a similar caveat, I am satisfied that an issue as to the adequacy of appeal should also be dealt with prior to considering whether there are substantial grounds for challenge. If a planning authority or the Board or, indeed, a Notice Party can satisfy the Court that the person seeking judicial review does not have a sufficient interest to meet the test set out in s.50, then it does not seem to me to be appropriate for the Court to go any further in a consideration of whether there are substantial grounds for the challenge. Furthermore in cases where those parties persuade the Court that an appeal to the Board would be an adequate remedy then it is, again, unnecessary to consider whether there are substantial grounds. In either case a decision as to whether there are, or are not, substantial grounds would be redundant. In such circumstances it would be unnecessary for the Court to embark on a consideration of the strength of the grounds put forward for suggesting that the decision under challenge is invalid."

25. The observations which he makes at paragraph 2.3 and 2.4 appear to me to apply only in exceptional circumstances. This case most certainly is not such an exception. The general approach of the Court should be that outlined in paragraph 2.2. of his judgment.

26. There is in this case no valid reason given for the failure on the part of the Applicant to make submission or observations or objections to Westmeath County Council. It seems to me that this case has many similarities with that which was decided by Hanna J

in *Moriarty v South Dublin County Council*, 24th November 2005. There he said at page 10 of the reserved judgment:

"The applicant, having previously objected successfully to an almost identical application by the Notice Party and engaged the planning consultants in the process, would be, if anything, on a higher state of alert than an ordinary member of the public but this cannot be held to give him a greater right than such ordinary member of the public. Accordingly, no good and sufficient reasons have been demonstrated."

27. Here there is a track record of the Applicant objecting to a previous application, unsuccessfully, but no explanation whatsoever is forthcoming as to why it was not done in the present case.

28 .Consequently, I am not satisfied that the statutory grounds have been made out and it follows that there is no locus standi to make this application. Before concluding I should observe, insofar as there were submissions made by reference to the case of *Brady v Donegal County Council*, 1989 I.L.R.M., that this case simply bears no resemblance to the issues which fell for determination in that case. In my view, it is not apposite for consideration here.

29. My conclusion is, therefore, that the Applicant not having made submissions or observations or objections to Westmeath County Council has not demonstrated to this Court that there are good and sufficient reasons for the Applicant not having made such and, consequently, this Court is mandated to refuse leave. That is dispositive of the entire application. There is no *locus standi* to make it and, consequently, the application for leave to apply for a judicial review is refused and the application dismissed.